Public Statements & Remarks

Statement of Commissioner Caroline D. Pham on the Deliberative Process Privilege

October 23, 2023

There is a disturbing trend among federal agencies that involves overbroad use of the deliberative process privilege against defendants in enforcement actions, so that relevant facts or final policy or final determinations cannot be used to support a defense against the alleged charges. I am seriously concerned that such attempts to shield the truth from greater scrutiny deprives defendants of due process and a fair hearing. Such basic human rights are the essence of a free and democratic society, and are embodied in the United States Constitution and Bill of Rights. These protections of life, liberty, and property are why the United States of America is a beacon of freedom across the world, and a stalwart defender of the rule of law against authoritarianism and autocracy. It is because of these first principles that I believe that the deliberative process privilege in enforcement actions (unrelated to Freedom of Information Act (FOIA) litigation) is an executive privilege that cannot be delegated by the head of the agency—namely, that the Commission cannot delegate the authority to invoke the deliberative process privilege to agency staff.

I quote in its entirety the dissenting opinion of U.S. Circuit Court Judge Haldane R. Mayer, former Special Assistant to U.S. Supreme Court Chief Justice Warren E. Burger, in *Marriott Int'l Resorts, L.P. v. United States*, 437 F.3d 1302, 1308-09 (Fed. Cir. 2006):

> Because the "deliberative process" privilege is merely a subset of executive privilege, and executi
> privilege must be invoked by an agency head, *see Kaiser Aluminum & Chem. Corp. v. United Stat*
> 141 Ct.Cl. 38, 157 F.Supp. 939, 947-48 (Ct.Cl.1958)., I dissent. Limiting the exercise of the privileg
> to agency heads helps ensure that the privilege is not abused or overused. A responsible subordir
> may fully review documents and submit only those for which invocation of the privilege would be n
> appropriate to the agency head, so I see no impediment to complete and accurate review of
> potentially privileged documents. It is no answer that in camera judicial inspection may be availabl
> upon a proper showing in disputed circumstances; executive decisions should be made by
> accountable executives in the first instance, and then should not be lightly second guessed.

The Commission must be as accountable as those we regulate. We must be held to the same standards if we are to avoid hypocrisy, and we must not shirk our duty to be fair and impartial in the application of law and regulation.

Another disturbing trend is the dubious increased use of alleged charges of making false statements to the CFTC. It is all too easy for the "truth" to become subjective as determined by the staff, instead of a fact-finding exercise. The criteria for establishing scienter may be so diminished as to be rendered meaningless. If this disturbing trend is allowed to continue, the Commission may well start to resemble a secret tribunal where we accuse others of crimes but will not tell why or how. There is no weighing of the equities, no regard for the Constitutional rights of the accused to defend themselves, and no respect for a fair hearing. Make no mistake: this is presumed guilty with no way to prove innocence. It is an abomination of the right to be presumed innocent until proven guilty.

Further, I caution the Commission and the staff that we must take care to resist the urge to make "secret agency law."[1] Such secrecy of the operations of the government is against the public interest and is a primary reason for the promulgation of the FOIA.[2] In the balancing act regarding when disclosure is, or is not, in the public interest, Congress codified certain common-law privileges against disclosure.[3] But these privileges are not absolute, for example, as detailed in the many cases examining the limitations of the deliberative process privilege.[4]

It bears reminding that the Commission should be an objective finder of fact and neutral arbiter of law that respects the Constitution and Constitutional rights. There must be no bias in the administration of justice and due process. If the Commission abuses its authority, we may well find that authority checked—taken away—by the courts or by the Congress as our Nation's founders intended.

[1] *See Nat'l Labor Rel. Bd. v. Sears, Roebuck & Co.*, 421 U.S. 132, 137-38, 148-54 (1975) (internal quotations and citations omitted).

[2] *Id.*

[3] *Id.*

[4] *See, e.g., Sec. and Exch. Comm'n v. Ripple Labs, Inc.*, No. 20 Civ. 10832 (AT) (SN), 2022 WL 4584111 (S.D.N.Y. Sept. 29, 2022) (finding that magistrate judge's order is not clearly erroneous that the SEC must produce certain internal agency documents that are not protected by the deliberative process privilege).

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