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CLE FOR IN-HOUSE COUNSEL

WASHINGTON, DC I OCTOBER 2019

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Program Agenda

7:45 - 8:30 a.m.	**Registration & Breakfast**
8:30 - 8:40 a.m.	**Welcome remarks and introduction** **Will O'Brien**, Office Managing Partner
8:40 - 9:40 a.m.	**The Changing World of Government Advocacy by Lawyers: Globalism, Technology, Competition and Consumer Centric Forces of Transformational Change** Panelists: **Nick Allard**, Senior Counsel **Randy Nuckolls**, Partner
9:40 - 9:50 a.m.	**Break**
9:50 - 10:50 a.m.	**Developments and Challenges in Cross-Border Investigations** Panelists: **Max Carr-Howard**, Partner **Melissa Gomez Nelson**, Partner **Matthew Lafferman**, Managing Associate
10:50 - 11 a.m.	**Break**
11 a.m. - 12 p.m.	**Five Things In House Counsel Should Know About Sanctions and Export Controls** Panelists: **Devin Crisanti**, General Counsel & Manager, Corporate Development, Air Drilling Associates **Peter Feldman**, Partner **Jason Silverman**, Partner **Mike Zolandz**, Partner

12 - 1:45 p.m. Panel: 12:30 - 1:30 p.m.	**Luncheon & Panel** **General Counsel Conversation: What I Wish I Had Known** **Panelists:** **Michelle Bryan**, General Counsel and Chief Administrative Officer, Intelsat **Mary Anne Hilliard**, Executive Vice President and Chief Legal Officer, Children's National Medical Center **Gail Lione**, Senior Counsel **Rick Palmore**, Senior Counsel
1:45 - 1:50 p.m.	**Break**
1:50 - 2:50 p.m.	**The Growing Cannabis and Hemp Industries Present Opportunities and Risks to Mainstream Businesses** **Panelists:** **Eric Berlin**, Partner **Tisha Schestopol**, Counsel
2:50 - 3 p.m.	**Break**
3 - 4 p.m.	**Key Considerations & Developments in Cybersecurity and the Importance of Cyber Insurance** **Panelists:** **Rich Dodge**, Partner **Deborah Rimmler**, Counsel **Tokë Vandervoort**, Senior Vice President & Deputy General Counsel, UNDER ARMOUR
4 - 5 p.m.	**Tech. Law Meets Ad. Law: Opportunities and Risks for IP and Communications Lawyers in the Evolving Administrative Law World** **Panelists:** **Kevin Greenleaf**, Counsel **Simon Steel**, Partner **Lauren Wilson**, Managing Associate

Tab 2

Speaker Biographies

CLE

Nicholas W. Allard
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Nick Allard is a member of Dentons' Public Policy practice. His practice draws on his understanding of legislative, regulatory and administrative matters to counsel clients in the fields of privacy, telecommunications, advanced broadband networked communications, technology, health, energy, environmental law, and higher education. Nick served as Dean (2012-2018) and President (2014-2018) of Brooklyn Law School where he continues as a Professor of Law. The courses Nick teaches include “Government Advocacy for Lawyers”. He is a prolific author on the subject, and has received multiple honors and awards for his work in government relations, education, communications and public service.

Eric P. Berlin
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As a leader of the Dentons US and Global Cannabis Groups, Eric is one of the nation’s leading cannabis law authorities, advocating full-time for clients in, or impacted by, the state-legal cannabis and hemp/CBD industries. After two decades of courtroom experience in high-stakes matters, Eric worked to help craft and get passed the Illinois and Ohio medical cannabis laws and now counsels companies on how best to achieve their business objectives while avoiding the legal risks of operating in a rapidly evolving regulatory environment with associated tensions between federal and state law.

Michelle Bryan
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Michelle Bryan is responsible for all aspects of Intelsat's legal and regulatory affairs, as well as human resources, government affairs, corporate real estate, facilities and general administrative services. Ms. Bryan has more than 20 years of senior corporate executive experience, both in human resources and legal matters. Her experience includes the position of Executive Vice President for Corporate Affairs and General Counsel for US Airways, a major airline with more than 40,000 employees worldwide. During her tenure at US Airways, she also served as Senior Vice President, Human Resources. Prior to joining Intelsat in January 2007, she served as general counsel for Laidlaw International, a transportation company.

Maxwell Carr-Howard
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Maxwell Carr-Howard is a member of the White Collar and Government Investigations, Global Anti-Corruption and Internal Investigations practice areas. As a former assistant United States attorney, Max is experienced in conducting complex transnational investigations and defending cross-border enforcement actions involving anti-corruption, antitrust and money laundering regulatory schemes, as well as those involving US economic sanctions, embargoes and export controls. Max has lived in Europe, has extensive experience in conducting transnational investigations in Asia, Africa, the Middle East and Russia. He currently splits his time between Washington DC and London. He has close professional relationships with the leadership of the FCPA units in both the US Department of Justice and the Securities and Exchange Commission and has defended clients before enforcement agencies in other jurisdictions.

Devin Crisanti
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Devin is the General Counsel & Manager, Corporate Development for Air Drilling Associates, the world's largest private provider of air drilling, managed pressure drilling and underbalanced drilling services to the petroleum and geothermal energy industries. Air Drilling is US-based and operates in numerous jurisdictions around the world, including South East Asia, the Middle East, North America, and South America. Through his exposure to Air Drilling's international operations, Devin has gained extensive experience with economic sanctions, the US Foreign Corrupt Practices Act (FCPA), and other general compliance and regulatory risk matters. Prior to joining Air Drilling, Devin was a corporate lawyer at a leading Canada-based international law firm.

Richard Dodge
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G. Richard Dodge, Jr. has extensive experience representing insurance and reinsurance clients in connection with coverage disputes involving numerous lines of insurance, including trade credit and political risk, directors and officers, errors and omissions, cyber, motors inventory, among other lines, as well as life and commercial reinsurance. Rich has also advised and defended insurers and reinsurers, and individuals in investigations and enforcement proceedings brought by the US Departments of Justice and Labor, the US Securities and Exchange Commission, and numerous state attorneys general and insurance commissioners. Rich has conducted countless internal reviews and government investigations into potential noncompliance with laws and regulations, and recommended remedial measures as needed.

Peter G. Feldman
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Peter helps clients in the US and around the world to achieve their business goals while addressing regulatory risk, with a particular focus on economic sanctions, export controls, the

US Foreign Corrupt Practices Act (FCPA) and general compliance matters. Peter has experience representing clients in regulatory, licensing and enforcement matters before the US Treasury Department's Office of Foreign Assets Control, the US State Department's Directorate of Defense Trade Controls and the US Commerce Department's Bureau of Industry and Security, and in FCPA matters before the US Department of Justice and US Securities and Exchange Commission.

Kevin Greenleaf
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Kevin is a patent attorney that utilizes his experience as a computer engineer in all areas of patent law. He has particular experience in defending and challenging patents before the Patent Trial and Appeal Board (PTAB) at the United States Patent and Trademark Office. Patexia recently objectively ranked him one of the top-10 practitioners in this area of the law. He utilizes administrative law principles to challenge PTAB decisions stemming from patent prosecution and post-grant challenges.

Mary Anne Hilliard
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Mary Anne Hilliard, Esq. oversees legal services, risk management, compliance, internal audit, insurance, workers' compensation and captive management at Children's National Hospital. In addition to being a lawyer, Mary Anne is also a registered nurse who practiced at Children's National early in her career. She went on to practice law in Washington, D.C., specializing in healthcare law issues and malpractice defense. She is extensively published and lectures widely at hospitals, universities and associations on healthcare law issues. Committed to the concept that the best way to manage risk is to prevent it, Mary Anne has led many local and national grant-funded initiatives to share risk data and study pediatric outcomes to reduce serious adverse events.

Matthew A. Lafferman
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Matthew A. Lafferman is a member of the White Collar and Government Investigations practice group. He represents financial institutions, technology and health care companies, and high-profile figures in litigation, government enforcement actions, congressional investigations, and a variety of criminal matters. Matt advises US and foreign multinational companies, executives, and management in a range of legal matters, including the Foreign Corrupt Practices Act (FCPA), the False Claims Act (FCA), and securities fraud. He has also counseled clients on collateral issues that often arise in cross-border matters, such as data privacy laws, the Stored Communication Act, and the related CLOUD Act.

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Gail A. Lione is a senior counsel at Dentons and adjunct professor of IP law at Georgetown Law Center. For over 23 years, Gail served as General Counsel of three companies in three different industries: global marketing/manufacturing; publishing, printing and digital imaging; and insurance, banking and financial services. She held executive roles at Harley-Davidson, Inc. Prior to that, Gail was General Counsel and Secretary of US News & World Report in DC and Sun Life Group of America in Atlanta. Combined with her experience as a public and private company director, Gail is in a unique position to advise corporate executive teams on governance, risk management opportunities and intellectual property strategy.

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Melissa Gomez Nelson is a member of the White Collar and Government Investigations practice. She steadfastly defends clients against allegations of corruption and fraud and utilizes her unique background and language abilities in conducting thoughtful internal investigations. Melissa frequently represents clients in a wide range of criminal matters involving allegations

related to FCPA, money laundering, and securities fraud. Melissa has extensive experience representing multinational clients and executives in criminal matters from initial grand jury investigations, through sentencing hearings. Although she started and has maintained her practice in Washington D.C., Melissa has experience representing clients in investigations across the globe.

C. Randall Nuckolls
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Randy Nuckolls is a partner Dentons' Washington, D.C. office and has more than thirty years of experience working on federal policy issues. Mr. Nuckolls counsels clients on federal legislative, regulatory, and ethics issues. He assists in planning legislative strategy and provides advice and guidance on regulatory matters before numerous federal agencies. Randy served in the United States Senate in senior staff positions, including as Chief Counsel and Legislative Director for Senator Sam Nunn. He has served as general counsel or Washington counsel for corporations, higher education institutions, and trade and non-profit organizations. His recent work focus has been in advising clients on federal ethics issues, federal election law, lobbying law compliance, and the Foreign Agent Registration Act.

Rick Palmore
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Rick Palmore is a senior counsel at Dentons. With nearly 20 years of experience serving as a general counsel and as a public company director, Rick advises public and private corporations and their leadership suites on risk management and governance issues across practices and industry sectors. Prior to joining the firm, Rick held executive roles at General Mills Inc. and Sara Lee Corporation. Before that, Rick was a litigation partner with Sonnenschein Nath & Rosenthal, a Dentons US legacy firm. Earlier in his career, Rick served as an assistant United States attorney for the Northern District of Illinois.

Deborah Rimmler
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Deborah Rimmler is a member of the Intelligence and Strategic Services practice, where she brings her general counsel operational experience to provide legal advice as well as using best-in-class technology to help clients improve their security posture across a wide range of physical and digital security areas. With twenty-five years of legal experience specializing in the fields of energy consulting, software business operations, and U.S. foreign assistance, Deborah excels at providing legal advice to support business growth including developing practical anti-corruption, business continuity, and information privacy and security programs.

Tisha Schestopol
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Tisha Schestopol provides healthcare and FDA regulatory counseling to life sciences and health care industry clients. She has been spending an increasing amount of her time advising clients in the hemp/CBD industries. Tisha previously served as in-house counsel for a biopharmaceutical manufacturer where she was responsible for developing and implementing the company's compliance program as the company commercialized its first product.

Jason M. Silverman
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Jason assists clients with transaction planning, compliance, investigations and enforcement matters relating to trade and economic sanctions administered by the U.S. Office of Foreign Assets Control, and export controls under the International Traffic in Arms Regulations and Export Administration Regulations. He regularly helps clients navigate compliance risk in pursuit of cross-border business opportunities, design and evaluate compliance programs, conduct transactional and third party due diligence, and investigate and resolve voluntary self-disclosure and enforcement matters. Jason advises clients in diverse industries, including aerospace and defense, information technology, telecommunications, energy, finance, education, infrastructure and industrial manufacturing.

Simon Steel
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Simon is an appellate litigator and regulatory lawyer who has worked extensively at the interfaces between regulatory and tech. law, and between antitrust and intellectual property. Before joining Dentons, he served as Special Counsel for Global Competition at the Federal Trade Commission and as a law clerk to Justices Breyer and O'Connor.

Tokë Vandervoort
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Tokë Vandervoort is SVP, Deputy General Counsel at Under Armour where she leads a diverse team of 45 professionals providing Commercial, Real Estate and Technology Transactions; Consumer Protection and Privacy; Patents, Trademarks, Brand Protection; Employment and Litigation support to UA's footwear, apparel and digital app business. She also co-leads the Data Incident Response Team with the CISO. Prior to UA, she was lead technology, privacy and cybersecurity counsel and CPO to a telecom and internet solutions company. Tokë is a member of the DHS Data Privacy and Integrity Advisory Committee, is active on the advisory board of the Georgetown Cyber Security Law Institute. Early in her career she served two federal district court clerkships.

Lauren Wilson
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Lauren Wilson is a member of the Federal Regulatory and Compliance practice, where she focuses on the communications and technology sectors. Lauren uses her experience and knowledge of the US Executive Branch and the consumer watchdog community to provide clients with strategic advocacy and advice on issues such as privacy and data security, universal service, competition, interconnection and public safety. She also has experience

advising startups, investors, and the world's largest technology companies on contractual and regulatory matters related to integrating and deploying new Internet-based products and services.

Michael E. Zolandz
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Mike is the chair of Dentons' Federal Regulatory and Compliance practice, and is a leader in the Firm's Public Policy and Government groups. He specializes in advising multinational businesses at the intersection of trade policy, politics and trade regulation, with particular expertise on sanctions programs and export controls. He advises across industry sectors and supports clients' commercial objectives, while advising on the nuances of trade and anti-corruption compliance, including in frontier markets.

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The Changing World of Government Advocacy by Lawyers:

Globalism, Technology Competition and Consumer Centric Transformational Forces

Nicholas W. Allard, Washington, DC

C. Randall Nuckolls, Washington, DC

Agenda

- Introduction and Course Overview
- The Role of Legal Counsel in the Public Policy Arena
  - The Three A's: Analysis, Advice, Advocacy
  - Why and When Do You Hire A Professional Public Policy Advocate?
  - Myths and Realities About Professional Lobbyists.
  - What Do Outside Legal Counsel Uniquely Bring to the Public Policy Process?
- The Best Practice is Compliance: A Primer
  - Lobbying Disclosure Act
  - Federal Tax Treatment of Lobbying Express

Agenda (*cont'd*)

- Foreign Agent Registration Act
- State Lobbying and Pay to Play
- Government Ethics Rules
- The Future of Government Advocacy
  - Globalism
  - Technology
  - Competition and Consumer Centric Forces

Meeting you today

Nick Allard
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- Nick Allard is a member of Dentons' Public Policy practice. His practice draws on his understanding of legislative, regulatory and administrative matters to counsel clients in the fields of privacy, telecommunications, advanced broadband networked communications, technology, health, energy, environmental law, and higher education. Clients include domestic and international organizations, ranging from startups to fortune 500 companies, nonprofits and public and private universities and colleges.
- Nick served as Dean (2012-2018) and President (2014-2018) of Brooklyn Law School where he continues as a Professor of Law. Under his leadership, Brooklyn Law School introduced several ground-breaking innovations including a new two-year J.D. option, created the Center for Urban Business Entrepreneurship (CUBE) launched the popular Business Boot Camp, a winter session program offering law students intensive training in the basics of the business world, and instituted a comprehensive package of initiatives to make a legal education more affordable and accessible.
- The courses Nick teaches include "Government Advocacy for Lawyers": He is a prolific author on the subject, and has received multiple honors and awards for his work in government relations, education, communications and public service.

Meeting you today (*cont'd*)

Randy Nuckolls
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- Randy Nuckolls is a partner in the Washington, D.C. office of Dentons. He has more than thirty years of experience working on federal policy issues.
- At Dentons, Mr. Nuckolls counsels clients on federal legislative, regulatory, and ethics issues. He assists in planning legislative strategy and providing client input to Members of Congress and Congressional committees. Mr. Nuckolls provides advice and guidance on regulatory matters before federal agencies including the Departments of Agriculture, Commerce, Education, Treasury, Defense, the Federal Trade Commission and the General Services Administration.
- He has served as general counsel or Washington counsel for corporations, higher education institutions, and trade and non-profit organizations. A major focus of his work in recent years has been in advising clients on federal ethics issues, federal election law, lobbying law compliance, and the Foreign Agent Registration Act.

Course Overview:

- This course will examine the role of attorney advocates in the public policy process. The focus will be on the United States Congressional legislative, oversight and investigative processes, as well as the interplay between the Congress, the federal executive branch agency regulatory process and the courts. [The multiple other arenas where policy issues are addressed such as, the press and new media, and at "grass roots" and "treetop levels" and at the ballot box may be mentioned, but are beyond the scope of this program. The increasingly international, multidimensional aspect of the policy process with respect to global trans-border issues and also the impact of state and local influences in a federal system will be noted and considered, but only insofar as they impact advocacy in Washington on the federal level.]

Course Overview: (*cont'd*)

- The course will:
  - Review the mechanics of how the public policy process works and where it breaks down.
  - Discuss both myths and realities about how U.S. federal laws and rules are made and implemented, and also influenced by lobbyists.
  - Examine best practices for government advocacy by attorneys and offer a primer on compliance with the myriad federal rules governing Washington representation of clients in the public, private and not-for-profit sector..
  - Conclude with a review of the big trends that are shaping the future of government advocacy in the public policy process.

Topic A:

- The role of Legal Counsel in the Public Policy Arena.
- The three A's: Analysis, Advice and Advocacy - what lawyers really do on behalf of clients regarding the Government's impact on their business.

- The Seven Deadly Virtues of Lobbyists:
  - Lobbyists provide information to the government to inform its decisions.
  - They provide information to their clients about how the government works, what to expect what is realistic. Jack Abramoff didn't do this. He misled his clients about what was needed and what could be done.
  - They help keep the system honest by holding other interests and lobbyists accountable - it's an adversarial, competitive process.
  - They help keep the system honest by holding the government accountable. Government officials do not particularly like this. They would rather not have this thorn in their sides. In this regard, lobbyists are like the press. Note: The freedom of the press and the right to petition our government are both protected in the first amendment because they are both important checks on the exercise of government power. Does the first amendment right to petition cover professional lobbyists?

- AND WOULD YOU BELIEVE?
  - Lobbyists comply with rules.
  - Lobbyists make sure that others follow the rules.
  - Lobbyists provide civility and help partisan, even stubbornly entrenched interests come together and find solutions.

- Why and When Do You Hire A Professional Public Policy Advocate Much Less a Professional Lobbyist? This is an important question. After all, it is your government; why should you need to pay someone to make your views known to your own government?

- The first part of the answer is that it helps to have a professional advocate. It makes a difference.
- In the civil and criminal justice systems we know that it makes a difference to have a lawyer. Perhaps you have heard the old maxim: “Show me someone who represents themselves in court, and I’ll show you someone who has a fool for a lawyer and an idiot for a client”.

- The arenas where laws and rules are made and implemented - - Congress, regulatory agencies, and the courts, not to mention the political arena of public opinion - - are every bit as challenging as are traditional legal arenas.
  - Having a professional lobbyist can mean the difference between success or failure, between compliance or unintentionally breaking a government ethics rule.
  - In addition, no matter how compelling and just is your cause.
  - No matter how urgent, you are competing for the limited attention of lawmakers - - and so, having a professional to help you be heard over the cacophony of equally noisy, worthy applicants for other compelling causes makes a difference.

- Myth and Realities about Influencing the Policy Process: Does Money Buy Results, are there Quick Fixes and "Silver Bullets"?
  - It's not magic, and there are no "silver bullet" easy fixes. The dirty little secret is that desired results are achieved through mastery of procedures and making an effective case often over time in a number of policy arenas, on the merits to the appropriate audience, someone who has the authority to make a decision.
  - Moreover, whatever is done can be undone so it is no simple matter to attain a desired outcome and to hang on to it.

- There are roughly 350 million experts in the U.S. about our government. Many are dead certain that lobbyists are corrupt, that money buys results, and, judging from some of the Obama administration rules punishing lobbyists, there even seems to be a belief that lobbyists have some potent, mystical, super power to hornswoggle government officials

- What Outside Legal Counsel uniquely brings to clients in the public policy process:
  - Attorney-Client Privilege
  - Ethics - including Avoidance of Conflicts of Interest
  - Rigor
  - Compliance

Topic B: The Best Practice is Compliance

Corporate Lobbying and Political Activity, a primer on compliance

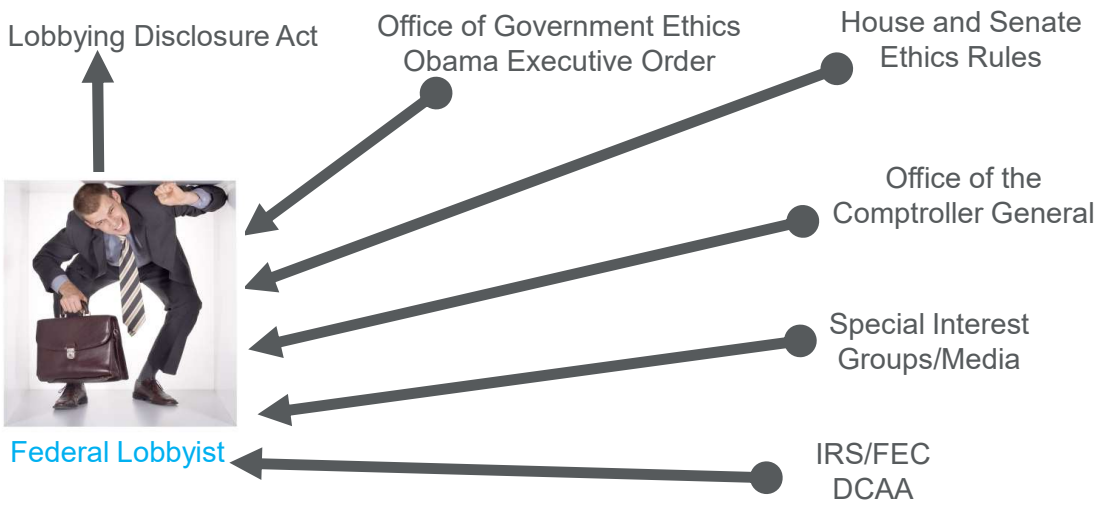
Overview

- Lobbying Disclosure Act
- Federal Tax Treatment of Lobbying Expenses
- Foreign Agent Registration Act
- State Lobbying Registration and Pay-to-Play
- Governance Ethics Rules

Lobbying Compliance Concerns

- *Lobbying Disclosure Act Compliance*
  - Lobbying Disclosure Act (LDA) and Honest Leadership and Open Government Act (HLOGA)
  - Definition of Lobbying under LDA and IRS Calculation of Lobbying Expenses
  - Audits Abound – GAO, IRS, and other Government Agencies

The Compliance World for Federal Lobbyists



Who is a Lobbyist?

- The LDA defines a "lobbyist" using a three-part test:
  - More than one "lobbying contact" with covered officials
  - "Lobbying activities" constitute 20% or more of the services performed by that individual on behalf of his/her employer or client during any quarter
  - Total organization "lobbying expenses" of $13,000 per quarter in the case of an employed "lobbyist" (or $3,000 per quarter in income for a lobbying firm)

Covered Contacts (LDA Definition)

- Oral, written or electronic communications with covered Legislative or Executive Branch official regarding:
  - Formulation, modification, or adoption of Federal legislation
  - Formulation, modification, or adoption of a Federal rule, regulation, Executive order, policy or position
  - The administration or execution of a Federal program or policy (**including the negotiation, award or administration of a Federal contract, grant, loan, permit or license**)
  - The nomination or confirmation of a person subject to confirmation by the Senate

Covered Individuals (LDA Definition)

- A "Covered Legislative Branch Official" includes
  - Members of Congress
  - An elected officer of either House of Congress
  - Employees of a Member, Committee, leadership staff, joint committee, working group or caucus
- A "Covered Executive Branch Official" includes
  - The President
  - The Vice President
  - Any officer or employee in the Executive Office of the President
  - Any Executive Schedule level I – V officer or employee
  - Any member of the armed services at or above pay grade O-7 & above
  - "Schedule C" political appointees

Covered Individuals (IRC Definition)

- "Covered Executive Branch Official" includes
  - All White House staff
  - Top two officials of all departments within the Executive Office of the President (OMB, STR)
  - Top two officials (and immediate staff) of each Cabinet Agency
  - Any person in the Executive Branch with legislative responsibility with whom you interact in attempting to influence specific legislation

“Lobbying Activities” (LDA Definition)

- Lobbying activities means lobbying contacts AND efforts in support of such contacts including preparation and planning activities, research and other background work that is intended, at the time it is performed, for use in contacts, and coordination with the lobbying activities of others

What is NOT a “Lobbying Contact”

- A speech, article or other material distributed to the public through a medium of mass communication
- A request for a meeting, a request for the status of an action, or other similar administrative request
- Testimony given before Congress or submitted for inclusion in the public record
- Information provided in writing in response to an oral or written request, or in response to a request for public comments in the Federal Register
- Required by subpoena or civil investigative demand
- Written comment filed as part of a public proceeding

Categories of Lobbying Expenses

- Calculation of time, overhead for all employees engaged in lobbying activities
- Hard costs (travel, hotels, conference fees, meals)
- Payments to outside lobbying firms, vendors, consultants, coalitions
- Percentage of association dues for lobbying
- State and local lobbying costs for Method B/C
- Grassroots communications for Method B/C

LDA Reporting Expenses

- Method A
  - Any LDA Registrant may use
- Method B
  - For Section 501(c)(3) organizations that have made a Section 501(h) election
- Method C
  - For any 501(c)(4) or (c)(6) or corporation that calculates nondeductible lobbying expenses and dues under Section 162(e)

Surviving a Federal Audit

- Auditors want to see a system in place that tracks the type of information that must be provided; time sheets, collection of information
- Full disclosure of topics, sections of bills being lobbied
- IRS Auditors ask questions about percentage of time spent by CEO and other executives
- DCAA and other government contract auditors are asking questions about nature of services performed by outside consulting firms hired by corporations

Semiannual LDA (LD-203) Reports

- Filed by Registrants and individual Lobbyists (1/30 and 7/30)
- Must disclose campaign contributions or donations to presidential libraries/inaugural committees >$200
- Also expenditures with respect to legislative & executive branch officials:
  - For events honoring covered officials
  - To an entity named after or in recognition of such official
  - To an entity “established, financed, maintained or controlled” or an entity designated by such official
  - To pay for a meeting, retreat or conference held by or in the name of one or more officials

LD-203 Certification Requirement

- LDA reports filed by Registrant and each listed lobbyist must include certification that:
  - They have “read and [are] familiar with” the gift & travel rules
  - Have “not provided, requested, or directed” any gift or travel “with knowledge” of any violation of these rules
- Civil fines up to $200,000 and criminal penalties up to 5 years in jail for a knowing violation
- Failure to properly file LD-203s is common cause of referrals to Justice Department

State/Local Lobbying Compliance

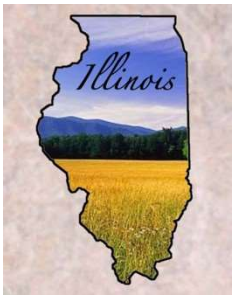
- The lobbying compliance playing field at the state and local levels is much more active (and complicated) than at the federal level
- Registration thresholds vary widely by jurisdiction:
  - Spending (Expenditure and reimbursement) thresholds
  - Time and activity thresholds
  - Gift thresholds
- Reporting requirements vary widely by jurisdiction:
  - Lobbying issue and subject matter reporting
  - Gift and expenditure reporting
  - Political contribution reporting (and sometimes bars on such giving)
- **New emphasis on the expansion of vendor/procurement lobbying frameworks across the country - activity that once was considered sales or business development with government purchasers is now considered lobbying**

State Lobbyist Disclosure Laws: Definition of a "Lobbyist"

- States are trending toward an expansion of the definition of "Lobbyist" into more executive branch and school board activities:
  - For example, several states have recently enacted legislation expanding their definitions of "lobbying" to broadly cover efforts to influence decision-making in the executive branch.

State Lobbyist Disclosure Laws: Vendor Lobbying

- Several states have gone so far as to create a separate legal definition for lobbying efforts aimed at government contracts – this new type of lobbying is entitled "Vendor Lobbying" and uses a separate reporting regime.
  - A person is deemed to be a lobbyist if he or she undertakes **any communication with an official of the executive or legislative branch of state government for the ultimate purpose of influencing any executive, legislative, or administrative action** – including regarding procurement-related matters.



Gifts and Travel Rules
Common Questions from Congressional Staff and the Private Sector

- What is the scope of the gift ban on lobbyists?
- What type of functions may I host?
  - Nominal food, other than a meal
  - Widely attended events
- Are Members/staff allowed to accept hosted travel?
  - Trip length and permitted lodging?
  - Scope of lobbyist involvement

lobbying community

The Bottom Line

- Member of Congress and staff and Executive Branch officials may NOT accept ANYTHING of value from ANYONE – whether personal or official – UNLESS acceptance is allowed under one of the Exceptions to the gift rules.

Permitted Gifts
Personal Friendship Exemption

- Based on long-standing personal friendship
- Paid for personally
  - Not with Corporate credit card
  - Not Charged to the Firm
  - No Business Tax Deduction
- Reciprocal Gift giving
- History of the Relationship
- Similar Gifts to others

Widely Attended Event

- Widely Attended Event
  - At least 25 other than Members
  - Open to individuals from throughout a given industry or profession . . .
- Invitation came from the Sponsor of the Event (contributors are not sponsors)
- The attendance of the staff person is related to his or her official duties
  - Ceremonial role
  - Appropriate to duties

Charity and Educational Events

- Charity Events
  - Primary purpose to raise funds for IRC 170(c) organization
  - Invitation only from the sponsor of the event
  - Unsolicited
  - May include waiver of fee, food, entertainment and instructional materials
- Educational Events
  - Lectures, seminars, discussion groups
  - Sponsored by universities, foundations, think tanks, or similar non-advocacy organizations
  - Does not extend to meals in connection with presentations by lobbyists
  - Does not extend to meals in connection with legislative briefings

Permitted Gifts

- Nominal food not part of a meal -- includes meeting snacks, reception food, light hors d'oeuvres, no one on one coffee or drinks
- An item of "nominal" value – any item under $10, greeting cards, baseball caps and T-shirts"
- Books or other informational material
- Special plaques or awards

Executive Branch Ethics Rules

- Generally, an Executive Branch employee may not accept gifts from "prohibited sources" (those seeking official action, doing business with the government or have interests that may be substantially affected by performance or non-performance of the employee's official duties) or given because of the employee's official position.

Executive Branch Exceptions

- A gift valued at $20 or less, provided that the total value of gifts from the same person is not more than $50 in a calendar year (employees of the same company are considered the same source).
- A gift based on family relationship or personal friendship
- Gifts of free attendance at certain widely attended gatherings, provided the agency has determined the attendance is in the interest of the agency
- Modest refreshments

Trump Executive Order on Ethics and Appointee Ethics Pledge

- Despite the traditional executive branch gift and ethics rules, the Trump Executive Order on Ethics prohibits all Executive Branch appointees from accepting gifts from federal lobbyists or registered lobbying organizations whatsoever.
- Very few exceptions to this prohibition exist. The following items do not qualify as "gifts" and may be given:
  - Modest items of food and non-alcoholic refreshments offered as other than a meal;
  - Items of little intrinsic value, such as greeting cards or plaques;
  - Gifts based on a personal relationship;
  - Certain types of publicly-available discounts;
  - Limited items based on outside business or employment relationships; and
  - Gifts authorized by supplemental agency regulation or statute.

Foreign Agent Registration Act

- Basics of FARA
  - Requires registration of any "agent" of a "foreign principal" that engages in activities **within the U.S.** that are intended to:
    - Persuade or influence the **Government of the United States** or any section of the public within **the United States** with reference to formulating, adopting, or changing the domestic or foreign policies of the United States or with reference to the political or public interests, policies, or relations of a government of a foreign country or a foreign political party.

- Agent
  - Requires control or direction
  - More than mere agreement on point of view
  - Does NOT require ability to bind the foreign principal

- Foreign Principal
  - Foreign government
  - Foreign political party
  - Foreign corporations or associations
  - Entities directed on behalf of the above

Scope of Covered Activities

- Political Activities - Similar to Lobbying Disclosure Act -- engaging with government officials
- Public Affairs Activities - Much broader category -- includes engagement with general public, other groups, so long as it is "for or on behalf of" foreign principal
- Public Relations Counsel includes "**any person who engages directly or indirectly in informing, advising, or in any way representing a principal in any public relations matter pertaining to political or public interests, policies, or relations of such principal**".
- Publicity Agent includes "**any person who engages directly or indirectly in the publication or dissemination of oral, visual, graphic, written , or pictorial information or matter of any kind**…."
- All categories of activity require intent to influence

Intersection with Lobbying

- FARA Activities are NOT the same as lobbying under the Lobbying Disclosure Act, or similar statutes
- Lobbying defined:
  - "Lobbying contacts and efforts in support of such contacts"
  - Contact = discussion of specific legislation and general issues
  - Includes preparation
- Activities under FARA are much broader in terms of scope of contacts, but require intent to influence policy

Key FARA Exemptions

- Legal representation
- Commercial activities on behalf of a foreign entity
- Representing foreign companies on political or commercial activities, so long as the foreign company's activities are NOT directed or controlled by a foreign government or foreign political party
- **Exemptions are fact-specific, and largely subjective**

FARA DECISION TREE

Is my client a foreign principal?

Yes

- Foreign government
- Foreign political party
- Foreign corporation or association
- Entities directed on behalf of the above

No

- Any other entity
- NO NEED TO REGISTER

If yes, am I an agent? 

FARA DECISION TREE

Am I an agent?

Yes

- Requires work to be performed in US
- Requires control or direction over activities
- More than mere agreement on point of view
- Does NOT require ability to bind foreign principal
- Does NOT require formal contract
- Does NOT require direct relationship with foreign party

No

- Work performed outside the US
- No control or direction over activities
- NO NEED TO REGISTER

If yes, am I a Public Relations Counsel or Publicity Agent?

FARA DECISION TREE

Am I a Public Relations Counsel or Publicity Agent?

Public relations counsel

- Engages directly or indirectly in informing or advising a foreign principal in any public relations matter pertaining to political or public interests, policies or relations of such foreign principal
- Requires direct nexus to policy considerations

Publicity Agent

- Engages in dissemination of information or matter of any kind on behalf of foreign principal
- Does not require direct nexus to policy considerations

If either, am I engaging in political activities?

FARA DECISION TREE

Am I engaging in political activities?

Yes

- Activities aimed at influencing the federal government with regard to formulating, adopting, or changing the domestic or foreign policies of the United States with reference to the political or public interests, policies, or relations of a government of a foreign country or a foreign political party
- Does not require contacting public officials - could include grassroots campaigns, preparing materials for others to use, etc.

No

- Private, nonpolitical activities in furtherance of the bona fide commercial, industrial, or financial operations of the foreign government
- Routine inquiries concerning current policies or seeking administrative action in a matter where such policy is not in question
- DO NOT NEED TO REGISTER

If yes, do the activities predominantly serve a foreign interest?

FARA DECISION TREE

Do the activities predominantly serve a foreign interest?

Yes

- Activities are directed by a foreign government or foreign political party
- Corporations with significant government equity interest or other financial interest are more likely to be serving government interest

No

- Activities are private and are not directed by a foreign government or foreign political party
- DO NOT NEED TO REGISTER

If yes, YOU MUST REGISTER UNDER FARA

Tab 4

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CLE FOR IN-HOUSE COUNSEL
WASHINGTON, DC I OCTOBER 2019

Developments and Challenges in Cross-Border Investigations

Maxwell Carr-Howard, Washington, DC and London

Melissa Gomez Nelson, Washington, DC

Matthew A. Lafferman, Washington, DC

Discussion Points

- **Starting investigations**
  - Where to focus and begin?
- **New risks to consider**
  - Determine local liability, defenses, and risks
  - New US agency to consider
  - New tools of the US government
  - Challenging US government jurisdiction
- **Conducting investigations**
  - Risk considerations
  - **Ethical and cultural considerations** in global investigations: local labor law, culture, language
  - **Data privacy**: compliance with local law, including GDPR in Europe, to avoid creating liability in the course of an investigation
  - **Preserving legal privilege** in jurisdictions where it is not recognized
- **Negotiating with multiple agencies**

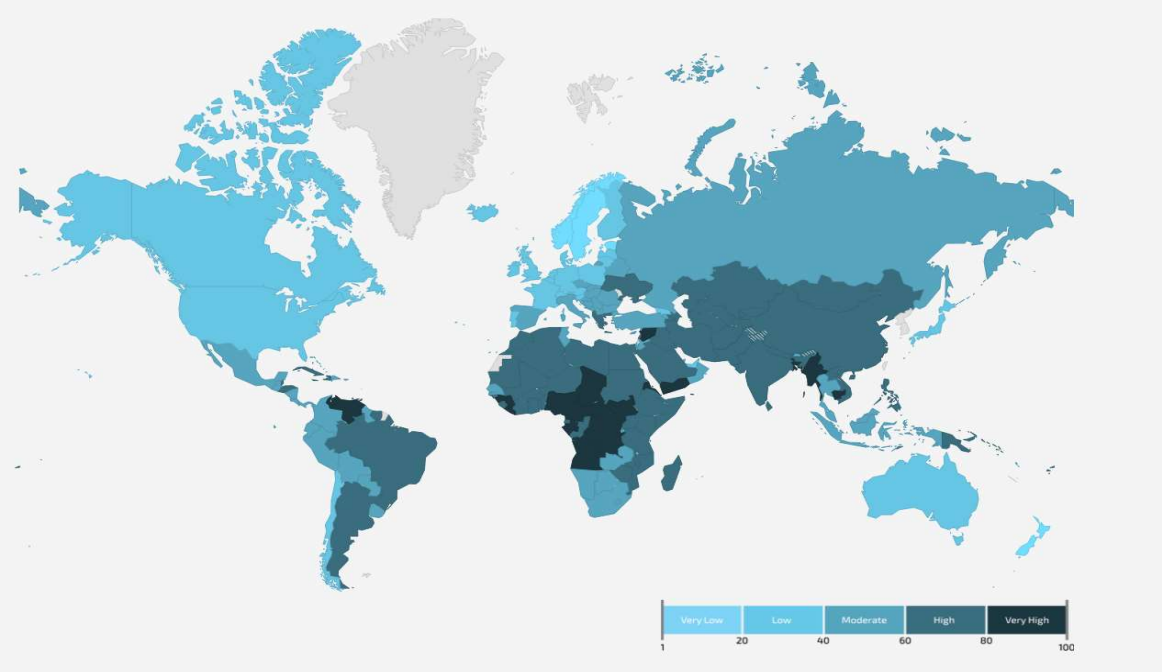
Worldwide corruption risk is on the rise

- A 2017 study by TRACE found that 60% of countries have an increased bribery risk compared with the 2014 study, while only 32 percent have a decreased bribery risk

- 2018 TRACE study identifies highest risk in countries in Central Asia, Middle East, and Africa

Rank	Country Name	Total Risk Score
169	Tajikistan	68
170	Yemen	68
171	Syria	68
172	Haiti	68
173	Madagascar	68
174	Ethiopia	69
175	Iraq	69
176	Nicaragua	69
177	Uzbekistan	69
178	Sudan	70
179	Djibouti	70
180	Laos	70
181	Republic of the Congo (Brazzaville)	70
182	Bangladesh	70
183	Central African Republic	71
184	Democratic Republic of Congo	71
185	Zimbabwe	72
186	Bermuda	72
187	Angola	72
188	Guinea-Bissau	72
189	Macau	73
190	Cambodia	75
191	South Sudan	75
192	Eritrea	76
193	Burundi	78
194	Equatorial Guinea	79
195	North Korea	81
196	Turkmenistan	82
197	Chad	82
198	Venezuela	82
199	Libya	83
200	Somalia	92

DENTONS



DENTONS

Anti-corruption enforcement is also increasing

- Enforcement agencies have become more aggressive in enforcing anti-corruption laws
- Out of the **top 10** FCPA enforcement actions, **more than half** have occurred in the **last 3 years**:
  - MTS (2019)
  - Petróleo Brasileiro S.A. – Petrobras (2018)
  - Société Générale S.A. (2018)
  - Keppel Offshore & Marine Ltd. (2017)
  - Telia Company AB (2017)
  - VimpelCom (2016)
  - Teva Pharmaceutical (2016)
- 2019 FCPA enforcement is already the **3rd largest in history** in terms of settlement amounts ($1.5 billion)
- According to 2018 TRACE report, Europe has 157 open investigations into alleged bribery of foreign officials—37% jump from previous year

Countries have implemented new anticorruption laws

- **India** - passed the Prevention of Corruption (Amendment) Act, 2018
  - New bribery offense for bribe payers, including “commercial organizations”
  - Recognizes defense for those “compelled” to give bribes who timely report
  - Also recognize new defense if implemented “adequate procedures ” (similar to UK Bribery Act)
- **Russia** expanded laws in 2018
  - Allow for the freezing of the assets of companies under investigation
  - New defenses for assisting authorities in uncovering and investigating misconduct
- **Italy** passed “bribe destroyer” bill in January 2019
  - Increased penalties for bribery involving both individuals and companies
  - Broadened the definition of a “foreign public official”
  - Adopted a new benefit for cooperation
- **Saudi Arabia**’s new law (effective September 2019) set to criminalize bribery in the private sector

Challenges in starting an investigation

- Determine risk considerations in different countries
  - Different action criminalized in various countries
    - Keep in mind potential application of the local law defense
  - Countries recognize different benefits for disclosure
    - *E.g.*, Spain does not recognize any legal benefits
  - Different countries adopt different defenses
    - *E.g.*, "adequate procedures" in India and United Kingdom
- High profitability of enterprise may carry higher risk of penalties/fines
  - Criminal penalties under the US Sentencing Guidelines and disgorgement are determined by profits causally connected to the misconduct

Dentons anti-bribery tool

- Preliminary method that can be used to compare and contrast the laws of different countries is Dentons' web-based tool—www.antiberiberylaws.com
- Allows for quick, customizable cross-comparisons of the anti-bribery and anti-corruption laws in multiple jurisdictions around the world

	United States *Foreign Corrupt Practices Act*	United Kingdom *Bribery Act*
Prohibited Conduct: Bribing	The US Foreign Corrupt Practices Act ("FCPA") prohibits directly or indirectly: 1. offering to pay, paying, promising to pay, or authorizing the payment of money or "anything of value"; 2. to or for the benefit of a non-US government official, political party, candidate; 3. with corrupt intent; 4. for the purpose of (a) influencing or inducing any act or decision of the official in his/her official capacity, or (b) securing any other improper advantage; 5. in order to obtain or retain business. In addition to its anti-bribery provisions, the FCPA also includes accounting provisions which require US "Issuers" (i.e., companies that either list securities on a US stock exchange or are required to file reports with the SEC) to: (1) make and keep accurate books, records, and accounts that, in reasonable detail, accurately and fairly reflect the transactions and disposition of the assets of the Issuer; and (2) "devise and maintain a system of internal accounting controls" sufficient to assure that (a) transactions are executed in accordance with management's authorization; (b) access to assets is permitted only with the proper authorization; and (c) accounting records reflect the existing assets.	• Prohibits direct and indirect bribery of any person (not limited to foreign officials or other public sector) to induce them to act "improperly" or reward them for acting improperly. It is a standalone offence to bribe a foreign public official to influence them to act in their capacity as such for the purposes of getting or keeping business or a business advantage.

New US agency to consider: the CFTC

- Commodity Futures Trading Commission **regulates commodity markets** (derivatives, futures, and swap markets) and enforces these laws to protect consumers from fraud, manipulation, and other abusive practices
  - Jurisdiction and enforcement granted under the Commodity Enforcement Act
- CFTC recently signaled that "**foreign corrupt practices**" will be an **ongoing enforcement priority**
  - On March 6, 2019, the CFTC issued an Enforcement Advisory providing guidance on how to apply the agency's policy on providing self-reporting and cooperation credit to cases involving "foreign corrupt practices."
  - On May 8, 2019, CFTC Division of Enforcement released its first publicly available Enforcement Manual, which encoded this Enforcement Advisory on "foreign corrupt practices."
  - In May 2019, the CFTC released a Whistleblower Alert providing guidance to whistleblowers on "foreign corrupt practices

CFTC enforcement advisory

- Absent "aggravating circumstances, **presumption of no civil penalties** to **non-registered** entities who
  - Timely and voluntarily disclose
  - Fully cooperate
  - Appropriately remediate

violations of the CEA "involving foreign corrupt practices"

- Still required to pay disgorgement, forfeiture, and restitution
- Importantly—policy **only applies to entities not registered** with the CFTC
  - CFTC still recognizes "**substantial reduction**" for registered entities that disclose/cooperate/remediate, just no presumption

Determining jurisdiction of the CFTC

- CFTC yet to bring enforcement action involving foreign bribery; although ongoing investigations
- CFTC may have jurisdiction if:
  - Payments were made to secure business in connection with regulated activities like trading, advising, or dealing in swaps or derivatives
  - Corrupt conduct was used to manipulate benchmarks that serve as the basis for related derivatives contracts
  - Prices obtained through corruption were falsely reported to benchmark
- But, as of now, court cases have **limited extraterritorial jurisdiction**

New tools of the US government: the CLOUD Act

- On March 23, 2018, Congress passed the Clarifying Lawful Overseas Use of Data Act ("CLOUD Act")
- DOJ released a **white paper** on April 10, 2019
- Amended the Stored Communications Act ("SCA")
  - SCA permits the US government to seek data from service providers of electronic communication services (*e.g.*, email) and remote computing services (*e.g.*, cloud computing)
- Extended SCA to apply **extraterritorially**
  - Law requires service providers to disclose all requested records within the provider's "**possession, custody, or control**" whether or not the information sought is "located within or outside of the United States"

The CLOUD Act (cont.)

- Also creates a framework for an executive agreement between the US and a foreign government to share information
  - **US and UK** just announced an Executive Agreement that will allow sharing of data regarding serious crime, including terrorism, child sexual abuse, and cybercrime, directly from tech companies based in the other country, without legal barriers
  - US announced it entered formal negotiations with **Australia** and the **EU**
- Potential limitations:
  - Preserves the right for a party to bring a challenge for "**comity**"
  - DOJ white paper recognizes law "**encryption neutral**" and "does not create any new authority for law enforcement to compel service providers to decrypt communications"

Challenging US jurisdiction under the FCPA

- ***United States v. Hoskins*** (September 2018)
  - Considered whether conspiracy or accomplice liability can extend to capture non-resident foreign nationals acting outside US
  - Second Circuit found that FCPA only extends to **issuers**, **domestic concerns**, and **persons acting within the territory of the US** and their respective agents

Challenging jurisdiction (cont.)

- **Use of an instrumentality of "interstate commerce"**
  - Only one opinion—*US v. Straub*—has considered this issue; later decision by court undercut initial decision
  - In light of the absence of judicial input, US authorities have interpreted broadly
  - Consider **arguments to narrow** this interpretation
    - **Presumption against extraterritorially** applies to limit statute "to its terms." *Morrison v. National Australia Bank Ltd*
    - The **legislative history of the statutory definition** of interstate commerce further illustrates that this definition was not intended to be given a broad construction
- Argument laid out in April 17, 2019 issue of *The Anti-Corruption Report*
  - "How the FCPA's Interstate Commerce Requirement Should Apply to Free Email Services"

Conducting investigations: inherent locality

- **Language and culture** are at the heart of an effective investigation
  - The old adage "two nations divided by a common language" is very real and can cause great humor and deep misunderstandings
  - Just think of the impact of a Slavic language or a traditional African culture can have on communication, cooperation and understanding
  - Don't underestimate the difference in understanding that a native and non-native speaker (even a very good speaker) may have
    - Understanding of local "slang," sayings, or local practice
  - Just because it is in writing does not mean that it reflects the author's intent

Conducting investigations: data privacy

- Data is **scattered across jurisdictions** (devices, storage, servers)
- Each jurisdiction has its **own rules** (EU is not alone) on privacy and labor laws, American assumptions should be recognized and rejected
  - Watch for "localization," "military secrets" and data transfer requirements
  - The simple act of sitting down with counsel can be very foreign
  - The role of a Works Council and have a unexpected and substantial impact
- **Recent modifications and their challenges:**
  - Pre-GDPR "consent forms" often impose US assumptions and ignore the rights of non-custodians
  - Data reviewed by third-party vendors without legal training or understanding of the issues under investigation
  - Translations conducted with limited understanding of local culture or law
  - Advice continues to be forwarded without regard to local privilege rules

Impact of “data privacy” and “data localization” laws in Europe and elsewhere on global investigations

- **Data privacy**: key aspects as they impact global investigations
  - “Personal data”: name, telephone number, email, what the person does at work; **but not the communication itself**
  - Consents often needed for data collection and review
  - Necessity principle: restricts all use of personal data, including collection, review, and later transmission
  - Export to (or “processing” from) a country without a comparable level of protection restricted to certain defined exceptions
    - these arguably do not include production in pre-trial discovery or outside of active *court* proceedings (e.g., under DPA)
    - Anonymization removes personal data
- **Data localization laws**: e.g., Russia, China
  - Require local storage of personal data

Conducting investigations: protecting privilege

- First, consider new rulings on privilege in investigations
  - Oral download of interview memoranda to SEC waived work product privilege. *S.E.C. v. Herrera*, 324 F.R.D. 258 (S.D. Fla. 2017).
- In handling/storing privileged material abroad, **do not assume** the legal system is just like yours…
  - For example:
    - Germany has no equivalent to American privilege, nor does it have discovery
    - The UK has privilege, but its not exactly the same
    - Spain has investigating judges AND prosecutors

Challenge: Legal privilege in global investigations

- **US approach:**
  - Prosecutors respect legal privilege
  - Legal privilege covers in-house counsel
  - Policies against requiring waiver
- **Other jurisdictions:**
  - Dawn raids at law firms
    - *E.g.*, German prosecutors raided the offices of Jones Day (appeal to German courts failed because firm had no rights under the German Constitution)
  - In-house counsel may not bestow privilege
    - In *Akzo Nobel Chemical Ltd. & Akcros Chemical Ltd. v. European Commission,* EU's highest court found that internal corporate communications with in-house counsel are *not privileged* (applies only to EU courts, not courts of EU member states)
  - European counsel does not always appreciate the value of privilege
  - But: prosecutors may not seek legal analysis, e.g. in investigation reports

Consider ethical obligations

- Obligations as to privileged communications?
  - **Duty to maintain confidentiality**: Model Rule 1.6.101
  - **Duty to safeguard confidential information:** Model Rule 1.6.220
  - **Privileged communications with organizational clients:** Rule 1.6.470
  - Virginia Rule 1.6:
    - "A lawyer shall not reveal information protected by the attorney-client privilege ***under applicable law*** or other information gained in the professional relationship that the client has requested be held inviolate or the disclosure of which would be embarrassing or would be likely to be detrimental to the client unless the client consents after consultation . . . ."
- If foreign authorities seize privileged communications in dawn raid, could waive privilege claims in US under third party doctrine
- Also, counsel should consider lack of privilege protections when traveling abroad

In sum: "Privilege" is not "privilege" everywhere

- Secure privilege at every step
  - Engagement letters
  - *Upjohn* warnings
    - *Cruz v. Coach Stores, Inc.*, 196 F.R.D. 228 (S.D.N.Y. 2000) (finding investigative audit not privileged when *Upjohn* factors not met—employees were never informed that it was confidential and purpose was for corporation to receive legal advice)
  - Diligent in using privilege designations and labels
- **BUT**, know that privilege will not be respected by all jurisdictions, you must recognize this to meet your ethical duties
  - Not just a question **what communications** are covered (in-house v. outside)
  - **Where the communication** are stored is CRITICAL
    - Storing information in a jurisdiction that protects privilege can prevent disclosure and uphold ethical obligations
    - Importantly, seizure of privileged communications by foreign authorities could waive claims of privilege in the US
  - Use diligence and protections (*e.g.*, encryption) when traveling abroad

Consider risks in negotiating with multiple agencies

- Determining appropriate order in which to negotiate with each agency
  - Consider risk of follow-on prosecutions
    - In January 2010, Alcatel-Lucent SA paid $10 million to settle charges that it paid kickbacks to government officials with the Costa Rican government
    - Honduran authorities opened investigation but closed without charges
    - In December 2010, Alcatel-Lucent paid $137.4 million to the DOJ and SEC to settle FCPA violations arising from improper payments in Costa Rica, Honduras, Malaysia, and Taiwan
    - Two days later, Honduran authorities reopened investigation
- DOJ and SEC have often credited amounts paid as part of monetary settlements with foreign enforcement authorities
  - Consider DOJ's a new "piling on" policy (announced in May 2018)
    - *Justice Manual* (formerly US Attorneys' Manual) § 1-12.100

New policies of US enforcement authorities

- DOJ updated its monitorship policy in October 2018 Benczkowski Memo
- Benczkowski Memo adopted new guidelines to ensure a more reasonable approach to imposing a monitorship.
- Notably, Benczkowski Memo recognized that monitorships should be limited in scope:
  - "[T]he scope of any monitorship should be appropriately tailored to address the specific issues and concerns that created the need for the monitor."
- Consider carve outs in US authorities' recent settlements with Fresenius and Walmart

New SFO "Corporate Co-Operation Guidance"

- In August 2019, the UK Serious Fraud Office (responsible for enforcing the UK Bribery Act) published **updated guidance** on corporate cooperation
- This guidance **builds on the cooperation practices** contained in the DPA Code of Practice - some key provisions:
  - **Privilege**: Entities claiming privilege must instruct independent counsel to **certify** that the material is privileged
  - **Identifying Information**: Organizations must "[a]ssist in **identifying** material that might **reasonably** be considered capable of assisting any accused or potential accused or undermining the case for the prosecution"
  - **Materials**: Entities must produce relevant material held abroad "where it is in the **possession or under the control**" of the organization
  - **Avoid 'Tainting' Witnesses**: Entities must **refrain from tainting** a potential witnesses by sharing statements made by other people

Think globally, act locally

- You need a **global plan**, but the solution is where the problem is…
  - Data is governed by local law? Review it **locally**, at least initially.
  - Data is in a local language? Review it **locally** to identify the key materials.
  - Need to talk with witnesses? Do it **locally**, with a local understanding of language, culture, and local legal standards.
- But wait, the issues are actually Global…
  - Conduct crosses borders, actors engaged in different jurisdictions
  - Enforcement agencies are in Washington, Paris, Berlin, London, etc.
  - So think globally with a truly global team, including **local and global experts**
  - With global and local access (restricted where required by data or privilege)
- The global team can act locally and provide near instantaneous and complainant access **globally through the cloud**

Closer collaboration minimizes interfaces

Managing corruption risk: A global approach for a global problem

May 7, 2019

The global expansion of corporate liability for corruption in several foreign countries demonstrates the need for companies to adopt a truly worldwide approach to anti-corruption. In the past year alone, India, Russia and Italy have all implemented notable changes to their respective anti-bribery laws that may raise new risks but also provide new defenses to multinational companies operating in those countries. Although companies have historically focused on the US authorities' expansive interpretation of the Foreign Corrupt Practices Act, these extraterritorial developments demonstrate the need for companies to be aware of the different anti-bribery laws applicable when investigating international corruption or designing and implementing successful compliance programs.

India

In July 2018, India passed the Prevention of Corruption (Amendment) Act, 2018 (the Amendment), which not only expands liability for public bribery against companies and those acting on their behalf, but also provides new, potentially applicable defenses for such companies. The Amendment creates a new separate offense for those who give an undue advantage to another person or persons in order to induce a public servant to improperly perform a public duty or reward the improper performance. Before the Amendment, India's anti-bribery law explicitly applied only to public servants who accepted bribes. While payers of bribes could be found indirectly liable through aiding and abetting, Indian prosecutors rarely brought these charges. Notably, however, the Amendment also adopts a defense for the provider of an undue advantage if such person (1) was "compelled" to give an "undue advantage" **and** (2) reports the acceptance of the undue advantage to a law enforcement authority or investigating agency within seven days of the act. But the Amendment provides little clarity on the meaning of "compelled."

The Amendment also incorporates a new bribery offense for "commercial organizations." Before the Amendment, Indian law did not explicitly extend bribery liability to commercial organizations. The Amendment extends liability to commercial organizations "if any person associated with the commercial organization gives or promises to give any undue advantage to a public servant" intending to obtain or retain business or advantage in the conduct of business for such commercial organization. In conjunction with this new bribery offense, the Amendment also imposes potential liability on officials of a commercial organization.

In addition, the Amendment mirrors the UK Bribery Act by incorporating a defense for commercial organizations charged with bribery if the organization can prove it had "adequate procedures" in compliance with

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such guidelines as may be prescribed to prevent persons associated with it from undertaking such conduct.

Russia

In 2018, Russia expanded the scope of its anti-bribery framework to allow for the freezing of the assets of companies under investigation, as well as to provide new defenses. In April 2018, Russia amended its anti-bribery law (the April 2018 Amendment) to provide companies a defense to prosecution if they (1) assist in detecting or investigating the bribe or (2) prove that the bribe has been extorted. Importantly, the April 2018 Amendment also allows Russian courts to freeze the assets of companies under investigation for corruption up to the maximum amount of any potential fine.

In December 2018, Russia again amended its anti-bribery law to expand the scope of corporate liability for bribery by closing a potential workaround. The law as originally enacted prohibited companies from offering or paying a bribe on behalf of or "in the interests of" that entity. However, this earlier version of the law did not preclude companies operating in Russia from paying bribes "in the interests of" foreign companies. The new law closes that potential loophole by also barring third parties from paying bribes "in the interests of" any "affiliated" entity. "Affiliated" is not clearly defined in the new law and thus bears a significant risk of an overly broad interpretation. The inclusion of this liability poses additional risk because third-party foreign companies would be identified in court documents and risk additional scrutiny by foreign enforcement authorities.

Italy

In January 2019, Italy added increased penalties and expanded definitions to its bribery laws to capture a broader range of conduct, as well as adopted a new defense for companies, under its "bribe destroyer" bill. The law increased penalties for individuals and companies in connection with certain acts of bribery and added provisions tolling the statute of limitations period. The law also broadened the definition of a "foreign public official" to include certain officials within a public international organization; members of international parliamentary assemblies, international or supranational organizations; and officials and judges of international courts. Importantly, the law further adopted a new benefit for cooperation: allowing companies that committed certain bribery offenses to limit disqualifying sanctions to a maximum of two years provided the company, before the first decision or judgment, actively collaborates to avoid further consequences of the offense, voluntarily discloses information assisting in obtaining evidence of the crime or identifying other offenders, or ensures the resulting profits are seized. To qualify, however, the company must show it has eliminated the organizational problems that led to the misconduct through the adoption and implementation of a suitable compliance program (pursuant to Legislative Decree no. 231/2001).

These developments demonstrate the need for companies addressing multinational corruption to be aware of the different obligations and exceptions in the law of the countries where the alleged misconduct occurred.

One method companies can use to compare and contrast the laws of different countries is Dentons' web-based tool that allows for quick, customizable cross-comparisons of the anti-bribery and anti-corruption laws in multiple jurisdictions around the world (available at **www.antibriberylaws.com**).

However, if you are confronting an actual allegation of bribery or corruption, you should work with local and global counsel to properly prioritize the geographical areas of investigation according to where liability may be the greatest and where cooperation with authorities could yield the most benefits.

Further, the differing obligations and exceptions in these and other countries highlight the need for a truly global compliance program that takes into account the various, and sometimes, competing obligations under the respective country's anti-bribery laws. To successfully combat the risk of global corruption, companies need to take a truly global approach.

*For more information concerning this alert or other recent developments regarding the changes to the changes in Indian, Russian, or Italian anti-bribery laws, or for information regarding Dentons online anti-bribery laws comparison tool at **www.antibriberylaws.com**, please contact us using the information provided in the upper right under "Key Contacts."*

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Division of
Enforcement

ENFORCEMENT ADVISORY

Advisory on Self Reporting and Cooperation for CEA Violations
Involving Foreign Corrupt Practices

The Division of Enforcement ("Division") issues this Advisory to provide further guidance regarding circumstances under the Division's cooperation and self-reporting program in which it may recommend a resolution with no civil monetary penalty.

On January 19, 2017, the Division of Enforcement issued two Enforcement Advisories (the "January 2017 Advisories") outlining the factors the Division would consider in evaluating cooperation by individuals and companies in the Division's investigations and enforcement actions. On September 26, 2017, the Division issued an additional Enforcement Advisory (the "September 2017 Advisory") outlining the ways in which the Division would consider voluntary disclosures by a company or individual in the context of its broader cooperation program. Among other things, in the September 2017 Advisory, the Division explained that "[i]f the company or individual self-reports, fully cooperates, and remediates, the Division will recommend the most substantial reduction in the civil monetary penalty that otherwise would be applicable." The September 2017 Advisory further explained that, in certain circumstances, the Division may recommend a resolution with no civil monetary penalty on account of voluntary disclosure, cooperation, and remediation.

This Advisory applies to companies and individuals not registered (or required to be registered) with the CFTC that timely and voluntarily disclose to the Division violations of the Commodity Exchange Act involving foreign corrupt practices, where the voluntary disclosure is followed by full cooperation and appropriate remediation, in accordance with the January 2017 and September 2017 Advisories.[1] In those circumstances, the Division will apply a presumption that it will recommend to the Commission a resolution with no civil monetary penalty, absent aggravating circumstances involving the nature of the offender or the seriousness of the offense. In its evaluation of any aggravating circumstances, the Division will consider, among other things, whether: executive or senior level management of the company was involved; the misconduct was pervasive within the company; or the company or individual has previously engaged in similar misconduct.

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[1] CFTC registrants have existing, independent reporting obligations to the Commission requiring them, among other things, to report any material noncompliance issues under the CEA, which would include any foreign corrupt practices that violate the CEA. Nevertheless, registrants that timely and voluntarily self-report misconduct, fully cooperate, and appropriately remediate will receive a recommended "substantial reduction in the civil monetary penalty," as set forth in the January 2017 and September 2017 Advisories, but the presumption of a recommendation of no civil monetary penalty will not apply.

If the Division recommends a resolution without a civil monetary penalty pursuant to this Advisory, the Division would still require payment of all disgorgement, forfeiture, and/or restitution resulting from the misconduct at issue. In addition, the Division will seek all available remedies—including, where appropriate, substantial civil monetary penalties—with respect to companies or individuals implicated in the misconduct that were not involved in submitting the voluntary disclosure.

The CLOUD Act: Potential thunderstorms on the data privacy frontier

April 19, 2018

On March 23, 2018, the Clarifying Lawful Overseas Use of Data Act ("CLOUD Act")[1] was quietly enacted as part of the 2,232-page omnibus budget legislation. The law amended the Stored Communications Act ("SCA"), which establishes procedures permitting the US government to seek data from service providers of electronic communication services,[2] such as email, or remote computing services,[3] including cloud computing (collectively, "providers"). The act did not receive much attention on Capitol Hill, as it was passed with neither review from a House or Senate committee nor a hearing. Nevertheless, the act is having significant implications on companies that utilize data services based or operating in the United States.

What is new

The CLOUD Act made three noteworthy changes to the SCA. First, it amended the mandatory disclosure provisions under the SCA to apply extraterritorially. Before the CLOUD Act, it was unclear whether the SCA could be applied to reach data that was stored outside the US. The Supreme Court was set to resolve this issue in the pending case *United States v. Microsoft Corp*.[4] There, Microsoft had refused to comply with a federal warrant issued to the company, demanding production of an individual's email records in 2013. Microsoft challenged the warrant, arguing that the government could not compel the production of the records because the underlying data was stored in Ireland and the SCA did not apply extraterritorially. In response, the government argued that the SCA did apply extraterritorially because the SCA reached all records in the recipient's custody or control, no matter where the materials are located.

The CLOUD Act amended the disclosure provisions to clarify that the provisions apply extraterritorially. In doing so, it seemingly adopted the government's position in Microsoft. Specifically, it stated that providers must disclose all requested records within the provider's "possession, custody, or control" whether or not the information sought is "located within or outside of the United States."[5] This amendment permits the US authorities to seek data from providers—regardless of where the data is stored—so long as the data is within the provider's "possession, custody, or control." The broad definition of "control" adopted by US courts provides US authorities with broad access to data from providers based or operating in the United States. In light of this new amendment, the Supreme Court mooted the appeal in Microsoft and remanded the case with instructions to the trial court to dismiss the case.

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Second, the CLOUD Act authorizes the US attorney general, with concurrence from the US secretary of State, to enter into new types of international agreements that allow foreign governments to access data stored in the United States. These are known as executive agreements.[6] Generally, principles of national sovereignty prohibit US or foreign authorities from traveling to each other's respective jurisdictions to serve entities located there with orders compelling disclosure. Instead, those governments must use a Mutual Legal Assistance Treaty ("MLAT") to compel such information, which is often a slow process.

The CLOUD Act creates a framework for an executive agreement between the US and a foreign government that gives such requests legal force. Thus, a provider subject to the jurisdiction of a country with which the US has entered an executive agreement could be served with an order requesting customer data under the SCA and the provider would be compelled to disclose the data, even if the data was stored in the United States. The process for entering these executive agreements is already underway, as the US and the UK have already started negotiations. Nevertheless, the CLOUD Act provides that the US attorney general must certify that a country's legal environment provides certain legal protections, such as defending privacy and civil liberties, before a country can qualify for an executive agreement with US authorities.

Third, the CLOUD Act created a new right for challenging mandatory disclosures when the data at issue is stored in a country with which the United States has an executive agreement.[7] It permits providers served with an SCA legal process to file a motion to quash within 14 days of service to challenge the compelled production. A motion to quash or modify may be filed if the provider reasonably believes (1) that customer or subscriber whose data is sought is not a US citizen or legal resident and does not live in the United States, and (2) that the disclosure would create a material risk that the provider would violate the laws of a country with which the US has an executive agreement.

A court may only modify or quash an SCA legal process if it finds (1) that the disclosure would cause the provider to violate the laws of the country at issue; (2) that customer or subscriber whose data is sought is not a US citizen or legal resident and does not live in the United States; and (3) the "interests of justice" factors laid out in the statute[8] favor the modification or quashing of the request.

Importantly, the CLOUD Act supplements and does not replace aspects of the current framework for seeking information abroad. The law explicitly preserves the right for a party to bring a challenge for "comity," which arises when a compelled protection conflicts with the law of the country in which production must be made.[9] Further, the CLOUD Act also expressly states that it does not affect or modify the current process for seeking data under an MLAT if US authorities choose to utilize that route.[10]

Who should take particular notice of this alert

The CLOUD Act has a significant impact on international data sharing. Companies should be aware that the US government can now directly seek

a warrant for data within the "possession, custody, or control" of providers that are based or operate in the United States, irrespective of where the data is stored. As such, foreign entities whose data would otherwise be outside of the US government's reach should pay particular attention to the CLOUD Act.

The rising tensions between US and European Union laws, predominately caused by the conflict of US enforcement efforts and the EU's focus on the right to data privacy, is of no surprise. Fortunately, challenges under the CLOUD Act to any personal data sought from EU member countries will likely be more robust in light of the upcoming application of the General Data Protection Regulation (GDPR). Thus, companies based outside of the US and US companies with foreign subsidiaries should consult with legal counsel about how the CLOUD Act will impact their respective entities' data.

For more information concerning this alert or other recent developments regarding the CLOUD ACT, please contact the authors.

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1. *Consolidated Appropriations Act*, Pub. L. No. 115-141, §§ 101–106, 132 Stat 348, 1213–25 (Mar. 23, 2018). ↩
2. “Electronic communication service” is defined as any service which provides to users “the ability to send or receive wire or electronic communications.” 18 USC. § 2510(15).↩
3. “Remote computing service” is defined as an entity that provides the public “computer storage or processing services by means of an electronic communications system.” 18 USC. § 2711(2).↩
4. 829 F.3d 197 (2d Cir. 2016), *cert. granted sub nom. United States v. Microsoft Corp*., 138 S. Ct. 356, 199 L. Ed. 2d 261 (2017).↩
5. Sec. 103(a)(1) of the CLOUD Act, *to be codified at* 18 USC. § 2713.↩
6. Sec. 105(a) of the CLOUD Act, *to be codified at* 18 USC. § 2523.↩
7. Sec. 103(b) of the CLOUD Act, *to be codified at* 18 USC. § 2713.↩
8. The “interests of justice” factors identified in the statute mirror the considerations of international comity.↩
9. Sec. 103(c) of the CLOUD Act, *to be codified at* 18 USC. § 2713.↩
10. Sec. 106 of the CLOUD Act, *to be codified at* 18 USC. § 2523.↩

Promoting Public Safety, Privacy, and the Rule of Law Around the World:

The Purpose and Impact of the CLOUD Act

White Paper

April 2019

www.justice.gov/CLOUDAct

Introduction

The United States enacted the CLOUD Act to speed access to electronic information held by U.S.-based global providers that is critical to our foreign partners' investigations of serious crime, ranging from terrorism and violent crime to sexual exploitation of children and cybercrime. Our foreign partners have long expressed concerns that the mutual legal assistance process is too cumbersome to handle their growing needs for this type of electronic evidence in a timely manner. The assistance requests the United States receives often seek electronic information related to individuals or entities located in other countries, and the only connection of the investigation to the United States is that the evidence happens to be held by a U.S.-based global provider. The CLOUD Act is designed to permit our foreign partners that have robust protections for privacy and civil liberties to enter into executive agreements with the United States to obtain access to this electronic evidence, wherever it happens to be located, in order to fight serious crime and terrorism. The CLOUD Act thus represents a new paradigm: an efficient, privacy and civil liberties-protective approach to ensure effective access to electronic data that lies beyond a requesting country's reach due to the revolution in electronic communications, recent innovations in the way global technology companies configure their systems, and the legacy of 20th century legal frameworks. The CLOUD Act authorizes executive agreements between the United States and trusted foreign partners that will make both nations' citizens safer, while at the same time ensuring a high level of protection of those citizens' rights.

Background

Often electronic evidence is held by communications service providers ("CSPs") with global operations. They may have customers all over the world and company offices and data storage facilities located in many different countries. As a result, CSPs and the data they control may be subject to more than one country's laws. Conflicting legal obligations may arise when a CSP receives an order from one government requiring the disclosure of data, but another government restricts disclosure of that same data. These potential legal conflicts present significant challenges to governments' ability to acquire electronic evidence that may be vital to pursuing criminal investigations in a timely, efficient manner.

Many governments can rely on their domestic laws to require CSPs within their jurisdiction to disclose electronic data under the companies' control, regardless of where the data is stored. The Convention on Cybercrime (also called the "Budapest Convention") requires each of the more than 60 countries that are party to it[1] to maintain the legal authority to compel companies in their territory to disclose stored electronic data under their control pursuant to valid legal process, with no exception for data the company stores in another country. However, CSPs may also be subject to other countries' laws restricting the disclosure of certain kinds of data, whether because the data is stored in another country or would require action in another

[1] For the official list of countries that are party to the Budapest Convention, see https://www.coe.int/en/web/conventions/full-list/-/conventions/treaty/185/signatures?p_auth=cmPs1otx

country to disclose it, or because the data pertains to another country's citizens. If national laws conflict, CSPs may be forced to choose which country's laws to follow, knowing that they may face consequences for violating another country's laws. Such conflicts pose serious problems for governments seeking data and can frustrate important investigations.

Sometimes such conflict-of-laws problems can be addressed by making a "mutual legal assistance" request to another country, using a system of agreements called "Mutual Legal Assistance Treaties" ("MLATs"). The MLAT system enables law enforcement agencies in one country to seek the assistance of foreign counterparts who can obtain the data. The foreign counterpart reviews a request under its own legal standards and may seek a court order under its law to obtain the data. If the order is granted, the foreign government obtains the data and transmits it to the requesting government. This process has many steps, and depending on the country and the complexity of the request, can take many months to complete.

The number of MLAT requests has increased dramatically in recent years, in light of the massive volume of electronic communications that occur daily over the Internet and the enormous amount of electronic data held by companies located throughout the world. While the MLAT process remains a critical evidence-gathering mechanism, the system has faced significant challenges keeping up with the increasing demands for electronic evidence in criminal investigations worldwide. Moreover, because many CSPs move data among data storage centers in various countries, and split up data into different pieces stored in different locations, it can be difficult both for governments and for the CSPs themselves to know where relevant data is located at any point in time for purposes of sending and fulfilling MLAT requests. The international community thus faces a critical question of how to provide governments efficient and effective access to evidence needed to protect public safety while preserving respect for sovereignty and privacy.

The CLOUD Act

As part of the United States's efforts to address these difficult issues, in March 2018 the U.S. Congress passed the Clarifying Lawful Overseas Use of Data Act, or "CLOUD Act." The CLOUD Act has two distinct parts. *First*, the Act authorizes the United States to enter into executive agreements with other countries that meet certain criteria, such as respect for the rule of law, to address the conflict-of-law problem. For investigations of serious crime, CLOUD agreements can be used to remove restrictions under each country's laws so that CSPs can comply with qualifying, lawful orders for electronic data issued by the other country. *Second*, the CLOUD Act makes explicit in U.S. law the long-established U.S. and international principle that a company subject to a country's jurisdiction can be required to produce data the company controls, regardless of where it is stored at any point in time. The CLOUD Act simply clarified existing U.S. law on this issue; it did not change the existing high standards under U.S. law that must be met before law enforcement agencies can require disclosure of electronic data.

I. CLOUD Act Executive Agreements

The CLOUD Act enables the United States to help its foreign law enforcement partners obtain electronic evidence from global CSPs based in the United States that our partners need for their investigations of serious crime, in a way that we hope and expect will be more efficient and effective than the current legal regime. It authorizes the U.S. government to enter into executive agreements with foreign nations under which each country would remove any legal barriers that may otherwise prohibit compliance with qualifying court orders issued by the other country. Both nations would be able to submit orders for electronic evidence needed to combat serious crime directly to CSPs, without involving the other government and without fear of conflict with U.S. or the other nation's law. Many countries have expressed concern that the MLAT process is not fast enough to provide timely access to electronic data held by global CSPs based in the United States for purposes of their criminal investigations. We anticipate that CLOUD Act agreements will help address some of these concerns and will provide substantial public safety benefits to our foreign law enforcement partners.

- *Many U.S.-based global CSPs currently do not disclose certain electronic data directly to foreign governments conducting criminal investigations.* Foreign governments investigating criminal activities increasingly require access to electronic evidence from companies based in the United States that provide communications services to millions of their citizens and residents. However, many of these U.S.-based global CSPs currently will not disclose electronic data directly to foreign investigating authorities, even if they are served with an order by the foreign authority. These companies are concerned about potential restrictions in U.S. law on disclosure of electronic data and liability if they comply with the foreign orders.

  The potential for conflict of laws exists even when the request from the investigating country involves only communications between non-U.S. persons located abroad and concerns criminal activities occurring entirely outside the United States. Indeed, the only connection to the United States may be that the CSP is headquartered there. When CSPs refuse to comply with orders, foreign law enforcement agencies may find their only viable recourse is the MLAT process, which can be challenging for them to use and is burdened by the increasing volume of requests for electronic evidence in the Internet era.

- *CLOUD Act agreements only remove potential conflicts of law for covered orders.* The CLOUD Act authorizes executive agreements that lift any restrictions under U.S. law on companies disclosing electronic data directly to foreign authorities for covered orders in investigations of serious crime. This would permit U.S.-based global CSPs to respond directly to foreign legal process in many circumstances.

  CLOUD Act agreements, however, do not impose any *new* obligation on U.S.-based global CSPs to comply with a foreign government order; nor does the fact of an agreement establish, by itself, that a foreign government has jurisdiction over that CSP. By the same

token, CLOUD Act agreements do not impose any new obligation on *foreign* CSPs to comply with a U.S. government order; and the fact of an agreement, by itself, does not establish that the U.S. government has jurisdiction over a foreign company. In addition, these agreements do not impose any obligation on either government to compel companies to comply with orders issued by the other. The only legal effect of a CLOUD agreement is to eliminate the legal conflict for qualifying orders. Because the United States currently receives many more requests for electronic data than it submits to other countries, we expect the CLOUD Act will have a more dramatic (and beneficial) impact on foreign requests to the United States than on U.S. requests to foreign partners, at least for the foreseeable future.

- *CLOUD Act agreements require significant privacy protections and a commitment to the rule of law.* The CLOUD Act requires that the agreements include numerous provisions protecting privacy and civil liberties. Orders requesting data must be lawfully obtained under the domestic system of the country seeking the data; must target specific individuals or accounts; must have a reasonable justification based on articulable and credible facts, particularity, legality, and severity; and must be subject to review or oversight by an independent authority, such as a judge or magistrate. Bulk data collection is not permitted. Foreign orders may not target U.S. persons or persons in the United States. Agreements may be used only to obtain information relating to the prevention, detection, investigation, or prosecution of serious crime, including terrorism. They may not be used to infringe upon freedom of speech. The functioning of each agreement is subject to periodic joint review by the parties to ensure that it is being properly applied. To be clear, the Act does not require foreign partners to adhere to standards that perfectly match the U.S. legal system. However, to be eligible, a country must establish appropriate standards and checks and balances within its legal framework to protect privacy, civil liberties, and human rights. Agreements are reviewed by the U.S. Congress at inception and for renewal every five years thereafter.

- *CLOUD Act agreements will reduce the burden on the MLAT system.* A CLOUD Act agreement would not be the exclusive mechanism for either party to the agreement to obtain electronic data; other mechanisms such as MLATs or domestic orders outside the agreement would remain available. However, CLOUD agreements will reduce the burden on the MLAT system, and remove potential legal conflicts that might otherwise be posed by domestic enforcement of orders, by allowing CSPs to respond directly to covered foreign orders without fear of a conflict between the two parties' laws. Moreover, because fewer U.S. government resources will be needed to process incoming MLAT requests from countries with CLOUD agreements, this should allow the United States to respond to other MLAT requests more expeditiously.

- *CLOUD Act agreements are encryption-neutral.* While CLOUD Act agreements will bring significant benefits to governments investigating or seeking to prevent serious crime, they will not solve all problems related to law enforcement's need for timely access to

electronic evidence. Notably, the agreements will not address challenges posed to law enforcement by end-to-end encryption, where decryption capability is limited to the end user. The CLOUD Act requires that executive agreements be "encryption neutral," neither requiring decryption nor foreclosing governments from ordering decryption to the extent authorized by their laws. This neutrality allows for the encryption issue to be discussed separately among governments, companies, and other stakeholders.

II. Ensuring Lawful Access to Data

In light of the challenges discussed above, it is clear that effective criminal investigations often depend on the investigating country having the authority under its domestic law to obtain electronic data that CSPs subject to its jurisdiction hold, including outside of its borders. Indeed, the entire CLOUD Act executive agreement framework is premised on the notion that both the U.S. and its foreign law enforcement partners will have the authority under their domestic laws to compel production of data held abroad by companies under their jurisdiction. Otherwise, the orders issued under the agreement would not reach such data and the CLOUD Act agreements would be of little practical value to either side.

Accordingly, the second part of the CLOUD Act clarifies that U.S. law requires that CSPs subject to U.S. jurisdiction must disclose data that is responsive to valid U.S. legal process, regardless of where the company stores the data. The Act amended the Stored Communications Act ("SCA"), the federal statute that provides U.S. investigators the authority to require the disclosure of information held by CSPs subject to U.S. jurisdiction, by adding the following sentence: "A provider of electronic communication service or remote computing service[2] shall comply with the obligations of this chapter to preserve, backup, or disclose the contents of a wire or electronic communication and any record or other information pertaining to a customer or subscriber within such provider's possession, custody, or control, regardless of whether such communication, record, or other information is located within or outside of the United States."

This amendment ensures that U.S. law complies with long-standing international principles already implemented in many countries[3] as required by the Budapest Convention decades ago.

[2] The term "remote computing service" is defined in 18 U.S.C. Section 2711 as "the provision to the public of computer storage or processing services by means of an electronic communications system." The term "electronic communication service" is defined in 18 U.S.C. Section 2510 as: "any service which provides to users thereof the ability to send or receive wire or electronic communications."

[3] Australia, Belgium, Brazil, Canada, Colombia, Denmark, France, Ireland, Mexico, Montenegro, Norway, Peru, Portugal, Serbia, Spain, the United Kingdom, and other countries assert domestic authority to compel production of data stored abroad. See, e.g., Winston Maxwell & Christopher Wolf, A Global Reality: Governmental Access to Data in the Cloud, 2-3 (Hogan Lovells) (updated 18 July 2012) ("Notably, every single country that we examined vests authority in the government to require a Cloud service provider to disclose customer data in certain situations, and in most instances this authority enables the government to access data physically stored outside the country's borders, provided there is some jurisdictional hook, such as the presence of a business within the country's borders.").

The clarification is not novel; it confirms U.S. law's conformity with that of many other countries, and it facilitates international cooperation in ways that are important to our foreign partners:

- ***The amendment ensured clarity by restoring the widely accepted and long-standing understanding of U.S. law.*** The CLOUD Act amendment settled a recent disagreement about the scope of the SCA. Specifically, it addressed a U.S. federal court decision from July 2016 (the *Microsoft* case)[4] which, for the first time, had held that the SCA does not authorize the government to require disclosure of data stored abroad from companies subject to U.S. jurisdiction. After the decision, some CSPs in the United States had refused to comply with U.S. court orders under the SCA to produce data stored on servers abroad. The companies refused to comply even where the court orders concerned investigations of criminal conduct within the United States and involving U.S. citizens. This prevented the government from obtaining data critical to protecting public safety in the United States and abroad.

- ***Most countries require disclosure of data wherever it is stored, consistent with the Budapest Convention.*** Article 18(1)(a) of the Budapest Convention requires each party to the convention to adopt national laws under which relevant authorities can compel providers in their territory to disclose electronic data in their possession or control.[5] This requirement contains no exception for data that a company controls but chooses to store abroad. After the *Microsoft* case, the CLOUD Act clarified U.S. law in a manner that ensures that the United States complies with its obligations under the Convention.

