Blogs
April 28, 2022
Public Chatter

Internal Investigations: Who Are the Company's Actual Adversaries?

Following up on **our recent blog in a series** about internal investigations, investigative attorneys are often engaged, at least in part, for the very purpose of establishing legal privilege over an internal investigation. In other words, they are paid to be paranoid about privilege waivers and their impact on our clients' legal fortunes. Can there be a real argument that the investigative materials frequently requested by outside auditors invoking Section 10A of the Securities and Exchange Act of 1934 are not also extremely attractive to potential hostile downstream litigants, including employees terminated as a result of the investigative findings, governmental authorities, or shareholders? It's worrying that legal protection might be considered waived if the protected materials could be shared with an adversary. See *S.E.C. v. Roberts*, 254 F.R.D. 371, 381 (N.D. Cal. 2008). Government Enforcers When government enforcers work with outside counsel and their publicly traded client in an FCPA investigation disclosed to the SEC and DOJ and the company's outside auditors to conduct a 10A review, are they adversaries for the purposes of the attorney work-product doctrine? The answer for government enforcers like the DOJ and SEC is pretty often "yes," even if the company is now working with government parties. See generally *Wadler v. Bio-Rad Laboratories, et al.*, 212 F. Supp. 3d 829 (2016) (ruling in the context of an FCPA internal investigation that, pursuant to the well-settled "general waiver" principle, privileged communications cannot be shared selectively); *United States v. Hatfield*, No. 06-CR-0550 (JS), at *3-4 (E.D.N.Y. Jan. 8, 2010) (holding that independent auditors were adverse to the company's CEO where auditors had "concerns regarding … management" and "a responsibility to publicly reveal the truth"). Outside Auditors The trickier question comes in the context of outside auditors. Aren't they there to help the company and aren't their interests consequently aligned? Although not in the majority, courts have concluded that independent auditors in fact have an inherently adversarial relationship with the companies they audit. Compare *Medinol, Ltd. v. Boston Scientific Corp.*, 214 F.R.D. 113, 116 (S.D.N.Y. 2002). As a consequence, companies have a solid basis for fearing a downstream assertion that they waived work product protection over the subject of the information disclosed to their outside auditors. These cases, and the more generally unsettled state of the law on this key issue, create a non-trivial risk that turning over their search terms today could create privilege waiver arguments tomorrow. This fight has been fought—most frequently with success. Although privilege waiver arguments are inherently fact-dependent, being prepared to identify and fight even unwitting efforts by third parties to put privilege in jeopardy is a skillset that should be part of every careful and experienced outside counsel's toolkit.

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