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What Companies Should Consider Before Waiving the Attorney-Client Privilege During a Government Investigation

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Earlier this year, BNP Paribas pleaded guilty to a single criminal charge and agreed to pay an $8.9 billion penalty as a result of clearing transactions on behalf of clients in Sudan, Iran, and other ''blacklisted'' countries. According to a New York Times article, before pleading guilty, BNP tried to convince prosecutors investigating the bank that it had a defense to the charges based on advice it received from a well-respected U.S. law firm when performing the transactions.[1] BNP apparently waived the attorney-client privilege during the investigation in part to show prosecutors a one-page legal memo prepared by the law firm that, the bank argued, authorized the transactions at issue. Prosecutors concluded, however, that the memo only covered a small portion of BNP's conduct and did not relieve the bank from criminal liability.

BNP's experience is not unique. Many companies waive privilege during an investigation with hopes of persuading the government not to bring formal charges. And many companies end up disappointed when the government does not simply walk away or give any considerable credit to the argument that the company followed legal advice.

Before 2008, companies had little choice but to waive privilege during an investigation. Policies published by the Department of Justice and the Securities and Exchange Commission authorized staff members to request that companies waive privilege during an investigation. More importantly, those policies suggested that, in some circumstances, companies needed to waive privilege in order to obtain credit for cooperating with an investigation. As a result, companies often faced the nearly impossible situation of regulators requesting waiver backed by threats that failing to waive would be viewed as a refusal to cooperate.

The DOJ and SEC policies have since been reversed, and companies are no longer requested to waive privilege or required to waive to be seen as cooperative. Although this is a positive development, it does make a company's decision whether to waive privilege much more complex. This article is intended to aid companies analyzing this decision. It addresses important considerations such as when a company has a valid advice-of-counsel defense that would support waiving the privilege, why waiver may be helpful in the absence of an advice-of-counsel defense, when to waive privilege during an investigation, and how waiver may affect executives and employees of the company. This article ultimately advises that companies undertake a deliberate analysis of these considerations and cautions companies to be reluctant to waive privilege in light of the evident pitfalls.

Do We Have an Advice-of-Counsel Defense? One of the primary reasons a company might want to waive privilege during an investigation is to demonstrate to the

[1] Jessica Silver-Greenberg and Ben Protess, *BNP Paribas Pinned Hopes on Legal Memo, in Vain*, N.Y. Times, June 3, 2014 (available at http://dealbook.nytimes.com/2014/06/03/bnp-paribas-pinned-hopes-on-legal-memo-in-vain/).

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government that the company has a valid advice-of-counsel defense that may be used at trial. If a company can demonstrate to the government during an investigation that it has a valid advice-of-counsel defense, the company can likely significantly increase its chances of avoiding a formal prosecution or enforcement action. However, the mere fact that outside counsel approved of a potentially risky course of conduct may not be enough to successfully invoke the defense. It is important to understand the contours of the defense before waiving with the hope of dissuading the government from taking further action.

Reliance on advice of counsel is technically not a ''defense;'' it is evidence of good faith and is relevant to evaluating a defendant's scienter.[2] At trial, evidence of reliance on counsel may be presented to disprove that a company or individual acted with the required intent (criminal) or knowledge (civil) necessary to establish liability. Assuming sufficient evidence is presented at trial, the jury will receive an instruction that, if the elements of the defense are met, a defendant has not acted with the required intent to have committed the charged offense.[3]

An advice-of-counsel defense typically applies only to offenses and claims that require ''willful''[4] or ''knowing''[5] conduct. This covers many white collar offenses, including securities fraud under Rule 10b-5, mail and wire fraud, money laundering, and violations of the Foreign Corrupt Practices Act and False Claims Act. However, be mindful that there are still several other potential claims, primarily in the civil enforcement context, where advice of counsel is not a defense. Included amongst these are strict liability claims under Section 11 of the Securities Act, and negligence claims under Section 17(a) of the Securities Act.

Circuit courts define the requirements of the defense slightly differently, but in general, there are two basic elements. First, a company must disclose all material facts to an attorney.[6] Second, the company must actually follow the advice from the attorney in good faith.[7] These requirements may seem obvious, but present several issues in practice that are worth consideration.

Did We Tell Our Attorney About Everything? Perhaps the hardest hurdle to overcome when asserting the advice-of-counsel defense is proving that the lawyer received all the necessary facts to render competent advice. Before waiving, a detailed factual investigation will likely be necessary to compare what information the company possessed with what information was actually communicated to the attorney. This task may be complicated by several factors. Executives, business line employees, and in-house counsel may all have different understandings and memories about the relevant facts, and it may be difficult to get a consistent picture of what information the company actually had at the time it sought legal advice. The relevant facts may have also changed over the course of time that the company was receiving advice from the attorney, and it may be unclear whether the attorney was updated about evolving facts. Of similar concern, there may not be a definitive record of the information that the company provided to the attorney when communications were conducted by phone or sent in piece-meal fashion by email.