- ***Explicit U.S. authority to obtain data CSPs store abroad restored our ability to fulfill MLAT requests from other governments.*** For a time, the inability of U.S. authorities to obtain data that U.S.-based CSPs accessed from their U.S. headquarters but had stored in servers abroad (because of the *Microsoft* decision) also adversely affected our ability to assist foreign countries to obtain electronic data. Just as the U.S. government could not obtain data that CSPs had stored abroad to pursue our own criminal investigations, we also could not obtain the same data to fulfill MLAT requests from other nations. This substantially crippled those nations' ability to acquire evidence from U.S.-based CSPs that was needed to solve crimes and apprehend criminals in their own countries. Our foreign law enforcement partners were increasingly frustrated by this situation and complained

[4] *Microsoft v. United States*, 829 F.3d 197 (2d Cir. 2016). In that case, the government had served upon Microsoft an SCA warrant that had been approved by an independent judge, who had found probable cause to believe the electronic data sought by the government related to the commission of a narcotics crime. The appellate court held, for the first time since the SCA was enacted in 1986, that the SCA did not require Microsoft to disclose information in its custody and control that it had stored on a server in Ireland. Many other U.S. courts disagreed with this decision, and it was on appeal to the U.S. Supreme Court when the CLOUD Act was enacted, mooting the case.

[5] Article 18(1)(a) of the Budapest Convention obligates each Party to "adopt such legislative and other measures as may be necessary to empower its competent authorities to order a person in its territory to submit specified computer data in that person's possession or control, which is stored in a computer system or a computer-data storage medium."

to the United States. This explicit authority in the CLOUD Act therefore also supports our foreign law enforcement partners, by reviving our longstanding ability to fulfill our partners' MLAT requests for data held by U.S.-based CSPs. By the same token, we expect our foreign partners to be able to fulfill any U.S. MLAT requests seeking data held by their local CSPs regardless of the location of the data.

- *The amendment did not expand U.S. investigative authority.* The CLOUD Act amendment to the SCA does not give U.S. law enforcement any *new* legal authority to acquire data. It merely confirms the scope of requirements under the SCA for CSPs that are subject to U.S. jurisdiction. And, it is worth emphasizing, requirements in the United States for obtaining a warrant for the content of electronic communications are perhaps the toughest in the world and are highly protective of individual privacy. A request to issue a warrant must be submitted to an independent judge for approval. The judge cannot authorize the warrant unless he or she finds that the government has established by a sworn affidavit that "probable cause" exists that a specific crime has occurred or is occurring and that the place to be searched, such as an email account, contains evidence of that specific crime. Further, the warrant must describe with particularity the data to be searched and seized; fishing expeditions to see if evidence exists are not permitted. The strict requirements of U.S. law are one reason some of our foreign law enforcement partners find MLAT requests to the United States so demanding.

- *The amendment did not extend U.S. jurisdiction to any new parties.* Nothing in the CLOUD Act changed the requirement that the United States must have personal jurisdiction over a company in order to require the disclosure of information the company holds. U.S. law limiting jurisdiction over foreign companies is based on constraints in the U.S. Constitution and has been developed by U.S. courts over many years. Personal jurisdiction is most readily established when a company is located in the United States. Whether a foreign company located outside the United States but providing services in the United States has sufficient contacts with the United States to be subject to U.S. jurisdiction is a fact-specific inquiry turning on the nature, quantity, and quality of the company's contacts with the United States. The more a company has purposefully directed its conduct into the United States, the more likely a court will find the company is subject to U.S. jurisdiction. U.S. courts applying this analysis in civil matters involving websites, for example, have focused on how interactive a site is with customers in their jurisdiction, considering factors like the function and mechanics of the website, any specific promotion to customers, solicitation of business through the site, and actual usage by customers. Other countries apply similar principles in assessing their personal jurisdiction over foreign companies, sometimes in ways that are more expansive than is permitted under U.S. law.

Conclusion

The United States enacted the CLOUD Act to address a situation that has become unsustainable. In the Internet age, data location is often not a good basis upon which to ground requests to produce electronic data. In fact, some of the largest global companies now operate networks of storage centers in multiple countries, with the data in near-constant transit, moving between servers and across borders automatically. In this technological environment, it can be impossible for investigating governments to submit multiple MLAT requests to multiple foreign governments to obtain electronic data scattered in multiple countries, especially when the governments (and sometimes even the CSPs themselves) do not know where the data is stored and when the data may well have been moved to another location by the time the requests are reviewed. The current situation undermines our foreign partners' efforts to protect the safety of their citizens, just as it undermines U.S. efforts to protect Americans. Nations must ensure that law enforcement officials have reasonable legal authorities to compel production of electronic data that a CSP controls but that may be located in other countries. At the same time, nations also have legitimate interests in protecting data from other governments that do not adhere to appropriate legal standards or abuse their authority for illicit purposes. The challenge is to ensure that government powers to compel production of electronic data are exercised and overseen in a way that respects the rule of law, protects privacy and human rights, and appropriately reduces conflicts between the laws of the countries concerned. Failing to address this situation would increase incentives for data localization across the world, which would harm both global commerce and public safety. A framework of executive agreements among rights-respecting countries under the CLOUD Act will support those countries' efforts to investigate serious crime—efforts that are vital to protecting our societies and keeping our citizens safe.

Additional Resources (click to view)

Full text of the CLOUD Act.

Remarks of Richard W. Downing, U.S. Deputy Assistant Attorney General, at the Academy of European Law, London, U.K., "Prospects for Transatlantic Cooperation on the Transfer of Electronic Evidence to Promote Public Safety" (April 5, 2019).

Remarks of Sujit Raman, U.S. Associate Deputy Attorney General, at the Center for Strategic and International Studies, Washington, D.C., "Toward a New Paradigm on Cross-Border Data Flows: Moving Ahead with the CLOUD Act" (May 24, 2018).

Thomas P. Bossert & Paddy McGuinness, "Don't Let Criminals Hide Their Data Overseas," N.Y Times (February 14, 2018).

Statement of Richard W. Downing, U.S. Deputy Assistant Attorney General, before the U.S. House of Representatives Committee on the Judiciary (June 15, 2017).

Statement of Brad Wiegmann, U.S. Deputy Assistant Attorney General, before the U.S. Senate Committee on the Judiciary's Subcommittee on Crime and Terrorism (May 24, 2017).

Written Testimony of Paddy McGuiness, U.K. Deputy National Security Advisor, before the U.S. Senate Committee on the Judiciary's Subcommittee on Crime and Terrorism, at a Hearing entitled "Law Enforcement Access to Data Stored Across Borders: Facilitating Cooperation and Protecting Rights" (May 24, 2017).

Frequently Asked Questions

A. Purpose of the CLOUD Act

1. What was the purpose of the CLOUD Act?

The United States enacted the CLOUD Act to improve procedures for both foreign and U.S. investigators in obtaining access to electronic information held by service providers. Such information is critical to investigations of serious crime by authorities around the world, ranging from terrorism and violent crime to sexual exploitation of children and cybercrime.

While the United States has faced serious issues in accessing such information to protect public safety, the need is even greater for our foreign partners because so much information is held by companies based in the United States. In recent years, the number of mutual legal assistance requests seeking electronic evidence from the United States has increased dramatically, straining resources and slowing response times. Foreign authorities have relatedly expressed a need for increased speed in obtaining this evidence. In addition, many of the assistance requests the United States receives seek electronic information related to individuals or entities located outside the United States, and the only connection of the investigation to the United States is that the evidence happens to be held by a company based in our nation.

The CLOUD Act updates 20th century legal frameworks to respond to the revolution in electronic communications and recent innovations in the way global technology companies configure their systems. The Act permits our foreign partners that have robust protections for privacy and civil liberties to enter into executive agreements with the United States to use their own legal authorities to access electronic evidence in order to fight serious crime and terrorism. The CLOUD Act thus represents a new paradigm: an efficient, privacy-protective approach to public safety by enhancing effective access to electronic data under existing legal authorities. This approach makes both the United States and its partners safer while maintaining high levels of protection of privacy and civil liberties.

The CLOUD Act also clarified the U.S. Stored Communications Act to enable the framework envisioned by the CLOUD Act, that each nation would use its own law to access data. The CLOUD Act clarified that U.S. law requires that providers subject to U.S. jurisdiction disclose data that is responsive to valid U.S. legal process, regardless of where the company stores the data. This ensured consistency with U.S. obligations under Article 18(1) of the Budapest Cybercrime Convention, aligning the United States with the more than 60 other parties to the Convention.

B. CLOUD Act Agreements

2. Who can enter into a CLOUD Act agreement with the United States?

The CLOUD Act provides that the United States may enter into CLOUD Act agreements only with rights-respecting countries that abide by the rule of law. In particular, before the United States can enter into an executive agreement anticipated by the CLOUD Act, the CLOUD Act requires that the U.S. Attorney General certify to the U.S. Congress that the partner country has in its laws, and implements in practice, robust substantive and procedural protections for privacy and civil liberties, based on factors such as:

- adequate substantive and procedural laws on cybercrime and electronic evidence, such as those enumerated in the Budapest Convention;
- respect for the rule of law and principles of nondiscrimination;
- adherence to applicable international human rights obligations;
- clear legal mandates and procedures governing the collection, retention, use and sharing of electronic data;
- mechanisms for accountability and transparency regarding the collection and use of electronic data; and
- a demonstrated commitment to the free flow of information and a global Internet.

3. How do CLOUD Act agreements relate to Mutual Legal Assistance (MLA) Treaties?

The CLOUD Act supplements rather than eliminates MLA, which remains another method by which evidence in criminal cases is made available to authorities from other countries. MLA will continue to be an option to obtain data that is not covered by such an agreement, as well as in the absence of such an agreement. As CLOUD Act agreements increase the efficiency of many requests for data, the United States should also be able to process MLA requests more quickly due to the decrease in volume, benefiting all partners regardless of whether the requesting country itself has a CLOUD Act agreement.

4. How do CLOUD Act agreements reduce conflicts of laws between countries?

Both the United States and any partner in a CLOUD Act agreement would agree to remove legal restrictions to providers' compliance with orders issued under the agreement in circumstances both countries find appropriate. As a result, countries that enter into CLOUD Act agreements will be able to use familiar domestic legal process to authorize access to data with the assurance

that the other party's law will not be a barrier to compliance with their lawful order. The types of orders that may be issued under the agreement must be mutually agreed with full consideration of the interests of both countries.

5. How is law enforcement access to data different under a CLOUD Act agreement?

Under a CLOUD Act agreement, a party has an alternative to the MLA process to obtain the disclosure of data held by a provider over whom it has jurisdiction. Because the agreement requires each country to remove legal restrictions to provider compliance with orders issued by the other country, the authorities of each country may use their own domestic authority to require disclosure with confidence that the legal demand will not violate the other country's law.

6. If a foreign country enters into a CLOUD Act agreement, could the United States then use the agreement to target data concerning that country's nationals? And could the foreign country use the agreement to target data concerning U.S. nationals?

The CLOUD Act requires that foreign government orders that are subject to an executive agreement may not intentionally target data of U.S. persons or persons located in the United States. The foreign government is free in negotiations to seek similar restrictions that would prevent the United States from using orders subject to the agreement to target data of its nationals or residents. The U.S. and other countries may continue to use their existing legal process to seek data outside CLOUD Act agreements, but may continue to face a conflict of laws in those circumstances.

7. Must legal process issued by another country under a CLOUD Act agreement conform to the requirements for U.S. legal process? For example, must a partner demonstrate "probable cause" in order to obtain content?

No. The legal process issued by a country under a CLOUD Act agreement does not have to conform to the requirements of U.S. law. Instead, the legal process must conform to the requirements of that country's domestic law for the data sought. This means, for example, that if two U.K. residents are communicating with each other in the course of committing a crime, but the data is stored by a provider based in the U.S., a U.K. order, rather than a U.S. warrant, can be used to obtain the evidence directly from the provider (assuming the U.K. otherwise has jurisdiction over that provider).

8. Must legal process issued by another country under a CLOUD Act agreement first be submitted to the U.S. government before it is served on a provider?

No. When proceeding under a CLOUD Act agreement, the foreign authorities may serve their domestic legal process directly on providers in accordance with their own law, and providers may disclose responsive data directly to the foreign authorities.

9. *What types of data are available to the U.S. and other countries pursuant to CLOUD Act agreements?*

CLOUD Act agreements concern data stored or processed by communications service providers. Such data could include the contents of communications, non-content information associated with such communications, subscriber information, and data stored remotely on behalf of a user ("in the cloud").

While CLOUD Act agreements may cover both access to stored content and non-content and ongoing acquisition of communications in real time, there is no requirement that any particular agreement cover all such access.

10. *Will CLOUD Act agreements cover civil, administrative, or commercial inquiries? Can they be used for spying on another country?*

No. CLOUD Act agreements are only used to obtain information relating to the prevention, detection, investigation, or prosecution of serious crime and only in response to legal process.

11. *How do CLOUD Act agreements enhance privacy?*

We expect the high standards required for eligibility for CLOUD Act agreements to be a significant motivation for countries to increase protections for privacy and civil liberties. The CLOUD Act requires that countries wishing to enter into executive agreements with the United States have in place rigorous standards for the issuance of legal process. While countries are not required to have the exact same requirements as United States law, the Act explicitly requires that covered foreign orders must be subject to independent review or oversight, be based on a reasonable justification grounded in credible and articulable facts, and identify a specific person, account, or other identifier. These procedural and substantive requirements ensure a solid legal and factual basis before investigators require disclosure of private communications. Moreover, the foreign government's laws must also protect from arbitrary and unlawful interference with privacy and must provide for procedures subject to effective oversight that govern how its authorities collect, retain, use, and share data. The foreign government must provide accountability and appropriate transparency about the collection and use of electronic data. To be eligible, some countries interested in executive agreements will likely need to increase standards and improve procedures.

12. *Do CLOUD Act agreements allow the U.S. government to acquire data that it could not before?*

No. CLOUD Act agreements remove the possibility that one party's legal restrictions on disclosing data could conflict with the other party's legal authority to collect evidence. CLOUD Act agreements do not alter the fundamental constitutional and statutory requirements U.S. law enforcement must meet to obtain legal process for that data – standards that are among the most privacy-protective in the world.

13. Do CLOUD Act agreements impose U.S. law on other countries?

No. To the contrary, the CLOUD Act affords respect to the laws of other countries, allowing partners to obtain authority under their own law and setting out a means to address partners' restrictions on disclosure. Foreign partners obtain legal authority under their own law, and foreign law need not match the legal standard applicable to U.S. authorities—though it must nevertheless provide adequate protections for privacy and civil liberties. Moreover, the CLOUD Act does not expand the jurisdiction of the United States, nor do CLOUD Act agreements create new obligations under U.S. law for service providers.

14. How would an order subject to a CLOUD Act agreement be enforced? Can a provider being ordered to disclose information challenge such authority?

There is no requirement under U.S. law that a provider comply with a foreign order, and the CLOUD Act creates no such requirement. Any enforcement must be conducted under the law of the country requiring the disclosure. A U.S.-based provider receiving a foreign order to disclose information can challenge the order under the foreign country's law to the extent such a challenge is permitted by that law. Because any legal prohibition on disclosing data in response to a foreign order that is subject to the agreement will have been removed, a foreign court enforcing the order will not need to consider comity interests or other burdens that might otherwise arise from a conflict of laws.

15. If a provider receives legal process subject to a CLOUD Act agreement and suspects that the legal process may not satisfy the requirements of the CLOUD Act, what can it do?

In the event the provider has concerns about the applicability of the agreement to a particular production order, it can consult with the designated authority of the country issuing the order. In addition, the designated authority of the other country has the ability to render the agreement inapplicable in a particular case if it believes the agreement is improperly invoked.

16. When is the account holder notified of an order issued under a CLOUD Act agreement?

CLOUD Act agreements do not create any obligations or restrictions on providers; they simply remove legal restrictions that would otherwise conflict with compliance with covered orders. Providers issued orders covered by a CLOUD Act agreement are subject to the domestic requirements of the issuing country, and the issuing country's law governs whether or how notice to an account holder by the provider may be prohibited.

C. Amendments to the Stored Communications Act

17. Does the amendment of the Stored Communications Act in the CLOUD Act create new authority for U.S. law enforcement to obtain information?

No. The clarification of the Stored Communications Act in the CLOUD Act restores certainty under United States law to ensure its consistency with long-standing practice and U.S. treaty obligations under the Budapest Convention. U.S. law enforcement uses existing legal authority to require the disclosure of data from companies already subject to U.S. law by meeting the traditional legal standards – standards that are among the most privacy-protective in the world.

18. What data is subject to a warrant under the Stored Communications Act?

The CLOUD Act does not create any new form of warrant. It simply clarifies the obligations under the Stored Communications Act of providers subject to U.S. jurisdiction, including obligations to disclose information pursuant to warrants. A warrant may require the disclosure of content of communications and all records and other information pertaining to a customer or subscriber of a provider. Under U.S. constitutional law, law enforcement must meet high standards to obtain a warrant and warrants may only permit searches of particular places for particular things.

19. What is necessary under the Stored Communications Act to obtain a warrant for stored content?

The Stored Communications Act permits law enforcement to obtain a warrant to require a provider to disclose the stored contents of a user account. Warrants must meet demanding and highly privacy-protective constitutional requirements. The warrant must be supported by a statement sworn under penalty of perjury showing probable cause that the place searched will contain particular things subject to seizure; must state with particularity the crime that is alleged, the information to be disclosed and the evidence to the seized; and must be approved by an independent judge. The CLOUD Act did not change these existing high standards under U.S. law. "Probable cause" is a particularly exacting standard, among the most demanding in the world.

20. Will a warrant issued under the Stored Communications Act allow the U.S. to scoop up large amounts of data indiscriminately?

No. The CLOUD Act did not alter or expand the historical scope of warrants issued under U.S. law. Indiscriminate or bulk data collection is not permitted.

21. Does the amendment of the Stored Communications Act in the CLOUD Act allow the United States to unilaterally obtain foreign nationals' data held overseas?

Just as in many other countries, and as required by the Budapest Convention, U.S. law provides that companies subject to U.S. jurisdiction may be compelled, pursuant to a court order, to produce data subject to their control regardless of where the data is stored. That data could potentially be about non-U.S. nationals, if the stringent requirements of U.S. law are met. Where

no CLOUD Act agreement is in place, a company's compliance with a U.S. court order might conflict with a foreign country's law forbidding production of data. In such cases, the U.S. government could elect to pursue alternate channels, such as narrowing or modifying a request to avoid the conflict; resolving the conflict through closer inquiry or good-faith negotiation; or making the request under an applicable MLAT. Should the U.S. government seek to enforce the order notwithstanding a conflict with foreign law, U.S. courts can be expected to apply long-standing U.S. and international principles regarding conflicts of law to ensure appropriate respect for international comity by applying a multi-factor balancing test, taking into account the interests of both the United States and the foreign country.

22. Does data ownership impact whether U.S. law enforcement can obtain data from a provider?

U.S. law related to law enforcement access to data, including under the provision amended by the CLOUD Act, does not turn on the question of data "ownership." Instead, fully consistent with the Budapest Convention, United States law can require the disclosure of data in a provider's possession or control. This focus on possession or control is consistent with paragraph 173 of the Explanatory Report to the Budapest Convention, which states:

> The term "possession or control" refers to physical possession of the data concerned in the ordering Party's territory, and situations in which the data to be produced is outside of the person's physical possession but the person can nonetheless freely control production of the data from within the ordering Party's territory. . .

23. What types of providers are subject the Stored Communications Act?

The provisions relating to the preservation and disclosure of data by providers are applicable only to providers of "remote computing service[s]" ("RCS") and "electronic communication service[s]" ("ECS"). RCS and ECS are defined by U.S. law. See 18 U.S.C. § 2510(15) ("'electronic communication service' means any service which provides to users thereof the ability to send or receive wire or electronic communications"); id. § 2711(2) ("'remote computing service' means the provision to the public of computer storage and processing services by means of an electronic communications system").

These definitions include such companies as email providers, cell phone companies, social media platforms, and cloud storage services. They do not include a company just because it has some interaction with the Internet, such as certain e-commerce sites.

These definitions are consistent with Article 1.c. of the Budapest Convention, which covers "any public or private entity that provides to users of its service the ability to communicate by means of a computer system" and "any other entity that processes or stores computer data on behalf of such communication service or users of such service."

24. Who is subject to the requirements of the Stored Communications Act? Is it only U.S. corporations, U.S.-headquartered corporations, or U.S.-owned companies? Does a warrant under the Stored Communications Act apply to a company located outside the United States but which provides its services within the territory of the U.S.?

The CLOUD Act did not give U.S. courts expanded jurisdiction over companies. Its amendment to the Stored Communications Act merely clarified the obligations of those providers who are already subject to U.S. jurisdiction by confirming that they are obliged to disclose responsive data within their possession or control, regardless of where it is stored.

In order to place legal requirements on a provider, the provider must be subject to U.S. jurisdiction. U.S. jurisdiction is not limited to U.S. corporations, U.S. headquartered companies, or companies owned by U.S. persons. But neither is U.S. jurisdiction unlimited.

United States requirements for exercising jurisdiction over a person are often more stringent than those in the law of other countries. Whether a company providing services in U.S. territory is subject to U.S. jurisdiction is a highly fact-dependent analysis regarding whether the entity has sufficient contacts with the U.S. to make the exercise of jurisdiction fundamentally fair. The more a company has purposefully availed itself of the privilege of conducting activities in the United States or purposefully directed its conduct into the U.S., the more likely a U.S. court is to find that the company is subject to U.S. jurisdiction.

25. Does a warrant under the Stored Communication Act apply to data stored by a U.S. company's subsidiary that is incorporated or headquartered in another country?

The CLOUD Act does not alter traditional requirements for jurisdiction over an entity with possession or control over data. The analysis remains the same regardless of corporate structure. The United States court must have jurisdiction over an entity that has possession or control over data in order to require its disclosure. Whether a company exercises sufficient control over data held by a subsidiary is a fact-dependent inquiry.

26. Will U.S. law enforcement go directly to service providers to obtain information of an employee of an enterprise when the enterprise is not otherwise suspected of committing a crime?

The CLOUD Act does not change U.S. law or practice with regard to enterprise customer data. The U.S. Department of Justice's Computer Crime and Intellectual Property Section has publicly advised that "prosecutors should seek data directly from the enterprise, if practical, and if doing so will not compromise the investigation. Therefore, before seeking data from a provider, the prosecutor, working with agents, should determine whether the enterprise or the provider is the better source for the data being sought." For more information about the factors that influence the Department's approach to seeking enterprise data, see: https://www.justice.gov/criminal-ccips/file/1017511/download.

27. Does the United States use the Stored Communications Act to obtain trade secrets of foreign corporations from service providers for the purpose of benefiting U.S. companies?

No. The United States has championed the international norm that no government should in any way conduct or support the theft of intellectual property, including trade secrets or other confidential business information, with the intent of providing competitive advantages to its companies or commercial sectors. See: https://www.esteri.it/mae/resource/doc/2017/04/declaration_on_cyberspace.pdf (G7 Declaration on Responsible States Behavior in Cyberspace). Under U.S. law, theft of trade secrets is subject to criminal prosecution with penalties of up to ten years in prison.

28. When a court order is issued by the United States pursuant to the Stored Communications Act, when is the account holder notified of the search?

Providers may notify account holders of searches pursuant to a U.S. court order under the Stored Communications Act unless an independent judge has issued a protective order. Protective orders relating to all Stored Communications Act orders (not just those for orders pursuant to CLOUD Act agreements) are issued when the independent judge determines that there is reason to believe that notification of the existence of the court order may create the adverse result of (1) endangering the life or physical safety of an individual; (2) flight from prosecution; (3) destruction of or tampering with evidence; (4) intimidation of potential witnesses; or (5) otherwise seriously jeopardizing an investigation or unduly delaying a trial. Under U.S. Department of Justice policy, such orders must generally be limited to one year.

29. Does the CLOUD Act require providers to decrypt data in response to law enforcement requests?

No. The CLOUD Act is "encryption neutral." It does not create any new authority for law enforcement to compel service providers to decrypt communications. Neither does it prevent service providers from assisting in such decryption, or prevent countries from addressing decryption requirements in their own domestic laws.

大成 DENTONS

Down but not out: Second Circuit's *Hoskins* decision narrows but does not eliminate FCPA liability for non-resident foreign nationals acting outside US

September 13, 2018

A recent Second Circuit Court of Appeals decision curtailed the broad theory of Foreign Corrupt Practices Act (FCPA) liability asserted by the US Department of Justice (DOJ). In *United States v. Hoskins*, the court ruled that the government could not use conspiracy or accomplice liability to charge non-resident foreign nationals acting outside the US with FCPA violations. The decision provides non-resident foreign entities and individuals with a new potential defense to FCPA charges. That said, non-resident foreign companies should be wary of the government using alternative legal theories and strategies, like a broad theory of agency liability, as a new basis to support an FCPA indictment.

In *Hoskins*,[1] the court considered a challenge by defendant Lawrence Hoskins to his indictment. From 2002 to 2009, Hoskins worked as an executive for foreign subsidiaries of Alstom S.A., a French company offering global power and transportation services. The allegations in the indictment centered around the engagement of two consultants by Alstom S.A. and its American-based subsidiary, Alstom Power, Inc., to bribe Indonesian foreign officials in order to secure a US$118 million contract. Although Hoskins neither worked for the US subsidiary nor was physically in the US at the time, he was charged with authorizing payments to the consultants while knowing that some portion of the payments would be used to bribe Indonesian officials.[2] The indictment alleged that Hoskins was liable as an agent of Alstom U.S., a US-based company. It further alleged that independent of his agency liability, Hoskins was also liable for conspiring with the company and its employees to violate the FCPA, as well as for aiding and abetting the violations.

Hoskins filed a motion to dismiss the third superseding indictment with the trial court, arguing that the DOJ could not rely on conspiracy or accomplice liability as a basis for FCPA violations because he was a non-resident foreign national that was not within the scope of the statute. The trial court agreed that Congress only intended to include a fixed set of entities and individuals, and "did not intend for the FCPA to encompass accomplice or conspiracy liability on non-resident foreign nationals who are not otherwise subject to direct liability" under the FCPA.[3] Accordingly, the court dismissed the charges that relied on conspiracy or accomplice liability.

On interlocutory appeal, the Second Circuit affirmed. The court acknowledged that the text of the statute explicitly defines a specific set of entities/individuals that may be charged with a violation:

1. American citizens, nationals, and residents, regardless of whether they violate the FCPA domestically or abroad;

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2. most American companies, regardless of whether they violate the FCPA domestically or abroad;
3. agents, employees, officers, directors, and shareholders of most American companies, when they act on the company's behalf, regardless of whether they violate the FCPA domestically or abroad;
4. foreign persons (including foreign nationals and most foreign companies) not within any of the aforementioned categories who violate the FCPA while present in the United States.[4]

Recognizing that the statute does not address non-resident foreign nationals acting outside the US and not as an agent, such as Hoskins, the court then examined the legislative history to determine whether Congress intended these entities or individuals to be covered by the FCPA. The court found that Congress only intended to cover the specifically enumerated categories listed above. It further reasoned that even if Congress had not demonstrated the intent to limit liability to these specific categories, it would still rule in Hoskins favor because the DOJ had not established a "clearly expressed congressional intent" to overcome a presumption against broadening the extraterritorial reach of a statute. Thus, the Second Circuit held that the DOJ could not use conspiracy or accomplice liability as a basis for charges against Hoskins.

Importantly, the Second Circuit did allow the prosecution to proceed on other grounds. Recognizing that the DOJ intended to argue that Hoskins was liable as an agent of Alstom U.S., an American-based company encompassed by the statute, or by committing acts in the US, the court ruled that if the DOJ could make this showing, Hoskins would be subject to FCPA liability.

Hoskins is noteworthy because it rejects the expansive theory of FCPA liability adopted by the DOJ and the US Securities and Exchange Commission (SEC) intended to capture non-resident foreign entities and individuals acting outside the US. The court's ruling refutes the government's assertion in a 2012 FCPA resource guide published by the DOJ and SEC that "[i]ndividuals and companies, including foreign nationals and companies, may also be liable for conspiring to violate the FCPA—i.e., for agreeing to commit an FCPA violation—even if they are not, or could not be, independently charged with a substantive FCPA violation."[5] This opinion overrules the government's position and provides a new potential defense for non-resident foreign nationals subject to FCPA scrutiny. In light of this ruling, future defendants may want to consider challenging the government's other broad theories of liability that have yet to be challenged.

Foreign businesses, however, should be on notice that the government may use alternative legal theories or strategies to bring charges against entities not explicitly captured by the FCPA. The government may try to assert broad interpretations of vicarious liability or agency as an alternative basis for jurisdiction for charges—especially in light of the *Hoskins* court's acceptance of that theory. Foreign companies that act on behalf of American companies or individuals, such as third-party agents and distributors, may be especially susceptible to this theory. On the other hand, entities such as foreign-based partnerships and joint ventures do not usually qualify as agents and thus may be able to avoid agency liability, relying on *Hoskins* as a new potential defense. Additionally, *Hoskins* may

spur US enforcement agencies to escalate their already increasing reliance on their foreign counterparts to bring enforcement actions against entities and individuals that fall outside the FCPA's scope. Companies that have concerns about the government's new prosecution theories or strategies in light of *Hoskins* should consult with legal counsel about whether these new theories are potentially applicable to their business dealings or subject to challenge.

For more information concerning this alert or other recent developments regarding United States v. Hoskins, please contact members of our ***White Collar and Government Investigations*** *team by using the information provided in the upper right under "Key Contacts."*

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1. *United States v. Hoskins*, --- F.3d ----, 2018 WL 4038192 (2d Cir. Aug. 24, 2018).↩
2. The indictment also included charges of wire fraud and money laundering that were not at issue on the appeal.↩
3. *Hoskins*, 2018 WL 4038192, at *3 (quoting *United States v. Hoskins*, 123 F.Supp.3d 316, 327 (D. Conn. 2015)).↩
4. *Id*. at *13. ↩
5. *A Resource Guide to the U.S. Foreign Corrupt Practices Act* by the Crim. Div. of the U.S. Dep't of Justice and the Enforcement Div. of the U.S. Sec. & Exchange Comm'n, at 34 (2012).↩

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How the FCPA's Interstate Commerce Requirement Should Apply to Free Email Services

By Maxwell Carr-Howard and Matthew A. Lafferman, *Dentons*

To establish jurisdiction, the FCPA requires the "use of the mails or any means or instrumentality of interstate commerce corruptly in furtherance" of an illicit payment. U.S. authorities have relied on a broad interpretation of the term "interstate commerce" to bring enforcement actions based on extraterritorial conduct without any tangible connection to, or action in, the United States. Indeed, enforcement actions have been repeatedly brought against companies that use free email services, such as Hotmail and Gmail, that have servers located in the U.S. Jurisdiction has been claimed based primarily on emails being routed through or stored on those servers without any other meaningful contact with the United States.

The DOJ's prosecutions in these kinds of cases are an overreach and should be halted. In this article, we offer an alternative interpretation of the FCPA interstate commerce requirement that is limited in application, legally supported and easy to apply. We argue that the statutory definition of interstate commerce should only extend to capture emails sent to or from, but not through, the U.S.

See "The History and Reach of dd-3 Jurisdiction and Lessons for Companies Investigating Potential Violations" (Apr. 18, 2018).

U.S. Authorities' Broad Interpretation of the FCPA Interstate Commerce Requirement

The FCPA incorporates a statutory jurisdictional requirement that the defendant "make use of the mails or any means or instrumentality of interstate commerce corruptly in furtherance" of an illicit payment. Despite "interstate commerce" being the controlling term, the U.S. authorities have relied on a broad interpretation of the provision to bring enforcement actions based on extraterritorial conduct without any tangible connection to, or action in, the United States.

To support their expansive enforcement, the U.S. authorities have relied on the statutory interpretation of interstate commerce. That definition states that "'interstate commerce' means trade, commerce, transportation, or communication among the several States, or between any foreign country and any State, or between any State and any place or ship outside thereof."[1] According to the FCPA Resource Guide, the U.S. authorities have adopted a broad interpretation of that provision to find that "placing a telephone call or sending an e-mail, text message, or fax from, to, or through the United States" satisfies the FCPA interstate commerce requirement.[2]

The U.S. authorities have relied on this interpretation to pursue companies for wholly foreign conduct by pointing to some electronic communication that is routed through the U.S. In one well-known example, the U.S. authorities settled an FCPA enforcement action against Magyar Telekom, a Hungarian telecommunications company, for bribing officials in the Macedonian government. Despite the fact that the scheme took place entirely abroad, the U.S. authorities relied on two emails that passed through or were stored on U.S. servers for their jurisdictional claim.

The expansive extraterritoriality of the FCPA has grave implications for foreign defendants. Given the increasingly interconnected nature of the internet, the U.S. authorities' interpretation of the FCPA interstate commerce requirement effectively projects their prosecutorial power far beyond U.S. borders to capture many foreign entities and individuals. This largely unconstrained power has resulted in criticism of global policing and prosecutorial overreach. Foreign defendants, however, may have a potential challenge to this broad interpretation.

See "Former SEC and DOJ Attorneys Discuss Thorny FCPA Questions on Jurisdiction and Liability" (Aug. 16, 2017).

A More Reasonable Interpretation of the FCPA Interstate Commerce Requirement

The relevant legal authority supports an alternative interpretation of the statutory definition of interstate commerce that limits its application to emails sent to or from, but not through, the U.S.

To begin with, the applicable law requires a strict, not broad, construction of the statutory definition. The relevant principle stems from *Morrison v. National Australia Bank Ltd.*[3] There, the Supreme Court recognized a presumption against construing federal statutes extraterritorially absent a clearly expressed affirmative intent by Congress. The Court applied this presumption against extraterritoriality to find that the anti-fraud provision of the Securities Exchange Act did not apply abroad.

As part of this presumption, however, the Court further recognized that statutes that apply extraterritorially are strictly construed. Specifically, the Court stated that "when a statute provides for some extraterritorial application, the presumption against extraterritoriality operates to limit that provision to its terms." The Second Circuit recently applied this principle in *United States v. Hoskins*,[4] to limit the application of the FCPA to only the types of entities or individuals specifically identified under the statute, even if they acted as an accomplice.[5]

This principle applies with equal force to strictly limit the statutory definition of interstate commerce. Read strictly, the statutory definition capturing "trade, commerce, transportation, or communication . . . between any foreign country and any State" is limited to only communications sent between the U.S. and another country – that is, to or from the U.S. and another country. This interpretation would clearly exclude emails that are sent between two foreign locations but are merely routed through the U.S., especially those hosted by a system that neither the sender nor the receiver is funding. After all, those means do not constitute trade, commerce, transportation, or communication *between* a foreign country and the U.S. The only thing that is happening is that the user has caused a few electrons to switch their location in a server that would exist irrespective of the sender's decision to use the service.

The legislative history of the statutory definition of interstate commerce further illustrates that this definition was not intended to be given a broad construction. The statutory definition incorporated into the FCPA was originally adopted from the Securities Exchange Act of 1934.[6] This definition, in turn, was derived from an almost identical definition of "interstate commerce" adopted under the Securities Act of 1933 (the 1933 Act). Drafters of the 1933 Act, however, intentionally removed "foreign commerce" from the definition[7] and replaced it with the more specific definition of "between any foreign country and any State"[8] in order to lessen the foreign reach of the law. In passing the FCPA, Congress similarly refused to enact a proposal to expand the foreign application of the statute by tacking on "foreign commerce" to the end of the phrase "instrumentality of interstate commerce."[9] This record shows that Congress intended to

strictly define the extraterritorial reach of the interstate commerce to explicitly exclude a broad definition of "foreign commerce."

The legislative history consequently invalidates the U.S. authorities' unreasonably broad interpretation of the FCPA interstate commerce requirement. Courts have interpreted the outer limits of using an instrumentality of foreign commerce to capture wholly foreign conduct that has some kind of theoretical nexus to the United States.[10] The outer limits of a broad definition of foreign commerce could capture emails or payments sent between two wholly foreign locations but routed through the U.S. because they would have that theoretical connection to U.S. territory. The statutory definition of interstate commerce undoubtedly encompasses some foreign commerce. Nonetheless, in light of the legislative intent to limit the extraterritorial reach of "interstate commerce" and the explicit exclusion of foreign commerce, the statutory definition of interstate commerce cannot be commensurate with the outer limits of "foreign commerce." Interpreting these terms as coextensive would not only render Congress's decision to use different language meaningless, but also would contravene the legislative intent of the FCPA.

The lack of any relationship between the use of free email services like Gmail and Hotmail – as opposed to investing in U.S.-based IT systems – and U.S. commerce is also significant. Compare the use of these emails to wire transfers. Unlike the use of these free email services, wire transfers admittedly have some effect on U.S. commerce. These transfers are usually accompanied by fees provided to the bank hosting the U.S.-based correspondent bank account. These funds are therefore received by U.S. banks and assist in funding their operations in the U.S. – contributing to the U.S. economy and commerce. In contrast, the free email services cost nothing to the user, and a single email, in the context of the ubiquity of the global internet, has no effect on U.S. commerce. As noted above, the impact of these email services is limited to a few electrons passing through a server for less than a millisecond. Thus, not only does the relevant law contradict the U.S. authorities' reliance on free email services as a basis for satisfying the FCPA interstate commerce requirement, but the use of these services does not even have a tangible relationship to U.S. commerce.

See "Hoskins and Ho Decisions Clarify the Jurisdictional Reach of the FCPA" (Sep. 19, 2018).

Existing Case Law Is Consistent With This Interpretation

Only two opinions from the same case, *S.E.C. v. Straub*, have interpreted the extent of the FCPA interstate commerce requirement. That case involved the underlying conduct at issue in the Magyar Telekom settlement. The SEC had brought charges against several company executives for orchestrating a bribery scheme in Macedonia. The SEC alleged that these executives had concealed their bribery scheme by actively falsifying representation letters and Sarbanes-Oxley Act certifications for submission in Magyar's SEC filings. Despite this conduct being confined to Europe, the SEC's complaint alleged that these executives used an instrumentality of interstate commerce because they sent emails "from locations outside the US, but were routed through and/or stored on network servers located within the US." These allegations omitted any mention that the emails on which the SEC relied were hosted by a free email service, Hotmail.

Initially, these allegations were found sufficient. In ruling on a motion to dismiss,[11] the court considered a challenge to the complaint for insufficiently alleging the use of an instrumentality of interstate commerce. Recognizing that the "use of the Internet is an 'instrumentality of interstate commerce,'" the court found in cursory fashion that these allegations were sufficient to satisfy the FCPA interstate commerce requirement at the pleading stage.[12]

The *Straub* court's ruling at summary judgment,[13] however, undercut its prior ruling. There, the court recognized that it relied on the above allegations to satisfy interstate commerce at the pleading stage, but noted that "[d]iscovery has since demonstrated the paucity of evidence in this regard, revealing only five emails that satisfy the SEC's description."[14] It then relied on the defendants' use of the Commission's EDGAR filing system, which defendants had employed to submit the falsified SEC filings used to conceal their scheme, as a basis for using an instrumentality of interstate commerce. Notably, the court specifically avoided finding whether

any emails used the instrumentalities of interstate commerce.[15] The *Straub* court's avoidance of relying on the emails routed through the U.S. as a basis for interstate commerce signals that such emails – either alone or in combination with other factors – were a tenuous basis for jurisdiction.

Further, the *Straub* court's ruling on the motion to dismiss does not contradict a narrow interpretation of the statutory definition of interstate commerce. This statutory definition was never raised in the briefing or the court's opinions and thus was never considered by the court. Nor did the court consider the applicable legislative history. The district court's holding in *Straub* simply does not preclude a finding that only emails sent to or from the United States would satisfy the statutory definition of interstate commerce.

In fact, the *Straub* opinions can be easily aligned with our view. At the motion-to-dismiss stage, the allegations did not mention that the emails on which the SEC relied were hosted by Hotmail, and it is not apparent that the court was limited to considering the allegations in the complaint. The ambiguity of the SEC's allegations made it unclear where the emails were sent. Nonetheless, at the summary judgment stage, it was clear that the emails were not to or from the U.S. and were hosted by a free email service, the court avoided relying on communications routed through the U.S. and instead relied upon the EDGAR submissions, which are clearly communications sent directly to the United States, to satisfy the FCPA interstate commerce requirement. In short, the *Straub* court's summary judgment decision effectively eschewed free email services in favor of communications sent to the U.S.

"How Broad Is the FCPA's Reach Over the Acts of Foreign Nationals?" (Mar. 20, 2013).

A Fair, Bright-Line Solution

Our view of the correct application of the FCPA's interstate commerce requirement provides a bright-line rule that will fairly apply the statutory intent of Congress. In addition to being supported by the relevant law, it allows for an easy to apply and follow rule. Perhaps most importantly, however, it shows that the U.S. authorities' broad interpretation of the FCPA interstate commerce requirement is ripe for a challenge. In light of the string of recent cases resulting from successful challenges of the government's enforcement capabilities,[16] such a challenge may very well succeed.

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[1] 15 U.S.C. § 78c(a)(17).

[2] U.S. Dep't of Justice & Crim. Div. of the SEC. & Exchange Comm'n, A *Resource Guide to the Foreign Corrupt Practices* Act at 11 (2012), https://www.justice.gov/sites/default/files/criminal-fraud/legacy/2015/01/16/guide.pdf.

[3] 561 U.S. 247 (2010).

[4] 902 F.3d 69 (2018).

[5] *Id.* at 95–97. *Hoskins* specifically found that the FCPA did not extend to a non-resident foreign national not otherwise subject to the statute and acting outside the U.S. but encompassed by the primary theories of accomplice liability—conspiracy, and aiding and abetting.

[6] Although this definition of "interstate commerce" is absent from Section 78dd-1 (anti-bribery provisions applied to issuers) but included in Sections 78dd-2 (anti-bribery provisions applied to domestic concerns), the legislative history shows that Congress was only "restating" the existing

definition of "interstate commerce" in Section 78dd-2 used under Section 78c. H.R. Conf. Rep. No. 95-831, 95th Cong., 1st Sess. (Dec. 6, 1977) ("The Senate bill ***restated*** the definition of interstate commerce in the Securities Exchange Act of 1934." (emphasis added)).

[7] Huston Thompson, a former member of the Federal Trade Commission and one of the primary drafters of the 1933 Act, testified before Congress that the drafters originally defined commerce to mean commerce "with foreign nations" but removed this term because the drafters wanted to avoid "jurisdiction extend[ing] out into foreign territory" and only capture "securities that were coming into this country." Federal Securities Act, Hearings on H.R. 4314 Before the House Comm. on Interstate and Foreign Commerce, 73d Cong. 1 (1933), *reprinted in* 2 Legislative History of the Securities Act of 1933 and Securities Exchange Act of 1934, at 54–55, 220 (comp. by J.S. Ellenberger & E. Mahar 1973).

[8] *Compare* H.R. 4500, 73d Cong. 1 (1933), *reprinted in* 3 Legislative History, *supra* note 8, 23 at 5 (draft bill introduced March 30, 1933), *with* H.R. 5480, 73d Cong. 1 (1933), *reprinted in* 3 Legislative History, *supra* note 8, 24 at 4 (draft bill introduced May 3, 1933) *and* 15 U.S.C. § 77b(a)(7).

[9] Foreign Payments Disclosure: Hearings Before the Subcomm. on Consumer Protection and Finance of the Comm. on Interstate and Foreign Commerce, 94th Cong. 1, 198, 201 (Sept. 21 and 22, 1976) (statements of Leonard C. Meeker advocating to broaden the language from "any means or instrumentality of interstate commerce" to state "interstate or foreign commerce").

[10] *See, e.g.*, *United States v. Weingarten*, 632 F.3d 60, 61 (2d Cir. 2011); *United States v. Yunis*, 681 F. Supp. 896, 905 (D.D.C. 1988), *aff'd*, 924 F.2d 1086 (D.C. Cir. 1991).

[11] S.E.C. *v. Straub*, 921 F. Supp. 2d 244 (S.D.N.Y. 2013).

[12] *Id.* at 262, 264 n.13.

[13] S.E.C. *v. Straub*, No. 11 CIV. 9645 (RJS), 2016 WL 5793398 (S.D.N.Y. Sept. 30, 2016).

[14] *Id.* at *10.

[15] *Id.* at *13 n.4.

[16] *See, e.g.*, *Lucia v.* S.E.C., 138 S. Ct. 2044 (2018); *Digital Realty Tr., Inc. v. Somers*, 138 S. Ct. 767 (2018); *Kokesh v. S.E.C.*, 137 S. Ct. 1635 (2017); *McDonnell v. United States*, 136 S. Ct. 2355 (2016); *Gabelli v. S.E.C.*, 568 U.S. 442, 133 S. Ct. 1216 (2013).

U.S. Department of Justice

Office of the Deputy Attorney General

The Deputy Attorney General

Washington, D.C. 20530

January 20, 2003

MEMORANDUM

TO: Heads of Department Components
United States Attorneys

FROM: Larry D. Thompson
Deputy Attorney General

SUBJECT: Principles of Federal Prosecution of Business Organizations

As the Corporate Fraud Task Force has advanced in its mission, we have confronted certain issues in the principles for the federal prosecution of business organizations that require revision in order to enhance our efforts against corporate fraud. While it will be a minority of cases in which a corporation or partnership is itself subjected to criminal charges, prosecutors and investigators in every matter involving business crimes must assess the merits of seeking the conviction of the business entity itself.

Attached to this memorandum are a revised set of principles to guide Department prosecutors as they make the decision whether to seek charges against a business organization. These revisions draw heavily on the combined efforts of the Corporate Fraud Task Force and the Attorney General's Advisory Committee to put the results of more than three years of experience with the principles into practice.

The main focus of the revisions is increased emphasis on and scrutiny of the authenticity of a corporation's cooperation. Too often business organizations, while purporting to cooperate with a Department investigation, in fact take steps to impede the quick and effective exposure of the complete scope of wrongdoing under investigation. The revisions make clear that such conduct should weigh in favor of a corporate prosecution. The revisions also address the efficacy of the corporate governance mechanisms in place within a corporation, to ensure that these measures are truly effective rather than mere paper programs.

Further experience with these principles may lead to additional adjustments. I look forward to hearing comments about their operation in practice. Please forward any comments to Christopher Wray, the Principal Associate Deputy Attorney General, or to Andrew Hruska, my Senior Counsel.

Federal Prosecution of Business Organizations[1]

I. Charging a Corporation: General

A. General Principle: Corporations should not be treated leniently because of their artificial nature nor should they be subject to harsher treatment. Vigorous enforcement of the criminal laws against corporate wrongdoers, where appropriate results in great benefits for law enforcement and the public, particularly in the area of white collar crime. Indicting corporations for wrongdoing enables the government to address and be a force for positive change of corporate culture, alter corporate behavior, and prevent, discover, and punish white collar crime.

B. Comment: In all cases involving corporate wrongdoing, prosecutors should consider the factors discussed herein. First and foremost, prosecutors should be aware of the important public benefits that may flow from indicting a corporation in appropriate cases. For instance, corporations are likely to take immediate remedial steps when one is indicted for criminal conduct that is pervasive throughout a particular industry, and thus an indictment often provides a unique opportunity for deterrence on a massive scale. In addition, a corporate indictment may result in specific deterrence by changing the culture of the indicted corporation and the behavior of its employees. Finally, certain crimes that carry with them a substantial risk of great public harm, e.g., environmental crimes or financial frauds, are by their nature most likely to be committed by businesses, and there may, therefore, be a substantial federal interest in indicting the corporation.

Charging a corporation, however, does not mean that individual directors, officers, employees, or shareholders should not also be charged. Prosecution of a corporation is not a substitute for the prosecution of criminally culpable individuals within or without the corporation. Because a corporation can act only through individuals, imposition of individual criminal liability may provide the strongest deterrent against future corporate wrongdoing. Only rarely should provable individual culpability not be pursued, even in the face of offers of corporate guilty pleas.

Corporations are "legal persons," capable of suing and being sued, and capable of committing crimes. Under the doctrine of *respondeat superior*, a corporation may be held criminally liable for the illegal acts of its directors, officers, employees, and agents. To hold a corporation liable for these actions, the government must establish that the corporate agent's actions (i) were within the scope of his duties and (ii) were intended, at least in part, to benefit the corporation. In all cases involving wrongdoing by corporate agents, prosecutors should consider the corporation, as well as the responsible individuals, as potential criminal targets.

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[1] While these guidelines refer to corporations, they apply to the consideration of the prosecution of all types of business organizations, including partnerships, sole proprietorships, government entities, and unincorporated associations.

Agents, however, may act for mixed reasons -- both for self-aggrandizement (both direct and indirect) and for the benefit of the corporation, and a corporation may be held liable as long as one motivation of its agent is to benefit the corporation. In *United States v. Automated Medical Laboratories*, 770 F.2d 399 (4th Cir. 1985), the court affirmed the corporation's conviction for the actions of a subsidiary's employee despite its claim that the employee was acting for his own benefit, namely his "ambitious nature and his desire to ascend the corporate ladder." The court stated, "*Partucci* was clearly acting in part to benefit AML since his advancement within the corporation depended on AML's well-being and its lack of difficulties with the FDA." Similarly, in *United States v. Cincotta*, 689 F.2d 238, 241-42 (1st Cir. 1982), the court held, "criminal liability may be imposed on the corporation only where the agent is acting within the scope of his employment. That, in turn, requires that the agent be performing acts of the kind which he is authorized to perform, and those acts must be motivated -- at least in part -- by an intent to benefit the corporation." Applying this test, the court upheld the corporation's conviction, notwithstanding the substantial personal benefit reaped by its miscreant agents, because the fraudulent scheme required money to pass through the corporation's treasury and the fraudulently obtained goods were resold to the corporation's customers in the corporation's name. As the court concluded, "Mystic--not the individual defendants--was making money by selling oil that it had not paid for."

Moreover, the corporation need not even necessarily profit from its agent's actions for it to be held liable. In *Automated Medical Laboratories*, the Fourth Circuit stated:

> [B]enefit is not a "touchstone of criminal corporate liability; benefit at best is an evidential, not an operative, fact." Thus, whether the agent's actions ultimately redounded to the benefit of the corporation is less significant than whether the agent acted with the intent to benefit the corporation. The basic purpose of requiring that an agent have acted with the intent to benefit the corporation, however, is to insulate the corporation from criminal liability for actions of its agents which be inimical to the interests of the corporation or which may have been undertaken solely to advance the interests of that agent or of a party other than the corporation.

770 F.2d at 407 (emphasis added; quoting *Old Monastery Co. v. United States*, 147 F.2d 905, 908 (4th Cir.), cert. denied, 326 U.S. 734 (1945)).

II. Charging a Corporation: Factors to Be Considered

A. General Principle: Generally, prosecutors should apply the same factors in determining whether to charge a corporation as they do with respect to individuals. *See* USAM § 9-27.220, *et seq.* Thus, the prosecutor should weigh all of the factors normally considered in the sound exercise of prosecutorial judgment: the sufficiency of the evidence; the likelihood of success at trial,; the probable deterrent, rehabilitative, and other consequences of conviction; and the adequacy of noncriminal approaches. *See* id. However, due to the nature of the corporate "person," some additional factors are present. In conducting an investigation, determining whether to bring charges, and negotiating plea agreements, prosecutors should consider the following factors in reaching a decision as to the proper treatment of a corporate target:

1. the nature and seriousness of the offense, including the risk of harm to the public, and applicable policies and priorities, if any, governing the prosecution of corporations for particular categories of crime (*see* section III, *infra*);

2. the pervasiveness of wrongdoing within the corporation, including the complicity in, or condonation of, the wrongdoing by corporate management (*see* section IV, *infra*);

3. the corporation's history of similar conduct, including prior criminal, civil, and regulatory enforcement actions against it (*see* section V, *infra*);

4. the corporation's timely and voluntary disclosure of wrongdoing and its willingness to cooperate in the investigation of its agents, including, if necessary, the waiver of corporate attorney-client and work product protection (*see* section VI, *infra*);

5. the existence and adequacy of the corporation's compliance program (*see* section VII, *infra*);

6. the corporation's remedial actions, including any efforts to implement an effective corporate compliance program or to improve an existing one, to replace responsible management, to discipline or terminate wrongdoers, to pay restitution, and to cooperate with the relevant government agencies (*see* section VIII, *infra*);

7. collateral consequences, including disproportionate harm to shareholders, pension holders and employees not proven personally culpable and impact on the public arising from the prosecution (*see* section IX, *infra*); and

8. the adequacy of the prosecution of individuals responsible for the corporation's malfeasance;

9. the adequacy of remedies such as civil or regulatory enforcement actions (*see*

section X, infra).

B. Comment: As with the factors relevant to charging natural persons, the foregoing factors are intended to provide guidance rather than to mandate a particular result. The factors listed in this section are intended to be illustrative of those that should be considered and not a complete or exhaustive list. Some or all of these factors may or may not apply to specific cases, and in some cases one factor may override all others. The nature and seriousness of the offense may be such as to warrant prosecution regardless of the other factors. Further, national law enforcement policies in various enforcement areas may require that more or less weight be given to certain of these factors than to others.

In making a decision to charge a corporation, the prosecutor generally has wide latitude in determining when, whom, how, and even whether to prosecute for violations of Federal criminal law. In exercising that discretion, prosecutors should consider the following general statements of principles that summarize appropriate considerations to be weighed and desirable practices to be followed in discharging their prosecutorial responsibilities. In doing so, prosecutors should ensure that the general purposes of the criminal law -- assurance of warranted punishment, deterrence of further criminal conduct, protection of the public from dangerous and fraudulent conduct, rehabilitation of offenders, and restitution for victims and affected communities -- are adequately met, taking into account the special nature of the corporate "person."

III. Charging a Corporation: Special Policy Concerns

A. General Principle: The nature and seriousness of the crime, including the risk of harm to the public from the criminal conduct, are obviously primary factors in determining whether to charge a corporation. In addition, corporate conduct, particularly that of national and multi-national corporations, necessarily intersects with federal economic, taxation, and criminal law enforcement policies. In applying these principles, prosecutors must consider the practices and policies of the appropriate Division of the Department, and must comply with those policies to the extent required.

B. Comment: In determining whether to charge a corporation, prosecutors should take into account federal law enforcement priorities as discussed above. *See* USAM § 9-27-230. In addition, however, prosecutors must be aware of the specific policy goals and incentive programs established by the respective Divisions and regulatory agencies. Thus, whereas natural persons may be given incremental degrees of credit (ranging from immunity to lesser charges to sentencing considerations) for turning themselves in, making statements against their penal interest, and cooperating in the government's investigation of their own and others' wrongdoing, the same approach may not be appropriate in all circumstances with respect to corporations. As an example, it is entirely proper in many investigations for a prosecutor to consider the corporation's pre-indictment conduct, *e.g.*,voluntary disclosure, cooperation, remediation or restitution, in determining whether to seek an indictment. However, this would not necessarily be appropriate in an antitrust investigation, in which antitrust violations, by definition, go to the

heart of the corporation's business and for which the Antitrust Division has therefore established a firm policy, understood in the business community, that credit should not be given at the charging stage for a compliance program and that amnesty is available only to the first corporation to make full disclosure to the government. As another example, the Tax Division has a strong preference for prosecuting responsible individuals, rather than entities, for corporate tax offenses. Thus, in determining whether or not to charge a corporation, prosecutors should consult with the Criminal, Antitrust, Tax, and Environmental and Natural Resources Divisions, if appropriate or required.

IV. Charging a Corporation: Pervasiveness of Wrongdoing Within the Corporation

A. General Principle: A corporation can only act through natural persons, and it is therefore held responsible for the acts of such persons fairly attributable to it. Charging a corporation for even minor misconduct may be appropriate where the wrongdoing was pervasive and was undertaken by a large number of employees or by all the employees in a particular role within the corporation, *e.g.*, salesmen or procurement officers, or was condoned by upper management. On the other hand, in certain limited circumstances, it may not be appropriate to impose liability upon a corporation, particularly one with a compliance program in place, under a strict *respondeat superior* theory for the single isolated act of a rogue employee. There is, of course, a wide spectrum between these two extremes, and a prosecutor should exercise sound discretion in evaluating the pervasiveness of wrongdoing within a corporation.

B. Comment: Of these factors, the most important is the role of management. Although acts of even low-level employees may result in criminal liability, a corporation is directed by its management and management is responsible for a corporate culture in which criminal conduct is either discouraged or tacitly encouraged. As stated in commentary to the Sentencing Guidelines:

> Pervasiveness [is] case specific and [will] depend on the number, and degree of responsibility, of individuals [with] substantial authority ... who participated in, condoned, or were willfully ignorant of the offense. Fewer individuals need to be involved for a finding of pervasiveness if those individuals exercised a relatively high degree of authority. Pervasiveness can occur either within an organization as a whole or within a unit of an organization.

USSG §8C2.5, comment. (n. 4).

V. Charging a Corporation: The Corporation's Past History

A. General Principle: Prosecutors may consider a corporation's history of similar conduct, including prior criminal, civil, and regulatory enforcement actions against it, in determining whether to bring criminal charges.

B. Comment: A corporation, like a natural person, is expected to learn from its mistakes. A history of similar conduct may be probative of a corporate culture that encouraged, or at least condoned, such conduct, regardless of any compliance programs. Criminal prosecution of a corporation may be particularly appropriate where the corporation previously had been subject to non-criminal guidance, warnings, or sanctions, or previous criminal charges, and yet it either had not taken adequate action to prevent future unlawful conduct or had continued to engage in the conduct in spite of the warnings or enforcement actions taken against it. In making this determination, the corporate structure itself, *e.g.*, subsidiaries or operating divisions, should be ignored, and enforcement actions taken against the corporation or any of its divisions, subsidiaries, and affiliates should be considered. *See* USSG § 8C2.5(c) & comment. (n. 6).

VI. Charging a Corporation: Cooperation and Voluntary Disclosure

A. General Principle: In determining whether to charge a corporation, that corporation's timely and voluntary disclosure of wrongdoing and its willingness to cooperate with the government's investigation may be relevant factors. In gauging the extent of the corporation's cooperation, the prosecutor may consider the corporation's willingness to identify the culprits within the corporation, including senior executives; to make witnesses available; to disclose the complete results of its internal investigation; and to waive attorney-client and work product protection.

B. Comment: In investigating wrongdoing by or within a corporation, a prosecutor is likely to encounter several obstacles resulting from the nature of the corporation itself. It will often be difficult to determine which individual took which action on behalf of the corporation. Lines of authority and responsibility may be shared among operating divisions or departments, and records and personnel may be spread throughout the United States or even among several countries. Where the criminal conduct continued over an extended period of time, the culpable or knowledgeable personnel may have been promoted, transferred, or fired, or they may have quit or retired. Accordingly, a corporation's cooperation may be critical in identifying the culprits and locating relevant evidence.

In some circumstances, therefore, granting a corporation immunity or amnesty or pretrial diversion may be considered in the course of the government's investigation. In such circumstances, prosecutors should refer to the principles governing non-prosecution agreements generally. *See* USAM § 9-27.600-650. These principles permit a non prosecution agreement in exchange for cooperation when a corporation's "timely cooperation appears to be necessary to the public interest and other means of obtaining the desired cooperation are unavailable or would not be effective." Prosecutors should note that in the case of national or multi-national corporations, multi-district or global agreements may be necessary. Such agreements may only be entered into with the approval of each affected district or the appropriate Department official. *See* USAM §9-27.641.

In addition, the Department, in conjunction with regulatory agencies and other executive branch departments, encourages corporations, as part of their compliance programs, to conduct internal investigations and to disclose their findings to the appropriate authorities. Some agencies, such as the SEC and the EPA, as well as the Department's Environmental and Natural Resources Division, have formal voluntary disclosure programs in which self-reporting, coupled with remediation and additional criteria, may qualify the corporation for amnesty or reduced sanctions.[2] Even in the absence of a formal program, prosecutors may consider a corporation's timely and voluntary disclosure in evaluating the adequacy of the corporation's compliance program and its management's commitment to the compliance program. However, prosecution and economic policies specific to the industry or statute may require prosecution notwithstanding a corporation's willingness to cooperate. For example, the Antitrust Division offers amnesty only to the first corporation to agree to cooperate. This creates a strong incentive for corporations participating in anti-competitive conduct to be the first to cooperate. In addition, amnesty, immunity, or reduced sanctions may not be appropriate where the corporation's business is permeated with fraud or other crimes.

One factor the prosecutor may weigh in assessing the adequacy of a corporation's cooperation is the completeness of its disclosure including, if necessary, a waiver of the attorney-client and work product protections, both with respect to its internal investigation and with respect to communications between specific officers, directors and employees and counsel. Such waivers permit the government to obtain statements of possible witnesses, subjects, and targets, without having to negotiate individual cooperation or immunity agreements. In addition, they are often critical in enabling the government to evaluate the completeness of a corporation's voluntary disclosure and cooperation. Prosecutors may, therefore, request a waiver in appropriate circumstances.[3] The Department does not, however, consider waiver of a corporation's attorney-client and work product protection an absolute requirement, and prosecutors should consider the willingness of a corporation to waive such protection when necessary to provide timely and complete information as one factor in evaluating the corporation's cooperation.

Another factor to be weighed by the prosecutor is whether the corporation appears to be protecting its culpable employees and agents. Thus, while cases will differ depending on the circumstances, a corporation's promise of support to culpable employees and agents, either

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[2] In addition, the Sentencing Guidelines reward voluntary disclosure and cooperation with a reduction in the corporation's offense level. *See* USSG §8C2.5)g).

[3] This waiver should ordinarily be limited to the factual internal investigation and any contemporaneous advice given to the corporation concerning the conduct at issue. Except in unusual circumstances, prosecutors should not seek a waiver with respect to communications and work product related to advice concerning the government's criminal investigation.

through the advancing of attorneys fees,[4] through retaining the employees without sanction for their misconduct, or through providing information to the employees about the government's investigation pursuant to a joint defense agreement, may be considered by the prosecutor in weighing the extent and value of a corporation's cooperation. By the same token, the prosecutor should be wary of attempts to shield corporate officers and employees from liability by a willingness of the corporation to plead guilty.

Another factor to be weighed by the prosecutor is whether the corporation, while purporting to cooperate, has engaged in conduct that impedes the investigation (whether or not rising to the level of criminal obstruction). Examples of such conduct include: overly broad assertions of corporate representation of employees or former employees; inappropriate directions to employees or their counsel, such as directions not to cooperate openly and fully with the investigation including, for example, the direction to decline to be interviewed; making presentations or submissions that contain misleading assertions or omissions; incomplete or delayed production of records; and failure to promptly disclose illegal conduct known to the corporation.

Finally, a corporation's offer of cooperation does not automatically entitle it to immunity from prosecution. A corporation should not be able to escape liability merely by offering up its directors, officers, employees, or agents as in lieu of its own prosecution. Thus, a corporation's willingness to cooperate is merely one relevant factor, that needs to be considered in conjunction with the other factors, particularly those relating to the corporation's past history and the role of management in the wrongdoing.

VII. Charging a Corporation: Corporate Compliance Programs

A. General Principle: Compliance programs are established by corporate management to prevent and to detect misconduct and to ensure that corporate activities are conducted in accordance with all applicable criminal and civil laws, regulations, and rules. The Department encourages such corporate self-policing, including voluntary disclosures to the government of any problems that a corporation discovers on its own. However, the existence of a compliance program is not sufficient, in and of itself, to justify not charging a corporation for criminal conduct undertaken by its officers, directors, employees, or agents. Indeed, the commission of such crimes in the face of a compliance program may suggest that the corporate management is not adequately enforcing its program. In addition, the nature of some crimes, *e.g.*, antitrust violations, may be such that national law enforcement policies mandate prosecutions of corporations notwithstanding the existence of a compliance program.

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[4] Some states require corporations to pay the legal fees of officers under investigation prior to a formal determination of their guilt. Obviously, a corporation's compliance with governing law should not be considered a failure to cooperate.

B. Comment: A corporate compliance program, even one specifically prohibiting the very conduct in question, does not absolve the corporation from criminal liability under the doctrine of *respondeat superior. See United States v. Basic Construction Co.*, 711 F.2d 570 (4th Cir. 1983) ("a corporation may be held criminally responsible for antitrust violations committed by its employees if they were acting within the scope of their authority, or apparent authority, and for the benefit of the corporation, even if... such acts were against corporate policy or express instructions."). In *United States v. Hilton Hotels Corp.*, 467 F.2d 1000 (9th Cir. 1972), *cert. denied,* 409 U.S. 1125 (1973), the Ninth Circuit affirmed antitrust liability based upon a purchasing agent for a single hotel threatening a single supplier with a boycott unless it paid dues to a local marketing association, even though the agent's actions were contrary to corporate policy and directly against express instructions from his superiors. The court reasoned that Congress, in enacting the Sherman Antitrust Act, "intended to impose liability upon business entities for the acts of those to whom they choose to delegate the conduct of their affairs, thus stimulating a maximum effort by owners and managers to assure adherence by such agents to the requirements of the Act."[5] It concluded that "general policy statements" and even direct instructions from the agent's superiors were not sufficient; "Appellant could not gain exculpation by issuing general instructions without undertaking to enforce those instructions by means commensurate with the obvious risks." *See also United States v. Beusch,* 596 F.2d 871, 878 (9th Cir. 1979) ("[A] corporation may be liable for the acts of its employees done contrary to express instructions and policies, but ... the existence of such instructions and policies may be considered in determining whether the employee in fact acted to benefit the corporation."); *United States v. American Radiator & Standard Sanitary Corp.*, 433 F.2d 174 (3rd Cir. 1970) (affirming conviction of corporation based upon its officer's participation in price-fixing scheme, despite corporation's defense that officer's conduct violated its "rigid anti-fraternization policy" against any socialization (and exchange of price information) with its competitors; "When the act of the agent is within the scope of his employment or his apparent authority, the corporation is held legally responsible for it, although what he did may be contrary to his actual instructions and may be unlawful.").

While the Department recognizes that no compliance program can ever prevent all criminal activity by a corporation's employees, the critical factors in evaluating any program are whether the program is adequately designed for maximum effectiveness in preventing and detecting wrongdoing by employees and whether corporate management is enforcing the program

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[5] Although this case and *Basic Construction* are both antitrust cases, their reasoning applies to other criminal violations. In the Hilton case, for instance, the Ninth Circuit noted that Sherman Act violations are commercial offenses "usually motivated by a desire to enhance profits," thus, bringing the case within the normal rule that a "purpose to benefit the corporation is necessary to bring the agent's acts within the scope of his employment." 467 F.2d at 1006 & n4. In addition, in *United States v. Automated Medical Laboratories*, 770 F.2d 399, 406 n.5 (4th Cir. 1985), the Fourth Circuit stated "that Basic Construction states a generally applicable rule on corporate criminal liability despite the fact that it addresses violations of the antitrust laws."

or is tacitly encouraging or pressuring employees to engage in misconduct to achieve business objectives. The Department has no formal guidelines for corporate compliance programs. The fundamental questions any prosecutor should ask are: "Is the corporation's compliance program well designed?" and "Does the corporation's compliance program work?" In answering these questions, the prosecutor should consider the comprehensiveness of the compliance program; the extent and pervasiveness of the criminal conduct; the number and level of the corporate employees involved; the seriousness, duration, and frequency of the misconduct; and any remedial actions taken by the corporation, including restitution, disciplinary action, and revisions to corporate compliance programs.[6] Prosecutors should also consider the promptness of any disclosure of wrongdoing to the government and the corporation's cooperation in the government's investigation. In evaluating compliance programs, prosecutors may consider whether the corporation has established corporate governance mechanisms that can effectively detect and prevent misconduct. For example, do the corporation's directors exercise independent review over proposed corporate actions rather than unquestioningly ratifying officers' recommendations; are the directors provided with information sufficient to enable the exercise of independent judgment, are internal audit functions conducted at a level sufficient to ensure their independence and accuracy and have the directors established an information and reporting system in the organization reasonable designed to provide management and the board of directors with timely and accurate information sufficient to allow them to reach an informed decision regarding the organization's compliance with the law. *In re: Caremark,* 698 A.2d 959 (Del. Ct. Chan. 1996).

Prosecutors should therefore attempt to determine whether a corporation's compliance program is merely a "paper program" or whether it was designed and implemented in an effective manner. In addition, prosecutors should determine whether the corporation has provided for a staff sufficient to audit, document, analyze, and utilize the results of the corporation's compliance efforts. In addition, prosecutors should determine whether the corporation's employees are adequately informed about the compliance program and are convinced of the corporation's commitment to it. This will enable the prosecutor to make an informed decision as to whether the corporation has adopted and implemented a truly effective compliance program that, when consistent with other federal law enforcement policies, may result in a decision to charge only the corporation's employees and agents.

Compliance programs should be designed to detect the particular types of misconduct most likely to occur in a particular corporation's line of business. Many corporations operate in complex regulatory environments outside the normal experience of criminal prosecutors. Accordingly, prosecutors should consult with relevant federal and state agencies with the expertise to evaluate the adequacy of a program's design and implementation. For instance, state and federal banking, insurance, and medical boards, the Department of Defense, the Department

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[6] For a detailed review of these and other factors concerning corporate compliance programs, see United States Sentencing Commission, GUIDELINES MANUAL, §8A1.2, comment. (n.3(k)) (Nov. 1997). *See* also USSG §8C2.5(f)

of Health and Human Services, the Environmental Protection Agency, and the Securities and Exchange Commission have considerable experience with compliance programs and can be very helpful to a prosecutor in evaluating such programs. In addition, the Fraud Section of the Criminal Division, the Commercial Litigation Branch of the Civil Division, and the Environmental Crimes Section of the Environment and Natural Resources Division can assist U.S. Attorneys' Offices in finding the appropriate agency office and in providing copies of compliance programs that were developed in previous cases.

VIII. Charging a Corporation: Restitution and Remediation

A. General Principle: Although neither a corporation nor an individual target may avoid prosecution merely by paying a sum of money, a prosecutor may consider the corporation's willingness to make restitution and steps already taken to do so. A prosecutor may also consider other remedial actions, such as implementing an effective corporate compliance program, improving an existing compliance program, and disciplining wrongdoers, in determining whether to charge the corporation.

B. Comment: In determining whether or not a corporation should be prosecuted, a prosecutor may consider whether meaningful remedial measures have been taken, including employee discipline and full restitution.[7] A corporation's response to misconduct says much about its willingness to ensure that such misconduct does not recur. Thus, corporations that fully recognize the seriousness of their misconduct and accept responsibility for it should be taking steps to implement the personnel, operational, and organizational changes necessary to establish an awareness among employees that criminal conduct will not be tolerated. Among the factors prosecutors should consider and weigh are whether the corporation appropriately disciplined the wrongdoers and disclosed information concerning their illegal conduct to the government.

Employee discipline is a difficult task for many corporations because of the human element involved and sometimes because of the seniority of the employees concerned. While corporations need to be fair to their employees, they must also be unequivocally committed, at all levels of the corporation, to the highest standards of legal and ethical behavior. Effective internal discipline can be a powerful deterrent against improper behavior by a corporation's employees. In evaluating a corporation's response to wrongdoing, prosecutors may evaluate the willingness of the corporation to discipline culpable employees of all ranks and the adequacy of the discipline imposed. The prosecutor should be satisfied that the corporation's focus is on the integrity and credibility of its remedial and disciplinary measures rather than on the protection of the wrongdoers.

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[7] For example, the Antitrust Division's amnesty policy requires that "[w]here possible, the corporation [make] restitution to injured parties...."

In addition to employee discipline, two other factors used in evaluating a corporation's remedial efforts are restitution and reform. As with natural persons, the decision whether or not to prosecute should not depend upon the target's ability to pay restitution. A corporation's efforts to pay restitution even in advance of any court order is, however, evidence of its "acceptance of responsibility" and, consistent with the practices and policies of the appropriate Division of the Department entrusted with enforcing specific criminal laws, may be considered in determining whether to bring criminal charges. Similarly, although the inadequacy of a corporate compliance program is a factor to consider when deciding whether to charge a corporation, that corporation's quick recognition of the flaws in the program and its efforts to improve the program are also factors to consider.

IX. Charging a Corporation: Collateral Consequences

A. General Principle: Prosecutors may consider the collateral consequences of a corporate criminal conviction in determining whether to charge the corporation with a criminal offense.

B. Comment: One of the factors in determining whether to charge a natural person or a corporation is whether the likely punishment is appropriate given the nature and seriousness of the crime. In the corporate context, prosecutors may take into account the possibly substantial consequences to a corporation's officers, directors, employees, and shareholders, many of whom may, depending on the size and nature (e.g., publicly vs. closely held) of the corporation and their role in its operations, have played no role in the criminal conduct, have been completely unaware of it, or have been wholly unable to prevent it. Prosecutors should also be aware of non-penal sanctions that may accompany a criminal charge, such as potential suspension or debarment from eligibility for government contracts or federal funded programs such as health care. Whether or not such non-penal sanctions are appropriate or required in a particular case is the responsibility of the relevant agency, a decision that will be made based on the applicable statutes, regulations, and policies.

Virtually every conviction of a corporation, like virtually every conviction of an individual, will have an impact on innocent third parties, and the mere existence of such an effect is not sufficient to preclude prosecution of the corporation. Therefore, in evaluating the severity of collateral consequences, various factors already discussed, such as the pervasiveness of the criminal conduct and the adequacy of the corporation's compliance programs, should be considered in determining the weight to be given to this factor. For instance, the balance may tip in favor of prosecuting corporations in situations where the scope of the misconduct in a case is widespread and sustained within a corporate division (or spread throughout pockets of the corporate organization). In such cases, the possible unfairness of visiting punishment for the corporation's crimes upon shareholders may be of much less concern where those shareholders have substantially profited, even unknowingly, from widespread or pervasive criminal activity. Similarly, where the top layers of the corporation's management or the shareholders of a closely-held corporation were engaged in or aware of the wrongdoing and the conduct at issue

was accepted as a way of doing business for an extended period, debarment may be deemed not collateral, but a direct and entirely appropriate consequence of the corporation's wrongdoing.

The appropriateness of considering such collateral consequences and the weight to be given them may depend on the special policy concerns discussed in section III, *supra*.

X. Charging a Corporation: Non-Criminal Alternatives

A. General Principle: Although non-criminal alternatives to prosecution often exist, prosecutors may consider whether such sanctions would adequately deter, punish, and rehabilitate a corporation that has engaged in wrongful conduct. In evaluating the adequacy of non-criminal alternatives to prosecution, *e.g.*, civil or regulatory enforcement actions, the prosecutor may consider all relevant factors, including:

1. the sanctions available under the alternative means of disposition;

2. the likelihood that an effective sanction will be imposed; and

3. the effect of non-criminal disposition on Federal law enforcement interests.

B. Comment: The primary goals of criminal law are deterrence, punishment, and rehabilitation. Non-criminal sanctions may not be an appropriate response to an egregious violation, a pattern of wrongdoing, or a history of non-criminal sanctions without proper remediation. In other cases, however, these goals may be satisfied without the necessity of instituting criminal proceedings. In determining whether federal criminal charges are appropriate, the prosecutor should consider the same factors (modified appropriately for the regulatory context) considered when determining whether to leave prosecution of a natural person to another jurisdiction or to seek non-criminal alternatives to prosecution. These factors include: the strength of the regulatory authority's interest; the regulatory authority's ability and willingness to take effective enforcement action; the probable sanction if the regulatory authority's enforcement action is upheld; and the effect of a non-criminal disposition on Federal law enforcement interests. *See* USAM §§ 9-27.240, 9-27.250.

XI. Charging a Corporation: Selecting Charges

A. General Principle: Once a prosecutor has decided to charge a corporation, the prosecutor should charge, or should recommend that the grand jury charge, the most serious offense that is consistent with the nature of the defendant's conduct and that is likely to result in a sustainable conviction.

B. Comment: Once the decision to charge is made, the same rules as govern charging natural persons apply. These rules require "a faithful and honest application of the Sentencing Guidelines" and an "individualized assessment of the extent to which particular charges fit the specific circumstances of the case, are consistent with the purposes of the Federal criminal code, and maximize the impact of Federal resources on crime." *See* USAM § 9-27.300. In making this determination, "it is appropriate that the attorney for the government consider, *inter alia*, such factors as the sentencing guideline range yielded by the charge, whether the penalty yielded by such sentencing range ... is proportional to the seriousness of the defendant's conduct, and whether the charge achieves such purposes of the criminal law as punishment, protection of the public, specific and general deterrence, and rehabilitation." *See* Attorney General's Memorandum, dated October 12, 1993.

XII. Plea Agreements with Corporations

A. General Principle: In negotiating plea agreements with corporations, prosecutors should seek a plea to the most serious, readily provable offense charged. In addition, the terms of the plea agreement should contain appropriate provisions to ensure punishment, deterrence, rehabilitation, and compliance with the plea agreement in the corporate context. Although special circumstances may mandate a different conclusion, prosecutors generally should not agree to accept a corporate guilty plea in exchange for non-prosecution or dismissal of charges against individual officers and employees.

B. Comment: Prosecutors may enter into plea agreements with corporations for the same reasons and under the same constraints as apply to plea agreements with natural persons. *See* USAM §§ 9-27.400-500. This means, *inter alia*, that the corporation should be required to plead guilty to the most serious, readily provable offense charged. As is the case with individuals, the attorney making this determination should do so "on the basis of an individualized assessment of the extent to which particular charges fit the specific circumstances of the case, are consistent with the purposes of the federal criminal code, and maximize the impact of federal resources on crime. In making this determination, the attorney for the government considers, inter alia, such factors as the sentencing guideline range yielded by the charge, whether the penalty yielded by such sentencing range ... is proportional to the seriousness of the defendant's conduct, and whether the charge achieves such purposes of the criminal law as punishment, protection of the public, specific and general deterrence, and rehabilitation." *See* Attorney General's Memorandum, dated October 12, 1993. In addition, any negotiated departures from the Sentencing Guidelines must be justifiable under the Guidelines and must be disclosed to the sentencing court. A corporation should be made to realize that pleading guilty to criminal charges constitutes an admission of guilt and not merely a resolution of an inconvenient distraction from its business. As with natural persons, pleas should be structured so that the corporation may not later "proclaim lack of culpability or even complete innocence." *See* USAM §§ 9-27.420(b)(4), 9-27.440, 9-27.500. Thus, for instance, there should be placed upon the record a sufficient factual basis for the plea to prevent later corporate assertions of innocence.

A corporate plea agreement should also contain provisions that recognize the nature of the corporate "person" and ensure that the principles of punishment, deterrence, and rehabilitation are met. In the corporate context, punishment and deterrence are generally accomplished by substantial fines, mandatory restitution, and institution of appropriate compliance measures, including, if necessary, continued judicial oversight or the use of special masters. *See* USSG §§ 8B1.1, 8C2.1, *et seq*. In addition, where the corporation is a government contractor, permanent or temporary debarment may be appropriate. Where the corporation was engaged in government contracting fraud, a prosecutor may not negotiate away an agency's right to debar or to list the corporate defendant.

In negotiating a plea agreement, prosecutors should also consider the deterrent value of prosecutions of individuals within the corporation. Therefore, one factor that a prosecutor may consider in determining whether to enter into a plea agreement is whether the corporation is seeking immunity for its employees and officers or whether the corporation is willing to cooperate in the investigation of culpable individuals. Prosecutors should rarely negotiate away individual criminal liability in a corporate plea.

Rehabilitation, of course, requires that the corporation undertake to be law-abiding in the future. It is, therefore, appropriate to require the corporation, as a condition of probation, to implement a compliance program or to reform an existing one. As discussed above, prosecutors may consult with the appropriate state and federal agencies and components of the Justice Department to ensure that a proposed compliance program is adequate and meets industry standards and best practices. *See* section VII, *supra*.

In plea agreements in which the corporation agrees to cooperate, the prosecutor should ensure that the cooperation is complete and truthful. To do so, the prosecutor may request that the corporation waive attorney-client and work product protection, make employees and agents available for debriefing, disclose the results of its internal investigation, file appropriate certified financial statements, agree to governmental or third-party audits, and take whatever other steps are necessary to ensure that the full scope of the corporate wrongdoing is disclosed and that the responsible culprits are identified and, if appropriate, prosecuted. *See* generally section VIII, *supra*.

U.S. Department of Justice

Office of the Deputy Attorney General

The Deputy Attorney General

Washington, D.C. 20530

MEMORANDUM

TO: Heads of Department Components
United States Attorneys

FROM: Paul J. McNulty
Deputy Attorney General

SUBJECT: Principles of Federal Prosecution of Business Organizations

The Department experienced unprecedented success in prosecuting corporate fraud during the last four years. We have aggressively rooted out corruption in financial markets and corporate board rooms across the country. Federal prosecutors should be justifiably proud that the information used by our nation's financial markets is more reliable, our retirement plans are more secure, and the investing public is better protected as a result of our efforts. The most significant result of this enforcement initiative is that corporations increasingly recognize the need for self-policing, self-reporting, and cooperation with law enforcement. Through their self-regulation efforts, fraud undoubtedly is being prevented, sparing shareholders from the financial harm accompanying corporate corruption. The Department must continue to encourage these efforts.

Though much has been accomplished, the work of protecting the integrity of the marketplace continues. As we press forward in our enforcement duties, it is appropriate that we consider carefully proposals which could make our efforts more effective. I remain convinced that the fundamental principles that have guided our enforcement practices are sound. In particular, our corporate charging principles are not only familiar, but they are welcomed by most corporations in our country because good corporate leadership shares many of our goals. Like federal prosecutors, corporate leaders must take action to protect shareholders, preserve corporate value, and promote honesty and fair dealing with the investing public.

We have heard from responsible corporate officials recently about the challenges they face in discharging their duties to the corporation while responding in a meaningful way to a government investigation. Many of those associated with the corporate legal community have expressed concern that our practices may be discouraging full and candid communications between corporate employees and legal counsel. To the extent this is happening, it was never the intention of the Department for our corporate charging principles to cause such a result.

Therefore, I have decided to adjust certain aspects of our policy in ways that will further promote public confidence in the Department, encourage corporate fraud prevention efforts, and clarify our goals without sacrificing our ability to prosecute these important cases effectively. The new language expands upon the Department's long-standing policies concerning how we evaluate the authenticity of a corporation's cooperation with a government investigation.

This memorandum supersedes and replaces guidance contained in the Memorandum from Deputy Attorney General Larry D. Thompson entitled Principles of Federal Prosecution of Business Organizations (January 20, 2003) (the "Thompson Memorandum") and the Memorandum from the Acting Deputy Attorney General Robert D. McCallum, Jr. entitled Waiver of Corporate Attorney-Client and Work Product Protections (October 21, 2005)(the "McCallum Memorandum").

