FCPA Update

A Global Anti-Corruption Newsletter

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WPP Settlement Highlights Risks of Expansion By Acquisition

In its fourth FCPA enforcement action of 2021, the SEC entered into a cease-and-desist order (the "Order") with the world's largest advertising agency, WPP plc.[1] The Order, the findings of which were neither admitted nor denied by WPP, found violations of the anti-bribery, internal controls, and books and records provisions of the FCPA involving WPP subsidiaries in India, China, Brazil, and Peru. The Order provides a cautionary tale of the risks associated with corporate expansion by acquisition. These risks relate to: (i) the difficulties in integrating newly acquired companies into a compliance program in the absence of adequate compliance

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1. *In the Matter of WPP plc*, Order Instituting Cease-and-Desist Proceedings Pursuant to Section 21C of the Securities Exchange Act of 1934, Making Findings and Imposing a Cease-and-Desist Order, Securities and Exchange Act Rel. No. 93117, Accounting and Auditing Enforcement Rel. No. 4257, Admin. Proc. File No. 3-20595 (Sept. 24, 2021), https://www.sec.gov/litigation/admin/2021/34-93117.pdf ("Order").

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infrastructure; and (ii) the risks surrounding the lack of effective oversight and control by the acquirer when an acquisition in a high-risk jurisdiction leaves a founder with *de facto* control of the acquired entity.

WPP's Expansion by Acquisition

WPP plc is a global marketing communications group domiciled in Jersey with dual headquarters in London and New York.[2] Its ADRs trade on the New York Stock Exchange. One of the ways that WPP expanded globally was by implementing an "aggressive acquisition strategy;" acquiring small local advertising agencies previously owned and operated by individuals or groups of individuals ("founders").[3] These transactions were often structured to include an earn-out provision (withholding part of the purchase price to align the founder's interest with future performance) and involved retaining the founder as CEO of the subsidiary. Although WPP, either centrally or at the market level, controlled financial matters and core functions, the founders continued to have "wide autonomy and outsized influence."[4]

As a result of its expansion, WPP employed approximately 100,000 people at over 3,000 locations in 112 countries. Despite this large footprint, WPP had no compliance department, and the SEC found that it lacked meaningful coordination between its legal, internal audit, and "Network Management" department, the last of which was responsible for managing local subsidiaries.[5]

Alleged Improper Payments in India, China, Brazil, and Peru

The SEC found that activities in four of the countries in which WPP operates – India, China, Brazil, and Peru – violated the FCPA. In each case, the CEO/founder of the subsidiary was directly involved.

India

One of WPP's subsidiaries, acquired in 2011, was located in Hyderabad, India. Between 2015 and 2017, half of that agency's revenue was attributable to the government public relations agencies of the Indian states of Telangana and Andra Pradesh. According to the SEC, during this two-year period, WPP received seven employee complaints implicating the CEO of the subsidiary in two separate schemes to make payments through third parties to officials at these state public relations agencies.[6]

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2. *Id.* ¶ 3.
3. *Id.* ¶ 4.
4. *Id.* ¶¶ 4-5.
5. *Id.* ¶¶ 6-7.
6. *Id.* ¶¶ 8-9.

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In response to the first complaint, WPP retained an Indian partner of an international accounting firm to investigate. However, the accounting firm relied only on information provided by the subsidiary, the management of which had been accused of involvement in the scheme. It did not contact relevant third parties and ultimately produced a report that made no conclusions as to the bribery allegations, but noted red flags in the vendor selection process. After additional anonymous complaints implicating both the CEO and CFO of the subsidiary, WPP called on the same accounting firm to conduct a review of the subsidiary's relationship with the third party. When the third party refused to cooperate, its contract was terminated, but its outstanding invoices were paid and no further action was taken to investigate the allegations of involvement by the CEO and CFO.[7]

A second scheme, also directed by the CEO/founder with the assistance of the CFO, involved retaining a third party, supposedly to execute an advertising campaign. In reality, according to the SEC, there was no advertising campaign and the third party passed funds back to the CEO of the subsidiary, who then used the funds to make payments to government officials or for other purposes.[8]

"Companies expanding through acquisitions should ensure that they have a compliance infrastructure that can adequately integrate and monitor new acquisitions."

