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KEY ENFORCEMENT PRIORITIES AND PRIVILEGE ISSUES IN GOVERNMENT AND INTERNAL INVESTIGATIONS

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Overview of Today's Presentation

- Introduction and Roles of Government Enforcement Agencies
- SEC and DOJ Enforcement Priorities
- Privilege Issues in Government/Internal Investigations
  - Privilege Basics and Overview
  - Government and Internal Investigations: Recurring Issues

Enforcement Authorities – Who Are the Players?

Department of Justice (DOJ)

- Composed of 93 US Attorneys' offices and Main Justice components
- Broad criminal and civil enforcement jurisdiction
- Operates through grand jury process
- Substantial risk of investigations

Securities and Exchange Commission (SEC)

- Responsible for protecting investors and ensuring efficient and safe operation of securities markets
- Has a variety of civil and administrative duties
- Division of Examinations has broad exam/audit authority
- Division of Enforcement can bring civil enforcement actions
- Regulatory authority gives it broad power to command productions and conduct investigations
- Enforces key laws, including the Securities Act of 1933, Securities Exchange Act of 1934, and the Investment Advisers Act of 1940 (Advisers Act)
- Has power to both regulate and enforce

Financial Industry Regulatory Authority (FINRA)

- Self-regulatory organization (SRO)
- Regulates broker-dealers and other firms dealing in securities
- Brings enforcement actions against regulated entities and individuals
- Has power to both regulate and enforce

SEC Enforcement Priorities: Division of Examinations

- **Private Funds**
  - The Division of Examinations (Division) will focus on registered investment advisers (RIAs) who manage private funds. The Division will review issues under the Advisers Act, including an adviser's fiduciary duty, and will assess risks, including a focus on compliance programs, fees and expenses, custody, fund audits, valuation, conflicts of interest, disclosures of investment risks, and controls around material nonpublic information. The Division will also review private fund advisers' portfolio strategies, risk management, and investment recommendations and allocations, focusing on conflicts and disclosures around these areas. In addition, the Division will review the practices, controls, and investor reporting around risk management and trading for private funds with indicia or signs of systemic importance.
- **ESG**
- **Retail Investors and Working Families**
- **Information Security and Operational Resiliency**
- **Emerging Technologies and Cryptoassets**

SEC Division of Enforcement Priorities

- Aggressive Enforcement and Penalties
- "Speeding Tickets"
- "More Sunshine" in Private Funds
- Conflict Issues

Recent Focus on Attorney-Client Privilege in Government Investigations

- Recent SEC and DOJ cases have brought attention to attorney-client privilege considerations.
  - *SEC v. Covington & Burling LLP*: SEC is seeking an order requiring Covington to comply with a subpoena seeking the names of clients, including public companies, whose files had been accessed in a 2020/2021 hack of Covington's email systems
  - Fenwick & West subpoenaed by federal law enforcement regarding FTX
  - Crime-fraud exception in Trump Special Counsel DOJ investigation and January 6th Committee investigation
- Each of these cases demonstrates the need to understand how to protect the attorney-client privilege and understand its scope.

Attorney-Client Privilege

- In order to establish the attorney-client privilege, the party seeking to assert the privilege must show **all** of the following:
  - a communication,
  - between privileged persons,
  - made in confidence,
  - for the purpose of seeking or rendering legal advice, and
  - with counsel acting in a legal capacity.
- The privilege is generally narrowly construed.
  - *See, e.g.*, *Westinghouse Elec. Corp. v. Republic of the Philippines*, 951 F.2d 1414, 1423 (3d Cir. 1991).