U.S. Department of Justice

Office of the Deputy Attorney General

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Washington, D.C. 20530

MEMORANDUM

TO: Heads of Department Components
United States Attorneys

FROM: Paul J. McNulty
Deputy Attorney General

SUBJECT: Principles of Federal Prosecution of Business Organizations

Federal Prosecution of Business Organizations[1]

I. Duties of the Federal Prosecutor; Duties of Corporate Leaders

The prosecution of corporate crime is a high priority for the Department of Justice. By investigating wrongdoing and bringing charges for criminal conduct, the Department plays an important role in protecting investors and ensuring public confidence in business entities and in the investment markets in which those entities participate. In this respect, federal prosecutors and corporate leaders share a common goal. Directors and officers owe a fiduciary duty to a corporation's shareholders, the corporation's true owners, and they owe duties of honest dealing to the investing public in connection with the corporation's regulatory filings and public statements. The faithful execution of these duties by corporate leadership serves the same values in promoting public trust and confidence that our criminal prosecutions are designed to serve.

A prosecutor's duty to enforce the law requires the investigation and prosecution of criminal wrongdoing if it is discovered. In carrying out this mission with the diligence and resolve necessary to vindicate the important public interests discussed above, prosecutors should be mindful of the common cause we share with responsible corporate leaders. Prosecutors should also be mindful that confidence in the Department is affected both by the results we achieve and by the real and perceived ways in which we achieve them. Thus, the manner in

[1] While these guidelines refer to corporations, they apply to the consideration of the prosecution of all types of business organizations, including partnerships, sole proprietorships, government entities, and unincorporated associations.

which we do our job as prosecutors – the professionalism we demonstrate, our resourcefulness in seeking information, and our willingness to secure the facts in a manner that encourages corporate compliance and self-regulation – impacts public perception of our mission. Federal prosecutors recognize that they must maintain public confidence in the way in which they exercise their charging discretion, and that professionalism and civility have always played an important part in putting these principles into action.

II. Charging a Corporation: General Principles

A. General Principle: Corporations should not be treated leniently because of their artificial nature nor should they be subject to harsher treatment. Vigorous enforcement of the criminal laws against corporate wrongdoers, where appropriate, results in great benefits for law enforcement and the public, particularly in the area of white collar crime. Indicting corporations for wrongdoing enables the government to address and be a force for positive change of corporate culture, alter corporate behavior, and prevent, discover, and punish white collar crime.

B. Comment: In all cases involving corporate wrongdoing, prosecutors should consider the factors discussed herein. First and foremost, prosecutors should be aware of the important public benefits that may flow from indicting a corporation in appropriate cases. For instance, corporations are likely to take immediate remedial steps when one is indicted for criminal conduct that is pervasive throughout a particular industry, and thus an indictment often provides a unique opportunity for deterrence on a massive scale. In addition, a corporate indictment may result in specific deterrence by changing the culture of the indicted corporation and the behavior of its employees. Finally, certain crimes that carry with them a substantial risk of great public harm, e.g., environmental crimes or financial frauds, are by their nature most likely to be committed by businesses, and there may, therefore, be a substantial federal interest in indicting the corporation.

Charging a corporation, however, does not mean that individual directors, officers, employees, or shareholders should not also be charged. Prosecution of a corporation is not a substitute for the prosecution of criminally culpable individuals within or without the corporation. Because a corporation can act only through individuals, imposition of individual criminal liability may provide the strongest deterrent against future corporate wrongdoing. Only rarely should provable individual culpability not be pursued, even in the face of an offer of a corporate guilty plea or some other disposition of the charges against the corporation.

Corporations are "legal persons," capable of suing and being sued, and capable of committing crimes. Under the doctrine of *respondeat superior*, a corporation may be held criminally liable for the illegal acts of its directors, officers, employees, and agents. To hold a corporation liable for these actions, the government must establish that the corporate agent's actions (I) were within the scope of his duties and (ii) were intended, at least in part, to benefit the corporation. In all cases involving wrongdoing by corporate agents, prosecutors should consider the corporation, as well as the responsible individuals, as potential criminal targets.

Agents, however, may act for mixed reasons -- both for self-aggrandizement (both direct and indirect) and for the benefit of the corporation, and a corporation may be held liable as long as one motivation of its agent is to benefit the corporation. *See United States v. Potter*, 463 F.3d 9, 25 (1st Cir. 2006) (stating that the test to determine whether an agent is acting within the scope of employment is whether the agent is performing acts of the kind which he is authorized to perform, and those acts are motivated--at least in part--by an intent to benefit the corporation). In *United States v. Automated Medical Laboratories*, 770 F.2d 399 (4th Cir. 1985), the Fourth Circuit affirmed a corporation's conviction for the actions of a subsidiary's employee despite its claim that the employee was acting for his own benefit, namely his "ambitious nature and his desire to ascend the corporate ladder." The court stated, "*Partucci* was clearly acting in part to benefit AML since his advancement within the corporation depended on AML's well-being and its lack of difficulties with the FDA." Furthermore, in *United States v. Sun-Diamond Growers of California*, 138 F.3d 961, 969-70 (D.C. Cir. 1998), *aff'd on other grounds*, 526 U.S. 398 (1999), the D.C. Circuit rejected a corporation's argument that it should not be held criminally liable for the actions of its vice-president since the vice-president's "scheme was designed to -- and did in fact -- defraud [the corporation], not benefit it." According to the court, the fact that the vice-president deceived the corporation and used its money to contribute illegally to a congressional campaign did not preclude a valid finding that he acted to benefit the corporation. Part of the vice-president's job was to cultivate the corporation's relationship with the congressional candidate's brother, the Secretary of Agriculture. Therefore, the court held, the jury was entitled to conclude that the vice-president had acted with an intent, "however befuddled," to further the interests of his employer. *See also United States v. Cincotta*, 689 F.2d 238, 241-42 (1st Cir. 1982) (upholding a corporation's conviction, notwithstanding the substantial personal benefit reaped by its miscreant agents, because the fraudulent scheme required money to pass through the corporation's treasury and the fraudulently obtained goods were resold to the corporation's customers in the corporation's name).

Moreover, the corporation need not even necessarily profit from its agent's actions for it to be held liable. In *Automated Medical Laboratories*, the Fourth Circuit stated:

> [B]enefit is not a "touchstone of criminal corporate liability; benefit at best is an evidential, not an operative, fact." Thus, whether the agent's actions ultimately redounded to the benefit of the corporation is less significant than whether the agent acted with the intent to benefit the corporation. The basic purpose of requiring that an agent have acted with the intent to benefit the corporation, however, is to insulate the corporation from criminal liability for actions of its agents which <u>may</u> be inimical to the interests of the corporation or which may have been undertaken solely to advance the interests of that agent or of a party other than the corporation.

770 F.2d at 407 (emphasis added; *quoting Old Monastery Co. v. United States*, 147 F.2d 905, 908 (4th Cir.), *cert. denied*, 326 U.S. 734 (1945)).

III. Charging a Corporation: Factors to Be Considered

A. General Principle: Generally, prosecutors apply the same factors in determining whether to charge a corporation as they do with respect to individuals. *See* USAM § 9-27.220, *et seq*. Thus, the prosecutor must weigh all of the factors normally considered in the sound exercise of prosecutorial judgment: the sufficiency of the evidence; the likelihood of success at trial; the probable deterrent, rehabilitative, and other consequences of conviction; and the adequacy of noncriminal approaches. *See id.* However, due to the nature of the corporate "person," some additional factors are present. In conducting an investigation, determining whether to bring charges, and negotiating plea agreements, prosecutors must consider the following factors in reaching a decision as to the proper treatment of a corporate target:

1. the nature and seriousness of the offense, including the risk of harm to the public, and applicable policies and priorities, if any, governing the prosecution of corporations for particular categories of crime (see section IV, *infra*);

2. the pervasiveness of wrongdoing within the corporation, including the complicity in, or condonation of, the wrongdoing by corporate management (see section V, *infra)*;

3. the corporation's history of similar conduct, including prior criminal, civil, and regulatory enforcement actions against it (see section VI, *infra*);

4. the corporation's timely and voluntary disclosure of wrongdoing and its willingness to cooperate in the investigation of its agents (see section VII, *infra*);

5. the existence and adequacy of the corporation's pre-existing compliance program (see section VIII, *infra*);

6. the corporation's remedial actions, including any efforts to implement an effective corporate compliance program or to improve an existing one, to replace responsible management, to discipline or terminate wrongdoers, to pay restitution, and to cooperate with the relevant government agencies (see section IX, *infra*);

7. collateral consequences, including disproportionate harm to shareholders, pension holders and employees not proven personally culpable and impact on the public arising from the prosecution (see section X, *infra*);

8. the adequacy of the prosecution of individuals responsible for the corporation's malfeasance; and

9. the adequacy of remedies such as civil or regulatory enforcement actions (see section XI, *infra).*

B. Comment: In determining whether to charge a corporation, the foregoing factors must be considered. The factors listed in this section are intended to be illustrative of those that should be considered and not a complete or exhaustive list. Some or all of these factors may or may not apply to specific cases, and in some cases one factor may override all others. For example, the nature and seriousness of the offense may be such as to warrant prosecution regardless of the other factors. In most cases, however, no single factor will be dispositive. Further, national law enforcement policies in various enforcement areas may require that more or less weight be given to certain of these factors than to others. Of course, prosecutors must exercise their judgment in applying and balancing these factors and this process does not mandate a particular result.

In making a decision to charge a corporation, the prosecutor generally has wide latitude in determining when, whom, how, and even whether to prosecute for violations of federal criminal law. In exercising that discretion, prosecutors should consider the following general statements of principles that summarize appropriate considerations to be weighed and desirable practices to be followed in discharging their prosecutorial responsibilities. In doing so, prosecutors should ensure that the general purposes of the criminal law -- assurance of warranted punishment, deterrence of further criminal conduct, protection of the public from dangerous and fraudulent conduct, rehabilitation of offenders, and restitution for victims and affected communities -- are adequately met, taking into account the special nature of the corporate "person."

IV. Charging a Corporation: Special Policy Concerns

A. General Principle: The nature and seriousness of the crime, including the risk of harm to the public from the criminal conduct, are obviously primary factors in determining whether to charge a corporation. In addition, corporate conduct, particularly that of national and multi-national corporations, necessarily intersects with federal economic, taxation, and criminal law enforcement policies. In applying these principles, prosecutors must consider the practices and policies of the appropriate Division of the Department, and must comply with those policies to the extent required.

B. Comment: In determining whether to charge a corporation, prosecutors should take into account federal law enforcement priorities as discussed above. *See* USAM § 9-27-230. In addition, however, prosecutors must be aware of the specific policy goals and incentive programs established by the respective Divisions and regulatory agencies. Thus, whereas natural persons may be given incremental degrees of credit (ranging from immunity to lesser charges to sentencing considerations) for turning themselves in, making statements against their penal interest, and cooperating in the government's investigation of their own and others' wrongdoing, the same approach may not be appropriate in all circumstances with respect to corporations. As an example, it is entirely proper in many investigations for a prosecutor to consider the corporation's pre-indictment conduct, *e.g.*,voluntary disclosure, cooperation, remediation or restitution, in determining whether to seek an indictment. However, this would not necessarily be appropriate in an antitrust investigation, in which antitrust violations, by definition, go to the

heart of the corporation's business and for which the Antitrust Division has therefore established a firm policy, understood in the business community, that credit should not be given at the charging stage for a compliance program and that amnesty is available only to the first corporation to make full disclosure to the government. As another example, the Tax Division has a strong preference for prosecuting responsible individuals, rather than entities, for corporate tax offenses. Thus, in determining whether or not to charge a corporation, prosecutors must consult with the Criminal, Antitrust, Tax, and Environmental and Natural Resources Divisions, if appropriate or required.

V. Charging a Corporation: Pervasiveness of Wrongdoing Within the Corporation

A. General Principle: A corporation can only act through natural persons, and it is therefore held responsible for the acts of such persons fairly attributable to it. Charging a corporation for even minor misconduct may be appropriate where the wrongdoing was pervasive and was undertaken by a large number of employees or by all the employees in a particular role within the corporation, *e.g.*, salesmen or procurement officers, or was condoned by upper management. On the other hand, in certain limited circumstances, it may not be appropriate to impose liability upon a corporation, particularly one with a compliance program in place, under a strict *respondeat superior* theory for the single isolated act of a rogue employee. There is, of course, a wide spectrum between these two extremes, and a prosecutor should exercise sound discretion in evaluating the pervasiveness of wrongdoing within a corporation.

B. Comment: Of these factors, the most important is the role of management. Although acts of even low-level employees may result in criminal liability, a corporation is directed by its management and management is responsible for a corporate culture in which criminal conduct is either discouraged or tacitly encouraged. As stated in commentary to the Sentencing Guidelines:

> Pervasiveness [is] case specific and [will] depend on the number, and degree of responsibility, of individuals [with] substantial authority ... who participated in, condoned, or were willfully ignorant of the offense. Fewer individuals need to be involved for a finding of pervasiveness if those individuals exercised a relatively high degree of authority. Pervasiveness can occur either within an organization as a whole or within a unit of an organization. *See* USSG §8C2.5, comment. (n. 4).

VI. Charging a Corporation: The Corporation's Past History

A. General Principle: Prosecutors may consider a corporation's history of similar conduct, including prior criminal, civil, and regulatory enforcement actions against it, in determining whether to bring criminal charges.

B. Comment: A corporation, like a natural person, is expected to learn from its mistakes. A history of similar conduct may be probative of a corporate culture that encouraged, or at least condoned, such conduct, regardless of any compliance programs. Criminal prosecution of a

corporation may be particularly appropriate where the corporation previously had been subject to non-criminal guidance, warnings, or sanctions, or previous criminal charges, and it either had not taken adequate action to prevent future unlawful conduct or had continued to engage in the conduct in spite of the warnings or enforcement actions taken against it. In making this determination, the corporate structure itself, *e.g.,* subsidiaries or operating divisions, should be ignored, and enforcement actions taken against the corporation or any of its divisions, subsidiaries, and affiliates should be considered. *See* USSG § 8C2.5(c) & comment.(n. 6).

VII. Charging a Corporation: The Value of Cooperation

A. General Principle: In determining whether to charge a corporation, that corporation's timely and voluntary disclosure of wrongdoing and its cooperation with the government's investigation may be relevant factors. In gauging the extent of the corporation's cooperation, the prosecutor may consider, among other things, whether the corporation made a voluntary and timely disclosure, and the corporation's willingness to provide relevant evidence and to identify the culprits within the corporation, including senior executives.

B. Comment: In investigating wrongdoing by or within a corporation, a prosecutor is likely to encounter several obstacles resulting from the nature of the corporation itself. It will often be difficult to determine which individual took which action on behalf of the corporation. Lines of authority and responsibility may be shared among operating divisions or departments, and records and personnel may be spread throughout the United States or even among several countries. Where the criminal conduct continued over an extended period of time, the culpable or knowledgeable personnel may have been promoted, transferred, or fired, or they may have quit or retired. Accordingly, a corporation's cooperation may be critical in identifying the culprits and locating relevant evidence. Relevant considerations in determining whether a corporation has cooperated are set forth below.

1. Qualifying for Immunity, Amnesty or Pretrial Diversion

In some circumstances, granting a corporation immunity or amnesty or pretrial diversion may be considered in the course of the government's investigation. In such circumstances, prosecutors should refer to the principles governing non-prosecution agreements generally. *See* USAM § 9-27.600-650. These principles permit a non-prosecution agreement in exchange for cooperation when a corporation's "timely cooperation appears to be necessary to the public interest and other means of obtaining the desired cooperation are unavailable or would not be effective." Prosecutors should note that in the case of national or multi-national corporations, multi-district or global agreements may be necessary. Such agreements may only be entered into with the approval of each affected district or the appropriate Department official. *See* USAM §9-27.641.

In addition, the Department, in conjunction with regulatory agencies and other executive branch departments, encourages corporations, as part of their compliance programs, to conduct internal investigations and to disclose their findings to the appropriate authorities. Some agencies, such as the Securities and Exchange Commission and the Environmental Protection Agency, as well as the Department's Environmental and Natural Resources Division, have formal voluntary disclosure programs in which self-reporting, coupled with remediation and additional criteria, may qualify the corporation for amnesty or reduced sanctions. Even in the absence of a formal program, prosecutors may consider a corporation's timely and voluntary disclosure in evaluating the adequacy of the corporation's compliance program and its management's commitment to the compliance program. However, prosecution and economic policies specific to the industry or statute may require prosecution notwithstanding a corporation's willingness to cooperate. For example, the Antitrust Division offers amnesty only to the first corporation to agree to cooperate. This creates a strong incentive for corporations participating in anti-competitive conduct to be the first to cooperate. In addition, amnesty, immunity, or reduced sanctions may not be appropriate where the corporation's business is permeated with fraud or other crimes.

2. Waiving Attorney-Client and Work Product Protections[2]

The attorney-client and work product protections serve an extremely important function in the U.S. legal system. The attorney-client privilege is one of the oldest and most sacrosanct privileges under U.S. law. *See Upjohn v. United States*, 449 U.S. 383, 389 (1976). As the Supreme Court has stated "its purpose is to encourage full and frank communication between attorneys and their clients and thereby promote broader public interests in the observance of law and administration of justice." *Id.* The work product doctrine also serves similarly important interests.

Waiver of attorney-client and work product protections is not a prerequisite to a finding that a company has cooperated in the government's investigation. However, a company's disclosure of privileged information may permit the government to expedite its investigation. In addition, the disclosure of privileged information may be critical in enabling the government to evaluate the accuracy and completeness of the company's voluntary disclosure.

Prosecutors may only request waiver of attorney-client or work product protections when there is a legitimate need for the privileged information to fulfill their law enforcement obligations. A legitimate need for the information is not established by concluding it is merely

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[2] The Sentencing Guidelines reward voluntary disclosure and cooperation with a reduction in the corporation's offense level. *See* USSG §8C2.5(g). The reference to consideration of a corporation's waiver of attorney-client and work product protections in reducing a corporation's culpability score in Application Note 12, was deleted effective November 1, 2006. *See* USSG §8C2.5(g), comment. (n.12).

desirable or convenient to obtain privileged information. The test requires a careful balancing of important policy considerations underlying the attorney-client privilege and work product doctrine and the law enforcement needs of the government's investigation.

Whether there is a legitimate need depends upon:

(1) the likelihood and degree to which the privileged information will benefit the government's investigation;

(2) whether the information sought can be obtained in a timely and complete fashion by using alternative means that do not require waiver;

(3) the completeness of the voluntary disclosure already provided; and

(4) the collateral consequences to a corporation of a waiver.

If a legitimate need exists, prosecutors should seek the least intrusive waiver necessary to conduct a complete and thorough investigation, and should follow a step-by-step approach to requesting information. Prosecutors should first request purely factual information, which may or may not be privileged, relating to the underlying misconduct ("Category I"). Examples of Category I information could include, without limitation, copies of key documents, witness statements, or purely factual interview memoranda regarding the underlying misconduct, organization charts created by company counsel, factual chronologies, factual summaries, or reports (or portions thereof) containing investigative facts documented by counsel.

Before requesting that a corporation waive the attorney-client or work product protections for Category I information, prosecutors must obtain written authorization from the United States Attorney who must provide a copy of the request to, and consult with, the Assistant Attorney General for the Criminal Division before granting or denying the request. A prosecutor's request to the United States Attorney for authorization to seek a waiver must set forth law enforcement's legitimate need for the information and identify the scope of the waiver sought. A copy of each waiver request and authorization for Category I information must be maintained in the files of the United States Attorney. If the request is authorized, the United States Attorney must communicate the request in writing to the corporation.

A corporation's response to the government's request for waiver of privilege for Category I information may be considered in determining whether a corporation has cooperated in the government's investigation.

Only if the purely factual information provides an incomplete basis to conduct a thorough investigation should prosecutors then request that the corporation provide attorney-client communications or non-factual attorney work product ("Category II"). This information includes legal advice given to the corporation before, during, and after the underlying misconduct occurred.

This category of privileged information might include the production of attorney notes, memoranda or reports (or portions thereof) containing counsel's mental impressions and conclusions, legal determinations reached as a result of an internal investigation, or legal advice given to the corporation.

Prosecutors are cautioned that Category II information should only be sought in rare circumstances.

Before requesting that a corporation waive the attorney-client or work product protections for Category II information, the United States Attorney must obtain written authorization from the Deputy Attorney General. A United States Attorney's request for authorization to seek a waiver must set forth law enforcement's legitimate need for the information and identify the scope of the waiver sought. A copy of each waiver request and authorization for Category II information must be maintained in the files of the Deputy Attorney General. If the request is authorized, the United States Attorney must communicate the request in writing to the corporation.

If a corporation declines to provide a waiver for Category II information after a written request from the United States Attorney, prosecutors must not consider this declination against the corporation in making a charging decision. Prosecutors may always favorably consider a corporation's acquiescence to the government's waiver request in determining whether a corporation has cooperated in the government's investigation.

Requests for Category II information requiring the approval of the Deputy Attorney General do not include:

(1) legal advice contemporaneous to the underlying misconduct when the corporation or one of its employees is relying upon an advice-of-counsel defense; and

(2) legal advice or communications in furtherance of a crime or fraud, coming within the crime-fraud exception to the attorney-client privilege.

In these two instances, prosecutors should follow the authorization process established for requesting waiver for Category I information.

For federal prosecutors in litigating Divisions within Main Justice, waiver requests for Category I information must be submitted for approval to the Assistant Attorney General of the Division and waiver requests for Category II information must be submitted by the Assistant Attorney General for approval to the Deputy Attorney General. If the request is authorized, the Assistant Attorney General must communicate the request in writing to the corporation.

Federal prosecutors are not required to obtain authorization if the corporation voluntarily offers privileged documents without a request by the government. However, voluntary waivers must be reported to the United States Attorney or the Assistant Attorney General in the Division where the case originated. A record of these reports must be maintained in the files of that office.

3. Shielding Culpable Employees and Agents

Another factor to be weighed by the prosecutor is whether the corporation appears to be protecting its culpable employees and agents. Thus, while cases will differ depending on the circumstances, a corporation's promise of support to culpable employees and agents, *e.g.*, through retaining the employees without sanction for their misconduct or through providing information to the employees about the government's investigation pursuant to a joint defense agreement, may be considered by the prosecutor in weighing the extent and value of a corporation's cooperation.

Prosecutors generally should not take into account whether a corporation is advancing attorneys' fees to employees or agents under investigation and indictment. Many state indemnification statutes grant corporations the power to advance the legal fees of officers under investigation prior to a formal determination of guilt. As a consequence, many corporations enter into contractual obligations to advance attorneys' fees through provisions contained in their corporate charters, bylaws or employment agreements. Therefore, a corporation's compliance with governing state law and its contractual obligations cannot be considered a failure to cooperate.[3] This prohibition is not meant to prevent a prosecutor from asking questions about an

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[3] In extremely rare cases, the advancement of attorneys' fees may be taken into account when the totality of the circumstances show that it was intended to impede a criminal investigation. In these cases, fee advancement is considered with many other telling facts to make a determination that the corporation is acting improperly to shield itself and its culpable employees from government scrutiny. *See discussion in* Brief of Appellant-United States, *United States v. Smith and Watson*, No. 06-3999-cr (2d Cir. Nov. 6, 2006). Where these circumstances exist, approval must be obtained from the Deputy Attorney General before prosecutors may consider this factor in their charging decisions. Prosecutors should follow the authorization process established for waiver requests of Category II information (see section VII-2, *infra*).

attorney's representation of a corporation or its employees.[4]

4. Obstructing the Investigation

Another factor to be weighed by the prosecutor is whether the corporation, while purporting to cooperate, has engaged in conduct intended to impede the investigation (whether or not rising to the level of criminal obstruction). Examples of such conduct include: overly broad assertions of corporate representation of employees or former employees; overly broad or frivolous assertions of privilege to withhold the disclosure of relevant, non-privileged documents; inappropriate directions to employees or their counsel, such as directions not to cooperate openly and fully with the investigation including, for example, the direction to decline to be interviewed; making presentations or submissions that contain misleading assertions or omissions; incomplete or delayed production of records; and failure to promptly disclose illegal conduct known to the corporation.

5. Offering Cooperation: No Entitlement to Immunity

Finally, a corporation's offer of cooperation does not automatically entitle it to immunity from prosecution. A corporation should not be able to escape liability merely by offering up its directors, officers, employees, or agents as in lieu of its own prosecution. Thus, a corporation's willingness to cooperate is merely one relevant factor, that needs to be considered in conjunction with the other factors, particularly those relating to the corporation's past history and the role of management in the wrongdoing.

VIII. Charging a Corporation: Corporate Compliance Programs

A. General Principle: Compliance programs are established by corporate management to prevent and to detect misconduct and to ensure that corporate activities are conducted in accordance with all applicable criminal and civil laws, regulations, and rules. The Department encourages such corporate self-policing, including voluntary disclosures to the government of any problems that a corporation discovers on its own. However, the existence of a compliance program is not sufficient, in and of itself, to justify not charging a corporation for criminal conduct undertaken by its officers, directors, employees, or agents. Indeed, the commission of such crimes in the face of a compliance program may suggest that the corporate management is

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[4] Routine questions regarding the representation status of a corporation and its employees, including how and by whom attorneys' fees are paid, frequently arise in the course of an investigation. They may be necessary to assess other issues, such as conflict-of-interest. Such questions are appropriate and this guidance is not intended to prohibit such inquiry.

not adequately enforcing its program. In addition, the nature of some crimes, *e.g.*, antitrust violations, may be such that national law enforcement policies mandate prosecutions of corporations notwithstanding the existence of a compliance program.

B. Comment: A corporate compliance program, even one specifically prohibiting the very conduct in question, does not absolve the corporation from criminal liability under the doctrine of *respondeat superior*. *See United States v. Basic Construction Co.*, 711 F.2d 570 (4th Cir. 1983) ("[A] corporation may be held criminally responsible for antitrust violations committed by its employees if they were acting within the scope of their authority, or apparent authority, and for the benefit of the corporation, even if... such acts were against corporate policy or express instructions."). In *United States v. Potter*, 463 F.3d 9, 25-26 (1st Cir. According to the court, a corporation cannot "avoid liability by adopting abstract rules" that forbid its agents from engaging in illegal acts; "even a specific directive to an agent or employee or honest efforts to police such rules do not automatically free the company for the wrongful acts of agents." Similarly, in *United States v. Hilton Hotels Corp.*, 467 F.2d 1000 (9th Cir. 1972), *cert. denied*, 409 U.S. 1125 (1973), the Ninth Circuit affirmed antitrust liability based upon a purchasing agent for a single hotel threatening a single supplier with a boycott unless it paid dues to a local marketing association, even though the agent's actions were contrary to corporate policy and directly against express instructions from his superiors. The court reasoned that Congress, in enacting the Sherman Antitrust Act, "intended to impose liability upon business entities for the acts of those to whom they choose to delegate the conduct of their affairs, thus stimulating a maximum effort by owners and managers to assure adherence by such agents to the requirements of the Act.[5] It concluded that "general policy statements" and even direct instructions from the agent's superiors were not sufficient; "Appellant could not gain exculpation by issuing general instructions without undertaking to enforce those instructions by means commensurate with the obvious risks." *See also United States v. Beusch*, 596 F.2d 871, 878 (9th Cir. 1979) ("[A] corporation may be liable for the acts of its employees done contrary to express instructions and policies, but ... the existence of such instructions and policies may be considered in determining whether the employee in fact acted to benefit the corporation."); *United States v. American Radiator & Standard Sanitary Corp.*, 433 F.2d 174 (3rd Cir. 1970) (affirming conviction of corporation based upon its officer's participation in price-fixing scheme, despite corporation's defense that officer's conduct violated its "rigid anti-fraternization policy" against any socialization (and exchange of price information) with its competitors; "When the act of the agent is within the scope of his employment or his apparent authority, the corporation is held

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[5] Although this case and *Basic Construction* are both antitrust cases, their reasoning applies to other criminal violations. In the *Hilton* case, for instance, the Ninth Circuit noted that Sherman Act violations are commercial offenses "usually motivated by a desire to enhance profits," thus, bringing the case within the normal rule that a "purpose to benefit the corporation is necessary to bring the agent's acts within the scope of his employment." 467 F.2d at 1006 & n4. In addition, in *United States v. Automated Medical Laboratories*, 770 F.2d 399, 406 n.5 (4th Cir. 1985), the Fourth Circuit stated "that Basic Construction states a generally applicable rule on corporate criminal liability despite the fact that it addresses violations of the antitrust laws."

legally responsible for it, although what he did may be contrary to his actual instructions and may be unlawful.").

While the Department recognizes that no compliance program can ever prevent all criminal activity by a corporation's employees, the critical factors in evaluating any program are whether the program is adequately designed for maximum effectiveness in preventing and detecting wrongdoing by employees and whether corporate management is enforcing the program or is tacitly encouraging or pressuring employees to engage in misconduct to achieve business objectives. The Department has no formal guidelines for corporate compliance programs. The fundamental questions any prosecutor should ask are: "Is the corporation's compliance program well designed?" and "Does the corporation's compliance program work?" In answering these questions, the prosecutor should consider the comprehensiveness of the compliance program; the extent and pervasiveness of the criminal conduct; the number and level of the corporate employees involved; the seriousness, duration, and frequency of the misconduct; and any remedial actions taken by the corporation, including restitution, disciplinary action, and revisions to corporate compliance programs.[6] Prosecutors should also consider the promptness of any disclosure of wrongdoing to the government and the corporation's cooperation in the government's investigation. In evaluating compliance programs, prosecutors may consider whether the corporation has established corporate governance mechanisms that can effectively detect and prevent misconduct. For example, do the corporation's directors exercise independent review over proposed corporate actions rather than unquestioningly ratifying officers' recommendations; are the directors provided with information sufficient to enable the exercise of independent judgment, are internal audit functions conducted at a level sufficient to ensure their independence and accuracy and have the directors established an information and reporting system in the organization reasonably designed to provide management and the board of directors with timely and accurate information sufficient to allow them to reach an informed decision regarding the organization's compliance with the law. *In re: Caremark*, 698 A.2d 959 (Del. Ct. Chan. 1996).

Prosecutors should therefore attempt to determine whether a corporation's compliance program is merely a "paper program" or whether it was designed and implemented in an effective manner. In addition, prosecutors should determine whether the corporation has provided for a staff sufficient to audit, document, analyze, and utilize the results of the corporation's compliance efforts. In addition, prosecutors should determine whether the corporation's employees are adequately informed about the compliance program and are convinced of the corporation's commitment to it. This will enable the prosecutor to make an informed decision as to whether the corporation has adopted and implemented a truly effective compliance program that, when consistent with other federal law enforcement policies, may result in a decision to charge only the corporation's employees and agents.

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[6] For a detailed review of these and other factors concerning corporate compliance programs, *see* USSG §8B2.1.

Compliance programs should be designed to detect the particular types of misconduct most likely to occur in a particular corporation's line of business. Many corporations operate in complex regulatory environments outside the normal experience of criminal prosecutors. Accordingly, prosecutors should consult with relevant federal and state agencies with the expertise to evaluate the adequacy of a program's design and implementation. For instance, state and federal banking, insurance, and medical boards, the Department of Defense, the Department of Health and Human Services, the Environmental Protection Agency, and the Securities and Exchange Commission have considerable experience with compliance programs and can be very helpful to a prosecutor in evaluating such programs. In addition, the Fraud Section of the Criminal Division, the Commercial Litigation Branch of the Civil Division, and the Environmental Crimes Section of the Environment and Natural Resources Division can assist U.S. Attorneys' Offices in finding the appropriate agency office and in providing copies of compliance programs that were developed in previous cases.

IX. Charging a Corporation: Restitution and Remediation

A. General Principle: Although neither a corporation nor an individual target may avoid prosecution merely by paying a sum of money, a prosecutor may consider the corporation's willingness to make restitution and steps already taken to do so. A prosecutor may also consider other remedial actions, such as implementing an effective corporate compliance program, improving an existing compliance program, and disciplining wrongdoers, in determining whether to charge the corporation.

B. Comment: In determining whether or not a corporation should be prosecuted, a prosecutor may consider whether meaningful remedial measures have been taken, including employee discipline and full restitution. A corporation's response to misconduct says much about its willingness to ensure that such misconduct does not recur. Thus, corporations that fully recognize the seriousness of their misconduct and accept responsibility for it should be taking steps to implement the personnel, operational, and organizational changes necessary to establish an awareness among employees that criminal conduct will not be tolerated. Among the factors prosecutors should consider and weigh are whether the corporation appropriately disciplined the wrongdoers and disclosed information concerning their illegal conduct to the government.

Employee discipline is a difficult task for many corporations because of the human element involved and sometimes because of the seniority of the employees concerned. While corporations need to be fair to their employees, they must also be unequivocally committed, at all levels of the corporation, to the highest standards of legal and ethical behavior. Effective internal discipline can be a powerful deterrent against improper behavior by a corporation's employees. In evaluating a corporation's response to wrongdoing, prosecutors may evaluate the willingness of the corporation to discipline culpable employees of all ranks and the adequacy of the discipline imposed. The prosecutor should be satisfied that the corporation's focus is on the integrity and credibility of its remedial and disciplinary measures rather than on the protection of the wrongdoers.

In addition to employee discipline, two other factors used in evaluating a corporation's remedial efforts are restitution and reform. As with natural persons, the decision whether or not to prosecute should not depend upon the target's ability to pay restitution. A corporation's efforts to pay restitution even in advance of any court order is, however, evidence of its "acceptance of responsibility" and, consistent with the practices and policies of the appropriate Division of the Department entrusted with enforcing specific criminal laws, may be considered in determining whether to bring criminal charges. Similarly, although the inadequacy of a corporate compliance program is a factor to consider when deciding whether to charge a corporation, that corporation's quick recognition of the flaws in the program and its efforts to improve the program are also factors to consider.

X. Charging a Corporation: Collateral Consequences

A. General Principle: Prosecutors may consider the collateral consequences of a corporate criminal conviction in determining whether to charge the corporation with a criminal offense.

B. Comment: One of the factors in determining whether to charge a natural person or a corporation is whether the likely punishment is appropriate given the nature and seriousness of the crime. In the corporate context, prosecutors may take into account the possibly substantial consequences to a corporation's officers, directors, employees, and shareholders, many of whom may, depending on the size and nature (*e.g.*, publicly vs. closely held) of the corporation and their role in its operations, have played no role in the criminal conduct, have been completely unaware of it, or have been wholly unable to prevent it. Prosecutors should also be aware of non-penal sanctions that may accompany a criminal charge, such as potential suspension or debarment from eligibility for government contracts or federal funded programs such as health care. Whether or not such non-penal sanctions are appropriate or required in a particular case is the responsibility of the relevant agency, a decision that will be made based on the applicable statutes, regulations, and policies.

Virtually every conviction of a corporation, like virtually every conviction of an individual, will have an impact on innocent third parties, and the mere existence of such an effect is not sufficient to preclude prosecution of the corporation. Therefore, in evaluating the severity of collateral consequences, various factors already discussed, such as the pervasiveness of the criminal conduct and the adequacy of the corporation's compliance programs, should be considered in determining the weight to be given to this factor. For instance, the balance may tip in favor of prosecuting corporations in situations where the scope of the misconduct in a case is widespread and sustained within a corporate division (or spread throughout pockets of the corporate organization). In such cases, the possible unfairness of visiting punishment for the corporation's crimes upon shareholders may be of much less concern where those shareholders have substantially profited, even unknowingly, from widespread or pervasive criminal activity.

Similarly, where the top layers of the corporation's management or the shareholders of a closely-held corporation were engaged in or aware of the wrongdoing and the conduct at issue was accepted as a way of doing business for an extended period, debarment may be deemed not collateral, but a direct and entirely appropriate consequence of the corporation's wrongdoing.

The appropriateness of considering such collateral consequences and the weight to be given them may depend on the special policy concerns discussed in section III, *supra*.

XI. Charging a Corporation: Non-Criminal Alternatives

A. General Principle: Non-criminal alternatives to prosecution often exist and prosecutors may consider whether such sanctions would adequately deter, punish, and rehabilitate a corporation that has engaged in wrongful conduct. In evaluating the adequacy of non-criminal alternatives to prosecution, *e.g.*, civil or regulatory enforcement actions, the prosecutor may consider all relevant factors, including:

1. the sanctions available under the alternative means of disposition;

2. the likelihood that an effective sanction will be imposed; and

3. the effect of non-criminal disposition on federal law enforcement interests.

B. Comment: The primary goals of criminal law are deterrence, punishment, and rehabilitation. Non-criminal sanctions may not be an appropriate response to an egregious violation, a pattern of wrongdoing, or a history of non-criminal sanctions without proper remediation. In other cases, however, these goals may be satisfied without the necessity of instituting criminal proceedings. In determining whether federal criminal charges are appropriate, the prosecutor should consider the same factors (modified appropriately for the regulatory context) considered when determining whether to leave prosecution of a natural person to another jurisdiction or to seek non-criminal alternatives to prosecution. These factors include: the strength of the regulatory authority's interest; the regulatory authority's ability and willingness to take effective enforcement action; the probable sanction if the regulatory authority's enforcement action is upheld; and the effect of a non-criminal disposition on federal law enforcement interests. *See* USAM §§ 9-27.240, 9-27.250.

XII. Charging a Corporation: Selecting Charges

A. General Principle: Once a prosecutor has decided to charge a corporation, the prosecutor should charge, or should recommend that the grand jury charge, the most serious offense that is consistent with the nature of the defendant's conduct and that is likely to result in a sustainable conviction.

B. Comment: Once the decision to charge is made, the same rules as govern charging natural persons apply. These rules require "a faithful and honest application of the Sentencing Guidelines" and an "individualized assessment of the extent to which particular charges fit the specific circumstances of the case, are consistent with the purposes of the federal criminal code, and maximize the impact of federal resources on crime." *See* USAM § 9-27.300. In making this determination, "it is appropriate that the attorney for the government consider, inter alia, such factors as the sentencing guideline range yielded by the charge, whether the penalty yielded by such sentencing range ... is proportional to the seriousness of the defendant's conduct, and whether the charge achieves such purposes of the criminal law as punishment, protection of the public, specific and general deterrence, and rehabilitation." *See* Attorney General's Memorandum, dated October 12, 1993.

XIII. Plea Agreements with Corporations

A. General Principle: In negotiating plea agreements with corporations, prosecutors should seek a plea to the most serious, readily provable offense charged. In addition, the terms of the plea agreement should contain appropriate provisions to ensure punishment, deterrence, rehabilitation, and compliance with the plea agreement in the corporate context. Although special circumstances may mandate a different conclusion, prosecutors generally should not agree to accept a corporate guilty plea in exchange for non-prosecution or dismissal of charges against individual officers and employees.

B. Comment: Prosecutors may enter into plea agreements with corporations for the same reasons and under the same constraints as apply to plea agreements with natural persons. *See* USAM §§ 9-27.400-500. This means, *inter alia*, that the corporation should be required to plead guilty to the most serious, readily provable offense charged. As is the case with individuals, the attorney making this determination should do so "on the basis of an individualized assessment of the extent to which particular charges fit the specific circumstances of the case, are consistent with the purposes of the federal criminal code, and maximize the impact of federal resources on crime. In making this determination, the attorney for the government considers, *inter alia*, such factors as the sentencing guideline range yielded by the charge, whether the penalty yielded by such sentencing range ... is proportional to the seriousness of the defendant's conduct, and whether the charge achieves such purposes of the criminal law as punishment, protection of the public, specific and general deterrence, and rehabilitation." *See* Attorney General's Memorandum, dated October 12, 1993. In addition, any negotiated departures from the Sentencing Guidelines must be justifiable under the Guidelines and must be disclosed to the sentencing court. A corporation should be made to realize that pleading guilty to criminal charges constitutes an admission of guilt and not merely a resolution of an inconvenient distraction from its business. As with natural persons, pleas should be structured so that the corporation may not later "proclaim lack of culpability or even complete innocence." *See* USAM §§ 9-27.420(b)(4), 9-27.440, 9-27.500. Thus, for instance, there should be placed upon the record a sufficient factual basis for the plea to prevent later corporate assertions of innocence.

A corporate plea agreement should also contain provisions that recognize the nature of the corporate "person" and ensure that the principles of punishment, deterrence, and rehabilitation are met. In the corporate context, punishment and deterrence are generally accomplished by substantial fines, mandatory restitution, and institution of appropriate compliance measures, including, if necessary, continued judicial oversight or the use of special masters. *See* USSG §§ 8B1.1, 8C2.1, *et seq.* In addition, where the corporation is a government contractor, permanent or temporary debarment may be appropriate. Where the corporation was engaged in government contracting fraud, a prosecutor may not negotiate away an agency's right to debar or to list the corporate defendant.

In negotiating a plea agreement, prosecutors should also consider the deterrent value of prosecutions of individuals within the corporation. Therefore, one factor that a prosecutor may consider in determining whether to enter into a plea agreement is whether the corporation is seeking immunity for its employees and officers or whether the corporation is willing to cooperate in the investigation of culpable individuals. Prosecutors should rarely negotiate away individual criminal liability in a corporate plea.

Rehabilitation, of course, requires that the corporation undertake to be law-abiding in the future. It is, therefore, appropriate to require the corporation, as a condition of probation, to implement a compliance program or to reform an existing one. As discussed above, prosecutors may consult with the appropriate state and federal agencies and components of the Justice Department to ensure that a proposed compliance program is adequate and meets industry standards and best practices. See section VIII, *supra*.

In plea agreements in which the corporation agrees to cooperate, the prosecutor should ensure that the cooperation is complete and truthful. To do so, the prosecutor may request that the corporation waive attorney-client and work product protection, make employees and agents available for debriefing, disclose the results of its internal investigation, file appropriate certified financial statements, agree to governmental or third-party audits, and take whatever other steps are necessary to ensure that the full scope of the corporate wrongdoing is disclosed and that the responsible culprits are identified and, if appropriate, prosecuted. See generally section VII, *supra*.

This memorandum provides only internal Department of Justice guidance. It is not intended to, does not, and may not be relied upon to create any rights, substantive or procedural, enforceable at law by any party in any matter civil or criminal. Nor are any limitations hereby placed on otherwise lawful litigative prerogatives of the Department of Justice.

U.S. Department of Justice

Office of the Deputy Attorney General

The Deputy Attorney General

Washington, D.C. 20530

September 9, 2015

MEMORANDUM FOR THE ASSISTANT ATTORNEY GENERAL, ANTITRUST DIVISION
THE ASSISTANT ATTORNEY GENERAL, CIVIL DIVISION
THE ASSISTANT ATTORNEY GENERAL, CRIMINAL DIVISION
THE ASSISTANT ATTORNEY GENERAL, ENVIRONMENT AND NATURAL RESOURCES DIVISION
THE ASSISTANT ATTORNEY GENERAL, NATIONAL SECURITY DIVISION
THE ASSISTANT ATTORNEY GENERAL, TAX DIVISION
THE DIRECTOR, FEDERAL BUREAU OF INVESTIGATION
THE DIRECTOR, EXECUTIVE OFFICE FOR UNITED STATES TRUSTEES
ALL UNITED STATES ATTORNEYS

FROM: Sally Quillian Yates
Deputy Attorney General

SUBJECT: Individual Accountability for Corporate Wrongdoing

Fighting corporate fraud and other misconduct is a top priority of the Department of Justice. Our nation's economy depends on effective enforcement of the civil and criminal laws that protect our financial system and, by extension, all our citizens. These are principles that the Department lives and breathes—as evidenced by the many attorneys, agents, and support staff who have worked tirelessly on corporate investigations, particularly in the aftermath of the financial crisis.

One of the most effective ways to combat corporate misconduct is by seeking accountability from the individuals who perpetrated the wrongdoing. Such accountability is important for several reasons: it deters future illegal activity, it incentivizes changes in corporate behavior, it ensures that the proper parties are held responsible for their actions, and it promotes the public's confidence in our justice system.

There are, however, many substantial challenges unique to pursuing individuals for corporate misdeeds. In large corporations, where responsibility can be diffuse and decisions are made at various levels, it can be difficult to determine if someone possessed the knowledge and criminal intent necessary to establish their guilt beyond a reasonable doubt. This is particularly true when determining the culpability of high-level executives, who may be insulated from the day-to-day activity in which the misconduct occurs. As a result, investigators often must reconstruct what happened based on a painstaking review of corporate documents, which can number in the millions, and which may be difficult to collect due to legal restrictions.

These challenges make it all the more important that the Department fully leverage its resources to identify culpable individuals at all levels in corporate cases. To address these challenges, the Department convened a working group of senior attorneys from Department components and the United States Attorney community with significant experience in this area. The working group examined how the Department approaches corporate investigations, and identified areas in which it can amend its policies and practices in order to most effectively pursue the individuals responsible for corporate wrongs. This memo is a product of the working group's discussions.

The measures described in this memo are steps that should be taken in any investigation of corporate misconduct. Some of these measures are new, while others reflect best practices that are already employed by many federal prosecutors. Fundamentally, this memo is designed to ensure that all attorneys across the Department are consistent in our best efforts to hold to account the individuals responsible for illegal corporate conduct.

The guidance in this memo will also apply to civil corporate matters. In addition to recovering assets, civil enforcement actions serve to redress misconduct and deter future wrongdoing. Thus, civil attorneys investigating corporate wrongdoing should maintain a focus on the responsible individuals, recognizing that holding them to account is an important part of protecting the public fisc in the long term.

The guidance in this memo reflects six key steps to strengthen our pursuit of individual corporate wrongdoing, some of which reflect policy shifts and each of which is described in greater detail below: (1) in order to qualify for any cooperation credit, corporations must provide to the Department all relevant facts relating to the individuals responsible for the misconduct; (2) criminal and civil corporate investigations should focus on individuals from the inception of the investigation; (3) criminal and civil attorneys handling corporate investigations should be in routine communication with one another; (4) absent extraordinary circumstances or approved departmental policy, the Department will not release culpable individuals from civil or criminal liability when resolving a matter with a corporation; (5) Department attorneys should not resolve matters with a corporation without a clear plan to resolve related individual cases, and should

memorialize any declinations as to individuals in such cases; and (6) civil attorneys should consistently focus on individuals as well as the company and evaluate whether to bring suit against an individual based on considerations beyond that individual's ability to pay.[1]

I have directed that certain criminal and civil provisions in the United States Attorney's Manual, more specifically the Principles of Federal Prosecution of Business Organizations (USAM 9-28.000 *et seq.*) and the commercial litigation provisions in Title 4 (USAM 4-4.000 *et seq.*), be revised to reflect these changes. The guidance in this memo will apply to all future investigations of corporate wrongdoing. It will also apply to those matters pending as of the date of this memo, to the extent it is practicable to do so.

1. To be eligible for <u>any</u> cooperation credit, corporations must provide to the Department all relevant facts about the individuals involved in corporate misconduct.

In order for a company to receive <u>any</u> consideration for cooperation under the Principles of Federal Prosecution of Business Organizations, the company must completely disclose to the Department all relevant facts about individual misconduct. Companies cannot pick and choose what facts to disclose. That is, to be eligible for any credit for cooperation, the company must identify all individuals involved in or responsible for the misconduct at issue, regardless of their position, status or seniority, and provide to the Department all facts relating to that misconduct. If a company seeking cooperation credit declines to learn of such facts or to provide the Department with complete factual information about individual wrongdoers, its cooperation will not be considered a mitigating factor pursuant to USAM 9-28.700 *et seq.*[2] Once a company meets the threshold requirement of providing all relevant facts with respect to individuals, it will be eligible for consideration for cooperation credit. The extent of that cooperation credit will depend on all the various factors that have traditionally applied in making this assessment (*e.g.*, the timeliness of the cooperation, the diligence, thoroughness, and speed of the internal investigation, the proactive nature of the cooperation, etc.).

This condition of cooperation applies equally to corporations seeking to cooperate in civil matters; a company under civil investigation must provide to the Department all relevant facts about individual misconduct in order to receive any consideration in the negotiation. For

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[1] The measures laid out in this memo are intended solely to guide attorneys for the government in accordance with their statutory responsibilities and federal law. They are not intended to, do not, and may not be relied upon to create a right or benefit, substantive or procedural, enforceable at law by a party to litigation with the United States.

[2] Nor, if a company is prosecuted, will it support a cooperation-related reduction at sentencing. *See* U.S.S.G. USSG § 8C2.5(g), Application Note 13 ("A prime test of whether the organization has disclosed all pertinent information" necessary to receive a cooperation-related reduction in its offense level calculation "is whether the information is sufficient ... to identify ... the individual(s) responsible for the criminal conduct").

example, the Department's position on "full cooperation" under the False Claims Act, 31 U.S.C. § 3729(a)(2), will be that, at a minimum, all relevant facts about responsible individuals must be provided.

The requirement that companies cooperate completely as to individuals, within the bounds of the law and legal privileges, *see* USAM 9-28.700 to 9-28.760, does not mean that Department attorneys should wait for the company to deliver the information about individual wrongdoers and then merely accept what companies provide. To the contrary, Department attorneys should be proactively investigating individuals at every step of the process – before, during, and after any corporate cooperation. Department attorneys should vigorously review any information provided by companies and compare it to the results of their own investigation, in order to best ensure that the information provided is indeed complete and does not seek to minimize the behavior or role of any individual or group of individuals.

Department attorneys should strive to obtain from the company as much information as possible about responsible individuals before resolving the corporate case. But there may be instances where the company's continued cooperation with respect to individuals will be necessary post-resolution. In these circumstances, the plea or settlement agreement should include a provision that requires the company to provide information about all culpable individuals and that is explicit enough so that a failure to provide the information results in specific consequences, such as stipulated penalties and/or a material breach.

2. Both criminal and civil corporate investigations should focus on individuals from the inception of the investigation.

Both criminal and civil attorneys should focus on individual wrongdoing from the very beginning of any investigation of corporate misconduct. By focusing on building cases against individual wrongdoers from the inception of an investigation, we accomplish multiple goals. First, we maximize our ability to ferret out the full extent of corporate misconduct. Because a corporation only acts through individuals, investigating the conduct of individuals is the most efficient and effective way to determine the facts and extent of any corporate misconduct. Second, by focusing our investigation on individuals, we can increase the likelihood that individuals with knowledge of the corporate misconduct will cooperate with the investigation and provide information against individuals higher up the corporate hierarchy. Third, by focusing on individuals from the very beginning of an investigation, we maximize the chances that the final resolution of an investigation uncovering the misconduct will include civil or criminal charges against not just the corporation but against culpable individuals as well.

3. Criminal and civil attorneys handling corporate investigations should be in routine communication with one another.

Early and regular communication between civil attorneys and criminal prosecutors handling corporate investigations can be crucial to our ability to effectively pursue individuals in

these matters. Consultation between the Department's civil and criminal attorneys, together with agency attorneys, permits consideration of the full range of the government's potential remedies (including incarceration, fines, penalties, damages, restitution to victims, asset seizure, civil and criminal forfeiture, and exclusion, suspension and debarment) and promotes the most thorough and appropriate resolution in every case. That is why the Department has long recognized the importance of parallel development of civil and criminal proceedings. *See* USAM 1-12.000.

Criminal attorneys handling corporate investigations should notify civil attorneys as early as permissible of conduct that might give rise to potential individual civil liability, even if criminal liability continues to be sought. Further, if there is a decision not to pursue a criminal action against an individual – due to questions of intent or burden of proof, for example – criminal attorneys should confer with their civil counterparts so that they may make an assessment under applicable civil statutes and consistent with this guidance. Likewise, if civil attorneys believe that an individual identified in the course of their corporate investigation should be subject to a criminal inquiry, that matter should promptly be referred to criminal prosecutors, regardless of the current status of the civil corporate investigation.

Department attorneys should be alert for circumstances where concurrent criminal and civil investigations of individual misconduct should be pursued. Coordination in this regard should happen early, even if it is not certain that a civil or criminal disposition will be the end result for the individuals or the company.

4. Absent extraordinary circumstances, no corporate resolution will provide protection from criminal or civil liability for any individuals.

There may be instances where the Department reaches a resolution with the company before resolving matters with responsible individuals. In these circumstances, Department attorneys should take care to preserve the ability to pursue these individuals. Because of the importance of holding responsible individuals to account, absent extraordinary circumstances or approved departmental policy such as the Antitrust Division's Corporate Leniency Policy, Department lawyers should not agree to a corporate resolution that includes an agreement to dismiss charges against, or provide immunity for, individual officers or employees. The same principle holds true in civil corporate matters; absent extraordinary circumstances, the United States should not release claims related to the liability of individuals based on corporate settlement releases. Any such release of criminal or civil liability due to extraordinary circumstances must be personally approved in writing by the relevant Assistant Attorney General or United States Attorney.

5. **Corporate cases should not be resolved without a clear plan to resolve related individual cases before the statute of limitations expires and declinations as to individuals in such cases must be memorialized.**

If the investigation of individual misconduct has not concluded by the time authorization is sought to resolve the case against the corporation, the prosecution or corporate authorization memorandum should include a discussion of the potentially liable individuals, a description of the current status of the investigation regarding their conduct and the investigative work that remains to be done, and an investigative plan to bring the matter to resolution prior to the end of any statute of limitations period. If a decision is made at the conclusion of the investigation not to bring civil claims or criminal charges against the individuals who committed the misconduct, the reasons for that determination must be memorialized and approved by the United States Attorney or Assistant Attorney General whose office handled the investigation, or their designees.

Delays in the corporate investigation should not affect the Department's ability to pursue potentially culpable individuals. While every effort should be made to resolve a corporate matter within the statutorily allotted time, and tolling agreements should be the rare exception, in situations where it is anticipated that a tolling agreement is nevertheless unavoidable and necessary, all efforts should be made either to resolve the matter against culpable individuals before the limitations period expires or to preserve the ability to charge individuals by tolling the limitations period by agreement or court order.

6. **Civil attorneys should consistently focus on individuals as well as the company and evaluate whether to bring suit against an individual based on considerations beyond that individual's ability to pay.**

The Department's civil enforcement efforts are designed not only to return government money to the public fisc, but also to hold the wrongdoers accountable and to deter future wrongdoing. These twin aims – of recovering as much money as possible, on the one hand, and of accountability for and deterrence of individual misconduct, on the other – are equally important. In certain circumstances, though, these dual goals can be in apparent tension with one another, for example, when it comes to the question of whether to pursue civil actions against individual corporate wrongdoers who may not have the necessary financial resources to pay a significant judgment.

Pursuit of civil actions against culpable individuals should not be governed solely by those individuals' ability to pay. In other words, the fact that an individual may not have sufficient resources to satisfy a significant judgment should not control the decision on whether to bring suit. Rather, in deciding whether to file a civil action against an individual, Department attorneys should consider factors such as whether the person's misconduct was serious, whether

it is actionable, whether the admissible evidence will probably be sufficient to obtain and sustain a judgment, and whether pursuing the action reflects an important federal interest. Just as our prosecutors do when making charging decisions, civil attorneys should make individualized assessments in deciding whether to bring a case, taking into account numerous factors, such as the individual's misconduct and past history and the circumstances relating to the commission of the misconduct, the needs of the communities we serve, and federal resources and priorities.

Although in the short term certain cases against individuals may not provide as robust a monetary return on the Department's investment, pursuing individual actions in civil corporate matters will result in significant long-term deterrence. Only by seeking to hold individuals accountable in view of all of the factors above can the Department ensure that it is doing everything in its power to minimize corporate fraud, and, over the course of time, minimize losses to the public fisc through fraud.

Conclusion

The Department makes these changes recognizing the challenges they may present. But we are making these changes because we believe they will maximize our ability to deter misconduct and to hold those who engage in it accountable.

In the months ahead, the Department will be working with components to turn these policies into everyday practice. On September 16, 2015, for example, the Department will be hosting a training conference in Washington, D.C., on this subject, and I look forward to further addressing the topic with some of you then.

JUSTICE NEWS

Deputy Attorney General Rod J. Rosenstein Delivers Remarks at the American Conference Institute's 35th International Conference on the Foreign Corrupt Practices Act

Oxon Hill, MD ~ Thursday, November 29, 2018

Remarks as prepared for delivery

Thank you, Sandra [Moser]. I appreciate your exceptional work for the Department of Justice. As the chief of the Criminal Division's Fraud Section, Sandra leads our efforts to enforce the Foreign Corrupt Practices Act. And she has helped to develop and implement many policy improvements.

It is nice to be in a room with so many friendly lawyers. As you know, the legal profession prizes collegiality. Once upon a time, there was a small town with just one lawyer who suffered from a lack of business. Then another lawyer moved to town, and they both prospered. So you see, lawyers benefit from collegiality.

I know that many of you have served in the Department of Justice, so you understand our work. In some respects, you serve a law enforcement function even today: you counsel clients about how to comply with the law so that they will not wind up on the wrong side of Sandra and her colleagues.

Prosecuting crime is our tool, but our goal is deterring crime. We want less business. Our Department's 115,000 employees work every day to uphold the rule of law, fulfilling the mission articulated in our name: Justice.

A few months after the creation of our federal government in 1789, President George Washington started the tradition of issuing a Thanksgiving Proclamation. He expressed thanks "for the peaceable and rational manner, in which we have been enabled to establish constitutions of government for our safety and happiness." President Washington prayed that the national government would be "a blessing to all the people, by constantly being a Government of wise, just, and constitutional laws, discreetly and faithfully executed and obeyed."

Almost a century later, in 1863, President Abraham Lincoln issued a Thanksgiving proclamation. In the midst of the Civil War, Lincoln expressed gratitude that the rule of law continued to be observed in most of the country. Outside of the battlefields, "order ha[d] been maintained, the laws ha[d] been respected and obeyed, and harmony ha[d] prevailed." Not even a civil war could extinguish America's commitment to the rule of law.

Another hundred years later, in 1987, President Ronald Reagan celebrated the bicentennial of the Constitution. His Thanksgiving Proclamation declared that "[t]he cause for which we give thanks, for which so many of our citizens through the years have given their lives, has endured 200 years – a blessing to us and a light to all mankind."

The cause continues. Earlier this year, President Donald Trump issued a proclamation explaining that "we govern ourselves in accordance with the rule of law rather [than] … the whims of an elite few or the dictates of collective will. Through law, we have ensured liberty."

As President Trump recognized, law provides the framework for free people to conduct their lives. At its best, law reflects moral choices; principled decisions that promote the best interests of society, and protect the fundamental rights of citizens.

The term "rule of law" describes the government's obligation to follow neutral principles and fair processes. The ideal dates at least to the time of Greek philosopher Aristotle, who wrote, "It is more proper that law should govern than any one of the citizens: upon the same principle, if it is advantageous to place the supreme power in some particular persons, they should be appointed to be only guardians, and the servants of the law."

The rule of law is indispensable to a thriving and vibrant society. It shields citizens from government overreach. It allows businesses to invest with confidence. It gives innovators protection for their discoveries. It keeps people safe from dangerous criminals. And it allows us to resolve differences peacefully through reason and logic.

When we follow the rule of law, it does not always yield the outcome we prefer. In fact, one indicator that we are following the law is when we respect a result that we do not agree with. We respect it because it is required by an objective analysis of the facts and a rational application of the rules.

The rule of law is not simply about words written on paper. The culture of a society and the character of the people who enforce the law determine whether the rule of law endures.

One of the ways that we uphold the rule of law is to fight bribery and corruption. Until a few decades ago, paying bribes was viewed as a necessary part of doing business abroad. Some American companies were unapologetic about corrupt payments.

In 1976, the U.S. Senate Banking Committee revealed that hundreds of U.S. companies had bribed foreign officials, with payments that totaled hundreds of millions of dollars. The Committee concluded that there was a need for anti-bribery legislation. It reasoned that "[c]orporate bribery is bad business" and "fundamentally destructive" in a free market society. That was the basis for the Foreign Corrupt Practices Act.

I visited the nation of Armenia in 1994, just as it was emerging from seven decades of Soviet domination. I gave a talk about public corruption at the University of Yerevan. After I finished, a student raised his hand. He asked me, "If you cannot pay bribes in America, how do you get electricity?"

It was a pragmatic question that illustrated how that young man had learned to think about his society. Corruption may start small, but it tends to spread like an infection. It stifles innovation, fuels inefficiency, and inculcates distrust of government.

We aim to prevent corruption. Your agenda includes a presentation by Sandra Moser and FCPA Unit Chief Dan Kahn. They will describe our prosecutors' efforts to enforce the FCPA, fight bribery around the world, and protect markets and governments from the debilitating effects of corruption.

Over the past year, our FCPA Unit reached eight corporate resolutions, four of which were coordinated with foreign authorities. The cases involved a total of almost one billion dollars in corporate criminal fines, penalties, and forfeitures.

Many of our cases require extensive coordination with domestic and foreign law enforcement partners. Three recent corporate resolutions involved collaboration with the Securities and Exchange Commission.

Those settlements resulted from coordinated dispositions consistent with the policy against "piling on" that we announced in May. Under that new policy, Department components work jointly with other enforcement agencies with overlapping jurisdiction. Our goal is to enhance relationships with law enforcement partners in the United States and abroad, and avoid duplicative penalties.

It is important to punish wrongdoers. But we should discourage the sort of disproportionate and inefficient enforcement that can result if multiple authorities repeatedly pursue the same violator for the same misconduct.

We recently announced our first coordinated FCPA resolution with French authorities. We also worked with authorities in the United Kingdom, Singapore, and Brazil. Anyone who considers committing fraud with the hope of hiding their misconduct in foreign jurisdictions, should know that the arm of American law enforcement is long. We work every day with partners around the globe to root out and punish misconduct that distorts markets and corrupts political systems.

The success of our FCPA program is part of a broader effort to combat corporate and white-collar crime. The Department announced last month that white collar prosecutions increased in 2018, to more than 6,500 defendants.

Fighting white collar crime is a top priority for the Department, and we increased prosecutions in every priority area last year. Thanks to a series of initiatives and policy enhancements, we are making white collar enforcement more effective and more efficient.

President Trump issued an executive order instructing us to strengthen our efforts to investigate and prosecute fraud, and we are following through on that mandate. Leaders of the Securities and Exchange Commission, the Federal Trade Commission, and the Bureau of Consumer Financial Protection joined the Department of Justice in July to announce a new Task Force on Market Integrity and Consumer Fraud.

The Task Force established working groups to focus on financial fraud, health care fraud, consumer fraud, and fraud against the government. Department officials and leaders of other relevant agencies co-chair the working groups.

The Task Force created a new web site to explain its goals and track its accomplishments. You can find it at www.justice.gov/fraudtaskforce. The site contains links to useful resources on fraud detection and prevention.

The Task Force will promote inter-agency cooperation, consider policy changes, and implement enforcement initiatives.

We welcome your input about how best to deter fraud and foster increased cooperation so our investigations will be both expeditious and effective. If you have any suggestions, I encourage you to contact the task force executive director, Associate Deputy Attorney General Matt Baughman.

Focusing on individual wrongdoers is an important aspect of the Department's FCPA program. Over the past year, we announced charges against more than 30 individual defendants, and convictions of 19 individuals.

Last year, we initiated a review of our Department's policy concerning individual accountability in corporate cases, to consider suggestions by our own employees and outside stakeholders about opportunities for improvements that will promote efficient enforcement and reduce fraud.

Today, we are announcing changes that reflect valuable input from the Department's criminal and civil lawyers, law enforcement agents, and private sector stakeholders.

Under our revised policy, pursuing individuals responsible for wrongdoing will be a top priority in every corporate investigation.

It is important to impose penalties on corporations that engage in misconduct. Cases against corporate entities allow us to recover fraudulent proceeds, reimburse victims, and deter future wrongdoing. Corporate-level resolutions also allow us to reward effective compliance programs and penalize companies that condone or ignore wrongdoing.

But the deterrent impact on the individual people responsible for wrongdoing is sometimes attenuated in corporate prosecutions. Corporate cases often penalize innocent employees and shareholders without effectively punishing the human beings responsible for making corrupt decisions.

The most effective deterrent to corporate criminal misconduct is identifying and punishing the people who committed the crimes. So we revised our policy to make clear that absent extraordinary circumstances, a corporate resolution should not protect individuals from criminal liability.

Our revised policy also makes clear that any company seeking cooperation credit in criminal cases must identify every individual who was substantially involved in or responsible for the criminal conduct.

In response to concerns raised about the inefficiency of requiring companies to identify every employee involved regardless of relative culpability, however, we now make clear that investigations should not be delayed merely to collect information about individuals whose involvement was not substantial, and who are not likely to be prosecuted.

We want to focus on the individuals who play significant roles in setting a company on a course of criminal conduct. We want to know who authorized the misconduct, and what they knew about it.

The notion that companies should be required to locate and report to the government every person involved in alleged misconduct in any way, regardless of their role, may sound reasonable. In fact, my own initial reaction was that it seemed like a great idea. But consider cases in which the government alleges that routine activities of many employees of a large corporation were part of an illegal scheme.

When the government alleges violations that involved activities throughout the company over a long period of time, it is not practical to require the company to identify every employee who played any role in the conduct. That is particularly challenging when the company and the government want to resolve the matter even though they disagree about the scope of the misconduct. In fact, we learned that the policy was not strictly enforced in some cases because it would have impeded resolutions and wasted resources. Our policies need to work in the real world of limited investigative resources.

Companies that want to cooperate in exchange for credit are encouraged to have full and frank discussions with prosecutors about how to gather the relevant facts. If we find that a company is not operating in good faith to identify individuals who were substantially involved in or responsible for wrongdoing, we will not award any cooperation credit.

Civil cases are different. The primary goal of affirmative civil enforcement cases is to recover money, and we have a responsibility to use the resources entrusted to us efficiently. Based on the experience of our civil lawyers over the past three years, the "all or nothing" approach to cooperation introduced a few years ago was counterproductive in civil cases. When criminal liability is not at issue, our attorneys need flexibility to accept settlements that remedy the harm and deter future violations, so they can move on to other important cases.

The idea that a company that engaged in a pattern of wrongdoing should always be required to admit the civil liability of every individual employee as well as the company is attractive in theory, but it proved to be inefficient and pointless in practice. Our civil litigators simply cannot take the time to pursue civil cases against every individual employee who may be liable for misconduct, and we cannot afford to delay corporate resolutions because a bureaucratic rule suggests that companies need to continue investigating until they identify all involved employees and reach an agreement with the government about their roles.

Therefore, we are revising the policy to restore some of the discretion that civil attorneys traditionally exercised – with supervisory review.

The most important aspect of our policy is that a company must identify all wrongdoing by senior officials, including members of senior management or the board of directors, if it wants to earn any credit for cooperating in a civil case.

If a corporation wants to earn maximum credit, it must identify every individual person who was substantially involved in or responsible for the misconduct.

When a company honestly did meaningfully assist the government's investigation, our civil attorneys now have discretion to offer some credit even if the company does not qualify for maximum credit. When we allow only a binary choice –full credit or no credit – experience demonstrates that it delays the resolution of some cases while providing little or no benefit.

In a civil False Claims Act case, for example, a company might make a voluntary disclosure and provide valuable assistance that justifies some credit even if the company is either unwilling to stipulate about which non-managerial employees are culpable, or eager to resolve the case without conducting a costly investigation to identify every individual who might face civil liability in theory, but in reality would not be sued personally.

So our attorneys may reward cooperation that meaningfully assisted the government's civil investigation, without the need to agree about every employee with potential individual liability.

As with the "all or nothing" criminal policy, we understand that the civil policy was not strictly enforced in many cases. I prefer realistic internal guidance that allows our employees to reach just results while following the policy in good faith.

I want to emphasize that our policy does not allow corporations to conceal wrongdoing by senior officials. To the contrary, it prohibits our attorneys from awarding any credit whatsoever to any corporation that conceals misconduct by members of senior management or the board of directors, or otherwise demonstrates a lack of good faith in its representations. Companies caught hiding misconduct by senior leaders or failing to act in good faith will not be eligible for any credit.

Other policy changes return discretion to our civil lawyers to resolve each case consistent with relevant facts and circumstances. Department attorneys are permitted to negotiate civil releases for individuals who do not warrant

additional investigation in corporate civil settlement agreements, again with appropriate supervisory approval.

And our attorneys once again are permitted to consider an individual's ability to pay in deciding whether to pursue a civil judgment. We generally do not want attorneys to spend time pursuing civil litigation that is unlikely to yield any benefit; not while other worthy cases are competing for our attention.

These commonsense reforms restore to our attorneys some of the discretion they previously exercised in civil cases; the same discretion routinely exercised by private lawyers and clients and by government agencies responsible for using their resources most efficiently to achieve their enforcement mission.

Returning discretion to Department attorneys is consistent with our commitment to hold individuals accountable in every appropriate case, using both our civil and criminal enforcement authorities. The Department will vigorously and diligently pursue enforcement actions against individuals in every case where it is justified by the facts. If it is not justified, we will move on.

Let me conclude by acknowledging that most companies want to do the right thing. Companies that self-report, cooperate, and remediate the harm they caused will be rewarded. Companies that condone or ignore misconduct will pay the price.

These policy changes reflect a lot of deliberation and analysis by experienced government and private sector lawyers who understand the practical implications of our policies and how they sometimes help – but sometimes inhibit – efforts to achieve our goals.

In summary, our corporate enforcement policies should encourage companies to implement improved compliance programs, to cooperate in our investigations, to resolve cases expeditiously, and to assist in identifying culpable individuals so that they also can be held accountable when appropriate. It is not always possible to achieve all of those goals, but the new policies strike a reasonable balance.

We will monitor the results, and we will revisit policies if warranted. As someone once remarked, "In God we trust; all others must bring data."

Thank you very much.

NOTE: The links to the aforementioned changes can be found below:

https://www.justice.gov/jm/jm-1-12000-coordination-parallel-criminal-civil-regulatory-and-administrative-proceedings#1-12.000

https://www.justice.gov/jm/jm-4-3000-compromising-and-closing#4-3.100

https://www.justice.gov/jm/jm-9-28000-principles-federal-prosecution-business-organizations#9-28.210

https://www.justice.gov/jm/jm-9-28000-principles-federal-prosecution-business-organizations#9-28.300

https://www.justice.gov/jm/jm-9-28000-principles-federal-prosecution-business-organizations#9-28.700

Speaker:
Deputy Attorney General Rod J. Rosenstein

Topic(s):
Foreign Corruption

Component(s):
Office of the Deputy Attorney General

9-47.120 - FCPA Corporate Enforcement Policy

1. Credit for Voluntary Self-Disclosure, Full Cooperation, and Timely and Appropriate Remediation in FCPA Matters

Due to the unique issues presented in FCPA matters, including their inherently international character and other factors, the FCPA Corporate Enforcement Policy is aimed at providing additional benefits to companies based on their corporate behavior once they learn of misconduct. When a company has voluntarily self-disclosed misconduct in an FCPA matter, fully cooperated, and timely and appropriately remediated, all in accordance with the standards set forth below, there will be a presumption that the company will receive a declination absent aggravating circumstances involving the seriousness of the offense or the nature of the offender. Aggravating circumstances that may warrant a criminal resolution include, but are not limited to, involvement by executive management of the company in the misconduct; a significant profit to the company from the misconduct; pervasiveness of the misconduct within the company; and criminal recidivism.

If a criminal resolution is warranted for a company that has voluntarily self-disclosed, fully cooperated, and timely and appropriately remediated, the Fraud Section:

- will accord, or recommend to a sentencing court, a 50% reduction off of the low end of the U.S. Sentencing Guidelines (U.S.S.G.) fine range, except in the case of a criminal recidivist; and
- generally will not require appointment of a monitor if a company has, at the time of resolution, implemented an effective compliance program.

To qualify for the FCPA Corporate Enforcement Policy, the company is required to pay all disgorgement, forfeiture, and/or restitution resulting from the misconduct at issue.

2. Limited Credit for Full Cooperation and Timely and Appropriate Remediation in FCPA Matters Without Voluntary Self-Disclosure

If a company did not voluntarily disclose its misconduct to the Department of Justice (the Department) in accordance with the standards set forth above, but later fully cooperated and timely and appropriately remediated in accordance with the standards set forth above, the company will receive, or the Department will recommend to a sentencing court, up to a 25% reduction off of the low end of the U.S.S.G. fine range.

3. Definitions

a. *Voluntary Self-Disclosure in FCPA Matters*

In evaluating self-disclosure, the Department will make a careful assessment of the circumstances of the disclosure. The Department will require the following items for a company to receive credit for voluntary self-disclosure of wrongdoing:

- The voluntary disclosure qualifies under U.S.S.G. § 8C2.5(g)(1) as occurring "prior to an imminent threat of disclosure or government investigation";
- The company discloses the conduct to the Department "within a reasonably prompt time after becoming aware of the offense," with the burden being on the company to demonstrate timeliness; and
- The company discloses all relevant facts known to it, including all relevant facts about all individuals substantially involved in or responsible for the violation of law.

b. *Full Cooperation in FCPA Matters*

In addition to the provisions contained in the Principles of Federal Prosecution of Business Organizations to satisfy the threshold for any cooperation credit, see JM 9-28.000, the following items will be required for a company to receive maximum credit for full cooperation for purposes of JM 9-47.120(1) (beyond the credit available under the U.S.S.G.):

- Disclosure on a timely basis of all facts relevant to the wrongdoing at issue, including: all relevant facts gathered during a company's independent investigation; attribution of facts to specific sources where such attribution does not violate the attorney-client privilege, rather than a general narrative of the facts; timely updates on a company's internal investigation, including but not limited to rolling disclosures of information; all facts related to involvement in the criminal activity by the company's officers, employees, or agents; and all facts known or that become known to the company regarding potential criminal conduct by all third-party companies (including their officers, employees, or agents);
- Proactive cooperation, rather than reactive; that is, the company must timely disclose all facts that are relevant to the investigation, even when not specifically asked to do so, and, where the company is or should be aware of opportunities for the Department to obtain relevant evidence not in the company's possession and not otherwise known to the Department, it must identify those opportunities to the Department;
- Timely preservation, collection, and disclosure of relevant documents and information relating to their provenance, including (a) disclosure of overseas documents, the locations in which such documents were found, and who found the documents, (b) facilitation of third-party production of documents, and (c) where requested and appropriate, provision of translations of relevant documents in foreign languages;
    - Note: Where a company claims that disclosure of overseas documents is prohibited due to data privacy, blocking statutes, or other reasons related to

foreign law, the company bears the burden of establishing the prohibition. Moreover, a company should work diligently to identify all available legal bases to provide such documents;

- Where requested and appropriate, de-confliction of witness interviews and other investigative steps that a company intends to take as part of its internal investigation with steps that the Department intends to take as part of its investigation[1]; and
- Where requested, making available for interviews by the Department those company officers and employees who possess relevant information; this includes, where appropriate and possible, officers, employees, and agents located overseas as well as former officers and employees (subject to the individuals' Fifth Amendment rights), and, where possible, the facilitation of third-party production of witnesses.

c. *Timely and Appropriate Remediation in FCPA Matters*

The following items will be required for a company to receive full credit for timely and appropriate remediation for purposes of JM 9-47.120(1) (beyond the credit available under the U.S.S.G.):

- Demonstration of thorough analysis of causes of underlying conduct (i.e., a root cause analysis) and, where appropriate, remediation to address the root causes;
- Implementation of an effective compliance and ethics program, the criteria for which will be periodically updated and which may vary based on the size and resources of the organization, but may include:
    - The company's culture of compliance, including awareness among employees that any criminal conduct, including the conduct underlying the investigation, will not be tolerated;
    - The resources the company has dedicated to compliance;
    - The quality and experience of the personnel involved in compliance, such that they can understand and identify the transactions and activities that pose a potential risk;
    - The authority and independence of the compliance function and the availability of compliance expertise to the board;
    - The effectiveness of the company's risk assessment and the manner in which the company's compliance program has been tailored based on that risk assessment;
    - The compensation and promotion of the personnel involved in compliance, in view of their role, responsibilities, performance, and other appropriate factors;
    - The auditing of the compliance program to assure its effectiveness; and
    - The reporting structure of any compliance personnel employed or contracted by the company.
- Appropriate discipline of employees, including those identified by the company as responsible for the misconduct, either through direct participation or failure in oversight, as well as those with supervisory authority over the area in which the criminal conduct occurred;

- Appropriate retention of business records, and prohibiting the improper destruction or deletion of business records, including implementing appropriate guidance and controls on the use of personal communications and ephemeral messaging platforms that undermine the company's ability to appropriately retain business records or communications or otherwise comply with the company's document retention policies or legal obligations; and
- Any additional steps that demonstrate recognition of the seriousness of the company's misconduct, acceptance of responsibility for it, and the implementation of measures to reduce the risk of repetition of such misconduct, including measures to identify future risks.

4. Comment

Cooperation Credit: Cooperation comes in many forms. Once the threshold requirements set out at JM 9-28.700 have been met, the Department will assess the scope, quantity, quality, and timing of cooperation based on the circumstances of each case when assessing how to evaluate a company's cooperation under the FCPA Corporate Enforcement Policy.

"De-confliction" is one factor that the Department may consider in appropriate cases in evaluating whether and how much credit that a company will receive for cooperation. When the Department does make a request to a company to defer investigative steps, such as the interview of company employees or third parties, such a request will be made for a limited period of time and be narrowly tailored to a legitimate investigative purpose (e.g., to prevent the impeding of a specified aspect of the Department's investigation). Once the justification dissipates, the Department will notify the company that the Department is lifting its request.

Where a company asserts that its financial condition impairs its ability to cooperate more fully, the company will bear the burden to provide factual support for such an assertion. The Department will closely evaluate the validity of any such claim and will take the impediment into consideration in assessing whether the company has fully cooperated.

As set forth in JM 9-28.720, eligibility for cooperation or voluntary self-disclosure credit is not in any way predicated upon waiver of the attorney-client privilege or work product protection, and none of the requirements above require such waiver. Nothing herein alters that policy, which remains in full force and effect. Furthermore, not all companies will satisfy all the components of full cooperation for purposes of JM 9-47.120(2) and (3)(b), either because they decide to cooperate only later in an investigation or they timely decide to cooperate but fail to meet all of the criteria listed above. In general, such companies will be eligible for some cooperation credit if they meet the criteria of JM 9-28.700, but the credit generally will be markedly less than for full cooperation, depending on the extent to which the cooperation was lacking.

Remediation: In order for a company to receive full credit for remediation and avail itself of the benefits of the FCPA Corporate Enforcement Policy, the company must have effectively remediated at the time of the resolution.

The requirement that a company pay all disgorgement, forfeiture, and/or restitution resulting from the misconduct at issue may be satisfied by a parallel resolution with a relevant regulator (e.g., the United States Securities and Exchange Commission).

M&A Due Diligence and Remediation: The Department recognizes the potential benefits of corporate mergers and acquisitions, particularly when the acquiring entity has a robust compliance program in place and implements that program as quickly as practicable at the merged or acquired entity. Accordingly, where a company undertakes a merger or acquisition, uncovers misconduct through thorough and timely due diligence or, in appropriate instances, through post-acquisition audits or compliance integration efforts, and voluntarily self-discloses the misconduct and otherwise takes action consistent with this Policy (including, among other requirements, the timely implementation of an effective compliance program at the merged or acquired entity), there will be a presumption of a declination in accordance with and subject to the other requirements of this Policy.[2]

Public Release: A declination pursuant to the FCPA Corporate Enforcement Policy is a case that would have been prosecuted or criminally resolved except for the company's voluntary disclosure, full cooperation, remediation, and payment of disgorgement, forfeiture, and/or restitution. If a case would have been declined in the absence of such circumstances, it is not a declination pursuant to this Policy. Declinations awarded under the FCPA Corporate Enforcement Policy will be made public.

[1]: Although the Department may, where appropriate, request that a company refrain from taking a specific action for a limited period of time for de-confliction purposes, the Department will not take any steps to affirmatively direct a company's internal investigation efforts.

[2]: In appropriate cases, an acquiring company that discloses misconduct may be eligible for a declination, even if aggravating circumstances existed as to the acquired entity.

[updated March 2019]

U.S. Department of Justice

Criminal Division

Office of the Assistant Attorney General *Washington, D.C. 20530*

October 11, 2018

TO: All Criminal Division Personnel

FROM: Brian A. Benczkowski
Assistant Attorney General

SUBJECT: Selection of Monitors in Criminal Division Matters

The purpose of this memorandum is to establish standards, policy, and procedures for the selection of monitors in matters being handled by Criminal Division attorneys.[1] This memorandum supplements the guidance provided by the memorandum entitled, "Selection and Use of Monitors in Deferred Prosecution Agreements and Non-Prosecution Agreements with Corporations," issued by then-Acting Deputy Attorney General, Craig S. Morford (hereinafter referred to as the "Morford Memorandum" or "Memorandum").[2] The standards, policy, and procedures contained in this memorandum shall apply to all Criminal Division determinations regarding whether a monitor is appropriate in specific cases and to any deferred prosecution agreement ("DPA"), non-prosecution agreement ("NPA"), or plea agreement[3] between the Criminal Division and a business organization which requires the retention of a monitor.

A. Principles for Determining Whether a Monitor is Needed in Individual Cases

Independent corporate monitors can be a helpful resource and beneficial means of assessing a business organization's compliance with the terms of a corporate criminal resolution, whether a DPA, NPA, or plea agreement. Monitors can also be an effective means of reducing the risk of a recurrence of the misconduct and compliance lapses that gave rise to the underlying corporate criminal resolution.

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[1] The contents of this memorandum provide internal guidance to Criminal Division attorneys on legal issues. Nothing in it is intended to create any substantive or procedural rights, privileges, or benefits enforceable in any administrative, civil, or criminal matter by prospective or actual witnesses or parties. This memorandum supersedes the June 24, 2009 Criminal Division memorandum on monitor selection.

[2] The Morford Memorandum requires each Department component to "create a standing or ad hoc committee…of prosecutors to consider the selection or veto, as appropriate, of monitor candidates." The memorandum also requires that the Committee include an ethics advisor, the Section Chief of the involved Department component, and one other experienced prosecutor.

[3] Although the Morford Memorandum applies only to DPAs and NPAs, this memorandum makes clear that the Criminal Division shall apply the same principles to plea agreements that impose a monitor so long as the court approves the agreement.

Despite these benefits, the imposition of a monitor will not be necessary in many corporate criminal resolutions, and the scope of any monitorship should be appropriately tailored to address the specific issues and concerns that created the need for the monitor. The Morford Memorandum explained that, "[a] monitor should only be used where appropriate given the facts and circumstances of a particular matter[,]" and set forth the two broad considerations that should guide prosecutors when assessing the need and propriety of a monitor: "(1) the potential benefits that employing a monitor may have for the corporation and the public, and (2) the cost of a monitor and its impact on the operations of a corporation." The Memorandum also made clear that a monitor should never be imposed for punitive purposes.

This memorandum elaborates on those considerations. In evaluating the "potential benefits" of a monitor, Criminal Division attorneys should consider, among other factors: (a) whether the underlying misconduct involved the manipulation of corporate books and records or the exploitation of an inadequate compliance program or internal control systems; (b) whether the misconduct at issue was pervasive across the business organization or approved or facilitated by senior management; (c) whether the corporation has made significant investments in, and improvements to, its corporate compliance program and internal control systems; and (d) whether remedial improvements to the compliance program and internal controls have been tested to demonstrate that they would prevent or detect similar misconduct in the future.

