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CLIENT ALERT

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Recent Court Decision Highlights the Risk of Corporate Privilege Waiver when Cooperating with Government Investigation

By: Joshua Robbins and Alexander Carroll

On May 4, 2022, New Jersey federal district judge Kevin McNulty unsealed a decision ordering Cognizant Technology Solutions Corp. to produce two of its former executives unredacted versions of memoranda and notes from its outside counsel's internal investigation into foreign bribery at the company.[1] This decision further enforced the court's finding in February that the company and its counsel had waived privilege and work product protection over the documents by disclosing details of the investigation to the Department of Justice while negotiating to resolve a criminal investigation. Both rulings serve as a cautionary reminder to companies to remain vigilant in preserving privilege, even when cooperating with the government.

DOJ Policy Regarding Corporate Cooperation and Privilege

Companies under investigation by DOJ or other federal agencies typically choose to cooperate with the government. Given the risks of indictment and collateral consequences (such as debarment from government programs), as well as the incentives DOJ provides for cooperation (such as the prospect of reduced penalties and deferred prosecution),[2] the decision is often an easy one.

How to cooperate can be trickier. At a minimum, DOJ has long expected that the company provide access to non-privileged materials and information it has on the facts under investigation. Outside counsel often do so through formal presentations, sometimes involving written notes, slide decks, or other visual aids, and frequently delving into details of relevant company operations, personnel, and documents. Counsel generally learns this information in the course of an internal investigation by reviewing relevant documents and interviewing company employees. The more difficult question is whether counsel should or must also reveal information that is generally covered by attorney-client privilege, such as the specific statements of company personnel to counsel.

DOJ policy on this point has varied over time. Under the "Holder Memo" and "Thompson Memo" issued in 1999 and 2003 by then-Deputy Attorneys General Eric Holder and Larry Thompson, DOJ stated that in determining whether to charge a business organization with a crime, prosecutors could consider as a factor its "willingness . . . to waive the privileges when necessary to provide timely and complete information." The policy was hugely controversial and drew intense opposition from the defense bar and

[1] *United States v. Coburn and Schwartz*, No. 2:19-cr-00120, Order, April 27, 2022.
[2] *See* Justice Manual, 9-28.700 ("Cooperation is a mitigating factor, by which a corporation . . . can gain credit in a case that otherwise is appropriate for indictment and prosecution.")

business community. By 2006, it was replaced by a series of further policy memoranda weakening and then eliminating the prospect of using privilege waiver as a factor in resolving corporate investigations.

The current policy is stated in the DOJ Justice Manual's Principles of Federal Prosecution of Business Organizations.[3] As it explains, to receive cooperation credit, a company "must identify all individuals substantially involved in or responsible for the misconduct at issue . . . and provide the Department all relevant facts relating to that misconduct." Justice Manual, § 9-28.700. At the same time, "[e]ligibility for cooperation credit is not predicated upon the waiver of attorney-client privilege or work product protection. *Id.*, § 9-28.720. Indeed, the Manual notes that while a company may choose to waive attorney-client privilege, "prosecutors should not ask for such waivers and are directed not to do so." *Id.* § 9-28.710. In particular, the Manual says that a company need not produce, and prosecutors may not request, notes of interviews of company personnel conducted by counsel. *Id.*, § 9-28.720, n.2.

Rather, the Manual stresses, "the sort of cooperation that is most valuable . . . is disclosure of the relevant *facts* concerning such misconduct." *Id.* To reiterate the point, the manual explains that the key question is this: "has the party timely disclosed the relevant facts about the putative misconduct?" (*Id.*) And to stress further that privilege waiver is not to be sought, the Manual says that "a corporation should receive the same credit for disclosing facts contained in materials that are not protected by the attorney-client privilege or attorney work product as it would for disclosing identical facts contained in materials that are so protected." *Id.*

In practice, the line between the required thorough disclosure of facts and the unnecessary waiver of privilege can be perilously unclear. To instill confidence in the quality and thoroughness of the investigation, company counsel may discuss with prosecutors some of the parameters of the investigation, such as the volume and nature of records reviewed and the categories or even identities of individuals interviewed. But discussion of the source of particular information, the contents of interviews, or counsel's impressions of any information learned in the investigation can be fraught with risk. Exactly what is revealed in cooperative presentations can determine whether privilege has been waived, both as to the government and as to third parties.

The Cognizant Case

The Cognizant waiver decisions arose from allegations that the company's President Gordon Coburn and Chief Legal Officer Steven Schwartz had authorized paying bribes to an Indian government official in return for a permit to build a facility in that country. The company hired outside counsel to conduct an internal investigation, and then voluntarily disclosed the matter to the government. DOJ opened an investigation into violations of the Foreign Corrupt Practices Act (FCPA), and the company cooperated with it extensively. Based largely on the company's voluntary disclosure and cooperation, DOJ agreed not to bring any charges against the company, nor even to require it to enter into a deferred prosecution agreement.[4]

[3] https://www.justice.gov/jm/jm-9-28000-principles-federal-prosecution-business-organizations

[4] Letter from DOJ to Counsel for Cognizant Technology Solutions Corporation, February 13, 2019, available at https://www.justice.gov/criminal-fraud/file/1132666/download. The company agreed to pay over $25 million in fines and disgorgement of profits to the Securities and Exchange Commission.