Attorney-Client Privilege

- ✓ **A communication**
  - Oral or written
  - Extends only to the communication, not the information communicated; cannot "cloak" something by copying a lawyer
- ✓ **Between privileged persons**
  - Commonly, the client and the client's attorney
    - Generally, two-way protection
  - "Client" is the intended beneficiary of the legal services
    - In corporate setting, privilege belongs to corporation, not to its employees
- ✓ **Made in confidence**
  - Cannot be made in presence of nonprivileged person
  - Not where client intends for communication to be shared with third party
- ✓ **For the purpose of seeking or rendering legal advice**
  - Not all communications
  - Does not extend to personal or business matters
- ✓ **With counsel acting in a legal capacity**

Attorney-Client Privilege

- Evolution of Privilege in the Corporate Setting
  - **Control group test (pre-*Upjohn*).** Privilege may be invoked only by those employees who communicate with counsel and who are in a position to control, or take a substantial role in the determination of, the course of action that a corporation may take based on the legal advice received.
  - **Subject-matter test.** Privilege attaches only when (i) the communication is made for the purpose of giving or receiving legal advice; (ii) the employee who is communicating with the attorney is doing so at the direction of a superior; (iii) the direction is given by the superior to obtain legal advice for the corporation; (iv) the subject matter of the communication is within the scope of the employee's duties; and (v) the communication is not disseminated beyond those persons who need to know.
  - US Supreme Court's decision in *Upjohn Co. v. United States*, 449 U.S. 383 (1981). Communications are privileged where (i) they are made to counsel at the direction of corporate superiors, (ii) they concern matters within the scope of the employees' duties, and (iii) the employees are aware that they are being questioned in order for the corporation to receive legal advice.
- Communications with agents of a lawyer for purposes of litigation or corporate due diligence (e.g., economists, consultants, accountants) are privileged, ***provided that they are retained for the purpose of enabling counsel to impart legal advice.***

Crime-Fraud Exception

- Communications between an attorney and a client in furtherance of a crime or fraud are not privileged.
  - To establish the "fraud" prong of the crime-fraud exception, the party challenging the privilege must show **(1)** a misrepresentation of a material fact, **(2)** with intent to deceive, **(3)** reliance upon the misrepresentation by the party deceived, and **(4)** resultant injury.
- May be used broadly by the government.

Privileged or Not?

PRIVILEGED

- Oral/written communications with your client relating to legal advice
- Memorializations of such communications
- Communications for the purpose of retaining counsel
- Communications between client and paralegals/support staff

NOT PRIVILEGED

- Underlying facts
- Communications where client is not seeking legal advice
- Communications with third parties
- Advice that aids in the commission of illegal activity
- Protected information that the client intentionally or inadvertently waives

Work-Product Doctrine

- **Court-created doctrine; now codified in the Federal Rules of Civil Procedure Rules:**
  - **Fed. R. Civ. P. 26(b)(3)(A)**: *Documents and Tangible Things.* Ordinarily, 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 (including the other party's attorney, consultant, surety, indemnitor, insurer, or agent). However, subject to **Rule 26(b)(4),** those materials may be discovered if:
    - (i) they are otherwise discoverable under **Rule 26(b)(1)**; and
    - (ii) the party 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.
  - But mental impressions, conclusions, opinions, and legal theories of attorney generally remain absolutely protected.
- **States have similar provisions.**
- **Materials prepared by attorney or anyone at the direction of the attorney where future litigation is a distinct possibility, including by the following persons:**
  - Paralegals
  - Support staff
  - Consultants/investigators/experts engaged by attorney
  - Client acting at attorney's direction
  - Jury research consultants

Waiver

- Evidentiary privileges can be waived
  - Only the client has authority to waive privilege **intentionally**
    - "At Issue" Waiver – privilege is waived where substance of legal advice is put at issue in a case
      - legal malpractice cases: courts frequently find that plaintiff has put the legal advice at issue and, therefore, plaintiff has waived privilege
      - where party seeks to recover reasonable legal fees and settlement costs under indemnification agreement
        - *DH Holdings Corp. v. Marconi Corp.*, 10 Misc. 3d 530 (Sup. Ct. N.Y. Cnty. 2005)
  - Others (including attorneys) can waive privilege **inadvertently**
    - Unintended failure to assert privilege
    - Unintended disclosure to third parties
- Waiver of privilege regarding some communications generally waives the privilege as to **all communications related to the same subject matter**
  - *See Fort James Corp. v. Solo Cup Co.*, 412 F.3d 1340, 1349 (Fed. Cir. 2005).
- Rule 502(d) Orders – limiting a waiver

Framework for Establishing and Protecting Attorney-Client Privilege

The appropriate client representative (GC, fiduciary, senior manager, etc.) should **prepare a memorandum or email directing in-house or outside counsel to conduct a confidential investigation** for purposes of providing legal advice to the entity.