Where misconduct occurred under different corporate leadership or within a compliance environment that no longer exists within a company, Criminal Division attorneys should consider whether the changes in corporate culture and/or leadership are adequate to safeguard against a recurrence of misconduct. Criminal Division attorneys should also consider whether adequate remedial measures were taken to address problem behavior by employees, management, or third-party agents, including, where appropriate, the termination of business relationships and practices that contributed to the misconduct. In assessing the adequacy of a business organization's remediation efforts and the effectiveness and resources of its compliance program, Criminal Division attorneys should consider the unique risks and compliance challenges the company faces, including the particular region(s) and industry in which the company operates and the nature of the company's clientele.

In weighing the benefit of a contemplated monitorship against the potential costs, Criminal Division attorneys should consider not only the projected monetary costs to the business organization, but also whether the proposed scope of a monitor's role is appropriately tailored to avoid unnecessary burdens to the business's operations.

In general, the Criminal Division should favor the imposition of a monitor only where there is a demonstrated need for, and clear benefit to be derived from, a monitorship relative to the projected costs and burdens. Where a corporation's compliance program and controls are demonstrated to be effective and appropriately resourced at the time of resolution, a monitor will likely not be necessary.

B. Approval, Consultation, and Concurrence Requirement for Monitorship Agreements

Before agreeing to the imposition of a monitor in any case, the Criminal Division attorneys handling the matter must first receive approval from their supervisors, including the Chief of the

relevant Section, as well as the concurrence of the Assistant Attorney General ("AAG") for the Criminal Division or his/her designee, who in most cases will be the Deputy Assistant Attorney General ("DAAG") with supervisory responsibility for the relevant Section.

C. Terms of Criminal Division Monitorship Agreements

As a preliminary matter, any DPA, NPA, or plea agreement between the Criminal Division and a business organization which requires the retention of a monitor (hereinafter referred to as the "Agreement"), should contain the following:

1. A description of the monitor's required qualifications;

2. A description of the monitor selection process;

3. A description of the process for replacing the monitor during the term of the monitorship, should it be necessary;

4. A statement that the parties will endeavor to complete the monitor selection process within sixty (60) days of the execution of the underlying agreement;

5. An explanation of the responsibilities of the monitor and the monitorship's scope; and

6. The length of the monitorship.

D. Standing Committee on the Selection of Monitors

The Criminal Division shall create a Standing Committee on the Selection of Monitors (the "Standing Committee").

1. Composition of the Standing Committee:

The Standing Committee shall comprise: (1) the DAAG with supervisory responsibility for the Fraud Section, or his/her designee;[4] (2) the Chief of the Fraud Section (or other relevant Section, if not the Fraud Section), or his/her designee;[5] and (3) the Deputy Designated Agency Ethics Official for the Criminal Division.[6] Should further replacements not contemplated by this paragraph be necessary for a particular case, the DAAG with supervisory responsibility for the Fraud Section will appoint any temporary, additional member of the Standing Committee for the particular case.

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[4] Should the DAAG be recused from a particular case, the Assistant Attorney General will appoint a representative to fill the DAAG's position on the Standing Committee.

[5] Should the Chief of the Section be recused from a particular case, he/she will be replaced by the Principal Deputy Chief or Deputy Chief with supervisory responsibility over the matter.

[6] Should the Deputy Designated Agency Ethics Official for the Criminal Division be recused from a particular case, he/she will be replaced by the Alternate Deputy Designated Agency Ethics Official for the Criminal Division or his/her designee.

The DAAG with supervisory authority over the Fraud Section, or his/her designee, shall be the Chair of the Standing Committee, and shall be responsible for ensuring that the Standing Committee discharges its responsibilities.

All Criminal Division employees involved in the selection process, including Standing Committee Members, should be mindful of their obligations to comply with the conflict-of-interest guidelines set forth in 18 U.S.C. Section 208, 5 C.F.R. Part 2635 (financial interest), and 28 C.F.R. Part 45.2 (personal or political relationship), and shall provide written certification of such compliance to the Deputy Designated Agency Ethics Official for the Criminal Division as soon as practicable, but no later than the time of the submission of the Monitor Recommendation Memorandum to the Assistant Attorney General for the Criminal Division ("the AAG").

2. Convening the Standing Committee:

The Chief of the relevant Section entering into the Agreement should notify the Chair of the Standing Committee as soon as practicable that the Standing Committee will need to convene. Notice should be provided as soon as an agreement in principle has been reached between the government and the business organization that is the subject of the Agreement (hereinafter referred to as the "Company"), but not later than the date the Agreement is executed. The Chair will arrange to convene the Standing Committee meeting as soon as practicable after receiving the Monitor Recommendation Memorandum described below, identify the Standing Committee participants for that case, and ensure that there are no conflicts among the Standing Committee Members.

E. The Selection Process

As set forth in the Morford Memorandum, a monitor must be selected based on the unique facts and circumstances of each matter and the merits of the individual candidate. Accordingly, the selection process should: (i) instill public confidence in the process; and (ii) result in the selection of a highly qualified person or entity, free of any actual or potential conflict of interest or appearance of a potential or actual conflict of interest, and suitable for the assignment at hand. To meet those objectives, the Criminal Division shall employ the following procedure[7] in selecting a monitor, absent authorization from the Standing Committee to deviate from this process as described in Section F below:

1. Nomination of Monitor Candidates:

At the outset of the monitor selection process, counsel for the Company should be advised by the Criminal Division attorneys handling the matter to recommend a pool of three qualified monitor candidates.[8] Within at least (20) business days after the execution of the Agreement, the Company should submit a written proposal identifying the monitor candidates, and, at a minimum, providing the following:

[7] The selection process outlined in this Memorandum applies both to the selection of a monitor at the initiation of a monitorship and to the selection of a replacement monitor, where necessary.

[8] Any submission or selection of a monitor candidate by either the Company or the Criminal Division should be made without unlawful discrimination against any person or class of persons.

a. a description of each candidate's qualifications and credentials in support of the evaluative considerations and factors listed below;

b. a written certification by the Company that it will not employ or be affiliated with the monitor for a period of not less than two years from the date of the termination of the monitorship;

c. a written certification by each of the candidates that he/she is not a current or recent (*i.e.,* within the prior two years) employee, agent, or representative of the Company and holds no interest in, and has no relationship with, the Company, its subsidiaries, affiliates or related entities, or its employees, officers, or directors;

d. a written certification by each of the candidates that he/she has notified any clients that the candidate represents in a matter involving the Criminal Division Section (or any other Department component) handling the monitor selection process, and that the candidate has either obtained a waiver from those clients or has withdrawn as counsel in the other matter(s); and

e. A statement identifying the monitor candidate that is the Company's first choice to serve as the monitor.

2. Initial Review of Monitor Candidates:

The Criminal Division attorneys handling the matter, along with supervisors from the Section, should promptly interview each monitor candidate to assess his/her qualifications, credentials and suitability for the assignment and, in conducting a review, should consider the following factors:

a. each monitor candidate's general background, education and training, professional experience, professional commendations and honors, licensing, reputation in the relevant professional community, and past experience as a monitor;

b. each monitor candidate's experience and expertise with the particular area(s) at issue in the case under consideration, and experience and expertise in applying the particular area(s) at issue in an organizational setting;

c. each monitor candidate's degree of objectivity and independence from the Company so as to ensure effective and impartial performance of the monitor's duties;

d. the adequacy and sufficiency of each monitor candidate's resources to discharge the monitor's responsibilities effectively; and

e. any other factor determined by the Criminal Division attorneys, based on the circumstances, to relate to the qualifications and competency of each monitor candidate as they may relate to the tasks required by the monitor agreement and nature of the business organization to be monitored.

If the attorneys handling the matter and their supervisors decide that any or all of the three candidates lack the requisite qualifications, they should notify the Company and request that counsel for the Company propose another candidate or candidates within twenty (20) business days.[9] Once the attorneys handling the matter conclude that the Company has provided a slate of three qualified candidates, they should conduct a review of those candidates and confer with their supervisors to determine which of the monitor candidates should be recommended to the Standing Committee.[10]

3. Preparation of a Monitor Recommendation Memorandum:

Once the attorneys handling the matter and their supervisors recommend a candidate, the selection process should be referred to the Standing Committee. The attorneys handling the matter should prepare a written memorandum to the Standing Committee, in the format attached hereto. The memorandum should contain the following information:

a. a brief statement of the underlying case;

b. a description of the proposed disposition of the case, including the charges filed (if any);

c. an explanation as to why a monitor is required in the case, based on the considerations set forth in this memorandum;

d. a summary of the responsibilities of the monitor, and his/her term;

e. a description of the process used to select the candidate;

f. a description of the selected candidate's qualifications, and why the selected candidate is being recommended;

g. a description of countervailing considerations, if any, in selecting the candidate;

h. a description of the other candidates put forward for consideration by the Company; and

i. a signed certification, on the form attached hereto, by each of the Criminal Division attorneys involved in the monitor selection process that he/she has complied with the conflicts-of-interest guidelines set forth in 18 U.S.C Section 208, 5 C.F.R. Part 2635, and 28 C.F.R. Part 45 in the selection of the candidate.

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[9] A Company may be granted a reasonable extension of time to propose an additional candidate or candidates if circumstances warrant an extension. The attorneys handling the matter should advise the Standing Committee of any such extension.

[10] If the Criminal Division attorneys handling the matter, along with their supervisors, determine that the Company has not proposed and appears unwilling or unable to propose acceptable candidates, consistent with the guidance provided herein, and that the Company's delay in proposing candidates is negatively impacting the Agreement or the prospective monitorship, then the attorneys may evaluate alternative candidates that they identify in consultation with the Standing Committee and provide a list of such candidates to the Company for consideration.

Copies of the Agreement and any other relevant documents reflecting the disposition of the matter must be attached to the Monitor Recommendation Memorandum and provided to the Standing Committee.

4. Standing Committee Review of a Monitor Candidate:

The Standing Committee shall review the recommendation set forth in the Monitor Recommendation Memorandum and vote whether or not to accept the recommendation. In the course of making its decision, the Standing Committee may, in its discretion, interview one or more of the candidates put forward for consideration by the Company.

If the Standing Committee accepts the recommended candidate, it should note its acceptance of the recommendation in writing on the Monitor Recommendation Memorandum and forward the memorandum to the AAG for ultimate submission to the Office of the Deputy Attorney General ("ODAG"). In addition to noting its acceptance of the recommendation, the Standing Committee may also, where appropriate, revise the Memorandum. The Standing Committee's recommendation should also include a written certification by the Deputy Designated Agency Ethics Official for the Criminal Division that the recommended candidate meets the ethical requirements for selection as a monitor, that the selection process utilized in approving the candidate was proper, and that the Government attorneys involved in the process acted in compliance with the conflict-of-interest guidelines set forth in 18 U.S.C. Section 208, 5 C.F.R. Part 2635, and 28 C.F.R. Part 45.

If the Standing Committee rejects the recommended candidate, it should so inform the Criminal Division attorneys handling the matter and their supervisors of the rejection decision. In this instance, the Criminal Division attorneys handling the matter, along with their supervisors, may either recommend an alternate candidate from the two remaining candidates proposed by the Company or, if necessary, obtain from the Company the names of additional qualified monitor candidates, as provided by paragraph C above. If the Standing Committee rejects the recommended candidate, or the pool of remaining candidates, the Criminal Division attorneys and their supervisors should notify the Company. The Standing Committee also should return the Monitor Recommendation Memorandum and all attachments to the attorneys handling the matter.

If the Standing Committee is unable to reach a majority decision regarding the proposed monitor candidate, the Standing Committee should so indicate on the Monitor Recommendation Memorandum and forward the Memorandum and all attachments to the Assistant Attorney General for the Criminal Division.

5. Review by the Assistant Attorney General:

Consistent with the terms of the Morford Memo, the AAG may not unilaterally make, accept, or veto the selection of a monitor candidate. Rather, the AAG must review and consider the recommendation of the Standing Committee set forth in the Monitor Recommendation Memorandum. In the course of doing so, the AAG may, in his/her discretion, request additional information from the Standing Committee and/or the Criminal Division attorneys handling the matter and their supervisors. Additionally, the AAG may, in his/her discretion interview the candidate recommended by the Standing Committee. The AAG should note his/her concurrence

or disagreement with the proposed candidate on the Monitor Recommendation Memorandum, or revise the memorandum to reflect this position, and forward the Monitor Recommendation Memorandum to the Office of the Deputy Attorney General ("ODAG").

6. Approval of the Office of the Deputy Attorney General:

All monitor candidates selected pursuant to DPAs, NPAs, and plea agreements must be approved by the ODAG.

If the ODAG does not approve the proposed monitor, the attorneys handling the matter should notify the Company and request that the Company propose a new candidate or slate of candidates as provided by Section E.1 above. If the ODAG approves the proposed monitor, the attorneys handling the matter should notify the Company, which shall notify the three candidates of the decision, and the monitorship shall be executed according to the terms of the Agreement.

F. Retention of Records Regarding Monitor Selection

It should be the responsibility of the attorneys handling the matter to ensure that a copy of the Monitor Recommendation Memorandum, including attachments and documents reflecting the approval or disapproval of a candidate, is retained in the case file for the matter and that a second copy is provided to the Chair of the Standing Committee.

The Chair of the Standing Committee should obtain and maintain an electronic copy of every Agreement which provides for a monitor.

G. Departure from Policy and Procedure

Given the fact that each case presents unique facts and circumstances, the monitor selection process must be practical and flexible. When the Criminal Division attorneys handling the case at issue conclude that the monitor selection process should be different from the process described herein, including when the Criminal Division attorneys propose using the process of a U.S. Attorney's Office with which the Criminal Division is working on the case, the departure should be discussed and approved by the Standing Committee. The Standing Committee can request additional information and/or a written request for a departure.[11]

[11] Where appropriate, a court may also modify the monitor selection process in cases where the Agreement is filed with the court.

Corporate Co-operation Guidance

This document is for guidance only. It assists in assessing the co-operation from business entities (herein referred to as "organisations"). Decisions in each case will turn upon the particular facts and circumstances of that case.[1]

Co-operation by organisations benefits the public and advances the interests of justice by enabling the Serious Fraud Office ("SFO") more quickly and reliably to understand the facts, obtain admissible evidence, and progress an investigation to the stage where the prosecutor can apply the law to the facts.

Co-operation will be a relevant consideration in the SFO's charging decisions to the extent set out in the **Guidance on Corporate Prosecutions** and the **Deferred Prosecution Agreements Code of Practice**. According to the Guidance on Corporate Prosecutions, it is a public interest factor tending against prosecution when management has adopted a "genuinely proactive approach" upon learning of the offending. Co-operation can be an important part of such a genuinely proactive approach (**DPA Code** 2.8.2(i)).

Co-operation means providing assistance to the SFO that goes above and beyond what the law requires. It includes: identifying suspected wrong-doing and criminal conduct together with the people responsible, regardless of their seniority or position in the organisation; reporting this to the SFO within a reasonable time of the suspicions coming to light; and preserving available evidence and providing it promptly in an evidentially sound format.

Genuine co-operation is inconsistent with: protecting specific individuals or unjustifiably blaming others; putting subjects on notice and creating a danger of tampering with evidence or testimony; silence about selected issues; and tactical delay or information overloads.

It is important that organisations seeking to co-operate understand that co-operation – even full, robust co-operation – does not guarantee any particular outcome. The very nature of co-operation means that no checklist exists that can cover every case. Each case will turn on its own facts. In discussing co-operation with an organisation, the SFO will make clear that the nature and extent of the organisation's co-operation is one of many factors that the SFO will take into consideration when determining an appropriate resolution to its investigation. The SFO will retain full and independent control of its investigation process.

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[1] "Organisations" includes corporate entities such as limited companies, limited liability partnerships, etc.

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Many legal advisers well understand the type of conduct that constitutes true co-operation. This will be reflected in the nature and tone of the interaction between a genuinely co-operative organisation, its legal advisers and the SFO. Nonetheless, some indicators of good practice are listed below, as are examples of steps which the SFO may ask an organisation to take. This is not a complete list; some items will be inapplicable (or undesirable) in certain cases and it is not intended to, nor does it, create legally enforceable rights, expectations or liabilities:

Preserving and providing material

1. Good general practices

i. Preserve both digital and hard copy relevant material using a method that prevents the risk of document destruction or damage.
ii. As and when material, especially digital material, is obtained, ensure digital integrity is preserved.
iii. Obtain and provide material promptly when requested, to respond to SFO requests and meet agreed timelines.
iv. Provide a list of relevant document custodians and the locations (whether digital or physical) of the documents.
v. Provide material in a useful, structured way, for example:
    a. Compilations of selected documents (including hard copy records, digital communications, records showing flow of cash) as requested by the SFO;
    b. Particularly relevant materials sorted, for example, by individual or specific issue;
    c. Relevant material gathered during an internal investigation;
    d. Basic background information about the organisation, including organograms; lists, job titles, and contact and personal information of relevant persons; and what categories of data exist (e.g. emails, audio, chats).
vi. Provide material on a rolling basis in an agreed manner.
vii. Inform the SFO without delay of suspicions of, and reasons for, data loss, deletion or destruction.
viii. Identify relevant material that is in the possession of third parties. The SFO may ask the organisation to facilitate the production of third-party material.
ix. Provide relevant material that is held abroad where it is in the possession or under the control of the organisation.
x. Promptly provide a schedule of documents withheld on the basis of privilege, including the basis for asserting privilege.

If an organisation decides to assert legal privilege over relevant material (such as first accounts, internal investigation

interviews or other documents), the SFO may challenge that assertion where it considers it necessary or appropriate to do so.

xi. Assist in identifying material that might reasonably be considered capable of assisting any accused or potential accused or undermining the case for the prosecution.

2. Digital evidence and devices

i. Provide digital material in a format the SFO requests that is, in a format ready for ingestion by and viewing on the SFO's document review platforms. The SFO may ask an organisation to provide schedules of relevant documents that it is producing and details of search terms, "seed sets" or other search methodologies applied to extract the documents.
ii. Create and maintain an audit trail of the acquisition and handling of digital material and devices, and identify a person to provide a witness statement covering continuity.
iii. Be alert to ageing technology or bespoke systems, and preserve means of reading digital files over the life of the investigation and any prosecution and appeal.
iv. Alert the SFO to relevant digital material that the organisation cannot access – for example, relevant private email accounts, messaging apps or social media that have come to light in an internal investigation.
v. Preserve and provide passwords, recovery keys, decryption keys and the like in respect of digital devices.

3. Hard-copy or physical evidence

Create and maintain an audit trail of the acquisition and handling of hard copy and physical material, and identify a person to provide a witness statement covering continuity.

4. Financial records and analysis

i. Provide records that show relevant money flows.
ii. Provide relevant organisational financial documents in a structured way, including bank records, invoices, money transfers, contracts, accounting records and other similar documents.
iii. Alert the SFO to relevant financial material that the organisation cannot access – for example, bank accounts into which monies flowed from the organisation.

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iv. Make accountants and/or other relevant personnel (internal and/or external) available to produce and speak to financial records and explain what they are and what they show about money flows.
v. Create and maintain an audit trail of the acquisition and handling of financial material, and identify a person to produce the exhibits and cover continuity.
vi. Provide financial information and calculations relevant to profit, disgorgement, financial penalty calculation and ability to pay.

5. Industry and background information

i. Provide industry knowledge, context and common practices.
ii. Identify potential defences that are particular to the market or industry at issue.
iii. Provide information on other actors in the relevant market.
iv. Notify the SFO of any other government agencies (domestic or foreign, law enforcement or regulatory) by whom the organisation has been contacted or to whom it has reported.

6. Individuals

i. To avoid prejudice to the investigation, consult in a timely way with the SFO before interviewing potential witnesses or suspects, taking personnel/HR actions or taking other overt steps.
ii. Identify potential witnesses including third parties.
iii. Refrain from tainting a potential witness's recollection, for example, by sharing or inviting comment on another person's account or showing the witness documents that they have not previously seen.
iv. Make employees and (where possible) agents available for SFO interviews, including arranging for them to return to the UK if necessary.
v. Provide the last-known contact details of ex-employees, agents and consultants if requested.

Witness Accounts and Waiving Privilege

In conducting internal investigations, some organisations will have obtained accounts from individuals. Since 2014, the **Deferred Prosecution Agreements Code of Practice** has provided (at paragraph 2.8.2(i):

> *"Co-operation: Considerable weight may be given to a genuinely proactive approach . . . . Co-operation will include identifying relevant witnesses, disclosing their accounts and the documents shown to them. Where practicable it will involve making the witnesses available for*

interview when requested. It will further include providing a report in respect of any internal investigation including source documents".

Organisations seeking credit for co-operation by providing witness accounts should additionally provide any recording, notes and/or transcripts of the interview and identify a witness competent to speak to the contents of each interview.

When an organisation elects not to waive privilege, the SFO nonetheless has obligations to prospective individual defendants with respect to disclosable materials.[2]

The existence of a valid privilege claim must be properly established.[3]

During the investigation, if the organisation claims privilege, it will be expected to provide certification by independent counsel that the material in question is privileged.

If privilege is not waived and a trial proceeds, where appropriate, the SFO will apply for a witness summons under section 2 Criminal Procedure (Attendance of Witnesses) Act 1965.[4]

An organisation that does not waive privilege and provide witness accounts does not attain the corresponding factor against prosecution that is found in the **DPA Code** (above) but will not be penalised by the SFO.[5]

Other

There may be circumstances, even when an organisation is co-operating, when it will be necessary or appropriate for the SFO to use powers of compulsion to obtain relevant material.

Compliance with compulsory process, in itself, does not indicate co-operation. Conversely, use of compulsion does not necessarily indicate that the SFO regards the organisation as non-co-operative.

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[2] As to privileged witness accounts, the House of Lords held that the importance of legal privilege outweighs a defendant's request for prior witness statements: *R v Derby Magistrates Court ex parte B* [1996] 1 AC 487.
[3] *See R (on the application of AL) v SFO* [2018] EWHC 856 (Admin).
[4] See the advice in *R (on the application of AL) v SFO* [2018] EWHC 856 (Admin) (the *XYZ* case).
[5] The Court of Appeal has not ruled out a court's consideration of the effect of an organisation's non-waiver over witness accounts as it determines whether a proposed DPA is in the interests of justice: *SFO v ENRC* [2018] EWCA Civ 2006 at [117].

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SFO issues guidance on corporate co-operation

August 9, 2019

On 6 August 2019, the SFO published "corporate co-operation guidance" contained within its Operational Handbook. The guidance sets out the matters that the SFO may take into account when assessing the extent of co-operation from business entities when considering charging decisions and/or a deferred prosecution agreement.

The guidance will be welcomed by companies and practitioners, but it does raise a number of questions in relation to internal investigations.

What does co-operation mean?

The guidance makes it clear that simply complying with legal requirements will not be sufficient to demonstrate co-operation. It states:

> "Co-operation means providing assistance to the SFO that goes above and beyond what the law requires. It includes: identifying suspected wrongdoing and criminal conduct together with the people responsible, regardless of their seniority or position in the organisation; reporting this to the SFO within a reasonable time of the suspicions coming to light; and preserving available evidence and providing it promptly in an evidentially sound format."

It goes on to say that:

> "genuine co-operation is inconsistent with: protecting individuals or unjustifiably blaming others; putting subjects on notice and creating a danger of tampering with evidence or testimony; silence about selected issues; and tactical delay or information overload."

Internal investigations

In contrast to the position previously adopted by the SFO which criticised companies that sought to undertake internal investigations, on the basis that it risked (amongst other things) destroying the evidence needed to put wrongdoers behind bars, the new guidance clearly envisages internal investigations being undertaken by companies. It suggests, however, that co-operation in this context will include:

- identifying relevant witnesses;
- disclosing witness accounts and the documents shown to them;
- making witnesses available for interview when requested; and
- providing copies of any reports produced following an internal investigation, including the source documents.

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Legal professional privilege

It is accepted that organisations may not wish to waive privilege and disclose legal advice, but the guidance says that the "SFO nonetheless has obligations to prospective individual defendants with respect to disclosable material" and stresses that the existence of a valid privilege claim must be "properly established".

The guidance also states:

> "During an investigation if an organisation claims privilege, it will be expected to provide confirmation by independent counsel that the material in question is privileged."

Preserving and providing material

Although the SFO guidance is not mandatory and it makes it clear that decisions in each case will turn upon the particular facts and circumstances of each case, the expectations of the SFO in terms of preserving and providing material, including digital evidence and devices, hard copy or physical evidence, financial records, industry and background information and interactions with individuals, is set out in some detail in the guidance and if companies wish to self-report and seek to co-operate with the SFO, they will need to have paid due regard to what the SFO considers to be full and proper co-operation.

Our observations

The SFO guidance provides helpful assistance to companies who are considering whether to self-report suspected wrongdoing. There are, however, a number of unanswered questions arising from the guidance where further clarity would be of assistance. In particular, in relation to internal investigations, corporates will very often lack a full understanding of the extent of any wrongdoing until they have undertaken a full and proper analysis of the facts and spoken to relevant individuals. In this regard, the suggestion, in the guidance, that in order to "avoid prejudice to an investigation, a company should consult, in a timely way with the SFO before interviewing potential witnesses or suspects, taking personnel HR actions or taking other overt steps" is unrealistic in circumstances where the precise extent of any conduct may not have been established and where urgent steps may need to be taken from a personnel/HR/risk perspective to protect the business and/or third parties from ongoing harm or to provide compensation. It is to be hoped that this area will be further clarified by the SFO.

Tab 5

大成 DENTONS

CLE FOR IN-HOUSE COUNSEL
WASHINGTON, DC I OCTOBER 2019

Five Things Every In-House Counsel Should Know About US Sanctions & Export Controls

Devin Crisanti, Air Drilling Associates

Peter Feldman, Washington, DC

Jason Silverman, Washington, DC

Mike Zolandz, Washington, DC

Five things every in-house counsel should know about sanctions and export controls

- The rules change frequently - and often with no advance notice or implementation period
- The regulators have high expectations for compliance
- US jurisdiction can extend far beyond US citizens and US territory
- Enforcement is aggressive
- Keeping an eye on the future: the use of trade controls, pace of change, and challenges of compliance are only increasing

The rules change frequently - and often with no advance notice or implementation period

Sources of sanctions

- Statutes
- Executive Orders
- Regulations (CACR, ITSR, . . .)
- Policies
- Licenses and interpretive opinions
- Enforcement actions
- Public statements and Frequently Asked Questions
- Lore
- And, in the case of Iran, "joint plans of action"
- All available on the OFAC website, except when they are not
- Typically no single, authoritative, up-to-date, official codification

Frequent Changes - Venezuela Sanctions Program

Sanctioned 108 individuals under the Venezuela sanctions program

Expansion of Venezuela Sanctions Scope

"Material Support" provisions of EO 13850 and 13884

Venezuela

- EO 13884 requires blocking of Government of Venezuela assets in the possession of US Persons, and prohibits transactions with any Government of Venezuela Entities
- This broadly prohibits US Persons from engaging in any transactions with the Government of Venezuela, including its subsidiaries and instrumentalities, unless authorized by a general or specific license
- Over *two dozen* general licenses have been issued authorizing various transactions otherwise prohibited, including by carving out certain PdVSA or GoV-owned entities, allowing transactions with Guaido government, winding down transactions, authorizing humanitarian and certain infrastructure-related transactions
- Many current and former government officials are also on the SDN list

PdVSA - Shifting Landscape

- **Initially,** PdVSA was subject only to debt and capital markets restrictions
- **January 28 - PdVSA designated as SDN**, with specific wind-down licenses for US Persons
  - No transactions by US Persons are permitted at this point, including for crude oil purchases, absent a license.
- **Non-US Persons -** no direct restrictions, but US policy discouraging transactions with PdVSA and targeting deceptive transactions

Key recent developments in U.S. sanctions on Venezuela

- **Seven rounds** of additional Venezuela SDN sanctions designations
  - OFAC: "U.S. sanctions need not be permanent; they are intended to change behavior. The U.S. would consider lifting sanctions for persons sanctioned under E.O. 13692 that take concrete and meaningful actions to restore democratic order, refuse to take part in human rights abuses and speak out against abuses committed by the government, and combat corruption in Venezuela."
- January 8 designation round targeted "significant corruption scheme" taking advantage of currency exchange practices and generating $2.4 billion in "corrupt proceeds"
  - Includes SDNs in Miami and New York
- **Three executive orders** targeting **crypto-currency; debts** owed to the GoV, certain transactions involving **pledges of equity** as collateral by GoV, dealing in gold, or engaging in **deceptive practices or corruption**

Additional Developments in Venezuela Sanctions

- **Designation** of Central Bank of Venezuela, BANDES, and related entities
  - **Limited wind-down** General Licenses issued, but are now mostly concluded
- **Additional** designations of vessels, trading entities
- **Suggestion** that additional targeting will occur focused on oil sector and significant participants in Venezuelan economy.
- **US recognizes** Guaido government as official government of Venezuela

Frequent Changes - Huawei

- On May 16, 2019, the Bureau of Industry and Security ("BIS") added Huawei Technologies Co. Ltd. and 68 of its non-US subsidiaries to the Entity List.
- On May 22, 2019, BIS issued a temporary general license authorizing certain activities, including those necessary for the continued operations of existing networks and to support existing mobile services; Renewed on August 21, 2019 until November 18, 2019.
  - A license is required to transfer any items "subject to the EAR" to any of the listed entities that do not fall under the general license.
  - License applications will be reviewed with a policy of denial.
- Among other items, all items in the United States or of US origin are "subject to the EAR," so this prohibition applies to a lot of items.
- However, in July, the Administration stated that while the licensing requirement remains, BIS would issue licenses to US companies to provide items to listed entities where there are no national security issues involved.

The regulators have high expectations for compliance

Primary US regulatory and enforcement agencies

US Department of the Treasury, Office of Foreign Assets Control (OFAC)

US Department of Commerce, Bureau of Industry and Security (BIS)

Note: this presentation focuses on “dual-use” or civilian trade controls and economic sanctions, so does not address the DDTC, the primary regulatory agency in charge of trade in military items, or ITAR.

US authorities have high regulatory expectations

- In May 2019, OFAC published its most extensive cross-sector compliance guidance -- the “Framework”
- Five “essential components”

OFAC identified 10 “Root Causes” of misconduct

- Lack of a formal compliance policy
- Misinterpreting, or failing to understand the applicability of, applicable regulations
- De-centralized compliance functions and inconsistent application of compliance policy
- Export or re-export of US-origin goods, technology, or services to sanctioned persons or countries
- Use of non-standard payment or commercial practices
- Utilizing the US financial system, or processing payments to or through US financial institutions, for commercial transactions involving OFAC-sanctioned persons or countries
- Inadequate sanctions screening software or other systems
- Improper/inadequate due diligence on customers/clients
- Facilitating transactions by persons who are attempting to avoid sanctions
- Individual negligence or bad acts by employees

US jurisdiction can extend far beyond US citizens and US territory

Understanding US trade controls jurisdiction

- "US Persons" (all sanctions programs)
  - US citizens and permanent resident aliens (green card holders), wherever located
  - Any person in the United States
  - US companies and their foreign **branches**, NOT subsidiaries
- "Persons subject to US jurisdiction" (Cuba)
  - US citizens and permanent resident aliens (green card holders), wherever located
  - Any person in the United States
  - US companies and their foreign branches AND subsidiaries (owned or controlled)
- "Foreign entities owned or controlled by US Persons" (Iran and Cuba)
  - "50% percent or greater equity interest by vote or value"; or
  - Majority of seats on the board of directors; or
  - "Otherwise controls the actions, policies, or personnel decisions"
- Potential jurisdiction over non-US Persons
  - Items "Subject to the EAR" / of US-origin
  - **Secondary sanctions** (*e.g.,* doing business with certain Specially Designated Nationals (SDNs) related to Iran or Russia)
  - "Causing"
  - Determined to have materially assisted, sponsored, or provided financial, material, or technological support for, or goods or services to or in support of certain sanctioned persons

Core sanctions compliance principles

- US Persons may NOT engage in or facilitate a transaction directly or indirectly involving a country (or Crimea) or person subject to sanctions, absent a license or other authorization from OFAC
  - US Persons cannot buy, sell, or transfer any goods, services or technology to, from, or involving any sanctioned country or person, absent OFAC approval
  - **no de minimis** threshold
  - no requirement that money or goods change hands, or that a transaction be consummated
- US law also prohibits "facilitation," aiding-and-abetting, conspiracy, etc.
  - Rule of thumb: if a US Person cannot engage in the transactional directly, then he/she cannot do so indirectly
- OFAC expects risk-based compliance measures, including 5 essential elements

Enforcement is aggressive

OFAC's public enforcement actions

2019 year to date: 22 public settlements; total penalties of US $1,288,112,800

Select recent enforcement actions

- **Haverly Systems, Inc**. -- first-ever sectoral sanctions enforcement - accepting payments from Rosneft beyond the 90-day permissible debt tenor
- **Kollmorgen Corporation** -- simultaneous corporate enforcement action plus individual sanctions designation
- **e.l.f. Cosmetics, Inc.** -- importing false eyelash kits from China that contained materials sourced from North Korea
- **DNI Express Shipping and Southern Cross Aviation --** representations and responses to OFAC subpoenas and enforcement investigations
- **British Arab Commercial Bank plc** -- the use of complex payment structures, including bulk funding arrangements, to process payments on behalf of, or otherwise involving, US sanctions targets, even when the bank has no offices, business, or presence under US jurisdiction

Keeping an eye on the future: the use of trade controls, pace of change, and challenges of compliance are only increasing

Trade controls impact every business - and shape the overall business environment

- Trade controls restrict who a person or company can do business with, and where and how they can do it
- Trade controls may be imposed by the United Nations, by the European Union, or by individual countries, such as the US - and companies can be subject to more than one set of authorities (some of which conflict)
- Trade controls may apply to goods, services or technology, to countries or territories, to individual people, and to entities - even ships and aircraft
  - Trade controls go beyond a list of “prohibited” countries
- Trade controls can affect day-to-day business, up and down a company’s supply chain - not only its customers and vendors
- Compliance with trade controls is critical - violations can result in significant penalties and reputational damage

Trade compliance is increasingly complicated

- US withdrawal from the JCPOA and restoration and expansion of secondary sanctions on Iran (e.g., the imposition of sectoral sanctions)
  - Limited wind-down periods that ended in 2018
  - Growing gap between US and EU approaches to Iran - and new conflicts between US and EU/EU member state legal obligations
- Countering America's Adversaries Through Sanctions Act created new, far-reaching secondary sanctions authorities targeting Russia
  - Aggressive designations/identifications with deep commercial-sector implications
  - New legislation (DASKA and DETER) being considered by Congress
- Continued expansion of Venezuela sanctions, including PdVSA and now the entire Maduro government
- New Nicaragua-related sanctions
- Global Magnitsky launched - convergence of sanctions and anti-corruption
- The China “trade wars”

Tab 6

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CLE FOR IN-HOUSE COUNSEL
WASHINGTON, DC I OCTOBER 2019

General Counsel Conversation: What I Wish I Had Known

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Table of contents

Table of contents (*cont'd*)

I. Who is the client?
Role clarification

- **Multiple hats**
- *In re Processed Egg Products Antitrust Litigation*, 278 F.R.D. 112 (E.D Pa. 2011) (included in the materials as 1)
  - The documents at issue during discovery were found to not be protected by attorney-client privilege because defendant did not demonstrate that they were prepared in connection with a request for, or the provision of, legal advice.
  - The documents, including memoranda, unsent letters, and emails from the president and vice president to trade cooperative executives were not privileged even though some were also sent to the corporate counsel or referenced comments made by counsel.
  - See also *Southeastern Pennsylvania Transportation Authority v. Caremarkpcs Health, L.P.*, 254 F.R.D. 253 (E.D. Pa. 2008) (included in the materials as 1a)

I. Who is the client?
Role clarification (*cont'd*)

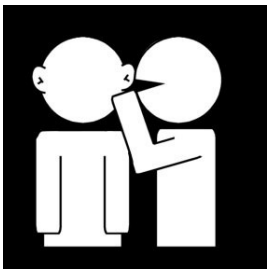
- *United States v. Askins*, Civ. No. 3:13-cr-00162, 2016 WL 4039204 (M.D. Tenn. July 28, 2016) (included in the materials as 2)
  - Former executive director argued that statements in meeting that included discussion about possibly falsifying documents and embezzlement were protected by attorney-client privilege because she had an attorney-client relationship with firm that provided legal advice to employer
  - Court held that firm did not represent executive director in her personal capacity and statements made in meeting were not made in confidence
- The privilege applies when the client is a corporation.
  - *Upjohn Co. v. United States*, 449 U.S. 383, 390 (1981).
- Model Rules of Professional Conduct r.1.13: "A lawyer employed or retained by an organization represents the organization acting through its duly authorized constituents." [Adopted by Iowa, Kansas, Missouri, North and South Dakota, Michigan and Illinois.]

II. Attorney-client privilege:
What is it?

Subject to waiver, the client (or other holder of the privilege) has a "privilege to refuse to disclose, and to prevent another from disclosing, a confidential communication between client and lawyer."
Cal. Evid. Code § 954

II. Attorney-client privilege:
What is it? (*cont'd*)

- **The attorney-client privilege protects:**
  - communications,
  - between the attorney and client,
  - made in confidence,
  - when the lawyer is acting in his capacity as a legal advisor,
  - and legal advice of any kind is sought,
  - unless waived.



- *Admiral Ins. Co. v. U.S. Dist. Ct.*, 881 F.2d 1486, 1492 (9th Cir. 1989).

II. Attorney-client privilege:
What communications are privileged?

- Discussions between the attorney and client in the course of the relationship.
- Some states construe privilege narrowly, *e.g.*, Michigan: "The scope of the [attorney-client] privilege is narrow: it attaches only to confidential communications by the client to its adviser that are made for the purpose of obtaining legal advice." *Fruehauf Trailer Corp. v. Hagelthorn*, 528 N.W.2d 778, 780 (Mich. Ct. App. 1995). However, "[t]he privilege does not . . . automatically shield documents given by a client to his counsel." *McCartney v. Attorney Gen.,* 587 N.W.2d 824, 828 (Mich. Ct. App. 1998)." See also *U.S. Fire Ins. Co. v. City of Warren*, No. 2:10-cv-13128, 2012 WL 2190747 (E.D. Mich. June 14, 2012). Key: If document wasn't privileged before it went to counsel, it's not privileged afterwards.
- Only "communications," not facts. Thus, facts contained in the communication are not protected.
  - Meeting minutes and facts discussed at a meeting do not become privileged just because counsel is present. Legal advice regarding those facts might be privileged if the client is directly seeking legal advice about them.

II. Attorney-client privilege:
What communications are privileged? (*cont'd*)

"Confidential" (Cal. Evid. Code § 952)

- **Communication must be made in confidence**: As far as the client is aware, the communication is not disclosed to any third party other than those who are reasonably necessary for the transmission of the information.
- May extend "to **communications with third parties who have been engaged to assist the attorney in providing legal advice**."
  - *United States v. Richey*, 632 F.3d 559, 566 (9th Cir. 2011).
  - However, the third party must be **assisting and reporting to** the attorney. (e.g., When an investigator was retained by an attorney to discover details of a marijuana-growing operation, conversations with the client were not privileged when the client told the investigator not to relay the conversation to the attorney.
    - *United States v. Haynes*, 216 F.3d 789, 798 (9th Cir. 2000).
- May extend to communications between non-lawyers within corporation if includes advice received from in-house counsel.

II. Attorney-client privilege:
When does it attach?

- Generally, the privilege only attaches when the attorney is giving legal advice.
- There is **no privilege** when the attorney is engaged in non-legal work, such as rendering business or technical advice.
- If legal advice is only incidental to a discussion of business policy, the communication may **not** be protected.
- There is no exact moment when privilege attaches. It is a balancing of the reasons for the communications and the advice given.
- A significant e-discovery issue for in-house counsel.

II. Attorney-client privilege:
Who can assert and waive it?

- The power to waive corporate attorney-client privilege rests with the corporation's management and is normally exercised by its officers and directors. *Commodity Futures Trading Comm'n v. Weintraub*, 471 U.S. 343, 348 (1985) (included in the materials as 3).
- The privilege stays with the corporation, not the managers.
  - Displaced managers cannot assert the attorney-client privilege, and new management can waive the privilege with respect to communications made by former officers and directors.

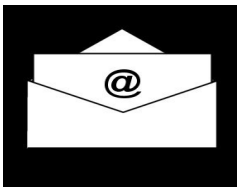
II. Attorney-client privilege:
An exception

Crime-fraud exception

- If advice is sought in order to aid someone to commit or plan to commit a crime or fraud; or
- If the attorney reasonably believes that disclosure of the information is necessary to prevent a criminal act that the attorney reasonably believes is likely to result in death or substantial bodily harm to an individual.

II. Attorney-client privilege:
How is it destroyed?

If the privilege attaches but is lost



- Privilege can be lost:
  - Third parties are present during conversations.
  - Later disclosure of confidential information to third parties.
  - Giving non-legal (business) advice.
- **Email – Be careful who you cc and bcc!**
  - An initial email with an attorney may be privileged.
  - But forwarding that email to people not included in the attorney-client relationship destroys the privilege.
- Who retains consultants/agents and for what purpose (clear representation)

II. Attorney-client privilege:
How is it destroyed? (*cont'd*)

A cautionary tale regarding work e-mail

Holmes v. Petrovich Dev. Co., 191 Cal. App. 4th 1047 (2011)

- Communications sent from a company computer between an employee and her attorney regarding possible legal action against the employer were not privileged.
- "[T]he e-mails sent via company computer…were akin to consulting her lawyer in her employer's conference room, in a loud voice, with the door open, so that any reasonable person would expect that their discussion of her complaints about her employer would be overheard by him." *Id*. at 1051.
- Factors relied upon:
  - The computer was the company's property.
  - The company had specific policies regarding using emails for work only.
  - The policies made clear that emails were not private and may be monitored.
  - The employee knew of and agreed to these conditions.

III. European in-house counsel attorney-client privilege

Case C-550/07P, *Akzo Nobel Chemicals Ltd. v. Comm'n*, 2010 E.C.R. I-08301, Sept. 14, 2010 (included in the materials as 4):

- Communications between in-house counsel and corporate client are not privileged in investigations conducted by the European Commission.
- Akzo involved a "dawn raid" procedure where investigators entered the business to recover documents that included communications between in-house counsel and company executives.
- Communications were for the purpose of seeking and providing legal advice; still not privileged.

See New Developments since November 2017

IV. Internal investigations:
"Yates memo"

"The Yates Memo"

- "Individual Accountability for Corporate Wrongdoing," Memorandum from Sally Yates, U.S. Deputy Attorney General, (Sept. 9, 2015) (included in materials as 5)

Impact on Privilege

- "The Yates Memo and Prosecution of Corporate Individuals: Whose Team Does Your General Counsel Play for Now?, " Glenn Colton, Stephen Hill, Thomas Kelly, Lisa Krigsten, George Newhouse, (Sept. 29, 2015) (included in materials as 6)

IV. Internal investigations:
Conflicts of interest

"Corporate *Miranda* Warnings"

To avoid potential misunderstandings, provide the following "corporate *Miranda* warning":

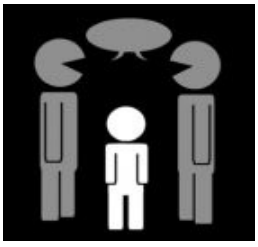
- Inform the individual that your allegiance and responsibility is owed to the corporation.
- Inform the individual that he or she should seek independent counsel to protect any potentially adverse interests.
- Instruct the individual that any confidential information will be used for the corporation's benefit.

These disclosures should be made in writing!

IV. Internal investigations:
Conflicts of interest (*cont'd*)

Beneficial dual representations

- Should counsel represent both the corporation and one or more of its officers, directors, or employees?
  - Can save the cost of hiring outside counsel.
  - Can keep control of the matter within the corporation.
- Allowed, subject to the provisions of applicable Rules of Professional Responsibility.



IV. Internal investigations:

Retention of privilege to materials and interview reports underlying an internal investigation

- Privilege Protects Communications reflected in the Interview materials since they were made to provide legal advice. *In re Gen. Motors LLC Ignition Switch Litig.*, 80 F. Supp. 3d 521 (S.D.N.Y. 2015) (included in materials as 7)

V. New developments

- **European in-house counsel attorney-client privilege**
  - In November 2017, the Paris Court of Appeal decided that emails between in-house counsels relating to the defense strategy set up by the company's outside counsels, although they neither originated from, nor were addressed to, an outside counsel, should be considered, during dawn raids, as protected by legal privilege and not be seized by the French Competition Authority.
  - In 2018, the English Court of Appeal's much-anticipated decision on legal professional privilege in Director of the Serious Fraud Office v. Eurasian Natural Resources Corporation Ltd. (The Director of the Serious Fraud Office v Eurasian Natural Resources Corporation Limited [2018] EWCA Civ 2006) contains mixed news for companies conducting internal investigations. While the decision provides some clarity regarding the availability of litigation privilege in the context of criminal investigations, the court held that it was unable to depart from the controversial decision in Three Rivers (No. 5) (Three Rivers District Council and Others v Governor and Company of the Bank of England (No. 5) [2003] QB 1556) which defined the "client" narrowly for the purposes of legal advice privilege. This means that companies, especially large corporations and multinational corporate groups, will continue to face difficulties in obtaining the information they need to investigate suspected wrongdoing, without losing the benefit of legal advice privilege under English law.

V. New developments (*cont'd*)

- **CLO conflicts of interest**
  - "A CLO's Departure Shines Light on In-House Conflicts," *Corporate Counsel*, (Aug. 3, 2016)
- **Internal investigations - employee refusal to cooperate**
  - *Gilman v. Marsh & McLennan Companies, Inc.*, 826 F.3d 69 (2d Cir. 2016) (included in materials as 8)
    - Former employees brought suit for breaches of contract and implied covenant of good faith and fair dealing for failure to pay employees severance or other compensation when employees were terminated for refusal to comply with employer's order to sit for interviews regarding employee participation in a criminal bid-rigging scheme.
    - Order to sit for interview was reasonable because employees in question were named by AG as co-conspirators in the scheme; order was also direct and unequivocal and, under Delaware law, failure to "obey a direct, unequivocal, reasonable order of the employer" is a "cause" for termination.
- **Communications between Corporate Counsel and former employees**
  - *Newman v. Highland Sch. Dist. No. 203*, 381 P.3d 1188 (Wash. 2016) (included in materials as 9)

VI. Some Warning signs

- Everyone else is doing it" – technically legal, competitive disadvantage, can't all be wrong (Ed Clark story), Bear Sterns, Lehman Bros.
- Aggressive growth sales/strategy – Wells Fargo
- Excessive leverage
- "Failure is not an option" – Enron; Volkswagen; Theranos
- Marginalizing risk management function – lack of enterprise wide risk management framework – Wells Fargo
- Compensation systems rewarding excessive risk – Enron; Wells Fargo
- Lack of transparency - Enron; Theranos
- Excessive risk culture – continually increasing risk limits
- Lack of "Reporting Up" culture in Legal Department - General Motors

VI. Some Warning signs (*cont'd*)

- Lack of transparency, especially with the Board - Enron; Wells Fargo; Theranos; General Motors
- Marginalizing or indifference to internal audit
- Arrogant suspension of disbelieve – willful blindness - General Motors
- Too good to be true – isn't'
- No culture of doing the right thing
- Ignoring red flags – General Motors; BP (formerly British Petroleum); Theranos
- Lack of independent control functions like law, compliance, risk and internal audit
- Long standing market behavior
- Excessive exit packages

VII. Background resources

1. The Smartest Guys in the Room: The Amazing Rise and Scandalous Fall of Enron by Bethany McLean and Peter Elkind
2. Conspiracy of Fools: A True Story by Kurt Eichenwald
3. YouTube video: Documentary: The Smartest Guys in the Room
4. High Performance with High Integrity – Ben Heineman
5. The Inside Counsel Revolution – Ben Heineman
6. Integrity: Good People, Bad Choices and Life Lessons from the White House by Egil "Bud" Krogj
7. Corporate Counsel as Corporate Conscience: Ethics and Integrity in the Post Enron Era – Paul Patton, Queen's Facility of Law, Legal Studies Research Papers Series, Accepted Paper No. 07-08 (Canadian Bar Review, Volume 84, 3, 2006)

VII. Background resources (*cont'd*)

8. Avoiding the San Andres Earthquake; Lessons Drawn from History for Corporate Counsel, June 11, 2015 – John K. Villa, Williams and Connelly LLP, Washington, DC - Association of Corporate Counsel
9. Corporate Governance and Crisis Management; a General Counsel's Perspective, Berkley Research Group – Chairman's Dinner, November 4, 2015, San Francisco, CA
10. Independent Directors of the Board of Wells Fargo and Company Sales Practices Investigation Report, April 10, 2017
11. Gate Keepers: The Profession of Corporate Governance – John C. Coffee, Jr. (Oxford Press)
12. Bad Blood: Secrets and Lies in a Silicon Valley Startup, by John Carreyrou
13. David Boies Pleads Not Guilty, by James B. Stewart, September 21, 2018, New York Times

01. *In re Processed Egg Products Antitrust Litigation*, 278 F.R.D. 112 (E.D. Pa. 2011)

278 F.R.D. 112
United States District Court,
E.D. Pennsylvania.

In re PROCESSED EGG PRODUCTS ANTITRUST LITIGATION.
This Document Applies To All Direct Purchaser Actions.

MDL No. 2002.
|
No. 08–md–2002.
|
Oct. 19, 2011.

Synopsis

Background: Direct purchasers of eggs brought antitrust action against trade cooperative for egg producers. Direct purchasers moved to compel discovery.

Holdings: The District Court, Timothy R. Rice, United States Magistrate Judge, held that:

[1] memorandum from cooperative member to cooperative executives and others was not protected by attorney-client privilege;

[2] unsent letters from member to trade cooperative president were not protected by attorney client privilege;

[3] unsent letters from member to trade cooperative president were not protected by work-product doctrine;

[4] e-mail between member's counsel was not protected by attorney-client privilege; and

[5] common-interest privilege did not apply to protect fax sent to cooperative member.

Motion granted in part and denied in part.

West Headnotes (24)

[1] Privileged Communications and Confidentiality
Elements in general;definition

Attorney-client privilege applies to any communication that satisfies the following elements: it must be (1) a communication (2) made between the client and the attorney or his agents (3) in confidence (4) for the purpose of obtaining or providing legal assistance for the client.

3 Cases that cite this headnote

[2] Privileged Communications and Confidentiality
Elements in general;definition

Attorney-client privilege protects confidential disclosures by a client to an attorney made in order to obtain legal assistance.

Cases that cite this headnote

[3] Privileged Communications and Confidentiality
Factual information;independent knowledge;observations and mental impressions

Attorney-client privilege only protects the disclosure of communications; it does not protect disclosure of the underlying facts.

1 Cases that cite this headnote

[4] Privileged Communications and Confidentiality
Elements in general;definition

Communications made both by a client and an attorney are privileged if the communications are for the purpose of securing legal advice.

6 Cases that cite this headnote

[5] **Privileged Communications and Confidentiality**

Construction

Attorney-client privilege obstructs the truth-finding process and should be applied only where necessary to achieve its purpose.

1 Cases that cite this headnote

[6] **Privileged Communications and Confidentiality**

Business communications

Because the attorney-client privilege promotes the dissemination of sound legal advice, it applies only where the advice is legal in nature, and not where the lawyer provides non-legal business advice.

3 Cases that cite this headnote

[7] **Privileged Communications and Confidentiality**

Confidential character of communications or advice

Privileged Communications and Confidentiality

Communications Through or in Presence or Hearing of Others;Communications with Third Parties

Attorney-client privilege applies only to communications made in confidence, because a client who speaks openly or in the presence of a third party needs no promise of confidentiality to induce a disclosure.

2 Cases that cite this headnote

[8] **Privileged Communications and Confidentiality**

Common interest doctrine;joint clients or joint defense

Common-interest privilege allows attorneys representing different clients with similar legal interests to share information without having to disclose it to others.

2 Cases that cite this headnote

[9] **Privileged Communications and Confidentiality**

Common interest doctrine;joint clients or joint defense

To qualify for protection under the common-interest privilege, the communication must be shared with the attorney of the member of the community of interest, and all members of the community must share a common legal interest in the shared communication.

2 Cases that cite this headnote

[10] **Privileged Communications and Confidentiality**

Common interest doctrine;joint clients or joint defense

Common-interest privilege does not apply unless the conditions of privilege are otherwise satisfied; it is not an independent privilege, but merely an exception to the general rule that no privilege attaches to communications that are made in the presence of or disclosed to a third party.

2 Cases that cite this headnote

[11] **Privileged Communications and Confidentiality**

Presumptions and burden of proof

A party asserting the common-interest privilege has the burden of establishing the elements of the attorney-client privilege generally, as well as those of the common-interest privilege.

1 Cases that cite this headnote

[12] **Federal Civil Procedure**

Work Product Privilege;Trial Preparation Materials

Attorney work product is discoverable only upon a showing of rare and exceptional circumstances. Fed.Rules Civ.Proc.Rule 26(b)(3), 28 U.S.C.A.

Cases that cite this headnote

[13] **Federal Civil Procedure**
Work Product Privilege;Trial Preparation Materials

Burden of demonstrating that a document is protected as work-product rests with the party asserting the doctrine. Fed.Rules Civ.Proc.Rule 26(b)(3), 28 U.S.C.A.

Cases that cite this headnote

[14] **Federal Civil Procedure**
Work Product Privilege;Trial Preparation Materials

Work-product doctrine is designed to protect material prepared by an attorney acting for his client in anticipation of litigation; the doctrine does not protect documents prepared in the ordinary course of business, or pursuant to public requirements unrelated to litigation, or for other nonlitigation purposes. Fed.Rules Civ.Proc.Rule 26(b)(3), 28 U.S.C.A.

3 Cases that cite this headnote

[15] **Federal Civil Procedure**
Work Product Privilege;Trial Preparation Materials

For the attorney-work product doctrine to apply, the material must have been prepared in anticipation of some litigation, not necessarily in anticipation of the particular litigation in which it is being sought. Fed.Rules Civ.Proc.Rule 26(b)(3), 28 U.S.C.A.

3 Cases that cite this headnote

[16] **Federal Civil Procedure**
Work Product Privilege;Trial Preparation Materials

A document will fall within the scope of the work-product doctrine only if it was prepared primarily in anticipation of future litigation. Fed.Rules Civ.Proc.Rule 26(b)(3), 28 U.S.C.A.

2 Cases that cite this headnote

[17] **Privileged Communications and Confidentiality**
In camera review

As a general matter, statements in briefs cannot be treated as evidence and a document for in camera inspection cannot establish all the elements of a privilege.

Cases that cite this headnote

[18] **Privileged Communications and Confidentiality**
Documents and records in general

Memorandum from egg producer's vice president to trade industry cooperative's senior vice president, animal welfare board, committee and others was not protected by attorney-client privilege in antitrust action against cooperative, even though it was also sent to cooperative's general counsel, where nothing about the memorandum or its contents suggested that the document was prepared in connection with a request for, or the provision of, legal advice.

Cases that cite this headnote

[19] **Privileged Communications and Confidentiality**
Letters and correspondence

Unsent letters from egg producer's president, to president of trade cooperative, in which egg producer's president expressed concerns about the legality and economic impact of cooperative's animal welfare program, were not protected by attorney-client privilege in antitrust action against cooperative, despite claim that letters were preliminary drafts of a document that was ultimately sent to counsel, where there were substantial differences in the content of the unsent letters and the letter ultimately sent to counsel, there was nothing to suggest that producer's president viewed unsent letters as drafts of the letter sent to counsel, and, even if unsent letters were drafts

of letter to counsel, there was nothing beyond the text of the letter to counsel to suggest that the unsent letters were privileged.

Cases that cite this headnote

[20] **Privileged Communications and Confidentiality**

Waiver of privilege

Even if unsent letters from egg producer's president, to president of trade cooperative, in which egg producer's president expressed concerns about the legality and economic impact of cooperative's animal welfare program, were privileged as drafts of a protected attorney-client communication, production of the unsent letters to plaintiffs would constitute waiver of any privilege.

Cases that cite this headnote

[21] **Federal Civil Procedure**

Work Product Privilege;Trial Preparation Materials

Unsent letters from egg producer's president, to president of trade cooperative, in which egg producer's president expressed concerns about the legality and economic impact of cooperative's animal welfare program, were not protected by work-product doctrine in antitrust action against cooperative; neither letter revealed anything about the mental processes of cooperative's counsel, nor was there any evidence that letters were prepared at counsel's direction. Fed.Rules Civ.Proc.Rule 26(b)(3), 28 U.S.C.A.

Cases that cite this headnote

[22] **Privileged Communications and Confidentiality**

E-mail and electronic communication

E-mail from egg producer's general counsel to its outside counsel, which summarized conversations to which both egg producer's and trade cooperative's representatives were parties was not protected by attorney-client privilege in antitrust action against trade cooperative; egg producer's counsel made no formal request that cooperative should obtain any legal opinions from its counsel, and there was no evidence to demonstrate that, notwithstanding the language of the document itself, the e-mail revealed a request by producer for legal advice from cooperative.

Cases that cite this headnote

[23] **Privileged Communications and Confidentiality**

E-mail and electronic communication

E-mails exchanged among egg producer's executives, which summarized a recent trade cooperative meeting and referenced general comments by cooperative's counsel about pending lawsuits, were not protected by attorney-client privilege in antitrust action against cooperative; documents themselves shed no light on precisely who was present when cooperative's counsel commented on the pending litigation, and evidence suggested that cooperative meetings, including committee meetings and sessions at which cooperative's counsel spoke, were open to the public.

Cases that cite this headnote

[24] **Privileged Communications and Confidentiality**

Common interest doctrine;joint clients or joint defense

Privileged Communications and Confidentiality

Waiver of privilege

Even if two-page fax sent to trade cooperative's president by its general counsel, which contained what appeared to be advice to cooperative about its policies regarding contact with its members' customers, was protected by attorney-client privilege, common-interest privilege did not apply to avoid waiver of attorney-client privilege in antitrust action against cooperative; cooperative forwarded the fax, in its entirety, to member's president in response to member's

cease-and-desist letter to cooperative, and there was no evidence to suggest that cooperative and member shared a common legal interest.

Cases that cite this headnote

*115 *MEMORANDUM OPINION*

TIMOTHY R. RICE, United States Magistrate Judge.

Direct purchaser plaintiffs ("Plaintiffs") seek to compel defendant United Egg Producers, Inc. ("UEP") to produce or remove from sequestration certain documents and information involving defendant Sparboe Farms ("Sparboe").[1] UEP maintains the attorney-client privilege, the common-interest privilege, and the work-product doctrine shield the communications at issue from disclosure. All privilege questions, including those raised in this motion, have been referred to me for resolution pursuant to Rule 72(a) of the Federal Rules of Civil Procedure. *See* Order, *In re Processed Egg Prods. Antitrust Litig.*, No. 08–md–2002 (E.D. Pa. Mar. 2, 2011) (Pratter, J.).[2]

This case presents issues concerning the existence and scope of the attorney-client privilege in the context of a trade industry cooperative of egg producers and related entities. At issue are several communications involving UEP officials, one of its member entities, and, at various times, attorneys. Although the parties debate the contours of nearly every aspect of privilege law, resolution of the pending motion depends on one fundamental question: Were any of the communications at issue made for the purpose of obtaining or providing legal advice? If not, they cannot fall within the bounds of the attorney-client privilege, regardless whether UEP and its members are treated as a single corporate entity or a group of entities sharing a common legal interest.

For the reasons set forth below, I conclude UEP has failed to meet its burden of establishing the communications at issue are protected by the attorney-client privilege. Only one of the documents at issue was related to a confidential request for legal advice, and any privilege as to that document was waived. I further conclude the record does not permit resolution of the parties' disputes over information conveyed to Plaintiffs during interviews with Sparboe personnel. Accordingly, the motion to compel is granted in part and denied without prejudice in part.[3]

I. BACKGROUND

The facts underlying this dispute are set forth in *In re Processed Egg Products Antitrust Litigation*, 821 F.Supp.2d 709, 712–16, No. 08–md–2002, 2011 WL 4465355, at *1–3 (E.D.Pa. Sept. 26, 2011) (Pratter, J.), and I will not repeat them at length here.

Plaintiffs allege UEP, its members, and other defendants conspired to limit supply and fix prices of eggs in violation of federal antitrust laws. ***116** *Id.* at 712–13, 2011 WL 4465355, at *1. To accomplish these violations, Plaintiffs allege UEP proposed, and its members adopted, an "animal welfare" program ("the Program"), which required egg producers to comply with guidelines reducing cage space densities for hens in order to sell "UEP-certified" eggs. *Id.* at 714, 2011 WL 4465355, at *2. Sparboe, a member of UEP and a former participant in the Program, settled the claims against it by agreeing to cooperate and provide information to Plaintiffs. *See* Order on Preliminary Approval of Sparboe Settlement at 2–3, ECF No. 214, *In re Processed Egg Prods. Antitrust Litig.*, No. 08–md–2002 (E.D. Pa. Oct. 23, 2009) (Pratter, J.). The information Sparboe disclosed to Plaintiffs—both in documents and witness interviews—in some instances included communications between Sparboe's officers and attorneys and UEP's officers and attorneys. *See* Pls.' Br. at 28–37; UEP's Br. at 18–44. Of particular interest here are communications from 2003 and later revealing Sparboe's concerns with, and objections to, the Program. *See* Pls.' Br. at 28–37; UEP's Br. at 18–44. UEP suggests those communications are protected by either the attorney-client privilege, the common-interest privilege, or the work-product doctrine. *See generally* UEP's Br.

Although Plaintiffs' motion to compel is focused on six specific documents and information conveyed in the interviews of four Sparboe witnesses, the parties assert much broader arguments. Specifically, Plaintiffs suggest UEP could not successfully invoke any privilege for communications between its counsel and any of its members before 2009. Pls.' Br. at 17–21. Conversely, UEP suggests all communications between its counsel or officers and any of its members are entitled to blanket

protection under a "single-entity" theory based on *Upjohn Co. v. United States*, 449 U.S. 383, 101 S.Ct. 677, 66 L.Ed.2d 584 (1981). UEP's Br. at 4–15. Neither of these sweeping pronouncements is necessary or appropriate to resolve the issues presented in Plaintiffs' motion. [4]

Plaintiffs' motion is properly resolved by examining the specific communications at issue and the circumstances under which they occurred. *Upjohn*, 449 U.S. at 396–97, 101 S.Ct. 677 (applying a "case-by-case" analysis, which "obeys the spirit of the Rules [of Evidence]"). Those communications are:

- A January 2003 memorandum from Sparboe's vice president to UEP officers, board members, and counsel about scientific committee recommendations, UEP's Br. at Ex. F (submitted in camera);
- June and July 2003 letters from Sparboe's president to UEP's president, neither of which were ever sent, raising questions about the wisdom and legality of the Program, UEP's Br. at Exs. C, D (submitted in camera);
- An October 2003 E-mail from Sparboe's in-house counsel to its outside counsel summarizing a meeting between Sparboe representatives and UEP's president at which Sparboe's concerns about the Program were discussed, UEP's Br. at Ex. E (submitted in camera);
- A September 2005 fax from UEP's counsel to UEP's president, which was later forwarded to Sparboe's counsel and Sparboe's president in response to Sparboe's belief that a UEP representative was interfering with relationships between Sparboe and its customers, UEP's Br. at Ex. 6 to Ex. A (submitted in camera); Pls.' Br. at Ex. F p. 6;
- A series of October 2008 E-mails among Sparboe representatives summarizing a recent UEP meeting, including comments by UEP's counsel about topics at issue in this litigation, UEP's Br. at Ex. 7 to Ex. A (submitted in camera); and
- Information disclosed to Plaintiffs, following Sparboe's settlement, by Sparboe's counsel and three of its officers who were interviewed regarding Sparboe's concerns about the Program and ***117** the witnesses' interactions with UEP's counsel, Pls.' Br. at Exs. E, H, I.

Pursuant to its settlement agreement, Sparboe produced to Plaintiffs copies of all documents except the October 2003 and October 2008 E-mails. *See* Oral Arg. Tr. at 107.

II. LEGAL FRAMEWORK

A. *The Attorney–Client Privilege*

[1] The attorney-client privilege is intended to encourage "full and frank communication between attorneys and their clients." *Wachtel v. Health Net, Inc.*, 482 F.3d 225, 231 (3d Cir.2007). The privilege "applies to any communication that satisfies the following elements: it must be '(1) a communication (2) made between [the client and the attorney or his agents] (3) in confidence (4) for the purpose of obtaining or providing legal assistance for the client.' " *In re Teleglobe Communications Corp.*, 493 F.3d 345, 359 (3d Cir.2007) (quoting the Restatement (Third) of the Law Governing Lawyers § 68 (2000)); *accord In re Application of Chevron Corp.*, 650 F.3d 276, 289 (3d Cir.2011).

[2] **[3]** The privilege protects "[c]onfidential disclosures by a client to an attorney made in order to obtain legal assistance." *Fisher v. United States*, 425 U.S. 391, 403, 96 S.Ct. 1569, 48 L.Ed.2d 39 (1976). "[T]he privilege exists to protect not only the giving of professional advice to those who can act on it but also the giving of information to the lawyer to enable him to give sound and informed advice." *Upjohn*, 449 U.S. at 390, 101 S.Ct. 677. However, it "only protects the disclosure of communications; it does not protect disclosure of the underlying facts." *Id.* at 385, 101 S.Ct. 677. The communication between lawyer and client "is not, in and of itself, the purpose of the privilege; rather, it only protects the free flow of information because it promotes compliance with law and aids administration of the judicial system." *Teleglobe*, 493 F.3d at 360–61 (emphasis omitted). "The privilege recognizes that sound legal advice or advocacy serves public ends and that such advice or advocacy depends upon the lawyer's being fully informed by the client." *Upjohn*, 449 U.S. at 389, 101 S.Ct. 677.

[4] Communications made both by a client and an attorney are privileged if the communications are "for the purpose of securing legal advice." *See In re Ford Motor Co.*, 110 F.3d 954, 965 n. 9 (3d Cir.1997); *United States*

v. Amerada Hess Corp., 619 F.2d 980, 986 (3d Cir.1980). Communications from an attorney are privileged for two reasons: first, to prevent "the use of an attorney's advice to support inferences as to content of confidential communications by the client"; and second, because "legal advice given to the client should remain confidential." *Amerada Hess Corp.*, 619 F.2d at 986.

[5] **[6]** **[7]** Nevertheless, the privilege obstructs the truth-finding process and should be "applied only where necessary to achieve its purpose." *Wachtel*, 482 F.3d at 231; *see Westinghouse Elec. Corp. v. Republic of Phil.*, 951 F.2d 1414, 1423 (3d Cir.1991) (construing the privilege narrowly). Because the privilege promotes the "dissemination of sound legal advice," it applies only where the advice is legal in nature, and not where the lawyer provides non-legal business advice. *Wachtel*, 482 F.3d at 231. In addition, the privilege applies only to communications made in confidence, because "a client who speaks openly or in the presence of a third party needs no promise of confidentiality to induce a disclosure." *Id.*

"Rule 501 requires the federal courts, in determining the nature and scope of an evidentiary privilege, to engage in the sort of case-by-case analysis that is central to common-law adjudication." *Id.* at 230; *see Upjohn*, 449 U.S. at 386, 396–97, 101 S.Ct. 677; *see also Harper–Wyman Co. v. Conn. Gen. Life Ins. Co.*, No. 86–9595, 1991 WL 62510, at *5 (N.D.Ill. Apr. 17, 1991) (analysis of whether communications between a trade association's counsel and association members are privileged "must be on a case-by-case basis, employing the usual concepts of attorney-client privilege"). "The party asserting the privilege bears the burden of proving that it applies to the communications at issue." *King Drug Co. of Florence, Inc. v. Cephalon, Inc.*, No. 06–1797, 2011 WL 2623306, at *4 n. 5 (E.D.Pa. July 5, 2011) (Goldberg, J.) (citing ***118** *In re Grand Jury Empanelled Feb. 14, 1978*, 603 F.2d 469, 474 (3d Cir.1979)).

B. *The Common–Interest Privilege* [5]

[8] The common-interest privilege "allows attorneys representing different clients with similar legal interests to share information without having to disclose it to others." *Teleglobe*, 493 F.3d at 364; *accord King Drug*, 2011 WL 2623306, at *2. Although the doctrine originated in the context of criminal co-defendants, it now "applies in civil and criminal litigation, and even in purely transactional contexts." *Teleglobe*, 493 F.3d at 364.

[9] To qualify for protection under the common-interest privilege, "the communication must be shared with the attorney of the member of the community of interest," and "all members of the community must share a common legal interest in the shared communication." *Id.* (emphasis omitted); *accord King Drug*, 2011 WL 2623306, at *2–3. "The attorney-sharing requirement helps prevent abuse by ensuring that the common-interest privilege only supplants the disclosure rule when attorneys, not clients, decide to share information in order to coordinate legal strategies." *Teleglobe*, 493 F.3d at 365. Meanwhile, the requirement that the parties to the communication share "at least a substantially similar legal interest" [6] prevents abuse of the privilege and "unnecessary information sharing." *Id.*

[10] **[11]** The common-interest privilege "does not apply unless the conditions of privilege are otherwise satisfied." *In re Diet Drugs Prods. Liability Litig.*, MDL No. 1203, 2001 WL 34133955, at *5 (E.D.Pa. Apr. 19, 2001); *accord In re Grand Jury Subpoenas*, 902 F.2d 244, 249 (4th Cir.1990). This is so because—despite its name—the common-interest privilege "is not an independent privilege, but merely an exception to the general rule that no privilege attaches to communications that are made in the presence of or disclosed to a third party." *Robinson v. Tex. Auto. Dealers Ass'n*, 214 F.R.D. 432, 443 (E.D.Tex.2003); *accord United States v. BDO Seidman, LLP*, 492 F.3d 806, 815 (7th Cir.2007); *see Teleglobe*, 493 F.3d at 365 (the privilege is "an exception to the disclosure rule"). Thus, the party asserting the privilege has the burden of establishing the elements of the attorney-client privilege generally, as well as those of the common-interest privilege. *See United States v. LeCroy*, 348 F.Supp.2d 375, 382 (E.D.Pa.2005); *Diet Drugs*, 2001 WL 34133955, at *4.

C. *The Work–Product Doctrine*

[12] **[13]** "[A] party may not discover documents and tangible things that are prepared in anticipation of litigation or for trial" unless otherwise discoverable or a party shows substantial need for the material. Fed.R.Civ.P. 26(b)(3). Pursuant to the work-product doctrine, documents reflecting the "mental impressions, conclusions, opinions, or legal theories of an attorney or other representative concerning ... litigation,"

Fed.R.Civ.P. 26(b)(3)(B), are "generally afforded near absolute protection from discovery," *Ford Motor Co.*, 110 F.3d at 962 n. 7. *See Upjohn*, 449 U.S. at 400, 101 S.Ct. 677 ("Rule 26 accords special protection to work product revealing the attorney's mental processes."). Such information is discoverable "only upon a showing of rare and exceptional circumstances." *In re Cendant Corp. Sec. Litig.*, 343 F.3d 658, 663 (3d Cir.2003). "The burden of demonstrating that a document is protected as work-product rests with the party asserting the doctrine." *Conoco, Inc. v. U.S. Dep't of Justice*, 687 F.2d 724, 730 (3d Cir.1982).

*119 **[14]** The work-product doctrine "is designed to protect material prepared by an attorney acting for his client in anticipation of litigation." *United States v. Rockwell Int'l*, 897 F.2d 1255, 1265 (3d Cir.1990); *see United States v. Nobles*, 422 U.S. 225, 238, 95 S.Ct. 2160, 45 L.Ed.2d 141 (1975) ("At its core, the work-product doctrine shelters the mental processes of the attorney, providing a privileged area within which he can analyze and prepare his client's case."). The doctrine does not protect documents prepared " 'in the ordinary course of business, or pursuant to public requirements unrelated to litigation, or for other nonlitigation purposes.' " *Martin v. Bally's Park Place Hotel & Casino*, 983 F.2d 1252, 1260 (3d Cir.1993) (quoting Fed.R.Civ.P. 26(b)(3) advisory committee note). The doctrine recognizes a lawyer must have a "certain degree of privacy, free from unnecessary intrusion by opposing parties and their counsel." *Hickman v. Taylor*, 329 U.S. 495, 511, 67 S.Ct. 385, 91 L.Ed. 451 (1947).

[15] **[16]** For the doctrine to apply, Rule 26(b)(3) requires only "that the material be prepared in anticipation of some litigation, not necessarily in anticipation of the particular litigation in which it is being sought." *Ford Motor Co.*, 110 F.3d at 967 (emphasis omitted). "[T]he preparer's anticipation of litigation [must] be objectively reasonable." *Martin*, 983 F.2d at 1260. Litigation need not be threatened before a document can be found prepared in anticipation of litigation. *Hydramar, Inc. v. Gen. Dynamics Corp.*, 115 F.R.D. 147, 150 n. 3 (E.D.Pa.1986). However, a document will fall within the scope of the work-product doctrine only if it was prepared primarily in anticipation of future litigation. *See Diet Drugs*, 2001 WL 34133955, at *5.

III. DISCUSSION

The parties implore me to draw broad conclusions about whether entire categories of communications are privileged. *See* Pls.' Br. at 37 (seeking a ruling "that UEP has not sustained its burden of demonstrating that a common interest privilege existed over pre–2009 communications"); UEP's Br. at 8 (arguing "communications between counsel for UEP and individual representatives of UEP members must be treated and protected like those among counsel for a corporation and its employees"). Although such conclusions might be helpful to guide the parties as they engage in future discovery in this litigation, I must confine my analysis to the actual disputes at hand. *Cf. Upjohn*, 449 U.S. at 386, 101 S.Ct. 677 ("[W]e sit to decide concrete cases and not abstract propositions of law. We decline to lay down a broad rule or series of rules to govern all conceivable future questions in this area, even were we able to do so."). Accordingly, I must focus on the specific contents of each disputed communication, coupled with "the unique context that led to [each document's] creation." *Faloney v. Wachovia Bank*, 254 F.R.D. 204, 210 n. 7 (E.D.Pa.2008).

[17] UEP has the burden of establishing each document at issue is privileged. *LeCroy*, 348 F.Supp.2d at 382. To satisfy its obligation, UEP primarily has chosen to rely on the content of the documents themselves, as well as an affidavit of its current general counsel, Kevin Haley ("the Haley affidavit"). *See* UEP's Br. at 19–44. It offered no testimony or affidavits from the parties to the communications at issue, or from any UEP members, revealing their understanding of their relationship with UEP counsel or whether they intended such communications to be confidential. As a general matter, "statements in briefs cannot be treated as evidence and a document for in camera inspection cannot establish all the privilege's elements." *Faloney*, 254 F.R.D. at 212–13. With that in mind, I will address each communication in turn and explain how UEP has failed to satisfy its burden of establishing privilege. [7]

A. *January 2003 Memorandum*

[18] The earliest document at issue is a January 17, 2003 memorandum by Garth *120 Sparboe, Sparboe's vice president and a member of UEP's Animal Welfare Committee. The memorandum is addressed to UEP's senior vice president Gene Gregory, UEP's board and executive committee chairman Mike Bynum, UEP's

Animal Welfare Committee chairman Paul Bahan, and UEP's general counsel Irving Isaacson. It "provides information and analysis ... regarding the economic impact of the animal welfare program." UEP's Br. at 32.

Although it would be possible for members of a UEP committee to engage in privileged attorney-client discussions with UEP's general counsel about legal matters related to the committee's work, *see In re Rail Freight Fuel Surcharge Antitrust Litig.*, 268 F.R.D. 114, 116 (D.D.C.2010), "merely copying an attorney on [a communication] does not establish that the communication is privileged," *IP Co.*, 2008 WL 3876481, at *3. UEP claims the memorandum is protected, arguing Isaacson was one of the recipients, Isaacson "understood [it] to be confidential and maintained it as such," and its topic was "the contours of the animal welfare program ... which was, at least in part, a legal exercise." *Id.* at 32–33 (citing and quoting the Haley affidavit). [8]

UEP's assertions fail to establish the memorandum is privileged. First, nothing about the memorandum or its contents suggests—either explicitly or implicitly—that the document was prepared in connection with a request for, or the provision of, legal advice. It is not marked "confidential" or "attorney-client privileged." [9] It contains no requests for Isaacson's opinion about any legal matter. It does not refer to any request by Isaacson for factual information from the committee related to a legal issue Isaacson was considering on behalf of UEP. Rather, the memorandum describes certain decisions made by a "scientific committee," primarily regarding cage density. As UEP correctly observed, it describes the "economic impact" of the Program, not any of the Program's legal ramifications. UEP's Br. at 32. Thus, the memorandum is not facially "for the purpose of obtaining or providing legal assistance." *See Teleglobe*, 493 F.3d at 359.

Second, nothing else in the record supplements the contents of the document and establishes the memorandum was, in fact, a request by Sparboe or his committee for legal advice or a response to a request by Isaacson for facts necessary to provide legal advice. The Haley affidavit asserts only that Isaacson "understood the ... memo ... to be the provision of factual information to assist [him] in providing legal advice to UEP regarding the development and negotiation of the [Program]." UEP's Br. at Ex. A ¶ 10; *accord id.* at Ex. B p. 4. Even if I were to credit that assertion, it sheds no light on the intent of the document's drafter or on the circumstances that led to the document's preparation. The Haley affidavit does not establish Isaacson asked the committee for facts that were necessary to resolve a legal issue on behalf of UEP, or that the memorandum was related to a request by the committee for legal guidance from Isaacson. Absent such evidence, UEP has not established a critical element of privilege. [10] *See Teleglobe*, 493 F.3d at 359; *IP Co.*, 2008 WL 3876481, at *3.

***121** B. *June & July 2003 Letters*

[19] The documents that appear to be at the heart of this motion, and the primary focus of the parties' briefs, are letters dated June 26 and July 10, 2003, from Robert Sparboe, Sparboe's president, to Al Pope, UEP's president. The parties agree neither letter was ever sent. *See* Pls.' Br. at 29, 31; *id.* at Ex. F pp. 3–4, 6. Neither Sparboe nor Pope is an attorney. The June letter is designated "Personal & Confidential"; the July letter bears only a "Certified Mail" marking. Sparboe's counsel was copied only on the July letter, while UEP's counsel was copied on neither. In both letters, Sparboe expresses concerns about the legality and economic impact of the Program. Similar—and, in some instances, nearly identical—concerns appear in a November 5, 2003 letter from Sparboe's counsel to UEP's counsel. [11]

UEP claims the June and July 2003 letters are privileged, characterizing them as drafts of the November 2003 letter, which it claims is privileged. *See* UEP's Br. at 19–29. Although "preliminary drafts of a document that is ultimately sent to counsel" may constitute privileged communications, *Laethem Equip. Co. v. Deere & Co.*, 261 F.R.D. 127, 140 (E.D.Mich.2009); *accord WebXchange Inc. v. Dell Inc.*, 264 F.R.D. 123, 127 (D.Del.2010), not every document containing facts later conveyed to counsel is automatically blanketed in privilege, *cf. Upjohn*, 449 U.S. at 395, 101 S.Ct. 677 (facts underlying an attorney-client communication are not privileged). As the party claiming the privilege, UEP must establish the June and July 2003 letters constitute drafts of a privileged communication. *Cf. King Drug*, 2011 WL 2623306, at *4 n. 5.

To sustain its privilege claims, UEP must offer evidence showing: (1) Sparboe prepared the June and July 2003 letters as drafts of the November 2003 letter; (2) Sparboe

intended the November 2003 letter to convey a privileged request for legal advice; and (3) Sparboe's disclosure of the June and July 2003 letters to Plaintiffs did not constitute waiver of any privilege. UEP has not adduced sufficient evidence to support any of these findings.

First, UEP relies entirely on the text of the two letters at issue to support its view that they are drafts of the November 2003 letter. Indeed, both letters contain passages that are echoed, sometimes verbatim, in the November 2003 letter. Nevertheless, there are also substantial differences in the letters' content, [12] and several passages that UEP construes as "explicit[ ] requests" for legal advice in the November 2003 letter, UEP's Br. at 22, are absent from the two earlier letters. UEP has offered no affidavits or other evidence showing Sparboe prepared the two earlier letters as drafts of the later one, or that Sparboe views them as such. [13] Although UEP suggests Sparboe's claim of privilege with respect to the November 2003 letter implies its production of the earlier letters was inadvertent, Sparboe has not claimed inadvertence or sought to claw back the earlier letters. Moreover, as Plaintiffs suggest, *see* Pls.' Reply at 19, Sparboe's production of the two letters while withholding the November 2003 letter could also imply it does not view the letters as drafts. Without additional evidence resolving these ambiguities and clarifying Sparboe's intent, UEP has not established the June and July 2003 letters are drafts of a privileged communication. Considered on their own, the two letters are merely communications from one executive to another with no apparent involvement by either executive's attorney and, therefore, are not privileged, even if Sparboe and UEP were viewed as parts of a "single entity" as ***122** UEP urges. *Cf. Upjohn,* 449 U.S. at 394, 396, 101 S.Ct. 677 (finding communications between corporate employees and general counsel "made at the direction of corporate superiors in order to secure legal advice from counsel" are protected, and declining to extend ruling beyond facts presented).

