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Antonia Apps is a partner in the New York office of Milbank, Tweed, Hadley & McCloy and a member of the firm's Litigation & Arbitration Group. She is a former federal prosecutor and nationally recognized trial attorney with experience in criminal and civil matters. She represents financial institutions, corporations, and executives in SEC and other regulatory enforcement proceedings, white-collar criminal investigations, complex commercial litigation and internal investigations. She also advises hedge funds on securities trading and compliance matters and teaches a course on white collar criminal law and procedure at Harvard Law School.

Ms Apps served for more than seven years as an Assistant United States Attorney for the Southern District of New York, Criminal Division, where she led many of the government's highest-profile securities fraud and insider trading cases, including the prosecution of the hedge fund S.A.C. Capital Advisors, L.P. As a member of the Securities and Commodities Fraud Task Force, she investigated and prosecuted a wide range of financial industry cases involving investment fraud, accounting fraud, broker-dealer fraud, market manipulation, fraud stemming from the sale of RMBS and CDOs, money laundering and obstruction. During her tenure, Ms Apps prosecuted more than 20 insider trading defendants, and tried numerous securities fraud trials. Ms Apps also argued several appeals in the Second Circuit, including the landmark case of *U.S. v. Newman*, for which she was the lead prosecutor at trial and on appeal. In 2014, she received the Executive Office of US Attorneys' Director's Award for Superior Performance.

Lawdragon has named Ms Apps in its list of 500 Leading Lawyers in America each year since 2014. She is ranked in *Chambers USA* for White-Collar Crime & Government Investigations, where clients and colleagues described her as a "terrific trial lawyer" who "understands the difficulties of the world we live in" and gives "advice tailored to a practical approach." Ms Apps has also been recognized by *Legal 500* for Corporate Investigations and White-Collar Criminal Defense and was named a Next Generation Lawyer in 2017. She was profiled in *Law360's* Trial Pro series and by *Global Investigations Review* in its April 2015 Women in Investigations feature.

Ms Apps received her undergraduate degree in law from the University of Sydney (1990) and went on to earn a Bachelor of Civil Law at Oxford University (1993) and an LLM from Harvard Law School (1994). She served as a law clerk for the Hon. Fred I. Parker in the US Court of Appeals for the Second Circuit, and previously as a law clerk to the Hon. Tom W. Waddell, Chief Judge of the Equity Division in the New South Wales Supreme Court.

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Recent Developments Relating to Corporate Investigations

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The United States Department of Justice (DOJ) has recently indicated a softening of its approach to corporate prosecutions, with the Deputy Attorney General stating that the government "will not employ the hammer of criminal enforcement to extract unfair settlements" from corporations.[1] These remarks came a day after the DOJ announced that it declined to bring criminal charges against Barclays PLC for alleged frontrunning of foreign exchange transactions after it criminally charged one of the bank's traders for the conduct. The declination was specifically grounded on Barclays' voluntary self-disclosure, its thorough investigation and full cooperation with the government.

These developments coincide with recent judicial decisions that appear to weaken the protection afforded investigation materials under applicable legal privileges. Courts in the UK and US have issued rulings requiring companies to disclose to adverse parties sensitive investigation materials prepared in connection with responding to government inquiries. The decisions highlight the need for counsel to take certain precautions in conducting internal investigations, especially with respect to interviews of current and former employees. This note explores these recent developments and recommends steps counsel can take to minimize the risk of disclosure of these materials to adverse third parties.

Incentives to cooperate with US government investigations

Cooperation by a corporate entity has long been a factor considered by the DOJ in deciding whether to bring criminal charges against the corporate entity.[2] In 2016, the Department initiated a "Pilot Program" for Foreign Corrupt Practices Act (FCPA) prosecutions which set forth specific "credit" that corporations might receive from voluntary self-disclosure and full cooperation with the government. In November 2017, the DOJ made the program permanent and further provided that the combination of voluntary self-disclosure, full cooperation and appropriate remedial action would establish a *presumption* that an entity will receive a declination to prosecute absent aggravating circumstances.[3] In the DOJ's recent announcement in the Barclays matter, the government extended the FCPA policy to non-FCPA cases, and emphasized the benefits of cooperation by stating that the result would have been different if Barclays had not voluntarily self-disclosed, cooperated and remediated. The government specifically noted that Barclays provided "all known relevant facts about the individuals involved in or responsible for the conduct."

THE DECISIONS HIGHLIGHT THE NEED FOR COUNSEL TO TAKE CERTAIN PRECAUTIONS IN CONDUCTING INTERNAL INVESTIGATIONS

Legal professional privileges in the UK

Under English law, there are two privileges that may be invoked to prevent disclosure of investigation materials. First, a "legal advice privilege" attaches to all confidential communications between lawyers and their clients for the purpose of giving or obtaining legal advice. The privilege extends to "lawyers' working papers" made by the lawyer for his or her own use in advising a client. However, English law narrowly defines the "client" in a corporate context to include only those authorized by the corporation to obtain legal advice on its behalf, and *not* providers of information such as employees and ex-employees. Thus, in a recent case involving an investigation by a US regulator and a parallel civil action in England, the English High Court held that interview notes of employees that were similar to verbatim transcripts had to be disclosed even when the interviews were conducted by US attorneys in the course of responding to inquiries by the US regulator.[4]

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Second, a "litigation privilege" attaches to communications between parties or their lawyers and third parties made for the purpose of obtaining advice in connection with existing or contemplated litigation, provided: (1) litigation is in process or reasonably in contemplation; (2) the communication is made with the sole or dominant purpose of conducting that anticipated litigation; and (3) the litigation must be adversarial, not investigative or inquisitorial.[5] Two recent cases reach different results as to whether interview notes are privileged, reflecting the uncertainty in this area.

