



CORPORATE WAVELENGTH

The Corporate Governance, Risk, and Compliance Web Series

Brought to you by Corporate Secretary and Foley & Lardner LLP

The New Era of Ethics and Privilege: Solving the DOJ, SEC and Sarbanes-Oxley Puzzle

June 11, 2007

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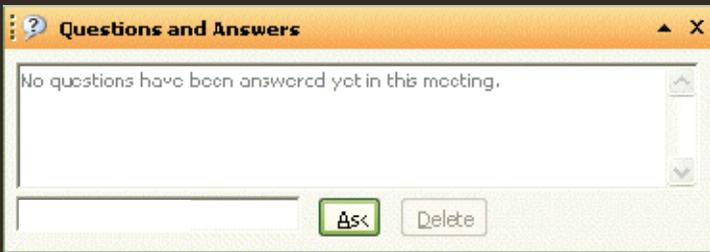


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Today's Speaker

Elizabeth Gray
 Partner, Foley & Lardner LLP

- Member of Securities Litigation, Enforcement & Regulation, White Collar Defense, and Corporate Compliance Practices
- Experienced with matters arising under the federal securities laws – including insider trading, accounting irregularities, option timing and market manipulation
- Previously worked at the SEC for 12 years, and ultimately served as Assistant Director of the Division of Enforcement



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Today's Moderator

Brendan Sheehan
 Executive Editor, *Corporate Secretary*



- Editorial mission: To provide innovative and insightful analysis for corporate secretaries, general counsel and compliance officers
- *Corporate Secretary* is the leading source of information on matters relating to the SEC, Sarbanes-Oxley, D&O insurance, shareholder communications, proxy solicitation and voting, director education and compensation, listing requirements and entity management

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Culture of Waiver

- Attorney-client Privilege has come under attack by government in recent years
- The SEC and DOJ have suggested that waiver of privilege is necessary to demonstrate cooperation, which may result in a lesser charge or penalty
- Some retrenchment in response to criticism

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Culture of Waiver cont.

- What steps can companies take to preserve and protect attorney-client privilege?
- What factors should companies consider in determining whether to waive privilege?

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The Basics of the Privilege

- In order for attorney-client privilege to apply, there must be an attorney-client relationship and the communication must be made in confidence for the purpose of obtaining legal advice

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The Basics of the Privilege cont.

- The corporation, not its constituents, is the client
 - Model Professional Rule of Conduct 1.13; Restatement of the Law Governing Lawyers Section 96
- As the client, the attorney-client privilege belongs to the corporation
 - *Upjohn Co. v. United States*, 449 U.S. 383 (1981); Model Rule 1.13 Comment [2]

Live Meeting Poll

Polling Question 1

You receive an internal report of possible accounting issues. What will be your first steps?

- **Immediately conduct a full internal investigation**
- **Conduct a brief internal investigation to determine credibility, then a full internal investigation if warranted**
- **Immediately call outside counsel to conduct an investigation**
- **Conduct a brief internal investigation to determine credibility, then call outside counsel to conduct a full investigation if warranted**

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Seaboard Report

- Issued in October 2001 – SEC report on effect of cooperation
- Companies will be given more favorable treatment if they cooperate
 - This can include no charges, reduced charges, or lighter sanctions
- Factors:
 - Compliance procedures before discovery of conduct
 - Self-reporting
 - Remedial measures
 - Waiver of attorney-client privilege and work product protection with respect to facts uncovered in the company's investigation





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Thompson Memorandum

- Issued in January 2003 – provided a guide to federal prosecutors for corporate prosecutions
- Memorandum provided new emphasis on the company's cooperation
- Two factors were:
 - Whether the company discloses the complete investigation
 - Willingness to waive attorney client and work product protection

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McNulty Memorandum

- Issued December 2006 – modified the DOJ's policy on waiver and cooperation in corporate prosecutions
- Supersedes the Thompson Memorandum
- Two main elements:
 - Waivers may only be sought where there is a legitimate need
 - Prosecutor must get prior approval

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McNulty Memorandum cont.

- Whether there is a legitimate need depends on:
 - How much the information will benefit the government's investigation
 - If the information sought can be obtained timely and without waiver
 - Completeness of the voluntary disclosure already provided
 - Collateral consequences to the corporation

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McNulty Memorandum cont.

- Two categories of privileged information:
 - Purely factual
 - Must get written permission from U.S. Attorney
 - Attorney client communications
 - Must get written permission from Deputy Attorney General

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McNulty Memorandum cont.

- Factors to be considered in charging a corporation:
 - Nature and seriousness of the offense
 - Pervasiveness of the wrongdoing within the company
 - Company's history of similar conduct
 - Timely and voluntary disclosure and willingness to cooperate
 - Existence and adequacy of pre-existing compliance program
 - Remedial actions
 - Collateral consequences
 - Adequacy of prosecution of individuals responsible
 - Adequacy of civil or regulatory enforcement

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Specter Bill (Senate Bill 186)

- Bill before the Senate that would cut back on prosecutorial power to request waivers
- It would bar prosecutors from requesting waivers or conditioning lenient treatment on disclosure of privileged information
- Bill's supporters argue that if a waiver can be considered in determining cooperation, will chill attorney client communication
- Bill's opponents defend that waivers are not prerequisites to cooperation credit, and prosecutors can no longer request waiver without a legitimate specific need

Live Meeting Poll

Polling Question 2

Which of the following Congressional actions with respect to waivers of privilege would you most strongly support?