After receiving a seventh anonymous complaint, this time including the name of an alleged bribe recipient, WPP directed its legal department to investigate. The legal department's investigation included third-party due diligence on the CEO and the alleged bribe recipient, as well as a review of the CEO's and CFO's email accounts. The background check discovered a close relationship between the CEO and the government official, as well as evidence of the government official's reputation for demanding kickbacks. The email review uncovered communications from the CEO and CFO tracking the funds paid to the two third parties to be used for improper payments.[9]

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7. *Id.* ¶¶ 10-14.
8. *Id.* ¶¶ 15-17.
9. *Id.* ¶¶ 18-20.

China

In 2014, WPP acquired a subsidiary in Shanghai. As in India, the acquisition was structured with an earn-out provision by which the co-founder would remain as CEO. According to the SEC, in 2017, a WPP internal audit noted that, at the direction of the CEO, the subsidiary was pursuing aggressive tax avoidance schemes and violating WPP's internal accounting controls to do so. In 2018, an employee of the subsidiary informed the WPP CFO of the APAC Network that the subsidiary was under a tax audit that could result in criminal charges. The employee added that the company had retained a third-party vendor at the recommendation of tax officials. The SEC also noted that, in a later discussion of the ongoing tax audit, the CEO mentioned to WPP regional management that he was using his "personal social connections" to attempt to control the tax audit. The China subsidiary paid over $100,000 to the vendor recommended by the tax officials two months before the tax audit was favorably finalized. According to the SEC, had the red flags described above been "properly investigated," this payment would have been detected or prevented.[10]

Latin America

WPP also acquired subsidiaries in Peru and Brazil, retaining the founders as CEOs in each case. In Brazil, according to the SEC, the CEO violated WPP's advisor payment policy (which prohibited companies from paying third parties to assist with procuring government contracts without WPP's approval) and thereby falsified the subsidiary's books and records. In Peru, the CEO allowed the subsidiary to be used as a conduit for bribes paid by a construction company to a politician, routing those payments through different WPP subsidiaries in Colombia and Chile, resulting in false records at each company.[11]

Cooperation and Remediation

Based on the findings in the Order, WPP paid just over $10 million in disgorgement, an $8 million civil penalty, and just over $1 million in prejudgment interest. Although the SEC has not adopted DOJ's practice of assigning percentage discounts as credit for cooperation and remediation, it did consider those factors in determining appropriate settlement terms. WPP's civil penalty was likely mitigated by its significant cooperation and remediation. Its cooperation efforts included making foreign employees available for interviews in the United States. As part of its remediation, WPP terminated the senior executives involved in the scheme and

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10. *Id.* ¶¶ 21-25.
11. *Id.* ¶¶ 26-30.

significantly expanded its global compliance program, which included the creation of 36 new positions. It also set up regional committees to monitor risk and has been conducting additional reviews of other subsidiaries in the relevant jurisdictions.[12]

Key Takeaways

While some of the findings in the Order appear brazen at first (especially those relating to India), it is important to remember that each subsidiary was a very small part of a vast global operation. The Order is useful primarily as a roadmap for the SEC's expectations for companies (including companies much smaller and less sophisticated than WPP) that encounter risk as they expand globally. In particular:

- Companies expanding through acquisitions should ensure that they have a compliance infrastructure that can adequately integrate and monitor new acquisitions. The SEC specifically noted WPP's size and geographic reach into high-risk jurisdictions when pointing out the lack of a compliance department at the company. While it can be difficult to decide exactly when a growing company needs a specialized compliance department or team, the SEC has made clear in this case it should occur well before a company has 100,000 employees in 122 jurisdictions.
- Beware of ownership without control. Part of WPP's expansion was to acquire small local advertising agencies while retaining the founders of those agencies as CEOs, allowing them to retain significant control over the local operations. While this may make business sense and is the surest way to acquire local "know how" as part of an acquisition, such local knowledge also may involve business practices inconsistent with the expectations of a multinational corporation, especially in high-risk jurisdictions. These risks are exacerbated when a founder retains *de facto* control despite having given up majority ownership. For this reason, compliance integration and monitoring of new acquisitions and "founders" are essential. For example, WPP conducted third-party due diligence on the CEO of its Indian subsidiary six years after its acquisition, and only after receiving seven anonymous reports of bribery. The due diligence uncovered connections to government officials, which may have been addressed more effectively had the diligence been done at the time of the acquisition.
- Don't under-react to anonymous complaints and red flags. In both India and China, the SEC found that WPP did not react to "the presence of red flags." In India, a series of anonymous complaints were not effectively

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12. *Id.* ¶ 37.