Relying on advice from outside counsel poses an additional layer of issues. Outside attorneys generally do not have the same access to business line employees as in-house attorneys. They may not pick up on important subtle facts, such as that one of the company's executives has a personal relationship with a counterparty to a deal. Even in the absence of such facts, companies need to ensure that they provided all information requested by outside counsel.

Beyond determining whether all advice was followed, a company considering waiver should be attuned to facts that may suggest that reliance on counsel was not done in good faith.

Part and parcel to this process, companies must determine whether outside counsel will actually support their position that all material information was disclosed. Outside attorneys may be reluctant to admit that their advice led to arguably unlawful behavior and may see an easy out by claiming that they did not have all the necessary facts to render complete advice. Cooperation from outside counsel during an investigation (and possible trial) is vital to ensuring that a viable advice of counsel defense can be raised.

Ultimately, it is easy for an aggressive regulator or prosecutor to discredit an advice-of-counsel defense if the company cannot present a clear record demonstrating a full disclosure of material facts to the attorney. A company should expect skepticism when presenting an advice-of-counsel defense when, for example, the only evidence of attorney involvement on a complex deal is a short phone call that the participants cannot recall in detail. In this situation, the hurdle for proving that the lawyer obtained a full understanding of the facts may be too high to overcome.

Did We Actually Follow Our Attorney's Advice? The second requirement for an advice-of-counsel defense is that the company followed the legal advice in good faith. A company will need to collect all evidence of communications to and from counsel and to carefully analyze whether it acted consistent with the attorney's advice. A prudent view to take is that the advice-of-counsel defense will be less successful if any advice from the lawyer was not followed, regardless of the company's interpretation of its importance.

Beyond determining whether all advice was followed, a company considering waiver should be attuned to facts that may suggest that reliance on counsel was not done in good faith. Although it may be common for a

[2] *See, e.g.*, *Howard v. SEC*, 376 F.3d 1136, 1147 (D.C. Cir. 2004).

[3] *See, e.g.,* Eleventh Circuit Pattern Jury Instruction (Criminal Cases) No. 18 (2010).

[4] *See, e.g.*, *U.S. v. Confronte*, 624 F.2d 869 (9th Cir. 1980) (applying defense to criminal tax evasion charges requiring ''willful'' conduct).

[5] *See, e.g.*, *U.S. ex rel. Pogue v. Diabetes Treatment Centers of America*, 565 F. Supp. 2d 153 (D.D.C. 2008) (applying defense to Anti-Kickback Statute and FCA claims requiring ''knowing'' conduct).

[6] *U.S. v. Lindo*, 18 F.3d 353, 356 (6th Cir. 1994).

[7] *Id.*

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company to seek a ''blessing'' from a lawyer only after developing a proposed course of conduct, the company should be mindful that a prosecutor or jury may hold it against the company for failing to consult with an attorney before developing the planned conduct. What at first blush may seem to be a valid legal opinion may later be interpreted as nothing more than a rubber stamp.

A company considering wavier should also closely analyze any written advice from the attorney. Memos from an attorney may include language that suggests a low degree of certainty in the advice given or that undermines the attorney's apparent approval of the company's conduct. Outside lawyers often feel compelled to protect themselves by stating that an action ''may comply with the law'' or by adding general caveats and disclaimers to an opinion. Such statements may undermine a company's claim that it relied in good faith on the advice.

An extra layer of complexity is added when multiple attorneys provided what may be considered as conflicting advice about a proposed course of conduct. Waiver will end up revealing to the government not only the supporting legal opinion that was ultimately relied on by the company, but also communications from other attorneys that reflect potential doubt about the legality of the conduct. This can arise both in the situation when a company consults with more than one outside counsel or when an in-house attorney disagrees with an aspect of advice presented by outside counsel. Before waiving privilege, a company should be prepared to explain why any conflicting advice was not followed and how it got comfortable with conflicting opinions between counsel. The company should look at issues such as which advice came first and whether there was any way to resolve conflicts between the attorneys' advice.

