FLA – EFCL CONFERENCE – 17 JUNE 2016

SESSION 1

"Assessing Credit for Corporate Co-operation: can the SFO Learn from the DOJ's Past Mistakes?"

SUMMARY OF THE DPA CODE OF PRACTICE AND OF RELEVANT SPEECHES DELIVERED BY THE SFO

DPA CODE OF PRACTICE

DRAFT DPA CODE OF PRACTICE (2013):

"Addition public interest factors against prosecution:

(i) a genuinely proactive approach adopted by the corporate management team when the offending is brought to their notice, involved self-reporting and remedial actions, including the compensation of victims. In applying this factor the prosecutor needs to establish whether sufficient information about the operation of the company it its entirety has been supplied in order to assess whether the company has been proactively compliant. ***This will include making witnesses available and disclosure of the details of any internal interview****.*

...

The prosecutor will also consider how early P self-reports and the extent that P involves the prosecutor in the early stages of an investigation and takes direction from the prosecutor... ***In particular the prosecutor will critically assess the manner of any internal investigation to determine whether its conduct could have led to material being destroyed or the gathering of first accounts from suspects being delayed to the extent that the opportunity for fabrication has been afforded. Errors in the conduct of internal investigations which lead to such adverse consequences will militate against the use of DPAs.****"*

[Emphasis added]

PUBLISHED DPA CODE OF PRACTICE (FEB 2014):

"Additional public interest factors against prosecution:

(i) Co-operation: Considerable weight may be given to a genuinely proactive approach adopted by P's management team when the offending is brought to their notice, involving within a reasonable time of the offending coming to light reporting P's offending otherwise unknown to the prosecutor and taking remedial actions including, where appropriate, compensating victims. In applying this factor the prosecutor needs to establish whether sufficient information about the operation and conduct of P has been supplied in order to assess whether P has been co-operative. ***Co-operation will include identifying relevant witnesses, disclosing their accounts and the documents shown to them. Where practicable it will involve making the witnesses available for interview when requested. It will further include providing a report in respect of any internal investigation including source documents****."*

...

The prosecutor will consider whether any actions taken by P by not self-reporting earlier may have prejudiced the investigation into P or the individuals that incriminate P. In particular the prosecutor will critically assess the manner of any internal investigation to determine whether its conduct could have led to material being destroyed or the gathering of first accounts from suspects being delayed to the extent that the opportunity for fabrication has been afforded. Internal investigations which lead to such adverse consequences may militate against the use of DPAs"

NB: "*All parties should keep in mind that DPAs are entirely voluntary agreements. The prosecutor is under no obligation to invite P to negotiate a DPA and P is under no obligation to accept that invitation should it be made. The terms of a DPA are similarly voluntary, and neither party is obliged to agree any particular term therein.* ***The Act does not, and this DPA Code cannot, alter the law on legal professional privilege*****."** (para 3.3)

[Emphasis added]

[C.f. US Attorney's Manual at 9-28.710 – 9-28.720 at Annex 1 below]

SFO SPEECHES

Speeches considered:

1. "*Ethical Business Conduct: An Enforcement Perspective*", David Green CB QC – 06 March 2014
2. "*Deferred Prosecution Agreements: What do we know so far?",* Ben Morgan speech to UK Aerospace and Defence Industry seminar - 01 July 2014
3. David Green CB QC speech to the Pinsent Masons Regulatory Conference - 23 October 2014
4. "*The Use of Information to Discern and Control Risk*", Alun Milford - 02 September 2014
5. David Green CB QC speech to the Cambridge Symposium 2014 - 02 September 2014
6. "*Compliance and cooperation*", Ben Morgan - 20 May 2015
7. David Green CB QC speech to the Cambridge Symposium 2015 - 7 September 2015
8. Ben Morgan at the Annual Anti Bribery & Corruption Forum - 29 October 2015
9. "*First use of DPA legislation and of s.7 Bribery Act 2010*", Ben Morgan - 1 December 2015
10. "*Speech to compliance professionals*", Alun Milford - 29 March 2016
11. "*The role and remit of the SFO*", Matthew Wagstaff -18 May 2016

Ethical Business Conduct: An Enforcement Perspective

David Green CB QC

06 March 2014

"So: what would the SFO expect from a corporate which was hoping for a DPA?

