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THIRTY YEARS IN THE MAKING: 42 C.F.R. PART 2 REVISITED AND REVISED

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Introduction

A lot can change in 30 years. In 1987, Ronald Reagan was President, nobody was on Twitter, and Apple was selling desktop computers rather than iPhones.

Something that had not changed since 1987, until the release of a Final Rule on January 18, 2017, was 42 C.F.R. Part 2, known as the Confidentiality of Alcohol and Drug Abuse Patient Records regulations ("Part 2"). Part 2 originates from federal legislation passed in the 1970s intended to protect the confidentiality of records containing the identity, diagnosis, prognosis, or treatment of any patient that are maintained in connection with the performance of any federally assisted program or activity relating to substance abuse education, prevention, training, treatment, rehabilitation, or research.[1] While Part 2 regulations have undergone some revisions since their initial promulgation in 1975, 1987 was the last time they saw any substantive alterations.[2]

Motivating Part 2 was the belief that a stigma attached to substance abuse disorders and that substance use disorder information could be misused against patients, causing them to avoid treatment and leading to a host of other negative consequences. For example, the disclosure of this information could result in the loss of employment, loss of housing, loss of child custody, discrimination by medical professionals and insurers, arrest, prosecution, and incarceration.[3] The intended purpose of Part 2 was to ensure that an individual receiving treatment for a substance use disorder in a Part 2 program was not made more vulnerable by reason of the availability of his record than an individual with a substance use disorder who does not seek treatment.[4] Its design is to protect Part 2 patient identifying information for patients seeking diagnosis, treatment, or referral for treatment for substance use disorders.

Part 2 applied to any information about alcohol and drug abuse patients obtained by a federally-assisted program. Part 2 defined a "program" as any individual or entity that held itself out as providing, and provided, alcohol or drug abuse diagnosis, treatment or referral for treatment.[5] The definition included any identified unit within a general medical facility providing these services, as well as medical personnel or other staff in a general medical care facility whose primary function is to provide such services.[6]

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IMPACT OF DOJ'S CORPORATE HEALTHCARE FRAUD ENFORCEMENT STRATEGIES ON ORGANIZATIONS AND DEFENSE COUNSEL

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Introduction

United States Department of Justice ("DOJ") corporate healthcare fraud enforcement strategies and policies, including most recently the Yates Memo's "individual accountability" policy, require organizations to provide information about their employees' involvement in misconduct in order to obtain cooperation credit.[1] The Yates Memo in particular has sparked renewed attention to the potential that the interests of organizations and their employees may become antagonistic during the course of internal investigations, cooperation, disclosure and resolution of matters.[2] Prior to issuance of the Yates Memo, cooperation credit was potentially available under DOJ policy even if an organization failed to disclose basic facts about its employees' involvement in criminal misconduct.[3] Now, "in order to qualify for **any** cooperation credit, corporations must provide to [DOJ] **all** relevant facts relating to the individuals responsible for the misconduct."[4] Moreover, the Yates Memo is not limited to criminal investigations, but applies to civil corporate matters, as well.[5] For those who were concerned about the prospect of conflicts between the interests of an organization and its employees, the Yates Memo ups the ante across the board.

DOJ is also pursuing other policies and strategies that increase the likelihood that the interests of organizations and their employees will become adverse, particularly in the healthcare industry. In late 2015, DOJ's Criminal Division's Fraud Section formed a separate Corporate Health Care Fraud Unit,[6] and DOJ has announced quite publicly that it is "increasingly applying traditional investigative techniques – including undercover officers, informants with body wires, bugs in offices, hidden cameras, GPS trackers and many other law enforcement tools – in health care fraud cases, including corporate health care fraud investigations."[7] In addition, DOJ has asserted that it "will follow evidence of healthcare fraud wherever it leads, including into corporate boardrooms and executive suites;"[8] that it is partnering with relator counsel;[9] and that the experienced prosecutors in its Corporate Health Care Fraud Unit "carefully review virtually every False Claims Act lawsuit filed by *qui tam* relators across the United States."[10] Recently, Acting Assistant Attorney General Blanco reiterated that healthcare fraud will be vigorously pursued under the new administration,[11] and there is no reason to think that DOJ's approach will change.