Second, assuming the documents at issue are drafts of the November 2003 letter, UEP has offered nothing beyond the text of the November 2003 letter to establish its privileged nature. According to UEP, the November 2003 letter contains six separate requests for legal opinions from UEP's counsel. UEP's Br. at 22. UEP, however, has failed to acknowledge, and offer evidence to resolve, ambiguities apparent on the face of the letter. *Cf. Faloney,* 254 F.R.D. at 212–13 (a party cannot establish all elements of privilege through the contested document itself). The November 2003 letter does not contain any "attorney-client privileged" markings. In fact, the record suggests the author of the letter—Sparboe's in-house counsel—"did not think [UEP's counsel] was acting as Sparboe's lawyer." Pls.' Br. at Ex. H (entry 14). The language used by Sparboe's counsel suggests he was writing on behalf of Sparboe as a separate corporation with its own legal advisor, and not as an agent or quasi-employee of UEP. [14] The letter itself contains some passages that resemble requests for legal advice, while other portions are better described as accusations and demands for explanations. For example, the third paragraph of the letter appears to be seeking a legal opinion about UEP's status under the Capper–Volstead Act. The fourth, fifth and sixth paragraphs, however, simply demand that UEP justify its legally questionable acts. In fact, those demands are the portions of the letter that also appear, in some form, in the earlier letters, both of which also included what might be viewed as a threat by Sparboe to terminate its membership in UEP. Without more, UEP has not established the November 2003 letter is privileged in its entirety. [15]

[20] Third, even if I were to conclude the June and July 2003 letters were privileged as drafts of a protected attorney-client communication, Sparboe's production of the June and July 2003 letters to Plaintiffs would constitute waiver of any privilege. [16] UEP has failed to adduce any evidence showing Sparboe—or any of its members—intended to be a party to a privileged, confidential, common-interest relationship with UEP's counsel for purposes of the letters at issue. The content of the letters suggests Sparboe, advised by ***123** its in-house counsel, was protecting its own interests by challenging what it perceived to be questionable policies and decision-making on the part of UEP. UEP has not established Sparboe's counsel intended the November 2003 letter (or the earlier letters) to be "in furtherance of" a common-interest relationship. *See LeCroy,* 348 F.Supp.2d at 381; *see also Robinson,* 214 F.R.D. at 451–52 (assessing an association member's relationship with association counsel on a case-by-case basis, and requiring proof beyond association counsel's perception that "an actual or sought after attorney-client relationship" existed between all association members and association counsel before applying a common-interest privilege).

[21] Finally, UEP's claim of work-product protection fails as to the June and July 2003 letters as well. Neither letter reveals anything about the mental processes of UEP's counsel, nor is there any evidence they were prepared at the direction of UEP's counsel. The only arguable link to any counsel is to Sparboe's in-house attorney—if the letters are viewed as drafts of the November 2003 letter. Sparboe has not claimed the letters are work-product protected, and it is not within UEP's power to invoke such a claim on Sparboe's behalf. [17]

C. *October 2003 and October 2008 E-mails*

Two other disputed communications are related in content and subject to similar analyses. Both are internal Sparboe E-mails that summarize conversations to which both Sparboe and UEP representatives were parties. The first, dated October 2, 2003, is from Sparboe's in-house counsel to its outside counsel, with Sparboe executives copied. It relates to a previous conversation among Sparboe's counsel regarding aspects of the Program and a July 2003 meeting between Sparboe representatives and UEP's president. The same meeting is referenced in the July and November 2003 letters discussed above. The E-mail is marked "attorney/client privileged communication."

The second set of E-mails are dated October 16 and 17, 2008, and were exchanged among a group of nine Sparboe executives. None of Sparboe's in-house or outside counsel are copied. The E-mails summarize a recent UEP Annual Meeting, and in two locations reference general comments made by UEP's counsel before the meeting about pending lawsuits. The E-mails do not describe under what circumstances, or to whom, such comments were made, nor do they contain any "privileged" or "confidential" markings.

Although neither its counsel nor any of its representatives were parties to the October 2003 and 2008 E-mails, UEP asserts both E-mails are privileged. *See* UEP's Br. at 30–32, 34–35. It argues the 2003 E-mail references a meeting between Sparboe and UEP, including "[n]o nonmembers," and is therefore a privileged communication under *Upjohn*. *Id.* at 31. It further suggests the E-mail is privileged because it reveals the substance of a subsequent "direct request for legal advice" made by Sparboe's counsel to UEP's counsel in the November 5, 2003 letter. *Id.* UEP characterizes the 2008 E-mails as including "classic legal advice" from Haley, and further suggests they "memorialize Haley's proposed litigation strategy." *Id.* at 34. In his affidavit, Haley avers he "do[es] not recall making [the] statement [attributed to him] in any UEP Board or Committee meeting ... or in the presence of non-UEP members." *Id.* at Ex. A ¶ 12; *see also id.* at Ex. B pp. 6–7 ("Haley does not recall specifically providing the legal advice attributed to him ... [and] does not believe he would have communicated this advice to anyone other than UEP members, UEP staff, and UEP committee members or advisors.").

[22] Again, UEP has failed to establish the E-mail communications are entitled to protection. [18] In the October 2003 E-mail, ***124** Sparboe's in-house counsel describes the July 2003 meeting with UEP's president as one in which Sparboe expressed its concerns about certain issues, but specifically notes it made no formal request that UEP should obtain any legal opinions from its counsel (who was not present at the meeting). [19] UEP has offered no evidence to demonstrate that, notwithstanding the language of the document itself, the 2003 E-mail reveals a request by Sparboe for legal advice from UEP. Its primary argument in support of its privilege claim regarding the 2003 E-mail depends on UEP's view that the E-mail reveals the content of the November 5, 2003 letter. Although the concerns referenced in the E-mail are similar to those outlined in the letter, for the reasons discussed above, *see supra* section III.B, UEP cannot rely on the letter to retroactively render privileged all previous communications on certain topics or containing certain facts. [20]

[23] UEP fares no better with respect to the October 2008 E-mails. The documents themselves shed no light on precisely who was present when UEP's counsel commented on the pending litigation before the October 2008 meeting. Plaintiffs have adduced evidence suggesting UEP meetings, including committee meetings and sessions at which UEP's counsel spoke, were open to the public and the trade press until 2009. *See* Pls.' Br. at Ex. B (deposition transcript at Ex. 10, announcing certain UEP committee meetings no longer "open to everyone" as of January 2009); *see also id.* (deposition transcript at Ex. 9, showing trade press present for UEP meetings, including those at which UEP counsel discussed legal issues). UEP's only evidence as to the circumstances under which its counsel made the statements summarized in the October 2008 E-

mails is essentially an averment by counsel that he cannot recall the statements, but probably would not have made them to anyone unaffiliated with UEP or its membership. *See* UEP's Br. at Ex. A ¶ 12; *id.* at Ex. B p. 6–7. That sort of speculation and conjecture cannot satisfy UEP's burden of proving the 2008 E-mails contain confidential, privileged legal advice. [21]

D. *September 2005 Fax*

[24] The final document at issue is a two-page fax dated September 12, 2005, sent to Al Pope (UEP's president) by Haley (its general counsel). The fax cover sheet contains boilerplate language stating it "may contain information that is privileged, confidential, and exempt from disclosure under applicable law." The second page of the fax contains what appears to be advice to UEP about its policies regarding contact with its members' customers. If that were the end of the story, the document likely would be protected, and Plaintiffs probably would not be seeking to compel its production.

However, the fax was precipitated by Sparboe's withdrawal from the Program, as well as a September 6, 2005 letter from Sparboe's president to UEP's chairman accusing a UEP staff member of interfering ***125** with Sparboe's relationships with its customers, and threatening legal action if the interference continued. *See* Pls.' Br. at Ex. A (UEPPRIV009). Moreover, the record reveals UEP forwarded the fax, in its entirety, to Sparboe's president as an attachment to its September 12, 2005 response to Sparboe's letter. *See* UEP's Br. at Ex. W; *see also id.* at Ex. B p. 6.

UEP claims the fax is privileged, offering an E-mail from its counsel to its president discussing the fax as evidence it contained legal advice sought by a client from his attorney. UEP's Br. at 35–37 & Ex. V (submitted in camera). Based on that evidence, I agree the fax would qualify for protection, assuming it remained confidential. Plaintiffs argue, however, that any privilege was waived when UEP's president and chairman attached the fax to their letter to Sparboe. [22] Pls.' Br. at 33–34. UEP responds by invoking a broad view of the common-interest privilege, pointing to Sparboe's status as a UEP member at the time, and characterizing the exchange as "sharing [a] corporation counsel's advice with the person within the corporation who raised [a] concern." UEP's Br. at 37 (citing *Upjohn*).

Although counsel for UEP suggested this document is the "closest call and probably the hardest one in the stack," Oral Arg. Tr. at 88, I disagree. Sparboe's September 6, 2005 letter to UEP was essentially a cease-and-desist letter. *See* Pls.' Br. at Ex. A (UEPPRIV009). It cannot be characterized as "rais[ing] a legal question" or "concern." UEP's Br. at 37. The letter did not request legal advice or assistance. It accused UEP of committing a tort, demanded that the actions cease, and threatened a lawsuit if they did not. *See* Pls.' Br. at Ex. A (UEPPRIV009). With respect to the issues raised in the letter and addressed in UEP's response, Sparboe and UEP shared no common legal interest; rather, they were poised as adversaries in threatened litigation. [23] Thus, UEP has not established a central element of the common-interest privilege with respect to the September 2005 fax. [24] *See Teleglobe,* 493 F.3d at 364 ("[A]ll members of the community must share a common legal interest in the shared communication.").

Moreover, for purposes of this exchange, there is no evidence Sparboe was acting as an agent of UEP, in its role as a member of the organization or any of its boards or committees. Instead, Sparboe was acting in its own interests, as an independent corporation advised by its own counsel. *See* Pls.' Br. at Ex. A (UEPPRIV009). To treat Sparboe as "person within [the UEP] corporation," at least as to this communication, would "fail[ ] to respect the corporate form." *Teleglobe,* 493 F.3d at 371. There may be instances in which the principles from *Upjohn* would render privileged communications between UEP's counsel and employees of its member companies. *See supra* note 16. For example, if Sparboe's president, acting in his capacity as a member of a UEP committee, sought advice about a legal issue confronting the organization as a whole; or if UEP's counsel were conducting a factual investigation related to a legal issue facing UEP, and in the course of his investigation interviewed Sparboe executives after making them aware of the purpose for the interview. This, however, is not one of those instances.

E. *Witness Interviews*

In addition to the six documents discussed above, UEP has asserted that certain information shared during interviews of Sparboe's representatives by Plaintiffs' counsel is privileged. UEP's Br. at 38–44. Those interviews were apparently memorialized in notes taken by Plaintiffs' counsel, and then summarized with little detail in a chart prepared by Plaintiffs for UEP's review. *See* Pls.' Br. at

*126 Ex. H. After receiving the chart, UEP prepared its own chart raising potential privilege claims regarding many of the entries on Plaintiffs' chart. *See* Pls.' Br., at Ex. E.

Neither chart is sufficient to allow me to determine whether, and to what extent, Plaintiffs have elicited privileged information from Sparboe witnesses. Although the burden is on UEP to establish the elements of its privilege claim, it cannot be faulted for failing to satisfy its burden when it had limited information from which to assess its claims as to the content of the interviews. I will deny Plaintiffs' motion with respect to the witness interviews without sustaining UEP's claims of privilege with respect to the chart. The parties should revisit the issue, mindful of the following:

- Any statements by Sparboe witnesses during interviews or in interrogatories related to the six documents at issue in this motion are not privileged, as I have determined the underlying documents are not privileged.

- Any statements related to communications between a Sparboe representative and UEP's counsel would be privileged only if UEP can establish either: (i) the Sparboe representative was acting in his capacity as a UEP member representative and communicated with UEP's counsel in connection with counsel's provision of legal advice to UEP; or (ii) the Sparboe representative intended to enter a privileged relationship with UEP's counsel and sought confidential legal advice.

- Failure to adduce evidence showing Sparboe's intent and expectations in connection with any disputed communications will likely complicate, if not defeat, any future privilege claims by UEP.

If the parties are unable to resolve the privilege issues related to the witness interviews on their own, they may request that I review Plaintiffs' interview notes to determine what, if any, attorney-client privileged or work-product protected information they contain.

An appropriate order follows.

ORDER

AND NOW, this 19th day of October, 2011, upon consideration of Direct Purchaser Plaintiffs' Motion to Compel Production of Sparboe Documents and Other Information (doc. 511), the accompanying memorandum of law (doc. 514), any responses and replies thereto (docs. 521, 528, 535), after oral argument on September 13, 2011, and for the reasons set forth in the accompanying Memorandum Opinion, it is hereby ORDERED that the motion is GRANTED in part and DENIED without prejudice in part.

The motion is granted with respect to the six documents at issue. Those documents identified in the sections III.A through III.D of the accompanying Memorandum Opinion, shall be produced to Direct Purchaser Plaintiffs and/or removed from sequestration, as appropriate, within fourteen (14) days of this Order.

The motion is denied without prejudice with respect to the contested witness interviews. The parties shall revisit the information contained in the interviews, endeavor to resolve any outstanding privilege issues left unresolved by the accompanying Memorandum Opinion, and request intervention from the Court if necessary within twenty-eight (28) days of this Order.

All Citations

278 F.R.D. 112

Footnotes

1 Plaintiffs filed their motion and the accompanying memorandum of law and exhibits under seal, and designated them "highly confidential." The same is true for UEP's responsive brief, UEP's exhibits, Plaintiffs' reply, and UEP's surreply. Copies of all of these documents (ECF Nos. 511, 513, 514, 520, 521, 528, 535) are on file with the Clerk. I will cite to them as follows: Pls.' Br., UEP's Br., Pls.' Reply, and UEP's Surreply. Oral argument on the motion was held on September 13, 2011. *See* Am. Tr. of Oral Arg., ECF No. 548, *In re Processed Egg Prods. Antitrust Litig.*, No. 08–md–2002 (E.D. Pa. Sept. 13, 2011) [hereinafter Oral Arg. Tr.].

2 All factual findings are made by clear and convincing evidence.

3 On July 1, 2010, after an in camera review in anticipation of this litigation, I ordered the return to UEP of documents "containing possible UEP privileged information." *See* Order at 1, *In re Processed Egg Prods. Antitrust Litig.*, No. 08–md–2002 (E.D. Pa. July 1, 2010). Based on letters from the parties, and without the benefit of full briefing, additional exhibits, or a factual record, I observed that, as an agricultural cooperative, "UEP may assert attorney-client privilege over the legal advice from its counsel and shared with its members." *Id.* at 3. That observation does not dictate any particular result here, now that the parties have extensively briefed the nuances of privilege law as it applies to the specific communications at issue. Although one could posit scenarios in which communications between UEP members and its counsel would be covered by a privilege held only by UEP, the record before me demonstrates none of the communications at issue are examples of such scenarios.

4 Both parties conceded as much during oral argument. *See* Oral Arg. Tr. at 38–40 (counsel for UEP admits categorical privilege determinations are inappropriate, and "the Court has to look at each specific communication and make a determination of all of the typical indicia of attorney-client privilege"); *id.* at 89 (counsel for Plaintiffs agrees the proper method is a "case-by-case [inquiry] applying the traditional principles of the attorney-client privilege").

5 The common-interest privilege is sometimes referred to as the "community-of-interest privilege" or the "joint-defense privilege." *Teleglobe,* 493 F.3d at 363–64. The three terms are synonymous. *Id.* They are distinct, however, from the "co-client privilege" or "joint-client privilege," which applies when two or more clients consult with the same attorney. *Id.* at 362–63. UEP has not invoked the co-client privilege here, so I need not discuss it. *See* Oral Arg. Tr. at 29, 100–01; Pls.' Br. at Exs. C–D.

6 The common interest binding parties to the communication must be legal in nature, and not merely commercial or business related. *See King Drug,* 2011 WL 2623306, at *3.

7 Because I conclude only one of the communications could be protected by the attorney-client privilege in the first instance, *see infra* section III.D, I need not reach issues of waiver or common-interest privilege except as to that document. *See IP Co. v. Cellnet Tech., Inc.,* No. C08–80126, 2008 WL 3876481, at *4 (N.D.Cal. Aug. 18, 2008); *Diet Drugs,* 2001 WL 34133955, at *5.

8 As to this document and others, the Haley affidavit contains paragraphs conveying Haley's description of what Isaacson "understood and intended." *See* UEP's Br. at Ex. A ¶¶ 9–10. According to UEP, ninety-six-year-old Isaacson is in poor health and "lacks the capacity to provide an affidavit on these issues." UEP's Surreply at 4 n. 5. Although I may consider Haley's account of what Isaacson told him for purposes of this motion, *see* Fed.R.Evid. 104(a), I conclude those portions of Haley's affidavit are entitled to little weight. First, they recount conversations between Haley and Isaacson that took place nearly a year ago. UEP's Br. at Ex. A ¶ 9. Second, they pertain to events that took place approximately eight years ago. *Id.* Third, I have no way of assessing whether, and to what extent, Isaacson's age and health problems may have impacted his ability to recall and accurately recount this information at the time of his conversations with Haley. And finally, Haley's belief about Isaacson's thought processes is inherently unreliable.

9 The absence of "privileged" or "confidential" markings on a document is not dispositive, but it is relevant to a privilege analysis. *Cf. Faloney,* 254 F.R.D. at 211 (absence of "confidential" marking outweighed by evidence the information in the document "was not public knowledge").

10 UEP has not suggested this memorandum is protected by the work-product doctrine. *See* UEP's Br. at 32–34; Pls.' Br. at Exs. C, D (entries 12 and 7–8, respectively).

11 Sparboe has not produced the November 2003 letter to Plaintiffs, and Plaintiffs have not sought to compel its production here. *See* Pls.' Reply at 19, 21 & n. 32. It is relevant to my discussion, however, because UEP's claims of privilege regarding the June and July letters largely depend on the status of the November letter.

12 For example, the June 2003 letter contains discussions of consumer confidence in the egg industry's "animal welfare friendliness," and the need for "consistent and thorough auditing procedures," neither of which appear in the subsequent letters.

13 Although not dispositive, I note that the June and July 2003 letters were addressed to and apparently written by non-lawyers. There is no evidence showing Sparboe's counsel assisted in their preparation.

14 The letter refers to "UEP, or you as their counsel," and asks how "UEP has prepared itself" to respond to certain claims. It does not use terms like "us," "we," or "our counsel" which would show Sparboe viewed itself and UEP as part of a single entity with the same attorney, as UEP maintains.

15 To date, Sparboe has withheld the November 2003 letter from its production to Plaintiffs. Based on the language of the letter, it is difficult to imagine either UEP or Sparboe establishing a legitimate privilege claim over the entire letter. However, Plaintiffs are not currently challenging Sparboe's privilege claim, so I will not evaluate it further.

16 For purposes of these letters, the record could not reasonably support the finding, urged by UEP, that Sparboe—which it views as a quasi-employee of "single entity" UEP—was incapable of waiving any privilege. *See* UEP's Br. at 26–27 (citing only cases holding dissenting corporate officers cannot waive the corporation's privilege). There is no evidence the letters were drafted by Sparboe's counsel while he was wearing his "UEP member representative hat," and not his "in-house counsel for Sparboe hat." *Cf. Teleglobe,* 493 F.3d at 372. At most, he may have been seeking legal advice for Sparboe from UEP's counsel, thus rendering Sparboe the "client" for privilege purposes. Any other view would extend *Upjohn* beyond its intended reach and ignore Sparboe's separate corporate form. *See id.* ("[A]bsent some compelling reason to disregard entity separateness, in the typical case courts should treat the various members of [a] corporate group as the separate corporations they are and not as one client."). UEP has cited cases acknowledging that, in some instances, communications between representatives of an organization's member entities and the organization's counsel may be privileged. *See, e.g., United States v. Ill. Power Co.,* No. 99–833, 2003 WL 25593221, at *3 (S.D.Ill. Apr. 24, 2003) (finding communications privileged where "[n]o one denie[d] that [the association] and its members possessed an expectation of privacy in the information provided by [the association's counsel]"). However, I have found no case categorically adopting the broad view espoused by UEP, without regard for the facts and circumstances surrounding the specific documents under consideration.

17 The parties dispute whether the letters were prepared "in anticipation of litigation." *See* Pls.' Br. at 30; UEP's Br. at 28–29. I need not reach that issue. There is no basis for finding the letters were "prepared ... by or for [UEP] or its representative." Fed.R.Civ.P. 23(b)(3)(A).

18 Sparboe has asserted its own attorney-client privilege as to both sets of E-mails. *See* Oral Arg. Tr. at 107; Sept. 19, 2011 Letter from T. Hutchinson to Hon. T. Rice (on file with the Court). The propriety of Sparboe's assertion of privilege is not before me, so I limit my analysis and my conclusions here to UEP's privilege claims only.

19 Because Sparboe asserts this document is privileged, I have not quoted from it, but have summarized the portion of it which is relevant to my analysis of UEP's privilege claim.

20 UEP's other privilege theories are inapplicable to the 2003 E-mail because its counsel was not present at the July 2003 meeting referenced therein, and it has offered no evidence the meeting took place at the request of its counsel or as part of a fact-gathering process initiated by its counsel. *Cf. Upjohn,* 449 U.S. at 394–95, 101 S.Ct. 677 ("The communications at issue were made by Upjohn employees to counsel for Upjohn acting as such, at the direction of corporate superiors in order to secure legal advice from counsel."); *Teleglobe,* 493 F.3d at 364 (common-interest privilege permits attorneys to share information with one another). Additionally, UEP has not sought work-product protection for the 2003 E-mail. *See* UEP's Br. at 30–32; Pls.' Br. at Ex. C (entry 19).

21 Moreover, UEP greatly overstates the level of "advice" at issue. My review of the 2008 E-mails reveals they contain no "proposed litigation strategy," UEP's Br. at 34; rather, the only comment attributed to UEP's counsel is a general statement that discussion of topics related to the litigation should occur privately. Such a comment does not amount to the sort of "mental processes" necessary to "analyze and prepare [a] client's case" that the work-product doctrine was intended to shelter, *see Nobles,* 422 U.S. at 238, 95 S.Ct. 2160, particularly where the record is devoid of proof regarding where, and to whom, the statement was made.

22 The letter to Sparboe was not marked "confidential" or "attorney-client privileged." *See* UEP's Br. at Ex. W.

23 Although counsel for both corporations were copied on Sparboe's letter and UEP's response, the letters were authored by and primarily addressed to executives of each company. This further calls into question the applicability of the common-interest privilege. *See Teleglobe,* 493 F.3d at 364 ("Sharing the communication directly with a member of the community may destroy the privilege.").

24 UEP has not suggested the fax is protected by the work-product doctrine. *See* UEP's Br. at 35–37; Pls.' Br. at Ex. C (entry 32).

End of Document

01.a. *Southeastern Pennsylvania Transp. Authority v. Caremarkpcs Health, L.P.*, 254 F.R.D. 253 (2008)

254 F.R.D. 253
United States District Court,
E.D. Pennsylvania.

SOUTHEASTERN PENNSYLVANIA TRANSPORTATION AUTHORITY, Plaintiff,
v.
CAREMARKPCS HEALTH, L.P., Defendant.

Civil Action No. 07–2919.
|
Dec. 9, 2008.

Synopsis
Background: Regional transportation authority brought state breach of contract action against corporation that agreed to provide prescription drug benefits for authority's members. Action was removed to federal court. The District Court, 2008 WL 5003032, denied defendant's motion to bar plaintiff from introducing claims or evidence and request that plaintiff amend first amended complaint, granted defendant's request to extend discovery, and denied its request to shift costs of additional discovery to plaintiff. Defendant objected to production of certain documents pursuant to attorney-client privilege.

[Holding:] The District Court, L. Felipe Restrepo, United States Magistrate Judge, held that defendant satisfied its burden of proving that nine contested documents were privileged and did not have to be produced.

Ordered accordingly.

West Headnotes (24)

[1] **Privileged Communications and Confidentiality**
In camera review

In camera review is appropriate method for resolving privilege disputes.

1 Cases that cite this headnote

[2] **Federal Courts**
Privilege and confidentiality

Pennsylvania law governed privilege dispute, as underlying diversity action arose under Pennsylvania law. Fed.Rules Evid.Rule 501, 28 U.S.C.A.

Cases that cite this headnote

[3] **Privileged Communications and Confidentiality**
Elements in general;definition

In Pennsylvania, elements that must be met in order for party to successfully assert attorney-client privilege are that (1) asserted holder of privilege is or sought to become client, (2) person to whom communication was made (a) is member of bar of court, or his or her subordinate, and (b) in connection with subject communication is acting as lawyer, (3) communication relates to fact of which attorney was informed (a) by his client (b) without presence of strangers (c) for purpose of securing primarily either (i) opinion of law or (ii) legal services or (iii) assistance in some legal proceeding, and (d) not for purpose of committing a crime or tort, and (4) privilege has been (a) claimed and (b) not waived by client.

1 Cases that cite this headnote

[4] **Privileged Communications and Confidentiality**
Legal secretaries, stenographers, paralegals, or clerks

Under Pennsylvania law, client communications with subordinate of attorney, such as paralegal, are also protected by attorney-client privilege so long as subordinate is acting as agent of duly qualified attorney under circumstances that would otherwise be sufficient to invoke the privilege.

Cases that cite this headnote

[5] **Privileged Communications and Confidentiality**

Corporations, partnerships, associations, and other entities

Under Pennsylvania law, fact that client is corporation does not vitiate attorney-client privilege, which applies to communications by corporate employee concerning matters within scope of his duties purposefully made to enable attorney to provide legal advice to corporation and may apply where communication is to in-house counsel rather than to outside counsel retained for particular matter.

7 Cases that cite this headnote

[6] **Privileged Communications and Confidentiality**

Corporations, partnerships, associations, and other entities

Privileged Communications and Confidentiality

Business communications

For attorney-client privilege to apply where communication is to in-house counsel rather than to outside counsel retained for particular matter, primary purpose of communication at issue must be to gain or provide legal assistance; in-house counsel may play dual role of legal advisor and business advisor.

4 Cases that cite this headnote

[7] **Privileged Communications and Confidentiality**

Corporations, partnerships, associations, and other entities

Privileged Communications and Confidentiality

Waiver of privilege

Scope of individual's employment is highly relevant to question of maintenance of confidentiality in context of attorney-client privilege, and communications retain their privileged status if information is relayed to other employees of officers of corporation on need to know basis; as such, privilege is waived if communications are disclosed to employees who did not need access to them.

Cases that cite this headnote

[8] **Privileged Communications and Confidentiality**

Mode or Form of Communications

Attorney-client privilege usually protects communications themselves.

1 Cases that cite this headnote

[9] **Privileged Communications and Confidentiality**

Documents and records in general

Privileged Communications and Confidentiality

Factual information;independent knowledge;observations and mental impressions

Documents sent to or prepared by counsel incorporating such information for purpose of obtaining or giving legal advice, planning trial strategy, etc. are protected from compelled disclosure, but to extent that purely factual material can be extracted from privileged documents without divulging privileged communications, such information is obtainable.

2 Cases that cite this headnote

[10] **Privileged Communications and Confidentiality**

Corporations, partnerships, associations, and other entities

Privileged Communications and Confidentiality

Documents and records in general

Document need not be authored or addressed to attorney in order to be properly withheld on attorney-client privilege grounds; when client is corporation, privileged communications may be shared by nonattorney employees in order to relay information requested by attorneys, and documents subject to privilege

may be transmitted between nonattorneys so that corporation may be properly informed of legal advice and act appropriately.

4 Cases that cite this headnote

[11] **Privileged Communications and Confidentiality**

Documents and records in general

Attorney-client privilege may extend to certain documents that, while not involving employees assisting counsel, still reflect confidential communications between client and counsel or subordinates of counsel for the purpose of either (1) providing legal services or (2) providing information to counsel to secure legal services.

2 Cases that cite this headnote

[12] **Privileged Communications and Confidentiality**

Business communications

Privileged Communications and Confidentiality

Effect of delivery of nonprivileged materials to attorney;preexisting documents

Attorney-client privilege does not shield documents merely because they were transferred to or routed through attorney, and what would otherwise be routine, nonprivileged communications between corporate officers or employees transacting general business of company do not attain privileged status solely because in-house or outside counsel is copied in on correspondence or memoranda; in order to successfully assert attorney-client privilege, corporation must clearly demonstrate that communication in question was made for express purpose of securing legal, not business, advice.

2 Cases that cite this headnote

[13] **Privileged Communications and Confidentiality**

Presumptions and burden of proof

Party asserting attorney-client privilege bears burden of proving that it applies to communication at issue, and it is important for party seeking to assert privilege to identify specific attorney with whom confidential communication was made in order to satisfy this burden; other relevant considerations are whether party has specifically identified all recipients of document, and whether document was widely distributed.

1 Cases that cite this headnote

[14] **Privileged Communications and Confidentiality**

Particular cases

Privileged Communications and Confidentiality

E-mail and electronic communication

Privileged Communications and Confidentiality

Legal secretaries, stenographers, paralegals, or clerks

Proposed contract language in e-mail sent from paralegal to associate vice president in underwriting group for corporation that agreed to provide prescription drug benefits for regional transportation authority's members was subject to attorney-client privilege; while authority argued it appeared that paralegal was merely discussing prices that would be offered, it was clear to court after in camera review that paralegal authored e-mail to relay legal advice and to seek additional guidance on particular contract terms from both legal and business personnel.

Cases that cite this headnote

[15] **Privileged Communications and Confidentiality**

Particular cases

Privileged Communications and Confidentiality

E-mail and electronic communication

Privileged Communications and Confidentiality

Legal secretaries, stenographers, paralegals, or clerks

String of e-mails sent by paralegal, acting as agent of senior legal counsel for corporation that agreed to provide prescription drug benefits for regional transportation authority's members, to associate vice president in underwriting group and her subordinate, were subject to attorney-client privilege despite regional transportation authority's claim they merely revealed which pharmacy networks would be offered; regardless of whether business concerns were intertwined in communications, their primary purpose was clearly to provide legal advice to businesspeople regarding contract language.

Cases that cite this headnote

[16] **Privileged Communications and Confidentiality**

Corporations, partnerships, associations, and other entities

Privileged Communications and Confidentiality

E-mail and electronic communication

E-mails sent from regional transportation authority's account executive to her supervisor and vice president of sales, and from vice president to account executive and senior legal counsel for corporation that agreed to provide prescription drug benefits for regional transportation authority's members, with paralegal and account executive's supervisor copied, were subject to attorney-client privilege even though they were not authored by attorney; after careful in camera review, court concluded that business people involved with account and contract were communicating with each other, and authority's senior legal counsel, to relay legal advice and to seek additional guidance on particular contract terms.

Cases that cite this headnote

[17] **Privileged Communications and Confidentiality**

E-mail and electronic communication

Affidavit of senior legal counsel for corporation that agreed to provide prescription drug benefits for regional transportation authority's members proclaiming that contested e-mails revealed her legal advice to her clients, was sufficient to establish that e-mails were privileged regardless of whether she was the sender.

1 Cases that cite this headnote

[18] **Privileged Communications and Confidentiality**

Particular cases

Privileged Communications and Confidentiality

E-mail and electronic communication

Privileged Communications and Confidentiality

Waiver of privilege

E-mail with cut-and-pasted excerpt from memorandum that was written by senior legal counsel for corporation that agreed to provide prescription drug benefits for regional transportation authority's members and addressed to its president, with general counsel and executive vice president of client management copied, was subject to attorney client privilege; documents revealed confidential legal communications between counsel and her corporate clients, purpose of disseminating memorandum was so that corporation could be properly informed of legal advice and act appropriately, privilege was not waived as memorandum was only disseminated to corporate employees on a "need to know" basis, and mere fact business concerns may have motivated communication at issue did not render documents unprivileged.

1 Cases that cite this headnote

[19] **Privileged Communications and Confidentiality**

Confidential character of communications or advice

Corporation's failure to specifically label senior in-house legal counsel's memorandum as "confidential" or "privileged" did not destroy attorney-client privilege; communications were confidential if they were not intended to be disclosed to third persons other than those to whom disclosure was in furtherance of rendition of professional legal services.

Cases that cite this headnote

[20] **Privileged Communications and Confidentiality**

E-mail and electronic communication

Privileged Communications and Confidentiality

Waiver of privilege

E-mail authored by senior underwriter of contract to provide prescription drug benefits for regional transportation authority's members and sent to senior in-house legal counsel, with copies to one of senior underwriter's subordinates, senior executive in networks group, paralegal, and account executive was subject to attorney-client privilege, which was not waived by e-mail's subsequent dissemination; primary purpose of e-mail was to keep counsel informed on contract terms at issue and status of contract negotiations so that she could render effective legal advice, and e-mail was disseminated only to other individuals who worked on account and needed to know about issues with contract terms and negotiations.

Cases that cite this headnote

[21] **Privileged Communications and Confidentiality**

Particular cases

Privileged Communications and Confidentiality

E-mail and electronic communication

Four redacted e-mails in e-mail string were protected by attorney-client privilege from discovery in breach of contract action against corporation; primary purpose of first e-mail was clearly to seek advice concerning contract language from both business and legal personnel and even if communications included consideration of various business concerns they were infused with legal concerns, second e-mail provided further feedback to both legal and business personnel regarding topics discussed in first, third e-mail contained feedback and advice from in-house attorneys and paralegal, the latter of whom sought further legal advice from her supervisors, and fourth e-mail provided paralegal with advice about contract terms and negotiations in order for legal department to provide their legal advice on contract.

1 Cases that cite this headnote

[22] **Privileged Communications and Confidentiality**

Conveyances and contracts

Privileged Communications and Confidentiality

Waiver of privilege

Draft addendum proposed to be attached to contract, which was drafted by senior in-house legal counsel for corporation and sent to paralegal and associate vice president in underwriting group was protected by attorney-client privilege from discovery in breach of contract action against corporation; privilege was not waived since draft addendum was not widely disseminated and not revealed to employees outside scope of those who needed to remain informed of counsel's legal advice.

1 Cases that cite this headnote

[23] **Privileged Communications and Confidentiality**

Conveyances and contracts

Privileged Communications and Confidentiality

Waiver of privilege

Draft contract that corporation's senior in-house legal counsel directed paralegal to prepare and revise, which counsel declared

set forth legal advice and incorporated confidential communications from her clients that were directly involved in finalization of contract and was disseminated to associate vice-president in underwriting group and her subordinate as well as account executive and was copied to client rebates manager, two of his subordinates, and subordinate of associate vice-president and of vice-president/ chief actuary was subject to attorney-client privilege, and that privilege had not been waived; draft contract incorporated counsel's legal advice and confidential communications from clients, and document was not disseminated among employees outside group of individuals who had "need to know" information.

Cases that cite this headnote

[24] **Privileged Communications and Confidentiality**
E-mail and electronic communication
Privileged Communications and Confidentiality
Conveyances and contracts
Privileged Communications and Confidentiality
Waiver of privilege

Red-lined draft contract attached to e-mail contained in document was protected by attorney-client privilege from discovery in breach of contract action against corporation; contract unequivocally contained legal advice from senior in-house counsel, and privilege was not waived as string of e-mails in document which contained red-lined draft contract were only disseminated to those corporate employees that worked on contract and had need to know of counsel's legal advice.

1 Cases that cite this headnote

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Andrea K. Zollett, Michael S. Baig, Foley & Lardner LLP, Chicago, IL, for Defendant.

MEMORANDUM AND OPINION

L. FELIPE RESTREPO, United States Magistrate Judge.

Before the Court is Defendant CaremarkPCS Health, L.P.'s ("Caremark") Memorandum of Law (Doc. No. 105) objecting to the production of certain documents pursuant to the attorney-client privilege. *See* Def.'s Mem. 1. Caremark's in-house attorney that worked on the contract at issue in this litigation, Sara Hankins, Esquire, has submitted an affidavit in support of Defendant's position. (Doc. No. 110). *See* Hankins Aff. ¶ 4. Caremark maintains that all communications at issue were "authored for the primary purpose of both obtaining and providing legal advice relative to the contract," and that all individuals involved in the communications were "directly involved in at least some aspect of the negotiation or finalization of the SEPTA contract." Def.'s Mem. 2, 5–6.

Plaintiff Southeastern Transportation Authority's ("SEPTA") Letter Memorandum (Doc. No. 106) argues that the documents are not privileged. *See* Pl.'s Mem. 1. SEPTA seeks production of e-mail strings, memoranda, and draft documents sent between those Caremark employees who worked on the SEPTA account and contract negotiations and Caremark's in-house counsel and paralegal responsible for providing legal advice on the SEPTA contract. [1] *See* Def.'s Amended ***257** Supp. Priv. Log. SEPTA argues that the "primary purpose" of these communications between business personnel and in-house legal staff was to obtain business advice, not legal advice and contends that in some cases, any potential

privilege was waived because the documents were too widely disseminated. *See* Pl.'s Mem. 3–4, 6–8, 10, 12–13.

[1] The Court finds that Caremark has satisfied its burden of proving that the documents are covered by the attorney-client privilege and need not be produced. The Court has reviewed these documents *in camera,* and will explain the application of the attorney-client privilege to each document below. [2]

I. DISCUSSION

[2] [3] "Pennsylvania privilege law governs this dispute because the underlying action arises under Pennsylvania law." *Santer,* 2008 WL 821060, at *1, 2008 U.S. Dist. LEXIS 23364, at *2 (citing Fed.R.Evid. 501; *Montgomery County v. Microvote Corp.,* 175 F.3d 296, 301 (3d Cir.1999)). In Pennsylvania, the following elements must be met in order for a party to successfully assert the attorney-client privilege:

> (1) the asserted holder of the privilege is or sought to become a client; (2) the person to whom the communication was made (a) is a member of the bar of a court, or his or her subordinate, and (b) in connection with this communication is acting as a lawyer; (3) the communication relates to a fact of which the attorney was informed (a) by his client (b) without the presence of strangers (c) for the purpose of securing primarily either (i) an opinion of law or (ii) legal services or (iii) assistance in some legal proceeding, and (d) not for the purpose of committing a crime or tort; and (4) the privilege has been (a) claimed and (b) not waived by the client.

Santer, 2008 WL 821060, at *1, 2008 U.S. Dist. LEXIS 23364, at *2 (quoting *Rhone–Poulenc Rorer v. Home Indem. Co.,* 32 F.3d 851, 862 (3d Cir.1994)). The two disputed issues in the present case are whether the contested communications were made primarily to secure legal advice and whether the privilege was waived with respect to certain documents. *See e.g.,* Pl.'s Mem. 1, 6, 8.

[4] The attorney-client privilege has historically been applied only to "communications from a client to an attorney," but "Pennsylvania courts have ... developed a corollary doctrine covering communications from an attorney to a client when such communications reflect the communications from the client to the attorney." *Santer,* 2008 WL 821060, at *1 n. 3, 2008 U.S. Dist. LEXIS 23364, at *4–5 n. 3 (citations omitted); *See also Ford,* 110 F.3d at 965 ("the entire discussion between a client and an attorney undertaken to secure legal advice is privileged, no matter whether the client or the attorney is speaking."). Communications with the subordinate of an attorney, such as a paralegal, are also protected by the attorney-client privilege so long as the subordinate is "acting as the agent of a duly qualified attorney under circumstances that would otherwise be sufficient to invoke the privilege." *Dabney v. Investment Corp. of America,* 82 F.R.D. 464, 465 (E.D.Pa.1979) (citing 8 Wigmore, Evidence § 2301 (McNaughton Rev.1961)).

[5] [6] The fact that the client is a corporation does not vitiate the attorney-client privilege. *Kramer v. Raymond Corp.,* 1992 WL 122856, at *1, 1992 U.S. Dist. LEXIS 7418, at *2–3 (E.D.Pa. May 29, 1992) (citing *Upjohn Co. v. United States,* 449 U.S. 383, 389–90, 101 S.Ct. 677, 66 L.Ed.2d 584 (1981)). "[T]he privilege applies to communications by a corporate employee concerning matters within the scope of his duties purposefully made to enable an attorney to provide legal advice to the corporation." *AAMCO Transmissions, Inc. v. Marino,* 1991 WL 193502, at *2, 1991 U.S. Dist. LEXIS 13326, at *8 (E.D.Pa. Sept. 24, 1991) (citing ***258** *Upjohn,* 449 U.S. 383, 101 S.Ct. 677; *Admiral Ins. Co. v. United States Dist. Court,* 881 F.2d 1486, 1492 (9th Cir.1989)). "Likewise, it is clear that the privilege may apply where the communication is to in-house counsel rather than to outside counsel retained for a particular matter." *Kramer,* 1992 WL 122856, at *1, 1992 U.S. Dist. LEXIS 7418, at *3 (citing *Upjohn,* 449 U.S. at 394–95, 101 S.Ct. 677). The "primary purpose" of the communication at issue must be "to gain or provide legal assistance" for the privilege to apply due to the fact that "in-house counsel may play a dual role of legal advisor and business advisor." *Kramer,* 1992 WL 122856, at *1, 1992 U.S. Dist. LEXIS 7418, at *3. In this regard, the Third Circuit has held that even when "the decision include [s] consideration

of" various business concerns, the attorney-client privilege still applies to the communications if the decision "was infused with legal concerns and was reached only after securing legal advice." *Faloney*, 254 F.R.D. at 209–10, 2008 WL 2631360, at *5 (quoting *Ford*, 110 F.3d at 966).

[7] "[T]he 'scope of an individual's employment is ... highly relevant to the question of maintenance of confidentiality.' " *SmithKline Beecham Corp. v. Apotex Corp.*, 232 F.R.D. 467, 476 (E.D.Pa.2005) (quoting *Smithkline Beecham Corp. v. Apotex Corp.*, 193 F.R.D. 530, 539 (N.D.Ill.2000)). "The communications retain their privileged status if they [sic] information is relayed to other employees of officers of the corporation on a need to know basis." *Andritz Sprout–Bauer, Inc. v. Beazer East, Inc.*, 174 F.R.D. 609, 633 (M.D.Pa.1997). As such, "[t]he 'privilege is waived if the communications are disclosed to employees who did not need access to' them." *SmithKline*, 232 F.R.D. at 476 (quoting *Baxter Travenol Lab. v. Abbott Lab.*, 1987 WL 12919, at *5, 1987 U.S. Dist. LEXIS 10300, at *14 (N.D.Ill. June 19, 1987)); *see also Andritz*, 174 F.R.D. at 633 ("Only when the communications are relayed to those who do not need the information to carry out their work or make effective decisions on the part of the company is the privilege lost." (citing *In re Grand Jury 90–1*, 758 F.Supp. 1411 (D.Colo.1991))).

[8] [9] It is important to note that the attorney-client privilege usually protects "the communications themselves." *Andritz*, 174 F.R.D. at 633. However, "[d]ocuments sent to or prepared by counsel incorporating such information for the purpose of obtaining or giving legal advice, planning trial strategy, etc. are protected from compelled disclosure[,]" but "[t]o the extent that purely factual material can be extracted from privileged documents without divulging privileged communications, such information is obtainable." *Id.* Additionally,

> [d]rafts of documents prepared by counsel or circulated to counsel for comments on legal issues are considered privileged if they were prepared or circulated for the purpose of giving or obtaining legal advice and contain information or comments not included in the final version. *Allegheny Ludlum Corp. v. Nippon Steel Corp.*, 1991 U.S. Dist. LEXIS 5173, 1991 WL 61144 at *5 (E.D.Pa. Apr. 15, 1991). **"Preliminary drafts of contracts are generally protected by attorney/client privilege, since '[they] may reflect not only client confidences, but also legal advice and opinions of attorneys, all of which is protected by the attorney/client privilege.' "** *Muller v. Walt Disney Productions*, 871 F.Supp. 678, 682 (S.D.N.Y.1994), quoting *Schenet v. Anderson*, 678 F.Supp. 1280, 1284 (E.D.Mich.1988). See also: *Upsher–Smith Laboratories, Inc. v. Mylan Laboratories, Inc.*, 944 F.Supp. 1411, 1444–45. Compare: *United States Postal Service v. Phelps Dodge Refining Corp.*, 852 F.Supp. 156, 163 (E.D.N.Y.1994).
>
> *Id.* (emphasis added).

[10] [11] "A document need not be authored or addressed to an attorney in order to be properly withheld on attorney-client privilege grounds." *SmithKline*, 232 F.R.D. at 477 (quoting *Santrade, Ltd. v. General Elec. Co.*, 150 F.R.D. 539, 545 (E.D.N.C.1993)). When the client is a corporation, "privileged communications may be shared by non-attorney employees in order to relay information requested by attorneys." *SmithKline*, 232 F.R.D. at 477 (citing *Santrade*, 150 F.R.D. at 545). Additionally, "documents subject to the privilege may be transmitted ***259** between non-attorneys ... so that the corporation may be properly informed of legal advice and act appropriately." *SmithKline*, 232 F.R.D. at 477 (quoting *Santrade*, 150 F.R.D. at 545). Furthermore, the privilege may also extend to certain "documents, [that] while not involving employees assisting counsel, still reflect confidential communications between client and counsel or subordinates of counsel for the purpose of either (1) providing legal services or (2) providing information to counsel to secure legal services." *SmithKline*, 232 F.R.D. at 477 (citing *Cuno, Inc. v. Pall Corp.*, 121 F.R.D. 198, 202 (E.D.N.Y.1988)).

[12] However, the "attorney-client 'privilege does not shield documents merely because they were transferred to or routed through an attorney.' " *SmithKline*, 232 F.R.D. at 478 (quoting *Resolution Trust Corp. v. Diamond*, 773 F.Supp. 597, 600 (S.D.N.Y.1991)). "What would otherwise be routine, non-privileged communications between corporate officers or employees transacting the general business of the company do not attain privileged status solely because in-house or outside counsel is 'copied in' on correspondence or memoranda." *SmithKline*, 232 F.R.D. at 478 (quoting *Andritz*, 174 F.R.D. at 633). Therefore, in order to successfully assert the attorney-client privilege, the corporation "must clearly demonstrate that the communication in question was made for the express purpose of securing legal not business advice." *Marino*, 1991 WL 193502, at *3, 1991 U.S. Dist. LEXIS

13326, at *9 (citing *Teltron, Inc. v. Alexander*, 132 F.R.D. 394, 396 (E.D.Pa.1990); *Avianca, Inc. v. Corriea*, 705 F.Supp. 666, 676 (D.D.C.1989)).

[13] The party asserting the attorney-client privilege "bears the burden of proving that it applies to the communication at issue." *Sampson v. Sch. Dist. of Lancaster*, 2008 WL 4822023, at *3 (E.D.Pa. Nov.5, 2008) (citing *In re Grand Jury Empanelled Feb. 14, 1978*, 603 F.2d 469, 474 (3d Cir.1979)). It is important for the party seeking to assert the privilege to "identify [a] specific attorney with whom a confidential communication was made" in order to satisfy this burden. *SmithKline*, 232 F.R.D. at 477 (citing *United States v. Construction Prods. Research, Inc.*, 73 F.3d 464, 473 (2d Cir.1996)). Other relevant considerations are whether the party has specifically identified all recipients of the document, and whether the document was "widely distributed." *SmithKline*, 232 F.R.D. at 478 ("The recipient lists were limited to between five and twenty-five individuals within a 50,000–person organization.").

In the present case, Sara Hankins, Esquire, has submitted an affidavit asserting that she was employed as Senior Legal Counsel at Caremark at the time the contested communications were made. *See* Hankins Aff. ¶ 4. She acted as "the principal in-house lawyer advising Caremark[ ] and its business representatives on the SEPTA contract, and the legal issues surrounding such contract" during that time frame. *Id.* Further, Ms. Hankins asserts that Joy Kershaw was a paralegal who acted as her subordinate, assisted with the SEPTA contract, and "was responsible for implementing the changes to the draft contract once [Ms. Hankins] had approved them." *Id.* ¶ 5. Ms. Hankins declares that she and Ms. Kershaw "worked on the contract in a strictly legal capacity." *Id.* ¶ 6. Bearing the above legal principles in mind, the Court will address the discoverability of each document separately.

A. Documents 225

[14] Document 225 is a string of e-mails that was produced to SEPTA with one exception; namely, Caremark redacted some proposed contract language from an e-mail sent from Ms. Kershaw to Allison Brown, the Associate Vice President in the Underwriting Group. Hankins Aff. ¶ 8. The four individuals carbon copied (hereinafter "CC'd") on the e-mail are Colette Millstone, the SEPTA account executive; Samantha Brown, in-house counsel for Caremark; Ms. Hankins; and Dan Parrish, one of Caremark's pharmacy network specialists. *Id.* Ms. Hankins asserts that she directed Ms. Kershaw to "convey legal advice by way of setting forth revised proposed contract language for consideration by the Caremark[ ] employees directly involved in the SEPTA contract negotiations, and to seek feedback from both business people and legal personnel regarding the ***260** proposed legal contract language." *Id.* SEPTA argues that it appears that Ms. Kershaw is merely discussing prices that would be offered to SEPTA rather than conveying legal advice. *See* Pl.'s Mem. 3.

After careful *in camera* review of this document, it is clear that Ms. Kershaw authored the redacted e-mail to relay legal advice and to seek additional guidance on particular contract terms from both legal and business personnel; as such, the document is privileged. *Andritz*, 174 F.R.D. at 633 (citing *Muller*, 871 F.Supp. at 682) ("[p]reliminary drafts of contracts are generally protected by attorney/client privilege ...."); *see also SmithKline*, 232 F.R.D. at 477 (citing *Cuno*, 121 F.R.D. at 202) (the privilege may extend to certain "documents, [that] while not involving employees assisting counsel, still reflect confidential communications between client and counsel or subordinates of counsel for the purpose of either (1) providing legal services or (2) providing information to counsel to secure legal services."). To require disclosure of this document would reveal client communications and legal advice that were incorporated into the proposed contract language. Furthermore, Ms. Hankins has asserted that she and Ms. Kershaw played solely a legal role in relation to the SEPTA contract. Hankins Aff. ¶ 6. Even if business concerns were at issue in the communications, as SEPTA suggests, it is clear that any business decisions were only being made after securing legal advice from Ms. Hankins and Ms. Kershaw concerning the contract language. *See Faloney*, 254 F.R.D. at 209–10, 2008 WL 2631360, at *5 (quoting *Ford*, 110 F.3d at 966). Therefore, the "primary purpose" of the communications was to relay legal advice, not business advice. *See Kramer*, 1992 WL 122856, at *1, 1992 U.S. Dist. LEXIS 7418, at *3. The fact that Ms. Kershaw authored the e-mail does not destroy the privilege because she was acting as the agent of Ms. Hankins under circumstances where the attorney-client privilege applies.

See Dabney, 82 F.R.D. at 465; *see also* Hankins Aff. ¶¶ 5, 8.

The e-mail was sent to those that needed to stay informed. Three of the individuals involved in the communication were members of Caremark's in-house legal staff and the other three individuals were those who were intimately involved with the SEPTA contract negotiation and formation. Because this e-mail was not widely disseminated and was only sent to individuals who had a "need to know" the legal advice, Caremark has satisfied its burden of establishing that the privilege has not been waived. *See SmithKline*, 232 F.R.D. at 476, 478 (quoting *Baxter*, 1987 WL 12919, at *5, 1987 U.S. Dist. LEXIS 10300, at *14); *see also Andritz*, 174 F.R.D. at 633.

B. DOCUMENT 486

[15] Document 486 is a string of e-mails which begins with the same e-mail that was redacted in-part in Document 225. Hankins Aff. ¶ 8. SEPTA argues that the communications merely reveal which pharmacy networks would be offered to SEPTA. Pl.'s Mem. 3. This string of e-mails contains the same redaction as that in Document 225. Hankins Aff. ¶ 8. The only difference is that in this string of e-mails, in addition to those personnel listed above, this information was also sent to Barbara Pollio, who was Ms. Brown's subordinate in the Underwriting Department. *See* Def.'s Mem. Ex. A (filed under seal).

As stated above, these communications are privileged because they contain legal advice regarding proposed contract language. *Andritz*, 174 F.R.D. at 633 (citing *Muller*, 871 F.Supp. at 682); *see also SmithKline*, 232 F.R.D. at 477 (citing *Cuno*, 121 F.R.D. at 202). Regardless of whether business concerns were intertwined in the communications, the primary purpose of the communications was clearly to provide legal advice to businesspeople regarding the contract language. *See Faloney*, 254 F.R.D. at 209–10, 2008 WL 2631360, at *5 (quoting *Ford*, 110 F.3d at 966); *see also Kramer*, 1992 WL 122856, at *1, 1992 U.S. Dist. LEXIS 7418, at *3. Since Ms. Kershaw was acting as the agent of Ms. Hankins when she sent the contested e-mail, the privilege is not lost. *See Dabney*, 82 F.R.D. at 465; *see also* Hankins Aff. ¶¶ 5, 8. Finally, since this e-mail was not widely disseminated and was only sent to individuals who had a "need to know" the legal advice, Caremark has established that ***261** the privilege was not waived. *See SmithKline*, 232 F.R.D. at 476, 478 (quoting *Baxter*, 1987 WL 12919, at *5, 1987 U.S. Dist. LEXIS 10300, at *14); *see also Andritz*, 174 F.R.D. at 633.

C. DOCUMENT 237

[16] Document 237 contains four e-mails, two of which are redacted. The first redacted email was sent by Ms. Millstone, the SEPTA account executive, to Scott Bond, Vice President of Sales, and Sara Sullivan, who was Ms. Millstone's Supervisor. Hankins Aff. ¶ 9. Ms. Hankins and Ms. Kershaw are CC'd on the e-mail. *Id.* The next redacted e-mail was sent from Mr. Bond to Ms. Millstone and Ms. Hankins, with Ms. Kershaw and Ms. Sullivan CC'd on the e-mail. *Id.*

SEPTA argues that Ms. Hankins is merely a recipient of these e-mails and that "there is no evidence of any communication let alone legal advice flowing from attorney Hankins." Pl.'s Mem. 5 (quoting *In re Vioxx Prods. Liab. Litig.*, 501 F.Supp.2d 789, 809 (E.D.La.2007)) ("When e-mail messages were addressed to both lawyers and non-lawyers for review, comment, and approval, we concluded that the primary purpose of such communications was not to obtain legal assistance since the same was being sought from all."). [3]

Ms. Hankins asserts that the first e-mail does in fact reveal legal advice that she gave concerning the SEPTA contract and calls for input from Mr. Bond. Hankins Aff. ¶ 9. With regard to the second e-mail, Ms. Hankins asserts that Mr. Bond responded and provided her with feedback "regarding specific contractual terms and strategy for contract negotiations." *Id.*

After careful *in camera* review of the contested e-mails, the Court finds that Caremark has met its burden of establishing that the attorney-client privilege applies. Here, it is evident that business people involved with the SEPTA account and contract were communicating with each other, and Ms. Hankins, to relay legal advice and to seek additional guidance on particular contract terms; as such, the documents are privileged even though they are not authored by an attorney. *See SmithKline*, 232 F.R.D. at 477 (quoting *Santrade*, 150 F.R.D. at 545). Furthermore, the privilege also applies because these documents reveal confidential legal communications

between Ms. Hankins and her corporate clients. *See SmithKline*, 232 F.R.D. at 477 (citing *Cuno*, 121 F.R.D. at 202).

[17] Absent specific evidence to the contrary, the Court finds that Ms. Hankins' affidavit proclaiming that the contested e-mails reveal her legal advice to her clients is ***262** sufficient to establish that they were privileged, regardless of whether or not she was the sender. *See RCN Corp. v. Paramount Pavilion Group LLC*, 2003 WL 23112381, at *3–4, 2003 U.S. Dist. LEXIS 24004, at *9–10 (E.D.Pa. Dec. 19, 2003) (holding that in-house counsel's affidavit that he was only involved in the communications in his legal capacity was sufficient to establish privilege when the opposing party merely accused him of acting in a business capacity in its brief (citing *Georgine v. Amchem Prods., Inc.*, 160 F.R.D. 478, 485 n. 3 (E.D.Pa.1995); *Meridian Mortgage Corp. v. Spivak*, 1992 U.S. Dist. LEXIS 12319, 1992 WL 205640, at *3 (E.D.Pa. Aug. 14, 1992))); *see also SmithKline*, 232 F.R.D. at 477 (quoting *Santrade*, 150 F.R.D. at 545) ("A document need not be authored or addressed to an attorney in order to be properly withheld on attorney-client privilege grounds."). Furthermore, because Caremark has established that these e-mails were only sent to employees that were involved with the SEPTA account and contract, and thus needed to stay informed of the legal advice, the privilege was not waived. *See SmithKline*, 232 F.R.D. at 476 (quoting *Baxter*, 1987 WL 12919, at *5, 1987 U.S. Dist. LEXIS 10300, at *14); *see also Andritz*, 174 F.R.D. at 633.

D. DOCUMENT 480

[18] Document 480 contains an e-mail with a cut-and-pasted excerpt from a memorandum that was written by Ms. Hankins and addressed to David George, Caremark's President, with Susan de Mars, Caremark's General Counsel, and Joe Filipek, Caremark's Executive Vice President of Client Management CC'd on the memorandum. Hankins Aff. ¶ 10. Ms. Hankins notes that the complete version of this memorandum was also sent to Mr. Bond and Ms. Millstone. *Id.* In the e-mail, Mr. Bond sends an excerpt of the memorandum to Andrew Thomas, Ms. Millstone's supervisor, Ms. Millstone, and Ms. Brown. *Id.* ¶ 11. Ms. Hankins notes that "the primary purpose of this memorandum was to set forth my legal analysis of the proposed SEPTA contract." *Id.* ¶ 10. Ms. Hankins asserts that all individuals that received the memorandum "needed to know what [her] advice was with respect to the contract at issue." *Id.* ¶¶ 10–11.

SEPTA contends that this memorandum "was disseminated to non-legal employees for the purposes of analyzing a business decision and further it was disseminated without regard to whether the underlying communication contained privileged legal advice," partially because the document does not state on its face that it contains legal advice and must be kept confidential. Pl.'s Mem. 5–6. Caremark argues that these communications reveal Ms. Hankins' legal advice only to those on a "need to know" basis and that the mere fact that the document is not "labeled 'privileged' " does not vitiate the privilege. Def.'s Mem. 8–9 (citing *Lifewise Master Funding v. Telebank*, 206 F.R.D. 298, 301 (D.Utah 2002)) (citations omitted).

The excerpted memorandum clearly reveals the legal advice of Ms. Hankins. Further, Mr. Bond's e-mail disseminating the excerpted memorandum clearly demonstrates that the purpose of this further dissemination is for the purpose of relaying the Ms. Hankins' legal advice contained in the memorandum. The privilege applies because these documents reveal confidential legal communications between Ms. Hankins and her corporate clients. *See SmithKline*, 232 F.R.D. at 477 (citing *Cuno*, 121 F.R.D. at 202). Further, the privilege applies because the purpose of disseminating the memorandum was "so that the corporation may be properly informed of legal advice and act appropriately." *SmithKline*, 232 F.R.D. at 477 (quoting *Santrade*, 150 F.R.D. at 545). As the memorandum was only disseminated to those corporate employees in a "need to know" position, the privilege was not waived. *See SmithKline*, 232 F.R.D. at 476 (quoting *Baxter*, 1987 WL 12919, at *5, 1987 U.S. Dist. LEXIS 10300, at *14); *see also Andritz*, 174 F.R.D. at 633. Moreover, the mere fact that business concerns may have motivated the communication at issue does not render the documents unprivileged because the Court finds that any business decisions being made were "infused with legal concerns and [were] reached only after securing legal advice." ***263** *Faloney*, 254 F.R.D. at 209–10, 2008 WL 2631360, at *5 (quoting *Ford*, 110 F.3d at 966).

[19] Caremark persuasively argues that its failure to specifically label Ms. Hankins' memorandum as

"confidential" or "privileged" does not destroy the privilege. Communications are confidential "if 'not intended to be disclosed to third persons other than those to whom disclosure is in furtherance of the rendition of professional legal services.' " *Faloney*, 254 F.R.D. at 209–10, 2008 WL 2631360, at *5 (quoting *United States v. Moscony*, 927 F.2d 742, 752 (3d Cir.1991)). The *Faloney* court held that communications were confidential even though an employee discussed them with other employees of the Defendant and even though the communications were not labeled as "confidential," because "the information was not public knowledge." *Faloney*, 254 F.R.D. at 210-11, 2008 WL 2631360, at *6 (citing *In re U.S. Healthcare, Inc. Sec. Litig.*, 1989 WL 11068, at *2 n. 2 (E.D.Pa. Feb. 8, 1989); *Moscony*, 927 F.2d at 752). Further, the communications were held to be confidential because "[t]he conveyed information was within the scope of [the employees] employment," and it had been established that the employees knew that the attorneys needed the information in order to render legal advice. *Faloney*, 254 F.R.D. at 212, 2008 WL 2631360, at *7.

Similarly, in the present case, all employees involved in the discussion surrounding the disputed memorandum were acting within the scope of their employment on the SEPTA contract. *See* Hankins Aff. ¶¶ 10–11. Furthermore, the portion of the e-mail that was produced is clear on its face that, while Mr. Bond originally thought the concerns were merely business decisions, the legal issues outlined in the memorandum were of consequence to the businesspeople involved in the communications. There is no evidence to indicate that the information contained in the memorandum was public knowledge or that it was disseminated to other employees that were not acting in the scope of their employment; as such, the fact that the memorandum was not labeled "confidential" or accompanied by instructions not to disclose, does not render it discoverable. *See Faloney*, 254 F.R.D. at 209–12, 2008 WL 2631360, at *5–7 (citations omitted).

E. DOCUMENT 481

[20] Document 481 consists of four e-mails, the first of which was redacted by Caremark. The redacted e-mail is authored by Ms. Allison Brown, "senior underwriter of the SEPTA contract," and is sent to Ms. Hankins. Hankins Aff. ¶ 12. Becky Hedberg, one of Ms. Brown's subordinates, and Ren Elder, "senior executive in the networks group," Ms. Kershaw, and Ms. Millstone are all CC'd on the e-mail. *Id.* Ms. Hankins declares that, in the e-mail, "Ms. Brown advises [her] and the SEPTA business team about a contract term, and apprises [them] of the status of the contract negotiations." *Id.* Ms. Hankins asserts that she needed to be kept abreast of this type of information in order to render her legal advice on the contract. *Id.* Subsequent e-mails in the chain reveal that this information was also shared with Mr. Bond, Andrew Thomas, who took over as Ms. Millstone's supervisor at some point, and Margaret Wear, who is "Vice President, Chief Actuary." *Id.; see also* Def.'s Mem. Ex. A (filed under seal).

Caremark argues that this e-mail should be privileged because it involves Ms. Brown "advis[ing] in-house counsel and the SEPTA business team about a new contract term and the reasons for resisting same, and appris[ing] them of the status of the contract negotiations." Def.'s Mem. 9 (citing *American Nat'l Bank and Trust Co. of Chicago v. AXA Client Solutions, LLC*, 2002 WL 1058776, at *4 (N.D.Ill. Mar. 22, 2002) (finding e-mail "correspondence with counsel regarding contract language on market timing" amongst in-house counsel and employees to be protected by the attorney-client privilege)). In response, SEPTA argues that Caremark has failed to establish that Ms. Brown was seeking legal advice from Ms. Hankins in the original email and further argues that the privilege was waived because the e-mail was disseminated to other non-lawyer Caremark employees. Pl.'s Mem. 8 (citing *Vioxx*, 501 F.Supp.2d at 812).

It is clear that the primary purpose of the redacted e-mail was to keep Ms. Hankins informed on the contract terms at issue and ***264** the status of contract negotiations so that she could render effective legal advice. Thus, Caremark has satisfied its burden of proving that the attorney-client privilege applies. *See Kramer*, 1992 WL 122856, at *1, 1992 U.S. Dist. LEXIS 7418, at *3. The e-mail was subsequently disseminated to other individuals who worked on the SEPTA account and needed to know about the issues with the contract terms and negotiations. For these reasons, the Court finds that the privilege was not waived. *See SmithKline*, 232 F.R.D. at 476, 478 (quoting *Baxter*, 1987 WL 12919, at *5, 1987 U.S. Dist. LEXIS 10300, at *14); see also *Andritz*, 174 F.R.D. at 633.

F. DOCUMENT 485

[21] Document 485 consists of an e-mail string of which four e-mails have been redacted by Caremark. Hankins Aff. ¶ 13. In the first e-mail, which was produced, Ms. Millstone asks Ms. Kershaw to forward a copy of the document discussed above in Document 225. After Ms. Kershaw does so, Ms. Millstone then drafts an e-mail, which was redacted, that is addressed to Ms. Kershaw, Ms. Brown, Mr. Elder, and Ms. Hankins. *Id.* Mr. Bond and Ms. Sullivan are CC'd on the e-mail. *Id.* Ms. Hankins states that the e-mail seeks legal advice from her regarding "proposed changes to the contract." *Id.* In the next redacted e-mail, Ms. Brown addresses Ms. Millstone regarding to the issues raised in the first e-mail. *Id.* The e-mail is addressed to Ms. Millstone, with Ms. Kershaw, Mr. Elder, Ms. Hedberg, Ms. Hankins, Ms. Sullivan, and Mr. Bond CC'd on the e-mail. *See* Def.'s Am. Supp. Priv. Log. Ms. Hankins asserts that the purpose of this e-mail was to "impart information to [her] for the purpose of seeking legal advice." Hankins Aff. ¶ 13. Two e-mails follow, both of which were produced; in both e-mails, Ms. Kershaw and Ms. Millstone contact each other regarding how to proceed.

The next redacted e-mail is from Ms. Kershaw to Ms. Millstone, with Ms. Brown, Ms. Hedberg, Ms. Hankins, Ms. Samantha Brown, another in-house lawyer at Caremark, and Cheryl Hall, Manager of Pricing, all CC'd on the e-mail. *Id.; see also* Def.'s Mem. Ex. A. Ms. Hankins asserts that this e-mail "both provides and directions from the Legal Department as well as seeking legal advice from one of her attorney supervisors." Hankins Aff. ¶ 13. This e-mail contains a red-lined "version of the referenced contract," which will be addressed separately. *Id.* The final redacted e-mail is from Ms. Allison Brown to Ms. Kershaw with CC's to Ms. Hedberg, Ms. Millstone, Ms. Samantha Brown, Ms. Hankins, Ms. Hall, Mr. Elder, and Colleen Currie, a subordinate of Mr. Elder. *See* Def.'s Am. Supp. Priv. Log; Def.'s Mem. Ex. A. Ms. Hankins asserts that in this e-mail, Ms. Brown responds to Ms. Kershaw's e-mail regarding the contract language and "discusses contract negotiation strategy." Hankins Aff. ¶ 13.

Six e-mails follow, all of which were produced, that contain correspondence between Ms. Millstone, Ms. Brown, Ms. Pollio, and Mr. Elder. A redacted e-mail follows, which contains the same document that was withheld pursuant to the e-mail string in Document 225. Hankins Aff. ¶ 8. Subsequent e-mails in the chain reveal this document and discussions related thereto between Ms. Brown, Mr. Parrish, Ms. Pollio, and Mr. Elder. These e-mails were produced. Ms. Hankins declares that "[t]he redacted portions of this string were drafted with the primary purpose of seeking legal advice and also revealed my legal advice." *Id.* ¶ 13. Caremark asserts that these communications were made to seek advice from both counsel and businesspeople concerning the pricing exhibit to the contract. Def.'s Mem. 10. It argues that the privilege applies to both the information communicated to the attorney and the advice the attorney has given. *Id.* at 11 (citing *Santrade, Ltd.*, 150 F.R.D. at 545; *Faloney*, 254 F.R.D. at 209–10, 2008 WL 2631360, at *5). Caremark also contends that even if the communications contained business-related concerns, the privilege should not be vitiated. Def.'s Mem. 11 (citing *Faloney*, 254 F.R.D. at 209–10, 2008 WL 2631360, at *5; *Ford*, 110 F.3d at 966). SEPTA argues that Caremark has not satisfied its burden to prove that all communications contained in the e-mail string were made for the purpose of securing legal advice and that even if the documents would be privileged, Caremark's wide dissemination of ***265** the information deems the privilege waived. Pl.'s Mem. 10.

The primary purpose of first redacted e-mail is clearly to seek advice concerning the contract language from both business and legal personnel. Even if these communications "include[d] consideration of" various business concerns, the attorney-client privilege still applies to the communications because they were "infused with legal concerns." *Faloney*, 254 F.R.D. at 209–10, 2008 WL 2631360, at *5 (quoting *Ford*, 110 F.3d at 966). Furthermore, all business personnel involved in the communications at issue were within the core group of individuals working on the SEPTA contract that had a "need to know" the information. *See SmithKline*, 232 F.R.D. at 476 (quoting *Baxter*, 1987 WL 12919, at *5, 1987 U.S. Dist. LEXIS 10300, at *14); *see also Andritz*, 174 F.R.D. at 633.

It is clear that the second redacted e-mail provides further feedback to both legal and business personnel regarding the topics discussed in the first redacted e-mail. The Court has considered Ms. Hankins' assertion that the purpose of this e-mail was to provide her with information necessary to render legal advice. Hankins Aff. ¶ 13. As

a result, the Court finds that for the same reasons the first e-mail is privileged, the second redacted e-mail is also privileged. The third e-mail is also privileged because it contains feedback and advice from Caremark's in-house attorneys and paralegal, and also because in the e-mail, Ms. Kershaw seeks further legal advice from her supervisors. *See Ford*, 110 F.3d at 965 ("the entire discussion between a client and an attorney undertaken to secure legal advice is privileged, no matter whether the client or the attorney is speaking.").

The fourth e-mail is also clearly privileged as it provides Ms. Kershaw with advice about contract terms and negotiations in order for the legal department to provide their legal advice on the contract. *See SmithKline*, 232 F.R.D. at 477 (citing *Cuno*, 121 F.R.D. at 202) (documents that "reflect confidential communications between client and counsel" in order to "provid[e] information to counsel to secure legal services" may be privileged). Finally, for the reasons discussed above, the cut-and-pasted contract language that Ms. Kershaw e-mailed to both business and legal personnel is privileged. Because none of the above communications were revealed to individuals outside of the core group of individuals who had a "need to know" of the information, the privilege was not waived. *See SmithKline*, 232 F.R.D. at 476 (quoting *Baxter*, 1987 WL 12919, at *5, 1987 U.S. Dist. LEXIS 10300, at *14); *see also Andritz*, 174 F.R.D. at 633.

G. DOCUMENT 553

[22] Document 553 "is a draft addendum that was proposed to be attached to the SEPTA contract," which was drafted by Ms. Hankins and sent to Ms. Kershaw and Ms. Brown. Hankins Aff. ¶ 14. SEPTA requests that the Court determine whether or not it contains legal advice or "non-legal editing or wordsmithing and/or basic comments." Pl.'s Mem. 12–13. Ms. Hankins asserts that this addendum "set[s] forth [her] legal advice." Hankins Aff. ¶ 14. "Preliminary drafts of contracts are generally protected by attorney/client privilege, since '[they] may reflect not only client confidences, but also legal advice and opinions of attorneys, all of which is protected by the attorney/client privilege.' " *Andritz*, 174 F.R.D. at 633 (quoting *Muller*, 871 F.Supp. at 682 (citations omitted)); *see also SmithKline*, 232 F.R.D. at 477 (citing *Cuno*, 121 F.R.D. at 202) (the privilege may also extend to certain "documents, [that] while not involving employees assisting counsel, still reflect confidential communications between client and counsel or subordinates of counsel for the purpose of either (1) providing legal services or (2) providing information to counsel to secure legal services."). The Court is satisfied that Caremark has satisfied its burden of proving that Document 553 is privileged. Since the draft addendum was not widely disseminated and not revealed to employees outside the scope of those who needed to remain informed of Ms. Hankins' legal advice, the privilege was not waived. *See SmithKline*, 232 F.R.D. at 476, 478 (quoting *Baxter*, 1987 WL 12919, at *5, 1987 U.S. Dist. LEXIS 10300, at *14); *see also Andritz*, 174 F.R.D. at 633.

H. DOCUMENT 554

[23] Document 554 "is a draft contract that [Ms. Hankins] directed Ms. Kershaw to ***266** prepare and revise." Hankins Aff. ¶ 15. Ms. Hankins declares that it "sets forth legal advice and incorporated confidential communications from [her] clients that were directly involved in the finalization of the SEPTA contract." *Id.* This draft contract was disseminated to Cyndi Street, a subordinate of Ms. Allison Brown, Ms. Brown herself, and Ms. Millstone. Def.'s Mem. 12; see also Def.'s Mem. Ex. A. Copied on this document are Patrick O'Neal, the client rebates manager, Michael Satre, a subordinate of Mr. O'Neal, Michael Caley, another subordinate of Mr. O'Neal, Ms. Pollio, Amy Companik, a subordinate of Ms. Brown, and Bonnie Stone, a subordinate of Margaret Wear. Def.'s Mem. 12; *see also* Def.'s Mem. Ex. A.

SEPTA extends its argument concerning Document 553 to the draft contract contained in Document 554. Pl.'s Mem. 12–13. After consideration of Ms. Hankins' assertion that this draft contract incorporates her legal advice and confidential communications from clients and the fact that the document was not disseminated amongst employees that were outside the group of individuals who had a "need to know" the information, the Court is again satisfied that the document is privileged and that the privilege has not been waived. *See Andritz*, 174 F.R.D. at 633 (quoting *Muller*, 871 F.Supp. at 682); *see also SmithKline*, 232 F.R.D. at 476 (quoting *Baxter*, 1987 WL 12919, at *5, 1987 U.S. Dist. LEXIS 10300, at *14).

I. DOCUMENT 555

[24] Document 555 is a red-lined draft contract, which was attached to an e-mail contained in Document 485. Hankins Aff. ¶ 13. Ms. Hankins declares that the draft contract contains her legal advice. *Id.* SEPTA extends its arguments concerning Documents 553 and 554 to Document 555. Pl.'s Mem. 12–13. This red-lined draft contract unequivocally contains legal advice from Ms. Hankins, leaving no doubt that it is privileged. *Andritz*, 174 F.R.D. at 633 (quoting *Muller*, 871 F.Supp. at 682) ("[p]reliminary drafts of contracts are generally protected by attorney/client privilege ...."); *see also SmithKline*, 232 F.R.D. at 477 (citing *Cuno*, 121 F.R.D. at 202). Moreover, because the string of e-mails in Document 485 which contained this red-lined draft contract were only disseminated to those Caremark employees that worked on the SEPTA contract and had a "need to know" of Ms. Hankins' legal advice, the privilege was not waived. *See SmithKline*, 232 F.R.D. at 476 (quoting *Baxter*, 1987 WL 12919, at *5, 1987 U.S. Dist. LEXIS 10300, at *14); *see also Andritz*, 174 F.R.D. at 633.

II. CONCLUSION

For the reasons stated above, the Court finds that Caremark has satisfied its burden of proving the contested documents are covered by the attorney-client privilege. Caremark has also demonstrated that it did not waive the privilege with respect to any of the disputed communications. Therefore, the Court will not require Caremark to produce Documents 225, 237, 480, 481, 485, 486, 553, 554, nor 555 to SEPTA. An appropriate order follows.

ORDER

AND NOW, this 8th day of December, 2008, upon consideration of the Affidavit of Sara Hankins, Esquire (Doc. No. 110), Caremark's Memorandum of Law (Doc. No. 105), and SEPTA's Letter Memorandum (Doc. No. 106), it is hereby **ORDERED** that Documents 225, 237, 480, 481, 485, 486, 553, 554, and 555 are **PRIVILEGED** and **NEED NOT** be produced.

All Citations

254 F.R.D. 253

Footnotes

1 The Court must take special caution not to discuss the specific content of the documents in detail, otherwise "the very purposes of [*in camera*] review" would be subverted, creating a risk that "the privilege will be destroyed." *In re Ford Motor Co.*, 110 F.3d 954, 966 n. 11 (3d Cir.1997); *See also Faloney v. Wachovia Bank, N.A.*, 2008 WL 2631360, at *3 n. 3 (E.D.Pa. June 25, 2008).

2 The Third Circuit has recognized that "*in camera* review is the appropriate method for resolving privilege disputes." *Santer v. Teachers Ins. & Annuity Ass'n*, 2008 WL 821060, at *1 n. 1, 2008 U.S. Dist. LEXIS 23364, at *3–4 n. 1 (E.D.Pa. Mar. 24, 2008) (citing *United Coal Cos. v. Powell Constr. Co.*, 839 F.2d 958, 966 (3d Cir.1988)).

3 SEPTA relies heavily on *Vioxx* throughout its letter memorandum. *See e.g.*, Pl.'s Mem. 2–3, 5, 6, 8, 9, 12. Not only is *Vioxx* not controlling law in this jurisdiction, but there are reasons to discount its persuasive force. The *Vioxx* Court enlisted the assistance of Special Master Paul Rice, a well known scholar in the area of attorney-client privilege, and Special Counsel Brent Barriere to resolve a number of attorney-client privilege disputes. *Vioxx*, 501 F.Supp.2d at 791–92. In *Vioxx*, as Caremark points out, two major privilege disputes dealt with a "pervasive regulation" theory and a "reverse engineering" theory. *Id.* at 800–805; *see also* Def.'s Mem. 1 n. 1. Under the "pervasive regulation" theory, Merck attempted to assert the attorney-client privilege with respect to certain documents on the basis that due to the heavy regulation of the drug industry, almost all activities of drug companies "carr[y] potential legal problems vis-a-vis government regulators." *Id.* at 800. The Special Master rejected this theory, noting that it "would effectively immunize most of the industry's internal communications because most drug companies are probably structured like Merck where virtually every communication leaving the company has to go through the legal department for review, comment, and approval." *Id.* at 801. The Special Master also noted that, while pervasive regulation "is a factor that must be taken into account when assessing" the application of the attorney-client privilege to communications with in-house counsel, the party asserting the privilege must still satisfy its "burden of persuasion on the elements of attorney-client privilege" with respect to each document. *Id.* at 800–801. Under the "reverse engineering" theory, Merck unsuccessfully argued that

even if things such as "studies" and "proposals," not normally privileged, were attached to communications, they should be privileged because "adversaries can discern the content of the legal advice that was subsequently offered." *Id.* at 804–05. In the present case, the communications at issue clearly involve negotiation of the SEPTA contract and its formation. *See* Hankins Aff. ¶¶ 7–15; Def.'s Mem. 1–2 n. 1. Because the factual scenarios and arguments being advanced in the present case are distinguishable from those in *Vioxx*, the Court is hesitant to rely on the *Vioxx* case as persuasive authority.

End of Document

02. *United States v. Askins*, Civ. No. 3:13-cr-00162, 2016 WL 4039204

(M.D. Tenn. July 28, 2016)

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Only the Westlaw citation is currently available.
United States District Court,
M.D. Tennessee, Nashville Division.

United States of America,
v.
Wendy Askins.

Civil No. 3:13-cr-00162
|
Filed 07/28/2016

Attorneys and Law Firms

Darryl Anthony Stewart, Office of the United States Attorney, Nashville, TN, for United States of America.

MEMORANDUM

ALETA A. TRAUGER, United States District Judge

***1** This matter comes before the court on a Motion to Dismiss Indictment and Disqualify Counsel filed by the defendant, Wendy Askins (Docket No. 150), to which the United States has filed a Response (Docket No. 156). For the reasons discussed herein, the motion will be denied.

BACKGROUND[1]

Askins is a former executive director of the Upper Cumberland Development District ("UCDD"), a quasi-governmental entity established by the State of Tennessee to further the economic development of the state's Upper Cumberland region. (Docket No. 131 ¶¶ 1, 4.) UCDD is governed by a board of directors and an executive committee, but its day-to-day operations are managed by the executive director. UCDD oversees the administration of the Cumberland Regional Development Corporation ("CRDC"), which is primarily focused on creating affordable housing, and the Cumberland Area Investment Corporation ("CAIC"), which administers an at least partially federally funded program offering loans to small businesses. (*Id.* at ¶¶ 1–3.)

In 2007, UCDD retained the Rader Law Firm to provide periodic legal assistance to UCDD as needed. (Docket No. 156-3, pp. 24, 168.) Throughout the relationship, the firm's services were paid for by UCDD with its discretionary funds. (*Id.* at pp. 53–55.) As executive director, Askins served as UCDD's primary contact with the Rader Law Firm, although the firm's senior partner, Daniel H. Rader, III ("Dan Rader"), has testified that, at times, he communicated with several other individuals at UCDD as well. (*Id.* at p. 193.) Askins has testified that, prior to 2011, UCDD called on the Rader Law Firm rarely, at a rate that she estimated as no more than twice per year. (*Id.* at p. 24.) In summer of 2011, Askins and UCDD deputy director Larry Webb met twice with Dan Rader to discuss the management of an allegedly UCDD-funded property known as the "Living the Dream" project, located at 1125 Deer Creek in Cookeville, Tennessee. (*Id.* at p. 26; Docket No. 131 ¶ 9(b), (j)–(m).) Askins and Webb were interested in forming a company to provide services to residents of the Living the Dream project, but Rader advised them that such steps would create a conflict of interest in light of their professional positions with UCDD. (Docket No. 156-3, pp. 59, 182–83.)

In the fall of 2011, UCDD received a number of requests from media outlets under Tennessee's Open Records Act and sought the assistance of the Rader Law Firm in responding to the requests. (*Id.* at pp. 59–61.) In the course of its review, the Rader Law Firm discovered irregularities in UCDD's records that prompted Dan Rader to call Askins and request that she set up a meeting with Mike Foster, the chairman of the UCDD board of directors. (*Id.* at pp. 134– 39.) Dan Rader has testified that he told Askins that she was "welcome to" attend the meeting as well. (*Id.* at p. 186.) The resulting meeting was held on January 12, 2012, and was attended by the following people: Askins; Foster; the vice chairman of the UCDD board of directors, John Pelham; Dan Rader; and Rader's son, another member of the firm, Daniel H. Rader, IV ("Danny Rader"). (*Id.* at pp. 64–65.) At the meeting, the Raders distributed a letter from Danny Rader addressed to Askins and Foster under their formal UCDD titles and at their UCDD work addresses. The letter detailed the scope of what had so far been requested by the media and produced by UCDD, and noted, in particular, issues related to the minutes of a February 16, 2010, board meeting. (Docket No. 150-2.) Throughout, the letter used the word "you" without clearly identifying whether it was referring to one of the recipients, both of the recipients, or UCDD itself. (*Id.*)

*2 The January 12, 2012, meeting was electronically recorded and has been transcribed. (Docket No. 150-1.) Among the topics discussed in the meeting were the possibility that documents had been falsified or destroyed, the possibility that an audit might reveal embezzlement by Askins, and the possibility of an eventual criminal investigation. (*Id.* at pp. 15, 18, 34–35, 38.) The transcript shows that: early in the meeting, Dan Rader stated that he had "been the lawyer for UCDD for a couple of years"; he later said, "[W]e represent the UCDD and we feel like we have an obligation to have you guys here to try to protect UCDD and its reputation"; and he later reiterated, "I want to protect UCDD, and that's who we represent, UCDD." (*Id.* at pp. 3, 18–19, 38) Shortly thereafter, Dan Rader said to Askins that, in light of some of the facts the Rader Law Firm had uncovered so far and the media's persistence in the matter, he thought Askins "need[ed] to probably consult a personal attorney." (*Id.* at p. 42.) Before the conversation ended, Dan Rader mentioned a final time that he was not Askins' criminal defense attorney. (*Id.* at p. 56.) Askins has testified that, until Dan Rader mentioned her need to get her own attorney, she believed that he represented her as well as UCDD. (Docket No. 156-3, pp. 67–68.)

