

## D.C. District Court Orders Production of Internal Compliance Investigation Materials

March 26, 2014

**On March 6, the United States District Court for the District of Columbia granted a motion to compel the production of documents arising from defendants' internal compliance investigations.** See *United States ex rel. Barko v. Halliburton Company*, No. 05-cv-1276 (D.D.C. Mar. 6, 2014). **The court rejected defendants' arguments that these documents qualified for attorney-client privilege or work product protections, relying on the fact that the investigation was required by both government contracting regulations and internal corporate policy.**

### *Case Background*

Plaintiff Harry Barko filed a *qui tam* suit under the False Claims Act against Halliburton Company, Kellogg, Brown & Root International, Inc. and several affiliates. In discovery, Barko requested documents relating to defendants' internal investigations of his allegations that defendants funneled contracts to a particular subcontractor who performed substandard work at inflated prices. Defendants withheld those documents, citing the attorney-client privilege and work product doctrine.

In response to Barko's motion to compel, the court reviewed the documents in camera and believed them to be "eye-openers." The reports "include both direct and circumstantial evidence" of the type of fraud that Barko alleged in his complaint.

### *The Internal Investigations*

The court provided a brief overview of defendants' Code of Business Conduct ("COBC") investigation process. COBC investigations typically begin upon a report of a possible COBC violation. Employees contact the Law Department directly or send tips through one of several available channels. These tips are processed by the director of the Code of Business Conduct who then decides whether to open a COBC file to investigate the allegation. If a file is opened, COBC investigators, who are not typically lawyers, interview witnesses, review documents, and, upon completion of the investigation, write a COBC report which is transmitted to the Law Department.

### *The Application of Attorney-Client Privilege*

The court held that the party invoking the attorney-client privilege must show that the communication "would not have been made 'but for' the fact that legal advice was sought."<sup>1</sup> Applying that standard, the court rejected defendants' assertion on the ground that "COBC investigations were undertaken pursuant to regulatory law and corporate policy rather than for the purpose of obtaining legal advice." Department of Defense regulations require contractors like defendants to have internal control systems with many of the features of the COBC program. According to the court, defendants' "COBC policies merely implement these regulatory requirements." Unlike the investigation in *Upjohn*,<sup>2</sup> which was conducted "only after

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<sup>1</sup> *United States v. ISS Marine Servcs, Inc.*, 905 F. Supp. 2d 121, 128 (D.D.C. 2012).

<sup>2</sup> *Upjohn Co. v. United States*, 449 U.S. 383, 389 (1981).

attorneys from the legal department conferred with outside counsel on whether and how to conduct an internal investigation,” the COBC investigation was performed as a matter of corporate policy, which flowed from defendants’ regulatory obligations.

The court also noted several features of the COBC investigations which further suggested that the purpose of the investigations was not to seek legal advice.

- Employees who were interviewed were never informed that the purpose of the interviews was to assist defendants in obtaining legal advice.
- The confidentiality agreements employees signed omitted any mention of a purpose to secure legal advice.
- The confidentiality agreements did, on the other hand, warn of the “possible adverse business impact” of unauthorized disclosure.

### ***Application of the Work Product Doctrine***

The court noted that work product protection requires that “the document can fairly be said to have been prepared or obtained because of the prospect of litigation.”<sup>3</sup> Citing many of the same factors described above, the court held that the COBC investigation was conducted “in the ordinary course of business irrespective of the prospect of litigation” because government regulations required it. The court also observed that the investigation took place several years *before* Barko filed his complaint, and noted that the fact that COBC investigators were not lawyers weighed against upholding defendants’ work product assertion.

### ***Key Takeaways***

The *Barko* decision underscores the need to ensure that attorneys direct and play a meaningful role in all aspects of internal compliance investigations. This is particularly true for large, multinational companies whose compliance investigation programs may not be designed with U.S. privilege laws in mind, but whose investigations could yield information supporting a finding of a U.S. nexus. Specifically, arguments in favor of privilege protections are strongest where attorneys are involved in the decision to open investigations, the development and approval of investigative work plans, and the supervision of compliance investigators.

The decision also illustrates that where appropriate internal investigations should reflect a documented purpose to obtain legal advice and prepare for litigation. Investigative files should explain how the investigation is necessary to obtain legal advice and prepare for future litigation. In addition, the decision makes clear that interview subjects should receive *Upjohn* warnings and be informed that the purpose of the interview is to collect facts in order for the company to receive legal advice and prepare for litigation.

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<sup>3</sup> *ISS Marine*, 905 F. Supp. 2d at 131.

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