The upshot is that every civil False Claims Act ("FCA") case may also be a criminal case, and every criminal healthcare fraud case may also be a civil FCA case. Thus, every individual with potential civil FCA liability also faces potential criminal liability, further increasing the potential for clashes between the interests of the organization and its personnel. Employees may be approached by agents of the Federal Bureau of Investigation ("FBI") or Department of Health and Human Services Office of Inspector General ("OIG"), and before the organization or its counsel is even aware there is an investigation, employees may sign cooperation agreements with the government, and might also begin to surreptitiously record conversations. And, rather than cooperating with organization counsel, employees may think that their penal interests require silence or dissembling, or that their financial, moral or patriotic interests warrant becoming whistleblowers.

This article addresses emerging issues in the conduct of internal investigations in light of current DOJ policies, including the danger of inadequate *Upjohn* warnings, the pitfalls of joint representation and joint defense agreements, the ramifications of providing employees with counsel and advancing attorney's fees to them, the risks of disciplining employees believed to be culpable, and the methods that can be used to disclose to the government facts obtained through privileged investigations and communications.

The Dangers of Inadequate *Upjohn* Warnings

In navigating this changing landscape, organizations and their counsel need to be aware of ethical requirements and practical constraints in their dealings with employees. The American Bar Association ("ABA") Model Rules address a lawyer's obligations when interests are, or may become, adverse, requiring the lawyer to explain whom he or she is representing:

> In dealing with an organization's directors, officers, employees, members, shareholders or other constituents, a lawyer shall explain the identity of the client when the lawyer knows or reasonably should know that the

> organization's interests are adverse to those of the constituents with whom the lawyer is dealing.[12]

The ethical obligation of the lawyer who represents an organization to provide this information to the organization's employees traditionally has been satisfied by giving an *Upjohn* warning.[13] As recommended by an ABA working group, the warning should address the following issues:

- The lawyer represents the company only and not the witness personally.
- The lawyer is collecting facts for the purpose of providing legal advice to the company.
- The communication is protected by the attorney-client privilege, which belongs exclusively to the company, not the witness.
- The company may choose to waive the privilege and disclose the communication to a third party, including the government.
- The communication must be kept confidential, meaning that it cannot be disclosed to any third party other than the witness's counsel.[14]

Some lawyers believe that DOJ's requirement (as expressed in the Yates Memo) that companies "turn in" their employees will drive a wedge between counsel and executives. The standard *Upjohn* warning makes clear that counsel does not represent the employee, but it does not mention that the organization may well use what the employees say against them. Sophisticated employees may be aware of that possibility and may think that the organization is not showing them the loyalty they may feel they've earned. And employees unaware of that possibility may be jarred by the warning itself.

To soften the harsh sound of the *Upjohn* warning, there may be an impulse to water it down.[15] But the failure to provide a clear *Upjohn* warning, and to document it, may have serious consequences, including a finding that the lawyer represents both the organization and the employee.[16] Moreover, failure to safeguard both parties' confidences could result in a referral to the State Bar for possible disciplinary action.[17]

The Pitfalls of Joint Representation and Joint Defense Agreements

In the past, some counsel have tried to represent both the organization and its employees. Now, however, counsel must give ever more careful consideration to the possibility that it will be in the interest of the organization to disclose facts that inculpate individual employees, and whether, under the circumstances of the particular case and the employee's involvement in the issues under investigation, that presents a conflict of interest.[18] Representing both an organization and its employees would prove challenging in many circumstances.[19] A prudent corporation may wish to structure its representation in such a way as to avoid being disabled, by virtue of joint representation, from providing some relevant facts to the government and thereby limiting its ability to seek cooperation credit.

At times, an organization and its employee have entered into a common interest or joint defense agreement.[20] Such an agreement allows individuals and entities with common legal interests, such as defending against a government investigation or litigation, to share privileged information while maintaining the privilege.