- **Federal prosecutors should be prevented from seeking waivers of privilege**
- **Federal prosecutors should be prevented from seeking waivers of privilege unless they can clearly demonstrate a pressing need**
- **Waiver of privilege to a government body does not constitute a general waiver**
- **Waiver of privilege cannot be a factor in granting credit for cooperation**
- **Congress should not pass any laws regarding waiver of privilege**

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Privilege and Work Product Issues

- **Waiver of Privilege**
 - Possible if there was an internal investigation and you plan to disclose the results to the government
 - However, McNulty memo and events preceding it lessen the pressure to automatically waive privilege
 - Waiver of privilege “is not a prerequisite” to be considered cooperative
 - It may expedite investigations
 - Prosecutors can only request a waiver if there is a legitimate need and must obtain written authorization before making the request
 - “Selective” waiver of the privilege to the government (or external auditors) may not work





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Privilege and Work Product Issues cont.

- Work Product
 - What type of deliverables will be expected as a result of the internal investigation
 - If documents were prepared at the direction of counsel, label them properly
- Communicating with the Auditor
 - When financial statements may be affected, consider how the auditor will be involved and what effect that may have on work product

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Preserve the Privilege

- Application of the privilege to communications with in-house counsel will be narrowly construed
- Such communications must be for the purpose of securing legal – not business – advice
 - Santoni, *In-House Counsel Beware: Wearing the Business Hat Could Mean Losing the Privilege*, 11 Geo. J. Legal Ethics 393 (1998); Comment, *An Analysis of the Troubling Issues Surrounding In-House Counsel and the Attorney-Client Privilege*, 23 Hamline L. Rev. 289 (1999)

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The Privilege and the Compliance Function

- Courts have repeatedly found that the attorney must be acting as a legal counselor dispensing legal advice for which the client has an expectation of confidentiality
- Courts have often looked at the multiple hats worn by corporate attorneys and the result has been the narrowing, even elimination of the privilege for many activities
- Business activities, even though performed by an attorney, are not accorded the privilege

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Establish and Maintain a Positive Relationship with the Government

- Identify Issues Early
- Gather Information
- Know the Documents
- Interview the Witnesses
- Synthesize the Information
- Contact the Government
- Call them before they call you
- If they've already called, respond promptly and provide information
- Keep them apprised of developments
- Establish and clarify expectations

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When an Investigation Begins

- Retain Documents
 - As soon as the government contacts you, send out a broad document retention notice
 - Coordinate with IT people to ensure emails and electronic documents (including metadata) are preserved
 - Prudent to preserve documents even if you only anticipate a subpoena or information request
 - Outcome of an investigation can change dramatically when documents aren't preserved

Live Meeting Poll

Polling Question 3

You've now completed an investigation of the reported conduct and found that the allegations have merit. What will you do next?

- Retain outside counsel
- Alert the SEC to the general nature of the issue
- Ask the SEC for a meeting, during which time you fully explain the issue
- Retain outside counsel and alert the SEC to the issue
- Do nothing

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When an Investigation Begins cont.

- Be careful when employee conduct is at issue
- The distinction between the interests of the corporation and its constituents is critical to maintaining control of the privilege
- A proper *Upjohn* or “Corporate Miranda” warning to affected employees must make that distinction clear
 - Model Rule 1.13, Comment [10]
- An improper warning could inadvertently give the employee control of the privilege
 - *In re Grand Jury Subpoena*, 2005 WL 1663786 (4th Cir. July 18, 2005)

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When an Investigation Begins cont.

- Conduct Interviews
 - When possible, review the documents first so they can be used to add structure to the interviews and to avoid the need to re-interview people
 - Be sure to provide *Upjohn* warnings
 - Consider privilege issues when drafting interview memos

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Witness Interviews and Depositions

- Consider whether the company will provide separate counsel to individuals
 - Opportunity to recommend competent counsel
 - Supports cooperation with government investigations
- Joint Defense Agreements
 - Encourages efficient communication
 - But consider negative effects if ultimately employee was involved in wrongdoing
 - What documents will the company provide to individuals before the interview?

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Internal & Government Investigations Retaining Outside Counsel

- When
 - The government has contacted you or it is likely that you will self-disclose issues to the government
- Why
 - Enhanced independence, particularly when there is any possibility that senior management was involved in the issues being reviewed
 - Limited in-house resources
 - Potential disclosure item for financial restatement
- Who
 - Consider those with experience particular to the relevant government body



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Resolving Investigations

- Consider independent remedial measures
- Address identified internal control deficiencies
- Consider appropriate disciplinary measures
- Determine waiver issues
- DOJ has increasingly required non-prosecution agreements when companies seek to avoid criminal prosecution
- And, the SEC has increasingly required companies to agree to monitors or consultants before agreeing to settlements






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Thank you for your participation

For more information on the Corporate Wavelength web conference series, visit
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