Client Alert | White Collar/Investigations

The FCA wades into the debate on privilege

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In a speech on 5 November, the Financial Conduct Authority **("FCA")** criticized some firms for letting *"legal privilege become an unnecessary barrier"* in sharing the output of internal investigations with the FCA.[1] The speech confirmed that the FCA expects firms to share the core product of their investigations - the evidence, which would include witness statements and investigation reports - with it.

This echoes the stance currently taken by the Serious Fraud Office ("SFO"), and highlights the difficulty corporates face in attempting to balance protecting their right to assert privilege against achieving the best outcome possible when liaising with the FCA or SFO in relation to alleged wrongdoing.

By contrast, the Securities and Exchange Commission ("SEC") and the Department of Justice ("DOJ") in the US both have policies prohibiting authorities from even making requests for waivers of privilege except in extraordinary circumstances, and cooperation credit cannot depend upon any privilege waiver or lack thereof. Interestingly, the FCA and SFO position is one that was previously taken by the DOJ and SEC, but from which they retracted following protests from companies. First, the DOJ and, subsequently, the SEC modified their procedures to allow enforcers to request that corporates waive privilege only in specific, extraordinary circumstances.

The UK law on privilege over documents produced during internal investigations

In the UK, communications and/or documents produced during the course of an internal investigation can be protected by one or more of two types of privilege: Legal Advice Privilege and Litigation Privilege.

Legal Advice Privilege

This covers communications between lawyers and clients for the purpose of giving or obtaining legal advice and documents created by lawyers during the course of giving legal advice although not actually delivered to the client. Privilege applies to the advice given by in-house lawyers as well as external lawyers, as long as they are acting in their capacity as lawyers and not in an executive or compliance capacity. Only those employees actually charged with responsibility for instructing the lawyers are considered to be the "client" for purposes of legal advice privilege.

On the same day as the FCA's comments on privilege, the High Court of England and Wales confirmed in the *Property Alliance Group*[2] case that, for the purpose of legal advice privilege, legal advice can also include factual briefings where these are given in a relevant legal context.

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1 http://www.fca.org.uk/news/speeches/internal-investigations-by-firms-

2 Property Alliance Group Limited v The Royal Bank of Scotland Plc [2015] EWHC 3187 (Ch).

It was noted that "*there is a clear public interest in regulatory investigations being conducted efficiently and in accordance with the law. That public interest will be advanced if the regulators can deal with experienced lawyers who can accurately advise their clients how to respond and cooperate. Such lawyers must be able to give their client candid factual briefings as well as legal advice, secure in the knowledge that any such communications and any record of their discussions and the decisions taken will not subsequently be disclosed without the client's consent*." The case related to the disclosure of documents prepared during the course of an FCA investigation.

Litigation Privilege

This covers (i) confidential communications between either the lawyer or the client and a third party, or (ii) confidential documents created by or on behalf of the lawyer or his client. These communications or documents must be made for the sole or dominant purpose of litigation (including adversarial[3] government investigations), where litigation is pending, existing, or reasonably contemplated.[4]

Legal teams acting for corporates conducting an internal investigation will generally take the view, therefore, that interview notes, investigation reports and other types of "source" material are protected by one or both of the above types of privilege.

The FCA's recent comments on privilege

In the speech on 5 November on the subject of firms' internal investigations, Jamie Symington of the FCA stated his disapproval of this approach:

> *"How an investigation is carried out and recorded can impact on whether the output, or parts of it, are amenable to claims of privileged [sic]. If the output of a report and supporting evidence are not available to the FCA, it devalues the usefulness of the whole exercise. This might require the FCA to undertake additional enquiries. So, we expect to agree in early discussions what will be provided to us. If not, firms are missing an opportunity to gain the full benefits."*

He continued:

> *"A practice we sometimes see is for the investigation to produce only lawyers' notes of … interviews. No recordings, no notes by others including the interviewee. Then firms will sometimes argue that the notes of the interview are privileged. This sort of approach looks to us like a 'gaming' of the process in order to shroud the output of an investigation in privilege. We find it particularly unhelpful and unwelcome.*
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> *Similarly, it has sometimes been suggested to us that – in order to avoid waiving privilege – firms would like to read aloud the output from investigations to us in a meeting, rather than to commit material into document form.*
>
> *It seems to me that this is an absurd way to suggest a that [sic] public authority should operate… Let me be clear: where firms propose to carry out or commission an internal investigation themselves – the starting point is that we expect them to share the core product of their investigation – i.e. the evidence - with us."*

