

Effectively Responding to Government Investigations

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Background

► Domestic and Foreign Government Agencies

- DOJ - Antitrust, US Attorneys, Tax, Civil Division; SEC; PCAOB; CFPB; IRS - Chief Counsel, Exam, OPR; FDA; CMS; DoD IG; HHS OIG; DOE; Congressional Committees; State AGs; Foreign Prosecutors and Tax Authorities, etc.

► Types of Investigations

- Criminal, Civil Enforcement, Mixed Criminal and Civil, Qui Tam, Regulatory, Political, etc.

► Common Issues, Challenges, and Strategies

- Unilateral
- Uncommon leverage
- Potentially very high stakes

Guiding Principles

- Don't Make Things Worse
- Establish Effective Communication and Credibility
- Out-Investigate the Government
- See the Big Picture
- Protect the Privilege
- Develop an Exit Strategy

Don't Make Things Worse

► US Attorneys > USAM > Title 9 > USAM Chapter 9-28.000

► PRINCIPLES OF FEDERAL PROSECUTION OF BUSINESS ORGANIZATIONS [new August 2008]

► 9-28.730 -- **Obstructing the Investigation**

► **Another factor to be weighed by the prosecutor is whether the corporation has engaged in conduct intended to impede the investigation.** Examples of such conduct could include: **inappropriate directions to employees** or their counsel, such as directions not to be truthful or to conceal relevant facts; making representations or submissions that contain **misleading assertions or material omissions**; and **incomplete or delayed production of records.**

Don't Make Things Worse

UNITED STATES DISTRICT COURT
SOUTHERN DISTRICT OF NEW YORK

----- X
UNITED STATES OF AMERICA :

- against - :

JEFFREY STEIN,
JOHN LANNING,
RICHARD SMITH,

JEFFREY

PHILIP V

JOHN L

ROBERT

DAVID

LARRY

STEVEN

RAYMOND

also k

GREGG

RANDY

MARK V

CAROL

DAVID

CARL HASTING,

RICHARD ROSENTHAL, and

DAVID GREENBERG,

Defendants.

X

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----- X

**SUPERSEDING
INDICTMENT**

S1 05 Cr. 888 (LAK)

Concealing Shelters with Sham Attorney-Client Privilege Claims

58. The conspirators also attempted to conceal their fraudulent tax shelter activities by attempting to cloak communications regarding those activities and certain of the activities themselves with the attorney-client privilege, although the

Don't Make Things Worse

- Handling a search warrant
 - Observe and document, but don't interfere
- Instructing employees regarding requests for interviews
 - Precise, written instructions regarding rights
- Disseminating information
- Interfacing with current and former employees
 - Counsel
 - Joint defense agreements
- Preserving and producing documents

Establishing Communication and Credibility

- Select appropriate outside counsel
 - Institutional knowledge
 - Respect
 - eDiscovery
- Create constructive dialogue
 - Listen
 - Don't get ahead of yourself or the facts
- Maintain open lines of communication
- Keep promises
 - Reliably produce documents
- Be proactive

Out-Investigate the Government

► In conducting an investigation, determining whether to bring charges, and negotiating plea or other agreements, prosecutors should consider the following factors in reaching a decision as to the proper treatment of a corporate target:

- the corporation's timely and voluntary disclosure of wrongdoing and its willingness to cooperate in the investigation of its agents (see USAM 9-28.700);
- 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 USAM 9-28.900);

► US Attorneys > USAM > Title 9 > USAM Chapter 9-28.000

Out-Investigate the Government

- Advantages
 - Determine severity of problem
 - Get ahead with management
 - Take action against wrongdoers
 - Keep open cooperation credit
 - Shape strategy
 - Shorten/narrow investigation
- Challenges
 - Cost
 - Client buy-in
 - Preserving privilege

See the Big Picture: Recent Trends

- Judge Kaplan decisions
 - 2009 Bank of America Settlement
 - 2011 Citicorp settlement
- Recent change to SEC Policy
 - June 2013 memo to SEC staff
 - Revision to “Neither Admit Nor Deny” policy
 - Will seek admissions in certain cases
- Other trends?

