EFFECTIVE COMPLIANCE PROGRAMS

Preserving and protecting attorney-client privilege in internal FCPA investigations.

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The Foreign Corrupt Practices Act, or FCPA, 15 U.S.C. §§ 78dd-1, et seq., generally prohibits any offer, payment, promise to pay, or authorization of the payment of money or anything of value to any person, with knowledge that it will be given or offered, directly or indirectly, to a foreign official to influence them to commit any act or omission in violation of their lawful duty, or to secure any improper advantage in order to assist in obtaining or retaining business.

Both the *Justice Manual* and the *U.S. Sentencing Commission Guidelines Manual* contain provisions taking into consideration whether a company had an effective compliance program in place.[1] The U.S. Department of Justice's updated June 2020 guidance for Evaluation of Corporate Compliance Programs (the "June 2020 Update")[2] also describes a "mechanism for the timely and thorough investigations of any allegations or suspicions of misconduct" as a "hallmark of a compliance program that is working effectively."[3] Indeed, internal investigations are a natural byproduct of an effective compliance program. Such investigations necessarily involve legal advice, with the goal of the investigation being to answer three legal questions: (1) whether a violation of the FCPA or other law has occurred, (2) if so, whether to make a voluntary disclosure to the government, and (3) whether any subsequent follow-up or discipline is appropriate.

Prior to embarking on an internal investigation, a company will want to ensure that its attorney-client privilege is maintained. For example, what will happen down the road to not only the attorneys' notes, but also the notes and files of any non-attorneys who assisted in the investigation? How is confidentiality maintained? With possible ripple effects for future civil litigation, preservation of the attorney-client privilege is important to keep in mind at the outset of any investigation. While the general recitations of the attorney-client privilege and work product privilege are well-established, the June 2020 Update gives occasion to review recent case examples and provide an overview of best practices to preserve privilege in internal investigations.

STAFFING THE INVESTIGATION

The elements of the attorney-client privilege in Texas are (1) a confidential communication; (2) made for the purpose of facilitating the rendition of professional legal services; (3) between or amongst the client, lawyer, and their representatives; and (4) the privilege has not been waived.[4]

Given the legal issues involved in undertaking an internal investigation, it is important that the company have an attorney—whether in-house or outside counsel—directing and leading the investigation. Additionally, many investigations involve complex accounting inquiries that also necessitate the hiring of an independent forensic accountant. In other instances, the investigation may require additional assistance from translators, e-discovery experts, or private detectives.

It is therefore beneficial to have a clear record at the outset of an investigation that the attorney will be leading the investigation and that decisions such as hiring any additional representatives to assist the attorney (such as accountants, translators, private detectives, or others) be done at the direction of counsel and for the purpose of assisting the attorney in providing legal advice to the company. The engagement of such third parties should also clearly and accurately reflect when the engagement is at the direction of counsel to assist counsel in providing legal services to the company. Otherwise, the work of such third parties is more susceptible to subsequent discovery requests.[5]

A recent case from the mergers and acquisitions context is instructive on the importance of engagement letters in anticipating future privilege issues. In *In re Stephens Inc.*,[6] the trial court ordered an investment bank to produce communications between the investment bank, its mergers and acquisitions client, and their respective law firms. The investment bank argued that such communications were privileged, under the "client representative" prong of Texas Rule of Evidence 503. Texas Rule of Evidence 503 defines a client representative as "a person who has authority to obtain professional legal services for the client or to act for the client on the legal advice rendered."[7] The court focused on the content of the investment bank's engagement letter and the fact that the engagement letter did not "expressly authorize" the investment bank to work with the client's attorneys or "obtain professional legal services for" the client. In the compliance context, this case serves as a cautionary reminder that the engagement of outside non-legal professionals is not necessarily privileged if it is not at the direction of counsel and properly documented with a clear engagement letter.