In essence: cooperation, cooperation, and cooperation.

The Code of Practice lists (non-exhaustively) factors which will militate against prosecution and towards a DPA. These include:-

- *A waiver of privilege, where necessary. This applies particularly to privilege which is often claimed, dubiously, over accounts given by witnesses in internal investigations. Of course, waiver cannot be compelled, but waiver of privilege where necessary would be an obvious sign of cooperation.*
- *An admission of guilt: again, this cannot be required but the same applies.*
- *Prompt notification of the problem to the prosecutor.*
- *Full disclosure of the extent of wrongdoing: holding something back or trying to hide something would be anathema to the process.*
- *Compensation to victims.*
- *Disciplinary action against wrongdoers*
- *Appropriate amendment to corporate structures.*

- *I might add: don't try and spin your way to a particular outcome by judicious leaking of selected information. Do not try and conduct DPA negotiations through the media."*

Deferred Prosecution Agreements: What do we know so far?

Ben Morgan speech to UK Aerospace and Defence Industry seminar

01 July 2014

"...My second practical tip concerns witness accounts. This has started to become an unnecessarily controversial point for some people, so let me explain clearly what we need, and that is access to the best possible facts about what has happened,

a) so that we can understand it and develop lines of enquiry, and

b) so that we can deal properly with the credibility of witnesses in any subsequent prosecution of the company or connected individuals.

I find it hard to see why that is objectionable. The extent to which privilege has to be a complicating factor is a matter entirely in the hands of the lawyers dealing with the incident. It seems to me to be entirely possible to capture factual accounts from witnesses in such a way as to avoid any claim to privilege being founded in the first place, and I can tell you now that approaching it like that would be something the SFO would take as a mark of a co-operating company. I know this will be unpopular, but why not get a non-lawyer to conduct those first interviews and avoid from the start arguments about privilege, and worries about collateral waiver.

The bottom line is that in the context of the investigation of possible crime, it is the SFO that is charged with conducting that investigation, not you and not lawyers, and anything that a company or its lawyers do that interferes with that or compromises it will be something we consider to be unhelpful, and not the mark of a co-operating company. So for interviews you haven't yet done, think about how you capture that first account. For interviews that have been done already, it follows that we still expect access to the factual accounts witnesses gave - those that we would have captured had you not elected to handle the matter yourself, without involving us. The old way of doing things has been to do everything possible to shroud that process in privilege, so if you are in that situation my next practical tip is you are going to need to waive privilege over the factual part of those accounts, if indeed it can properly be said to apply at all. We do not want to see legal advice - we do want facts. One way to go about this might be to agree with us to instruct external independent counsel to redact accounts for legal advice privilege. I appreciate litigation privilege can be a more nuanced analysis, but that is the kind of point that we expect a co-operating company to take a co-operative approach to. I really don't see why access to facts should be controversial for a co-operating company. Let me also say that so-called factual summaries produced later by lawyers are not adequate. It is the actual first account we need, not a carefully drafted version of it some time later. Let me also make it clear that we are quite prepared to challenge any claim to privilege of any kind on such accounts, particularly if it seems to us that a lazy, blanket approach is being taken."

David Green CB QC speech to the Pinsent Masons Regulatory Conference

23 October 2014

- *"We have set out very clearly the SFO's stance around Deferred Prosecution Agreements (DPAs). We have explained the vital and central importance of cooperation by the corporate which hopes for a DPA. When asked to approve a proposed DPA, the judge has to decide whether a DPA would be in the interests of justice. The prosecution and the corporate will be advocating for the same result. Inevitably, this will place an onus on the judge to determine the precise degree and extent of culpable behaviour by the corporate and the conduct of the corporate during the investigation. No cooperation, no DPA.*
- *We confront and if necessary will litigate what we see as over-expansive claims of privilege. Legal routes available to us include declaratory relief in the High Court or prosecution for failure to comply with a Section 2 notice."*