In 1999 DOJ adopted a policy that was decidedly hostile to joint defense agreements, warning that support of culpable employees by providing information to them about the government's investigation pursuant to a joint defense agreement may be considered by a prosecutor in weighing the value of cooperation.[21] In 2008 DOJ revised that policy, and although it now is ostensibly noncommittal,[22] in practice it discourages their use. DOJ's current position, stated in a provision of the U.S. Attorney's Manual entitled "Obstructing the Investigation," is that "[t]he mere participation by a corporation in a joint defense agreement does not render the corporation ineligible to receive cooperation credit, and prosecutors may not request that a corporation refrain from entering into such agreements."[23] DOJ goes on to caution, however, that because entering into such an agreement has the potential to complicate a corporation's ability to cooperate:

> the corporation may wish to avoid putting itself in the position of being disabled, by virtue of a particular joint defense or similar agreement, from providing some relevant facts to the government and thereby limiting its ability to seek such cooperation credit. Such might be the case if the corporation gathers facts from employees who have entered into a joint defense agreement with the corporation, and who may later seek to prevent the corporation from disclosing the facts it has acquired.[24]

DOJ concludes that ultimately, "[c]orporations may wish to address this situation by crafting or participating in joint defense agreements, to the extent they choose to enter them, that provide such flexibility as they deem appropriate."[25] Thus, as with joint representation of employees, a joint defense agreement with an employee may prove to be an obstacle to obtaining cooperation credit for the organization.

The Ramifications of Providing Employees with Counsel and Advancing Attorney's Fees

Once counsel provides a sufficient *Upjohn* warning, other issues may arise. An employee to whom an *Upjohn* warning is given might wonder, and may well ask, "Do I need to get my own counsel?" and "Who will pay the attorney's fees?"

Model Rule 4.3 provides a basis

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for a partial response to the first question. It reads:

> The lawyer shall not give legal advice to an unrepresented person, other than the advice to secure counsel, if the lawyer knows or reasonably should know that the interests of such a person are or have a reasonable possibility of being in conflict with the interests of the client.[26]

Thus, if there is a reasonable possibility of the organization's and the employee's interests being in conflict, the lawyer may, but is not required to, advise the employee to secure counsel, and no more. Further, when a "lawyer knows or reasonably should know that the unrepresented person misunderstands the lawyer's role in the matter, the lawyer shall make reasonable efforts to correct the misunderstanding."[27]

Regarding payment of legal fees, prior DOJ policy – specifically, the 2003 Thompson Memo – viewed advancing attorney's fees to employee counsel as demonstrating lack of cooperation.[28] The Second Circuit held that, as practiced in the case before it, the policy violated the Sixth Amendment,[29] and DOJ rescinded it,[30] but the concerns that animated its adoption – that a company may pretend cooperation while "circling the wagons," and may pay an employee's legal fees to advance such a strategy[31] – may still linger within DOJ. In addition, when the organization decides to pay for an employee's counsel, arrangements to interview the employee for an internal investigation become more cumbersome. Moreover, an employee's lawyer may think that it is in the employee's interest not to be interviewed by the organization, depriving organization counsel of important facts. An employee's lawyer might even arrange for an employee to meet with the government without the organization's knowledge.

These considerations underscore the importance and value of setting the organization's policy for advancing or indemnifying fees of its personnel at the earliest stages, taking into account the organization's bylaws, applicable law, business considerations, and how the decision to pay legal fees may impact the organization's legal interests in light of DOJ policy.

The Risks of Disciplining the Culpable Employee

Difficult issues arise when an organization suspects that one of its employees may have engaged in misconduct. Even where suspicious of employee wrongdoing, a zealous advocate may proceed to interview an employee where permissible to benefit the organization that counsel represents.[32] If the investigation is complete and the evidence of misconduct is clear, the organization must decide whether to terminate the employee. But if the investigation is ongoing, or evidence of wrongdoing is equivocal, the organization faces hard choices.

DOJ's position is that "a company is not required to take specific actions against employees . . . to obtain cooperation credit."[33] But there is a caveat: "[A] corporation's response to misconduct says much about its willingness to ensure that such misconduct does not recur."[34] Therefore, "prosecutors should consider . . . whether the corporation appropriately disciplined wrongdoers, once those employees are identified by the corporation as culpable for the misconduct."[35] In a recent case brought under the Foreign Corrupt Practices Act ("FCPA"),[36] DOJ reduced the amount of monetary credit it was giving for cooperation because the company failed to discipline a senior executive who was aware of misconduct and had oversight responsibility for the culpable employees.[37]

Terminating an employee who is believed to be culpable is not without risks. For one, the organization may believe that it is unfair to terminate the employee, and an employee who feels the same way may consider legal remedies such as an action for wrongful discharge or defamation. An organization may also have a legitimate concern that an employee who has been terminated may falsely implicate the organization or others in wrongdoing for purposes of revenge.[38] In addition, the FCA has anti-retaliation provisions,[39] and culpable employees may try to portray themselves as whistleblowers, hoping to gain some leverage to stave off adverse employment actions. Thus, an organization must give careful consideration not only to what action to take, but also to the timing of any such action.

