LEGAL UPDATES

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Avoiding Privilege Pitfalls: *Barko* Calls for Caution

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Corporations conducting internal investigations need to be wary that information learned and materials generated in the course of these investigations may later fall into the hands of adversaries in litigation.

A recent decision by a federal district court, *United States ex rel. Barko v. Halliburton Company, et al.*, demonstrates this pitfall.

In *Barko*, the court ruled Halliburton must disclose reports it had prepared regarding alleged violations of the company's Code of Business Conduct. Under the narrowest reading of the decision, such disclosure should be expected whenever an investigation is (1) conducted as part of routine compliance, (2) by non-attorneys, (3) well in advance of any litigation, (4) where the witnesses interviewed were not informed the nature of the investigation was for Halliburton to obtain legal advice, and (5) where no consultation occurred "with outside counsel on whether and how to conduct an internal investigation."

However, the court's ruling was not limited to situations where the above five factors are present, and a company should not assume that by slightly improving the barriers to adversarial discovery, internal corporate documents necessarily will be protected. Rather, the prudent approach is to take all steps possible to safeguard internal findings.

First, the corporation should be clear that its purpose in conducting an internal investigation is to obtain legal advice. The court in *Barko* listed as the chief reason for its ruling that the investigations at issue "were undertaken pursuant to regulatory law and corporate policy rather than for the purpose of obtaining legal advice." It is important to detach an internal investigation from any regulatory prerequisite.

Second, the corporation should confer with outside counsel regarding the need for an internal investigation. *Barko* employed a "but-for" test whereby the privilege would attach only to communication that would not have been made but for the fact that legal advice was sought. Under this stringent test, consultation with outside counsel is the best indicator that the investigation is intended primarily to secure legal advice rather than for business or regulatory purposes.

Third, all written and verbal communication with employees by outside counsel should reiterate that the purpose of the investigation is for the corporation to obtain legal advice.

These steps also increase the likelihood that materials generated will be subject to the attorney work product doctrine. *Barko* overruled Halliburton's work product claim for the same general reasons as it did the corporation's attorney-client privilege claim: the investigation at issue was conducted well before the litigation at issue, and the resulting reports were "multi-purpose documents" with "non-litigation purposes."

What This Means to You

The ability of companies subject to complex regulatory schemes such as the federal securities laws or government contracting requirements to safeguard findings of an internal investigation is questionable in light of decisions such as *Barko*. As a result, each time a situation arises that may call for an internal investigation, it is important for the corporation to determine with outside counsel the approach most likely to effectively conduct the investigation and preserve its findings.