What if We Don't Have an Advice-of-Counsel Defense? Even without an iron-clad advice-of-counsel defense, there still may be practical benefits to waiver. Perhaps the most obvious reason to waive the attorney-client privilege is to appear cooperative with a government investigation. Regulators frequently emphasize how companies that are cooperative and transparent during investigations consistently avoid formal charges or receive more generous settlement terms.[8]

Despite the practical expectation that waiver will help demonstrate cooperation, companies should be aware that DOJ and SEC guidance prohibit the government from requesting a waiver and from interpreting a company's refusal to waive as a failure to cooperate.[9] Rather, the ''key measure of cooperation'' is supposed to be the company's willingness to disclose all relevant facts learned during an investigation, as opposed to disclosing privileged communications addressing those facts.[10]

Companies may also be encouraged to waive privilege when faced with a rogue employee. In this circumstance, waiver can help demonstrate that the employee disregarded legal advice received by the company. The company may not be able to assert a viable advice-of-counsel defense because the lawyer's advice was not followed, but the company may be able to show that it had proper procedures in place that the rogue employee flouted. This tactic has the benefit of potentially absolving the company of liability, but it comes at the cost of admitting to wrongdoing by an employee. Companies facing this situation should be mindful that if the rogue employee is a senior executive, pointing the finger at them may raise more questions with regulators about the culture of the company and the effectiveness of compliance and controls.

When Should We Waive Privilege? In light of the guidance referenced above prohibiting the government from asking a company to waive privilege, a company generally has flexibility in deciding when to waive. When the investigation focuses on one discrete action by the company, and the company obtained clear legal advice supporting the conduct, the company may want to waive early in the investigation in an effort to steer the government into an early decision to drop the investigation. When faced with a sprawling investigation into multiple transactions or business areas, a company may want to wait until the government shows its hand and provides some indication of which conduct it believes violated the law.

Companies should be aware that once they assert an advice-of-counsel defense, the government can ask a company to waive privilege. According to the DOJ, it ''cannot fairly be asked to discharge its responsibility to the public to investigate alleged corporate crime, or to temper what would otherwise be the appropriate course of prosecutive action, by simply accepting on faith an otherwise unproven assertion that an attorney—perhaps even an unnamed attorney—approved potentially unlawful practices.''[11] The SEC similarly instructs that a party asserting an advice of counsel defense ''must waive the privilege'' in order to ''enable the staff to evaluate the validity of the defense.''[12]

Even if a company is considering an advice-of-counsel defense at trial, there may be circumstances where it is beneficial to delay waiver during the investigation. The threat of an advice-of-counsel defense alone may be enough to scare the government away. For example, the mere fact that a company spoke with in-house or outside counsel is not privileged, and a company may be able to identify for the government the existence of numerous and frequent contacts with an attorney without revealing the substance of the communication. There may also be scenarios in which the relevant attorney has non-privileged communications with third parties, such as with a counterparty to a business deal. These communications can be highlighted by the company during negotiations with the government as more proof that an attorney was advising the company on a transaction. A savvy prosecutor may be reluctant to charge a company even without seeing privileged communications when the record demonstrates frequent and substantive contact with an attorney.

[8] *See* Robert S. Khuzami, Director, S.E.C. Division of Enforcement, Remarks at News Conference Announcing Enforcement Cooperation Initiative and New Senior Leaders (Jan. 13, 2010) (available at http://www.sec.gov/news/speech/2010/spch011310rsk.htm).

[9] USAM 9-28.710, Principles of Federal Prosecution of Business Organizations, Attorney-Client and Work Product Protection; S.E.C. Enforcement Manual § 4.3, Waiver of Privilege (Oct. 9, 2013).

[10] USAM 9-28.710.

[11] USAM 9-28.720.

[12] S.E.C. Enforcement Manual § 4.3.

Ultimately, once a company asserts an advice-of-counsel defense at trial, the attorney-client privilege will be deemed to have been waived.[13] The general principle espoused by courts during litigation is that the privilege cannot be used both as a sword and a shield.[14]

Will Waiving the Privilege Affect Our Employees at the Center of an Investigation? One of the trickiest issues to evaluate when considering waiver is how it may affect relationships with executives, line employees, and in-house counsel. It is common for regulators to target these individuals during investigations, and these targets may be the ones who actually communicated with the relevant attorney. Although the privilege belongs to the company and it is the company's decision whether to waive, individual employees may wish to assert an advice-of-counsel defense based on advice the company received.[15]

Targeted employees may have personal interests that conflict with the company's interest as to the issue of waiver. In the case of a rogue employee, a company may be able to prove it acted appropriately by waiving privilege, but the rogue employee will likely be hurt by evidence that he acted contrary to legal advice. This is an obvious example. However, oftentimes the situations are less obvious and more complex. Take, for example, the scenario in which the government is investigating several mortgage backed securities structured by a bank and is considering taking action both against the bank and the deal managers in charge of the individual securities. If one deal manager relied heavily on attorney advice before communicating with investors, it will likely be in his personal interest for the company to waive privilege and reveal those communications. On the other hand, the company may be hesitant to waive if there is little to no record of attorney advice supporting the actions of the other deal managers.