The Use of Information to Discern and Control Risk

Alun Milford, General Counsel at the Cambridge Symposium of Economic Crime

02 September 2014

"Whilst our statutory schemes allow us to overcome third party rights to or obligations of confidence, the law draws a line where legal professional privilege is concerned. This is a substantive rule of law developed by the courts in recognition of the powerful public interest in allowing those within this jurisdiction full and proper access to the courts. Its rationale is to be found in the rule of law therefore. In balancing the public interest in ascertaining the truth and ensuring that legal advice can be freely sought and given, the courts have decided that the absolute confidence between lawyer and client should prevail. As Sir James Knight-Bruce V-C put it in 1846, "Truth, like all other good things, may be loved unwisely - may be pursued too keenly - may cost too much."

Whilst we have no interest whatsoever in the advice lawyers give their clients, corporate or otherwise, we are very interested in what third parties to the corporate client might tell the company about the events under investigation. Privilege is frequently claimed over those accounts. Whether or not privilege actually applies depends on the particular facts of the case. Whilst, of course, we are free to speak to those witnesses ourselves, we are hindered in that endeavour if we do so without knowing their first account of events. It impacts on our ability to assess their credibility and potentially to call them as witnesses in subsequent trials. Even where we have considered ourselves capable of calling such witnesses, we have become embroiled in hard-fought applications to stay the trials as an abuse of process on the basis that we could not give disclosure of first witness accounts. That we have, to date, defeated those claims does not mean that they or a version of them could never succeed: like privilege, all depends on the facts of the case.

Let me be clear. We are simply not interested in communications between client and lawyer on questions of liability or rights. Our interest is focussed on facts: the accounts of witnesses spoken to in

corporate investigations. We do not regard ourselves as constrained from asking for them. What if they are denied us?

1. *We will view as uncooperative false or exaggerated claims of privilege, and we are prepared to litigate over them: to do otherwise would be to fail in our duty to investigate crime.*
2. *If a company's assertion of privilege is well-made out, then we will not hold that against the company: to do otherwise would be inconsistent with the substantive protection privilege offers.*
3. *By the same token if, notwithstanding the existence of a well-made out claim to privilege, a company gives up the witness accounts we seek, then we will view that as a significant mark of co-operation: here again, to do otherwise would be inconsistent with the substantive protection privilege offers."*

David Green CB QC speech to the Cambridge Symposium of Economic Crime 2014

02 September 2014

(Para 3) *"These cases require above all else resilience and focus on the part of the investigating team. Vast quantities of digital data have to be obtained, uploaded, searched and assessed. Witnesses need to be identified and traced. Often, we will need to obtain evidence from jurisdictions where that exercise can be problematic. Those we investigate are well resourced and lawyered-up. Claims of privilege can transcend extravagance and amount to a strategy of deliberate obstruction, a strategy we will always challenge. But individuals, corporates and their lawyers need to understand that we will make progress and we will not go away. These cases illustrate that determination."*

Compliance and cooperation

Ben Morgan, Joint head of Bribery and Corruption

20 May 2015

"If there is one message to take away from what I say today it's this - if you find out about a problem I think it is overwhelmingly in your best interests to engage with us early and to do so fully, honestly and with integrity. Just as you urge those in your business not to treat the compliance process as a passive, box-ticking exercise but rather something that needs substance more than just form, so too engaging with us at the back-end of that process needs substance. If it is worth doing at all, it is worth doing properly.

There are three reasons why I say that I think engaging with us properly is in your interests, and I'll expand on those in the time I have left. The first is that we will be unimpressed if we find out about a problem from someone other than you, and there is a good chance we will. The second is that when we do find out about it, if the evidence is there we will prosecute those who didn't tell us about their own wrong-doing, or who did so in an artificial, less-than-frank way. And thirdly - a more positive note- for

those who do engage with us properly, there is an opportunity to deal with a problem in something other than a traditionally adversarial way. And while we don't start from this point, it seems to me this option has the potential to be, by some distance, the most effective commercial outcome for a responsible company wanting to resume honest business quickly.

...