In the spring of 2013, Dan Rader was contacted by the FBI about his dealings with Askins and the UCDD. (*Id.* at 190.) Dan Rader discussed the matter over the phone with Mark Farley, who had by that time succeeded Askins as executive director of UCDD. Dan Rader confirmed with Farley that UCDD wished to waive its attorney-client privilege in the matter. (*Id.*) Dan Rader went on to speak with the FBI in May of 2013, and again in early 2016. (*Id.*) Danny Rader met with a TBI special agent and an investigator with the Tennessee Attorney General's Office in August of 2013. (Docket No. 150-4.) Over the course of the interviews, both Dan and Danny Rader conveyed information they had received from Askins in the January 12, 2012, meeting.

On September 25, 2013, a federal grand jury charged Askins with one count of conspiracy to commit an offense against or defraud the United States, six counts of theft of public money, four counts of bank fraud, three counts of money laundering, and two counts of making false statements in a matter under federal jurisdiction. (Docket No. 1.) The grand jury returned a superseding indictment on February 24, 2016, charging Askins with one count of conspiracy to commit an offense against or defraud the United States, two counts of embezzlement from a program receiving government funds, one count of theft of government property, four counts of bank fraud, and four counts of money laundering. (Docket No. 131.) Many, if not all, of the charges Askins faces touch in some way on documents, actions, or transactions discussed in the January 12, 2012, meeting with the Rader Law Firm attorneys. (*Id.*) On July 27, 2016, Askins filed an *in camera* motion asking the court to dismiss the indictments in light of the Government's reliance on communications between Askins and the Rader Law Firm, which Askins asserts were protected by attorney-client privilege. (Docket No. 150.)

LEGAL STANDARD

Motions to dismiss indictments are governed by Rule 12 of the Federal Rules of Criminal Procedure, which states that "[a] party may raise by pretrial motion any defense, objection, or request that the court can determine without a trial on the merits." Fed. R. Crim. P. 12(b). The Sixth Circuit guides district courts to "dispose of all motions before trial if they are capable of determination without trial of the general issue." *United States v. Jones*, 542 F.2d 661, 665 (6th Cir. 1976). A defense raised in a motion to dismiss indictment is "capable of determination if trial of the facts surrounding the commission of the alleged offense would be of no assistance in determining the validity of the defense." *Id.* at 664 (citing *United States v. Covington*, 395 U.S. 57, 60 (1969)). On a motion to dismiss indictment, "the [c]ourt must view the [i]ndictment's factual allegations as true, and must determine only whether the [i]ndictment is 'valid on its face.' " *United States v. Campbell*, No. 02-80863, 2006 WL 897436, at *2 (E.D. Mich. Apr. 6, 2006) (citing *Costello v. United States*, 350 U.S. 359, 363 (1956)). Accordingly, the court must resolve factual issues in this case, such as they exist, in favor of the allegations in the indictment. With this standard in mind, the court turns to an analysis of the defendant's motion.

ANALYSIS

*3 Askins contends that, at the time of the January 12, 2012, meeting, she enjoyed an attorney-client relationship with the Rader Law Firm, and she reasonably and correctly believed that her statements in the meeting

were covered by attorney-client privilege. She argues that she never consented to the firm's decision to break the privilege and that the information that the Raders provided to investigators has so tainted the proceedings in this matter that the only appropriate remedy is dismissal of the indictment. Alternately, she challenges the adequacy of UCDD's waiver of its attorney-client privilege in the same communications. The government counters that the Rader Law Firm never represented Askins in her personal capacity, that its only relevant attorney-client relationship was with UCDD, and that UCDD validly waived the relevant attorney-client privilege through Farley, its executive director.

"The attorney-client privilege protects from disclosure 'confidential communications between a lawyer and his client in matters that relate to the legal interests of society and the client.' " *Ross v. City of Memphis*, 423 F.3d 596, 600 (6th Cir. 2005) (quoting *In re Grand Jury Subpoena (United States v. Doe)*, 886 F.2d 135, 137 (6th Cir. 1989)). The Sixth Circuit has described the elements of attorney-client privilege as follows:

> (1) Where legal advice of any kind is sought (2) from a professional legal adviser in his capacity as such, (3) the communications relating to that purpose, (4) made in confidence (5) by the client (6) are at his instance permanently protected (7) from disclosure by himself or by the legal adviser (8) except the protection be waived.

Humphreys, Hutcheson & Moseley v. Donovan, 755 F.2d 1211, 1219 (6th Cir. 1985) (quoting *United States v. Goldfarb*, 328 F.2d 280, 281 (6th Cir.), *cert. denied*, 377 U.S. 976 (1964)). "The privilege's primary purpose is to encourage 'full and frank communication between attorneys and their clients and thereby promote broader public interests in the observance of law and the administration of justice.' " *Ross*, 423 F.3d at 600 (quoting *Swidler & Berlin v. United States*, 524 U.S. 399, 403 (1998)). Attorney-client privilege "applies only where necessary to achieve its purpose and protects only those communications necessary to obtain legal advice." *In re Columbia/HCA Healthcare Corp. Billing Practices Litig.*, 293 F.3d 289, 294 (6th Cir. 2002) (quoting *In re Antitrust Grand Jury*, 805 F.2d 155, 162 (6th Cir. 1986)). "The attorney-client privilege is 'narrowly construed because it reduces the amount of information discoverable during the course of a lawsuit.' " *Ross*, 423 F.3d at 600 (quoting *United States v. Collis*, 128 F.3d 313, 320 (6th Cir. 1997)).

"The client, not the attorney, is the holder" of the rights attendant to attorney-client privilege. *Fausek v. White*, 965 F.2d 126, 132 (6th Cir. 1992). Because the client owns the rights, the client may also waive them. *See Cooper v. United States*, 5 F.2d 824, 825 (6th Cir. 1925) ("The rule which forbids an attorney from divulging matters communicated to him by his client in the course of professional employment is for the benefit of the client. But it may be waived by the client...."). Askins and the government agree that UCDD and the Rader Law Firm enjoyed an attorney-client relationship capable of giving rise to attorney-client privilege. (Docket No. 151, p. 11; Docket No. 156, p. 9.) Askins, however, argues that the firm also represented her in her personal capacity, and that any waiver of attorney-client privilege was therefore incomplete unless both she and UCDD consented. (Docket No. 151, p. 11.) *See Anderson v. Clarksville Montgomery Cty. Sch. Bd. & Sch. Dist.*, 229 F.R.D. 546, 548 (M.D. Tenn. 2005) (noting that, in case where single attorney represented multiple clients, "it appears appropriate to maintain the attorney-client privilege absent a waiver by all plaintiffs").

***4** The Sixth Circuit has recognized that, when an attorney for an entity communicates with the entity's employees, "[t]he default assumption is that the attorney only represents the corporate entity, not the individuals within the corporate sphere...." *Ross*, 423 F.3d at 605 (quoting *In re Grand Jury Subpoena*, 274 F.3d 563, 571 (1st Cir. 2001)). That assumption, however, can be overcome in certain cases if the employee demonstrates, as a threshold matter, that he clearly "indicate[d] to the lawyer that he [sought] advice in his individual capacity." *Id.* (citing *United States v. Dakota*, 197 F.3d 821, 825 (6th Cir. 1999)).

Askins relies on the following in support of her claim that the Rader Law Firm represented her in her personal capacity: her contemporaneous belief that the firm represented her; the lack of a clearer warning from UCDD's attorneys that they did not represent her; the ambiguous use of "you" in Danny Rader's letter from the day of the meeting; the fact that she was a "high managerial agent" whose activities might give rise to criminal liability for UDCC under Tenn. Code Ann. §

39-11-404(a)(2); and her two prior meetings with Dan Rader in which they had discussed her potential conflict of interest related to Living the Dream. All of the factors Askins has identified, however, are either inapposite to the test adopted by the Sixth Circuit or inadequate to the purpose for which she has presented them.

The Sixth Circuit does not direct a court considering a claim of personal privilege with corporate counsel to weigh the general equities of the situation. Rather, the court must determine whether the communications between the officer or employee claiming privilege and the relevant attorney or attorneys affirmatively establish the formation of a personal attorney-client relationship that is distinct from the preexisting attorney-client relationship between the attorney and the corporate entity. *See Ross*, 423 F.3d at 605 ("Our court, like many others, requires that the individual officer seeking a personal privilege 'clearly claim[ ]' he is seeking legal advice in his individual capacity.") (quoting *In re Grand Jury Proceedings, Detroit, Michigan, August 1977*, 570 F.2d 562, 563 (6th Cir. 1978)).

The only communications on which Askins can base her argument that she sought to form a personal attorney-client relationship with the Rader Law Firm are her 2011 meetings about her potential conflict of interest regarding Living the Dream and the January 12, 2012, meeting itself. Nothing about the 2011 meetings, however, suggests that they amounted to a departure from the firm's ordinary role as counsel to UCDD. The advisability of UCDD's executive director starting a private business that would give rise to a conflict of interest with her UCDD duties is well within the range of topics appropriate for UCDD's counsel to opine upon. Askins' 2011 meetings with Dan Rader were, therefore, insufficient to establish a newfound relationship of personal representation. The transcript of the January 12, 2012, similarly reveals no evidence of a personal attorney-client relationship. Whatever Askins' subjective belief going into the meeting, the meeting itself was plainly conducted as a discussion between UCDD's counsel and relevant personnel about UCDD's obligations and predicament.[2] Accordingly, the attorney-client privilege in this case remained UCDD's to waive.

***5** Moreover, even if Askins had established an attorney-client relationship with the Rader Law Firm, her communications during the January 12, 2012, meeting would not be entitled to attorney-client privilege, because they were not made in confidence. "The essence of the privilege is confidentiality, and when confidentiality is destroyed, there is little justification for incurring the heavy cost to the production of relevant evidence which the privilege exacts." *360 Const. Co., Inc. v. Atsalis Bros. Painting Co.*, 280 F.R.D. 347, 351 (E.D. Mich. April 12, 2012). Because attorney-client privilege applies only to confidential communications, it "will not shield from disclosure statements made by a client to his or her attorney in the presence of a third party." *Reed v. Baxter*, 134 F.3d 351, 357 (6th Cir. 1998) (citing 8 John Henry Wigmore, Wigmore on Evidence § 2311 (3d ed.1940)). The January 12, 2012, meeting was not attended only by Askins and the Raders, but also by Foster and Pelham in their capacities as chairman and vice chairman of UCDD's board. Insofar as Askins committed any of the acts with which she has been charged, her interests were highly adverse to UCDD's. She could have no reasonable expectation of confidentiality of statements made in front of members of its board of directors.

Askins also challenges the adequacy of UCDD's waiver of its attorney-client privilege through Farley. Askins takes issue with the fact that Farley's waiver was not in writing, was not approved by UCDD's board, and was not preceded by a more detailed discussion of the waiver sought. The Government contends that Farley's waiver was valid, and that, in any event, Askins does not have standing to assert UCDD's privilege. *See In re Grand Jury Proceedings*, 469 F.3d 24, 26 (1st Cir. 2006) (holding that executive, intervening only in his personal capacity, lacked standing to assert the corporation's privilege). Both of the Government's arguments are well-taken. "[W]hen control of a corporation passes to new management, the authority to assert...the corporation's attorney-client privilege passes as well." *CFTC v. Weintraub*, 471 U.S. 343, 349 (1985). UCDD's attorney-client privilege is no longer Askins' to assert. Moreover, even if Askins had standing to assert UCDD's rights, she has not established that the alleged defects she identifies would render the waiver invalid.

CONCLUSION

For the reasons discussed herein, the Motion to Dismiss Indictment and Disqualify Counsel by the defendant (Docket No. 150) will be denied.

An appropriate order will enter.

All Citations

Slip Copy, 2016 WL 4039204

Footnotes

1 In addition to the federal charges pending in this court, Askins is currently facing state charges in the Criminal Court for Putnam County, Tennessee. Askins filed a motion to dismiss her indictment in Putnam County, raising essentially the same arguments she raises here. (Docket No. 156-1.) That court held an evidentiary hearing on the motion and heard testimony from several witnesses, including Askins, before denying the motion. (Docket No. 156-2.) The government has provided excerpts from that hearing. (Docket No. 156-3.) The facts in this section come variously from the state court hearing, other materials the parties have produced relevant to this motion, and Askins' indictments.

2 The letter from Danny Rader does nothing to complicate the court's analysis. Askins is correct that, at least at times, the "you" in the letter appears clearly to refer to her. (E.g., Docket No. 150-2, p. 5.) Such use of the second person, however, is hardly surprising, given that Askins was an identified recipient of the letter. What matters is that both the content and context of the letter are consistent with the Rader Law Firm's communicating with her in her capacity as its client's executive director.

03. *Commodity Futures Trading Comm'n v. Weintraub*, 471 U.S. 343, 348 (1985)

105 S.Ct. 1986
Supreme Court of the United States

COMMODITY FUTURES TRADING COMMISSION, Petitioner
v.
Gary WEINTRAUB et al.

No. 84–261.
|
Argued March 19, 1985.
|
Decided April 29, 1985.

Officer and director of corporate debtor appealed from an order of the United States District Court for the Northern District of Illinois, Nicholas J. Bua, J., which affirmed a United States Magistrate's order that debtor's trustee in bankruptcy had authority to waive corporation's attorney-client privilege. The Court of Appeals, 7th Cir., 722 F.2d 338, reversed, and certiorari was granted. The Supreme Court, Justice Marshall, held that the trustee of a corporation in bankruptcy has the power to waive the corporation's attorney-client privilege with respect to prebankruptcy communications.

Reversed.

West Headnotes (21)

[1] **Privileged Communications and Confidentiality**
Corporations, partnerships, associations, and other entities

Attorney-client privilege attaches to corporations as well as to individuals.

60 Cases that cite this headnote

[2] **Privileged Communications and Confidentiality**
Purpose of privilege

Both for corporations and individuals, the attorney-client privilege serves the function of promoting full and frank communications between attorneys and their clients; it thereby encourages observance of the law and aids in the administration of justice.

33 Cases that cite this headnote

[3] **Corporations and Business Organizations**
Reliance on attorneys, accountants, professionals, and experts as defense

Privileged Communications and Confidentiality
Waiver of privilege

As an inanimate entity, a corporation must act through agents; it cannot speak directly to its lawyers and, similarly, it cannot directly waive the attorney-client privilege when disclosure is in its best interest.

44 Cases that cite this headnote

[4] **Privileged Communications and Confidentiality**
Corporations, partnerships, associations, and other entities

Attorney-client privilege for a corporation does not only cover communications between counsel and top management; under certain circumstances, communications between counsel and lower-level employees are also covered.

19 Cases that cite this headnote

[5] **Privileged Communications and Confidentiality**
Waiver of privilege

For solvent corporations, power to waive the corporate attorney-client privilege rests with the corporation's management and is normally exercised by its officers and directors; the managers, of course, must exercise the privilege in a manner consistent with their fiduciary duty to act in the best interests of the corporation and not of themselves as individuals.

126 Cases that cite this headnote

[6] **Corporations and Business Organizations**
Directors, officers, or agents in general

Authority of corporate officers derives legally from that of the board of directors.

2 Cases that cite this headnote

[7] **Privileged Communications and Confidentiality**
Corporations, partnerships, associations, and other entities

Privileged Communications and Confidentiality
Waiver of privilege

When control of a corporation passes to new management, the authority to assert and waive the corporation's attorney-client privilege passes as well.

131 Cases that cite this headnote

[8] **Privileged Communications and Confidentiality**
Waiver of privilege

New managers installed as the result of a corporate takeover, merger, loss of confidence by shareholders, or simply normal succession may waive the attorney-client privilege with respect to communications made by former officers and directors.

67 Cases that cite this headnote

[9] **Privileged Communications and Confidentiality**
Corporations, partnerships, associations, and other entities

Displaced corporate managers may not assert the corporate attorney-client privilege over the wishes of current managers, even as to statements that the former might have made to counsel concerning matters within the scope of their corporate duties.

65 Cases that cite this headnote

[10] **Bankruptcy**
Privilege

Legislative history of Bankruptcy Code provision, stating that "Subject to any applicable privilege, after notice and a hearing, the court may order an attorney * * * that holds recorded information * * * relating to the debtor's property or financial affairs, to disclose such recorded information to the trustee", makes clear that Congress did not intend to give a corporate debtor's directors the right to assert the corporation's attorney-client privilege against the bankruptcy trustee; indeed, statements made by members of Congress regarding the effect of said provision specifically deny any attempt to create an attorney-client privilege assertable on behalf of the debtor against the trustee. Bankr.Code, 11 U.S.C.A. § 542(e).

98 Cases that cite this headnote

[11] **Bankruptcy**
Privilege

In regard to Bankruptcy Code provision relating to disclosure to the trustee of recorded information held by an attorney, accountant, or other person, the provision's "subject to any applicable privilege" language is merely an invitation for judicial determination of privilege questions. Bankr.Code, 11 U.S.C.A. § 542(e).

4 Cases that cite this headnote

[12] **Bankruptcy**
Privilege

Bankruptcy Code provision relating to disclosure to the trustee of recorded information held by an attorney, accountant or other person was not intended to limit the trustee's ability to obtain corporate information; the provision was intended to restrict, not expand, the ability of accountants

and attorneys to withhold information from the trustee. Bankr.Code, 11 U.S.C.A. § 542(e).

5 Cases that cite this headnote

[13] **Bankruptcy**
Privilege

Because the attorney-client privilege is controlled outside of bankruptcy, by corporation's management, the actor whose duties most closely resemble those of management should control the privilege in bankruptcy, unless such a result interferes with policies underlying the bankruptcy laws.

7 Cases that cite this headnote

[14] **Bankruptcy**
Privilege

Bankruptcy Code gives the trustee wide-ranging management authority over the debtor, whereas the powers of the debtor's directors are severely limited; thus, the trustee plays the role most closely analogous to that of a solvent corporation's management, and the directors should not exercise the traditional management function of controlling the corporation's attorney-client privilege unless a contrary arrangement would be inconsistent with policies of the bankruptcy laws. Bankr.Code, 11 U.S.C.A. §§ 323, 343, 363(b), (c)(1), 521, 541, 547, 547(b)(4)(B), 548, 704(1, 2, 4).

131 Cases that cite this headnote

[15] **Bankruptcy**
Privilege

No federal interest would be impaired by the trustee in bankruptcy's control of a debtor corporation's attorney-client privilege with respect to prebankruptcy communications; on the other hand, vesting such power in the corporate directors would frustrate the Bankruptcy Code's goal of empowering the trustee to uncover insider fraud and recover misappropriated corporate assets. Bankr.Code, 11 U.S.C.A. §§ 547, 548, 704(4).

74 Cases that cite this headnote

[16] **Bankruptcy**
Representation of debtor, estate, or creditors

Fiduciary duty of a corporation's trustee in bankruptcy runs to shareholders as well as to creditors.

183 Cases that cite this headnote

[17] **Bankruptcy**
Priorities

In bankruptcy, interests of the corporate debtor's shareholders become subordinated to the interests of creditors.

7 Cases that cite this headnote

[18] **Bankruptcy**
Privilege

In cases in which it is clear that the corporate debtor's estate is not large enough to cover any shareholder claims, the trustee in bankruptcy's exercise of the corporation's attorney-client privilege will benefit only creditors, but there is nothing anomalous in this result; rather, it is in keeping with the hierarchy of interests created by the bankruptcy laws. Bankr.Code, 11 U.S.C.A. § 726(a).

49 Cases that cite this headnote

[19] **Bankruptcy**
Debtor in possession, in general

If a corporate debtor remains in possession, that is, if a trustee is not appointed, the debtor's directors bear essentially the same fiduciary obligation to creditors and shareholders as would the trustee for a debtor out of possession; indeed, the willingness of courts to leave debtors in possession is premised upon an assurance that the officers and managing employees can be depended upon to carry out the fiduciary responsibilities of a trustee.

117 Cases that cite this headnote

[20] **Bankruptcy**
Privilege

Giving the trustee in bankruptcy of a corporate debtor control over the corporate attorney-client privilege will not have an undesirable chilling effect on attorney-client communications and does not discriminate against insolvent corporations; the chilling effect is no greater than in the case of a solvent corporation and, by definition, corporations in bankruptcy are treated differently from solvent corporations.

18 Cases that cite this headnote

[21] **Bankruptcy**
Privilege

Trustee of a corporation in bankruptcy has the power to waive corporation's attorney-client privilege with respect to prebankruptcy communications. Bankr.Code, 11 U.S.C.A. § 542(e).

124 Cases that cite this headnote

**1988 *343 *Syllabus* *

Petitioner filed a complaint in Federal District Court alleging violations of the Commodity Exchange Act by Chicago Discount Commodity Brokers (CDCB), and respondent Frank McGhee, acting as sole director and officer of CDCB, entered into a consent decree that resulted in the appointment of a receiver who was ultimately appointed trustee in bankruptcy after he filed a voluntary petition in bankruptcy on behalf of CDCB. Respondent Weintraub, CDCB's former counsel, appeared for a deposition pursuant to a subpoena *duces tecum* served by petitioner as part of its investigation of CDCB, but refused to answer certain questions, asserting CDCB's attorney-client privilege. Petitioner then obtained a waiver of the privilege from the trustee as to any communications occurring on or before the date of his initial appointment as a receiver. The District Court upheld a Magistrate's order directing Weintraub to testify, but the Court of Appeals reversed, holding that a bankruptcy trustee does not have the power to waive a corporate debtor's attorney-client privilege with respect to communications that occurred before the filing of the bankruptcy petition.

Held: The trustee of a corporation in bankruptcy has the power to waive the corporation's attorney-client privilege with respect to prebankruptcy communications. Pp. 1990–1996.

(a) The attorney-client privilege attaches to corporations as well as to individuals, and with regard to solvent corporations the power to waive the privilege rests with the corporation's management and is normally exercised by its officers and directors. When control of the corporation passes to new management, the authority to assert and waive the privilege also passes, and the new managers may waive the privilege with respect to corporate communications made by former officers and directors. Pp. 1990–1991.

(b) The Bankruptcy Code does not explicitly address the question whether control of the privilege of a corporation in bankruptcy with respect to prebankruptcy communications passes to the bankruptcy trustee or, as respondents assert, remains with the debtor's directors. Respondents' contention that the issue is controlled by § 542(e) of the Code—which provides that "[s]ubject to any applicable privilege," the *344 court may order an attorney who holds recorded information relating to the debtor's property or financial affairs to disclose such information to the trustee—is not supported by the statutory language or the legislative history. Instead, the history makes clear that Congress intended the courts to deal with privilege questions. P. 1992.

(c) The Code gives the trustee wide-ranging management authority over the debtor, whereas the powers of the debtor's directors are severely limited. Thus the trustee plays the role most closely analogous to that of a solvent corporation's management, and the directors should not exercise the traditional management function of controlling the corporation's privilege unless a contrary arrangement would be inconsistent with policies of the bankruptcy laws. P. 1993.

(d) No federal interests would be impaired by the trustee's control of the corporation's attorney-client privilege with respect to prebankruptcy communications. On the other hand, vesting such power in the directors would frustrate the Code's goal of empowering the trustee to uncover **1989 insider fraud and recover misappropriated corporate assets. Pp. 1993–1994.

(e) There is no merit to respondents' contention that the trustee should not obtain control over the privilege because, unlike the management of a solvent corporation, the trustee's primary loyalty goes not to shareholders but to creditors. When a trustee is appointed, the privilege must be exercised in accordance with the trustee's fiduciary duty to all interested parties. Even though in some cases the trustee's exercise of the privilege will benefit only creditors, such a result is in keeping with the hierarchy of interests created by the bankruptcy laws. Pp. 1994–1995.

(f) Nor is there any merit to other arguments of respondents, including the contentions that giving the trustee control over the privilege would have an undesirable chilling effect on attorney-client communications and would discriminate against insolvent corporations. The chilling effect is no greater here than in the case of a solvent corporation, and, by definition, corporations in bankruptcy are treated differently from solvent corporations. Pp. 1995–1996.

722 F.2d 338 (CA7 1984), reversed.

Attorneys and Law Firms

Bruce N. Kuhlik argued the cause *pro hac vice* for petitioner. With him on the briefs were *Solicitor General Lee,* *345 *Deputy Solicitor General Bator, Kenneth M. Raisler, Whitney Adams,* and *Helen G. Blechman.*

David A. Epstein argued the cause for respondents. With him on the brief for respondents McGhee et al. was *Gary A. Weintraub, pro se.**

* *John K. Notz, Jr., pro se,* and *David F. Heroy* filed a brief for John K. Notz, Jr., Trustee, as *amicus curiae* urging reversal.

Opinion

Justice MARSHALL delivered the opinion of the Court.

The question here is whether the trustee of a corporation in bankruptcy has the power to waive the debtor corporation's attorney-client privilege with respect to communications that took place before the filing of the petition in bankruptcy.

I

The case arises out of a formal investigation by petitioner Commodity Futures Trading Commission to determine whether Chicago Discount Commodity Brokers (CDCB), or persons associated with that firm, violated the Commodity Exchange Act, 7 U.S.C. § 1 *et seq.* CDCB was a discount commodity brokerage house registered with the Commission, pursuant to 7 U.S.C. § 6d(1), as a futures commission merchant. On October 27, 1980, the Commission filed a complaint against CDCB in the United States District Court for the Northern District of Illinois alleging violations of the Act. That same day, respondent Frank McGhee, acting as sole director and officer of CDCB, entered into a consent decree with the Commission, which provided for the appointment of a receiver and for the receiver to file a petition for liquidation under Chapter 7 of the Bankruptcy Reform Act of 1978 (Bankruptcy Code). The District Court appointed John K. Notz, Jr., as receiver.

Notz then filed a voluntary petition in bankruptcy on behalf of CDCB. He sought relief under Subchapter IV of Chapter 7 of the Bankruptcy Code, which provides for the *346 liquidation of bankrupt commodity brokers. 11 U.S.C. §§ 761–766. The Bankruptcy Court appointed Notz as interim trustee and, later, as permanent trustee.

As part of its investigation of CDCB, the Commission served a subpoena *duces tecum* upon CDCB's former counsel, respondent Gary Weintraub. The Commission sought Weintraub's testimony about various CDCB matters, including suspected misappropriation of customer funds by CDCB's officers and employees, and other fraudulent activities. Weintraub appeared for his deposition and responded to numerous inquiries but refused to answer 23 questions, asserting CDCB's attorney-client privilege. The Commission then moved

to compel answers to those questions. It argued that Weintraub's assertion of the attorney-client privilege was inappropriate because the privilege could not be used to "thwart legitimate access to information sought in an administrative investigation." App. 44.

**1990 Even though the Commission argued in its motion that the matters on which Weintraub refused to testify were not protected by CDCB's attorney-client privilege, it also asked Notz to waive that privilege. In a letter to Notz, the Commission maintained that CDCB's former officers, directors, and employees no longer had the authority to assert the privilege. According to the Commission, that power was vested in Notz as the then-interim trustee. *Id.*, at 47–48. In response to the Commission's request, Notz waived "any interest I have in the attorney/client privilege possessed by that debtor for any communications or information occurring or arising on or before October 27, 1980"—the date of Notz' appointment as receiver. *Id.*, at 49.

On April 26, 1982, a United States Magistrate ordered Weintraub to testify. The Magistrate found that Weintraub had the power to assert CDCB's privilege. He added, however, that Notz was "successor in interest of all assets, rights and privileges of CDCB, including the attorney/client privilege at issue herein," and that Notz' waiver was therefore valid. App. to Pet. for Cert. 19a–20a. The District Court *347 upheld the Magistrate's order on June 9. *Id.*, at 18a. Thereafter, Frank McGhee and his brother, respondent Andrew McGhee, intervened and argued that Notz could not validly waive the privilege over their objection. Record, Doc. No. 49, p. 7. [1] The District Court rejected this argument and, on July 27, entered a new order requiring Weintraub to testify without asserting an attorney-client privilege on behalf of CDCB. App. to Pet. for Cert. 17a. [2]

The McGhees appealed from the District Court's order of July 27 and the Court of Appeals for the Seventh Circuit reversed. 722 F.2d 338 (1984). It held that a bankruptcy trustee does not have the power to waive a corporate debtor's attorney-client privilege with respect to communications that occurred before the filing of the bankruptcy petition. The court recognized that two other Circuits had addressed the question and had come to the opposite conclusion. See *In re O.P.M. Leasing Services, Inc.*, 670 F.2d 383 (CA2 1982); *Citibank, N.A. v. Andros*, 666 F.2d 1192 (CA8 1981). [3] We granted certiorari to resolve the conflict. 469 U.S. 929, 105 S.Ct. 321, 83 L.Ed.2d 259 (1984). We now reverse the Court of Appeals.

*348 II

[1] [2] It is by now well established, and undisputed by the parties to this case, that the attorney-client privilege attaches to corporations as well as to individuals. *Upjohn Co. v. United States*, 449 U.S. 383, 101 S.Ct. 677, 66 L.Ed.2d 584 (1981). Both for corporations and individuals, the attorney-client privilege serves the function of promoting full and frank communications between attorneys and their clients. It thereby encourages observance of the law and aids in the administration of justice. See, *e.g.*, *Upjohn Co. v. United States, supra*, at 389, 101 S.Ct., at 682; *Trammel v. United States*, 445 U.S. 40, 51, 100 S.Ct. 906, 912, 63 L.Ed.2d 186 (1980); *Fisher v.* **1991 *United States*, 425 U.S. 391, 403, 96 S.Ct. 1569, 1577, 48 L.Ed.2d 39 (1976).

[3] [4] The administration of the attorney-client privilege in the case of corporations, however, presents special problems. As an inanimate entity, a corporation must act through agents. A corporation cannot speak directly to its lawyers. Similarly, it cannot directly waive the privilege when disclosure is in its best interest. Each of these actions must necessarily be undertaken by individuals empowered to act on behalf of the corporation. In *Upjohn Co.*, we considered whether the privilege covers only communications between counsel and top management, and decided that, under certain circumstances, communications between counsel and lower-level employees are also covered. Here, we face the related question of which corporate actors are empowered to waive the corporation's privilege.

[5] [6] The parties in this case agree that, for solvent corporations, the power to waive the corporate attorney-client privilege rests with the corporation's management and is normally exercised by its officers and directors. [4] The managers, of *349 course, must exercise the privilege in a manner consistent with their fiduciary duty to act in the best interests of the corporation and not of themselves as individuals. See, *e.g.*, *Dodge v. Ford Motor Co.*, 204 Mich. 459, 507, 170 N.W. 668, 684 (1919).

[7] [8] [9] The parties also agree that when control of a corporation passes to new management, the authority to assert and waive the corporation's attorney-client privilege passes as well. New managers installed as a result of a takeover, merger, loss of confidence by shareholders, or simply normal succession, may waive the attorney-client privilege with respect to communications made by former officers and directors. Displaced managers may not assert the privilege over the wishes of current managers, even as to statements that the former might have made to counsel concerning matters within the scope of their corporate duties. See Brief for Petitioner 11; Tr. of Oral Arg. 26. See generally *In re O.P.M. Leasing Services, Inc., supra,* at 386; *Citibank v. Andros, supra,* at 1195; *In re Grand Jury Investigation,* 599 F.2d 1224, 1236 (CA3 1979); *Diversified Industries, Inc. v. Meredith,* 572 F.2d 596, 611, n. 5 (CA8 1978) (en banc). [5]

The dispute in this case centers on the control of the attorney-client privilege of a corporation in bankruptcy. The Government maintains that the power to exercise that privilege with respect to prebankruptcy communications passes to the bankruptcy trustee. In contrast, respondents maintain that this power remains with the debtor's directors.

III

As might be expected given the conflict among the Courts of Appeals, the Bankruptcy Code does not explicitly address ***350** the question before us. Respondents assert that 11 U.S.C. § 542(e) is dispositive, but we find reliance on that provision misplaced. Section 542(e) states:

> "*Subject to any applicable privilege,* after notice and a hearing, the court may order an attorney, accountant, or other person that holds recorded information, including books, documents, records, and papers, relating to the debtor's property or financial affairs, to disclose such recorded ****1992** information to the trustee." (emphasis added).

According to respondents, the "subject to any applicable privilege" language means that the attorney cannot be compelled to turn over to the trustee materials within the corporation's attorney-client privilege. In addition, they claim, this language would be superfluous if the trustee had the power to waive the corporation's privilege.

The statutory language does not support respondents' contentions. First, the statute says nothing about a trustee's authority to waive the corporation's attorney-client privilege. To the extent that a trustee has that power, the statute poses no bar on his ability to obtain materials within that privilege. Indeed, a privilege that has been properly waived is not an "applicable" privilege for the purposes of § 542(e).

Moreover, rejecting respondents' reading does not render the statute a nullity, as privileges of parties other than the corporation would still be "applicable" as against the trustee. For example, consistent with the statute, an attorney could invoke the personal attorney-client privilege of an individual manager.

[10] [11] The legislative history also makes clear that Congress did not intend to give the debtor's directors the right to assert the corporation's attorney-client privilege against the trustee. Indeed, statements made by Members of Congress regarding the effect of § 542(e) "specifically deny any attempt to create an attorney-client privilege assertable on behalf of the debtor against the trustee." *In re* ***351** *O.P.M. Leasing Services, Inc.,* 13 B.R. 54, 70 (Bkrtcy. SDNY 1981) (Weinfeld, J.), aff'd, 670 F.2d 383 (CA2 1982); see also 4 Collier on Bankruptcy ¶ 542.06 (15th ed. 1985). Rather, Congress intended that the courts deal with this problem:

> "The extent to which the attorney client privilege is valid against the trustee is unclear under current law and is left to be determined by the courts on a case by case basis." 124 Cong.Rec. 32400 (1978) (remarks of Rep. Edwards); *id.,* at 33999 (remarks of Sen. DeConcini).

The "subject to any applicable privilege" language is thus merely an invitation for judicial determination of privilege questions.

[12] In addition, the legislative history establishes that § 542(e) was intended to restrict, not expand, the ability of accountants and attorneys to withhold information from the trustee. Both the House and the Senate Report state that § 542(e) "is a new provision that deprives accountants and attorneys of the leverage that they ha[d], ... under State law lien provisions, to receive payment in full ahead

of other creditors when the information they hold is necessary to the administration of the estate." S.Rep. No. 95–989, p. 84 (1978); H.R.Rep. No. 95–595, pp. 369–370 (1977), U.S.Code Cong. & Admin.News, 1978, pp. 5787, 5870, 6325–6326. It is therefore clear that § 542(e) was not intended to limit the trustee's ability to obtain corporate information.

IV

[13] In light of the lack of direct guidance from the Code, we turn to consider the roles played by the various actors of a corporation in bankruptcy to determine which is most analogous to the role played by the management of a solvent corporation. See *Butner v. United States,* 440 U.S. 48, 55, 99 S.Ct. 914, 918, 59 L.Ed.2d 136 (1979). Because the attorney-client privilege is controlled, outside of bankruptcy, by a corporation's management, the actor whose duties most closely resemble those of management ***352** should control the privilege in bankruptcy, unless such a result interferes with policies underlying the bankruptcy laws.

A

The powers and duties of a bankruptcy trustee are extensive. Upon the commencement of a case in bankruptcy, all corporate property passes to an estate represented by the trustee. 11 U.S.C. §§ 323, 541. The trustee is "accountable for all property received," §§ 704(2), 1106(a)(1), ****1993** and has the duty to maximize the value of the estate, see § 704(1); *In re Washington Group, Inc.,* 476 F.Supp. 246, 250 (MDNC 1979), aff'd *sub nom. Johnston v. Gilbert,* 636 F.2d 1213 (CA4 1980), cert. denied, 452 U.S. 940, 101 S.Ct. 3084, 69 L.Ed.2d 954 (1981). He is directed to investigate the debtor's financial affairs, §§ 704(4), 1106(a)(3), and is empowered to sue officers, directors, and other insiders to recover, on behalf of the estate, fraudulent or preferential transfers of the debtor's property, §§ 547(b)(4)(B), 548. Subject to court approval, he may use, sell, or lease property of the estate. § 363(b).

Moreover, in reorganization, the trustee has the power to "operate the debtor's business" unless the court orders otherwise. § 1108. Even in liquidation, the court "may authorize the trustee to operate the business" for a limited period of time. § 721. In the course of operating the debtor's business, the trustee "may enter into transactions, including the sale or lease of property of the estate" without court approval. § 363(c)(1).

[14] As even this brief and incomplete list should indicate, the Bankruptcy Code gives the trustee wide-ranging management authority over the debtor. See 2 Collier on Bankruptcy ¶ 323.01 (15th ed. 1985). In contrast, the powers of the debtor's directors are severely limited. Their role is to turn over the corporation's property to the trustee and to provide certain information to the trustee and to the creditors. §§ 521, 343. Congress contemplated that when a trustee is appointed, he assumes control of the business, and ***353** the debtor's directors are "completely ousted." See H.R.Rep. No. 95–595, pp. 220–221 (1977).[6]

In light of the Code's allocation of responsibilities, it is clear that the trustee plays the role most closely analogous to that of a solvent corporation's management. Given that the debtor's directors retain virtually no management powers, they should not exercise the traditional management function of controlling the corporation's attorney-client privilege, see *supra,* at 1991, unless a contrary arrangement would be inconsistent with policies of the bankruptcy laws.

B

[15] We find no federal interests that would be impaired by the trustee's control of the corporation's attorney-client privilege with respect to prebankruptcy communications. On the other hand, the rule suggested by respondents —that the debtor's directors have this power—would frustrate an important goal of the bankruptcy laws. In seeking to maximize the value of the estate, the trustee must investigate the conduct of prior management to uncover and assert causes of action against the debtor's officers and directors. See generally 11 U.S.C. §§ 704(4), 547, 548. It would often be extremely difficult to conduct this inquiry if the former management were allowed to control the corporation's attorney-client privilege and therefore to control access to the corporation's legal files. To the extent that management had wrongfully diverted or appropriated corporate assets, it could use the privilege as a shield against the trustee's efforts to identify those assets. The Code's goal of uncovering insider fraud would be substantially defeated if the debtor's directors were to

retain the one management power that might effectively thwart an investigation into their own *354 conduct. See generally *In re Browy*, 527 F.2d 799, 802 (CA7 1976) (*per curiam*).

Respondents contend that the trustee can adequately investigate fraud without controlling the corporation's attorney-client privilege. They point out that the privilege does not shield the disclosure of communications relating to the planning or commission of ongoing fraud, crimes, and ordinary **1994 torts, see, *e.g.*, *Clark v. United States*, 289 U.S. 1, 15, 53 S.Ct. 465, 469, 77 L.Ed. 993 (1933); *Garner v. Wolfinbarger*, 430 F.2d 1093, 1102–1103 (CA5 1970), cert. denied, 401 U.S. 974, 91 S.Ct. 1191, 28 L.Ed.2d 323 (1971). Brief for Respondents 11. The problem, however, is making the threshold showing of fraud necessary to defeat the privilege. See *Clark v. United States, supra*, 289 U.S., at 15, 53 S.Ct., at 469. Without control over the privilege, the trustee might not be able to discover hidden assets or looting schemes, and therefore might not be able to make the necessary showing.

In summary, we conclude that vesting in the trustee control of the corporation's attorney-client privilege most closely comports with the allocation of the waiver power to management outside of bankruptcy without in any way obstructing the careful design of the Bankruptcy Code.

V

Respondents do not seriously contest that the bankruptcy trustee exercises functions analogous to those exercised by management outside of bankruptcy, whereas the debtor's directors exercise virtually no management functions at all. Neither do respondents seriously dispute that vesting control over the attorney-client privilege in the trustee will facilitate the recovery of misappropriated corporate assets.

Respondents argue, however, that the trustee should not obtain control over the privilege because, unlike the management of a solvent corporation, the trustee's primary loyalty goes not to shareholders but to creditors, who elect him and who often will be the only beneficiaries of his efforts. See 11 U.S.C. §§ 702 (creditors elect trustee), 726(a) (shareholders *355 are last to recover in bankruptcy). Thus, they contend, as a practical matter bankruptcy trustees represent only the creditors. Brief for Respondents 22.

[16] [17] [18] We are unpersuaded by this argument. First, the fiduciary duty of the trustee runs to shareholders as well as to creditors. See, *e.g.*, *In re Washington Group, Inc.*, 476 F.Supp., at 250; *In re Ducker*, 134 F. 43, 47 (CA6 1905).[7] Second, respondents do not explain why, out of all management powers, control over the attorney-client privilege should remain with those elected by the corporation's shareholders. Perhaps most importantly, respondents' position ignores the fact that bankruptcy causes fundamental changes in the nature of corporate relationships. One of the painful facts of bankruptcy is that the interests of shareholders become subordinated to the interests of creditors. In cases in which it is clear that the estate is not large enough to cover any shareholder claims, the trustee's exercise of the corporation's attorney-client privilege will benefit only creditors, but there is nothing anomalous in this result; rather, it is in keeping with the hierarchy of interests created by the bankruptcy laws. See generally 11 U.S.C. § 726(a).

[19] Respondents also ignore that if a debtor remains in possession—that is, if a trustee is not appointed—the debtor's directors bear essentially the same fiduciary obligation to creditors and shareholders as would the trustee for a debtor out of possession. *Wolf v. Weinstein*, 372 U.S. 633, 649–652, 83 S.Ct. 969, 979–981, 10 L.Ed.2d 33 (1963). Indeed, the willingness of courts to leave debtors in possession "is premised upon an assurance that the officers and managing employees can be depended upon to carry out the fiduciary responsibilities of a trustee." *Id.*, at 651, 83 S.Ct., at 980. Surely, then, the management of a debtor-in-possession *356 would have to exercise control of the corporation's attorney-client privilege consistently with this obligation to treat all parties, not merely the shareholders, fairly. By the same token, when a trustee is appointed, the privilege must be **1995 exercised in accordance with the trustee's fiduciary duty to all interested parties.

To accept respondents' position would lead to one of two outcomes: (1) a rule under which the management of a debtor-in-possession exercises control of the attorney-client privilege for the benefit only of shareholders but exercises all of its other functions for the benefit of both shareholders and creditors, or (2) a rule under which the attorney-client privilege is exercised for the benefit of

both creditors and shareholders when the debtor remains in possession, but is exercised for the benefit only of shareholders when a trustee is appointed. We find nothing in the bankruptcy laws that would suggest, much less compel, either of these implausible results.

VI

Respondents' other arguments are similarly unpersuasive. First, respondents maintain that the result we reach today would also apply to *individuals* in bankruptcy, a result that respondents find "unpalatable." Brief for Respondents 27. But our holding today has no bearing on the problem of individual bankruptcy, which we have no reason to address in this case. As we have stated, a corporation, as an inanimate entity, must act through agents. See *supra,* at 1991. When the corporation is solvent, the agent that controls the corporate attorney-client privilege is the corporation's management. Under our holding today, this power passes to the trustee because the trustee's functions are more closely analogous to those of management outside of bankruptcy than are the functions of the debtor's directors. An individual, in contrast, can act for himself; there is no "management" that controls a solvent individual's attorney-client privilege. If control over that privilege passes to a trustee, it must be ***357** under some theory different from the one that we embrace in this case.

[20] Second, respondents argue that giving the trustee control over the attorney-client privilege will have an undesirable chilling effect on attorney-client communications. According to respondents, corporate managers will be wary of speaking freely with corporate counsel if their communications might subsequently be disclosed due to bankruptcy. See Brief for Respondents 37–42; see also 722 F.2d, at 343. But the chilling effect is no greater here than in the case of a solvent corporation, where individual officers and directors always run the risk that successor management might waive the corporation's attorney-client privilege with respect to prior management's communications with counsel. See *supra,* at 1991.

Respondents also maintain that the result we reach discriminates against insolvent corporations. According to respondents, to prevent the debtor's directors from controlling the privilege amounts to "economic discrimination" given that directors, as representatives of the shareholders, control the privilege for solvent corporations. Brief for Respondents 42; see also 722 F.2d, at 342–343. Respondents' argument misses the point that, by definition, corporations in bankruptcy are treated differently from solvent corporations. "Insolvency is a most important and material fact, not only with individuals but with corporations, and with the latter as with the former the mere fact of its existence may change radically and materially its rights and obligations." *McDonald v. Williams,* 174 U.S. 397, 404, 19 S.Ct. 743, 745, 43 L.Ed. 1022 (1899). Respondents do not explain why we should be particularly concerned about differential treatment in this context.

Finally, respondents maintain that upholding trustee waivers would create a disincentive for debtors to invoke the protections of bankruptcy and provide an incentive for creditors to file for involuntary bankruptcy. According to respondents, "[i]njection of such considerations into bankruptcy ***358** would skew the application of the bankruptcy laws in a manner not contemplated by Congress." Brief for Respondents 43. The law creates numerous incentives, both for and against the filing ****1996** of bankruptcy petitions. Respondents do not explain why our holding creates incentives that are inconsistent with congressional intent, and we do not believe that it does.

VII

[21] For the foregoing reasons, we hold that the trustee of a corporation in bankruptcy has the power to waive the corporation's attorney-client privilege with respect to prebankruptcy communications. We therefore conclude that Notz, in his capacity as trustee, properly waived CDCB's privilege in this case. The judgment of the Court of Appeals for the Seventh Circuit is accordingly reversed.

It is so ordered.

Justice POWELL took no part in the consideration or decision of this case.

All Citations

471 U.S. 343, 105 S.Ct. 1986, 85 L.Ed.2d 372, 53 USLW 4505, 12 Collier Bankr.Cas.2d 651, 1 Fed.R.Serv.3d 417, 12 Bankr.Ct.Dec. 1247, Bankr. L. Rep. P 70,360, 17 Fed. R. Evid. Serv. 529

Footnotes

* The syllabus constitutes no part of the opinion of the Court but has been prepared by the Reporter of Decisions for the convenience of the reader. See *United States v. Detroit Lumber Co.*, 200 U.S. 321, 337, 26 S.Ct. 282, 287, 50 L.Ed. 499.

1 The Court of Appeals found that Andrew McGhee resigned his position as officer and director of CDCB on October 21, 1980. 722 F.2d 338, 339 (CA7 1984). Frank McGhee, however, remained as an officer and director. See n. 5, *infra.*

2 The June 9 order had not made clear that Weintraub was barred only from invoking the *corporation's* attorney-client privilege.

3 The Court of Appeals distinguished *O.P.M. Leasing,* where waiver of the privilege was opposed by the corporation's sole voting stockholder, on the ground that the corporation in *O.P.M. Leasing* had no board of directors in existence during the tenure of the trustee. Here, instead, Frank McGhee remained an officer and director of CDCB during Notz' trusteeship. 722 F.2d, at 341. The court acknowledged, however, a square conflict with *Citibank v. Andros.*

After the Court of Appeals' decision in this case, the Court of Appeals for the Ninth Circuit held that a bankruptcy examiner has the power to waive the corporation's attorney-client privilege over the objections of the debtor-in-possession. *In re Boileau,* 736 F.2d 503 (CA9 1984). That holding also conflicts with the holding of the Seventh Circuit in this case.

4 State corporation laws generally vest management authority in a corporation's board of directors. See, *e.g.,* Del.Code Ann. Tit. 8, § 141 (1983); N.Y.Bus.Corp.Law § 701 (McKinney Supp.1983–1984); Model Bus.Corp.Act § 35 (1979). The authority of officers derives legally from that of the board of directors. See generally Eisenberg, Legal Models of Management Structure in the Modern Corporation: Officers, Directors, and Accountants, 63 Calif.L.Rev. 375 (1975). The distinctions between the powers of officers and directors are not relevant to this case.

5 It follows that Andrew McGhee, who is now neither an officer nor a director, see n. 1, *supra,* retains no control over the corporation's privilege. The remainder of this opinion therefore focuses on whether Frank McGhee has such power.

6 While this reference is to the role of a trustee in reorganization, nothing in the Code or its legislative history suggests that the debtor's directors enjoy substantially greater powers in liquidation.

7 The propriety of the trustee's waiver of the attorney-client privilege in a particular case can, of course, be challenged in the bankruptcy court on the ground that it violates the trustee's fiduciary duties. Respondents, however, did not challenge the waiver on those grounds; rather, they asserted that the trustee never has the power to waive the privilege.

04. Case C-550/07P, *Akzo Nobel Chemicals Ltd. v. Comm'n*,

2010 E.C.R. I-08301, Sept. 14, 2010

Court of Justice of the European Union
PRESS RELEASE No No 90/10
Luxembourg, 14 September 2010

Press and Information

Judgment in Case C-550/07 P
Akzo Nobel Chemicals Ltd v Commission

In the field of competition law, internal company communications with in-house lawyers are not covered by legal professional privilege

By decision of 10 February 2003[1], the Commission ordered Akzo Nobel Chemicals and its subsidiary Akcros Chemicals to submit to an investigation aimed at seeking evidence of possible anti-competitive practices. The investigation was carried out by Commission officials assisted by representatives of the Office of Fair Trading ('OFT', the British competition authority), at the applicants' premises in the United Kingdom.

During the examination of the documents seized a dispute arose in relation, in particular, to copies of two e-mails exchanged between the managing director and Akzo Nobel's coordinator for competition law, an Advocaat of the Netherlands Bar and a member of Akzo Nobel's legal department employed by that company. After analysing those documents, the Commission took the view that they were not covered by legal professional privilege.

By decision of 8 May 2003[2], the Commission rejected the claim made by those two companies that the documents at issue should be covered by legal professional privilege.

Akzo Nobel and Akcros brought actions challenging those two decisions before the General Court, which were dismissed by its judgment of 17 September 2007[3]. They subsequently appealed against that judgment to the Court of Justice.

In support of their appeal, Akzo Nobel and Akcros claim essentially that the General Court wrongly refused to grant legal professional privilege to the two e-mails exchanged with their in-house lawyer.

The Court had the opportunity to give a ruling on the extent of legal professional privilege in *AM & S Europe* v *Commission*[4], holding that it is subject to two cumulative conditions. First, the exchange with the lawyer must be connected to 'the client's rights of defence' and, second, that the exchange must emanate from 'independent lawyers', that is to say 'lawyers who are not bound to the client by a relationship of employment'.

As regards the second condition, the Court, in its judgment today, observes that the requirement that the lawyer must be independent is based on a conception of the lawyer's role as collaborating in the administration of justice and as being required to provide, in full independence and in the overriding interests of that cause, such legal assistance as the client needs. It follows that the requirement of independence means the absence of any employment relationship between the lawyer and his client, so that legal professional privilege does not cover exchanges within a company or group with in-house lawyers.

The Court considers that an in-house lawyer, despite his enrolment with a Bar or Law Society and the fact that he is subject to the professional ethical obligations, does not enjoy the same degree of independence from his employer as a lawyer working in an external law firm does in relation to his client. Notwithstanding the professional ethical obligations applicable in the present case, an in-

[1] Commission Decision C (2003) 559/4 of 10 February 2003
[2] Commission Decision C (2003) 1533 of 8 May 2003
[3] Case T-125/03 *Akzo Nobel Chemicals and Akcros* v *Commission*, see also Press Release 62/07
[4] Case 155/79 *AM & S* v *Commission*

house lawyer cannot, whatever guarantees he has in the exercise of his profession, be treated in the same way as an external lawyer, because he occupies the position of an employee which, by its very nature, does not allow him to ignore the commercial strategies pursued by his employer, and thereby affects his ability to exercise professional independence. Furthermore, an in-house lawyer may be required to carry out other tasks, namely, as in the present case, the task of competition law coordinator, which may have an effect on the commercial policy of the undertaking. Such functions cannot but reinforce the close ties between the lawyer and his employer.

In those circumstances, the Court holds, as a result of the in-house lawyer's economic dependence and the close ties with his employer, that he does not enjoy a level of professional independence comparable to that of an external lawyer. It follows that the General Court did not commit an error of law with respect to the second condition for legal professional privilege laid down in the judgment in *AM& S Europe* v *Commission*.

Moreover, the Court considers that that interpretation does not violate the principle of equal treatment in so far as the in-house lawyer is in fundamentally different position from external lawyers.

Furthermore, the Court, responding to the argument put forward by Akzo Nobel and Ackros that national laws have evolved in the field of competition law, considers that no predominant trend towards protection under legal professional privilege of correspondence within a company or group with in-house lawyers may be discerned in the legal systems of the Member States. Accordingly, the Court considers that the current legal situation in the Member States does not justify consideration of a change in the case law towards granting in-house lawyers the benefit of legal professional privilege. Similarly, the evolution of the legal system of the European Union and the amendment of the rules of procedure[5] for competition law are also unable to justify a change in the case-law established by the judgment in *AM& S Europe* v *Commission*.

Akzo Nobel and Akcros also argued that the interpretation by the General Court lowers the level of protection of the rights of defence of undertakings. However, the Court considers that any individual who seeks advice from a lawyer must accept the restrictions and conditions applicable to the exercise of that profession. The rules on legal professional privilege form part of those restrictions and conditions.

Finally, as regards the breach of the principle of legal certainty relied on by Akzo Nobel and Akcros, the Court considers that it does not require identical criteria to be applied as regards legal professional privilege. Consequently, the fact that in the course of an investigation by the Commission legal professional privilege is limited to exchanges with external lawyers in no way undermines that principle.

Therefore, **the Court dismisses the appeal brought by Akzo Nobel and Akcros.**

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[5] Council Regulation (EC) No 1/2003 of 16 December 2002 on the implementation of the rules on competition laid down in Articles 81 and 82 of the Treaty (OJ 2003 L 1, p. 1)

05. The Yates Memo

"Individual Accountability for Corporate Wrongdoing,"

Memorandum from Sally Yates, U.S. Deputy Attorney General, (Sept. 9, 2015)

U.S. Department of Justice

Office of the Deputy Attorney General

The Deputy Attorney General

Washington, D.C. 20530

September 9, 2015

MEMORANDUM FOR THE ASSISTANT ATTORNEY GENERAL, ANTITRUST DIVISION
THE ASSISTANT ATTORNEY GENERAL, CIVIL DIVISION
THE ASSISTANT ATTORNEY GENERAL, CRIMINAL DIVISION
THE ASSISTANT ATTORNEY GENERAL, ENVIRONMENT AND NATURAL RESOURCES DIVISION
THE ASSISTANT ATTORNEY GENERAL, NATIONAL SECURITY DIVISION
THE ASSISTANT ATTORNEY GENERAL, TAX DIVISION
THE DIRECTOR, FEDERAL BUREAU OF INVESTIGATION
THE DIRECTOR, EXECUTIVE OFFICE FOR UNITED STATES TRUSTEES
ALL UNITED STATES ATTORNEYS

FROM: Sally Quillian Yates
Deputy Attorney General

SUBJECT: Individual Accountability for Corporate Wrongdoing

Fighting corporate fraud and other misconduct is a top priority of the Department of Justice. Our nation's economy depends on effective enforcement of the civil and criminal laws that protect our financial system and, by extension, all our citizens. These are principles that the Department lives and breathes—as evidenced by the many attorneys, agents, and support staff who have worked tirelessly on corporate investigations, particularly in the aftermath of the financial crisis.

One of the most effective ways to combat corporate misconduct is by seeking accountability from the individuals who perpetrated the wrongdoing. Such accountability is important for several reasons: it deters future illegal activity, it incentivizes changes in corporate behavior, it ensures that the proper parties are held responsible for their actions, and it promotes the public's confidence in our justice system.

There are, however, many substantial challenges unique to pursuing individuals for corporate misdeeds. In large corporations, where responsibility can be diffuse and decisions are made at various levels, it can be difficult to determine if someone possessed the knowledge and criminal intent necessary to establish their guilt beyond a reasonable doubt. This is particularly true when determining the culpability of high-level executives, who may be insulated from the day-to-day activity in which the misconduct occurs. As a result, investigators often must reconstruct what happened based on a painstaking review of corporate documents, which can number in the millions, and which may be difficult to collect due to legal restrictions.

These challenges make it all the more important that the Department fully leverage its resources to identify culpable individuals at all levels in corporate cases. To address these challenges, the Department convened a working group of senior attorneys from Department components and the United States Attorney community with significant experience in this area. The working group examined how the Department approaches corporate investigations, and identified areas in which it can amend its policies and practices in order to most effectively pursue the individuals responsible for corporate wrongs. This memo is a product of the working group's discussions.

The measures described in this memo are steps that should be taken in any investigation of corporate misconduct. Some of these measures are new, while others reflect best practices that are already employed by many federal prosecutors. Fundamentally, this memo is designed to ensure that all attorneys across the Department are consistent in our best efforts to hold to account the individuals responsible for illegal corporate conduct.

The guidance in this memo will also apply to civil corporate matters. In addition to recovering assets, civil enforcement actions serve to redress misconduct and deter future wrongdoing. Thus, civil attorneys investigating corporate wrongdoing should maintain a focus on the responsible individuals, recognizing that holding them to account is an important part of protecting the public fisc in the long term.

The guidance in this memo reflects six key steps to strengthen our pursuit of individual corporate wrongdoing, some of which reflect policy shifts and each of which is described in greater detail below: (1) in order to qualify for any cooperation credit, corporations must provide to the Department all relevant facts relating to the individuals responsible for the misconduct; (2) criminal and civil corporate investigations should focus on individuals from the inception of the investigation; (3) criminal and civil attorneys handling corporate investigations should be in routine communication with one another; (4) absent extraordinary circumstances or approved departmental policy, the Department will not release culpable individuals from civil or criminal liability when resolving a matter with a corporation; (5) Department attorneys should not resolve matters with a corporation without a clear plan to resolve related individual cases, and should

memorialize any declinations as to individuals in such cases; and (6) civil attorneys should consistently focus on individuals as well as the company and evaluate whether to bring suit against an individual based on considerations beyond that individual's ability to pay.[1]

I have directed that certain criminal and civil provisions in the United States Attorney's Manual, more specifically the Principles of Federal Prosecution of Business Organizations (USAM 9-28.000 *et seq.*) and the commercial litigation provisions in Title 4 (USAM 4-4.000 *et seq.*), be revised to reflect these changes. The guidance in this memo will apply to all future investigations of corporate wrongdoing. It will also apply to those matters pending as of the date of this memo, to the extent it is practicable to do so.

1. To be eligible for <u>any</u> cooperation credit, corporations must provide to the Department all relevant facts about the individuals involved in corporate misconduct.

In order for a company to receive <u>any</u> consideration for cooperation under the Principles of Federal Prosecution of Business Organizations, the company must completely disclose to the Department all relevant facts about individual misconduct. Companies cannot pick and choose what facts to disclose. That is, to be eligible for any credit for cooperation, the company must identify all individuals involved in or responsible for the misconduct at issue, regardless of their position, status or seniority, and provide to the Department all facts relating to that misconduct. If a company seeking cooperation credit declines to learn of such facts or to provide the Department with complete factual information about individual wrongdoers, its cooperation will not be considered a mitigating factor pursuant to USAM 9-28.700 *et seq.*[2] Once a company meets the threshold requirement of providing all relevant facts with respect to individuals, it will be eligible for consideration for cooperation credit. The extent of that cooperation credit will depend on all the various factors that have traditionally applied in making this assessment (*e.g.*, the timeliness of the cooperation, the diligence, thoroughness, and speed of the internal investigation, the proactive nature of the cooperation, etc.).

This condition of cooperation applies equally to corporations seeking to cooperate in civil matters; a company under civil investigation must provide to the Department all relevant facts about individual misconduct in order to receive any consideration in the negotiation. For

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[1] The measures laid out in this memo are intended solely to guide attorneys for the government in accordance with their statutory responsibilities and federal law. They are not intended to, do not, and may not be relied upon to create a right or benefit, substantive or procedural, enforceable at law by a party to litigation with the United States.

[2] Nor, if a company is prosecuted, will it support a cooperation-related reduction at sentencing. *See* U.S.S.G. USSG § 8C2.5(g), Application Note 13 ("A prime test of whether the organization has disclosed all pertinent information" necessary to receive a cooperation-related reduction in its offense level calculation "is whether the information is sufficient ... to identify ... the individual(s) responsible for the criminal conduct").

example, the Department's position on "full cooperation" under the False Claims Act, 31 U.S.C. § 3729(a)(2), will be that, at a minimum, all relevant facts about responsible individuals must be provided.

The requirement that companies cooperate completely as to individuals, within the bounds of the law and legal privileges, *see* USAM 9-28.700 to 9-28.760, does not mean that Department attorneys should wait for the company to deliver the information about individual wrongdoers and then merely accept what companies provide. To the contrary, Department attorneys should be proactively investigating individuals at every step of the process – before, during, and after any corporate cooperation. Department attorneys should vigorously review any information provided by companies and compare it to the results of their own investigation, in order to best ensure that the information provided is indeed complete and does not seek to minimize the behavior or role of any individual or group of individuals.

Department attorneys should strive to obtain from the company as much information as possible about responsible individuals before resolving the corporate case. But there may be instances where the company's continued cooperation with respect to individuals will be necessary post-resolution. In these circumstances, the plea or settlement agreement should include a provision that requires the company to provide information about all culpable individuals and that is explicit enough so that a failure to provide the information results in specific consequences, such as stipulated penalties and/or a material breach.

2. Both criminal and civil corporate investigations should focus on individuals from the inception of the investigation.

Both criminal and civil attorneys should focus on individual wrongdoing from the very beginning of any investigation of corporate misconduct. By focusing on building cases against individual wrongdoers from the inception of an investigation, we accomplish multiple goals. First, we maximize our ability to ferret out the full extent of corporate misconduct. Because a corporation only acts through individuals, investigating the conduct of individuals is the most efficient and effective way to determine the facts and extent of any corporate misconduct. Second, by focusing our investigation on individuals, we can increase the likelihood that individuals with knowledge of the corporate misconduct will cooperate with the investigation and provide information against individuals higher up the corporate hierarchy. Third, by focusing on individuals from the very beginning of an investigation, we maximize the chances that the final resolution of an investigation uncovering the misconduct will include civil or criminal charges against not just the corporation but against culpable individuals as well.

3. Criminal and civil attorneys handling corporate investigations should be in routine communication with one another.

Early and regular communication between civil attorneys and criminal prosecutors handling corporate investigations can be crucial to our ability to effectively pursue individuals in

these matters. Consultation between the Department's civil and criminal attorneys, together with agency attorneys, permits consideration of the full range of the government's potential remedies (including incarceration, fines, penalties, damages, restitution to victims, asset seizure, civil and criminal forfeiture, and exclusion, suspension and debarment) and promotes the most thorough and appropriate resolution in every case. That is why the Department has long recognized the importance of parallel development of civil and criminal proceedings. *See* USAM 1-12.000.

Criminal attorneys handling corporate investigations should notify civil attorneys as early as permissible of conduct that might give rise to potential individual civil liability, even if criminal liability continues to be sought. Further, if there is a decision not to pursue a criminal action against an individual – due to questions of intent or burden of proof, for example – criminal attorneys should confer with their civil counterparts so that they may make an assessment under applicable civil statutes and consistent with this guidance. Likewise, if civil attorneys believe that an individual identified in the course of their corporate investigation should be subject to a criminal inquiry, that matter should promptly be referred to criminal prosecutors, regardless of the current status of the civil corporate investigation.

Department attorneys should be alert for circumstances where concurrent criminal and civil investigations of individual misconduct should be pursued. Coordination in this regard should happen early, even if it is not certain that a civil or criminal disposition will be the end result for the individuals or the company.

4. Absent extraordinary circumstances, no corporate resolution will provide protection from criminal or civil liability for any individuals.

There may be instances where the Department reaches a resolution with the company before resolving matters with responsible individuals. In these circumstances, Department attorneys should take care to preserve the ability to pursue these individuals. Because of the importance of holding responsible individuals to account, absent extraordinary circumstances or approved departmental policy such as the Antitrust Division's Corporate Leniency Policy, Department lawyers should not agree to a corporate resolution that includes an agreement to dismiss charges against, or provide immunity for, individual officers or employees. The same principle holds true in civil corporate matters; absent extraordinary circumstances, the United States should not release claims related to the liability of individuals based on corporate settlement releases. Any such release of criminal or civil liability due to extraordinary circumstances must be personally approved in writing by the relevant Assistant Attorney General or United States Attorney.

5. **Corporate cases should not be resolved without a clear plan to resolve related individual cases before the statute of limitations expires and declinations as to individuals in such cases must be memorialized.**

If the investigation of individual misconduct has not concluded by the time authorization is sought to resolve the case against the corporation, the prosecution or corporate authorization memorandum should include a discussion of the potentially liable individuals, a description of the current status of the investigation regarding their conduct and the investigative work that remains to be done, and an investigative plan to bring the matter to resolution prior to the end of any statute of limitations period. If a decision is made at the conclusion of the investigation not to bring civil claims or criminal charges against the individuals who committed the misconduct, the reasons for that determination must be memorialized and approved by the United States Attorney or Assistant Attorney General whose office handled the investigation, or their designees.

Delays in the corporate investigation should not affect the Department's ability to pursue potentially culpable individuals. While every effort should be made to resolve a corporate matter within the statutorily allotted time, and tolling agreements should be the rare exception, in situations where it is anticipated that a tolling agreement is nevertheless unavoidable and necessary, all efforts should be made either to resolve the matter against culpable individuals before the limitations period expires or to preserve the ability to charge individuals by tolling the limitations period by agreement or court order.

6. **Civil attorneys should consistently focus on individuals as well as the company and evaluate whether to bring suit against an individual based on considerations beyond that individual's ability to pay.**

The Department's civil enforcement efforts are designed not only to return government money to the public fisc, but also to hold the wrongdoers accountable and to deter future wrongdoing. These twin aims – of recovering as much money as possible, on the one hand, and of accountability for and deterrence of individual misconduct, on the other – are equally important. In certain circumstances, though, these dual goals can be in apparent tension with one another, for example, when it comes to the question of whether to pursue civil actions against individual corporate wrongdoers who may not have the necessary financial resources to pay a significant judgment.

Pursuit of civil actions against culpable individuals should not be governed solely by those individuals' ability to pay. In other words, the fact that an individual may not have sufficient resources to satisfy a significant judgment should not control the decision on whether to bring suit. Rather, in deciding whether to file a civil action against an individual, Department attorneys should consider factors such as whether the person's misconduct was serious, whether

it is actionable, whether the admissible evidence will probably be sufficient to obtain and sustain a judgment, and whether pursuing the action reflects an important federal interest. Just as our prosecutors do when making charging decisions, civil attorneys should make individualized assessments in deciding whether to bring a case, taking into account numerous factors, such as the individual's misconduct and past history and the circumstances relating to the commission of the misconduct, the needs of the communities we serve, and federal resources and priorities.

Although in the short term certain cases against individuals may not provide as robust a monetary return on the Department's investment, pursuing individual actions in civil corporate matters will result in significant long-term deterrence. Only by seeking to hold individuals accountable in view of all of the factors above can the Department ensure that it is doing everything in its power to minimize corporate fraud, and, over the course of time, minimize losses to the public fisc through fraud.

Conclusion

The Department makes these changes recognizing the challenges they may present. But we are making these changes because we believe they will maximize our ability to deter misconduct and to hold those who engage in it accountable.

In the months ahead, the Department will be working with components to turn these policies into everyday practice. On September 16, 2015, for example, the Department will be hosting a training conference in Washington, D.C., on this subject, and I look forward to further addressing the topic with some of you then.

06. Dentons Yates Memo e-alert

"The Yates Memo and Prosecution of Corporate Individuals: Whose Team Does Your General Counsel Play for Now?, " Glenn Colton, Stephen Hill, Thomas Kelly, Lisa Krigsten, George Newhouse, (Sept. 29, 2015)

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The Yates Memo and prosecution of corporate individuals: Whose team does your general counsel play for now?

September 28, 2015

The US Department of Justice's "new" guidelines for the prosecution of individual defendants in corporate prosecutions, set out recently in a memorandum by Deputy Attorney General Sally Q. Yates, are not so much a new approach as they are a renewed commitment that addresses issues that have dogged the Department of Justice (DOJ) for years. New or not, the burdens the guidelines create for general counsel are extraordinary.

In the wake of several widely publicized post-collapse corporate prosecutions that left individuals unprosecuted, the DOJ has made changes to the *Principles of Federal Prosecution*, key DOJ policy and directives that provide federal prosecutors with guidelines for both the investigation and prosecution of corporate offenders, and the persons who are ultimately responsible for corporate conduct. The "new" guidelines require corporations to investigate, determine and identify responsible individuals in order to receive any cooperation credit.[1] They also direct that DOJ's civil and criminal lawyers work together early and often, and end the practice of individual "passes" from civil or criminal liability when resolving a matter with a corporation. For general counsel this presents a number of issues, including the Memo's effect on privilege and internal investigations, the importance of an internal communications protocol that recognizes general counsel's heightened role and the value of having a step-by-step plan in place *before* word of an internal or government investigation comes across your desk.

The Yates Memo, released on September 9, 2015, identifies four key areas in "strengthening [DOJ's] pursuit of individual corporate wrongdoing." Counsel wishing to mitigate criminal liability for a client must plan with the following in mind: (1) to obtain "any cooperation credit, corporations must provide to the Department all relevant facts relating to the individuals responsible for the misconduct"—the corporation must be prepared to "name names." (2) Criminal and civil investigations must focus on individuals "from the inception of the investigation." (3) "Absent extraordinary circumstances" the DOJ will not release culpable individuals from civil or criminal liability when resolving a matter with a corporation—no more free passes in connection with deferred prosecution agreements (DPAs) or non-prosecution agreements (NPAs), and (4) DOJ prosecutors are directed not to settle with the corporation "without a clear plan to resolve related individual cases."

Elaborating in a speech at New York University Law School the day after the memo was released, Yates noted that corporations can no longer "plead ignorance" and that "if they don't know who is responsible, they will need to find out." To get any cooperation credit, Yates said corporations "will need to investigate and identify the responsible parties." Added to the directive to "focus" on responsible corporate executives from the beginning, this affirmative requirement—to investigate, identify and disclose the identity of corporate wrongdoers, and to turn the information over to prosecutors —represents a new requirement imposed by the DOJ.

Given this course, a general counsel's role has become much more central to the early determination of whether the issues presented raise the specter of criminal or civil liability. With the limited information available at the outset of an investigation, the GC must balance his or her obligation to communicate with leadership against the obligation, as the company lawyer, to gather evidence of individual misconduct for disclosure to the government. This raises questions of whether and what the organization's lawyer tells the CEO and other officers, the company's risk manager and others during those critical first moments.

Several key questions immediately come to mind: How does a GC deal with

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employees who decline to be interviewed as part of an internal investigation, or advise the GC that they first wish to seek counsel, invoking the company's indemnification policy? And what about a situation in which legal advice provided by a GC is relevant to establishing intent or good faith?

Perhaps foremost among the issues for the general counsel is how he or she responds to the investigation in a way that promotes his or her client company's interests while still fulfilling the role of day-to-day advisor to that company and its leaders—some of whom may be the focus of the investigation.

Potential scenarios

The directives of the Yates Memo may present new challenges in a number of scenarios:

One: The controller of a corporation regularly and informally consults general counsel seeking legal opinions on issues of public disclosure, internal control considerations and legal requirements for accounting policies and procedures. This includes a recent question about the chief financial officer's suggestion to delay the receipt of certain shipped inventory until the end of the quarter. When the company receives a subpoena for records, including for records of inventory on hand, the chief financial officer, the controller, the chief executive officer and the board chair all ask the general counsel for his or her take on what to do.

Two: A company's policies dictate that all employees must cooperate with internal investigations, including submitting to interviews. When a former real estate broker for the company is contacted by the FBI, an internal investigation is initiated into certain real estate purchases by the company. The general counsel's approach in the past was to gather all those affected by the reach of this investigation to coordinate a response. When notified, the CEO and the vice president for real estate each ask the general counsel: "Do I need a lawyer?"

Civil considerations

In her NYU speech, Yates termed the change in criminal cooperation policy a "substantial shift from prior practice" and evidence that "the rules have just changed." Notably, however, the Yates Memo distinctly expands the expectations placed on a company regarding cooperation by reaching well into civil litigation as well, which often runs side-by-side with criminal matters. The Yates Memo directs that "a company under civil investigation must provide to the Department all relevant facts about individual misconduct in order to receive any consideration in the negotiation." The memo specifies but doesn't limit this to False Claims Act matters, and supplements two other directives: that civil and criminal lawyers should "be in routine communication with one another," and that civil investigations should "focus on individuals and whether to bring suit against them based on considerations beyond ability to pay." Yates' instructions apply to the very common approach taken by the DOJ of initially opening investigations as criminal *and* civil matters.

Next steps

The policy reflected by the Yates Memo and by Yates' elaboration highlight the need for general counsel to have a well-thought-out response and communication plan before an investigative issue arises. For one thing, it is paramount to have the capacity to affect a truly independent internal investigation (conducted by outside counsel) with the possibility that the full results of the investigation, including otherwise protected work product materials, will be turned over to the government. This independence is not easy in the practical sense because general counsel needs to be able to continue to be available to advise in unrelated matters.

In the wake of the rollout of the Yates Memo, there will be a premium on prosecution of corporate leaders, and much more vigorous oversight of corporate investigations. Precisely how the government proposes to

monitor the breadth and extent of the corporate internal investigations remains to be seen. The prosecutors who bring these cases will be held to account for their charging decisions and pressured in every corporate prosecution to include individual defendants. Corporate counsel should now assume that civil matters at DOJ have an active parallel criminal component and act accordingly, given the mandates to the department's civil lawyers.

This "balancing" means that general counsel should think through and design a proactive plan and communications protocol well before an investigation is underway, keeping in mind that, if the corporation wants any consideration in the charging equation, it must "find out" by "investigat[ing] and identif[ying] the responsible parties, then provide all non-privileged evidence implicating those individuals." Such a plan should, at a minimum, consider the following: (1) Are the company's internal privileged communications adequately protected from unintentional waiver? (2) Does the company have a sufficiently robust internal investigations protocol to meet the need to cooperate with federal authorities?, and (3) what does the company tell an executive or other employee who asks "do I need a lawyer" during an interview or request for information? These issues, discussed with client representatives before there is an open investigation implicating certain individuals, will likely lead to more buy-in and a successful response.

This plan and the issues it addresses should be closely linked to the company's internal investigation and policies around indemnification. They report a good approach for general counsel to address the challenges they now face in light of the Yates' Memorandum.

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[1] The policy speaks in absolutes here: in order to get "any" consideration, the company must provide "complete" disclosure of "all" individuals involved in or responsible for the misconduct, regardless of position, and provide the DOJ "all facts" (not "relevant" facts) relating to the misconduct.

07. *In re Gen. Motors LLC Ignition Switch Litigation*, 80 F. Supp. 3d 521 (S.D.N.Y. 2015)

80 F.Supp.3d 521
United States District Court,
S.D. New York.

In re GENERAL MOTORS LLC IGNITION SWITCH LITIGATION.
This Document Relates To All Actions.

No. 14–MD–2543 (JMF).
|
Signed Jan. 15, 2015.

Synopsis
Background: Plaintiffs in multi-district litigation against an automobile manufacturer, relating to a defective ignition switch, moved to compel production of documents underlying an internal investigation into the defect conducted by an outside law firm.

Holdings: The District Court, Jesse M. Furman, J., held that:

[1] the attorney-client privilege applied to the outside law firm's communications with current and former employees, agents, and in-house counsel;

[2] documents prepared by the outside law firm while conducting interviews were protected from disclosure under the attorney work product doctrine; and

[3] the manufacturer did not waive attorney-client privilege or attorney work product protection by releasing a resulting report to the government.

Motion denied.

West Headnotes (11)

[1] **Privileged Communications and Confidentiality**
Elements in general; definition

311HPrivileged Communications and Confidentiality
311HIIIAttorney-Client Privilege
311Hk102Elements in general; definition

The attorney-client privilege protects communications: (1) between a client and his or her attorney (2) that are intended to be, and in fact were, kept confidential (3) for the purpose of obtaining or providing legal assistance.

2 Cases that cite this headnote

[2] **Privileged Communications and Confidentiality**
Corporations, partnerships, associations, and other entities

311HPrivileged Communications and Confidentiality
311HIIIAttorney-Client Privilege
311Hk120Parties and Interests Represented by Attorney
311Hk123Corporations, partnerships, associations, and other entities

The attorney-client privilege applies to communications between corporate counsel and a corporation's employees, made at the direction of corporate superiors in order to secure legal advice from counsel.

2 Cases that cite this headnote

[3] **Privileged Communications and Confidentiality**
Factual information; independent knowledge; observations and mental impressions

311HPrivileged Communications and Confidentiality
311HIIIAttorney-Client Privilege
311Hk143Factual information; independent knowledge; observations and mental impressions

The attorney-client privilege protects communications rather than information.

2 Cases that cite this headnote

[4] **Privileged Communications and Confidentiality**
Factual information; independent knowledge; observations and mental impressions

311HPrivileged Communications and Confidentiality
311HIIIAttorney-Client Privilege
311Hk143Factual information; independent knowledge; observations and mental impressions

The attorney-client privilege does not impede disclosure of information except to the extent that the disclosure would reveal confidential communications.

1 Cases that cite this headnote

[5] **Privileged Communications and Confidentiality**
Confidential character of communications or advice

311HPrivileged Communications and Confidentiality
311HIIIAttorney-Client Privilege
311Hk156Confidential character of communications or advice

The fact that certain *information* in otherwise protected documents might ultimately be disclosed or that certain *information* might later be disclosed to others does not, by itself, create the factual inference that the *communications* were not intended to be confidential at the time they were made, for the purposes of the attorney-client privilege.

Cases that cite this headnote

[6] **Privileged Communications and Confidentiality**
Elements in general; definition

311HPrivileged Communications and Confidentiality
311HIIIAttorney-Client Privilege
311Hk102Elements in general; definition

So long as obtaining or providing legal advice was one of the significant purposes of the internal investigation, the attorney-client privilege applies, even if there were also other purposes for the investigation.

2 Cases that cite this headnote

[7] **Privileged Communications and Confidentiality**
Corporations, partnerships, associations, and other entities
Privileged Communications and Confidentiality
Subject Matter; Particular Cases

311HPrivileged Communications and Confidentiality
311HIIIAttorney-Client Privilege
311Hk120Parties and Interests Represented by Attorney
311Hk123Corporations, partnerships, associations, and other entities
311HPrivileged Communications and Confidentiality
311HIIIAttorney-Client Privilege
311Hk144Subject Matter; Particular Cases
311Hk145In general

The attorney-client privilege applied to an outside law firm's communications with current and former employees, agents, and in-house counsel, as part of investigating and preparing a report into an automobile manufacturer's defective ignition switch and delays in recalling affected vehicles, even though the resulting report was publicly released, where the communications were conducted as part of the manufacturer's request for legal advice in light of government investigation and threat of civil litigation, the interviewees were told that the purpose of the interviews was to assist in providing legal advice, the communications were treated as confidential, and a primary purpose of the communications was to assist the outside council in providing legal advice to the manufacturer.

1 Cases that cite this headnote

[8] **Federal Civil Procedure**
Work Product Privilege; Trial Preparation Materials

170AFederal Civil Procedure
170AXDepositions and Discovery
170AX(E)Discovery and Production of Documents and Other Tangible Things
170AX(E)3Particular Subject Matters
170Ak1604Work Product Privilege; Trial Preparation Materials
170Ak1604(1)In general

To demonstrate that material is protected by the attorney work product doctrine, a party need only show that, in light of the nature of the document and the factual situation in the particular case, the document can fairly be said to have been prepared or obtained because of the prospect of litigation.

1 Cases that cite this headnote

[9] **Federal Civil Procedure**
Work Product Privilege; Trial Preparation Materials

170AFederal Civil Procedure
170AXDepositions and Discovery
170AX(E)Discovery and Production of Documents and Other Tangible Things
170AX(E)3Particular Subject Matters
170Ak1604Work Product Privilege; Trial Preparation Materials
170Ak1604(1)In general

Work product protection does not apply to documents that are prepared in the ordinary course of business or that would have been created in essentially similar form irrespective of the litigation.

1 Cases that cite this headnote

[10] **Federal Civil Procedure**
Work Product Privilege; Trial Preparation Materials

170AFederal Civil Procedure
170AXDepositions and Discovery
170AX(E)Discovery and Production of Documents and Other Tangible Things
170AX(E)3Particular Subject Matters
170Ak1604Work Product Privilege; Trial Preparation Materials
170Ak1604(1)In general

An outside law firm's interviews with current and former employees, agents, and in-house counsel of an automobile manufacturer, and resulting documents were prepared in anticipation of litigation, and thus were protected from disclosure under the attorney work product doctrine, in the absence of any showing that plaintiffs in multidistrict litigation relating to defective ignition switches could not prepare their case by other means, where all interviewees were informed that the purpose of the interviews was to gather information to assist the attorneys in providing legal advice, the interviews were conducted while the Department of Justice was investigating the company, and the plaintiffs were free to depose the witnesses who were interviewed. Fed.Rules Civ.Proc.Rule 26(b)(3), 28 U.S.C.A.

1 Cases that cite this headnote

[11] **Federal Civil Procedure**
Waiver
Privileged Communications and Confidentiality
Waiver of privilege

170AFederal Civil Procedure
170AXDepositions and Discovery
170AX(E)Discovery and Production of Documents and Other Tangible Things
170AX(E)3Particular Subject Matters
170Ak1604Work Product Privilege; Trial Preparation Materials
170Ak1604(2)Waiver
311HPrivileged Communications and Confidentiality
311HIIIAttorney-Client Privilege
311Hk168Waiver of privilege

An automobile manufacturer did not waive attorney-client privilege or attorney work product protection in communications and documents compiled as part of an outside law firm's investigation and preparation of a report into defective ignition switch and delays in recalling affected vehicles by disclosing the report to Congress, the Department of Justice, and other federal agencies, where the

manufacturer had not offensively used the report in the multidistrict litigation or made a selective or misleading presentation that was unfair to adversaries, and the manufacturer had produced, or would soon produce, millions of pages of documents, including some that would otherwise be privileged. Fed.Rules Evid.Rule 502(a), 28 U.S.C.A.

3 Cases that cite this headnote

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OPINION AND ORDER

JESSE M. FURMAN, District Judge:

Less than one year ago, General Motors LLC ("New GM") announced the first of what would be become many recalls of its vehicles based on an ignition switch defect. Shortly after the first recall, New GM retained the law firm Jenner & Block LLP ("Jenner") and its chairperson, Anton Valukas, to conduct an internal investigation into the defect and the delays in recalling the affected vehicles. As part of their investigation, Valukas and his colleagues reviewed a vast number of documents and interviewed over 200 New GM employees and former employees, among others. The result was a written report (the "Valukas Report") that New GM submitted to Congress, the Department of Justice ("DOJ"), and the National Highway Traffic Safety Administration ("NHTSA"), among others.