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addressed. Although many of these complaints lacked specificity, they all identified the CEO's involvement. While it can be difficult to judge the veracity of every anonymous complaint, any allegation of wrongdoing against senior management merits attention – and repeated complaints (especially if appearing to come from different sources) add to the urgency. Although WPP commissioned a fulsome review after receiving the seventh anonymous complaint containing the identity of the alleged recipient, the Order makes clear that the SEC believes such a review should have occurred earlier. In China, numerous warning signs relating to a tax audit were raised, but (according to the SEC) not followed up on. Again, the SEC appears to believe that an audit flagging aggressive accounting by a founder, combined with information that the subsidiary had retained a third party on the recommendation of the tax auditors, should have merited a review.

- If a company is going to investigate, the investigation should be commensurate with the seriousness of the risk. All companies face resource constraints and must decide what to investigate and how closely to look. In the Order, the SEC specifically noted that the accounting firm initially retained in India was overly reliant on the subsidiary for information and did not contact third parties. The fact that the accounting firm did not come to a conclusion with regard to the anonymous allegations of bribery appears not to have provoked any interest in additional investigation. When a review was eventually carried out by the legal department, the SEC specifically mentioned that the use of a third party background check and email review yielded significant results. There is a middle ground between a cursory glance and "boiling the ocean." The Order suggests that that middle ground cannot be reached by substantial reliance on the subsidiary, against whose management allegations have been made, as the main source of information.

WPP is a vast company doing business across the world. Although it had policies in place throughout the relevant period, those policies were less meaningful to the businesses it was acquiring in jurisdictions where payment of bribes to government officials is often business as usual. WPP's risk was increased significantly by its expansion through acquisition. The lesson for companies, both larger and smaller than WPP, is that you can expose yourself to immense risk when you acquire

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business practices of small individual-run businesses in high-risk jurisdictions without a fulsome compliance program to handle the integration and monitoring of those acquisitions.

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Eleventh Circuit Upholds Taint Team Procedures, Finding Safeguards Sufficient to Protect Attorney-Client Privilege

In a significant ruling on August 30, 2021, the Eleventh Circuit Court of Appeals upheld DOJ's use of a so-called "taint team" or "filter team" to screen for potentially privileged materials in a white-collar criminal case. This ruling is the latest in a string of developments concerning the use of such teams whereby federal prosecutors and agents, separate from the prosecution team, determine whether potentially privileged documents can be shared with the prosecution team.

This longstanding practice has come under intense scrutiny in recent years. A Fourth Circuit decision in 2019 heavily criticized DOJ's taint team procedures, prompting calls for reform. In 2020, DOJ created a "Special Matters Unit" (SMU) within the Fraud Section to provide dedicated expertise in filter reviews of potentially privileged material. Nonetheless, DOJ's current approach varies depending on the circumstances and jurisdiction. In some cases, DOJ uses taint team procedures that leave DOJ entirely in control of the privilege review process; in other cases, DOJ uses a taint team but involves the putative privilege-holder and/or the court in making or approving privilege determinations; and in some cases DOJ even requests the appointment of a special master, an independent third party, to handle the process.

Given how frequently DOJ seizes potentially privileged material in FCPA and other white-collar cases, its treatment of these issues has significant implications in criminal investigations. By understanding exactly what procedures DOJ plans to employ, companies and their counsel can advance the strongest possible arguments to safeguard the attorney-client privilege and work product protection.

Taint Teams

DOJ policy has long contemplated the use of taint teams in circumstances where difficult privilege issues are likely to arise. Specifically, this involves cases where search warrants are executed at an attorney's premises or at businesses where a lawyer's materials may be searched.[1] In such circumstances, the Justice Manual – which governs how federal prosecutors should handle investigations – provides that a taint team should be created, "consisting of agents and lawyers not involved in the underlying investigation."[2]

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1. Justice Manual § 9-13.420, https://www.justice.gov/jm/jm-9-13000-obtaining-evidence.
2. *Id.*

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Pursuant to the Justice Manual, the requirements of a taint team are fairly minimal: they must include only lawyers and agents not on the prosecution team; they must not disclose information to the prosecution team until instructed by the attorney in charge of the taint team; and they must generally apprise the court (in the affidavit in support of the search warrant) of the intention to use a taint team. Notably, DOJ policy does not require any judicial involvement in making privilege determinations, leaving that responsibility solely in DOJ's hands. Nor does DOJ policy call for obtaining any input from the putative privilege-holder.