Counsel should confirm in writing that they have received the internal investigation request. May also provide a brief outline of the direction of the investigation.

Counsel should consider advising those working on the investigation in writing that **(i)** they have been asked to assist with the investigation; **(ii)** they are to treat all information as privileged and confidential; **(iii)** they should not discuss their work or findings with others; **(iv)** they should not make copies of their notes or work papers for sharing with others; and **(v)** they should mark all investigative notes, reports, documents, and communications, including email correspondence, as "Privileged and Confidential."

Employees assisting with the investigation should be instructed to report to the lawyers directly and not through their usual chain of command.

The Investigation Team

- The team must be **independent**, **uninvolved with the matters under investigation** (either directly or by virtue of a management position), **have access to the appropriate resources** (legal, accounting, IT, and human resources), and **have relevant subject-matter expertise** in the affected business or product area.
- How regulators and enforcers view an investigation will depend on **the nature of the allegations**, **the scope of the conduct**, **the jurisdiction(s) involved**, and **the level of inquiry made**.
- The integrity of the investigation is of paramount concern and must appear independent and rigorous to clients and authorities.
- In-house counsel vs. outside counsel.

General Investigation Concerns

Will the attorney-client privilege apply to the investigation itself?

- The central question, assuming all other elements of attorney-client privilege are met, is ***whether in-house counsel was acting as a lawyer*** or ***in a nonlawyer/business capacity***
- Where in-house counsel wears more than one hat, some courts may impose a higher burden to show that their advice was given in a legal capacity, rather than as a business advisor
  - "[I]n order to demonstrate that the communication in question is privileged, the company bears the burden of 'clearly showing' that the in-house attorney gave advice in her legal capacity, not in her capacity as a business advisor." *Ames v. Black Ent. Television*, 1998 WL 812051, at *8 (S.D.N.Y. Nov. 18, 1998).

Will the work-product doctrine apply?

- Central questions:
  - Was the material at issue ***created in anticipation of litigation?***
  - Would the material ***have been created regardless of litigation?***

Witness Interviews and Privilege

- **Must provide clear *Upjohn* warnings about whom you represent, who possesses the privilege, and the purpose of the interview** (gathering facts to provide legal advice to the client).
- The DOJ requires that **companies seeking cooperation credit disclose all relevant facts regarding individual misconduct**.
- While the DOJ recognizes the "extremely important function[s]" of the attorney-client privilege and attorney work-product protection, "[w]hat the government seeks and needs to advance its legitimate (indeed, essential) law enforcement mission is not waiver of those protections, but rather the facts known to the corporation about the putative criminal misconduct under review." *Justice Manual* § 9-28.710.
- *Justice Manual* Section 9-28.710 contains a clear statement that **prosecutors should not ask companies seeking cooperation credit to waive attorney-client privilege and attorney work-product protection.**

Witness Interviews and Privilege

- **Limit distribution (both internal and external) of privileged documents**
  - Do not assume that all distributions—even within the company—are automatically confidential and privileged
  - Watch for disclosure between investigations, particularly if one is privileged and one is not
- **Make deliberate use of privilege marking—but avoid blanket designations**
- **Maximize privilege and work-product protections for interview summaries or memoranda:**
  - Mark "Privileged and Confidential"
  - Do not draft a verbatim "transcription" of the interview
  - Pepper thoughts and impressions throughout
  - Include confirmation that *Upjohn* warning was delivered

Waiver Risks in Cooperation Mode

- The government expects full cooperation for cooperation credit, including disclosure of all relevant facts.
- **Nov. 2017:** FCPA Corporate Enforcement Policy (*Justice Manual* § 9-47.120)
  - If a company (i) voluntarily self-discloses, (ii) fully cooperates, and (iii) timely remediates, there will be a presumption of resolution through declination absent certain aggravating factors.
  - The DOJ has said that the policy will apply beyond the FCPA context.
- There are risks with disclosure of privileged communications or attorney work product with the government.
- "Oral Downloads" of otherwise-privileged witness interview memoranda can result in a waiver of work-product protection over the memoranda. *See, e.g.*, *SEC v. Herrera*, 2017 WL 6041750 (S.D. Fla. Dec. 5, 2017).
- Submission of a written report to the government may result in an implied waiver of attorney-client privilege and work-product protection, if attorney-client–privileged or work-product material formed the basis of the submission. *See, e.g.*, *In re Grand Jury Investigation*, 2017 WL 4898143 (D.D.C. Oct. 2, 2017).