Plaintiffs in this multi-district litigation proceeding ("MDL") bring claims relating to the subject matter of the Valukas Report, namely the ignition switch defect. As part of discovery, New GM has disclosed the Valukas Report itself, and has agreed to disclose on a rolling basis every New GM document cited in the Report, including otherwise privileged documents (pursuant to a Federal Rule of Evidence 502(d) order). But it refuses to disclose other materials underlying the Valukas investigation, particularly notes and memoranda relating to the witness interviews conducted by the Jenner lawyers. The principal question here is whether those materials are protected from disclosure by either or both the attorney-client privilege or the attorney work product doctrine.

For the reasons that follow, the Court agrees with New GM that the materials at issue are protected by both the attorney-client privilege and the attorney work product

doctrine and that New GM has not waived either form of protection as to the materials at issue. Accordingly, New GM need not produce them in discovery at this time.

*524 BACKGROUND

As noted, this MDL relates to defects in certain General Motors vehicles and associated product recalls, general familiarity with which is assumed. The following facts are taken from the parties' briefs (14–MD–2543 Docket Nos. 437, 438, 465, 466) and are included by way of background to the privilege issues addressed in this Opinion and Order.

In February 2014, New GM announced the first recall of GM-brand vehicles based on an ignition switch defect. (Def. General Motors LLC's Br. Regarding Privileged Interview Notes & Mem. (Docket No. 437) ("New GM's Opening Br.") 1, 3). Following the announcement of the "highly publicized" recalls, DOJ launched a criminal investigation into New GM. (*Id.*). In light of the DOJ investigation—and the spate of civil litigation anticipated by New GM—the company retained Jenner and its chairperson, Anton Valukas. (New GM's Opening Br., Ex. 1 (Decl. of Anton Valukas) ("Valukas Decl.") ¶¶ 1, 2). According to Valukas and Michael P. Millikin, the General Counsel of New GM, Jenner was retained "to represent New GM's interests and to provide legal advice to new GM in a variety of matters relating to the recalls, including the DOJ investigation and other anticipated government investigations and civil litigation." (*Id.* ¶ 2; *see also* New GM's Opening Br., Ex. 2 (Decl. Michael P. Millikin) ("Millikin Decl.") ¶¶ 4–5). "As part of [New GM's] request for legal advice regarding the pending government investigation," New GM directed Valukas to "investigate the circumstances that led up to the recall of the Cobalt and other cars due to the flawed ignition switch"—specifically, "to determine why it took so long to recall the Cobalt and other vehicles." (Valukas Decl. ¶ 2; *see also* Millikin Decl. ¶ 5; Pls.' Br. Concerning Produc. Material Related Valukas Report (Docket No. 438) ("Pls.' Opening Br.") 5 (internal quotation marks omitted); New GM's Opening Br. 4 (internal quotation marks omitted)).

The investigation that followed was swift but wide-ranging. In the span of only seventy days, the Jenner lawyers collected over 41 million documents and conducted over 350 interviews with 230 witnesses, including over 200 current and former GM employees, several employees of GM's insurance claims administrator, and several of New GM's outside counsel. (Pls.' Opening Br., Ex. A (Report to Bd. of Directors of Gen. Motors Co. Regarding Ignition Switch Recalls ("Valukas Report")) 14; Valukas Decl. ¶ 3). According to Valukas, the interviews were conducted confidentially, with the intention of preserving the attorney-client privilege between New GM and its counsel; all witnesses were informed at the outset of each interview that the purpose of the interview was to assist in the provision of legal advice to New GM and that the interview was privileged and should be kept confidential. (Valukas Decl. ¶ 4). No transcript or recording was made of the interviews. (*Id.* ¶ 5). Instead, the Jenner lawyers produced three types of writings during and after the interviews: attorney notes taken during the interviews; summaries created after each interview; and formal attorney memoranda created after the interviews (collectively, the "Interview Materials"). (New GM's Opening Br. 5).

On May 29, 2014, Valukas presented the fruits of Jenner's labors—a 315–page document that came to be known as the "Valukas Report"—to the New GM Board of Directors. (Pls.' Opening Br. 5; *see generally* Valukas Report).[1] The Valukas Report, which includes citations to many (but *525 not all) of the witness interviews conducted by the Jenner lawyers, is prominently marked (on the cover and each page thereafter) "Privileged and Confidential: Protected by Attorney–Client Privilege and As Attorney Work Product." (Pls.' Opening Br. 5; New GM's Opening Br. 6). New GM, however, provided a copy of the report to Congress, DOJ, and NHTSA in connection with their ongoing investigations into the defects and related recalls. (New GM's Opening Br. 6). Thereafter, NHTSA published a copy of the report on its website with personal identifying information redacted. (*Id.; see also* Def. General Motors LLC's Resp. Pls.' Br. Concerning Produc. Material Related Valukas Report (Docket No. 465) ("New GM's Resp. Br.") 4 n. 4). Months later, New GM placed the Report into the MDL Document Depository, making it available to Plaintiffs in the MDL. (New GM's Opening Br. 6).

On October 15, 2014, Plaintiffs in *Melton v. General Motors, LLC et al.*, No. 14–A–1197–4 (Ga. Cobb Cnty. Ct.) ("*Melton II*"), a related state court action against New GM, filed a motion to compel New GM to produce various documents relating to the Valukas Report. (New GM's Oct. 24, 2014 Ltr. (14–MD–2543 Docket No. 363), Ex. 2). Shortly thereafter, New GM filed a letter, arguing, *inter alia,* that this Court—rather than the *Melton II* Court—should decide most of the issues raised by the motion to compel. (New GM's Oct. 30, 2014 Ltr. (14–MD–2543 Docket No. 369) 3). After further discussion, this Court and the *Melton II* Court agreed with the parties' proposal to meet and confer in an effort to

narrow the issues in dispute, and ordered the parties to submit a joint letter by November 12, 2014, indicating what issues remained to be decided and "proposing an expedited briefing schedule to address both the substantive merits of any remaining disputes and whether and how the two courts should coordinate rulings on those disputes." (14–MD–2543 Order No. 21 (Docket No. 390) (emphasis omitted)). The parties' meet-and-confer process did narrow the issues in dispute: New GM agreed to produce many documents previously identified as privileged, including some documents previously produced to the federal government (*see* Nov. 12, 2014 Joint Ltr. (Docket No. 397) 1)—an agreement that was memorialized in a Federal Rule of Evidence 502(d) order adopted by the Court on November 14, 2014. (*See* 14–MD–2543 Order No. 23 (Docket No. 404) 3). But New GM refused to produce other documents relating to the Valukas Report demanded by Plaintiffs, including, most notably, the Interview Materials. (Nov. 12, 2014 Joint Ltr. 3).

Per this Court's Order (Docket No. 406), the parties then submitted joint opening and responsive briefs on the question of whether those materials are protected by the attorney-client privilege or the attorney work product doctrine and whether that question should be decided by this Court or the *Melton II* Court. (14–MD–2543 Docket Nos. 437, 438, 465, 466). In their opening brief, Plaintiffs indicate that they are seeking to compel production of three categories of information: (1) "An index evidencing all documents or information provided to Anton Valukas and/or Jenner & Block with respect to investigation into the GM ignition switch recalls"; (2) "Copies of all hard drives of documents that were gathered in connection with the investigation of GM and the preparation of the Valukas Report encompassing the 23 TB of data and 41 million documents referenced in the Valukas Report"; and (3) "A copy of all notes, transcripts, and tapes (audio or video) related to any person interviewed during the course of the Valukas investigation and preparation of the Valukas Report, including any of those not cited in the final Valukas Report." (Pls.' Opening Br. 13). Both sides agree, however, that the question of whether the relevant ***526** materials are subject to disclosure should be decided by this Court rather than the *Melton II* Court. (Pls.' Opening Br. 13–14; New GM's Opening Br. 8–9).

DISCUSSION

As a threshold matter, the Court agrees with the parties that the question of whether the materials at issue are protected by the attorney-client privilege or the attorney work product doctrine should be decided in this forum. First, a decision by this Court is consistent with the Court's role as "the lead case for discovery ... in Coordinated Actions," including *Melton II*, a role that the Court has played in an effort to promote efficiency and ensure consistency in ignition switch litigation across the country. (14–MD–2543 Order No. 15 (Docket No. 315) ("Joint Coordination Order") 3). Given the size and nature of this Court's docket, not to mention its national jurisdiction, it is in a better position than any other tribunal to decide issues that are likely to arise in, or apply to, large numbers of other ignition switch cases. Second, as discussed below, because New GM initially provided the Valukas Report "to a federal office or agency," and subsequently produced the Report in this "federal proceeding," Rule 502 of the Federal Rules of Evidence governs—and limits—the scope of any waiver of any such privilege. Fed.R.Evid. 502(a). Moreover, Rule 502(d) provides that this Court's ruling on the question of waiver is binding on other courts throughout the country. In short, a decision on the questions presented by this Court in the first instance will help prevent inconsistent rulings in related actions as Valukas Report-related privilege issues arise (as they are bound to do).[2]

Turning then to the substantive questions, New GM argues that the Interview Materials are protected by both the attorney-client privilege and the attorney work product doctrine. Plaintiffs dispute both claims and contend that, even if the Interview Materials are protected, New GM has waived those protections. The Court will address each issue in turn.

A. The Attorney–Client Privilege

[1] [2] New GM contends first that the Interview Materials "reflect confidential communications between New GM's outside counsel and its current or former employees, agents, and counsel," and are thus protected by the attorney-client privilege. (New GM's Opening Br. 9). In the Second Circuit, "[t]he attorney-client privilege protects communications (1) between a client and his or her attorney (2) that are intended to be, and in fact were, kept confidential (3) for the purpose of obtaining or providing legal assistance." *Brennan Ctr. for Justice at N.Y. Univ. Sch. of Law v. DOJ*, 697 F.3d 184, 207 (2d Cir.2012) (internal quotation marks omitted).[3] ***527** It is well established that the privilege applies to communications between corporate counsel and a corporation's employees, made "at the direction of corporate superiors in order to secure legal advice from counsel." *Upjohn Co. v. United States*, 449 U.S. 383, 394, 101 S.Ct. 677, 66 L.Ed.2d 584 (1981). And although the Supreme Court and Second Circuit have not addressed the

issue, *see id.* at 395 n. 3, 101 S.Ct. 677 (declining to address the issue), district courts in this Circuit have consistently held that the privilege also extends to "conversations between corporate counsel and *former* employees of the corporation, so long as the discussion related to the former employee's conduct and knowledge gained during employment." *In re Refco Inc. Sec. Litig.*, Nos. 07–MD–1902 (JSR) et al., 2012 WL 678139, at *2 (S.D.N.Y. Feb. 28, 2012) (emphasis added) (citing cases).

Upjohn is the foundational case on attorney-client privilege in the corporate environment. There, the Supreme Court held that the privilege protected interview notes and memoranda prepared by a corporation's in-house counsel during an internal investigation of illegal payments by employees. The Court noted that, in this context, "the privilege exists to protect not only the giving of professional advice to those who can act on it but also the giving of information to the lawyer to enable him to give sound and informed advice." *Upjohn*, 449 U.S. at 390, 101 S.Ct. 677. That is the case, the Court explained, because the "first step in the resolution of any legal problem is ascertaining the factual background and sifting through the facts with an eye to the legally relevant." *Id.* at 390–91, 101 S.Ct. 677. Furthermore, failing to consistently and predictably protect communications between corporate counsel and lower-level employees would "threaten[ ] to limit the valuable efforts of corporate counsel to ensure their client's compliance with the law," because "[i]n light of the vast and complicated array of regulatory legislation confronting the modern corporation, corporations ... constantly go to lawyers to find out how to obey the law." *Id.* at 392, 101 S.Ct. 677 (internal quotation marks omitted). Applying those principles, the Court concluded that the documents at issue were privileged because they were collected by in-house counsel as part of "a factual investigation to determine the nature and extent of the questionable payments and to be in a position to give legal advice to the company with respect to the payments," and the interviewed employees were "sufficiently aware" of the legal purpose of the interviews and the confidentiality attached to their communications. *Id.* at 394–95, 101 S.Ct. 677 (emphasis omitted).

Upjohn applies squarely to the materials at issue in this case, at least to the extent that they reflect witnesses' communications rather than the thoughts or impressions of lawyers (a subject that is discussed further below). Here, as in *Upjohn*, the internal investigation and accompanying interviews were conducted "as part of [the company's] request for legal advice" in light of possible misconduct and accompanying governmental investigations and civil litigation. (Valukas Decl. ¶ 2). Here, as in *Upjohn*, the employees interviewed were aware (and, in fact, explicitly told) that the purpose of the interviews was to collect information to assist in providing legal advice to the ***528** company, and that the matters discussed were therefore confidential. (*Id.* ¶ 4). Here, as in *Upjohn*, the documents reflecting communications between the company's lawyers and its employees during the interview process have not been provided to third parties; instead, they have been shared, if at all, only with King & Spalding (a law firm that has also been representing New GM in connection with the recalls) and with the holder of the privilege, New GM itself. (*Id.* ¶¶ 3, 6–8). And although the investigation here was conducted by outside counsel rather than in-house counsel, that difference from *Upjohn* strengthens rather than weakens New GM's claim to the privilege. *See, e.g., ABB Kent–Taylor, Inc. v. Stallings and Co., Inc.*, 172 F.R.D. 53, 55 (W.D.N.Y.1996) (noting that "[p]rivilege issues with respect to communications between in-house corporate counsel and the corporate client have proven to generate thorny discovery and disclosure problems" because "[i]n-house counsel often serve their corporate employer in mixed business-legal roles").

In arguing otherwise, Plaintiffs make two principal arguments. First, citing the testimony of New GM's Chief Executive Officer Mary Barra before Congress, in which she promised to share the Valukas Report and "everything and anything that is related to safety," Plaintiffs assert "[t]here was no expectation that the Valukas Report or the investigation would be confidential." (Pls.' Opening Br. 2, 14–15).[4] Second, Plaintiffs contend that the privilege does not apply to the Interview Materials because the communications they reflect were not made for the purpose of obtaining or providing legal advice. (Pls.' Opening Br. 15–16). Noting that "[m]ost of the Report contains factual findings and then ends with a series of recommendations relating to business processes controls, communications, policies, and training," Plaintiffs argue that the Valukas Report "itself did not reflect the provision of legal advice." (*Id.* at 15–16). It follows, they contend, that "drafts of the report and memoranda of the lawyers' interviews with witnesses were not prepared 'primarily' or 'predominantly' for the purpose of providing legal advice." (*Id.* at 15–16). More specifically, Plaintiffs assert that the investigation was conducted—and the Valukas Report was prepared—for the purpose of making business recommendations, not legal recommendations, and thus that communications made during the course of the investigation do not meet the "primary purpose" test for application of the privilege. (Pls.' Resp. Br. Concerning Produc. Material Related Valukas Report (Docket No. 466) ("Pls.' Resp. Br.") 4).

[3] [4] [5] Those arguments are unavailing. Plaintiffs' first argument—that New GM did not intend to keep the Interview Materials confidential—is based on a flawed inference: that because New GM promised to (and did) disclose the *facts* shared in the Valukas Report, it follows that the company did not intend to keep the *communications* reflected in the Interview Materials confidential. It is well established, however, that the attorney-client privilege "protects communications rather than information." *In re Grand Jury Subpoena Duces Tecum Dated Sept. 15, 1983,* 731 F.2d 1032, 1037 (2d Cir.1984). Thus, "the privilege does not impede disclosure of information except to the extent *529 that that disclosure would reveal confidential communications." *Id.* And "the fact that certain *information* in [otherwise protected] documents might ultimately be disclosed" or "that certain *information* might later be disclosed to others" does not, by itself, "create the factual inference that the *communications* were not intended to be confidential at the time they were made." *Id.* (emphases added). Were it otherwise, "any attorney-client communications relating to the preparation of publicly filed legal documents—such as court pleadings—would be unprotected," which is plainly not the law. *In re Grand Jury Subpoena,* 341 F.3d 331, 336 (4th Cir.2003); *see also In re Feldberg,* 862 F.2d 622, 629 (7th Cir.1988) (noting that "[r]are is the case in which attorney-client conversations do not lead to some public disclosure" and that, just because a trial is public or a lawyer writes a brief to be filed with the court, it does not follow that communications "antecedent" to the trial and "drafts of the brief" are unprivileged); *Grand Jury Subpoena Duces Tecum Dated Sept. 15, 1983,* 731 F.2d at 1037 (holding that the privilege can apply to "drafts of communications the final version of which might eventually be sent to other persons, and as distributed would not be privileged").

The touchstone of the analysis, therefore, is not whether New GM intended to keep confidential the results of its investigation, but rather whether it intended to keep confidential the communications reflected in the Interview Materials. Applying that standard here, New GM has established a valid claim to the privilege. Barra may have promised transparency in matters relating to safety (*see* Pls.' Opening Br. 14–15), but she did not promise to disclose the communications reflected in the Interview Materials. And the participants in the interviews themselves understood that their communications were intended to be kept confidential. As Valukas explains in a sworn declaration, consistent with *Upjohn* and its progeny, "at the outset of each interview the interviewing attorney informed the witness that the purpose of the interview was to gather information to assist in providing legal advice to New GM, that the interview was accordingly privileged, that this privilege belonged to New GM, and that the witness should keep confidential the matters discussed in the interview." (Valukas Decl. ¶ 4). And consistent with those warnings and assurances, Jenner and New GM have never shared the Interview Materials with any government agency or third party. (*Id.* ¶¶ 5–8).[5]

[6] Plaintiffs' second argument—that the communications reflected in the Interview Materials were not made for the purpose of obtaining or providing legal assistance—is also unpersuasive. Plaintiffs are certainly correct that the privilege attaches only if "the predominant purpose of the communication is to render or solicit legal advice." *In re County of Erie,* 473 F.3d 413, 420 (2d Cir.2007). Further, it is plain, as Plaintiffs argue, that New GM's purposes in retaining Jenner and producing the Valukas Report were not exclusively legal—that the company sought to identify *530 and correct the problems that resulted in the delayed recalls and to address a public relations fiasco by reassuring investors and the public that it takes safety seriously. The primary purpose test, however, does not require a showing that obtaining or providing legal advice was the *sole* purpose of an internal investigation or that the communications at issue "would not have been made 'but for' the fact that legal advice was sought." *In re Kellogg Brown & Root, Inc.,* 756 F.3d 754, 759 (D.C.Cir.2014). Instead, as the D.C. Circuit has expressly held, "the primary purpose test, sensibly and properly applied, cannot and does not draw a rigid distinction between a legal purpose on the one hand and a business purpose on the other." *Id.* at 759. "So long as obtaining or providing legal advice was one of the significant purposes of the internal investigation, the attorney-client privilege applies, even if there were also other purposes for the investigation ...." *Id.* at 758–59.

To be sure, the D.C. Circuit's decision in *Kellogg Brown & Root* is not binding on this Court. Nevertheless, its analysis of the "primary purpose" test as applied to internal investigations in the corporate setting is consistent with the Second Circuit's analysis in *County of Erie,* where the Court explained (in addressing the privilege as applied to advice by a government lawyer) that "[t]he modern lawyer almost invariably advises his client upon not only what is permissible but also what is desirable ... [T]he privilege of nondisclosure is not lost merely because relevant nonlegal considerations are expressly stated in a communication which also includes legal advice." 473 F.3d at 420 (internal quotation marks omitted); *see also id.* at 421 ("The predominant purpose of a particular document—legal advice, or not—may also be informed by the overall needs and objectives that

animate the client's request for advice."). More broadly, the D.C. Circuit's holding is consistent with—if not compelled by—the Supreme Court's logic in *Upjohn.* Rare is the case that a troubled corporation will initiate an internal investigation solely for legal, rather than business, purposes; indeed, the very prospect of legal action against a company necessarily implicates larger concerns about the company's internal procedures and controls, not to mention its bottom line. Accordingly, an attorney-client privilege that fails to account for the multiple and often-overlapping purposes of internal investigations would "threaten[ ] to limit the valuable efforts of corporate counsel to ensure their client's compliance with the law." *Upjohn,* 449 U.S. at 393, 101 S.Ct. 677.

Applying those standards here, the Court finds that New GM has met its burden of demonstrating that the provision of legal advice was a "primary purpose" of Jenner's investigation and the communications reflected in the Interview Materials. In the face of an already-launched criminal investigation by the DOJ, and the inevitability of civil litigation, New GM "retained Jenner to represent New GM's interests and to provide legal advice to new GM in a variety of matters relating to the recalls," including the DOJ investigation. (Valukas Decl. ¶ 2). "[I]n order to facilitate [that] provision of legal advice," Jenner and Valukas conducted the interviews in question. (*Id.* ¶ 3). And as New GM's submissions make plain, the interviews have in fact been used in connection with Jenner's representation of New GM with respect to the DOJ investigation. (*See, e.g., id.* ¶ 9 (noting that Jenner lawyers "orally proffered" to representatives of the U.S. Attorney's Office for the Southern District of New York "their hypothetical understandings, based on the interviews, of what certain witnesses would likely say about the facts relating to the ignition switch recalls")). Accordingly, regardless of whether New GM had other purposes in retaining Jenner, and regardless of whether the Valukas ***531** Report *itself* contained legal as opposed to business advice—a question this Court need not, and does not, reach—the underlying investigation, and the interviews conducted as part of it, had a "primary purpose" of enabling Valukas and Jenner to provide New GM with legal advice.

This Court's decision in *Allied Irish Banks,* upon which Plaintiffs principally rely (Pls.' Opening Br. 15–17; Pls.' Resp. Br. 5), does not call for a different result. In that case, the Court held (applying New York law) that the attorney-client privilege did not protect materials underlying a report prepared following an internal investigation. *See* 240 F.R.D. at 103–05. But that holding was based on facts unlike those here. There, the company had hired a non-lawyer—the principal of a consulting firm, touted by the bank as an "eminent person with standing and expertise in the financial services industry"—to produce the report, which the company promptly released publicly. *Id.* at 100–01. The terms of the consultant's engagement had been limited to business-related matters and had said nothing about legal advice. *See id.* And while the consultant had, in turn, engaged a law firm to "assist" in his investigation, *id.; see also id.* at 105, neither the company nor the law firm "provided any evidence regarding the manner in which [the law firm's] purported legal advice was provided to [the company] ... or on what dates," *id.* at 101. In fact, "[t]he only document attributable in any form to [the law firm] that was also presented to [the company]" was the final report itself, "which indisputably did not provide legal advice." *Id.* at 104. In this case, by contrast, New GM explicitly engaged Jenner, a law firm, to provide legal advice, and—whether or not such advice is reflected in the Valukas Report—there is no dispute that Jenner has in fact provided legal advice to the company as a result of its investigation. *See also, e.g., Orbit One Commc'ns, Inc. v. Numerex Corp.,* 255 F.R.D. 98, 104 (S.D.N.Y.2008) (noting that determination of "the precise limits of the attorney-client privilege in the corporate context" requires a "fact-intensive" analysis).

[7] In short, as a threshold matter, New GM has shown that the attorney-client privilege applies to the portions of the Interview Materials reflecting communications between current and former New GM employees and agents and outside counsel.

B. The Attorney Work Product Doctrine

As noted, New GM argues that the Interview Materials are also protected by the attorney work product doctrine. (New GM's Opening Br. 11–12; New GM's Resp. Br. 13–16). Protection of attorney work product is based on the notion that "it is essential that a lawyer work with a certain degree of privacy, free from unnecessary intrusion by opposing parties and their counsel. Proper preparation of a client's case demands that he assemble information, sift what he considers to be the relevant from the irrelevant facts, prepare his legal theories and plan his strategy without undue and needless interference." *Hickman v. Taylor,* 329 U.S. 495, 510–11, 67 S.Ct. 385, 91 L.Ed. 451 (1947). As the Supreme Court acknowledged in *Hickman,* "[t]his work is reflected, of course, in interviews, statements, memoranda, correspondence, briefs, mental impressions, personal beliefs, and countless other tangible and intangible ways." *Id.* at 511, 67 S.Ct. 385. *Hickman* has since been codified in Rule 26(b)(3) of the Federal Rules of Civil Procedure,

which provides that "[o]rdinarily, a party may not discover documents and tangible things that are prepared in anticipation of litigation or for trial by or for another party or its representative." Fed.R.Civ.P. 26(b)(3).

*532 [8] [9] As the Second Circuit has noted, "[n]othing" in Rule 26(b)(3) "states or suggests that documents prepared 'in anticipation of litigation' with the purpose of assisting in the making of a business decision do not fall within its scope." *United States v. Adlman*, 134 F.3d 1194, 1198–99 (2d Cir.1998). Indeed, "a requirement that documents be produced primarily or exclusively to assist in litigation in order to be protected is at odds with the text and the policies of the Rule. Nowhere does Rule 26(b)(3) state that a document must have been prepared to *aid* in the conduct of litigation in order to constitute work product, much less *primarily* or *exclusively* to aid in litigation. Preparing a document 'in anticipation of litigation' is sufficient." *Id.* at 1198. Accordingly, to demonstrate that material is protected by the attorney work product doctrine, a party need only show that, "in light of the nature of the document and the factual situation in the particular case, the document can fairly be said to have been prepared or obtained *because of* the prospect of litigation." *Schaeffler v. United States*, 22 F.Supp.3d 319, 335 (S.D.N.Y.2014) (internal quotation marks omitted). Work product protection does not apply to "documents that are prepared in the ordinary course of business or that would have been created in essentially similar form irrespective of the litigation." *Id.* (internal quotation marks omitted).

[10] Applying those standards here, Rule 26(b)(3) provides an independent basis for New GM to withhold the Interview Materials. The materials at issue were produced in a situation far from the "ordinary course of business"; the interviews were conducted—and the Interview Materials were prepared—in light of the pending DOJ investigation and the anticipation of civil litigation. (Valukas Decl. ¶¶ 2–3; Millikin Decl. ¶¶ 4–5). Further, in light of the nature of the documents at issue and the factual situation in this case, it can "fairly be said" that the Interview Materials would not have been created in "essentially similar form" had New GM not been faced with the inevitability of such litigation. *See, e.g., In re Woolworth Corp. Sec. Class Action Litig.*, No. 94–CV–2217 (RO), 1996 WL 306576, at *3 (S.D.N.Y. June 7, 1996) (noting that when civil and criminal litigation are virtually certain, "[a]pplying a distinction between 'anticipation of litigation' and 'business purposes' is ... artificial, unrealistic, and the line between is ... essentially blurred to oblivion"). Indeed, the interviews themselves were shaped by the specter of litigation: All witnesses were informed "that the purpose of the interview[s] was to gather information to assist in providing legal advice to New GM," and the interviews were conducted with an eye towards the goal of "facilitat[ing] [Jenner's] provision of legal advice to New GM." (Valukas Decl. ¶¶ 3–4). Interview notes and memoranda produced in the course of similar internal investigations have long been considered classic attorney work product. *See, e.g., William A. Gross Constr., Assoc., Inc. v. Am. Mfrs. Mut. Ins. Co.*, 262 F.R.D. 354, 362 (S.D.N.Y.2009); *In re Cardinal Health, Inc. Sec. Litig.*, No. C2–04–575 (RPP), 2007 WL 495150, at *5 (S.D.N.Y. Jan. 26, 2007). There is no basis to reach a different conclusion here.

That does not end the analysis, however, as the protections afforded by the attorney work product doctrine are not absolute. Instead, a party may obtain "fact" work product if it "shows that it has substantial need for the materials to prepare its case and cannot, without undue hardship, obtain their substantial equivalent by other means." Fed.R.Civ.P. 26(b)(3)(ii).[6] Plaintiffs *533 here cannot make that showing as to the Interview Materials as a whole, given the vast amount of materials that New GM has produced or will be producing and given the fact that Plaintiffs are free to depose the witnesses whom the Jenner attorneys interviewed as part of the Valukas investigation. *See Hickman*, 329 U.S. at 513, 67 S.Ct. 385 (noting that "direct interviews with the witnesses themselves all serve to reveal the facts in [the attorney's] possession to the fullest possible extent consistent with public policy"); *see also, e.g., Gucci Am., Inc. v. Guess?, Inc.*, 271 F.R.D. 58, 80 (S.D.N.Y.2010) ("No substantial need exists where a party can obtain the information it seeks through discovery devices such as interrogatories or deposition testimony."). Accordingly, Plaintiffs' request for the Interview Materials is denied on the independent ground that it constitutes attorney work product. That denial, however, is without prejudice to any future application (after conferring with counsel for New GM) for particular materials in the event that a witness who was interviewed by the Valukas team proves to be unavailable for deposition as a result of death, invocation of the Fifth Amendment privilege against self-incrimination, or otherwise. And to facilitate any such application, New GM is ordered to disclose, within two weeks, the names of all witnesses who were interviewed by the Valukas team but not mentioned by name in the Valukas Report itself. (*See* Dec. 15, 2014 Hr'g Tr. at 8:2–10:21).

C. Waiver

[11] Finally, the Court turns to the question of whether New GM waived the protections of either the

attorney-client privilege or the attorney work product doctrine—as to which New GM also bears the burden of proof. *See, e.g., United States v. Int'l Bhd. of Teamsters, Chauffeurs, Warehousemen & Helpers of Am., AFL–CIO,* 119 F.3d 210, 214 (2d Cir.1997); *Denney v. Jenkens & Gilchrist,* 362 F.Supp.2d 407, 412 (S.D.N.Y.2004). Rule 502 of the Federal Rules of Evidence, titled "Attorney–Client Privilege and Work Product; Limitations on Waiver," provides that "when [a] disclosure is made in a federal proceeding or to a federal office or agency and waives the attorney-client privilege or work-product protection, the waiver extends to an undisclosed communication or information in a federal or state proceeding *only if:* (1) the waiver is intentional; (2) the disclosed and undisclosed communications or information concern the same subject matter; *and* (3) they ought in fairness to be considered together." Fed.R.Evid. 502(a) (emphases added). As the Advisory Committee Notes state, the Rule—enacted in 2008—"provides that a voluntary disclosure in a federal proceeding or to a federal office or agency ... generally results in a waiver *only* of the communication or information disclosed." Fed.R.Evid. 502, Committee Notes (emphasis added). In particular, such disclosure results in a subject matter waiver of undisclosed materials only in those "unusual situations in which fairness requires a further disclosure of related, protected information, in order to prevent a selective and misleading presentation of evidence to the disadvantage of the adversary." *Id.*

Significantly, although the parties discuss the common law of waiver in their memoranda of law (*see* New GM's Opening Br. 15–16; Pls.' Opening Br. 17–20), both sides agree that the waiver analysis is ***534** controlled by Rule 502. (Pls.' Opening Br. 17–20; Pls.' Resp. Br. 7–9; *see* Dec. 15, 2014 Hr'g Transcript at 14:16–15:12). After all, New GM provided the Valukas Report to Congress, DOJ, and NHTSA—"federal office[s] or agenc[ies]"—and has since disclosed the Report in this MDL—a "federal proceeding." Applying Rule 502, there is no basis to conclude that New GM waived either attorney-client privilege or the attorney work product doctrine with respect to documents that New GM has withheld—namely, the Interview Materials. Specifically, as New GM has shown, the company has—as of today's date—"neither offensively used the Valukas Report in litigation nor made a selective or misleading presentation that is unfair to adversaries in this litigation, or any other." (New GM's Resp. Br. 11; *see also* New GM's Opening Br. 7 & n. 3). Additionally, New GM has produced, or soon will produce, millions of pages of documents, including many that would otherwise be privileged (pursuant to the Court's Rule 502(d) Order). (14–MD–2543 Docket No. 404). Put simply, this case does not present the unusual and rare circumstances in which fairness requires a judicial finding of waiver with respect to related, protected information.

D. Plaintiffs' Other Requests

Separate and apart from the Interview Materials, Plaintiffs seeks both "[a]n index evidencing all documents or information provided to Anton Valukas and/or Jenner & Block with respect to investigation into the GM ignition switch recalls" and "[c]opies of all hard drives of documents that were gathered in connection with the investigation of GM and the preparation of the Valukas Report encompassing the 23 TB of data and 41 million documents referenced in the Valukas Report." (Pls.' Opening Br. 13). Substantially for the reasons argued by New GM in its responsive memorandum of law (New GM's Resp. Br. 16–17), the Court denies those requests. Plaintiffs have not argued—nor, likely, could they—that the production of those materials is "reasonably calculated to lead to the discovery of admissible evidence." Fed.R.Civ.P. 26(b)(1). Moreover, in light of the extensive—indeed, vast—universe of documents that New GM has disclosed or will be disclosing in the coming months, the discovery sought by Plaintiffs is "unreasonably cumulative or duplicative." Fed.R.Civ.P. 26(b)(2)(C)(i). Accordingly, Plaintiffs' requests for those additional materials are DENIED.

CONCLUSION

For the foregoing reasons, the Court agrees with New GM that the Interview Materials are protected by both the attorney-client privilege and the attorney work product doctrine. The Court acknowledges that that ruling deprives Plaintiffs of material that might be helpful in the preparation of their cases. In reality, however, it "puts [Plaintiffs] in no worse position than if the communications had never taken place," *Upjohn,* 449 U.S. at 395, 101 S.Ct. 677, as Plaintiffs themselves are free to question the witnesses who were interviewed by the Valukas team. Moreover, in the memorable words of Justice Robert Jackson, "[d]iscovery was hardly intended to enable a learned profession to perform its functions ... on wits borrowed from the adversary." *Hickman,* 329 U.S. at 516, 67 S.Ct. 385 (Jackson, J., concurring). And, in the final analysis, the cost of withholding the materials is outweighed by the benefits to society of "encourag[ing] 'full and frank communication between attorneys and their clients and thereby promot[ing] broader public interests in the observance of law and the administration

of justice.' " *535 *Swidler & Berlin v. United States*, 524 U.S. 399, 403, 118 S.Ct. 2081, 141 L.Ed.2d 379 (1998) (quoting *Upjohn*, 449 U.S. at 389, 101 S.Ct. 677).

Accordingly, and for the reasons explained above, Plaintiffs' application to compel disclosure of the Interview Materials and other items is DENIED, except that New GM is ordered to disclose, **within two weeks,** the names of all witnesses who were interviewed by Valukas and his colleagues but not mentioned by name in the Valukas Report itself.

SO ORDERED.

All Citations

80 F.Supp.3d 521, 90 Fed.R.Serv.3d 1084

Footnotes

1 Jenner submitted amended versions of the Valukas Report to the New GM Board on June 1, 2014, and June 4, 2014. (New GM's Opening Br. 6 n. 2). As used in this Opinion and Order, the "Valukas Report" refers to the final version.

2 As reflected in the Joint Coordination Order, this Court's proper role does not extend to deciding issues that are specific to any individual related case or cases. Accordingly, the Court intimates no view on the motion to compel in *Melton II* to the extent it raises issues specific to that case, such as whether New GM or its attorneys committed fraud during discovery in *Melton I*. To the extent that case-specific issues are raised in *Melton II* or any other related case, the Court leaves it to the court presiding over the case to decide the issue in the first instance.

3 Insofar as many of the cases in this MDL are subject to this Court's diversity jurisdiction, it is by no means clear that federal law should govern analysis of the attorney-client privilege. *See, e.g., Dixon v. 80 Pine St. Corp.*, 516 F.2d 1278, 1280 (2d Cir.1975) ("It is not contested that, in a diversity case, the issue of privilege is to be governed by the substantive law of the forum state ...."). In their memoranda, however, the parties rely solely on federal law and fail to address the issue of choice of law. Given that, the Court finds that the parties have implicitly consented to application of federal privilege law and that that implied consent "is sufficient to establish choice of law" on the question. *Krumme v. WestPoint Stevens Inc.*, 238 F.3d 133, 138 (2d Cir.2000) (internal quotation marks omitted); *see also Allied Irish Banks v. Bank of Am., N.A.*, 240 F.R.D. 96 (S.D.N.Y.2007) (finding implied consent to apply New York privilege law where the parties did not address the choice of law and cited New York cases).

4 Relatedly, Plaintiffs contend that they are entitled to the Interview Materials because the Valukas Report was, in fact, "not kept confidential." (Pls.' Opening Br. 2). That contention is analyzed further below, in connection with Plaintiffs' broader argument that New GM waived any attorney-client privilege through its disclosures to Congress, NHTSA, and DOJ.

5 Based on the interviews, and in order to cooperate with the DOJ investigation, Jenner attorneys "made oral hypothetical proffers" of "what certain witnesses might say if the DOJ were to speak with them," a tactic New GM represents is "in accord with typical practice in DOJ investigations conducted in the Southern District of New York." (New GM Opening Br. 6). Plaintiffs make no argument that those oral proffers—which "were not complete or verbatim recitations of what the witnesses said or of the [Interview Materials]" (Valukas Decl. ¶ 9)—or the intention to make those oral proffers, vitiated the attorney-client privilege.

6 By contrast, "opinion" work product is subject to heightened protection; it is not subject to disclosure absent, "at a minimum ... a highly persuasive showing of need." *In re Grand Jury Proceedings*, 219 F.3d 175, 192 (2d Cir.2000) (internal quotation marks omitted). Although New GM argues that some of the Interview Materials contain opinion work product (New GM's Opening Br. 18–19), the Court need not reach that question at this juncture.

End of Document

08. *Gilman v. Marsh & McLennan Companies, Inc.*, 826 F.3d 69 (2d Cir. 2016)

826 F.3d 69
United States Court of Appeals,
Second Circuit.

William W. Gilman, Edward J. McNenney, Jr., Plaintiffs–Appellants,
v.
Marsh & McLennan Companies, Inc., Marsh Inc., Marsh USA Inc., Marsh Global Broking Inc., Michael Cherkasky, Defendants–Appellees.

Docket No. 15-0603-cv(L)
|
August Term, 2015
|
Argued: January 13, 2016
|
Decided: June 16, 2016

Synopsis

Background: Former employees brought action against their former employer, an insurance brokerage, for violations of Employee Retirement Income Security Act (ERISA), breach of contract, and breach of the implied covenant of good faith and fair dealing, based on employer's refusal to pay employees unvested, deferred compensation or severance when it terminated them. The United States District Court for the Southern District of New York, Oetken, J., 868 F.Supp.2d 118, granted summary judgment to employer. Employees appealed.

Holdings: The Court of Appeals, Dennis Jacobs, Circuit Judge, held that:

[1] brokerage's orders that employees sit for interviews regarding their participation in criminal bid-rigging scheme was reasonable, and thus employees' refusal to comply gave brokerage cause to terminate them;

[2] employees were terminated for cause, not as result of reduction-in-force, restructuring, or retirement, and thus they were not entitled to payment pursuant to terms of stock award and severance plans; and

[3] brokerage's demands that employees sit for interviews regarding their participation in scheme was not state action that infringed their Fifth Amendment right against self-incrimination.

Affirmed.

West Headnotes (8)

[1] **Federal Courts**
Summary judgment

Federal Courts
Summary judgment

Court of Appeals reviews district court's grant of summary judgment de novo, construes the evidence in the light most favorable to the non-moving party, and draws all reasonable inferences in its favor.

Cases that cite this headnote

[2] **Labor and Employment**
Disobedience or insubordination

Under Delaware law, "cause" for termination of an employee includes the refusal to obey a direct, unequivocal, reasonable order of the employer.

Cases that cite this headnote

[3] **Labor and Employment**
Disobedience or insubordination

Under Delaware law, insurance brokerage's orders that employees sit for interviews regarding their participation in criminal bid-rigging scheme was reasonable, and thus employees' refusal to comply gave brokerage cause to terminate them; employees had been named as co-conspirators in scheme for their conduct as brokerage's employees, it was obvious that state attorney general intended to prosecute them criminally, and brokerage was not only entitled to question employees about potential on-the-job criminal conduct, but had duty to its shareholders to do so, further, in absence of exculpatory explanation, it needed to assume bid-rigging

allegations were true and it was vicariously liable for employees' criminal conduct.

Cases that cite this headnote

[4] **Labor and Employment**
Conduct or misconduct in general

Under Delaware law, when an employer, because of an employee's wrongful conduct, can no longer place the necessary faith and trust in an employee, the employer is entitled to dismiss such employee without penalty.

Cases that cite this headnote

[5] **Labor and Employment**
Severance pay

Under Delaware law, insurance brokerage's employees were not terminated as result of reduction-in-force, restructuring, or retirement, but rather they were terminated for cause, for their failure to comply with brokerage's orders that they sit for interviews regarding their participation in criminal bid-rigging scheme, and thus employees were not entitled to payment pursuant to terms of stock award and severance plans; it was objectively plain that employees' refusal to be interviewed would result in termination, there was no evidence they were fired as part of a reduction-in-force or restructuring, and employee's filing of retirement papers in direct response to brokerage's interview demand could not preempt known, imminent, for-cause termination.

Cases that cite this headnote

[6] **Contracts**
Construction as a whole

Under Delaware law, court reads a contract as a whole and will give each provision and term effect, so as not to render any part of the contract meaningless or illusory.

Cases that cite this headnote

[7] **Contracts**
Terms implied as part of contract

Delaware law implies a covenant of good faith and fair dealing in every contract, which requires a party in a contractual relationship to refrain from arbitrary or unreasonable conduct which has the effect of preventing the other party to the contract from receiving the fruits of the bargain.

Cases that cite this headnote

[8] **Witnesses**
Form and Purpose of Inquiry

Insurance brokerage's demands that employees sit for interviews regarding their participation in alleged criminal bid-rigging scheme was not state action that infringed their Fifth Amendment right against self-incrimination, and thus brokerage's demands did not preclude employees' termination for cause with attendant loss of deferred compensation and severance pay; brokerage was cooperating with state attorney general's investigation, but it had good institutional reasons for requiring employees to sit for interviews or else lose their jobs: its stock price was sinking and its clients, directors, and investors were demanding answers, and there was no evidence attorney general forced brokerage to demand interviews or intervened in brokerage's decisionmaking. U.S. Const. Amend. 5.

Cases that cite this headnote

Attorneys and Law Firms

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Before: KEARSE, WINTER, and JACOBS, Circuit Judges.

Opinion

DENNIS JACOBS, Circuit Judge:

Faced with the prospect of criminal indictment premised on the actions of two employees, a company demanded that those employees explain themselves under the threat of termination. They refused, were fired, and in this suit seek to recover employment benefits they lost by termination. They appeal from the judgment of the United States District Court for the Southern District of New York (Oetken, J.), dismissing their complaint on summary judgment. We agree with the district court that the defendant company—Marsh (i.e., Marsh & McLennan Cos., Marsh Inc., Marsh USA Inc., and Marsh Global Broking Inc.)—had cause to fire William Gilman and Edward McNenney, Jr., for refusal to comply with its reasonable order. Accordingly, we affirm. [1]

BACKGROUND

In April 2004, the New York Attorney General (the "AG") began investigating "contingent commission" arrangements by which insurance brokers were thought to be steering clients to particular insurance carriers. Marsh, as one of the brokers under investigation, retained outside counsel, Davis Polk & Wardwell LLP, to conduct an internal investigation of the AG's allegations. The internal investigation included interviews with Gilman and McNenney in the spring and summer of 2004.

The focus of the AG investigation shifted, in September 2004, to an alleged bid-rigging scheme involving Marsh and several insurance carriers. On October 13, 2004, two individuals at American International Group, Inc. ("AIG") pleaded guilty to felony complaints charging them with participation in a bid-rigging scheme with Marsh. In the allocution of one of the AIG employees, Gilman and McNenney were identified as co-conspirators. The next day, the AG filed a civil complaint against Marsh for alleged fraudulent business practices and antitrust violations.

The fallout from the civil complaint was swift and severe. Marsh's stock price plunged, a raft of private civil suits were filed, and Marsh's directors, clients, and shareholders demanded answers to the bid-rigging allegations. Marsh responded by expanding the ongoing internal investigation; on October 19, 2004, Marsh suspended Gilman and McNenney (with pay). More or less at the same time, Marsh's counsel asked Gilman and McNenney to sit for interviews and warned that failure to comply would result in termination. Gilman was asked to interview with a lawyer from Davis Polk as soon as possible. McNenney alleges that he was asked to submit to an interview with a lawyer from the AG and that he was told to do so without presence of counsel. (Marsh vigorously denies that McNenney was asked to interview with the AG, let alone to do so without counsel.)

On October 25, 2004, the CEO of Marsh's parent company resigned and was replaced by Michael Cherkasky. The same day, Cherkasky met with Eliot Spitzer, then-Attorney General of New York, to discuss the investigation. Gilman and McNenney contend that the upshot of the meeting was that the AG would forgo criminal prosecution of Marsh itself in exchange for its cooperation with the AG's investigation, including waivers of attorney-client privilege and work-product immunity for information developed in the (expanding) internal investigation. That day, an AG press release announced that a civil proceeding would suffice to punish and reform Marsh, and that criminal prosecutions arising out of the alleged bid-rigging scheme would be limited to individuals. This press release was widely understood to mean the AG would indict Gilman and McNenney—as it eventually did.

By the time of the October 25 meeting and agreement between Cherkasky and Spitzer, neither Gilman nor McNenney had complied with Marsh's counsel's requests that they sit for interviews. On October 27, 2004, McNenney's attorney conveyed McNenney's refusal to Davis Polk; Marsh fired him the next day. On October 28, 2004, Gilman's attorney scheduled an interview for his client on November 2. But on November 1, 2004, Gilman submitted paperwork purporting to effectuate an early retirement; later that day, his attorney conveyed Gilman's

refusal to be interviewed. Marsh fired Gilman the next day, and did not accept Gilman's purported retirement.

As Marsh employees, Gilman and McNenney were eligible for some valuable employment benefits. Under Marsh's Stock Award Plans, they received grants of stock options, stock bonus units, and/or deferred stock units, some of which they could have been entitled to upon termination if (for example) they had retired or were fired without cause. If, however, they were terminated "for cause," any unvested stock benefits were forfeited. Under Marsh's ERISA-governed Severance Pay Plan, Gilman and McNenney were entitled to severance if, inter alia, they remained in good standing with Marsh on their last day of work and if their employment terminated (i) because they lacked job skills, or (ii) in connection with a restructuring, or (iii) because Marsh had eliminated their position. An otherwise-eligible employee whose employment was terminated "for cause" was not entitled to severance. Marsh took the position that it fired Gilman and McNenney "for cause," and denied them unvested, deferred compensation as well as severance.

As relevant here, Gilman and McNenney sued Marsh to obtain the lost employment benefits, alleging violations of ERISA, breach of contract, and breach of the implied covenant of good faith and fair dealing. The district court granted summary judgment in favor of Marsh, concluding that the interview requests were reasonable, that Gilman's and McNenney's refusal to sit for interviews gave Marsh cause for termination, that Marsh did in fact fire them for cause (and did not breach the implied covenant), and that Gilman's purported retirement was ineffective. Gilman and McNenney appeal.

DISCUSSION

We review the grant of summary judgment de novo, construe the evidence in the light most favorable to the non-moving party, and draw all reasonable inferences in its favor. Noll v. Int'l Bus. Mach. Corp., 787 F.3d 89, 93–94 (2d Cir. 2015).

The first question is whether the demand that Gilman and McNenney submit to interviews was reasonable as a matter of law. If so, Marsh had cause to fire them and deny them employment benefits. If not, Gilman's and McNenney's claims against Marsh for benefits should have withstood summary judgment. We conclude that the interview demands were reasonable as a matter of law because at the time they were made, Gilman and McNenney were Marsh employees who had been implicated in an alleged criminal conspiracy for acts that were within the scope of employment and that imperiled the company. The second question is whether there is a triable issue of fact as to whether Marsh fired them for cause. We conclude that there is not and reject the argument that Gilman and McNenney were let go routinely as part of a reduction in force and the argument that Gilman could not be fired because he had preemptively resigned. Finally, we reject Gilman's and McNenney's contention that, in light of Marsh's cooperation with the AG, Marsh's requirement that they answer potentially incriminating questions amounted to state action, and was thus unreasonable. Accordingly, Marsh had cause to fire them, as it did, and Gilman and McNenney are entitled to none of the employment benefits they seek.

I

[2] [3] Under Delaware law, which governs Marsh's employment contracts with Gilman and McNenney, "cause" for termination includes the refusal to "obey a direct, unequivocal, reasonable order of the employer." Unemployment Ins. Appeal Bd. v. Martin, 431 A.2d 1265, 1268 (Del. 1981). Gilman and McNenney do not dispute that Marsh's orders that they sit for interviews were direct and unequivocal. So the decisive issue is whether the orders were reasonable.

[4] When Gilman and McNenney were named as co-conspirators in a criminal bid-rigging scheme for their conduct *as Marsh employees*, it was obvious (as Gilman and McNenney themselves affirmatively argue) that the AG intended to prosecute them criminally. At that time, Marsh had sufficient basis to act on the allegations, made under oath in open court, and would have had cause to terminate Gilman and McNenney, regardless of the ultimate resolution of the allegations. See Smallwood v. Allied Waste N. Am., Inc., 2010 WL 5556177, at *2 (Del. Super. Ct. Dec. 30, 2010) (holding that an employer had "just cause" to fire an employee for allegedly criminal conduct notwithstanding the employee's eventual acquittal on criminal charges). "When an employer, because of an employee's wrongful conduct, can no longer

place the necessary faith and trust in an employee, [the employer] is entitled to dismiss such employee without penalty." Barisa v. Charitable Research Found., Inc., 287 A.2d 679, 682 (Del. Super. Ct. 1972); cf. Moeller v. Wilmington Sav. Fund Soc., 723 A.2d 1177, 1179 (Del. 1999) (concluding that, for purposes of claiming unemployment benefits, an employer would have "just cause" to terminate employees if they had engaged in illegal or criminal conduct). If Marsh had indeed fired them then, it would have been for cause, and Gilman and McNenney would for that reason have been ineligible for the employment benefits they currently seek. It is difficult to see how their claims for benefits improved because Marsh instead gave them the chance to explain themselves, and they refused to comply.

Marsh was presumptively entitled to seek information from its own employees about suspicions of on-the-job criminal conduct. Marsh could take measures to protect its standing with investors, clients, employees, and regulators. Marsh also had a duty to its shareholders to investigate any potentially criminal conduct by its employees that could harm the company. See, e.g., In re Caremark Int'l Inc. Derivative Litig., 698 A.2d 959, 968–70 (Del. Ch. 1996). And as corporate officers, Gilman and McNenney had a duty to Marsh to disclose information they had about the AG's allegations. See, e.g., Beard Research, Inc. v. Kates, 8 A.3d 573, 601 (Del. Ch. 2010).

Marsh's demands placed Gilman and McNenney in the tough position of choosing between employment and incrimination (assuming of course the truth of the allegations). But though Gilman and McNenney "may have possessed the personal rights to [not sit for interviews], that does not immunize [them] from all collateral consequences that come from [those] act[s]," including leaving Marsh "with no practical option other than to remove [them]." Hollinger Int'l, Inc. v. Black, 844 A.2d 1022, 1077 (Del. Ch. 2004). "[T]here would be a complete breakdown in the regulation of many areas of business if employers did not carry most of the load of keeping their employees in line and have the sanction of discharge for refusal to answer what is essential to that end." United States v. Solomon, 509 F.2d 863, 870 (2d Cir. 1975). Marsh had to use the "sanction of discharge for refusal to answer," id. because in the absence of an exculpatory explanation, Marsh needed to assume the worst: that the bid-rigging allegations were true and that Marsh was vicariously liable for their criminal conduct.

Gilman and McNenney argue that the October interview requests were unreasonable because Marsh had already interviewed them earlier in the year. This is nonsense. In the spring and summer of 2004, the AG was investigating potential civil infractions involving insurance brokers steering clients to certain insurance carriers. Come September, however, the AG shifted focus to a criminal bid-rigging scheme. Then, in mid-October, Gilman and McNenney were named as co-conspirators in the criminal conspiracy and the AG filed a civil complaint against Marsh in which Gilman and McNenney were named. Circumstances had altered and stakes were raised. There is no reason to believe the October interviews would have been duplicative of the earlier interviews; and even if all Marsh sought was updated reassurance, the demand for interviews would have been reasonable. No doctrine limits a company's inquiries as to allegations of employee misconduct.

Gilman and McNenney also argue that the interviews were intended to produce incriminating evidence that Marsh could turn over to the AG to assist in the looming prosecution of Gilman and McNenney, and that Marsh did that as quid pro quo to save itself from criminal prosecution by the AG. But this argument ignores the incontestable fact that Marsh's interview requests *predated* Cherkasky's October 25 meeting with Spitzer in which (Gilman and McNenney contend) the AG agreed not to prosecute Marsh, and Marsh agreed to waive attorney-client privilege and work-product immunity.

Given the circumstances, Marsh's demand that Gilman and McNenney explain themselves in an interview under the penalty of termination was unassailable, even routine. It did what any other company would do, and (arguably) what any company should do. Marsh's interview demands were reasonable and it had cause to fire Gilman and McNenney for refusing to comply.

II

[5] There is no genuine issue of material fact that Marsh fired Gilman and McNenney for their refusal to cooperate. It was objectively plain (and no witness has denied being aware) that the failure of Gilman or McNenney to comply with the interview requests would result in termination. Therefore, it was no surprise that

each was fired the day after Marsh was notified of his refusal. Gilman and McNenney nevertheless posit that they may have been fired as part of a reduction-in-force or restructuring, which (if so) would entitle them to severance. Gilman and McNenney fail to proffer evidence in support, and certainly create no triable issue of fact on this question.

[6] Gilman also argues that he successfully pulled off what disgruntled employees eventually tell their employers: "You can't fire me; I quit." However, Delaware courts "read a contract as a whole and ... will give each provision and term effect, so as not to render any part of the contract ... meaningless or illusory." Osborn ex rel. Osborn v. Kemp, 991 A.2d 1153, 1159 (Del. 2010) (internal quotation marks omitted). The definitions of "cause" in the Stock Award and Severance Plans would be rendered "meaningless or illusory" if an employee could preempt a known, imminent, for-cause termination with a voluntary retirement, and thereby reap all of the benefits of being a faithful employee. [2]

There is no genuine dispute that Gilman filed his retirement papers in direct response to Marsh's (reasonable) interview request, or that Gilman would be fired immediately if he did not comply with Marsh's (reasonable) interview request. Marsh's internal investigators tried for weeks to schedule Gilman for an interview; they were finally able to pin him down for November 2; and just the day before, Gilman faxed retirement paperwork to Marsh. Coincidence is not that convenient.

[7] For the same reasons, Gilman's and McNenney's argument that Marsh breached its duty of good faith and fair dealing also fails. Delaware law implies a "covenant of good faith and fair dealing" in every contract, which "requires a party in a contractual relationship to refrain from arbitrary or unreasonable conduct which has the effect of preventing the other party to the contract from receiving the fruits of the bargain." Dunlap v. State Farm Fire & Cas. Co., 878 A.2d 434, 441–42 (Del. 2005) (internal quotation marks omitted). But the conduct complained of here—Marsh's interview requests and subsequent termination of their employment—was neither arbitrary, nor, as just discussed, unreasonable.

III

[8] Gilman and McNenney argue that Marsh's interview demands constitute state action that infringed their right against self-incrimination. This is "the legal equivalent of the 'Hail Mary pass' in football." In re Lionel Corp., 722 F.2d 1063, 1072 (2d Cir. 1983) (Winter, J., dissenting). They advance the following argument: if Marsh's request that Gilman and McNenney sit for interviews under the penalty of termination is deemed state action (because of Marsh's cooperation with the AG), and if that demand and threat violated their Fifth Amendment right, then Marsh's request was unreasonable as a matter of law, and their refusal to comply with the interview demands cannot support their loss of benefits.

The claim that Marsh was a state actor leans heavily on United States v. Stein, 541 F.3d 130 (2d Cir. 2008); but Stein cannot support that weight. In Stein, federal prosecutors were investigating potential criminal conduct by employees of the accounting firm KPMG. Under a longstanding policy, the firm was bound to pay the legal defense bills of its employees, and it was willingly doing so. During its discussions with prosecutors, KPMG got the unsubtle message that, if it wished to avoid its own indictment, it would have to adopt a new Fees Policy and stop paying for its employees' defense. We upheld the district court's finding of fact that this change was "a direct consequence of the government's overwhelming influence," id. at 136, which would not have happened "but for" the prosecutors' conduct, id. at 144. In effect and in fact, the prosecution arranged to strip criminal defendants of their chosen counsel by stopping at the source the defense fees to which defendants were entitled by contract from an employer willing to pay. The government's influence in Stein was "overwhelming" in several respects: KPMG's "survival depended on its role in a joint project with the government to advance government prosecutions," id. at 147; "the government forced KPMG to adopt its constricted Fees Policy," id. at 148; the government "intervened in KPMG's decisionmaking," id.; the prosecutors "steered KPMG toward their preferred fee advancement policy and then supervised its application in individual cases," id.; and "absent the prosecutors' involvement ... KPMG would not have changed its longstanding fee advancement policy," id. at 150. Since the government steered KPMG to adopt a policy it otherwise would not have adopted, and

then supervised KPMG's implementation of that policy, KPMG's conduct was found to constitute state action.

Stein has no bearing on this case. Marsh had good institutional reasons for requiring Gilman and McNenney to sit for interviews or else lose their jobs: the company's stock price was sinking and its clients, directors, investors, and regulators were demanding answers about the allegations. There is no evidence that the AG "forced" Marsh to demand interviews, "intervened" in Marsh's decisionmaking, "steered" Marsh to request interviews, or "supervised" the interview requests. Nor is there evidence that the nature and scope of the pending interviews were framed by the government, or changed after Cherkasky's October 25 meeting with Spitzer. The expansion of Marsh's internal investigation was precipitated by allegations advanced by the government, but it is not a measure it would have forgone "but for" the AG's influence.

Even if, as McNenney contends, Davis Polk sought to interview him without counsel and with the AG present, that request occurred well before October 25, and McNenney adduced no evidence that Marsh's request for an interview arose out of pressure or coercion from the AG. And Marsh, which already had cause to fire McNenney, could presumably put additional conditions on its interview request anyway, as it still gave McNenney fundamentally the same choice to explain himself or be fired.

Gilman and McNenney invite us to consider that the occasion for the corporate investigation was a criminal initiative by government, and that a likely use of the internal investigation was that Marsh would offer up its findings (together with the employees' testimony) in the nature of a sacrifice to an angry prosecutor. No doubt, Marsh was compelled by circumstances to conduct an investigation (with expectation that any privileges attached to it would be waived) and that one mighty circumstance was a possible prosecution of the firm. But in the ordinary course, allegations of serious wrongdoing would provoke such an investigation, whether or not the allegations were made by prosecutors and whether or not the company itself was at risk of prosecution. The interests of prudent directors alone would justify or compel such a measure. Stein is properly distinguished because (among other things) KPMG had no institutional interest in stripping its employees of their chosen defense counsel and KPMG was forced to abandon a longstanding policy that it had decided to continue; it was therefore found that government compulsion was the "but for" reason for the new Fees Policy.

This is not a Stein case. This case is more nearly an analog of D.L. Cromwell Investments, Inc., v. NASD Regulation, Inc., 279 F.3d 155 (2d Cir. 2002), in which the government and a private actor, NASD, simultaneously investigated certain stockbrokers for suspected criminal activity. The stockbrokers argued that the Fifth Amendment protected them from complying with NASD's demand for on-the-record interviews (made on the pain of expulsion from their profession) because NASD had become a state actor. As Stein recognized, the holding of D.L. Cromwell is that there was no state action because NASD "had independent regulatory interests and motives for making [its] inquiries and for cooperating with [a] parallel investigation[ ] being conducted by the government." Stein, 541 F.3d at 150. That is, "[NASD] would have requested interviews regardless of governmental pressure." Id. We arrived at this conclusion notwithstanding "informal and formal sharing of documents and information between the government and the NASD" and "the fact that the NASD interview demands followed shortly after [the stockbrokers] contested grand jury subpoenas." Id.

Gilman and McNenney urge that we adopt, in effect, this categorical rule: acts that are taken by a private company in response to government action, and that have as one goal obtaining better treatment from the government, amount to state action. But a company is not prohibited from cooperating, and typically has supremely reasonable, independent interests for conducting an internal investigation and for cooperating with a governmental investigation, even when employees suspected of crime end up jettisoned. A rule that deems all such companies to be government actors would be incompatible with corporate governance and modern regulation. See Solomon, 509 F.2d at 870.

CONCLUSION

For the foregoing reasons, we affirm.

All Citations

826 F.3d 69, 41 IER Cases 795

Footnotes

1 We also affirm the district court's dismissal of Gilman and McNenney's claims for (i) abuse of process against Marsh and the CEO of Marsh, Michael Cherkasky, and (ii) misconduct against Cherkasky as an attorney, in a summary order filed simultaneously with this Opinion.

2 The Severance Plan defines "cause" as including "insubordination," "willful misconduct," "failure to comply with [Marsh] policies or guidelines," and "commission of an act rising to the level of a crime." The Stock Award Plans governing stock bonus units and deferred stock units define "cause" as including "willful misconduct in the performance of the employee's duties," "continued failure after notice, or refusal, to perform the duties of the employee," "breach of fiduciary duty or breach of trust," and "any other action likely to bring substantial discredit to [Marsh]." To the extent this footnote (or any other record citation in this opinion) is drawn from the sealed appendix, the sealed material that is referenced is hereby deemed unsealed.

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09. *Newman v. Highland Sch. Dist. No. 203*, 381 P.3d 1188 (Wash. 2016)

381 P.3d 1188
Supreme Court of Washington,
EN BANC.

Matthew A. Newman, Randy Newman and Marla Newman, Respondents,
v.
Highland School District No. 203, Petitioner.

NO. 90194–5
|
Argued Nov. 17, 2015
|
Filed Oct. 20, 2016

Synopsis

Background: Parents and student-athlete filed negligence complaint against school district after student suffered a permanent brain injury at a football game, one day after he allegedly sustained a head injury at practice. Parents sought discovery of communications between coaches and school district during the time coaches were unrepresented by counsel for school district. School district sought a protective order. The Superior Court, Yakima County, Blaine G. Gibson, J., denied the motion. School district appealed.

Holdings: The Supreme Court, Stephens, J., held that:

[1] as a matter of first impression, attorney-client privilege did not extend to postemployment communications between corporate counsel for school district and former employees, and

[2] parents and student were not entitled to an award of attorney fees.

Affirmed.

Wiggins, J., filed dissenting opinion in which Gordon McCloud and Owens, JJ., and Madsen, C.J., joined.

West Headnotes (11)

[1] **Privileged Communications and Confidentiality**
Government and government employees and officers

311HPrivileged Communications and Confidentiality
311HIIIAttorney-Client Privilege
311Hk120Parties and Interests Represented by Attorney
311Hk126Government and government employees and officers

Attorney-client privilege did not extend to postemployment communications between corporate counsel for school district and former employees, and thus, school district was not entitled to a protective order to shield communications between counsel and former employees in connection with negligence action filed by parents and student-athlete against school district after student suffered a brain injury during a football game; former employees no longer owed duties of loyalty, obedience, and confidentiality to employer. Wash. Rev. Code Ann. § 5.60.060(2)(a).

Cases that cite this headnote

[2] **Privileged Communications and Confidentiality**
Presumptions and burden of proof

311HPrivileged Communications and Confidentiality
311HIIIAttorney-Client Privilege
311Hk171Evidence
311Hk173Presumptions and burden of proof

A party claiming that otherwise discoverable information is exempt from discovery on grounds of the attorney-client privilege carries the burden of establishing entitlement to the privilege. Wash. Rev. Code Ann. § 5.60.060(2)(a).

Cases that cite this headnote

[3] **Privileged Communications and Confidentiality**

Attorney-Client Privilege
Privileged Communications and Confidentiality
Elements in general; definition

311HPrivileged Communications and Confidentiality
311HIIIAttorney-Client Privilege
311Hk100In general
311HPrivileged Communications and Confidentiality
311HIIIAttorney-Client Privilege
311Hk102Elements in general; definition

Attorney-client privilege does not automatically shield any conversation with any attorney; to qualify for the privilege, communications must have been made in confidence and in the context of an attorney-client relationship. Wash. Rev. Code Ann. § 5.60.060(2)(a).

Cases that cite this headnote

[4] **Privileged Communications and Confidentiality**
Elements in general; definition

311HPrivileged Communications and Confidentiality
311HIIIAttorney-Client Privilege
311Hk102Elements in general; definition

Attorney-client privilege is a narrow privilege and protects only communications and advice between attorney and client. Wash. Rev. Code Ann. § 5.60.060(2)(a).

Cases that cite this headnote

[5] **Privileged Communications and Confidentiality**
Corporations, partnerships, associations, and other entities

311HPrivileged Communications and Confidentiality
311HIIIAttorney-Client Privilege
311Hk120Parties and Interests Represented by Attorney
311Hk123Corporations, partnerships, associations, and other entities

Attorney-client privilege extends to corporate clients and may encompass some communications with lower level employees. Wash. Rev. Code Ann. § 5.60.060(2)(a).

Cases that cite this headnote

[6] **Privileged Communications and Confidentiality**
Purpose of privilege
Privileged Communications and Confidentiality
Factual information; independent knowledge; observations and mental impressions

311HPrivileged Communications and Confidentiality
311HIIIAttorney-Client Privilege
311Hk106Purpose of privilege
311HPrivileged Communications and Confidentiality
311HIIIAttorney-Client Privilege
311Hk143Factual information; independent knowledge; observations and mental impressions

Attorney-client privilege does not shield facts from discovery, even if transmitted in communications between attorney and client; rather, only privileged communications themselves are protected to encourage full and frank communication between attorneys and their clients and thereby promote broader public interests in the observance of law and administration of justice. Wash. Rev. Code Ann. § 5.60.060(2)(a).

Cases that cite this headnote

[7] **Privileged Communications and Confidentiality**
Purpose of privilege

311HPrivileged Communications and Confidentiality
311HIIIAttorney-Client Privilege
311Hk106Purpose of privilege

Attorney-client privilege recognizes that sound legal advice or advocacy serves public ends and that such advice or advocacy depends upon the lawyer being fully informed by the client. Wash. Rev. Code Ann. § 5.60.060(2)(a).

Cases that cite this headnote

[8] **Privileged Communications and Confidentiality**
Absolute or qualified privilege

311HPrivileged Communications and Confidentiality
311HIIIAttorney-Client Privilege
311Hk108Absolute or qualified privilege

Because attorney-client privilege sometimes results in exclusion of evidence which is otherwise relevant and material, contrary to the philosophy that justice can be achieved only with the fullest disclosure of facts, privilege cannot be treated as absolute; rather, it must be strictly limited to the purpose for which it exists. Wash. Rev. Code Ann. § 5.60.060(2)(a).

Cases that cite this headnote

[9] **Privileged Communications and Confidentiality**
Corporations, partnerships, associations, and other entities

311HPrivileged Communications and Confidentiality
311HIIIAttorney-Client Privilege
311Hk120Parties and Interests Represented by Attorney
311Hk123Corporations, partnerships, associations, and other entities

Corporate attorney-client privilege may arise when the constituents of an organizational client communicate with the organization's lawyer in that person's organizational capacity. Wash. Rev. Code Ann. § 5.60.060(2)(a).

Cases that cite this headnote

[10] **Privileged Communications and Confidentiality**
Corporations, partnerships, associations, and other entities

311HPrivileged Communications and Confidentiality
311HIIIAttorney-Client Privilege
311Hk120Parties and Interests Represented by Attorney
311Hk123Corporations, partnerships, associations, and other entities

Interests served by attorney-client privilege are sufficiently protected by recognizing that communications between corporate counsel and employees during the period of employment continue to be privileged after the agency relationship ends. Wash. Rev. Code Ann. § 5.60.060(2)(a).

Cases that cite this headnote

[11] **Costs**
Attorney fees on appeal or error

102Costs
102XOn Appeal or Error
102k252Attorney fees on appeal or error

Parents and student-athlete were not entitled to an award of attorney fees on appeal from order denying school district's motion for a protective order to shield communications between counsel for school district and former employees under attorney-client privilege in negligence action; school district's response to parents' discovery request was reasonable as issue of whether attorney-client privilege extended to former employees was a novel legal issue. Wash. Rev. Code Ann. § 5.60.060(2)(a); Wash. Super. Ct. Civ. R. 37(a)(4).

Cases that cite this headnote

***1189** Appeal from Yakima County Superior Court, 12–2–03162–1, Honorable Blaine G. Gibson.

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Opinion

STEPHENS, J.

**1 ¶1 Highland High School quarterback Matthew Newman suffered a permanent brain injury at a football game in 2009, one day after he allegedly sustained a head injury at football practice. Three years later, Newman *1190 and his parents (collectively Newman) sued Highland School District No. 203 (Highland) for negligence. Before trial, Highland's counsel interviewed several former coaches and appeared on their behalf at their depositions. Newman moved to disqualify Highland's counsel, asserting a conflict of interest. The superior court denied the motion but ruled that Highland's counsel "may not represent non-employee witness[es] in the future." Clerk's Papers (CP) at 636. Newman then sought discovery concerning communications between Highland and the former coaches during time periods when the former coaches were unrepresented by Highland's counsel. Highland responded with a motion for a protective order, arguing its attorney-client privilege shielded counsel's communications with the former coaches. The trial court denied the motion, and Highland appealed.

¶2 At issue is whether postemployment communications between former employees and corporate counsel should be treated the same as communications with current employees for purposes of applying the corporate attorney-client privilege. Although we follow a flexible approach to application of the attorney-client privilege in the corporate context, we hold that the privilege does not broadly shield counsel's postemployment communications with former employees. The superior court properly denied Highland's motion for a protective order. We affirm the lower court and lift the temporary stay of discovery.

FACTS AND PROCEDURAL HISTORY

¶3 Matthew Newman suffered a permanent brain injury during a football game on September 18, 2009. Newman sued Highland for negligence in violation of the Lystedt law, RCW 28A.600.190, which requires the removal of a student athlete from competition or practice if he or she is suspected of having a concussion. Newman alleges that Matthew suffered a head injury at football practice the day before the September 18 game, and that Highland coaches permitted him to play in the game even though he exhibited symptoms of a concussion.

¶4 In preparing for trial, Newman's counsel deposed the entire football coaching staff employed at the time of Newman's injury, including coaches who were no longer employed by Highland. At the depositions, Highland's counsel indicated that he had interviewed the former coaches before their individual depositions, and was appearing on their behalf for purposes of their depositions.

¶5 Newman moved to disqualify Highland's counsel from representing the former coaches, claiming a conflict of interest under Rule of Professional Conduct (RPC) 1.7. The superior court denied the motion but ruled that Highland's counsel "may not represent non-employee witness[es] in the future." CP at 636.

¶6 Newman then sought discovery concerning communications between Highland's counsel and its former coaches. Highland moved for a protective order to

shield those communications, asserting attorney-client privilege. The superior court denied the protective order and directed Highland to respond to Newman's discovery requests. The superior court ordered Highland's counsel to disclose "exactly when defense counsel represented each former employee," and barred defense counsel from asserting the attorney-client privilege with respect to communications outside the deposition representation. CP at 70.[1]

**2 ¶7 Highland sought discretionary review of the superior court's discovery order, which the Court of Appeals denied. This court subsequently granted discretionary review and *1191 entered a temporary stay of discovery. *Newman v. Highland Sch. Dist. No. 203*, 180 Wash.2d 1031, 332 P.3d 985 (2014).

ANALYSIS

1. The Corporate Attorney–Client Privilege Does Not Shield Communications between Corporate Counsel and Former Employees

[1]¶8 Whether the attorney-client privilege extends to postemployment communications between corporate counsel and former employees is an issue of first impression in Washington. The leading United States Supreme Court case addressing corporate attorney-client privilege, *Upjohn Co. v. United States*, expressly did not answer this question. 449 U.S. 383, 394 n.3, 101 S.Ct. 677, 66 L.Ed.2d 584 (1981). Highland argues the flexible approach to protecting privileged communications recognized in *Upjohn* supports extending the privilege to postemployment communications with former employees. Am. Pet'r's Br. at 23. We disagree. Because we conclude *Upjohn* does not justify applying the attorney-client privilege outside the employer-employee relationship, the trial court properly denied Highland a protective order to shield from discovery communications with former coaches who are otherwise fact witnesses in this litigation. We affirm the trial court's decision to deny Highland's motion for protective order, and lift the temporary stay of discovery.

[2]¶9 We begin by recognizing that, in our open civil justice system, parties may obtain discovery regarding any unprivileged matter that is relevant to the subject matter of the pending action. CR 26(b)(1). " '[T]he privilege remains an exception to the general duty to disclose.' " *Peralta v. Cendant Corp.*, 190 F.R.D. 38, 41 (D. Conn. 1999) (alteration in original) (quoting 8 JOHN HENRY WIGMORE, EVIDENCE IN TRIALS AT COMMON LAW 554 (McNaughton rev. ed. 1961)). A party claiming that otherwise discoverable information is exempt from discovery on grounds of the attorney-client privilege carries the burden of establishing entitlement to the privilege. *See Dietz v. John Doe*, 131 Wash.2d 835, 844, 935 P.2d 611 (1997).

[3] [4] [5]¶10 Washington's attorney-client privilege provides that "[a]n attorney or counselor shall not, without the consent of his or her client, be examined as to any communication made by the client to him or her, or his or her advice given thereon in the course of professional employment." RCW 5.60.060(2)(a). But the attorney-client privilege does not automatically shield any conversation with any attorney. *See, e.g., Morgan v. City of Federal Way*, 166 Wash.2d 747, 755–56, 213 P.3d 596 (2009). To qualify for the privilege, communications must have been made in confidence and in the context of an attorney-client relationship. *See id.* at 755–57, 213 P.3d 596. It is "a narrow privilege and protects only 'communications and advice between attorney and client.' " *Hangartner v. City of Seattle*, 151 Wash.2d 439, 452, 90 P.3d 26 (2004) (quoting *Kammerer v. W. Gear Corp.*, 96 Wash.2d 416, 421, 635 P.2d 708 (1981)). The privilege extends to corporate clients and may encompass some communications with lower level employees, as both the United States Supreme Court and this court have recognized. *Upjohn*, 449 U.S. at 396, 101 S.Ct. 677; *Wright v. Grp. Health Hosp.*, 103 Wash.2d 192, 195–96, 691 P.2d 564 (1984); *Youngs v. PeaceHealth*, 179 Wash.2d 645, 650–51, 316 P.3d 1035 (2014).

**3 [6] [7] [8]¶11 The attorney-client privilege does not shield facts from discovery, even if transmitted in communications between attorney and client. *Youngs*, 179 Wash.2d at 653, 316 P.3d 1035 ("Facts are proper subjects of investigation and discovery, even if they are also the subject of privileged communications."). Rather, only privileged communications themselves are protected in order "to encourage full and frank communication between attorneys and their clients and thereby promote broader public interests in the observance of law and administration of justice." *Upjohn*, 449 U.S. at 389, 101 S.Ct. 677. The attorney-client privilege "recognizes that sound legal advice or advocacy serves public ends and that such advice or advocacy depends upon the lawyer being fully informed by the client." *Id.* However, because "the privilege sometimes results in the exclusion of evidence which is otherwise relevant and material, contrary to the philosophy that justice can be achieved only with the fullest disclosure of the facts, the privilege cannot be treated as absolute; rather, it must be *1192 strictly limited to the purpose for which it exists." *Pappas v. Holloway*, 114 Wash.2d 198, 203–04, 787 P.2d 30

(1990) (citing *Dike v. Dike*, 75 Wash.2d 1, 11, 448 P.2d 490 (1968)).

¶12 In enunciating a flexible test for determining the scope of the attorney-client privilege in the corporate setting, *Upjohn* expanded the definition of "client" to sometimes include nonmanagerial employees. 449 U.S. at 394–95, 101 S.Ct. 677; *see also Youngs*, 179 Wash.2d at 661, 316 P.3d 1035. The *Upjohn* Court considered several factors, including whether the communications at issue (1) were made at the direction of corporate superiors, (2) were made by corporate employees, (3) were made to corporate counsel acting as such, (4) concerned matters within the scope of the employee's duties, (5) revealed factual information " 'not available from upper-echelon management,' " (6) revealed factual information necessary " 'to supply a basis for legal advice,' " and whether the communicating employee was sufficiently aware that (7) he was being interviewed for legal purposes, and (8) the information would be kept confidential. *Youngs*, 179 Wash.2d at 664 n.7, 316 P.3d 1035 (quoting *Upjohn*, 449 U.S. at 394, 101 S.Ct. 677).

¶13 In denying Highland's motion for a protective order, the superior court incorrectly stated that this court has never adopted *Upjohn*. In both *Wright* and *Youngs*, this court embraced *Upjohn*'s flexible approach to applying the attorney-client privilege in the corporate client context. *Wright*, 103 Wash.2d at 195–96, 691 P.2d 564; *Youngs*, 179 Wash.2d at 645, 316 P.3d 1035. However, until today we have never considered whether *Upjohn* supports expanding the scope of the privilege to include counsel's communications with *former* nonmanagerial employees. In *Youngs*, this court relied on *Upjohn* to recognize that corporate litigants have the right to engage in confidential fact-finding and to communicate directions to employees whose conduct may embroil the corporation in disputes. *Youngs*, 179 Wash.2d at 651–52, 316 P.3d 1035. The court in *Youngs* relied on the values underlying the attorney-client privilege to create an exception to the general prohibition on defense counsel's ex-parte contact with the plaintiff's treating physician, applicable when the physician is employed by the defendant. *Id.* at 662, 316 P.3d 1035 (creating exception based on attorney-client privilege to rule established in *Loudon v. Mhyre*, 110 Wash.2d 675, 756 P.2d 138 (1988)). But *Youngs* did not answer whether the attorney-client privilege should extend beyond termination of the employment relationship.

¶14 Today, we reject Highland's argument that *Upjohn* and *Youngs* support a further extension of the corporate attorney-client privilege to postemployment communications with former employees. The flexible approach articulated in *Upjohn* presupposed attorney-client communications taking place within the corporate employment relationship. *Upjohn*, 449 U.S. at 389, 101 S.Ct. 677 (the purpose of the attorney-client privilege is "to encourage full and frank communication between attorneys and their clients"); *see also Youngs*, 179 Wash.2d at 661, 316 P.3d 1035 (noting corporate employees may sometimes be corporate clients). We decline to expand the privilege to communications outside the employer-employee relationship because former employees categorically differ from current employees with respect to the concerns identified in *Upjohn* and *Youngs*.

**4 [9]¶15 A school district, like any organization, can act only through its constituents and agents. *See* RPC 1.13 cmt. 1. Corporate attorney-client privilege may arise when "the constituents of an organizational client communicate[ ] with the organization's lawyer in that person's organizational capacity." *Id.* at cmt. 2; *see also* RESTATEMENT (THIRD) OF THE LAW GOVERNING LAWYERS § 73(2) (AM. LAW INST. 2000). An organizational client, including a governmental agency, can require its own employees to disclose facts material to their duties (with some limits not relevant here) to its counsel for investigatory or litigation purposes. *See* RESTATEMENT (THIRD) OF AGENCY § 8.11 (AM. LAW INST. 2006).

¶16 But everything changes when employment ends. When the employer-employee relationship terminates, this generally terminates the agency relationship.[2] As a result, *1193 the former employee can no longer bind the corporation and no longer owes duties of loyalty, obedience, and confidentiality to the corporation. *See id.* & cmt. d. Without an ongoing obligation between the former employee and employer that gives rise to a principal-agent relationship, a former employee is no different from other third-party fact witnesses to a lawsuit, who may be freely interviewed by either party. *See Infosystems, Inc. v. Ceridian Corp.*, 197 F.R.D. 303, 305 (E.D. Mich. 2000) (" 'It is virtually impossible to distinguish the position of a former employee from any other third party who might have pertinent information about one or more corporate parties to a lawsuit.' " (quoting *Clark Equip. Co. v. Lift Parts Mfg. Co.*, 1985 WL 2917, at *5 (N.D. Ill. Oct. 1, 1985) (court order))).

¶17 Highland's argument for extending the attorney-client privilege to its communications with the former coaches emphasizes that these former employees may possess vital information about matters in litigation, and that their conduct while employed may expose the corporation to vicarious liability. These concerns are not unimportant,

but they do not justify expanding the attorney-client privilege beyond its purpose. The underlying purpose of the corporate attorney-client privilege is to foster full and frank communications between counsel and the client (i.e., the corporation), not its former employees. *State v. Chervenell*, 99 Wash.2d 309, 316, 662 P.2d 836 (1983). This purpose is preserved by limiting the scope of the privilege to the duration of the employer-employee relationship. *See* RESTATEMENT (THIRD) OF THE LAW GOVERNING LAWYERS § 73(2).[3] Upon termination of the employment relationship, the interests of employer and former employee may diverge. But the attorney-client privilege belongs solely to the corporation, and it may be waived or asserted solely by the corporation, even to the detriment of the employee.

**5 [10]¶18 Refusing to extend the corporate attorney-client privilege articulated in *Upjohn* beyond the employer-employee relationship preserves a predictable legal framework. *Upjohn* recognized the value of predictability when determining the applicability of the attorney-client privilege:

> [I]f the purpose of the attorney-client privilege is to be served, the attorney and client must be able to predict with some degree of certainty whether particular discussions will be protected. An uncertain privilege, or one which purports to be certain but results in widely varying applications by the courts, is little better than no privilege at all.

449 U.S. at 393, 101 S.Ct. 677. We find this considerations particularly relevant here, where the question before us is at what point in the employer-employee relationship the attorney-client privilege ceases to attach. All agree that it cannot extend forever and that it cannot encompass every communication between corporate counsel and former employees. But it is difficult to find any principled line of demarcation that extends beyond the end of the employment relationship. We conclude that the interests served by the privilege are sufficiently protected by recognizing that communications between corporate *1194 counsel and employees during the period of employment continue to be privileged after the agency relationship ends. *See supra* note 1.

¶19 We recognized that some courts have extended the corporate attorney-client privilege to former employees because of the corporation's perceived need to know what its former employees know. *See In re Allen*, 106 F.3d 582, 605–06 (4th Cir. 1997) (collecting cases). We find this justification unpersuasive. A defendant might easily perceive itself as needing to know many things known by potential witnesses, and might strongly prefer not to share its conversations with those witnesses with the other side. So might a plaintiff. So might a government. That alone should not be enough to justify frustrating "the truthseeking mission of the legal process" by extending the old privilege. *United States v. Tedder*, 801 F.2d 1437, 1441 (4th Cir. 1986) (citing *United States v. (Under Seal)*, 748 F.2d 871, 875 (4th Cir. 1984)).

¶20 The superior court properly rejected Highland's argument that former employees should be treated the same as current employees. The court appropriately allowed Highland to assert its attorney-client privilege over communications with the former coaches only during the time Highland's counsel purportedly represented them at their depositions. We therefore affirm the superior court's decision to deny Highland's motion for a protective order and lift the temporary stay of discovery issued by our commissioner.