Methods for Conveying Facts Covered by Privilege

Confidential notes, summaries, and memoranda of employee interviews conducted during outside counsel's internal investigation for the purpose of providing legal advice are protected from disclosure by the attorney-client privilege and work product doctrine.[40] Despite this protection, in 1999 DOJ issued the "Holder Memo," which provided that prosecutors could consider the corporation's willingness to waive privilege in evaluating cooperation credit.[41] Following criticism,[42] DOJ reversed course; its position now is that eligibility for cooperation credit does not require waiver of privilege.[43] While a corporation is free to waive privilege, "prosecutors should not ask for such waivers and are directed not to do so."[44]

Although DOJ no longer allows prosecutors to seek waiver of privilege in typical cases, it does require disclosure of "the facts known to the corporation about the putative criminal

misconduct under review."[45] DOJ policy also requires the organization to "let the prosecutor know about the existence of and basis for" a claim of privilege over relevant facts, "so that the prosecutor is aware that there are relevant facts that are not being provided and has an opportunity to understand the basis for the claim of privilege."[46] "The prosecutor will make a determination, based on all the circumstances, about the validity of the claim, and discuss an appropriate resolution with company counsel."[47]

Counsel must decide how to convey to the government the non-privileged facts the investigation uncovered. If counsel makes such disclosures and the government prosecutes a company employee, the employee may argue waiver and seek production of all privileged documents.[48] Public companies may face claims of privilege waiver in shareholder litigation.[49] The primary focus of much of the litigation in this context concerns the contents of interview memoranda. When a lawyer proffers to the government "general impressions" of the interviews, but does not relay what was said in the interviews "in substantial part," there would be no waiver.[50] Some lawyers make oral hypothetical proffers of what a witness "might and might not say in response to the government's questions," which one court held did not result in a waiver of privilege.[51] Other lawyers simply provide the government with copies of privileged interview memoranda, or with verbatim oral "downloads" of privileged communications, which courts have held constitutes a waiver of privilege.[52]

Where there is a waiver, it generally is limited to the communications disclosed. Federal Rule of Evidence 502 rejects the broad subject matter waiver doctrine that had previously been adopted by many courts[53] and displaces it with a narrow doctrine that reserves subject matter waiver for "those unusual situations in which fairness requires a further disclosure of related, protected information."[54] Rule 502(a) provides:

> Disclosure Made in a Federal Proceeding or to a Federal Office or Agency; Scope of a Waiver. When the disclosure is made in a federal proceeding or to a federal office or agency and waives the attorney-client privilege or work-product protection, the waiver extends to an undisclosed communication or information in a federal or state proceeding only if: (1) the waiver is intentional; (2) the disclosed and undisclosed communications or information concern the same subject matter; and (3) they ought in fairness to be considered together.

Rule 502 has an additional, strong protection; it makes a federal court order finding no waiver binding on all other courts, state and federal. Rule 502(d) provides:

> Controlling Effect of a Court Order. A federal court may order that the privilege or protection is not waived by disclosure connected with the litigation pending before the court—in which event the disclosure is also not a waiver in any other federal or state proceeding.

Relying on this Rule, one court has entered an order allowing a party to waive attorney-client privilege and work product protection regarding certain categories of information material to a case without thereby waiving such privilege and protection regarding other information that may be of interest in other lawsuits.[55]

Conclusion

According to DOJ, whether to cooperate with a government investigation is a voluntary decision reserved to the best judgment of the organization.[56] But DOJ also has made clear the perils of a decision not to cooperate. In contrasting dispositions in two FCPA cases, then Assistant Attorney General ("AAG") Leslie Caldwell pointed out that for the organization that self-disclosed and cooperated, DOJ "ultimately declined to prosecute the company," but that the organization that refused to cooperate incurred the largest fine in FCPA history up to that time.[57]

Thus, while an organization may voluntarily choose not to cooperate, given the pressure exerted on it by DOJ to choose otherwise, counsel must be careful that employees' interests do not obstruct or hamstring the organization's ability to obtain full cooperation credit. As DOJ devotes more and more resources to healthcare fraud enforcement,[58] counsel are bound to face this issue with ever increasing frequency.

