

## CLIENT ALERT

### Decision Could Limit Work Product Protection for Cooperating Companies

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A Northern District of Texas federal court decision could have unintended consequences on the government's ability to pressure companies to cooperate. In *Securities and Exchange Commission v. Microtune, Inc., et al.*, the Court held that the work product protection did not apply to internal investigation documents where the evidence suggested that the documents were created not "in anticipation of litigation" but rather for pure business purposes and/or to cooperate with the government. No. 3-08-CV-1105-B, 2009 WL 1574872, at \*\*1-2 (N.D. Tex., June 4, 2009).

*Microtune* is an SEC enforcement action against certain of the company's former officers. The defendants sought discovery of documents the company's lawyers and their advisors had created during the company's internal investigation and cooperation with the SEC, including documents the company had never disclosed to the SEC. The court allowed the discovery, rejecting the company's claims that the material in question, which included "internal memoranda, analyses, and other working documents . . . regarding the investigation and the legal implications of the investigation's findings," were protected by either the attorney-client privilege or the work product protection. *Id.* at \*\*4, 7.

The court reasoned that the material was not subject to the work product protection because the company presented insufficient proof that "the primary motivating purpose" for its creation was the "anticipation of litigation or . . . trial." *Id.* at \*6. Some documents, the court found, were created for pure business purposes. *Id.* \*7. As for others the company claimed were created "in anticipation of litigation," the court was not persuaded by outside counsel's general declaration that the company anticipated SEC and civil suits would follow the investigation or by the fact that the documents were created after the SEC began its investigation. *Id.* at \*\*6, 7. The court instead focused on the fact that the SEC "investigation was triggered by the company's self-reporting of wrongdoing," insinuating that the evidence showed that cooperation with the government was actually the company's primary motivation for creating the documents, and indeed for its entire investigation. *Id.* at \*7; *see id.* at \*6. Having concluded that the work product protection did not apply, the court never reached the issue of whether the disclosure of some, but not all, potential work product operated as a subject matter waiver.

Companies must balance many considerations when deciding whether to self-report, and whether to cooperate once an investigation has commenced. The court's strict interpretation in *Microtune* only reinforces the risks that may be encountered when making those decisions. Moreover, the decision provides a good lesson concerning the care companies and their counsel must take when creating work product to fully articulate, in a non-privileged way, legitimate contemporaneous concerns about anticipated litigation that can, and often does, follow a government investigation.

For more information, please contact the professional(s) listed below, or your regular Crowell & Moring contact.

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