WITNESS INTERVIEWS

Witness interviews are an essential component of any investigation, but particularly in rapidly evolving situations, it is important to keep in mind some of the basic tenets of attorney-client privilege. A recent case from the U.S. District Court for the Southern District of Texas provides a reminder about the practical limitations on the privilege. In *Heckman v. TransCanada USA Servs., Inc.,*[8] the court held that a non-lawyer's notes of a phone interview were not privileged, even though they were attached to an email to outside counsel. As the court reiterated, "documents do not become cloaked with the lawyer-client privilege merely by the fact of their being passed from client to lawyer."[9]

The dynamic nature of witness interviews can be gleaned from the June 2020 Update. For instance, the DOJ added more questions about testing the effectiveness of a company hotline, asking: "*Does the company take measures to test whether employees are aware of the hotline and feel comfortable using it?*"[10] The June 2020 Update also asks with respect to disciplinary measures: "*Are the actual reasons for discipline communicated to employees? If not, why not?*"[11]

The quantity and nature of employee communications can thus be much more than isolated interviews conducted during an investigation. The situation can become more complex where a lawyer instructs a non-lawyer to contact a witness and then report back to the lawyer. The communication may be at the request of counsel, but over time, the memories of the purpose of the communication and at whose direction it was done can fade. Where feasible, having an attorney present at all interviews can avoid this issue.

REMEDIAL MEASURES AND RELATED COMMUNICATIONS

Another component of the government's criteria for an effective compliance program is whether appropriate remedial measures are taken, such as disciplinary measures to discourage bad conduct and incentives to encourage good compliance behavior.[12] In either situation, it is not uncommon for human resources and compliance personnel to work together and to communicate the message—whether positive or negative—to the affected employee. All such communications should be intentional and clear in their messaging and purpose. Without the involvement of counsel in these communications, they are less likely to be privileged. Even with the involvement of counsel, however, it is important to keep in mind that the attorney-client privilege does not cover communications that pertain to purely human relations matters.[13]

In *Miniex v. Houston Hous. Auth.,* the court observed: "There is no presumption that a company's communications with counsel are privileged."[14] Ultimately the court found that two memoranda written by the Houston Housing Authority's in-house counsel and addressed to the CEO about the general counsel's work performance were not privileged because they were prepared primarily to provide the CEO with factual information about the general counsel to "help him make an employment decision" rather than "to render legal advice."

CONCLUSION

Because of the nature of the potential criminal issues involved, companies understandably often desire to act swiftly upon learning—whether through a company hotline, internal audit, or otherwise—of a possible violation of the FCPA. However, in subsequent civil litigation, a lot can ultimately come down to how the investigation was structured, who led the investigation, and what written communications are generated. Particularly given that the June 2020 Update subtly encourages more communications, companies should be mindful in these communications to preserve the attorney-client privilege. **TBJ**

NOTES

1. *See* U.S. Dep't of Justice, Justice Manual, §§ 9-28.300(A)(5), 9-28.800, et seq.; U.S. Guidelines Manual, §§ 9-28.300(A)(5), 9-28.800, et seq.; U.S. Sentencing Comm'n, Guidelines Manual, §§ 8c2.5(f), 8b2.1.
2. https://www.justice.gov/criminal-fraud/page/file/937501/download.
3. June 2020 Update, at 16.
4. *Huie v. DeShazo,* 922 S.W.2d 920, 923 (Tex. 1996); Tex. R. Evid. 503(b).
5. *Cf. In re Baldev Patel,* 218 S.W.3d 911, 920 at n. 6 (Tex. App.—Corpus Christi 2007, no pet.) (noting that while Texas has established a statutory accountant-client privilege protecting confidential communications, there is no accountant-client evidentiary privilege in Texas); *In re Stephens Inc.,* 579 S.W.3d 438, 444 at n.4 (Tex. App.—San Antonio 2019, no pet.).
6. 579 S.W.3d 438 (Tex. App.—San Antonio 2019, no pet.).
7. *Id.* at 446 (citing Tex. R. Evid. 503(a)(2)(A)).
8. No. 3:18-CV-00375, 2020 WL 211037, at *3 (S.D. Tex. Jan. 13, 2020).
9. *Id.* (quoting *United States v. Robinson,* 121 F.3d 971, 975 (5th Cir. 1997)).
10. 2020 Update, at 6.
11. *Id.* at 13.
12. *Id.*
13. *See Miniex v. Houston Hous. Auth.,* CV 4:17-00624, 2019 WL 2524918, at *4 (S.D. Tex. Mar. 1, 2019).
14. *Id.* (quoting *Equal Employment Opportunity Comm'n v. BDO USA, L.L.P.,* 876 F.3d 690, 696 (5th Cir. 2017)).

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