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Alert

White Collar Defense and Investigations and Securities Litigation and Enforcement Client Service Groups and Government Contracts and False Claims Act Teams

To: Our Clients and Friends March 17, 2014

The Evisceration of Attorney-Client Privilege for In-House Investigations? District Court Rules that Internal Investigations Conducted Pursuant to Regulatory Law and Corporate Policy are Not Protected by Attorney-Client Privilege or the Work-Product Doctrine

The U.S. District Court for the District of Columbia recently issued an order compelling the production of materials prepared during the course of internal investigations on the grounds that the materials were created pursuant to "regulatory law and corporate policy," and thus not prepared in anticipation of litigation or to further the provision of legal advice. The Court ruled this even though the investigations were initiated by reports to the company's legal department and were overseen by corporate counsel. This ruling is a strong warning to companies subject to any regulations or corporate policy requiring investigations or reporting to carefully clarify and document the role of counsel. Furthermore, where appropriate, the potential for litigation related to their internal investigations should be documented in detail in initial *Upjohn* correspondence. *United States ex re. Harry Barko v. Halliburton Co.*, Dkt. No. 150, 1:05-CV-1276 (Mar. 6, 2014).

In this False Claims Act *qui tam* action, Plaintiff-Relator (a former contract administrator for KBR Inc.) alleged that Halliburton, KBR, Inc. (formerly a subsidiary of Halliburton) and other subcontractors, inflated the costs of construction services on military bases in Iraq. Separately, KBR conducted internal investigations in accordance with its Code Of Business Conduct ("COBC") investigating potential violations of law and corporate policy.

Plaintiff-Relator moved to compel the production of these investigation reports and other documents created pursuant to the Company's COBC compliance program in response to "tips" regarding potential misconduct directed to the company's legal department, either directly or through a dedicated email address, dedicated P.O. Box, or the Company's third-party operated hotline program. Those "tips" were initially routed to in-house counsel who determined whether to open an investigation into the reported conduct by sending the tip to the company's compliance Director, an attorney, who then oversaw the investigation.

Following an *in camera* review, the District Court ruled that because the company's investigations were not undertaken for the primary purpose of seeking legal advice, they were not covered by attorney-client privilege. In addition, the Court found that the documents were not prepared or obtained because of the prospect of litigation; therefore, they were not attorney work product.

The Court's reasoning effectively denies attorney-client privilege over in-house, internal investigations that arise for more than one purpose, for example, to comply with regulatory requirements to investigate potential fraud in addition to providing legal advice and preparing for potential litigation with the government regarding such potential fraud.

The District Court denied Defendants' motion to certify interlocutory appeal under 28 U.S.C. § 1292(b) on March 11, 2014, and Defendants have petitioned the United States Court of Appeals for the District of Columbia for a Writ of Mandamus to vacate the District Court's Order. We note that the District Court's opinion quoted extensively from the documents, publicly releasing highly inflammatory information that is still the subject of dispute. The Circuit Court has ordered the District Court's order stayed pending its review and requested additional briefing from the parties.

While the internal investigations in this matter were connected to the company's obligations under the Federal Acquisition Regulation ("FAR") (including the Mandatory Disclosure Rule) and the Anti-Kickback Act, similar investigations are frequently undertaken by companies across the country subject to a wide variety of "regulatory law" and disclosure requirements, including the Sarbanes-Oxley Act, the Foreign Corrupt Practices Act, and many others. This decision cautions public companies and federal contractors to review how they conduct in-house investigations to determine whether they can clarify the role of counsel so that the "primary purpose" test is met, thereby providing attorney-client privilege protection to such investigations.

This decision further narrows the scope of the attorney-client privilege, which we have discussed in previous alerts, including Attorney-Client Privilege in FCPA Investigation Nullified Based on Crime-Fraud Exception.

For more information about this update, or if you have any questions regarding internal investigations, please contact Mark Srere, Daniel Schwartz, or Jennifer Mammen at +1 202 508 6000, Kevin Lombardo at +1 310 576 2100, or any members of Bryan Cave's White Collar Defense and Investigations, Securities Litigation and Enforcement, Government Contracts, or False Claims Act Practices.