Defense counsel and many courts have raised strenuous objections to the use of taint teams over the years. They have argued, among other things, that prosecutors are naturally inclined to take a highly restrictive view of the attorney-client privilege and thus, in any situation where application of the privilege is less than abundantly clear, a taint team is likely to deem the privilege inapplicable. Critics also argue that prosecutors and federal agents – even if not members of the prosecution team – have a bias toward wanting to see an investigation and prosecution succeed. This arguably incentivizes not withholding documents that could provide valuable evidence of guilt. Another line of criticism stresses the lack of any formal "wall" separating prosecutors on a taint team from prosecutors handling the underlying investigation – even though they often work in the same office and may be members of the same team on other cases – and the resulting risk that, intentionally or not, privileged material may leak from the taint team to the prosecution team. Indeed, one court memorably noted the "obvious flaw" in the taint team procedure: "the government's fox is left in charge of the appellants' henhouse, and may err by neglect or malice, as well as by honest differences of opinion."[3]

Despite these criticisms, DOJ's use of taint teams continued unabated, with the general endorsement of most courts. But a Fourth Circuit decision in 2019 significantly changed the landscape

The Fourth Circuit's 2019 Decision

In In re Search Warrant Issued June 13, 2019,[4] the government obtained a warrant to search a law firm's offices based on a belief that a partner at the firm ("Lawyer A") was obstructing a federal investigation into the partner's client ("Client A"), who was also a lawyer. Prosecutors contended that the crime-fraud exception to the attorney-client privilege applied because Lawyer A was furthering the criminal activities of Client A.[5]

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3. *In re Grand Jury Subpoenas*, 454 F.3d 511, 523 (6th Cir. 2006); *see also United States v. SDI Future Health, Inc.*, 464 F. Supp. 2d 1027, 1037 (D. Nev. 2006) ("Federal courts have taken a skeptical view of the Government's use of 'taint teams' as an appropriate method for determining whether seized or subpoenaed records are protected by the attorney-client privilege."); *In re Search Warrant for L. Offs. Executed on Mar. 19, 1992*, 153 F.R.D. 55, 59 (S.D.N.Y. 1994) (finding the use of a taint team to be "highly questionable" and "discouraged," "notwithstanding our own trust in the honor of an AUSA").

4. 942 F.3d 159 (4th Cir. 2019).

5. *Id.* at 165.

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The magistrate judge who issued the search warrant authorized DOJ's proposed taint team procedures, which called for: (i) a taint team comprised of, among others, prosecutors from a different division of the same U.S. Attorney's Office, and federal agents and paralegals not involved in the underlying investigation; (ii) the taint team to forward materials deemed to be non-privileged directly to the prosecution team; and (iii) the taint team to confer with counsel to Lawyer A on documents that were potentially privileged or where the privileged material could be potentially redacted, and to seek a judicial ruling where no agreement could be reached.[6]

Following a search of the law firm in which agents seized extremely voluminous records, both Lawyer A and Client A challenged the use of the taint team. The district court denied relief, finding that "[t]here is no inherent conflict in having the seized documents reviewed by [the taint team] composed of Assistant United States Attorneys who have no connection to the underlying case or [the law firm] and no contact with the [prosecution team] on this case."[7]

"Although the Eleventh Circuit ruled in the government's favor, the taint team protocol that it upheld included far more safeguards – and gave both the court and the putative privilege-holders a much greater role – than DOJ has historically used and continues to use in many jurisdictions."