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Impact of DOJ's Corporate Healthcare Fraud Enforcement Strategies

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Endnotes

1 *See* Memorandum from Deputy Attorney Gen. Sally Q. Yates on Individual Accountability for Corporate Wrongdoing 2-3 (Sept. 9, 2015) ("Yates Memo"), https://www.justice.gov/archives/dag/file/769036/download.

2 *See, e.g.*, Robert R. Stauffer & William C. Pericak, Twenty Questions Raised by the Justice Department's Yates Memorandum, Bloomberg BNA (May 16, 2016), https://jenner.com/system/assets/publications/15188/original/Stauffer_Pericak_Bloomberg_May_2016.pdf?1463730304.

3 U.S. Dep't of Justice, Frequently Asked Questions: Corporate Cooperation and the Individual Accountability Policy 1, https://www.justice.gov/dag/individual-accountability/faq (last updated Nov. 30, 2016) ("DOJ, Corporate Cooperation FAQ").

4 Yates Memo 2 (emphases added).

5 *Id.*; *see also* U.S. Attorney's Manual § 4-3.100, Pursuit of Claims Against Individuals.

6 Remarks by Assistant Attorney Gen. for the Criminal Div. Leslie R. Caldwell at Health Care Compliance Ass'n's 20th Annual Compliance Inst. (April 18, 2016) ("AAG Caldwell, April 18, 2016"), https://www.justice.gov/opa/speech/assistant-attorney-general-leslie-r-caldwell-speaks-health-care-compliance-association-s.

7 Remarks by Assistant Attorney Gen. for the Criminal Div. Leslie R. Caldwell at the Am. Bar Ass'n's 25th Annual Nat'l Inst. on Health Care Fraud (May 14, 2015), https://www.justice.gov/opa/speech/assistant-attorney-general-leslie-r-caldwell-delivers-remarks-american-bar-association-s.

8 AAG Caldwell, April 18, 2016, *supra* note 6.

9 Remarks by Assistant Attorney Gen. for the Criminal Div. Leslie R. Caldwell at the Taxpayers Against Fraud Educ. Fund Conference (Sept. 17, 2014), https://www.justice.gov/opa/speech/remarks-assistant-attorney-general-criminal-division-leslie-r-caldwell-taxpayers-against.

10 AAG Caldwell, April 18, 2016, *supra* note 6.

11 Remarks by Acting Assistant Attorney Gen. for the Criminal Div. Kenneth R. Blanco at Am. Bar Ass'n's 27th Annual Institute on Health Care Fraud (May 18, 2017) ("Blanco Remarks"), https://www.justice.gov/opa/speech/acting-assistant-attorney-general-kenneth-blanco-criminal-division-speaks-american-bar.

12 ABA Model Rule 1.13(f).

13 *See generally Upjohn Co. v. United States*, 449 U.S. 383 (1981).

14 ABA, White Collar Crime Working Grp., Upjohn Warnings: Recommended Best Practices When Corporate Counsel Interacts With Corporate Employees (July 17, 2009), https://www.crowell.com/PDF/ABAUpjohnTaskForceReport.pdf.

15 *See In re Grand Jury Subpoena: Under Seal*, 415 F.3d 333, 340 (4th Cir. 2005) ("We note, however, that our opinion should not be read as an implicit acceptance of the watered-down '*Upjohn* warnings' the investigating attorneys gave the appellants. It is a potential legal and ethical mine field.")

16 *See United States v. Ruehle*, 583 F.3d 600, 605-07 (9th Cir. 2009) (although attorney claimed to have given *Upjohn* warning, defendant denied recollection of receiving it, and district court finding that defendant reasonably believed attorney represented him individually was not clearly erroneous); *United States v. Nicholas*, 606 F. Supp. 2d 1109, 1116–17 (C.D. Cal. 2009) ("As an initial matter, the Court has serious doubts whether any *Upjohn* warning was given to Mr. Ruehle. Mr. Ruehle did not remember being given any warning, no warning is referenced in Mr. Lefler's notes from the meeting, and no written record of the warning even exists."), *rev'd on other grounds sub nom. Ruehle*, 583 F.3d 600.

17 *Ruehle*, 583 F.3d at 606.