The final thing I want to say is a word on proper cooperation. I've mentioned a few times how important it is to do things properly if you do choose to engage with us, if you set off down that fork in the road as opposed to electing to be a traditional adversary. And it is really important - it's what I want you to take away from this. We are no longer, at the SFO, in the world of having to talk up DPAs like some sort of salesmen; corporates want them and some will get them. We have issued our first invitation letters giving corporates the opportunity to enter into DPA negotiations. Where we are now is working with corporates on how best to go through that process - not "why DPA", but "how DPA". And when it comes to "how", the DPA Code is clear; we and the court need you to cooperate fully with our investigation. I and others at the SFO have spoken in some detail about what that looks like so I'm not going to go over that ground extensively again, I will just say this. We have made clear what we expect. It's all there in the DPA Code. ***Crucially, where suspicions of corrupt activity arise, we do not require you to carry out internal investigations; investigation is our job****. And while we do understand that up to a point you will need to do some work to look into allegations of bribery, we find internal investigations that 'trample over the crime scene' to be unhelpful. Our stance is to ask for genuine cooperation with our investigation, not duplication of it. We don't expect you to keep us in the dark while you carry out extensive private investigations and some months or even years later present us with a package of your findings. If there is suspected criminal conduct, that is our job and there are some important issues around access to, and integrity of, evidence (especially regarding witness accounts) and we expect those to be respected in the same way they would be in any other criminal investigation. We expect you to engage with us early, and to work with us as we investigate, not to rush ahead and, whether intentionally or not, complicate the work we need to do. This is, we appreciate, to some extent a departure from the way things used to be and the way certain practices have built up in other jurisdictions, but we make no apology for that. Our job is to investigate possible criminal offences and we take a very dim view of anything anyone does that makes that job more difficult than it needs to be."*

[emphasis added]

David Green CB QC speech to the Cambridge Symposium on Economic Crime 2015

7 September 2015

"Why do SFO cases take long to conclude?

The sheer quantity of data is vast; obstacles, technical or legal, must be overcome. Claims of privilege may have to be tested. Witnesses and suspects must be identified. Some individuals and some companies choose to cooperate, others choose not to do so.

...

DPA's are intended as a mechanism whereby the collateral damage to innocent parties occasioned by the prosecution of a company can be avoided in an appropriate case. On the English and Welsh model, the prosecutor must identify the full extent of the offending. Judicial approval is required at a preliminary hearing which will take place in private and at the final application for approval which will always be in public. Crucially, the judge must be satisfied that the DPA is in the interests of justice, and is fair, reasonable and proportionate. Rubber stamps have no part in the process.

The bar is a high one. This does not mean that corporates lose their right to contest a genuine question of law or that they have to waive privilege. But cooperation is vital, and for this simple reason: how can the prosecutor convince the judge that a DPA rather than a prosecution is in the interests of justice?"

Ben Morgan at the Annual Anti Bribery & Corruption Forum

29 October 2015

"Last point then, some examples of the kind of things we might want to discuss with you in terms of framing an investigation when you come and talk to us. These include:

- *Identifying relevant witnesses;*
- *Agreeing the sequencing of interviewing them with us; (we may want to speak to certain people first and we'd like to discuss that with you).*
- ***Another example is disclosure to us of the factual elements of interviews you've already conducted. You had a choice about whether to conduct those interviews in such a way as to create claims to privilege, but also having done so, a choice whether to assert those claims over the factual content. The way you deal with both of these decisions is something we will consider carefully in the context of your cooperation**.*
- *Provision of relevant contemporary documentation is another example; in a timely manner, in a suitable digital format and arranged sensibly.*
- *Alerting us to potentially relevant sources of documentation. If we are obviously interested in a particular issue and serve you with a formal or informal request for documents relating to it, if there is a search term or repository of information that you know about but we don't – tell us. This is a really good example of pro-active cooperation, doing that bit more than just meeting your legal obligation to respond to a section 2 notice, for example. That is the difference between cooperating with us, in the way we want, and being investigated by us in the traditional way.*
- ***Another example is if you are interviewing someone, either before you've spoken to us or after, ask the right questions. I've seen transcripts of interviews conducted by law firms that are almost laughable in the way they build up to an issue, set up an obvious and crucial next question, but don't ask it. If you purport to investigate, you need to do so in a properly inquisitional way**.*
- *And finally for now, the handling of data – an entire speech in itself really, but just think about how you do it, bearing in mind the kind of issues we will obviously have to understand – integrity of images, location of data, continuity of evidence, format in which it is supplied etc. These are all things where you have options in what you do, and the ability to make our work simpler."*