But on appeal, the Fourth Circuit reversed. The Circuit found that the magistrate judge "erred in assigning judicial functions to the executive branch," because the resolution of a dispute over whether a document is protected by privilege should be decided by the courts and not the executive branch.[8] Thus, the essential problem with the taint team protocol was that it allowed the prosecution, under some circumstances, to decide on its own that documents were or were not privileged: "[A] court simply cannot delegate its responsibility to decide privilege issues to another government branch."[9] This problem was "compound[ed]" by the fact that the taint team included federal agents and paralegals, who were not lawyers.[10]

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6. *Id.* at 165-66.
7. *Id.* at 169.
8. *Id.* at 176.
9. *Id.* at 177.
10. *Id.*

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The court also described prior criticisms of DOJ taint teams and noted examples in which taint teams improperly exposed prosecution teams to privileged material.[11] In sum, the Fourth Circuit concluded that the taint team procedure "left the government's fox in charge of guarding the Law Firm's henhouse."[12]

Developments Since 2019

The Fourth Circuit's decision in *In re Search Warrant* gained widespread attention and fueled calls for DOJ to reform its taint team procedures.

In 2020, DOJ created the Special Matters Unit within the Fraud Section. The Department announced that the SMU would "focus on issues related to privilege and legal ethics," including, among other things, "conduct[ing] filter reviews to ensure that prosecutors are not exposed to potentially privileged material," "litigat[ing] privilege-related issues in connection with Fraud Section cases," and "provid[ing] training and guidance to Fraud Section prosecutors."[13]

Although it appeared that the SMU was created in response to the Fourth Circuit's decision, it is not yet clear in what ways the SMU is changing DOJ's approach to privilege reviews. Additionally, even if the SMU implements new policies or procedures, those changes presumably would apply only to cases involving the Fraud Section, not those led by a U.S. Attorney's Office or another component of Main Justice.

Since the Fourth Circuit's decision in *In re Search Warrant*, DOJ's approach to privilege reviews has varied from case to case, depending on the circumstances and jurisdiction. Some courts have expressly declined to follow the Fourth Circuit.

For instance, a judge in the Southern District of New York recently remarked that, "[t]o the extent that the Fourth Circuit's decision . . . can be read to categorically prohibit the use of filter teams to conduct privilege reviews in the first instance of lawfully seized materials, the Court declines to follow it. Courts in th[e Second] Circuit have long blessed such procedures and rightly so, as they adequately balance the law enforcement (and public) interest in obtaining evidence of crimes with respect for privileged communications."[14]

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11. *Id.* at 177-78.
12. *Id.* at 178 (citing *In re Grand Jury Subpoenas*, 454 F.3d at 523). The Fourth Circuit also faulted the magistrate judge for authorizing the taint team procedure *ex parte* rather than in an adversarial proceeding following the search, *id.*, and found that the taint team's protocol impermissibly authorized the prosecution to contact the law firm's clients to seek a waiver of the privilege, *id.* at 180.
13. *Fraud Section, Year In Review:* 2020, at 4, https://www.justice.gov/criminal-fraud/file/1370171/download.
14. *United States v. Avenatti*, No. 19 Cr. 374 (JMF), 2021 WL 4120539, at *1 (S.D.N.Y. Sept. 9, 2021).

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And yet, even in districts where DOJ remains free to use a taint team to make privilege determinations without judicial involvement, the Department sometimes affirmatively requests that the court appoint a special master to handle the privilege review.[15] In these typically more high-profile or complex cases, DOJ or the court may contend that the involvement of a third party in the privilege review process helps to "ensure the 'perception of fairness.'"[16]

In sum, there is a significant lack of uniformity in DOJ's current approach to privilege reviews. But a recent Eleventh Circuit decision may lead to greater consistency.

The Eleventh Circuit's Recent Decision

In *In re Sealed Search Warrant & Application for a Warrant by Tel. or Other Reliable Elec. Means*,[17] the FBI executed a search warrant at a suite of offices in Miami, including an in-house counsel's office. The matter involved an investigation into a Ukrainian billionaire and others for money laundering and related crimes.

As in the Fourth Circuit case, the government described its proposed taint team procedures in the search warrant application, and the magistrate judge authorized them when issuing the warrant. Here, the procedures called for: (i) the creation of a taint team comprised of prosecutors and agents not involved in the underlying investigation; (ii) the taint team to segregate all communications to or from attorneys and forward non-attorney communications directly to the prosecution team; and (iii) the taint team to review attorney communications and, if the team determines that any such communications are not privileged (*e.g.*, because the crime-fraud exception applies), to obtain a court order before providing the documents to the prosecution team.[18]