Waiver Risks in Cooperation Mode

Mitigating risks in cooperation mode:

- Potentially consider a confidentiality agreement with protective provisions (limitations addressed below)
  - Limit government's discretion to disclose materials produced to it;
  - Nonwaiver provisions in which the government agrees that production of privileged communication or attorney work product does not result in waiver;
  - Government will not assert a broader subject-matter waiver based on disclosures; and
  - Clawback provisions are in place to address any inadvertent disclosures.
- Where possible, share facts without disclosing protected communications or materials.
- Before sharing privileged material or attorney work product:
  - Make certain that producing material advances important interests that cannot be secured by sharing only facts that government says it wants; and
  - Ensure that benefits outweigh risk of disclosure being deemed a waiver.

Waiver Risks in Cooperation Mode

- Problems with nonwaiver agreements with the government:
  - Privileged communications are not supposed to be disclosed, especially to adversarial parties.
  - Government may require an exception to nondisclosure if information becomes pertinent to future cases or to discharge its duties as required by law.
- Mixed results in courts upholding the enforceability of these agreements.
  - Some courts have said privilege remains intact despite disclosures to the government due to, among other reasons, the public interest in furthering the truth-finding process.
  - Other courts have found waiver in disclosure to the DOJ despite nonwaiver agreements.
- Prosecutors may refuse to enter into broad nonwaiver agreements.

Selective Waiver

Minority View – Selective Waiver Allowed:

***Diversified Indus. v. Meredith*, 572 F.2d 596 (8th Cir. 1977):**
Court recognized selective waiver of the attorney-client privilege in the context of disclosures to the government. The SEC's subpoena requested a copy of an internal investigation report, which Diversified provided. The Eighth Circuit held that Diversified's disclosure of the report in a separate and nonpublic SEC investigation resulted in only a "limited waiver" of the attorney-client privilege and therefore the report was still privileged with respect to third parties.

Prevailing view – no selective waiver (most circuits):

The prevailing view in most circuits is that there can never be "selective waiver" of the attorney-client privilege or work-product protection. Thus, if a company turns over protected material (such as the results of an internal investigation) to the government, it has forever waived that privilege/protection with respect to all third parties. Does not serve purposes of attorney-client privilege—encouraging full disclosure to attorney to obtain legal advice—to allow selective waiver.

- E.g., *In re Pac. Pictures Corp.*, 679 F.3d 1121 (9th Cir. 2012): Rejecting the selective waiver doctrine; noting that Congress had considered but failed to legislate selective waiver. Also, rejecting selective waiver for production pursuant to confidentiality agreement with government.
- *In re Qwest Commc'ns Int'l Inc.*, 450 F.3d 1179 (10th Cir. 2006): Declining to adopt selective waiver doctrine; corporation's production of privileged materials to the government constituted waiver as to third-party civil litigants. Confidentiality agreements between the corporation, the SEC, and the DOJ did not support selective waiver where government could share documents with other agencies and make use of them in proceedings and investigations.

Second Circuit rejects a general doctrine but suggests limited application – *In re Steinhardt Partners L.P.*, 9 F.3d 230 (2d Cir. 1993):

While court denied mandamus petition and refused to apply selective waiver doctrine, court declined to adopt a per se rule that voluntary disclosures to the government waive work-product protection. Rather, the court recognized that a full waiver may be inappropriate where either (1) the disclosing party and the government share a common interest, or (2) the government and the disclosing party have entered into an explicit agreement that the government will maintain the confidentiality of the disclosed materials (i.e., a nonwaiver agreement).