[emphasis added]

First use of DPA legislation and of s.7 Bribery Act 2010

Ben Morgan at the Managing Risk and Mitigating Litigation Conference 2015

1 December 2015

"We will only invite a company into DPA negotiations if our Director is persuaded that they have offered genuine cooperation.

...

And that means – prompt reporting, scoping and conducting your own investigation in conjunction with us, taking into account our interests in doing so and providing access to the kind of material we need to test the quality of evidence gathered and your own conclusions on it..."

Speech to compliance professionals

Alun Milford speaking at the European Compliance and Ethics Institute, Prague

29 March 2016

"It is clear from this that we are not opposed to internal investigations in principle. It all depends on how the investigation is conducted and when we are notified of concerns within the company. Let's deal with the latter first. We do not need to know of every allegation of crime immediately on it being made. Plainly, it is reasonable of a company to undertake an initial assessment of the strength of the complaint. But if that assessment reveals, let's say, reasonable grounds to suspect corruption in the way the company or those associated with it conducted business, we want to know about it as soon as possible. We can then agree a way forward with the company or its representatives, as we did with Standard Bank.

...

Crucially also, we will want to know what witnesses spoken to by those conducting the internal investigation had to say.

Why are witness first accounts so important to us? The immediate point is that they simply help us understand quickly what went on. Of course we can and we will go to speak to witnesses ourselves but companies who tell us what they were told during the course of an internal investigation plainly help us in the course of our inquiries. There is a second reason why we want witness accounts. As I have previously made clear, people who give an account to an internal investigation are liable to be witnesses in any criminal case we might bring. In considering the evidence witnesses might give us, we are duty-bound to assess its accuracy and integrity. So fundamental to prosecutors is that duty that it is set out in the Code for Crown Prosecutors. An important way in which accuracy or integrity is tested is by reference to first accounts. Plainly, if we do not have first accounts then our ability to assess witness

credibility might be affected to the extent that we might not be able to call them as witnesses. Even where we have considered ourselves capable of calling such witnesses, we have become embroiled in hard-fought applications to stay the trial as an abuse of process on the basis that we could not give disclosure of first witness accounts. That we have, to date, defeated those claims does not mean that they or a version of them could never succeed: like privilege, all depends on the facts of the case. And that brings me to the question of privilege.

Let me be clear. We have no interest in communications between client and lawyer on questions of liability or rights. We are focused on the underlying facts, including the accounts of witnesses spoken to in corporate investigations. We do not regard ourselves as constrained from asking for them even if they are privileged and, as with our colleagues in US DoJ who do operate under that constraint, our experience is that at least some corporates are not themselves constrained from letting us know what their investigators were told. As the saying goes, there are more solutions than problems*.*

Of course, there will be cases in which we are told that the corporate concerned does want to claim privilege over the witness accounts. Whether privilege in fact applies depends entirely on the facts of the case, something we will review very carefully. And then what?

1. ***We will view as uncooperative false or exaggerated claims of privilege, and we are prepared to litigate over them: to do otherwise would be to fail in our duty to investigate crime****.*
2. ***If a company's assertion of privilege is well-made out, then we will not hold that against the company: to do otherwise would be inconsistent with the substantive protection privilege offers. We will simply judge the question of co-operation in our normal way against our published criteria****.*
3. ***By the same token if, notwithstanding the existence of a well-made-out claim to privilege, a company gives up the witness accounts we seek, then we will view that as a significant mark of co-operation: here again, to do otherwise would be inconsistent with the substantive protection privilege offers****.*
4. ***For the same reason, we will view as a significant mark of co-operation a company's decision to structure its investigation in such a way as not to attract privilege claims over interviews of witnesses****."*