As the court later found, part of Cognizant's cooperation included its counsel's providing oral "downloads"—that is, "detailed accounts"—of the contents of 42 privileged witness interviews of 19 company employees (including Coburn and Schwartz), conducted by counsel in the internal investigation. According to Coburn and Schwartz, these oral reports were "sweeping in scope," covering virtually every issue in the case. Cognizant apparently admitted that its counsel had actually "read out" to prosecutors specific portions of its memoranda of the interviews.

The government then turned its attention to Coburn and Schwartz, charging both with FCPA violations. The two now-former executives claimed that DOJ had improperly "outsourced" its investigation to Cognizant's counsel, and served subpoenas on the company for records of its internal investigation, such as statements made by company employees in the investigation, as well as attorneys' notes and memoranda from the investigation, and all emails related to the investigation. When the company objected that the requested records were protected by attorney-client privilege and the attorney work product doctrine, Coburn and Schwartz moved to compel production, arguing that the company had waived privilege as to the entire internal investigation.

The court first addressed the waiver issue in February 1, 2022 decision. It found that company counsel's oral "downloads" of their interviews of Cognizant employees waived the company's attorney-client privilege and work product protection as to the entire contents of those interviews. Indeed, it went further, finding that the disclosures entailed a broad waiver as to all subject matter covered by the downloads and interviews. Among other things, the court held that the company was thus required to produce to Coburn and Schwartz (1) "all memoranda, notes, summaries, or other records of the interviews themselves"; (2) all documents and communications described in the "downloads" (e.g., otherwise privileged internal emails); and (3) documents and communications that counsel reviewed and that formed "any part of the basis" of the presentations to DOJ.

That decision, however, did not quite settle the matter. Cognizant later asked the court to "clarify" its order and confirm that it was permitted to "extensively redact" investigation interview memoranda and withhold production of its counsel's notes related to its presentations to the government. In a decision unsealed on May 4, the court rejected this position, and ordered the memoranda and notes produced in full, unredacted. As it explained, even if those items had not been conveyed to the government "verbatim and in their entirety," they were nonetheless "foundational to Cognizant's presentation to the government," and thus subject to the waiver.

The court also observed that there was an important upside to the company's choices. In its view, the company had "dodged a bullet" in persuading the government to decline prosecution entirely, and "could not have anticipated, at least vis-à-vis the government, that it could shield anything"—i.e., privileged communications or attorney work product—in order to receive such cooperation credit. That is an arguable premise, given the DOJ policy on waiver discussed above,[5] but it apparently influenced the court's approach to the waiver issue.

[5] DOJ declined to prosecute Cognizant as part of its recently-developed FCPA Corporate Enforcement Policy. That program, incorporated into the Justice Manual at § 9-47.120, confirms that it does not create any exceptions to the general policy against basing cooperation credit on waiver of privilege.

The timing of the court's decisions may have spared the company a few bullets more. In September 2021, it reached a $95 million dollar settlement to resolve a shareholder class action based on its failure to property disclose the bribe payments that led to the government disclosures and DOJ prosecution. Had the court in the criminal case found waiver earlier, the plaintiffs in the class action may have been able to obtain the same records that Coburn and Schwartz compelled, as waiver to the government is typically considered waiver as to third parties—such as plaintiff shareholders and consumers—as well. *See, e.g., In re Pacific Pictures Corp.*, 679 F.3d 1121 (9th Cir. 2012).

What to Do:
While cooperating with government investigations may be unavoidable for most companies, privilege and work product waiver is not. To avoid the risk of such waiver and its collateral consequences for parallel civil litigation, companies and their counsel should be cautious in communicating with the government, keeping in mind DOJ's policy on waiver. In particular:

1. As discussed in the Justice Manual, disclose to the government only the ultimate *facts* found through investigation. If investigators obtained the facts through privileged sources (e.g., counsel interviews), do not discuss those sources.
2. Do not disclose, either in detail or in general, interview statements or other communications between counsel and company personnel. In particular, do not quote verbatim statements made during any investigation interviews or anything said in internal emails or other written records created during the investigation.
3. Do not discuss the content of any investigation memoranda or notes written by counsel or those working under their direction, nor counsel's mental impressions or opinions of interviews or other aspects of the investigation.
4. If government representatives press for information that appears to risk privilege waiver, cite to the relevant DOJ policy—and possibly to the *Cognizant* decisions—as a basis for resisting.

Joshua Robbins
Shareholder
(949) 224-6284
jrobbins@buchalter.com

Alexander Carroll
Attorney
(949) 224-6495
acarroll@buchalter.com