These issues become even more complex when an investigation leads to a formal prosecution or enforcement action. There is limited legal authority from courts on how to handle an employee seeking to assert an advice-of-counsel defense when a company refuses to waive privilege. One court has held that, in the criminal context, an individual's Sixth Amendment right to present a defense may outweigh a company's interest in preventing disclosure of privileged communications.[16] In *U.S. v. W.R. Grace*, a mining company and seven of its executives were indicted for conspiring to conceal information about the dangers asbestos posed to the mine workers. The company refused to waive privilege out of concern for the impact waiver would have on pending civil litigation. Five of the executives moved to sever their trials so they could present otherwise privileged evidence to support an advice-of-counsel defense. The District of Montana agreed to sever the trials of two executives, including the company's general counsel, after reviewing documents under seal that had ''significant exculpatory value, the admission of which is incompatible with [the company's] right to a fair trial.''[17] The court concluded that, on balance, the two executives' Sixth Amendment rights outweighed the company's interest in preserving privilege. The case never proceeded to trial, so the court was never forced to make a decision about which privileged communications would ultimately be admitted at trial. The decision in *W.R. Grace* has been cited favorably by other courts,[18] but none have addressed the key issue of when a criminal defendant is able to introduce communications that his employer claims are privileged.

The balancing approach used in *W.R. Grace* does not apply in the context of a civil enforcement action because an individual's Sixth Amendment right is not at issue. It is still unclear how courts will handle the case of an individual facing an enforcement action who wants to raise an advice-of-counsel defense over the privilege assertion of the company. In one case that had the potential to bring this issue to a head, the SEC filed a motion taking the position that, if the court would not force the company to waive privilege, the individual should be precluded from asserting an advice-of-counsel defense and from presenting evidence referencing the advice received from counsel.[19] The case was resolved without a decision on the motion.

The uncertainty of how this issue will be managed by the courts on cases that proceed to trial emphasizes the need for companies to try to get as many targeted employees (particularly executives) to buy-in to the company's decision about waiver during the investigative stage. Other than in a situation with a rogue employee, consulting with counsel for the individuals will help a company determine how to best wade through the potential conflicts with employees that may arise once a decision is made on waiver.

Will Waiving Hurt Us in Private Civil Litigation? Another important consideration when contemplating waiver during an investigation is the likelihood that disclosed privileged communications will support plaintiffs' claims in private civil litigation. Privileged communications may help spurned investors or counterparties find the ammunition necessary to support a case that may pose far more significant damages than an enforcement action.

It is worth noting for those familiar with the doctrine of selective waiver that most circuit courts reject the doctrine in its entirety.[20] For those not familiar, selective waiver is a doctrine that allows a company to disclose privileged communications to a government regulator without waiving the privilege more broadly. Defendants have promoted selective waiver as a means of encouraging cooperation with a government regulator by removing the threat that privileged communications disclosed during an investigation will be obtained by private litigants. The Eighth Circuit is the only circuit that universally approves of the application of selective waiver.[21] The fact that most circuits reject selective

[13] *Chevron Corp. v. Penzoil Co.*, 974 F.2d 1156, 1162-63 (9th Cir. 1992).
[14] *Id.*
[15] *See U.S. v. McClatchey*, 217 F.3d 823, 830-32 (10th Cir. 2000).
[16] *U.S. v. W.R. Grace*, 439 F. Supp. 2d 1125 (D. Mont. 2006)
[17] 439 F. Supp. 2d at 1147.
[18] *See U.S. v. Mix*, No. 12-171 Sec. K(1), 2012 WL 2420016 (E.D. La. June 26, 2012).
[19] *See S.E.C. v. Stoker*, No. 11-civ-07388, Pl.'s Mem. in Support of Mot. to Compel., ECF No. 40 (S.D.N.Y. 2011).
[20] *See* E. Scott Morvillo & Jason Somensatto, *Disclosure to the Government and the Current State of Selective Waiver*, Practising Law Institute, Internal Investigations 2013 Course Handbook (Mar. 29, 2013).
[21] *See Diversified Industries, Inc. v. Meredith*, 572 F.2d 596, 611 (8th Cir. 1977).

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waiver, and the doctrine is universally applied in only one circuit, means companies should be reluctant to rely on selective waiver as a protection when deciding whether to waive privilege during an investigation unless future litigation will be confined to the Eighth Circuit.

Conclusion. Deciding to waive privilege is a complex decision that requires strategic consideration of several variables. There is no one-size-fits-all approach. As a result, the decision should only be made after consultation with all key players, including management, outside counsel, and counsel for affected employees. This process will help reveal the numerous potential issues that might present problems and cautions against waiver.