Following the search, various interested parties (the "Intervenors") challenged the use of a filter team.[19] The magistrate judge rejected the Intervenors' argument that taint teams are *per se* impermissible, but nonetheless imposed a modified protocol.[20] Specifically, the court ruled that the Intervenors could conduct an initial review of

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15. *See, e.g., In re Search Warrants Executed on Apr. 28, 2021*, No. 21 M.C. 425 (JPO), 2021 WL 2188150, at *4 (S.D.N.Y. May 28, 2021) (search of premises belonging to Rudolph Giuliani and Giuliani Partners LLC).
16. *Id.*at *2; *see also In re Search Warrants Executed on April 9, 2018*, No. 18 Mag. 3161 (S.D.N.Y.), Dkt. No. 38 at 8; Dkt. No. 104 at 88 (search of premises of Michael Cohen).
17. 11 F.4th 1235, 1239 (11th Cir. 2021).
18. *Id.* at 1240.
19. *Id.* at 1240.
20. *Id.* at 124243.

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all seized items and provide a privilege log to the prosecutors, but that the taint team could review the underlying communications when determining whether to challenge any privilege designations, and that the court or a special master would rule on any privilege disputes.[21]

The Intervenors appealed but the district court affirmed, as did the Eleventh Circuit. In a significant victory for DOJ, the Circuit rejected the argument that "government agents should never . . . review documents that are designated by their possessors as . . . privileged until after a court has ruled on the privilege assertion."[22]

The court distinguished the Fourth Circuit's decision on both factual and legal grounds. As a factual matter, "unlike in [the Fourth Circuit case], this case involve[d] no claims that the majority of seized materials were both privileged and irrelevant to the subject of the investigation."[23] And as a legal matter, the modified taint team protocol "did not assign judicial functions to the executive branch" because the Intervenors had an opportunity to designate documents as privileged and obtain judicial review before any such documents were disclosed to the prosecution team.[24] The court thus found the taint team protocol to be reasonable and appropriate under the circumstances.[25]

Key Takeaways

Although the Eleventh Circuit ruled in the government's favor, the taint team protocol that it upheld included far more safeguards – and gave both the court and the putative privilege-holders a much greater role – than DOJ has historically used and continues to use in many jurisdictions. Most significantly, the protocol enabled the privilege-holders to review the documents in the first instance, to designate documents as privileged, and to obtain judicial review before any such documents were disclosed to the prosecution team. Of course, the Eleventh Circuit did not say that such measures are required in every case, and a significant open question is what measures must be included at a bare minimum.

It remains to be seen how other circuits will rule on this issue and whether the U.S. Supreme Court will weigh in. Given that no majority rule has yet emerged:

- Will courts agree with the Fourth Circuit that taint teams are, effectively, *per se* impermissible, at least under certain circumstances?

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21. *Id.* at 1243. The court also directed the government to use a taint team comprised of attorneys and staff from outside the U.S. Attorney's Office handling the investigation. *Id.*
22. *Id.* at 1249-50 (internal quotation marks omitted).
23. *Id.* at 1251.
24. *Id.*
25. *Id.* at 1252.

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- Will they follow the Eleventh Circuit and bless taint teams when the procedures allow for input by the privilege-holder and a final determination by the court?
- Or will they follow the Southern District of New York and other courts that continue to allow the prosecution to make privilege determinations on its own?

It also remains to be seen what policies or procedures will be adopted by the SMU or by DOJ as a whole.

It is common in FCPA and other white-collar investigations for law enforcement authorities to execute search warrants on email accounts, cell phones, computers, and physical premises, often collecting enormous quantities of potentially privileged material. In evaluating whether and how to challenge DOJ's taint-team procedures, key factors include whether:

- the searched premises or accounts were used by lawyers or are otherwise likely to include large volumes of privileged material;
- there is a basis to believe that a large portion of the seized material is unrelated to the subject matter of the investigation;
- the protocol enables the putative privilege-holder to play a role in the process and assert privilege over particular documents;
- the protocol allows DOJ's taint team to make final privilege determinations on its own, rather than requiring a court order before potentially privileged material may be shared with the prosecution team;
- the taint team is comprised of prosecutors from the same office conducting the underlying investigation;
- the taint team includes non-lawyers like agents or paralegals; and
- the protocol was adopted *ex parte* or following an adversarial process.

It is critical that companies and their counsel keep these precedents and relevant considerations in mind when facing a criminal investigation.

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