

Internal Investigations and Attorney-Client Privilege: Hoping for the Best- Planning for the Worst

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The Background – the Growth in Internal Investigations

Cases Filed by the DOJ and SEC Under the Foreign Corrupt Practices Act: 2004-2010



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The Background – the Growth in Internal Investigations

- Whistleblower provisions
 - False Claims Act (31 U.S.C. § 3730(h))
 - Dodd-Frank (Section 922(b))
 - Sarbanes Oxley (18 U.S.C. § 1513(e))

Conduct of the Internal Investigation

- Who conducts? In-house staff versus outside professionals
- Who administers? Separate committee versus audit committee versus general counsel

Hoping for the Best – The Goal of the Investigation

- General contours of the investigative process
 - Determine the merits of the alleged impropriety, responsible individuals, missing/inadequate controls
 - Persuading DOJ/SEC, etc. that there is not a violation of law, or if there is, that the company should not be prosecuted/pay a fine/suffer other sanctions
 - Take appropriate personnel actions, policy changes, and so on to remedy problem and prevent future recurrences

Preparing for the Worst: Maintaining Privilege & Subsequent Litigation

- Tension between maintaining privilege and displaying candor towards the government
- Company/executives may find itself/ themselves enmeshed in litigation with the government if resolution efforts not successful
- Company may face shareholder derivative litigation in wake of public reporting of the problem requiring the internal investigation
 - *White v. Avon Products, Inc.* (S.D.N.Y. filed 7/21/2010)
 - *Wollman v. Coleman* (D.N.J. filed May 2, 2011)

Attorney-Client/Work Product Privilege Considerations in Internal Investigations



- What is covered by the privilege?
 - Privilege applies to communications between company employees and counsel acting on behalf of the company where 1) employees were acting at the direction of corporate superiors; 2) employees were sufficiently aware that the communications were intended to aid the company in obtaining legal advice; 3) the communications concerned matters within the scope of the employee's company duties and involved needed information that was not available to upper echelon managers; and 4) the employee was informed that the communications were considered highly confidential and steps were taken to protect that confidence. *Upjohn Co. v. United States*, 449 U.S. 383, 390-91 (1981)

Attorney-Client/Work Product Privilege Considerations in Internal Investigations

- Former employees covered if communications were at the direction of management and concerning matters within the scope of the former employee's duties
- *Upjohn*, 449 U.S. at 402-03 (concurring opinion); *In re Allen*, 106 F.3d 582, 605-06 (4th Cir. 1997) *but see Peralta v. Cendant Corp.*, 190 F.R.D. 38 (D. Conn. 1999) (privilege did not apply to deposition preparation session with former employee)

Attorney-Client/Work Product Privilege Considerations in Internal Investigations

- What is covered?
 - Communications with client (A/C)
 - Interview notes (A/C – W/P)
 - Documents collected/reviewed (W/P)
 - Summary memoranda (A/C – W/P)
 - Results of ESI collections
 - Hard drives, cell phone cards, and other devices

Attorney-Client/Work Product Privilege Considerations in Internal Investigations

- Who owns the privilege?
 - *Upjohn* and its progeny
 - The company – neither employees nor former employees can waive
 - *United States v. Graf*, 610 F.3d 1148 (9th Cir. 2010)
 - *Matter of Bevill, Bresler & Shulman Asset Mgmt. Corp.*, 805 F.2d 120, 123 (3d Cir. 1986)

Background, p. 1

International Yo-Yo Co. ("IYYCO") is an American-based toy manufacturer. It has developed a wildly successful new yo-yo, called "The Congress." The Congress gyrates wildly to the left, to the right and all around, but defying the laws of nature, never seems to move anywhere. IYYCO has set its sights on the lucrative Australian market, where people really seem to like toys. Unfortunately, because of the political might of the Australian boomerang industry, it is very difficult to obtain the import permits necessary to bring yo-yos into Australia.

Background, p. 2

Nevertheless, the sales group responsible for selling The Congress in Australia managed to obtain the required permits and has been successful in marketing the yo-yos in the Australian market.

IYYCO has recently determined that it is possible the Australian division may have made payments of a dubious nature to the Australian Boomerang Ministry in exchange for obtaining the necessary import permits for The Congress. IYYCO has retained outside counsel to conduct an internal investigation into whether company employees committed acts in violation of the Foreign Corrupt Practices Act ("FCPA).

Act I

Outside counsel retained by IYYCO, Steve Sharpy, is interviewing Tammy Tattletale, a mid-level employee of IYYCO's Australian division, to determine what she may know about any possible payments made to the Australian government with regard to import licenses for The Congress.

Act II

In connection with his internal investigation, Mr. Sharpy has retained Boy Arwe Big, a national accounting firm, to conduct a forensic audit of IYYCO's Australian division. Mr. Sharpy is meeting with Ms. Tattletale, who has recently received a promotion, and Green I. Shade, a CPA with BAB, to go over the Mr. Shade's findings.

Act III

IYYCO has determined that certain payments made to the Australian Boomerang Ministry may violate the FCPA and has decided to report its findings to the Department of Justice in the hope of obtaining cooperation credit from DOJ. Mr. Sharpy is meeting with Mac McGruff, Special Agent in Charge of the FBI's St. Louis office, to relate what he has learned so far in his investigation.

Avoiding Waiver of the Privilege – Special Considerations in Internal Investigations

- Goal is to display candor and build trust with the government to enable client to earn maximum cooperation credit
- Countervailing consideration is avoiding waiver of privileged information
- Lack of bright line guidance
 - *United States v. Reyes*, 239 F.R.D. 591, 602-03 (N.D. Cal. 2006)(interview summaries, notes and internal memoranda and all reports or notes of presentations made to government not protected).

Avoiding Waiver of the Privilege – Special Considerations in Internal Investigations

- *SEC v. Roberts*, 254 F.R.D. 371 (N.D. Cal. 2008)(interview notes relied upon in presentations to the government and notes of meetings and communications with government not protected).
- *Ryan v. Gifford*, 2008 WL 43699, No. 2213-CC (Del. Ch. 2008)(selective waiver of privilege in conversations with government and NASDAQ officials eliminated protection for interview notes, summary of investigation and communications with government)

Avoiding Waiver of the Privilege – Special Considerations in Internal Investigations

- *But see Diversified Industries v. Meredith*, 572 F.2d 596, 611 (8th Cir. 1977)(selective waiver does not require production of internal interview notes, reports and minutes even though such documents produced to the SEC)
- *In re Grand Jury Proceedings*, 841 F.2d 230, 234 (8th Cir. 1988)(rejecting selective waiver doctrine); *In re Chrysler Motors Corp.*, 860 F.2d 844, 846-47 (8th Cir. 1988)(same)

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