2. Attorney Fees on Appeal

[11]¶21 We deny Newman's request for attorney fees on appeal. Newman requests fees under CR 26(c) and CR 37(a)(4) for successfully challenging Highland's claim of attorney-client privilege. Br. of Resp'ts at 33. We deny Newman's request because Highland's opposition to discovery was reasonable given that the question of whether the corporate attorney-client privilege extends to former employees was a novel legal question of first impression in Washington. CR 37(a)(4) (mandatory award of expenses and attorney fees for successfully challenging a motion becomes discretionary if "the court finds that the opposition to the motion was substantially justified or that other circumstances make an award of expenses unjust"). For these same reasons, we also exercise our discretion to deny Newman's request for fees pursuant to chapter 7.21 RCW (2001).[4]

CONCLUSION

**6 ¶22 We affirm and lift the temporary stay of discovery. The superior court properly denied Highland's motion for a protective order shielding from discovery its postemployment communications with former employees.

WE CONCUR:

Johnson, J.

Fairhurst, J.

González, J.

Yu, J.

WIGGINS, J. (dissenting)

¶23 I agree with the majority that any communications that fall within the attorney-client privilege during employment remain protected by the privilege after employment is terminated. I also agree with the majority this court has adopted the reasoning of *Upjohn Co. v. United States*, 449 U.S. 383, 101 S.Ct. 677, 66 L.Ed.2d 584 (1981). However, I disagree with the majority's decision to adopt a bright-line rule that will cut off the corporate attorney-client privilege at the termination of employment, and will exclude from its scope all postemployment communications with former employees, even when those employees have relevant personal knowledge regarding the subject matter of the legal inquiry and even though had they remained employed, such communications with counsel would have been privileged under ***1195** *Upjohn*. This temporal limitation is at odds with the functional analysis underlying the decision in *Upjohn* and ignores the important purposes and goals that the attorney-client privilege serves.

¶24 Instead, I would conclude the scope of the attorney-client privilege and the decision as to whether to extend its protections to former employees is based on the flexible approach articulated in *Upjohn*. Under this flexible analysis, I would hold that postemployment communications consisting of a factual inquiry into the former employee's conduct and knowledge during his or her employment, made in furtherance of the corporation's legal services, are privileged. Accordingly, I respectfully dissent.

ANALYSIS

I. The Majority's Position Is at Odds with *Upjohn's* Functional Analysis

¶25 As the majority correctly acknowledges, this court has embraced the flexible approach in *Upjohn* for determining the scope of the attorney-client privilege in the corporate context. Majority at 1192; *see also Youngs v. PeaceHealth*, 179 Wash.2d 645, 653, 316 P.3d 1035 (2014). *Upjohn* is the leading case on the scope of corporate attorney-client privilege. In *Upjohn*, the Supreme Court was presented with the question of whether the attorney-client privilege in the corporate context could ever apply to communications between corporate counsel and lower-level corporate employees.

¶26 At the time the Supreme Court decided *Upjohn*, two competing tests had emerged in the lower courts regarding the scope of the corporate attorney-client privilege. *Upjohn*, 449 U.S. at 386, 101 S.Ct. 677. One such test, adopted by the lower court in *Upjohn*, was the "control group test," which would have limited the corporate attorney-client privilege to the " 'control group' " of the corporation, namely "those officers, usually top management, who play a substantial role in deciding and directing the corporation's response to the legal advice given." *United States v. Upjohn Co.*, 600 F.2d 1223, 1224, 1226 (6th Cir. 1979), *rev'd*, 449 U.S. 383, 101 S.Ct. 677, 66 L.Ed.2d 584. The control group test was based on the rationale that only those individuals who acted like a traditional "client" would receive the protection of the privilege, and as the lower court in *Upjohn* stated, it adopted the control group because the corporate client was an inanimate entity and "only the senior management, guiding and integrating the several operations, ... can be said to possess an identity analogous to the corporation as a whole." *Id.* at 1226.

****7** ¶27 On appeal, the Supreme Court unanimously rejected the narrow control group test. *Upjohn*, 449 U.S. at 390, 101 S.Ct. 677. Instead of looking to the identity of the individual corporate actors to see whether they possessed a sufficient identity of relationship to the corporation so as to qualify as a client—as the lower court had done—the Court looked to the nature of the communications to see whether the purposes underlying the attorney-client privilege would be furthered by its extension to the communications at issue. *Id.* at 391–92, 101 S.Ct. 677. The Supreme Court identified several purposes underlying the privilege, including that the privilege encourages full and frank communication between attorneys and their clients, and enables clients to take full advantage of the legal system. *Id.* at 389, 391, 101 S.Ct. 677. The privilege is based on a recognition "that sound legal advice or advocacy serves public ends and that such advice or advocacy depends upon the lawyer's being fully informed by the client." *Id.* at 389, 101 S.Ct. 677. The control group test was inadequate because it failed to recognize that the privilege "exists to

protect not only the giving of professional advice to those who can act on it but also the giving of information to the lawyer to enable him to give sound and informed advice." *Id.* at 390, 101 S.Ct. 677.

¶28 The *Upjohn* Court declined to establish a bright-line rule regarding the scope of the attorney-client privilege in the corporate setting. *Id.* at 396–97, 101 S.Ct. 677. Instead, the Court provided a functional framework for analyzing the scope of the attorney-client privilege on a case-by-case basis. *Id.* This functional analysis focused on the communications at issue and the perceived purposes underlying the privilege. *Id.* at 394–95, 101 S.Ct. 677. "In large part, the Court's inquiry resolves into a single question: Would application of the privilege under the circumstances ***1196** of this particular case foster the flow of information to corporate counsel regarding issues about which corporations seek legal advice?" John E. Sexton, *A Post–*Upjohn *Consideration of the Corporate Attorney–Client Privilege*, 57 N.Y.U. L. REV. 443, 459 (1982).

¶29 In *Upjohn*, the Court found it relevant that the communications were made by corporate employees to corporate counsel at the direction of corporate superiors, and that the communications concerned factual information that fell within the scope of the employee's duties that was " 'not available from upper-echelon management' " and that was necessary " 'to supply a basis for legal advice.' " *Youngs*, 179 Wash.2d at 664 n.7, 316 P.3d 1035 (quoting *Upjohn*, 449 U.S. at 394, 101 S.Ct. 677). The Court also noted that the communicating employee was aware that the interview was conducted for legal purposes and that the information would be kept confidential. *Id.* In light of these characteristics, the *Upjohn* Court held that these communications were privileged because doing so was consistent with the underlying purpose of the attorney-client privilege to allow for full and frank fact-finding. *Upjohn*, 449 U.S. at 395, 101 S.Ct. 677.

¶30 We previously praised the *Upjohn* Court's analysis and its focus on furthering the "laudable goals of the attorney-client privilege." *Wright v. Grp. Health Hosp.*, 103 Wash.2d 192, 202, 691 P.2d 564 (1984). In our recent decision in *Youngs*, we acknowledged in our discussion of the attorney-client privilege that *Upjohn* "defines the scope of the corporate attorney-client privilege," 179 Wash.2d at 651, 316 P.3d 1035, and we expressly relied on *Upjohn*'s reasoning after observing that Washington courts had endorsed *Upjohn's* " 'flexible ... test' " for more than 30 years, *id.* at 662, 316 P.3d 1035 (alteration in original) (quoting *Wright*, 103 Wash.2d at 202, 691 P.2d 564).

¶31 The majority in this case now eschews *Upjohn* 's functional analysis for a bright-line rule, cutting off the privilege at the termination of employment. *See* majority at 1193–94. The majority argues that *Upjohn* supports this bright-line rule because the Court presupposed that the communications occurred within the corporate employee relationship, *Id.* at 1192. Nothing in the *Upjohn* decision supports the majority's bald assertion that the decision "presupposed attorney-client communications taking place within the corporate employment relationship" before the privilege would attach. *Id.* In fact, 7 of the 86 employees interviewed by corporate counsel in *Upjohn* had left employment prior to being interviewed. *Upjohn*, 449 U.S. at 394 n.3, 101 S.Ct. 677. The Court expressly declined to decide the issue whether former employees were included in the privilege, instead providing the functional framework for lower courts to utilize in answering that precise question.[1] *See id.*

****8** ¶32 Moreover, the majority's focus on the formalities of the relationship between the employee and the corporation as the standard for the attorney-client privilege misses the point of the *Upjohn* Court's functional framework. The *Upjohn* Court rejected the control group test, and the focus that test placed on the level of control and responsibilities of the specific employee, to instead adopt a framework that looked at the communications themselves and the benefits and goals of the privilege. "A primary reason that the *Upjohn* Court rejected the control group test was that in the Court's eyes the restriction placed upon the relationship of the information-giver to the corporation undermined the purposes of the corporate attorney-client privilege." Sexton, *supra*, at 497. "[A]n approach that focuses solely upon the status of the communicator fails to adequately meet the objectives sought to be served by the attorney-client privilege." *Samaritan Found. v. Goodfarb*, 176 Ariz. 497, 501, 862 P.2d 870 (1993). By looking only at the identity of the former employee, the majority sidesteps around the important functional analysis contemplated by *Upjohn*.

***1197** II. The Functional *Upjohn* Analysis Supports Extending the Attorney–Client Privilege to Communications with Former Employees for Purposes of Factual Investigation

¶33 At issue in this case is not, as the majority puts it, "whether postemployment communications between former employees and corporate counsel should be treated *the same as* communications with current employees," majority at 1190 (emphasis added), but rather whether the

corporate attorney-client privilege provides any protection for the communications between the former coaches and the counsel for the school district and the scope of any such protection. Though neither *Upjohn* nor *Youngs* had cause to consider whether and to what degree the privilege extends to former employees, the principles underlying these and other decisions support extending the privilege to former employees in certain circumstances based on the flexible analysis of *Upjohn.*

¶34 While it is well established that the attorney-client privilege attaches to corporations, the application of the privilege to corporations presents unique and special problems. *Commodity Futures Trading Comm'n v. Weintraub*, 471 U.S. 343, 348, 105 S.Ct. 1986, 1991, 85 L.Ed.2d 372 (1985). Unlike an individual client, who is traditionally both the provider of information and the person who will act on a lawyer's advice, these roles of providing information and acting are often separated within a corporation. *Upjohn*, 449 U.S. at 391, 101 S.Ct. 677. As an inanimate entity, a corporation can act only through its agents and thus cannot itself speak directly to its lawyers. *Commodity Futures Trading Comm'n*, 471 U.S. at 348, 105 S.Ct. 1986. And as the Court recognized in *Upjohn*, it will often be the lower-level employees who possess the information needed by corporate counsel in order to adequately advise the client. *Upjohn*, 449 U.S. at 391, 101 S.Ct. 677. Moreover, lower-level employees can and do, by their individual actions as agents of the corporation, embroil a corporate client in legal difficulties. *Id.* Thus, in at least some cases, the only way corporate counsel will be able to determine what the actions of its client (the corporation) were in order to provide relevant legal advice would be to speak with those lower-level employees that have knowledge of the relevant events and activities of the corporation.

¶35 Former employees, just like current employees, may possess relevant information pertaining to events occurring during their employment "needed by corporate counsel to advise the client with respect to actual or potential difficulties." *In re Coordinated Pretrial Proceedings in Petrol Prods. Antitrust Litig.*, 658 F.2d 1355, 1361 n.7 (9th Cir. 1981). Relevant knowledge obtained by an employee during his or her period of employment does not lose relevance simply because employment has ended. When former employees have relevant knowledge about incidents that occurred while they were employed, the extension of the attorney-client privilege to cover postemployment communications may further support the privilege's fact-finding purpose. *See id.*; *In re Allen*, 106 F.3d 582, 606 (4th Cir. 1997). "[A] formalistic distinction based solely on the timing of the interview [between corporate counsel and the knowledgeable employee] cannot make a difference if the goals of the privilege as outlined in *Upjohn* are to be achieved." Sexton, *supra,* at 499.

**9 ¶36 The majority dismisses this "need to know" rationale as unpersuasive and as an unjustified extension of the purpose of the privilege. Majority at 1193, 1194. But the majority overlooks that this stated purpose—facilitating the flow of relevant and necessary information from lower-level employees to counsel—was a key function of the privilege identified by the Court in *Upjohn* and a critical reason that Court extended the privilege to lower-level employees in the first place. *See Upjohn*, 449 U.S. at 391, 101 S.Ct. 677.

¶37 Other courts have relied on *Upjohn*'s reasoning, and its acknowledgment that one purpose of the privilege is to facilitate the gathering of relevant facts by counsel, to justify extending the scope of the attorney-client privilege to cover at least some communications with former employees. *See, e.g., In re Coordinated Pretrial Proceedings*, 658 F.2d at 1361 n.7 ("Former employees, as well as current employees, may possess the relevant information needed by corporate counsel to advise the client with respect to actual **1198** or potential difficulties."); *Admiral Ins. Co. v. U.S. Dist. Court*, 881 F.2d 1486, 1493 (9th Cir. 1989) ("[T]he *Upjohn* rationale necessarily extended the privilege to former corporate employees...."); *In re Allen*, 106 F.3d at 606 ("[W]e hold that the analysis applied by the Supreme Court in *Upjohn* to determine which employees fall within the scope of the privilege applies equally to former employees."); *Peralta v. Cendant Corp.*, 190 F.R.D. 38, 41 (D. Conn. 1999).

¶38 However, I acknowledge that *Upjohn* 's policies and purposes do not require us to consider former employees exactly as we consider current employees. Former employees present their own unique considerations: they probably do not communicate with corporate counsel "at the direction of corporate superiors," *Upjohn*, 449 U.S. at 394, 101 S.Ct. 677, and they do not hold an agency relationship with the corporate client such that their present or future actions could bind the corporation.

¶39 I am persuaded that the appropriate line is expressed in this simple test: Did the communications with the former employee, whenever they occurred, "relate to the former employee's conduct and knowledge, or communication with defendant's counsel, during his or her employment?" *Peralta*, 190 F.R.D. at 41. If so, the communications are privileged, consistent with *Upjohn. Id.* The *Peralta* court that adopted this test noted it was rejecting a wholesale application of the specific *factors* identified in *Upjohn* because former employees, unlike

current employees, were not directed to speak with corporate counsel at the direction of management. *Id.* But the court relied on the rationale of *Upjohn*, which is to say the court looked to the purpose of the attorney-client privilege and whether that privilege was served by applying it to postemployment communications with a former employee—it held that the privilege applied to the extent the communications concerned the underlying facts in the case. *See id.*

¶40 The majority justifies departing from *Upjohn* on the basis that former employees "categorically differ" from current lower-level employees, such that the privilege should extend to their communications with corporate counsel. Majority at 1192. The majority focuses on agency principles and the policy announced in the *Restatement (Third) of the Law Governing Lawyers* § 73 (Am. Law Inst. 2000). *Id.* I reject these positions as incorrectly framed statements of the law, and because they are inconsistent with the functional framework of *Upjohn.*

**10 ¶41 The majority gives much weight to the fact that during employment, an employer can force an employee to disclose information to the corporation, but after employment, any such duty expires. Majority at 1192–93. In addition, the majority notes that current employees owe duties of loyalty and obedience to the corporation, which also expire at termination. *Id.* (citing *Restatement (Third) of Agency* § 8.11 (Am. Law Inst. 2006)). Without this continuing duty to the corporation, the majority argues that a former employee becomes a simple third-party fact witness to whom the attorney-client privilege should not attach. *Id.*

¶42 The majority's premise is mistaken. *Upjohn* based its analysis of the attorney-client privilege on the idea that the attorney-client privilege, if applied to lower-level employees, would allow corporate counsel to obtain necessary and relevant information regarding the client, and with that information the attorney could inform the corporation's managers and officers of the corporation's legal duties and obligations. *Upjohn*, 449 U.S. at 392, 101 S.Ct. 677. The value the Court placed on the privilege to in effect promote the free and frank exchange of information presupposes that application of the privilege would foster communications that, but for the privilege, would never have occurred. *See* Sexton, *supra*, at 491; *Upjohn*, 449 U.S. at 389, 101 S.Ct. 677 (noting that a goal of the privilege is to promote "full and frank communication"). Moreover, notably missing from the Supreme Court's analysis in *Upjohn* is any discussion of the roles that a duty of loyalty or obedience plays with respect to the attorney-client privilege. The privilege itself is not grounded in concepts of a duty on behalf of the client to disclose information to its attorney, just as its extension to lower-level employees is not based on their duty to provide information to the corporation.

*1199 ¶43 Concepts of agency are undoubtedly relevant to the corporate attorney-client privilege, just not as the majority applies them. The rationale behind extending the privilege beyond the control group of the corporation is that lower-level employees, by virtue of their agency relationship with the corporation, have the authority to bind the corporation and control its actions in ways that can lead to legal consequences for the corporation. *See Upjohn*, 449 U.S. at 391, 101 S.Ct. 677; *see also Commodity Futures Trading Comm'n*, 471 U.S. at 348, 105 S.Ct. 1986 (noting that a corporation is an inanimate entity that can act only through its agents). It is for this reason that corporate counsel should be able to speak frankly with those employees and agents who have knowledge of the events that relate to the subject of the lawyer's legal services, regardless of those employees' subsequent personal employment decisions. Extending the privilege to cover communications with former employees who were knowledgeable agents of the corporation with respect to the time period and subjects discussed in the communications ensures that this remains a privilege with the corporation and distinguishes these employees from third-party witnesses. Sexton, *supra*, at 497.

¶44 Temporal concepts associated with the duration of agency, as they relate to the timing a communication is made to counsel, should not be dispositive of the privilege, as they bear little relationship to the goals of the privilege identified by the Supreme Court. It is for this reason that I would also reject the position articulated in the *Restatement (Third) of the Law Governing Lawyers* § 73(2) and comment e that the privilege be limited to those with a present and ongoing agency relationship with the corporation. Such a position is incompatible with the *Upjohn* Court's focus on the nature of the communications, rather than on the formalities of the relationship to the corporation. Furthermore, as the *Restatement* itself acknowledges, its position with respect to former employees is inconsistent with other courts that have considered the issue. *See* RESTATEMENT (THIRD) OF THE LAW GOVERNING LAWYERS § 73 cmt. e (acknowledging that of the few decisions on point, several courts disagree with the *Restatement*'s position regarding former employees).

III. Extending the Privilege to Former Employees Will Not Burden the Legal Process

**11 ¶45 The majority implies that extending the privilege to former employees would lack predictability and would frustrate the truth seeking mission of the legal process. Majority at 1193, 1194. While these concerns are not insignificant, I do not believe they justify the majority's harsh, bright-line rule.

¶46 First, we have continuously held that the attorney-client privilege extends only to communications and does not protect the underlying facts. *Youngs*, 179 Wash.2d at 653, 316 P.3d 1035; *Wright*, 103 Wash.2d at 195, 691 P.2d 564. Highland has always allowed, and concedes, that Newman may continue to conduct ex parte interviews with the former coaches for the purposes of learning any facts of the incident known to the coaches. *See* Pet'r's Reply Br. at 14.

¶47 The attorney-client privilege exists because we recognize that the relationship between attorney and client is important and worth protecting, even at the expense of some measure of truth seeking. *Lowy v. PeaceHealth*, 174 Wash.2d 769, 785, 280 P.3d 1078 (2012) ("[T]he attorney-client ... privilege[ ] [is] ... founded on the premise that communication in th[is] relationship[ ] is so important that the law is willing to sacrifice its pursuit for the truth, the whole truth, and nothing but the truth."). Where we have defined the scope or extended the attorney-client privilege, we have done so in recognition of the important purposes the privilege seeks to protect. *See, e.g., Youngs*, 179 Wash.2d at 650, 316 P.3d 1035; *Dietz v. John Doe*, 131 Wash.2d 835, 849, 935 P.2d 611 (1997). And we have sought to equitably balance the values underlying the privilege against concerns over burdening discovery. *See, e.g., Dietz*, 131 Wash.2d at 849, 935 P.2d 611. In *Dietz*, we addressed the question of whether the attorney-client privilege extends to protect the disclosure of a client's identity, when doing so may implicate the client in potential wrongdoing. *Id.* at 839, 935 P.2d 611. We noted that in such a case, application *1200 of the attorney-client privilege would stand at odds with principles of open discovery and "a general duty to give what testimony one is capable of giving." *Id.* at 843, 935 P.2d 611 (internal quotation marks omitted) (quoting *Jaffee v. Redmond*, 518 U.S. 1, 9, 116 S.Ct. 1923, 135 L.Ed.2d 337 (1996)).

¶48 While we extended the privilege in *Dietz*, we recognized our need to keep that particular extension narrow. *Id.* at 849, 935 P.2d 611. "The privilege is *imperative* to preserve the sanctity of communications between clients and attorneys." *Id.* at 851, 935 P.2d 611 (emphasis added). Moreover, the truth seeking concerns expressed by the majority are less serious here than in *Dietz* because application of the privilege will not prohibit discovery of relevant facts; Newman remains able to interview the former coaches. By contrast, in *Dietz* the privilege presented a complete obstacle to learning the identity of a potentially at-fault party. *See Dietz*, 131 Wash.2d at 848–49, 935 P.2d 611. The policies underlying the privilege support its extension in this case, and truth seeking principles do not justify a different conclusion.

¶49 Second, like the majority, I too recognize the value of predictability with respect to the boundaries of the attorney-client privilege. Because attorneys and clients must be able to predict with at least some certainty where their discussions will be protected, "[a]n uncertain privilege ... is little better than no privilege at all." *Upjohn*, 449 U.S. at 393, 101 S.Ct. 677. But such concerns do not require that we sever our analysis from the guiding principles of *Upjohn*; rather, we must use those principles to set clear standards for parties and courts to follow.

**12 ¶50 The distinction I would draw today should not be difficult for the parties to apply if the relevant purpose of the privilege—promoting necessary factual investigation—is kept clear. *Accord Peralta*, 190 F.R.D. at 41. It will be incumbent on counsel to exercise caution when communicating with their client's former employees in order to ensure communications stay within these parameters. Should disputes arise as to whether a specific communication is privileged, they should be submitted to the trial court for a determination as to whether the purposes identified today would be furthered by its application.

IV. Application to the Facts of This Case

¶51 In this case, the trial court ordered Highland School District No. 203 to respond to discovery requests concerning the "disclosure of communications between defense counsel and former employees made after the employment ended and not during the time defense counsel claims to have represented the former employees for purposes of their depositions." Clerk's Papers at 68–70. The trial court ordered this disclosure after erroneously concluding that we have not adopted *Upjohn*[2] and on the determination that the attorney-client privilege does not apply to any postemployment communications with former employees. *Id.* at 69–70,

¶52 Matthew Newman has brought claims against the school district based on the Lystedt act, under which coaches who know or suspect an athlete is suffering from a concussion must remove the athlete from play until the

athlete receives proper medical clearance. *See* RCW 28A.600.190; Pet'r's Am. Br. at 4–6; Br. of Resp'ts 6–7. Thus, Highland's liability in this case is contingent on the actions and knowledge of its football coaches who were employed during the time Newman played football for Highland School District and were present when Newman allegedly suffered a concussion and/or injury, regardless of whether those coaches remain employed by the district today. *See* CP at 96–104 (Compl.).

¶53 The former coaches at issue were employed by Highland during the relevant time period when Newman was injured. *See, e.g.*, CP at 1267. They possessed knowledge of matters "within the scope of their duties" as football coaches for the school district, such as the training they received and their interactions with and observations of Newman before and during his injury. *See, e.g.*, CP at 230–32, 1267, 1587–89. Communications with Highland's counsel that concerned the former ***1201** coaches' knowledge and conduct during their employment and the events surrounding Newman's injury would be necessary to supply a basis for legal advice to the school district as to liability.

¶54 In light of these facts, the purposes underlying the privilege support its extension to communications with former coaches regarding their conduct and knowledge during employment. This extension would promote frank and open fact-finding, and enable the attorney to uncover the facts necessary to render legal advice to the client. *Cf. In re Allen*, 106 F.3d at 606. To the extent communication between the former coaches and Highland's attorneys concerns a factual inquiry into the former coaches' conduct and knowledge during his or her employment, I would hold that any such communications are privileged and Highland need not answer questions regarding these communications. I would conclude that postemployment communications between the former employer's counsel and a former employee that constitute a relevant factual inquiry into their conduct and knowledge during employment would be privileged, consistent with *Upjohn*. Thus, I would hold that the trial court's order compelling discovery is based on an incorrect interpretation of the law and should be reversed.

****13** ¶55 This conclusion, however, does not completely resolve the current dispute between the parties about the postemployment communications with former coaches. Newman contends that the communications at issue concern more than just fact-finding. Br. of Resp'ts at 25–30. Newman argues that the predeposition communications with former coaches should not be privileged because the purpose of these predeposition, postemployment communications was not fact-finding, but rather to " 'woodshed[ ]' " the witness and influence the witness's testimony.[3] Br. of Resp'ts at 25–27, 30.

¶56 Some of this controversy stems from the unusual circumstance that Highland's attorneys formally appeared for and represented the former coaches for purposes of their depositions.[4] The trial court allowed this representation,[5] and Newman did not challenge this order on appeal. Thus, Newman seeks, and the trial court order compelled, discovery of communications made only "when defense counsel did not represent the former employees for the purposes of the depositions." CP at 68–70. The communications to prepare the former coaches for a deposition do not appear to fall within the court's order to compel, as the actual representation of the former coaches may potentially include these predeposition meetings between defense counsel and the former coaches. *See, e.g.*, CP at 226–27 (Dep. of Dustin Shafer) (noting that a discussion with defense counsel regarding formal representation for purposes of Shafer's deposition occurred at a meeting with counsel one week prior to his deposition).

¶57 However, the record is unclear as to when the school district's defense counsel represented the former coaches. Without knowing the scope of the communications at issue, whether they were limited to a factual inquiry into the former employee's conduct and knowledge during his or her employment, and whether or not such communications occurred during the period of formal representation, it is impossible to tell whether the communications at issue meet the test I suggest today.

***1202** ¶58 Accordingly, I would vacate the trial court's order to compel. On remand, the plaintiff would not be entitled to the broad discovery of communications with former coaches during the time the coaches were represented, as he has requested. CP at 37–43. And if such broad requests are made, defendant may raise the privilege again to the extent such communications fell within the scope of the direct representation, or to the extent such communications were made as a factual inquiry concerning the former employee's conduct and knowledge during his or her employment, relevant to the underlying case. Consequently, discovery should and would be tailored to specific questioning regarding communications falling outside the bounds of normal factual inquiry and thus is outside the scope of the attorney-client privilege with former employees.

V. Contempt Sanctions and Attorney Fees

****14** ¶59 I would also vacate the trial court's order

imposing contempt sanctions of $2,500 per day on Highland until discovery is provided. We previously placed a broad order staying all matters before the trial court related to the discovery of allegedly privileged communications, which put a stay on the contempt sanctions order. Because I would reverse the trial court's order compelling production, I would also vacate the order imposing sanctions on Highland.

¶60 I also join in the majority's denial of Newman's request for attorney fees.

CONCLUSION

¶61 I would hold that the attorney-client privilege attaches to postemployment communications concerning a relevant factual inquiry into the former employee's conduct and knowledge during his or her employment. The former coaches in this case had relevant information within the scope of their employment, and to the extent these communications concerned their knowledge and conduct during employment with Highland, such communications would be privileged. I would vacate both the trial court's order to compel and contempt order, lift the stay of discovery, and remand for further proceedings consistent with this opinion.

¶62 I dissent.

Gordon McCloud, J.

Owens, J.

Madsen, C.J.

All Citations

381 P.3d 1188, 2016 WL 6126472

Footnotes

1 Newman did not appeal the trial court's order denying disqualification of Highland's counsel from representing the former coaches at their depositions, and does not challenge the assertion of attorney-client privilege during this period. Nor do the parties dispute that communications with counsel during the coaches' employment are protected by the attorney-client privilege. This notion of a "durable privilege" is well recognized and does not appear to be at issue here because the relevant communications occurred after the coaches left Highland's employment. *See In re Coordinated Pretrial Proceedings in Petrol. Prods. Litig.*, 658 F.2d 1355, 1361 n.7 (9th Cir. 1981) (recognizing that attorney-client privileged conversations "remain privileged after the employee leaves"); *see also Peralta v. Cendant Corp.*, 190 F.R.D. 38, 41 (D. Conn. 1999) (concluding any privileged information obtained during employment remains privileged upon termination of employment).

2 Some courts have recognized that the attorney-client privilege could extend to former employees in those situations in which a continuing agency duty exists. *See Peralta*, 190 F.R.D. at 41 n.1 (stating "[a]ccording to the Restatement (Third) of the Law Governing Lawyers, [§ 73 cmt. e,] the attorney-client privilege would not normally attach to communications between former employees and counsel for the former employer" in the absence of "a continuing duty to the corporation" based on agency principles); *Infosystems, Inc. v. Ceridian Corp.*, 197 F.R.D. 303, 306 (E.D. Mich. 2000) (recognizing "there may be situations where the former employee retains a present connection or agency relationship with the client corporation" that would justify application of the privilege).

3 The *Restatement* recognizes that in general privileged communications are temporally limited to the duration of a principal-agent relationship:

> [A] person making a privileged communication to a lawyer for an organization must then be acting as agent of the principal-organization. The objective of the organizational privilege is to encourage the organization to have its agents communicate with its lawyer ... [.] Generally, that premise implies that persons be agents of the organization at the time of communicating.

RESTATEMENT (THIRD) OF THE LAWYERS GOVERNING LAWYERS § 73 cmt. e. The *Restatement* comment acknowledges the privilege may extend to postemployment communications in limited circumstances, based on the agency principles discussed in note 2 of this opinion. *Id.*

4 This discretionary review does not include any issue concerning the trial court's order imposing contempt sanctions against Highland, or limit the trial court's ability to revisit that order in light of our decision. *See Washburn v. Beatt Equip. Co.*, 120 Wash.2d 246, 300, 840 P.2d 860 (1992) ("Absent a proper certification, an order which adjudicates

fewer than all claims or the rights and liabilities of fewer than all parties is subject to revision at any time before entry of final judgment as to all claims and the rights and liabilities of all parties.").

1 In a concurring opinion in *Upjohn*, Chief Justice Burger approved of the factors considered by the majority to conclude that the communications were privileged, but would have gone further to hold that the privilege would also protect communications with a former employee regarding conduct "within the scope of employment." *Upjohn*, 449 U.S. at 403, 101 S.Ct. 677 (Burger, C.J., concurring in part and concurring in the judgment).

2 The trial court issued its order on January 28, 2014, just five days after our decision in *Youngs*, 179 Wash.2d 645, 316 P.3d 1035. CP at 70.

3 The record and briefing indicate that each party has accused the other of witness tampering in this case. *See, e.g.*, Br. of Resp'ts at 30; CP at 830.

4 When asked by the trial court what it meant to represent for purposes of the deposition, the attorney representing Highland stated, "It means that I can interview them, talk to them about the facts, what they recall, give them ideas as to what I think subject matters will come up so they're somewhat prepared as to the questions." Verbatim Report of Proceedings (VRP) at 44 (Sept. 27, 2013).

5 This issue came before the trial court on a motion to disqualify defense counsel filed by Newman. *Id.* at 42. The trial court expressed concerns about defense counsel's representation of these former employees and the potential conflicts this posed. VRP at 117. The trial court concluded this was "a very poor decision" but that it was not necessarily an ethics violation. *Id.* The trial court ordered Highland's counsel not to engage in any further representation of former coaches for depositions. CP at 68–70. The parties have not challenged this ruling in the present appeal, and the merits of this ruling are not properly before the court.

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Tab 7

大成 DENTONS

CLE FOR IN-HOUSE COUNSEL
WASHINGTON, DC I OCTOBER 2019

CANNABIS & HEMP: OPPORTUNITIES & RISKS

Eric Berlin, Chicago

Tisha Schestopol, Washington, DC

Introduction

- **Eric Berlin**
  - Helps lead Dentons US & Global Cannabis Groups
  - 100% time spent on clients in or impacted by legal cannabis industry
  - Helped draft and pass Illinois and Ohio medical cannabis laws
- **Tisha Schestopol**
  - Counsels industry clients on FDA-related matters

Agenda

- Cannabis, hemp, and CBD
- States' legalization
- US federal laws on cannabis
- Hemp legalization & CBD
- Ancillary business opportunities & risks
- Impact on employers
- Conclusion and Q&A

What is Cannabis?

Hemp (not > .3% THC) **"Marijuana"**

+ Extracts from glands on flowers & leaves containing cannabinoids, terpenes and flavonoids

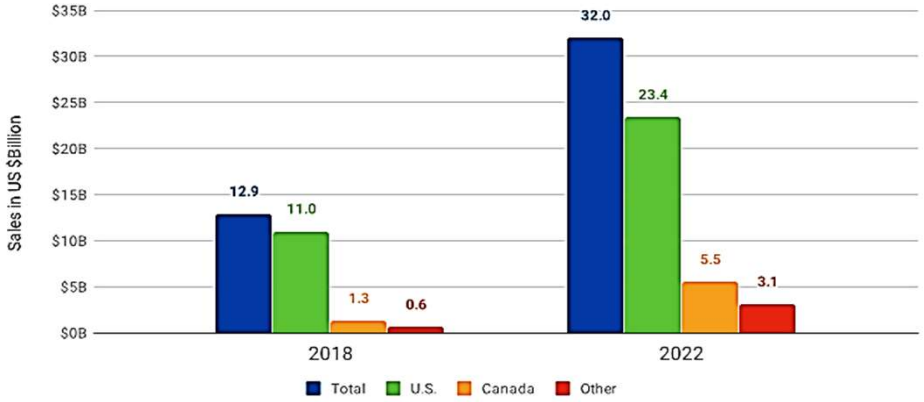
Medical Cannabis?

- Does cannabis have **medicinal properties**?
  - Effective as analgesic and for nausea
  - CBD for epilepsy
  - Some positive studies for Crohn's, Multiple Sclerosis, Alzheimer's, Parkinson's & diabetes
- Is cannabis **safe**?
  - DEA's chief ALJ: "one of the safest therapeutically active substances known"
  - In states with medical cannabis programs, each of the following has declined significantly:
    - opioid overdoses
    - Medicare prescriptions for conditions treated by cannabis
    - absences from work due to illness

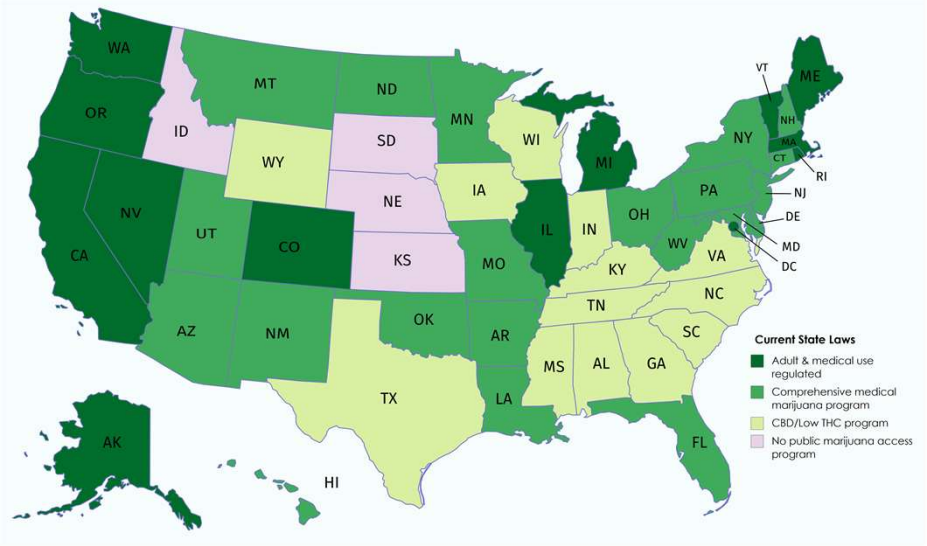
Cannabis Products

The Global & U.S. Markets

- Annual global cannabis market (inc. black market) = **$150 billion**
- **Legal** retail sales & projected: $13B (2018) to $32B (2022)



Current U.S. State Laws



No Two States The Same

- **Permit process**: open vs. competitive
- **Vertical integration**: required vs. prohibited
  cultivator →processor → distributor → testing lab → dispensary
- Different **advertising** standards
- **Home grow** permitted vs. not
- Different **forms** (smoking, vaping, oils, edibles), **limits**, etc.

U.S. Federal Law

- Cannabis = **Schedule I drug**, Controlled Substances Act
- **Illegal** to:
  - manufacture (grow), sell, or possess
  - advertise (print, internet, and communication facilities [*e.g.*, TV and radio])
  - sell paraphernalia (not authorized by state)
  - Control property on which cannabis trafficking knowingly occurs
- Conspiracy, Aiding & Abetting, AML, RICO

Federal Enforcement

- Feds **not enforcing** vs. state compliance businesses
- **History of non-enforcement**
  - Cole Memo
  - Rohrabacher (Joyce) protection for medical cannabis
  - Sessions rescission of Cole Memo
  - AG Barr pledged not to “go after” state law compliant companies

Implications of Federal Illegality

- Limited **banking**
  - Fin-CEN guidance
- **Tax** Code 280E
- Limited **IP** protection
- No federal **bankruptcy** protection
- **Interstate** commerce limitations

Federal Reform

- **Pending Bills**
  - Many different aspects and kinds
  - FAIR Banking
  - STATES
  - Equity/Expungement
  - Insurance
- **Reform in 2019?**
  - Likely no Congressional action beyond possibly banking

Hemp

- Industrial hemp research programs under **2014 Farm Bill**
  - Morphed into research on commercialization of products with CBD
- **Epidiolex**
- **2018 Farm Bill** removed hemp and extracts of hemp from CSA
  - For hemp farmers and producers, expands banking options, expands IP protection, decreases tax liabilities, and makes crop insurance available
  - "Grandfathers" 2014 Farm Bill programs at least one year
  - Does not make sales of hemp or CBD nationally legal
    - States can ban, but must permit hemp/extracts/products to pass through state
    - Awaiting USDA regs

FDA on CBD

- **FDA** has claimed full jurisdiction
  - Illegal to add CBD to food, beverage or supplement
  - Illegal to make my health claim about CBD product
  - Plans to enforce only against the most “egregious, over-the-line claims”
- **Product choice** implications
- **Labeling** implications
- **Cease & desist letters** issued

Chain of Development, Production and Sale

- **Cultivation**
  - Construction, HVAC, gardening, hydroponics
- **Products**
  - Extraction, infusion, ingredients, packaging, labeling, hardware
- **Retail/Dispensary**
  - POS software, all impacting other retailers
- **Commercialization Generally**
  - Real estate, accountants, lawyers, marketing, public relations, temp agencies, financial services

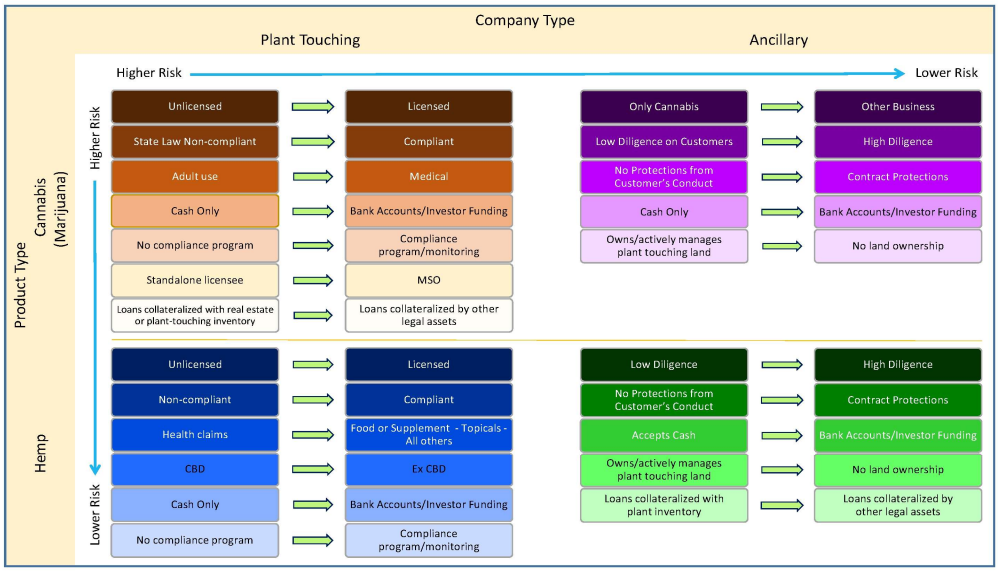
Ancillary Product/Service Suppliers

- Federal **vs.** state law
- **Risks** of aiding/abetting, conspiracy, money laundering
- **Low enforcement** risk
- **Banking** implications
- **Real estate**

Risks from Selling to Cannabis Companies

- Sale of products that could be considered paraphernalia
- Lease space to cannabis manufacturers/distributors
- Lack of diligence on customers' compliance with state law
- Lack of termination right if cannabis risk profile alters

Risks Matrix



Employer Rights & Limitations

- States have taken **varied approaches**
- No requirement for **health insurance** to cover
- Most: employers **may not discriminate**
  - No employee right to use cannabis at work
  - Workplace safety and federal law considerations
- Review existing drug policies; training to spot **impairment**

International Legalization

- **Uruguay** first country to legalize for adults
- **Canada** – Medical, and adult use added October 17, 2018
- **Medical legalization**: Mexico, Argentina, Columbia, Chile, Jamaica, Germany, Denmark, Greece, Italy, Catalonia, Croatia, Czech Republic, Macedonia, Poland, Turkey, Australia, Israel, South Africa, Thailand

Industry Future

- **Disrupt several sectors:**
  - alcohol, beer, pharma, health & wellness, food ingredients
- **Life Science/Pharma**
  - CBD, cannabinoids, ratios, terpene mixes, testing
- **Adult/Recreational Use**
- **Health & wellness/ingredients**

Tab 8

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WASHINGTON, DC I OCTOBER 2019

Key Considerations & Developments in Cybersecurity and the importance of Cyber Insurance

Rich Dodge, Partner, Washington, DC

Deborah Rimmler, Counsel, Washington, DC

Tokë Vandervoort, Senior Vice President,
Deputy General Counsel UNDER ARMOUR

Agenda

- Cybersecurity and data protection
- Cyber Insurance: What does it cover/exclude?
- Cyber Insurance v. Risk Management
- Securing Cyber Insurance Coverage

Global Threat Environment

1 — Cyber Attacks
- Whether from cybercriminals, hacktivists or state-sponsored actors, cyber threats have the potential to significantly disrupt core operations and damage brands
- Incidents like ransomware, hijacking vendor payments, stealing personal data and many others costs millions in lost revenue and brand damage

2 — Physical Safety
- Violence against employees can be random or targeted with political or criminal motivations
- Active shooter and terrorist risks require situational awareness and monitoring
- Traveling employees are especially vulnerable as targets in unfamiliar locations

3 — Geopolitical, Financial and Environmental Risks
- Mounting global uncertainty as nationalism and anti-globalism is on the rise
- Regulatory environments, especially in data privacy, create compliance and cost uncertainty
- Political risks like those in Venezuela and Middle East require active monitoring

4 — Reputational Risks
- Leaks of proprietary or client confidential information by employees damage brand integrity
- Layer a well-publicized cybersecurity breach on top of soft risks to competitiveness posed by unsettled employees or cost conscious clients and you could trigger a enterprise threatening situation

5 — Malicious Insiders theft, fraud and sabotage
- Money laundering, corruption and insider trading schemes
- Sixty-nine percent of enterprise security executives reported experiencing an attempted theft or corruption of data by insiders during the last 12 months

6 — Negligent Insiders
- Even a seemingly harmless act by an employee can open the door to cyber attacks
- Negligence in internal controls enforcement and training
- Alcohol and drug abuse can lead to poor performance, negligence and criminal behavior

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Legal, Ethical and Moral Obligations to Protect People and Information

01 Protect Staff
- Employers have obligations to provide safe workplaces
- Many jurisdictions have tort duties of care imputed to managing things like employee travel or even active shooter safety planning

02 Protect Personal Data
- Organizations possess personal data of employees, clients and others that must be protected as required by global privacy laws and numerous breach notification regimes
- GDPR and other similar compliance laws will consume significant firm resources

03 Protect Client Data
- Trade Secrets Laws
- Contractual obligations to protect confidential information
- Many contracts now include duties on breach notification and post breach obligations to recover lost data

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Insider Threat Statistics
Your Greatest Asset is also Your Greatest Liability

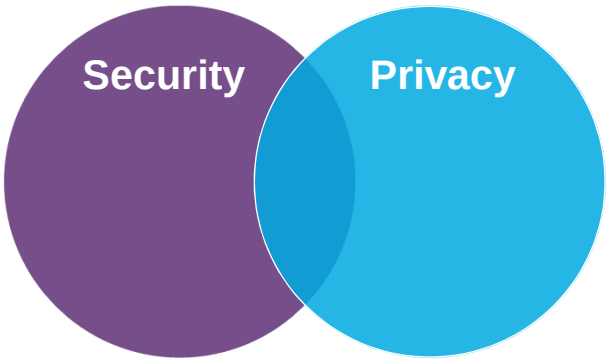
- Carnegie Mellon University's Software Engineering Institute CERT Program publishes seminal study ***Common Sense Guide to Mitigating Insider Threats*** (6th edition out in December 2018)
- In 2017, CERT updated definition of Insider Threat to include unintentional acts, as well as malicious, and to address physical threats
- 20% of electronic crime events were suspected or known to be caused by insiders (2017 US State of Cybercrime Survey)
- Most common insider incidents were unintentional exposure of confidential information, customer records compromised or stolen, employee records compromised or stolen, confidential information intentionally exposed and confidential information compromised or stolen
- Example of intersection of procedure (identify assets, access controls, separation of duties, employee onboarding & termination) with technical measures (monitoring access to critical data and assets, data encryption, data transfer and removal restrictions, monitoring employees)

Security Concerns & Privacy Obligations

Security & Privacy are at the intersection of all business sectors

Yet--Security concerns to protect people and assets are often at odds with privacy obligations to protect personal information

CERT Guide: Privacy cannot exist without security, whereas some security practices may need to be scoped to better fit the privacy needs of individuals and the regulatory demands on an organization.



Holistic Security: Wide Array of Issues

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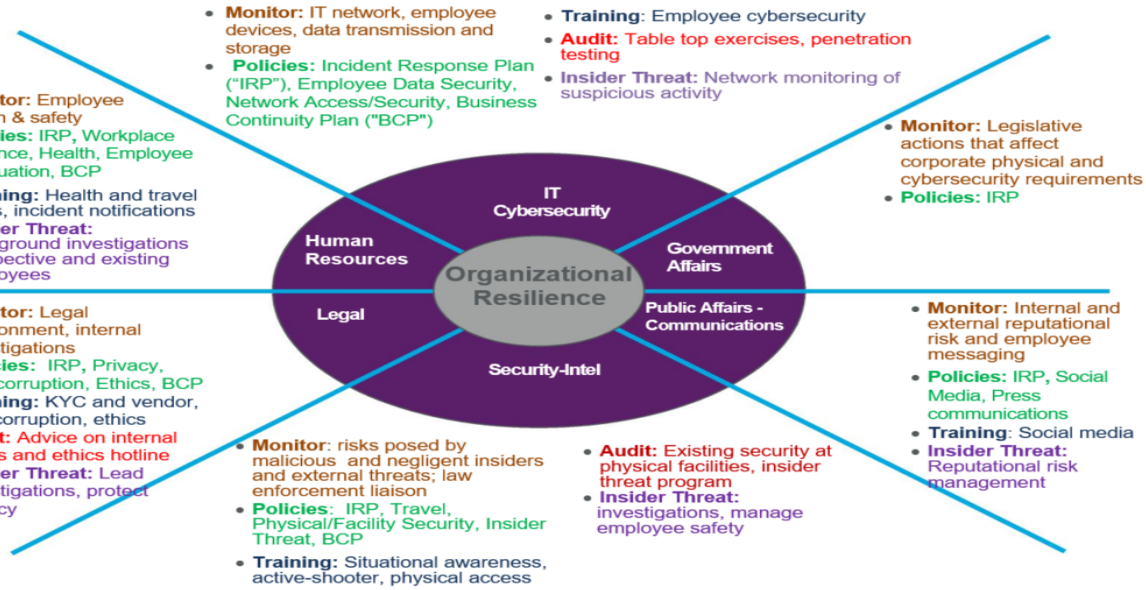
Holistic Security: Stakeholder Coordination



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Practical Considerations: Don't Forget Record Keeping

- Preserving evidence for later legal proceedings, whether offensive or defensive
- Incident response team should be ready to preserve the types of evidence that could be involved in various incidents
  - Middle of an incident: record keeping best practices are typically put to the wayside as they are never top concern
  - Proper retention (prevent loss, deletion or overwriting) of emails, IT monitoring logs, audit trails
- Have plan to store incident response report and relevant supporting documents in one place
  - Make sure this actually happens

Practical Considerations: Stakeholder coordination is key to effective crisis management

- Employee training and incident response team/executive table tops
- Identify outside counsel and expert investigators
  - On retainer and ready to go
  - Preserve privilege
  - Preserve evidence and required records
- Identify law enforcement liaison
- **Know your insurance policy obligations for reporting and coverage**
- Strong data handling policies, security procedures, supply chain/vendor management and employee training will:
  - minimize the risk of breaches; and, when breaches occur (and they will),
  - help demonstrate that your actions were reasonable to regulators and the public.
- Strong breach response procedures will reduce the risk of political infighting following a breach, minimize the risk of the types of chaos that often accompanies breaches, increase the likelihood of compliance and minimize harm.

Cyber Insurance: protecting something you can't touch from people you'll never see

- Direct premiums written for both standalone and packaged cyber policies grew about 12 percent in 2018 from $1.8 billion to $2.0 billion. A.M. Best Market Report
  - The $2.0 billion in Direct written premium is more than double what was written in 2015
- Stand-alone cyber policies cover two areas of liability: first party damage, covering injuries to the company, and third party liability, covering injuries resulting from third party actions
  - First party coverage: includes damage resulting from data assets and infrastructure being compromised, such as data destruction, business interruption, first party property damage, theft and extortion, and damage to company brands and reputation. Also, covers the costs of incident response and remediation, investigation and security audit expense.
  - Third party coverage: includes damages relating to regulatory failures (violation of state breach law notifications) and causes of action related to inadequate data security safeguards, including shareholder derivative actions brought against directors themselves.
- Recent case law demonstrates that it is best for a company to procure a cyber insurance policy rather than rely on other coverages.

Cyber Insurance: What Does it Cover?

- **Typical Coverage**:
  - Event Causes – phishing, ransomware, 3rd parties, social engineering,
  - Legal counsel* – response and defense
  - Public Relations*
  - IT forensics (including breach related Pen Testing)
  - Ransomware negotiation and payment
  - Breach remediation
  - Data restoration
  - Breach notification costs
  - Call Center services
  - Credit Monitoring, Identity Restoration, tort damages, some fines
  - Business Impact/Interruption – use of systems/downtime, loss of data, certain revenue, hardware loss

Cyber Insurance: What Does it Exclude?

- **Common Exclusions**
  - Profits – speculative losses, potential future lost profits
  - Loss of value/theft of your Intellectual Property
  - Betterments – post breach remedial measures
  - Acts of War - ?

Cyber Insurance v. Risk Management

- *"An interesting finding is the important role cyber insurance can play not only in managing risk of a data breach but in improving the security posture of the company. While it has been suggested that having insurance encourages companies to slack off on security, our research suggests the opposite. Those companies with good security practices are more likely to purchase insurance."*

~ Ponemon Institute Research Report 2014

Securing Cyber Insurance Coverage

- **Securing Coverage:**
  - Working with Broker – intel, advocacy, expertise to navigate complex product and stack mix,
  - Underwriting and Cyber Risk Assessment – external v internal
  - Preparation - teams, tabletops, etc
- **Invoking/Navigating Coverage**
  - Notice Triggers – 20/20 foresight
  - Timing – late notice prejudice
  - Choice of counsel and other providers
  - Other policies - E&O, D&O, Property, Crime, etc
- **Common Exclusions**
  - Profits – speculative losses, potential future lost profits
  - Loss of value/theft of your Intellectual Property
  - Betterments – post breach remedial measures
  - Acts of War - ?

Appendix: Recent Cyber Coverage Case Law Developments

- General Liability Insurance Policies may cover "property damage" relating to a cyber breach.
  - Eyeblaster Inc. v. Federal Ins. Co., 613 F.3d 797 (8th Cir. 2010) (damage to computer as a result of virus was covered damage or loss of use of "tangible property")
  - Retail Systems, Inc. v. CAN Ins. Co., 469 N.W.2d 735 (Minn. Ct. App. 1991) (since broad definition of covered "tangible property" was ambiguous, terms construed in favor of policyholder and coverage for lost computer tape found)
  - But Ciber, Inc. v. Federal Ins. Cos., 2018 WL 1203157 (D. Colo. 2018) (coverage denied where damages resulted in inadequacies in the new software, and not the loss of use of computers).
- General Liability Insurance Policies may also cover "personal and advertising injury"
  - Travelers Indem. Co. of Am. V. Portal Healthcare Solutions, LLC, 35 F. Supp. 3d 765 (E.D. Va. 2014) (stolen PII posted on-line, court found coverage because policy covered electronic publication of material that discloses information about a person's private life)
  - But Recall Total Info. Mgmt. v. Federal Ins. Co., 83 A.3d 664 (Conn. App. Ct. 2014) (court found that PII on tapes that fell off truck were not published and thus, not covered by a CGL policy)

Appendix: Recent Cyber Coverage Case Law Developments

- Stand Alone Cyber Insurance Policies
  - Evolving Case law and policy language
    - P.F. Chang's China Bistro, Inc. v. Federal Ins. Co., 2016 WL 3055111 (D. Ariz. May 31, 2016) (pursuant to its contracts with credit card companies that required P.F. Change to pay back the credit card companies for fraud losses, P.F. Chang had assumed the liability and thus claim not covered under its cyber insurance policy).
    - Cottage Health vs. Columbia Casualty Co. et al., No. 16CV02310 (Cal. St., Santa Barbara) (insurer denied coverage based on, among other things, the "Failure to Follow Minimum Required Practices" exclusion).
    - New Hotel Manteleone, LLC v. Certain Underwriters at Lloyd's of London, Subscribing to Ascent Policy No. ASC14C000944, 2:16-cv-00061 (E.D. La.) (insurers denied claim under an endorsement that limited coverage of "payment card industry fines" — penalties charged by credit card associations for not complying with data security standards — to $200,000)
  - Case to watch - Mondelez v. Zurich: Zurich denied coverage for damages relating to NotPetya attack on ground that its all-risk property policy excluded "loss or damage directly or indirectly caused by or resulting from . . . [a] hostile or warlike action . . . by any government or sovereign power . . . or agent or authority [thereof]." The all-risk policy provided cyber insurance cover.

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Tab 9

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Tech. Law Meets Ad. Law: Opportunities and Risks for IP and Communications Lawyers in the Evolving Administrative Law World

Kevin Greenleaf, Washington, DC

Simon Steele, Washington, DC

Lauren Wilson, Washington, DC

Ad. Law Issues in IP Cases

Kevin Greenleaf

Three big themes—

- Courts know administrative law
- Procedural fairness is a clue to administrative law issues
- Case teams without administrative law expertise lose cases they should win

Fundamental obligations of agencies

- Explain: "show your work," explain the evidence, don't rely on speculation or junk science. *Chenery*: an agency decision can only be affirmed on its own reasoning.
- Agencies must act consistently and not in render "arbitrary and capricious" decisions

The *quid pro quo* of judicial review

- If there is "reasoned decisionmaking" (*Chenery*), judicial review will (usually) be very deferential:
  - on interpretations of statute, *Chevron* deference
  - on interpretations of regulation, *Auer* deference
  - On findings of fact, "substantial evidence" under *Overton Park*.
- For procedural issues, Courts give "searching review," but only briefly look at substantive procedural outcome.
- **BUT:** if the agency fails obligations of "reasoned decisionmaking," *vacatur* is granted nearly *per se*. Very few cases in the middle—***most cases are won or lost on standard of review***.

APA Overview

- The Administrative Procedure Act (APA) provides default agency procedure and judicial review standards for courts.
- Major provisions
  - § 553: Rulemaking procedure
  - § 554–557: Adjudication procedure
  - § 706: Judicial review standards
- Applies to patent law under *Dickenson v.* Zurko, 527 U.S. 150 (1999) and trademark law under *Recot, Inc. v. M.C. Becton*, 214 F.3d 1322, 1327 (Fed. Cir. 2000).

Rulemaking Overview

- Many agencies have notice-and-comment rulemaking authority, which allows them to pass rules under 5 U.S.C. § 553.
- Rules passed under § 553 are regarded as having the force of law, and are potentially eligible for strong *Chevron* deference.
- The AIA expanded the PTO's authority
  - § § 316, 326 provides some substantive rulemaking authority for IPRs and PGRs, respectively.

APA Adjudication

- **Formal Adjudication**
  - Governed by 5 U.S.C. § § 554, 556 and 557.
  - Similar to federal trials, but federal rules of evidence and civil procedure do not apply.
  - Eligible for *Chevron* deference when an agency interprets its ambiguous statute.
- **Informal Adjudication**
  - Governed by § 555, but APA provides little guidance.
  - Generally no *Chevron* deference.

PTAB Adjudication & Deference

- CAFC in *Belden Inc. v. Berk-Tek LLC* held that AIA trials are "formal adjudication."
- This is not beyond dispute: Statutes invoking formal adjudication use the magic words "hearing" and "on the record."
- Split among scholars regarding whether *Chevron* or *Skidmore* is the appropriate standard.

PTAB Rulemaking & Deference

- Outside the AIA, the PTO lacks substantive rulemaking authority and isn't eligible for *Chevron* deference.
- However, under the AIA, Congress expressly delegated some rulemaking authority to the PTO for IPRs and PGRs.
- Supreme Court in *Cuozzo Speed Techs. LLC v. Lee* gave *Chevron* deference to the PTO.

Chevron deference

- Step Zero: Congressional authorization
- Step One: Ambiguous statute?
- Step Two: Reasonable interpretation?

Skidmore deference

- If an agency's procedure is highly informal, the reviewing court applies weak deference under SC's *Skidmore v. Swift & Co.*
- Applying *Skidmore*, the court will merely ask whether it is persuaded by the agency's reasoning.
  - If the court is not persuaded, it will disregard the agency's interpretation.
  - If the court is persuaded, it will adopt the agency's position.
- Adjudicative Decisions from TTAB or PTAB may receive *Skidmore* deference
  - *Aqua Products, Inc. v. Matal*, 872 F. 3d 1290, 1333 (Fed. Cir. 2017).

Auer deference

- Deals with agency interpretation of its regs.

Stay tuned…

Cuozzo Speed Technologies LLC v. Lee

- ***Cuozzo* issue 1: Patent claim interpretation**
- Routine illustration of *Chevron*:
  - Congress granted substantive rulemaking authority
    - "prescribe regulations … establishing and governing inter partes review" (35 U.S.C. § 316(a)(4)).
  - Statute not explicit on claim construction standard
  - PTO interpretation of statute was reasonable.

SAS Institute v. Iancu

- SAS Institute holds that the PTAB can't institute a partial review
- *Puzzling* case. By a 5-4 majority, the Supreme Court held that § 318(a) is so unambiguously clear that the Director lacks authority to "establish a regulation governing an IPR" on partial institution.

§ 314(a)Threshold.—The Director may not authorize an inter partes review to be instituted unless the Director determines that … there is a reasonable likelihood that the petitioner would prevail with respect to **at least 1 of the claims challenged in the petition**.

§ 316(a)(4) Regulations.—The Director shall prescribe regulations—**establishing and governing inter partes review under this chapter** and the relationship of such review to other proceedings under this title

§ 318(a) Final Written Decision.— If an inter partes review is instituted and not dismissed under this chapter, the Patent Trial and Appeal Board shall issue a final written decision with respect to the patentability of **any patent claim challenged by the petitioner** and any new claim added under section 316(d).

Aqua Products v. Matal

- The party briefs are silent on administrative law; they argue only *patent* law. They lost this issue, six-to-five.
- Key holding (though only by thinnest possible majority, six out of eleven judges): a "rule" about amending claims in an IPR that the PTO attempted to promulgate by decision of the PTAB (rather than by notice and comment) is invalid. Six judges did a lot of hard work reframing the case and doing their own legal research *on administrative law* to strike down the *Idle Free* rule.
- Judge Reyna, for the swing opinion, says it simply: "The Patent Office cannot effect an end-run around its congressionally delegated authority by conducting rulemaking through adjudication without undertaking the process of promulgating a regulation."

Thryv, Inc. v. Click-To-Call Tech., LP

> [Decision] whether to institute an inter partes review under this section shall be final and nonappealable.

35 U.S.C. § 314(d).

Rulemaking procedural defects in PTAB Precedential Decision divest PTAB of *Chevron* deference

- Agency rulemaking-by-adjudication may only interpret underlying statutes or regulations; gap-filling a silence, without an "active" ambiguity, requires a *regulation*. *Facebook, Inc. v. Windy City Innovations, LLC*, case no. 18-1400 (Fed. Cir. 2019)
- No common law authority for incremental rulemaking
- The *Idle Free* rule required paperwork submissions from parties—the PTO can't promulgate such a rule without rulemaking procedure required under the Paperwork Reduction Act
- The PTO neglected requirements for notice under APA § 552.
- The PTAB's commonplace reliance on "informative" opinions as if they were precedential is systemically problematic.

"Substantial evidence"
Chenery Doctrine

Substantial evidence—very different between court/court and court/agency review

Jury
Juries decisions are given "black box" review
A spaghetti sauce test: "It's in there." A jury may be affirmed if evidence "somewhere in the pile" supports inferences that lead to the verdict.

Substantial evidence—very different between court/court and court/agency review

Jury	Agency
Juries decisions are given "black box" review	An agency must ***explain***
A spaghetti sauce test: "It's in there." A jury may be affirmed if evidence "somewhere in the pile" supports inferences that lead to the verdict.	A ten-page document is not self-explanatory, the agency must explain the precise evidence relied on (enough that its "path may reasonably be discerned").
	An agency must explain its view of evidence that "fairly detracts" from the conclusion
	Agencies cannot be affirmed on unexplained inferences—the Solicitor can't provide *ex post* rationalizations that should have been stated in PTAB decision.

Ad. Law Issues in the Communications Law Context

Lauren Wilson

Interpretative vs. Legislative Rules: *PDR Network, PLC v. Carlton & Harris Chiropractic, Inc.*

- The Telephone Consumer Protection Act makes it unlawful for any person to send an "unsolicited advertisement" by fax
- The Administrative Orders Review Act (Hobbs Act) gives federal courts of appeals "exclusive jurisdiction to enjoin, set aside, suspend (in whole or in part), or to determine the validity of" certain "final orders of the Federal Communications Commission."
- Question for SCOTUS: Did the Hobbs Act's vesting of exclusive jurisdiction in the courts of appeals mean that a district court must adopt and follow a 2006 FCC order interpreting the term "unsolicited advertisement" as including certain faxes that promote "free" goods.
- SCOTUS ruled that the lower court must first resolve two questions:
  - Legislative rule or interpretive rule?
  - Did appellant have a "prior" and "adequate" opportunity to seek judicial review?

Interpretative vs. Legislative Rules: *PDR Network, PLC v. Carlton & Harris Chiropractic, Inc.*

- Legislative rule: issued by an agency pursuant to statutory authority'" and has the '"force and effect of law'" (*Chrysler Corp*. v. *Brown*)
- Interpretive rule: advis[es] the public of the agency's construction of the statutes and rules which it administers'" and lacks '"the force and effect of law'" (*Perez* v. *Mortgage Bankers Assn*.)
- SCOTUS: An interpretive rule *may* not be binding on a district court, and the district court may not be required to follow it.

Who Decides?: “Protecting America from Online Censorship”

- According to news reports, President Trump is considering an Executive Order that would instruct the FCC to issue rules interpreting and limiting immunities of social media providers (Facebook, Twitter, etc.) under the Communications Decency Act, 47 U.S.C. 230.
  - https://www.cnn.com/2019/08/09/tech/white-house-social-media-executive-order-fcc-ftc
- We’ll wait to see the E.O., but this raises the question: what statutory authority does the actor have?
  - “It is axiomatic that administrative agencies may issue regulations only pursuant to authority delegated to them by Congress.” *American Library Ass’n v. FCC*, 406 F.3d 689 (D.C. Cir. 2005).
  - The President may have power to tell the FCC how to execute laws Congress has authorized the agency to execute, but can’t give the FCC new powers.
- 47 U.S.C. 230 instructs courts, not the FCC: it provides a defense to civil suits when a provider censors content it considers offensive
  - Section 230 does not “delegate any enforcement role to any federal agency or federal official.” *Am. Freedom Defense Initiative v. Lynch,* 217 F. Supp. 3d 100, 105 (D.D.C. 2016), aff’d, 697 Fed. Appx. 7 (D.C. Cir. 2017).

Deregulation and Policy Change: *Mozilla* and the Repeal of Net Neutrality

Background on the Issues

- The 1996 Telecommunications Act creates two possible classifications for broadband Internet access: 1) a Title I “information service” or 2) a Title II “telecommunications service.”
- The FCC’s authority to regulate broadband depends on this classification -- “telecommunications services” are subject to common carrier-type regulations prohibiting unjust and unreasonable charges, practices, and discrimination. “Information services” are exempt from such regulation.
- A comparable set of classifications applies to mobile broadband (unregulated “private mobile service” vs. regulated “commercial mobile service”).

Deregulation and Policy Change: *Mozilla* and the Repeal of Net Neutrality

History of the FCC's Net Neutrality and Broadband Classification Decisions

- 1998: Broadband over phone lines is a "telecommunications service."
- 2002: Cable broadband is an "information service."
- 2005: Wireline broadband is an "information service."
- 2007: Wireless broadband is an "private mobile service."
- 2010: Net Neutrality rules apply to broadband (classified as an "information service").
- 2015: Broadband Internet access is a "telecommunications service" (wireline) / "commercial mobile service" (wireless).
- 2018: Broadband Internet access is an "information service" (wireline) / "private mobile service" (wireless) (*Restoring Internet Freedom Order*).

Deregulation and Policy Change: *Mozilla* and the Repeal of Net Neutrality

More on the *Restoring Internet Freedom Order*

- Reclassification of Broadband
  - Lawful interpretation of statute
  - Supported by public policy
  - Will not undermine infrastructure deployment, public safety, disability access, or universal service (all issues raised by commenters and the *Mozilla* petitioners)
- Eliminated bright-line Net Neutrality rules and the Internet Conduct Standard
- Adopted transparency requirements
- Preempted states' rights to impose rules that the Order repealed or refrained from imposing, or that are more stringent than the Order.

Deregulation and Policy Change: *Mozilla* and the Repeal of Net Neutrality

FCC Classification Decisions in the Courts

- 2005: The Supreme Court upheld the FCC's classification of cable broadband as an information Service in *National Cable & Telecomms. Ass'n v. Brand X Internet Servs*., 545 U.S. 967 (2005).
- 2014: The D.C. Circuit overturned the FCC's order applying net neutrality rules to broadband, which was then classified as an information service. *Verizon v. FCC*, 740 F.3d 623 (D.C. Cir. 2014).
- 2016: The D.C. Circuit upheld the FCC's classification of wireline and wireless broadband as a "telecommunications service" and "commercial mobile service", respectively. *United States Telecom Association v. FCC*, 825 F.3d 674(D.C. Cir. 2016).
- **2019: The D.C. Circuit upheld the FCC's classification of wireline and wireless broadband as an "information service" and a "private mobile service", respectively.** *Mozilla v. FCC*, No. 18-1051, __ F.3d __, 2019 WL 4777860 (D.C. Cir. Oct. 1, 2019).

Deregulation and Policy Change: *Mozilla* and the Repeal of Net Neutrality

***Mozilla v. FCC* (on *Chevron*)**

"The central issue before us is whether the Commission lawfully applied the statute in classifying broadband Internet access service as an "information service.""

- *Brand X* rules the day on reclassification.
- The FCC has interpretive "discretion" to classify broadband as either an information service or a telecommunications service.
- SCOTUS has already ruled that classifying broadband as an information service based on certain functionalities - caching and DNS - is a reasonable policy choice.

Deregulation and Policy Change: *Mozilla* and the Repeal of Net Neutrality

***Mozilla v. FCC* (on *Mead*)**

- While the Court's *Chevron* analysis of an agency's statutory interpretation overlaps with arbitrary and capricious review, "each test must be independently satisfied."
- Under *Brand X*'s controlling precedent, the agency advanced a reasonable interpretation of the statute's definition of "information service."
- **BUT parts of the Commission's decision are still arbitrary and capricious under the APA. The *Order* failed to adequately examine or explain the implications of its decision for:**
  - Public safety (statutorily mandated factor)
  - Pole attachments (subject to regulation in connection with "telecommunications services")
  - Lifeline / Universal Service (funded by "telecommunications services")

Deregulation and Policy Change: *Mozilla* and the Repeal of Net Neutrality

***Mozilla v. FCC* (on Preemption)**

- Because the agency does not have authority to regulate "information services," it does not have the authority to preempt state and local regulation of the same.
- Likely aware of this, the Commission grounded preemption in (i) the "impossibility exception" to state jurisdiction, and (ii) the "federal policy of nonregulation for information services."
- However, the impossibility exception is not an independent source of authority -- it applies only where there is already statutory authority to regulate.
- Likewise, preemption power must be conferred by Congress. *Louisiana PSC* rules the day here -- absent statutory authority, courts "simply cannot accept [the] argument that the [Commission] may nevertheless take action which it thinks will best effectuate a federal policy."

Telecom Lawyer's Ad Law Playbook

- *Chevron* is critical to success, but not a panacea.
- Reasonable decision-making does not mean foolproof decision-making. Focus on compiling and presenting clear, rational, evidence.
- Advocacy should stress severable issues / rule parts.
- Anticipate and plan for policy outcomes resulting from mutually exclusive statutory interpretations.

大成DENTONS

Administrative Law: Old Framework, New Issues

Simon Steel

Two Old Myths

- Ad. law is stable, and courts almost always defer to agencies
  - Fundamental principles are stable, but
  - Judicial activism/skepticism of administrative state is on the rise
    - Growing judicial skepticism about deference/delegation/unaccountable policy-making; so far marginal S. Ct. majority holds to, but limits, precedent (*Burwell, Kisor, Gundy, Allina*)
  - Trump Admin. "innovations" raise new questions
    - Deregulation
    - Unitary executive theory, Executive Orders, Presidential tweets, acting administrators
- Tech law is technocratic/apolitical, so raises few ad. law issues
  - Ad. law issues aren't confined to hot-button political controversies
  - Everything has a political dimension
    - *E.g.,* internet search and "censorship"; open access
    - In the age of "Deep State," the separation of powers is again political

Major Themes

- *Chevron* deference is not dead, but it's not hard to bypass
- Old constitutional doctrines are alive -- be creative
- It's all about the separation of powers
- Advantage: deregulation

Chevron's Status: Alive . . .

- *Mozilla* reflects that the basic rule of *Chevron* still holds after 35 years:
  - courts will defer to an agency's interpretation of an "ambiguous" statute, especially in a "technical" area
  - if the statute is "ambiguous" at "Stage One," the courts generally defer at "Stage Two," even to diametrically opposite and changing agency positions
- Unless and until the Supreme Court overrules *Chevron*, lower courts re bound by it
- When circuit courts apply *Chevron*, the agency generally wins:
  - 77.4% agency win rate overall, 93.8% at Stage Two
  - Barnett & Walker, *Chevron in the Circuit Courts*, 116 Mich. L. Rev. 1 (2017) (2003-13 data)
  - agency win rates are likely higher in technical/relatively apolitical contexts

. . . But in Jeopardy

- Although Justice Scalia was once *Chevron*'s strongest advocate on the Supreme Court (*e.g., United States v. Mead Corp.,* 533 U.S. 218, 239-45 (2001)), he and other conservative jurists became skeptical of it as unduly empowering unaccountable bureaucrats:
  - "*Chevron* deference raises serious separation-of-powers questions." *Michigan v. EPA*, 135 S. Ct. 2699, 2712 (2015) (Thomas, J., concurring).
  - "*Chevron* and *Brand X* permit executive bureaucracies to swallow huge amounts of core judicial and legislative power and concentrate federal power in a way that seems more than a little difficult to square with the Constitution of the framers' design." *Gutierrez-Brizuela v. Lynch,* 834 F.3d 1142, 1149 (10th Cir. 2016) (Gorsuch, J., concurring).
  - "[I]n cases where an agency is . . . interpreting a specific statutory term or phrase [rather than, e.g., "reasonable"], courts should determine whether the agency's interpretation is the best reading of the statutory text." Kavanaugh, Fixing Statutory Interpretation, 129 Harv. L. Rev. 2118, 2154 (2016).

Death by 1000 Cuts?

- "Jurisdictional" Questions: *City of Arlington v. FCC,* 569 U.S. 290 (2013)
  - 6-3, held *Chevron* applies to "jurisdictional questions" (Justices Scalia and Thomas in majority)
  - But Justices Roberts & Alito dissented: deference under *Chevron* is due "only after we have determined on our own that Congress has given interpretive authority to the agency." 569 U.S. at 327.
- "Who Decides" Issues:
  - *Epic Sys. Corp. v. Lewis,* 138 S. Ct. 1612, 1629-30 (2018): NLRB can't decide NLRA displaces Arbitration Act
  - *Union Pac. R.R. v. STB*, 863 F.3d 816 (8th Cir. 2017): STB was delegated power to adjudicate, but FRA had power to define "OTP" trigger for adjudication
  - *Mozilla*: preemption
  - *Peter v. NantKwest, Inc*., No. 18-801: re attorney fees for PTO under 35 USC 145 -- SG did not argue *Chevron*

Death by 1000 Cuts?

- "Major" Questions:
  - *King v. Burwell*, 135 S. Ct. 2480, 2488-89 (2015): Congress wouldn't implicitly delegate a "question of deep 'economic and political significance' that is central to [the ACA] to the IRS"
  - *U.S. Telecom Ass'n v. FCC*, 855 F.3d 381, 418-35 (D.C. Cir. 2017) (Kavanaugh, J., dissenting from denial of reh'g) (Obama FCC net neutrality rule violates "major rules doctrine" and First Amendment)
- Traditional canons of statutory interpretation:
  - Context/statutory scheme: *Utility Air Regulatory Corp. v. EPA,* 573 U.S. 302, 321-24 (2014) (rejecting EPA claim of authority to regulate motor vehicle GHG)
  - Constitutional avoidance: *Solid Waste Agency of N. Cook Cty. v. U.S. Army Corps of Eng.,* 531 U.S. 159, 172-73 (2001) (no deference to Migratory Bird rule because non-navigable waters not clearly within Commerce Clause power)
  - Legislative history: *INS v. Cardoza-Fonseca*, 480 U.S. 421, 436-42 (1987)

Death by 1000 Cuts?

- Interpretive rules, interpretation of agency rules, and "unfair surprise"
  - *Chevron* applies only to rulemaking and formal adjudication (*see Mead*); *Skidmore* only applies to informal interpretation/guidance
    - *Skidmore:* weight given to agency view depends on thoroughness, validity of reasoning, consistency, other factors giving power to persuade (not control)
    - *Perez v. Mortgage Bankers Ass'n,* 135 S. Ct. 1199 (2015): APA never requires N&C for interpretive rules, but they lack force of law
    - *Azar v. Allina Health Servs*., 139 S. Ct. 1804 (2019): Medicare Act required N&C to establish "substantive legal standard," so informal new policy changing payments was invalid
  - Where an agency interprets its own rules rather than the statute, intermediate *Auer/Kisor* deference applies:
    - "The underlying regulation must be genuinely ambiguous; the agency's interpretation must be reasonable and must reflect its authoritative, expertise-based, and fair and considered judgment; and the agency must take account of reliance interests and avoid unfair surprise." *Kisor v. Wilkie,* 139 S. Ct. 2400, 2424 (2019) (Roberts, CJ, controlling concurrence); *see also Christopher v. SmithKline Beecham Corp*., 567 U.S. 142 (2012)
    - Note separation of powers rationale; is "unfair surprise" one-way ratchet?

Dormant at the Supreme Court?

- Empirically, an old study found S. Ct. agency win rates barely higher under *Chevron* (76.2%) than under *Skidmore* (73.5%) or de novo review (66%)
  - W. Eskridge & L. Baer, *The Continuum of Deference: Supreme Court Treatment of Agency Statutory Interpretations from Chevron to Hamdan,* 96 Geo. L.J. 1083, 1142 (2008)
- In OT 2017, the Court applied *Chevron* deference in 0/5 cases:
  - *Wisconsin Central Ltd. v. U.S.; Digital Realty Trust, Inc. v. Somers; Pereira v. Sessions; SAS Inst. v. Iancu; Epic Sys. v. Lewis*
- In OT 2018, the Court applied *Chevron* deference in 0/3 cases:
  - *Smith v. Berryhill; BNSF Ry. Co. v. Loos; Sturgeon v. Frost*
- Note one academic argument for S. Ct. being different -- national uniformity -- consider application to Federal Circuit

Broader Jeopardy

- Judicial survey says: most judges outside DC Circuit (but not there) dislike, although comply with, *Chevron*
  - A. Gluck & R. Posner, *Statutory Interpretation on the Bench: A Survey of 42 Judges on the Federal Courts of Appeals,* 131 Harv. L. Rev. 1298, 1348 (2018)
- Separation of Powers Restoration Act, H.R. 1927 & S. 909 (introduced by 20 House Republicans and 13 Senate Republicans on 3/27/19)
  - would amend APA to require courts in judicial review proceedings to decide all questions of law de novo
- Executive Order on Promoting the Rule of Law Through Transparency & Fairness in Civil Administrative Enforcement & Adjudication (Oct. 9, 2019), section 5:
  - No agency can seek deference "to establish a new or expanded claim of jurisdiction" without prior Federal Register/agency website publication

Separation of Powers and Appointments Clause Arguments

- As we've seen, modern conservative skepticism of Chevron is founded on separation of powers concerns -- the unaccountable executive
- The same concerns animate broader constitutional issues not just about what Congress has delegated, but whether/how it can delegate:
  - *Gundy v. United States,* 139 S. Ct. 2116 (2019): AG authority to issue sex offender regs. did not violate non-delegation doctrine given "discernible principle" in statute (5-3), but at least 4 votes to require more.
  - *Free Enter. Fund v. Pub. Co. Accounting Oversight Bd.,* 561 U.S. 477 (2010): statutory limitations on removal violated separation of powers.
  - *Ass'n of Am. R.R. v. Dept. of Transp.*, 821 F.3d 19, 38-39 (D.C. Cir. 2016): provision for STB (not President) to appoint arbitrator to resolve FRA/Amtrak disagreement on regulations violated Appointments Clause.
  - *U.S. v. Aurelius Investment,, LLC*, No. 18-1514: are members of Financial Oversight & Mgmt. Bd. for Puerto Rico "Officers of the United States" who must be appointed by President, not Congress? If so, what is the remedy?

Trump Administration Opportunities (1): Irregularities

- The Trump Administration provides a convergence of forces that creates new administrative law tensions re "who decides":
  - Executive at war with Congress
  - "Clear the swamp"/"I know best"/rule by Executive Order/tweet
  - Chaotic/"acting" appointments process
  - Unitary executive theory increasingly prevalent
- Be alert for potential issues such as:
  - Is "acting" administrator lawfully appointed as acting?
  - Any deference is generally due to the agency Congress appointed to interpret/enforce the statute, not to others in the Executive, e.g.:
    - Deference is to agency reasoning, not post hoc rationalization by DOJ/counsel on judicial review (but some courts defer to agency amicus briefs)
    - O.L.C. opinions cannot trump case law or agency interpretations (e.g. *Cook v. FDA*, 733 F.3d 1 (D.C. Cir. 2013) vs. https://www.justice.gov/olc/opinion/file/1162686/download)

Trump Administration Opportunities (2): Deregulation

- Deregulation is a major focus of the Trump presidency -- *e.g., Mozilla* -- so if you want to combat agency regulation, you may have allies in the White House, at OMB, and at DOJ/the SG's office
  - DOJ/SG may not defend in court/may avoid *Chevron* arguments.
- Executive Orders restrict regulations, impose additional requirements, and empower OMB scrutiny (but are generally not judicially enforceable).
  - E.O. 13771, section 2(a) (1/30/17): "Unless prohibited by law, whenever an executive department or agency (agency) publicly proposes for notice and comment or otherwise promulgates a new regulation, it shall identify at least two existing regulations to be repealed."
    - Also, budgeting, planning, OMB consultation, regulatory cost restrictions.
    - What's a regulation? Probably most of Federal Register is exceptions, caveats, definitions, etc.
    - If Congress says "shall," "prohibited by law"?
    - Subject to pending suit, albeit with standing issues: *Public Citizen v. Trump,* No. 17-253 (D.D.C.).

Trump Administration Opportunities (2): Deregulation

- E.O. 13777, Enforcing the Regulatory Reform Agenda (2/24/17):
  - Agency Regulatory Reform Task Forces to eliminate unnecessary/unjustified regs. in conjunction with OMB; cost-benefit and job effects analyses
- E.O. on Promoting the Rule of Law Through Improved Agency Guidance Documents (10/9/19):
  - Guidance documents on agency website, noting they lack force of law; review and consider rescinding guidance documents and report to OMB; presumptive N&C before new guidance; opportunity to contest guidance docs.; no staff issuance; OMB review of new guidance
- *See also* E.O. 12866 (9/30/93): generally requires cost-benefit analysis, OMB review, special requirements for "significant regulatory action" (e.g. $100 million + economic effect) -- not new but more emphasized under Trump

Trump Administration Opportunities (2): Deregulation

- E.O. on Promoting the Rule of Law through Transparency & Fairness in Civil Administrative Enforcement & Adjudication (10/9/19):
  - Sec. 1: "No person should be subjected to a civil administrative enforcement action or adjudication absent prior public notice of both the enforcing agency's jurisdiction over particular conduct and the legal standards applicable to that conduct. Moreover, the Federal Government should, where feasible, foster greater private-sector cooperation in enforcement, promote information sharing with the private sector, and establish predictable outcomes for private conduct."
  - Sec. 3: "Guidance documents may not be used to impose new standards of conduct on persons outside the executive branch except as expressly authorized by law or as expressly incorporated into a contract." Can cite guidance doc. only if in Federal Register/on website
  - Also: notice requirements re standards of conduct, jurisdictional claims, information collection; and right to contest and voluntary self-reporting requirements.