[emphasis added]

The role and remit of the SFO

Matthew Wagstaff, Joint Head of Bribery & Corruption

18 May 2016

"...Thirdly, the management of internal investigations themselves. I need to preface any comments here by making clear that it is not for the SFO to give advice to corporates on what should or should not be included within a self-report. Obviously, we would expect any such report to be both thorough and accurate but, beyond that, what we won't do is sit down with you and give you concrete guidelines as

to what lines of enquiry to follow, what individuals to speak to or what documents to review. Put bluntly, that is not our job.

...

*Perhaps I can start by making clear what we do not mean when we talk about **co-operation**? Co-operation does not mean that we will expect corporates to waive the legal rights and protections to which they are entitled, including – where they are genuinely well-founded in fact and law – any claims to legal professional privilege. In saying this, I appreciate that there are those who accuse the SFO of double standards; of saying on the one hand that we respect a company's right to privilege but then on the other hand insisting on access to, for example, witness accounts so as to, in effect, make waiver of privilege a condition of co-operation. My response to that is that requiring a corporate to provide us with the factual narrative that underpins any self-report does not, of itself, give rise to a demand that privilege be waived. And that is all that we want: the factual narrative. We want to know what happened and what the witnesses say happened. It really is that simple.*

So: genuine co-operation does not require a company to waive privilege. More positively, what co-operation does mean is that we will expect corporates to work with us in identifying the full extent of the alleged wrong-doing. This will include, as I mentioned earlier, telling us about something that we do not already know. Plainly, a corporate which only provides information to us after we have already become aware of concerns from other sources cannot expect to derive the same level of credit as one which, of its own volition, notifies us of something of which we were previously unaware.

...

It follows from this that co-operation will also extend to assisting the SFO as it carries out its own investigation. This will mean, for example, not tipping off data custodians who may also be potential suspects and not carrying out its own enquiries in a manner that is likely to cause prejudice to our investigation. As I have mentioned already, it will mean providing us with access to any first witness accounts that may have been taken. Witness accounts, especially first witness accounts, are of crucial importance for us in testing the accuracy and integrity of our evidence"

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17 JULY 2016

References:

The above referred speeches can be accessed from:

https://www.sfo.gov.uk/2014/03/06/ethical-business-conduct-enforcement-perspective/
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ANNEX 1

US ATTORNEYS' MANUAL – TITLE 9: CRIMINAL [EXTRACT]

9-28.710 - Attorney-Client and Work Product Protections

The attorney-client privilege and the attorney work product protection serve an extremely important function in the American legal system. The attorney-client privilege is one of the oldest and most sacrosanct privileges under the law. See Upjohn v. United States, 449 U.S. 383, 389 (1981). As the Supreme Court has stated, "[i]ts purpose is to encourage full and frank communication between attorneys and their clients and thereby promote broader public interests in the observance of law and administration of justice." Id. The value of promoting a corporation's ability to seek frank and comprehensive legal advice is particularly important in the contemporary global business environment, where corporations often face complex and dynamic legal and regulatory obligations imposed by the federal government and also by states and foreign governments. The work product doctrine serves similarly important goals.

For these reasons, waiving the attorney-client and work product protections has never been a prerequisite under the Department's prosecution guidelines for a corporation to be viewed as cooperative. Nonetheless, a wide range of commentators and members of the American legal community and criminal justice system have asserted that the Department's policies have been used, either wittingly or unwittingly, to coerce business entities into waiving attorney-client privilege and work-product protection. Everyone agrees that a corporation may freely waive its own privileges if it chooses to do so; indeed, such waivers occur routinely when corporations are victimized by their employees or others, conduct an internal investigation, and then disclose the details of the investigation to law enforcement officials in an effort to seek prosecution of the offenders. However, the contention, from a broad array of voices, is that the Department's position on attorney-client privilege and work product protection waivers has promoted an environment in which those protections are being unfairly eroded to the detriment of all.