18 ABA Model Rule 1.7(a), concerning conflicts of interest among current clients, provides:

> Except as provided in paragraph (b), a lawyer shall not represent a client if the representation involves a concurrent conflict of interest. A concurrent conflict of interest exists if:
>
> (1) the representation of one client will be directly adverse to another client; or
>
> (2) there is a significant risk that the representation of one or more clients will be materially limited by the lawyer's responsibilities to another client, a former client or a third person or by a personal interest of the lawyer.

19 *See, e.g., In re Grand Jury Subpoena*, 415 F.3d at 340 ("Had the investigating attorneys, in fact, entered into an attorney-client relationship with [employees], as their statements to the [employees] professed they could, they would not have been free to waive the [employees'] privilege when a conflict arose.… Indeed, the court would be hard pressed to identify how investigating counsel could robustly investigate and report to management or the board of directors of a publicly-traded corporation with the necessary candor if counsel were constrained by ethical obligations to individual employees.").

20 *See, e.g.*, D.C. Bar, Ethics Op. 349: Conflicts of Interest for Lawyers Associated with Screened Lawyers Who Participated in a Joint Defense Group (2009), https://www.dcbar.org/bar-resources/legal-ethics/opinions/opinion349.cfm.

[21] *See* Memorandum from Deputy Attorney General Eric H. Holder, Jr. to All Component Heads and U.S. Attorneys (June 16, 1999), http://federalevidence.com/pdf/Corp_Prosec/Holder_Memo_6_16_99.pdf.

[22] DOJ, Corporate Cooperation FAQ, *supra* note 3 (question #6); *see also* U.S. Attorney's Manual, § 9-28.730, Obstructing the Investigation.

[23] U.S. Attorney's Manual, § 9-28.730, Obstructing the Investigation.

[24] *Id.*

[25] *Id.*

[26] ABA Model Rule 4.3.

[27] *Id.*

[28] Memorandum from Deputy Attorney General Larry D. Thompson on Principles of Federal Prosecution of Business Organizations (January 20, 2003), http://federalevidence.com/pdf/Corp_Prosec/Thompson_Memo_1-20-03.pdf.

[29] *United States v. Stein*, 541 F.3d 130, 155-58 (2d Cir. 2008) (by causing defendants' employer to terminate payment of legal fees for their defense, Sixth Amendment's protection against unjustified governmental interference with the right to defend oneself using whatever assets one has or might reasonably and lawfully obtain was violated).

[30] Memorandum from Deputy Attorney Gen. Mark R. Filip on Principles of Federal Prosecution of Business Organizations § 9-28.730 (Aug. 28, 2008) ("Filip Memo"), https://www.justice.gov/sites/default/files/dag/legacy/2008/11/03/dag-memo-08282008.pdf.

[31] *Stein*, 541 F.3d at 156-57 (2d Cir. 2008).

[32] *Cf. IBM Corp.*, 341 NLRB No. 148 (June 9, 2004) (addressing right of corporation to conduct investigatory interview that might result in discipline).

[33] DOJ, Corporate Cooperation FAQ, *supra* note 3 (question #3).

[34] *Id.* (quoting U.S. Attorney's Manual § 9-28.1000, Restitution and Remediation).

[35] *Id.* (quoting U.S. Attorney's Manual § 9-28.1000).

[36] 15 U.S.C. § 78dd-1 *et seq.*

[37] Deferred Prosecution Agreement at 4, *United States v. Embraer SA*, No. 16-cr-60294-JIC (S.D. Fla. Oct. 24, 2016), https://www.justice.gov/criminal-fraud/file/904636/download; Press Release, U.S. Dep't of Justice, Embraer Agrees to Pay More than $107 Million to Resolve Foreign Corrupt Practices Act Charges (Oct. 24, 2016), https://www.justice.gov/opa/pr/embraer-agrees-pay-more-107-million-resolve-foreign-corrupt-practices-act-charges (noting that Embraer fully cooperated, but that it did not engage in full remediation because it did not discipline a senior executive, and that the 20 percent discount reflected "Embraer's full cooperation but incomplete remediation").

[38] *Cf. Cooper Tire & Rubber Co. v. Farese*, 423 F.3d 446, 457 (5th Cir. 2005) (noting purpose of non-disparagement clause is "to prevent a disgruntled former employee from disseminating sensitive or false information in revenge for being terminated").

[39] 31 U.S.C. § 3730(h).

