

Authors

Jason S. Lewis
214-740-8432
jlewis@lockelord.com

Gregory S. Saikin
713-226-1534
gsaikin@lockelord.com

www.lockelord.com

This *Client Alert* is provided solely for educational and informational purposes. It is not intended to constitute legal advice or to create an attorney-client relationship. Readers should obtain legal advice specific to their enterprise and circumstances in connection with each of the topics addressed.

If you would like to be removed from our mailing list, please contact us at either unsubscribe@lockelord.com or Locke Lord Bissell & Liddell LLP, 111 South Wacker Drive, Chicago, Illinois 60606, Attention: Marketing. If we are not so advised, you will continue to receive *Client Alerts*.

Attorney Advertising

© 2008 Locke Lord Bissell & Liddell LLP

SEC Releases its Internal Enforcement Manual*Privilege Waiver Addressed In Detail*

The Securities and Exchange Commission (SEC) recently made its internal Enforcement Manual, also referred to as the Red Book, available to the public for the first time. Similar to the Department of Justice's (DOJ) United States Attorney's Manual, also publicly available, the stated purpose of the Red Book is "to be a reference for the staff in the U.S. Securities and Exchange Commission in the investigation of potential violations of federal [] law." Despite its internal purpose, the availability of the Red Book will help guide companies, individuals, and private practitioners through the rough waters of SEC enforcement investigations.

In addition to addressing the SEC's process for opening investigations, issuing Wells notices, and authorizing enforcement actions, among other things, the Red Book clarifies the SEC's position on requesting privilege waivers—an issue which over the past few years has become increasingly controversial in the eyes of Congress, the Judiciary, federal regulators, and possible defendants. In general, at issue is whether federal regulators are able to view a company's or individual's failure to waive the attorney-client or work-product privilege as a lack of cooperation, a factor most federal enforcement agencies look to when determining whether to bring an enforcement action. In August 2008, following threats by Congress to enact legislation in the area, the DOJ revised several of its own policies to include that "cooperation will be measured by the extent to which a corporation discloses relevant facts and evidence, not its waiver of privileges."

Like the revised DOJ policy, the SEC determines cooperation based on, among other things, whether the party has timely disclosed relevant facts, not whether it has waived a privilege. In particular, the Red Book contains the following policy on privilege waiver:

Waiver of privilege is not a pre-requisite to obtaining credit for cooperation. A party's decision to assert a legitimate privilege will not negatively affect their claim to credit for cooperation. The appropriate inquiry in this regard is whether, notwithstanding a

legitimate claim of privilege, the party has disclosed all relevant underlying facts with- in its knowledge.

In addition, the Red Book mandates that requests for privilege waivers cannot be made unilaterally by SEC staff attorneys, specifically stating the "staff should not ask a party to waive the attorney-client or work product privileges and is directed not to do so." According to the Red Book, all "decisions regarding a potential waiver of privilege are to be reviewed with the Assistant supervising the matter and that review may involve more senior members of management as deemed necessary." This policy mirrors DOJ policy in that line federal prosecutors must similarly seek approval from upper-management before requesting privilege waiver. However, the SEC's policy appears to be more relaxed than the DOJ's policy in some respects. For example, unlike DOJ policy, the SEC does not place a complete prohibition on requesting documents containing core-work product (e.g. legal advice) in the event a request for privilege waiver is authorized.

Despite the latest privilege waiver reforms, it remains to be seen whether Congress will find it necessary to enact its own reforms into federal law to further protect the attorney-client and work-product privileges. Such legislation would also likely cover investigations by all federal enforcement agencies, including the DOJ, SEC, CFTC, and IRS, among others.

For the full text of the Red Book, please [click here](#).

For the related LLBL *Client Alert* on DOJ privilege policy revisions, please [click here](#).

About the Authors

Jason Lewis is a partner at LLB&L. He returned to the Firm in 2007 after serving as an SEC Enforcement Attorney in the Ft. Worth regional office. Mr. Lewis focuses his practice on SEC enforcement matters, governmental investigations, internal corporate investigations, and securities litigation.

Greg Saikin is an associate at LLB&L. He concentrates on white collar criminal defense and internal investigations.