Nonwaiver Agreements

Have been enforced in Second Circuit with some exceptions:	– *In re ex parte Application of financialright GmbH* (unpublished; S.D.N.Y. 2017): Production of privileged investigation information to DOJ under nonwaiver agreement did not waive privilege even where DOJ could disclose information in furtherance of duties/responsibilities or as otherwise required by law. – *In re Nat. Gas Commodity Litig.*, 2005 WL 1457666 (S.D.N.Y. June 21, 2005): No waiver of work-product protection where (i) disclosing party had entered into confidentiality agreement with CFTC/DOJ, and (ii) plaintiff did not show substantial need prior to securing counsel's analysis since plaintiff had access to underlying documents and data. – *Police & Fire Ret. Sys. of the City of Detroit v. SafeNet, Inc.*, 2010 WL 935317 (S.D.N.Y. Mar. 12, 2010): Defendant did not waive work-product protection when, pursuant to a confidentiality agreement, it produced privileged material to the SEC and the US Attorney's Office. Citing *Steinhardt.* – *But see Guess v. Zwrin*, 2013 WL 3481350 (S.D.N.Y. July 10, 2013): Disclosure of work product to SEC waived work product protection, notwithstanding existence of confidentiality agreement. (But plaintiff did not ask for opinion work product, so court did not decide if waiver extends that far.) Court noted that SEC's ability to disclose in furtherance of duties/responsibilities "provides for an exception that swallows the rule."
Other Circuits:	– *In re Qwest Commc'ns Int'l Inc.*, 450 F.3d 1179 (10th Cir. 2006): Confidentiality agreements giving agencies broad discretion to use documents as they saw fit did not support application of selective waiver doctrine. – *In re Columbia/HCA Healthcare Corp. Billing Prac. Litig.*, 293 F.3d 289 (6th Cir. 2002): Internal audit materials were disclosed to the DOJ under confidentiality agreement. Court rejected selective waiver doctrine and A-C privilege was waived without exception for confidentiality agreement. Work-product protection also waived since material was disclosed to adversary (government) even though it was under confidentiality agreement.

Best Practices: Minimizing Privilege Issues in Investigations

- **Update corporate policies and procedures:** Statements that all internal investigations are directed by counsel and conducted for the purpose of obtaining legal advice (i.e., not for a business purpose).
- **Ensure attorney direction and oversight:** Attorneys initiate and direct the investigation. Delegate to nonattorney agents only if the attorney is directing and overseeing their work.
- **Document and communicate the legal purpose:** Memorialize that the investigation is being conducted for the purpose of obtaining legal advice.
- Determine the point person for all communications and restrict communications to this point person.
- Restrict distribution of investigation materials.
  - Limit communications/email circulation to individuals on a "need-to-know" basis.
- Mark written materials "**Privileged and Confidential**."
- Counsel should deliver *Upjohn* warnings in interviews.
- Potentially seek a confidentiality agreement or protective order from the government depending on the circumstances.
- Provide information to government with express caveat that any waiver of attorney-client privilege or work-product protection is unintentional and subject to clawback and/or is limited to the subject of the disclosure.
- Take a thematic approach to presentation.
- Use hypotheticals to discuss and outline areas of concern.
- Focus on providing historical facts without witness-specific quotes and attributions of information. Do not read from interview memoranda.
- Rely on documents and emails to convey facts.

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With a background in senior positions at the US Securities and Exchange Commission (SEC) and as in-house counsel at a financial services firm, **Ivan** brings insights to securities investigations, examinations, and litigation. He represents public companies, financial services firms, and individuals before the SEC, the Financial Industry Regulatory Authority (FINRA), the Chicago Board Options Exchange (CBOE) and various stock exchanges. Clients in the securities industry regularly seek Ivan's advice on compliance and regulatory matters.

Read Ivan's extended profile >>

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Justin, who spent nearly a decade in the US Department of Justice's Criminal Division, represents clients in a variety of litigation matters, including government investigations, internal investigations, compliance counseling and training, and other white-collar matters involving major representations across all industries. At the DOJ, Justin most recently served as the principal assistant chief of the Fraud Section's Market Integrity and Major Frauds Unit, where he led 45 prosecutors who handled complex white-collar criminal investigations and prosecutions, including securities and commodities fraud, financial fraud, market manipulation, procurement fraud and government contracts, and public corruption matters. He is admitted to practice in New York only, and his practice is supervised by DC Bar members.

Read Justin's extended profile >>

THANK YOU