[40] *United States v. Mount Sinai Hosp.*, 185 F. Supp. 3d 383, 389–90 (S.D.N.Y. 2016).

[41] *United States v. Stein*, 435 F. Supp. 2d 330, 337 (S.D.N.Y. 2006) (quoting from Holder Memo), *aff'd*, 541 F.3d 130 (2d Cir. 2008).

[42] *See* Letter of 33 former U.S. Attorneys to Senate Judiciary Committee Chairman Patrick Leahy, S. 186 (Jan. 4, 2007), http://federalevidence.com/pdf/Corp_Prosec/FormerUSAttyLetter_6_23_08.pdf (introduced by Senator Spector and supporting reform legislation).

[43] Filip Memo, *supra* note 30, § 9-28.720. Unlike DOJ's absolute prohibition, the Securities and Exchange Commission ("SEC") instructs that "staff should not ask a party to waive the attorney-client privilege or work product protection without prior approval of the Director or Deputy Director." SEC Enforcement Manual § 4.3 (emphasis omitted).

[44] U.S. Attorney's Manual § 9-28.710, Attorney-Client and Work Product Protections. DOJ makes an exception where an employee raises an advice of counsel defense, and permits prosecutors to ask the corporation for the privileged communications allegedly supporting it. *See id.* § 9-28.720(b)(i).

[45] *Id.* § 9-28.710.

[46] DOJ, Corporate Cooperation FAQ, *supra* note 3 (question #5).

[47] *Id.*

[48] *See, e.g., United States v. Treacy*, No. S2 08 CR 366, 2009 WL 812033 (S.D.N.Y. March 24, 2009).

[49] *See, e.g., S.E.C. v. Bank of Am. Corp.*, No. 09 CIV. 6829 (JSR), 2009 WL 3297493, at *1 (S.D.N.Y. Oct. 14, 2009).

[50] *Id.* at *3; *Treacy*, 2009 WL 812033, at *3.

[51] *United States v. Camacho*, No. 94 CR 313, 2004 WL 1367457, at *4 (S.D.N.Y. June 16, 2004). ("The Court reaches this finding of fact [no waiver] notwithstanding the fact that exchanges between Sercarz and AUSA McCarthy pertaining to what Cherry might and might not say in response to the government's questions did take place. It is clear that an exchange of this nature did occur. It is equally clear, however, that Mr. Sercarz, in order to advance his client's interests while protecting his client's privilege, chose his words with a care consistent with his reputation and experience.").

[52] *S.E.C. v. Vitesse Semiconductor Corp.*, No. 10 Civ. 9239, 2011 WL 2899082, at *2-3 (S.D.N.Y. July 14, 2011).

[53] Fed. R. Evid. 502(a) advisory committee's notes ("The rule rejects the result in *In re Sealed Case*, 877 F.2d 976 (D.C. Cir. 1989), which held that inadvertent disclosure of documents during discovery automatically constituted a subject matter waiver.").

[54] *Id.* As also explained in the Advisory Committee Notes, Rule 502 did not adopt a "selective waiver" provision, which would have allowed an entity to waive privilege only as to the government, and not as to other parties.

[55] *S.E.C. v. Bank of Am. Corp.*, No. 09 CIV. 6829 (JSR), 2009 WL 3297493, at *1 (S.D.N.Y. Oct. 14, 2009).

[56] *See* U.S. Attorney's Manual, § 9-28.700, The Value of Cooperation.

[57] Remarks of Assistant Attorney Gen. Leslie R. Caldwell at Am. Conference Inst.'s 32nd Annual Int'l Conference on Foreign Corrupt Practices Act (Nov. 17, 2015), https://www.justice.gov/opa/speech/assistant-attorney-general-leslie-r-caldwell-delivers-remarks-american-conference.

[58] DOJ currently has 56 prosecutors in its Health Care Fraud Unit, up from 40 in 2014. *Compare* Blanco Remarks, *supra* note 11 (noting 56 HCF unit prosecutors) *with* Remarks of Assistant Attorney Gen. Leslie R. Caldwell at Taxpayers Against Fraud Education Fund Conference (Sept. 17, 2014), https://www.justice.gov/opa/speech/remarks-assistant-attorney-general-criminal-division-leslie-r-caldwell-taxpayers-against (noting 40 HCF unit prosecutors).

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