See the Big Picture

- Anticipate the next wave
 - Disclosures
 - Press
 - Other Investigations
 - Tag-Along Litigation
 - Shareholder class actions
 - Derivative actions
- Establish acceptable guideposts

Navigating Privilege

- Balance of Factors
 - Obtain necessary information from employees
 - Maintain flexibility to use information for Company's benefit
 - Avoiding exposing Company to collateral consequences
 - Getting the government documents quickly
 - Cost concerns
- Areas of Concern
 - Request for waivers
 - Reliance on advice of counsel
 - Inadvertent waiver

Navigating Privilege: Selective Waiver

- ▶ Majority

- ▶ Provision of privileged information to the government constitutes waiver to all parties
- ▶ See, e.g., *Qwest Communications v. International Inc.*, 450 F.3d 1179 (10th Cir. 2006).

- ▶ Minority

- ▶ No general waiver; privilege can still be asserted against third parties
- ▶ See, e.g., *Diversified Industries, Inc. v. Meredith*, 572 F.2d 596 (8th Cir. 1977).

- ▶ Proposal eliminated from Fed. R. Evid. 502

- ▶ Too controversial

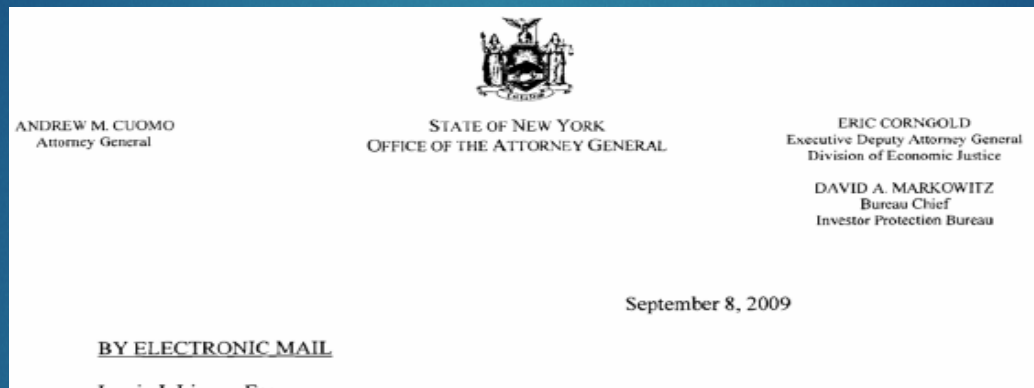
Navigating Privilege: Requests for Waiver

US Attorneys > USAM > Title 9 > USAM Chapter 9-28.000

9-28.710, Attorney-Client and Work Product Protections [new August 2008]

The Department understands that the attorney-client privilege and attorney work product protection are essential and long-recognized components of the American legal system. **What 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.** In addition, while a corporation remains free to convey non-factual or "core" attorney-client communications or work product—if and only if the corporation voluntarily chooses to do so—**prosecutors should not ask for such waivers and are directed not to do so.** The critical factor is whether the corporation has provided the facts about the events, as explained further herein.

Navigating Privilege: Reliance on Advice



The facts of the cascading losses and bonus payments – and the facts of Bank of America’s senior executives’ knowledge of these events – are straightforward. However, as discussed in detail below, the decision-making process by which Bank of America and its executives decided not to disclose these material facts to Bank of America’s shareholders has been hidden from our investigation by Bank of America’s repeated invocation of the attorney-client privilege. These invocations have been made even though Bank of America has offered reliance on legal advice as a justification for each of its failures to disclose. It is axiomatic, however, that the attorney-client privilege may not be used as both a sword and a shield.¹

Navigating Privilege: Inadvertent Waiver

- Guidance from Federal Rules Advisory Committee
 - ▶ Precautions taken, scope of discovery, extent of disclosure, number of documents, time constraints, use of analytic software and linguistic tools, use of records management system, time taken to rectify the error, fairness
- Case law
 - ▶ Similar factors
- Document procedures
- Obtain agreement or understanding
- Act quickly

Develop an Exit Strategy

- Early intervention
- Objective assessment of facts and exposure
- Continuous dialogue with government
- Shape course of investigation
- Demonstrate current compliance
- Balance competing costs
- Minimize collateral consequences

Questions