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.*

9-28.720 - Cooperation: Disclosing the Relevant Facts

Eligibility for cooperation credit is not predicated upon the waiver of attorney-client privilege or work product protection. Instead, the sort of cooperation that is most valuable to resolving allegations of misconduct by a corporation and its officers, directors, employees, or agents is disclosure of the relevant facts concerning such misconduct. In this regard, the analysis parallels that for a non-corporate defendant, where cooperation typically requires disclosure of relevant factual knowledge and not of discussions between an individual and his attorneys.

Thus, when the government investigates potential corporate wrongdoing, it seeks the relevant facts. For example, how and when did the alleged misconduct occur? Who promoted or approved it? Who was responsible for committing it? In this respect, the investigation of a corporation differs little from the investigation of an individual. In both cases, the government needs to know the facts to achieve a just and fair outcome. The party under investigation may choose to cooperate by disclosing the facts, and the government may give credit for the party's disclosures. If a corporation wishes to receive credit for such cooperation, which then can be considered with all other cooperative efforts and circumstances in evaluating how fairly to proceed, then the corporation, like any person, must disclose the relevant facts of which it has knowledge.[1]

> *(a) Disclosing the Relevant Facts—Facts Gathered Through Internal Investigation*
>
> *Individuals and corporations often obtain knowledge of facts in different ways. An individual knows the facts of his or others' misconduct through his own experience and perceptions. A corporation is an artificial construct that cannot, by definition, have personal knowledge of the facts. Some of those facts may be reflected in documentary or electronic media like emails, transaction or accounting documents, and other records. Often, the corporation gathers facts through an internal investigation. Exactly how and by whom the facts are gathered is for the corporation to decide. Many corporations choose to collect information about potential misconduct through lawyers, a process that may confer attorney-client privilege or attorney work product protection on at least some of the information collected. Other corporations may choose a method of fact-gathering that does not have that effect—for example, having employee or other witness statements collected after interviews by non-attorney personnel. Whichever process the corporation selects, the government's key measure of cooperation must remain the same as it does for an individual: has the party timely disclosed the relevant facts about the putative misconduct? That is the operative question in assigning cooperation credit for the disclosure of information—not whether the corporation discloses attorney-client or work product materials.*

Accordingly, 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.[2] On this point the Report of the House Judiciary Committee, submitted in connection with the attorney-client privilege bill passed by the House of Representatives (H.R. 3013), comports with the approach required here:

> *[A]n ... attorney of the United States may base cooperation credit on the facts that are disclosed, but is prohibited from basing cooperation credit upon whether or not the materials are protected by attorney-client privilege or attorney work product. As a result, an entity that voluntarily discloses should receive the same amount of cooperation credit for disclosing facts that happen to be contained in materials not protected by attorney-client privilege or attorney work product as it would receive for disclosing identical facts that are contained in materials protected by attorney-client privilege or attorney work product. There should be no differentials in an assessment of cooperation (i.e., neither a credit nor a penalty) based upon whether or not the materials disclosed are protected by attorney-client privilege or attorney work product.*

H.R. Rep. No. 110-445 at 4 (2007).

In short, the company may be eligible for cooperation credit regardless of whether it chooses to waive privilege or work product protection in the process, if it provides all relevant facts about the individuals who were involved in the misconduct. But if the corporation does not disclose such facts, it will not be entitled to receive any credit for cooperation.

Two final and related points bear noting about the disclosure of facts, although they should be obvious. First, the government cannot compel, and the corporation has no obligation to make, such disclosures (although the government can obviously compel the disclosure of certain records and witness testimony through subpoenas). Second, a corporation's failure to provide relevant information about individual misconduct alone does not mean the corporation will be indicted. It simply means that the corporation will not be entitled to mitigating credit for that cooperation. Whether the corporation faces charges will turn, as it does in any case, on the sufficiency of the evidence, the likelihood of success at trial, and all of the other factors identified in USAM 9-28.300. If there is insufficient evidence to warrant indictment, after appropriate investigation has been completed, or if the other factors weigh against indictment, then the corporation should not be indicted, irrespective of whether it has earned cooperation credit. The converse is also true: The government may charge even the most cooperative corporation pursuant to these Principles if, in weighing and balancing the factors described herein, the prosecutor determines that a charge is required in the interests of justice. Put differently, even the most sincere and thorough effort to cooperate cannot necessarily absolve a corporation that

has, for example, engaged in an egregious, orchestrated, and widespread fraud. Cooperation is a potential mitigating factor, but it alone is not dispositive.

