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Corporate Crime

Avoiding Pitfalls Protecting Privilege and Confidentiality

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Corporate entities are ever vigilant about protecting legal privilege and confidentiality. To maintain maximum protection, corporations and their counsel would be well-advised to take a hard look at their disclosures to regulators and monitors, as recent court decisions have indicated that even compelled, narrowly-tailored disclosure could erode the expectations of privilege and confidentiality historically associated with such disclosures.

Involuntary Waiver

Recently, in connection with a high-profile insider trading trial, Judge Laura Taylor Swain of the Southern District of New York ruled that JPMorgan waived its attorney-client and work product privileges for certain communications underlying a written response to a regulatory inquiry. See Mem. Order, *United States v. Stewart*, No. 1:15-cr-00287-LTS-2 (S.D.N.Y. July 22, 2016), ECF No. 141. In response to a Financial Industry Regulatory Authority (FINRA) inquiry into pre-acquisition trading in the stock of Kendle International Inc., JPMorgan submitted a letter affirming that none of its employees with knowledge of the deal—including investment banker Sean Stewart—knew the individuals on a list of traders of the stock. FINRA independently verified that Stewart's father was on the list, and followed up with JPMorgan to address the discrepancy. JPMorgan then interviewed Stewart, and sent a clarifying letter to FINRA stating that Stewart had merely overlooked his father's name on the original list and confirmed that he had not discussed the transaction with his father before it was publicly announced.

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In 2015, the Department of Justice charged Stewart and his father with insider trading, and the government moved to compel the testimony of JPMorgan's in-house counsel regarding her interview with Stewart, and to compel the bank to produce related documents. JPMorgan asserted privilege over the underlying communications—though not the facts disclosed—and stated that any testimony or production would be limited to those facts alone. Judge Swain disagreed, finding that through its clarifying letter, JPMorgan had made a limited waiver of attorney-client and attorney work product privilege, and granted the government's motion to compel. The ruling seemed to focus on the fact that JPMorgan's letter to FINRA noted that "Mr. Stewart *reported that* he did not discuss the transaction at issue with his father," (id. at 3, emphasis supplied) and therefore contained an express statement Stewart made in a privileged setting, rather than perhaps relating only the underlying fact, such as "Mr. Stewart did not discuss the transaction at issue with his father." Judge Swain also

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reasoned that the prior disclosures to FINRA were "voluntary," despite the threat of sanctions for noncompliance, because FINRA is a "self-regulatory organization" and the "disclosures were not compelled by a court or other government order." Id. at 4. The resulting waiver applied to Stewart's initial statement that he recognized no names on FINRA's list, his subsequent explanation that he had overlooked his father's name on the list, and his representation to JPMorgan counsel that he did not discuss the transaction with his father and did not know how his father could have learned about the pending deal. Id. at 6. Thus, although JPMorgan attempted to provide a factual response to FINRA's inquiry without waiving the privilege attached to the underlying communications—a process that corporate counsel engage in with high regularity—Judge Swain nevertheless found that a waiver had occurred.

Compliance Monitors' Reports

Compliance monitors' reports, which historically had been kept confidential, may now also be subject to a disconcerting trend of disclosure. In January 2016, a report on HSBC's failures to combat money laundering was ordered partially unsealed by now-retired Judge John Gleeson of the Eastern District of New York. See Mem. Order, *United States v. HSBC Bank USA N.A.*, No. 12-CR-763 (JG) (E.D.N.Y. Jan. 28, 2016), ECF No. 52.

Both the government and the bank were troubled by the court's erosion of the expectation of confidentiality that had been agreed upon in their deferred prosecution agreement, and in July they both appealed to the Second Circuit to vacate the district court's decision. See *United States v. HSBC Bank USA, N.A.*, No. 16-308 (2d Cir. July 21, 2016), ECF Nos. 100 (brief for United States) & 106 (brief for HSBC). The government and HSBC agreed that Judge Gleeson had wrongfully treated the monitor's report as a "judicial document," with a First Amendment right of public access. They argued it was an executive document, part of an agreement implemented by members of the executive branch with prosecutorial discretion, and therefore protected by a higher confidentiality standard. At least one other Court of Appeals would likely agree: In *United States v. Fokker Services, B.V.*, No. 15-3016 (D.C. Cir. April 5, 2016), the D.C. Circuit held that the prosecutor alone controls the terms of a deferred prosecution agreement. It is possible that the Second Circuit in *HSBC* will follow the reasoning in *Fokker* and agree that the monitor's report is not a judicial document and that its confidentiality endures. Until a decision is issued, however, the ultimate treatment of the report remains uncertain and corporate clients should be aware of the possibility that information shared with a compliance monitor might be publicly disclosed.

Takeaways

To protect against the erosion of the corporate expectation of privilege and confidentiality, counsel should consider the following points when advising their clients in government investigations:

- Whenever possible, avoid disclosing any specific privileged communications to regulators and provide only the facts underlying such communications.
- Keep written communications about investigations at a high level and to a minimum.
- Seek to provide non-privileged documentary support for facts learned in privileged witness interviews, which may minimize the risk of waiver.
- Evaluate whether the risk of a subject-matter privilege waiver may, in certain circumstances, outweigh the cooperation-related benefit of compliance with voluntary requests for information (such as the FINRA request in the JPMorgan matter).
- Follow developments in case law regarding disclosures to corporate monitors. Although the government's reinforced authority under *Fokker* offers comfort that disclosures will remain confidential, resolution of the pending appeal in *HSBC* will provide more direct guidance.