Symington ended his speech by stating that the FCA has no interest in *"deliberately undermining confidentiality or legal privilege"*. It is difficult to see how this tallies with his expectation that all of the evidence produced in an internal investigation be shared with the FCA, especially given the very recent ruling in the *Property Alliance Group* case (noted above). The fact that the ruling was given on the same day as the FCA's speech highlights the gulf between the current law and the attitude of the FCA.

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3 The principle that the government investigation must be an adversarial one has been heavily criticized.

4 *U.S.A v. Philip Morris Inc and British American Tobacco (Investments) Ltd* [2003] EWHC 3028 (Comm), approved by Court of Appeal, [2004] EWCA Civ 330).

Increased pressure on corporates

The FCA's comments on privilege in internal investigations are in line with the SFO's current stance on the matter.

Disclosure of witness accounts appears to be a pre-requisite to qualifying for an invitation to enter into negotiations for a Deferred Prosecution Agreement ("**DPA**"). In the Deferred Prosecution Agreements Code of Practice, co-operation is listed as a public interest factor against prosecution (and therefore in favour of a DPA). The Code states that "*Considerable weight may be given to a genuinely proactive approach…Co-operation will include identifying relevant witnesses, disclosing their accounts and the documents shown to them…It will further include providing a report in respect of any internal investigation including source documents*".

Representatives of the SFO have spoken publically a number of times on the issue of privilege over documents produced during an internal investigation, but most recently Ben Morgan stated in relation to witness interviews:

> *"You had a choice about whether to conduct those interviews in such a way as to create claims to privilege, but also having done so, a choice whether to assert those claims over the factual content. The way you deal with both of these decisions is something we will consider carefully in the context of your cooperation[5]."*

The difficulty for corporates is that both the FCA and the SFO are requiring them to take a leap of faith and hand over privileged documents with no assurance that this will improve their prospects of obtaining a satisfactory resolution in the circumstances. For example, a corporate could hand over witness accounts to the SFO in the hope of obtaining a DPA but still end up being prosecuted whilst the SFO has been assisted by the waiver of the corporate's privilege rights.

An additional challenge is posed for corporates under investigation in both the U.S. and the U.K., as privilege restrictions that are respected for a co-operating company in the U.S. might not be respected in the U.K. Where the two countries are cooperating in an investigation, this could lead to an "end run" around the U.S. privilege, as the SFO and FCA can share information derived from their investigation with their counterparts in the DOJ and SEC, if it is deemed in the public interest to do so. Under the "silver platter doctrine", the U.S. authorities may use any evidence lawfully obtained by authorities in other countries, even if they would not have been able to secure the evidence directly themselves.

This can pose significant difficulties not only for U.S. companies who rely on stringent protections of privilege, but also for their counsel, who may be facing demands from UK authorities for information that ethically they cannot provide. This occurred with the SFO's attempt to force the testimony of attorneys from the U.S. firm Akin Gump in the trial of Victor Dadaleh. In that case, after the attorneys hastily returned to the U.S. to be outside the reach of U.K. process, the court ultimately recognized the ethical obligations of the attorneys and did not force their testimony, which led to the collapse of the U.K. prosecution.

Tough Calls

The FCA's recent comments seem to reflect a general shift by UK regulators towards either challenging or using their positions of power to side-step claims of privilege over source documents in internal investigations. Waiving privilege over such documents is a difficult decision to make, and one that needs to be considered carefully, particularly where an investigation may touch on multiple jurisdictions where privilege protections differ significantly. It is important to seek specialist advice right from the outset of an internal investigation to ensure that privilege rights are preserved and protected, and only waived after a careful and considered analysis of the potential benefits and pitfalls.

5 http://www.sfo.gov.uk/about-us/our-views/other-speeches/speeches-2015/ben-morgan-at-the-annual-anti-bribery--corruption-forum.aspx

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