(b) Legal Advice and Attorney Work Product

Separate from (and usually preceding) the fact-gathering process in an internal investigation, a corporation, through its officers, employees, directors, or others, may have consulted with corporate counsel regarding or in a manner that concerns the legal implications of the putative misconduct at issue. Communications of this sort, which are both independent of the fact-gathering component of an internal investigation and made for the purpose of seeking or dispensing legal advice, lie at the core of the attorney-client privilege. Such communications can naturally have a salutary effect on corporate behavior—facilitating, for example, a corporation's effort to comply with complex and evolving legal and regulatory regimes.[3] Except as noted in subparagraphs (b)(i) and (b)(ii) below, a corporation need not disclose and prosecutors may not request the disclosure of such communications as a condition for the corporation's eligibility to receive cooperation credit.

Likewise, non-factual or core attorney work product—for example, an attorney's mental impressions or legal theories—lies at the core of the attorney work product doctrine. A corporation need not disclose, and prosecutors may not request, the disclosure of such attorney work product as a condition for the corporation's eligibility to receive cooperation credit.

(i) Advice of Counsel Defense in the Instant Context

Occasionally a corporation or one of its employees may assert an advice-of-counsel defense, based upon communications with in-house or outside counsel that took place prior to or contemporaneously with the underlying conduct at issue. In such situations, the defendant must tender a legitimate factual basis to support the assertion of the advice-of-counsel defense. See, e.g., Pitt v. Dist. of Columbia, 491 F.3d 494, 504-05 (D.C. Cir. 2007); United States v. Wenger, 427 F.3d 840, 853-54 (10th Cir. 2005); United States v. Cheek, 3 F.3d 1057, 1061-62 (7th Cir. 1993). The Department 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. Accordingly, where an advice-of-counsel defense has been asserted, prosecutors may ask for the disclosure of the communications allegedly supporting it.

(ii) Communications in Furtherance of a Crime or Fraud

Communications between a corporation (through its officers, employees, directors, or agents) and corporate counsel that are made in furtherance of a crime or fraud are, under settled precedent, outside the scope and protection of the attorney-client privilege. See United States v. Zolin, 491 U.S. 554, 563 (1989); United States v. BDO Seidman, LLP, 492 F.3d 806, 818 (7th Cir. 2007). As a result, the Department may properly request such communications if they in fact exist.

Footnotes:

[1] This section of the Principles focuses solely on the disclosure of facts and the privilege issues that may be implicated thereby. There are other dimensions of cooperation beyond the mere disclosure of facts, such as providing non-privileged documents and other evidence, making witnesses available for interviews, and assisting in the interpretation of complex business records.

[2] By way of example, corporate personnel are usually interviewed during an internal investigation. If the interviews are conducted by counsel for the corporation, certain notes and memoranda generated from the interviews may be subject, at least in part, to the protections of attorney-client privilege and/or attorney work product. ***To receive cooperation credit for providing factual information, the corporation need not produce, and prosecutors may not request, protected notes or memoranda generated by the interviews conducted by counsel for the corporation****. To earn such credit, however, the corporation does need to produce, and prosecutors may request, relevant factual information—including relevant factual information acquired through those interviews, unless the identical information has otherwise been provided—as well as relevant non-privileged evidence such as accounting and business records and emails between non-attorney employees or agents.*

[3] These privileged communications are not necessarily limited to those that occur contemporaneously with the underlying misconduct. They would include, for instance, legal advice provided by corporate counsel in an internal investigation report. Again, the key measure of cooperation is the disclosure of factual information known to the corporation, not the disclosure of legal advice or theories rendered in connection with the conduct at issue (subject to the two exceptions noted in USAM 9-28.720(b)(i-ii)).