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In-House Corporate Compliance Investigation and Privilege

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By now, most companies are aware of the benefits of having a compliance program and policies in place to effectively investigate non-compliance issues and to discover and disclose improper conduct in a timely manner. Clearly, robust compliance programs and policies promote compliance with the law and protect the company's legal interest.

The recently issued federal court opinion in *United States ex rel. Barko v. Halliburton Co.*, No. 1:05-CV-1276 (D.D.C. slip op. issued March 6, 2014), will likely urge litigants to assert that such compliance programs and policies are merely "routine business practices," and that information obtained and documents created in the course of such compliance programs are not subject to the protections of either the attorney-client privilege or the work-product doctrine, and thus subject to discovery.

In *Barko*, a qui tam False Claims Act case (*i.e.*, a whistleblower suit), a federal court held that a company's internal investigation was not privileged and that documents related to the investigation must be produced in discovery. The court reached this conclusion after considering the scope of the attorney-client privilege and the work-product doctrine and finding that the investigation was undertaken pursuant to regulatory law and corporate policy rather than for the purpose of obtaining legal advice.

The *Barko* decision arose from a privilege dispute over certain documents, including witness statements and a written investigative report, created during an internal investigation conducted pursuant to defendants' Code of Business Conduct (COBC). The court, after an *in camera* review, found the documents to be most illuminating on the alleged conduct involved in the scheme and even commented that such documents were "eye-openers."

The *Barko* court observed that Department of Defense regulations ***required*** the defendants to have an internal control program like the COBC "to "[f]acilitate timely discovery and disclosure of improper conduct in connection with Government contracts." The court summarized the COBC internal investigation program as follows:

- COBC investigations typically begin when KBR receives a report of a potential COBC violation from an employee who either contacts the law department directly or sends a tip to a dedicated post office box, email address, or a third-party operated hotline.
- Once received, these "tips" regarding potential misconduct are routed to the Director of the Code of Business Conduct. The director then decides whether to open a COBC file to investigate the matter. Subsequent investigation documentation is then made part of the COBC file by the director.

• As part of the investigation, COBC investigators interview personnel with potential knowledge of the allegations, review relevant documents and obtain witness statements. Once the investigation is complete, COBC investigators write a COBC Report. The COBC Report is then transmitted to the Law Department. (*Barko*, slip op at 3-4).

The *Barko* court was mindful of *Upjohn Co. v. United States*, 449 U.S. 383, 390 (1981), wherein the Supreme Court ruled that the attorney-client privilege applies to communications made during internal investigations "as long as '[t]he communications at issue were made by [company] employees to counsel for [the company] acting as such, at the direction of corporate superiors in order to secure legal advice from counsel." In *Barko*, however, "the COBC investigations were undertaken pursuant to regulatory law and corporate policy rather than for the purpose of obtaining legal advice." The *Upjohn* internal investigation, in contrast, was conducted only after attorneys from the legal department conferred with outside counsel on whether and how to conduct an internal investigation. See *Upjohn*, 449 U.S. at 386-87.

The *Barko* defendants' claims of protection under the work-product doctrine fared no better than their claim of protection under the attorney-client privilege. The court first noted the governing standard for an assertion of privilege under the work-product doctrine: "whether, in light of the nature of the document and the factual situation in the particular case, the document can fairly be said to have been prepared or obtained because of the prospect of litigation." *Barko* (slip op. at 7 (citation omitted). Next, the court observed that this standard required at least a subjective belief by the lawyer that litigation was a real possibility, and that belief must have been objectively reasonable. '[T]he [work-product] privilege has no applicability to documents prepared by lawyers 'in the ordinary course of business or for other non-litigation purposes.'" *United States v. ISS Marine Servs., Inc.*, 905 F. Supp. 2d 121, 137 (D.D.C. 2012) (internal citation omitted). The *Barko* court then reasoned:

"The investigation was conducted from 2004-2006. However, the complaint in this litigation was not unsealed until 2009. Finally, the fact that the investigation was conducted by non-attorney investigators makes it harder for KBR to assert the documents were prepared in anticipation of litigation. While documents produced by non-attorneys can be protected under the work-product doctrine, the fact that non-attorneys are conducting the investigation is another indication that the documents were not prepared in anticipation of litigation." (*Barko*, slip op at 8).

Perhaps the *Barko* court could have more fully addressed the types of activity the regulations require contractors to address and investigate which are, by their nature, potential violations of law. Whether an alleged violation of law has occurred inherently requires legal analysis. On the other hand, the fact pattern of the COBC investigations undertaken were all too easily susceptible of characterization as failing to seek to secure legal advice from counsel. For that reason alone, it is not terribly disturbing that the *Barko* court found this particular compliance activity to have been conducted pursuant to regulatory law and corporate policy rather than for the purpose of obtaining legal advice.

In point of fact, the *Barko* court addressed specific issues that were instrumental in guiding its conclusions:

1. No attorneys were involved to conduct the COBC investigations.
2. In contrast to *Upjohn*, there was no indication that the internal investigators sought the advice from outside counsel to guide the scope and manner of the investigation.
3. The employees who were interviewed were never informed that the purpose of the interview was to assist defendants in obtaining legal advice, further supporting the notion the investigation was for business purposes, rather than the procurement of legal advice.
4. The confidentiality agreement signed by employees did not mention that the purpose of the investigation was to obtain legal advice.

See *Barko*, slip op. at 6.

Several lessons may be learned from *Barko* in addressing compliance programs and policies. First and foremost, preservation of the protections afforded by the attorney-client privilege and the work-product doctrine should be of paramount importance in both the creation of and any revision to compliance programs and policies. Second, the structure, scope and conduct of internal investigations will provide the elemental basis for any claim of protection under either the attorney-client privilege or the work-product doctrine. Third, outsourcing investigations to non-legal firms and/or conducting investigations internally without seeking advice from outside counsel carries substantial risk to the company's ability to preserve the protections of the attorney-client privilege and the work-product doctrine. Last, the commencement of and all activities in pursuit of an internal investigation should be carefully designed to preserve the protections afforded by the attorney-client privilege and the work-product doctrine.

If you have any questions about attorney-client privilege, work product doctrine or need assistance with other compliance issues, contact Joe Edwards or any other member of Crowe & Dunlevy's White Collar, Compliance and Investigations practice group.

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