In *SFO* v. *ENRC Limited*, the company conducted an internal investigation into a whistleblower's allegations of corruption concerning its mining operations in Kazakhstan and Africa. ENRC later reported its findings to the UK Serious Frauds Office (SFO) in an (unsuccessful) effort to persuade it not to bring a criminal prosecution. The SFO subsequently sought disclosure of the investigation interview notes. The judge ordered their disclosure, finding that the SFO investigation was not adversarial at the time the interview notes were created, and the mere existence of an SFO investigation did not mean there was "also a real risk of prosecution."[6] Applying the "dominant purpose" test, the judge held that the purpose of the investigation was to uncover the truth of the whistleblower's allegations and to self-disclose to the SFO in order to avoid a criminal prosecution, which could not "be equated with the conduct of a *defense* to a criminal prosecution."[7] The decision is on appeal.

By contrast, in *Bilta (UK) Ltd* v. *Royal Bank of Scotland Plc*, the court applied the litigation privilege to protect from disclosure interview notes prepared in connection with a company's investigation by the UK tax authority, Her Majesty's Revenue and Customs (HMRC), into tax payments due on tradeable "carbon credits." The judge distinguished *ENRC* on the ground that the interviews were conducted by outside counsel after the HMRC sent a letter stating that they had sufficient grounds to deny RBS's tax claims. The court ruled that the "ostensibly collaborative and cooperative nature of RBS's interactions with HMRC" after receipt of the letter did not "preclude the investigation being conducted for the dominant purpose of litigation."[8] Moreover, the judge acknowledged that "fending off the [tax] assessment was just part of the continuum that formed the road to the litigation" that was considered almost inevitable.[9] The court also recognized the importance of counsel expressly seeking to preserve privilege in reports submitted to HMRC about the matter.

Legal privileges under US law

US law provides broader protection for investigation materials. First, the attorney client privilege protects communications: (1) between a client and his or her attorney; (2) that are intended to be, and in fact are, kept confidential; (3) for the purpose of providing legal assistance. Internal investigations led by counsel – including confidential communications exchanged with current and former employees during the investigation – are protected by the attorney client privilege.[10] Further, the privilege is not lost if the investigation was also conducted for a business purpose, provided that obtaining or providing the legal advice was one of the significant purposes of the investigation.[11]

Second, the work product doctrine – the privilege most analogous to the UK "litigation privilege" – protects from disclosure documents "prepared in anticipation of litigation," whether prepared by a lawyer or a non-lawyer. In most US jurisdictions, a document is created "in anticipation of litigation" when it is prepared "because of" existing or expected litigation; it does not lose that protection because it is also created in order to assist with a business decision.

Providing privileged documents to the government generally waives the applicable privilege. Under DOJ principles, cooperation credit does not require disclosure of privilege materials, and prosecutors may not request protected notes and memoranda.[12] To receive credit under the DOJ's FCPA policies, corporations must disclose "all facts" (which are not privileged) learned "during a company's independent investigation" including "attribution of facts to specific sources" but not where "such attribution [would] violate the attorney-client privilege."[13] Providing general impressions of interviews without organizing the presentation in a witness-specific fashion likely will not result in waiver of the privilege.[14] However, at least one court found privilege waiver and compelled production of attorney interview memoranda where counsel provided the US regulator with detailed oral summaries of those interview memoranda.[15]

Key takeaways

First, in order to preserve privilege under US law in the context of cooperation with the government, counsel should avoid providing "oral downloads" of witness interviews where possible and instead provide general impressions of interviews as part of presentation of findings of facts. Further, it is important to carefully document what information was provided to the government in the event of a subsequent dispute about the scope of any possible privilege waiver.

Second, to assist in preserving a claim to litigation privilege under English law, a company should (1) record and analyse all communications with, and actions taken by, the relevant authorities to assist in determining when adversarial proceedings can be said reasonably to be in contemplation; and (2) document the purpose for which particular investigation materials are produced (*i.e.*, to support a claim that the dominant purpose was adversarial litigation). To preserve the legal advice privilege, it is advisable for outside counsel to conduct the interviews in the presence of a representative of the "client" and for outside counsel to prepare interview memoranda which contain counsel's thoughts and impressions sufficient identify the trend of legal advice.

Ultimately, in both jurisdictions, it is important to draft notes and memoranda of witness interviews carefully, in light of the fact that they may ultimately be determined not to be privileged and require disclosure to an adverse party.

1 *See* Remarks of Deputy Attorney General Rosenstein delivered at the 32nd Annual ABA National Institute on White Collar Crime (March 2, 2018).
2 *See* United States Attorneys' Manual (USAM) § 9-28.000. It is also a relevant factor under the US Sentencing Guidelines in determining the amount of the fine the corporation will pay.
3 Aggravating circumstances relate to the seriousness of the offense or nature of the offender, including the involvement of executive management in the misconduct. *See* USAM § 9-47.120.
4 *See The RBS Rights Litigation* [2016] EWHC 3161. The court left open the possibility that a corporate entity that demonstrates "some attribute of or addition to the relevant [Notes] which distinguishes them from verbatim transcripts or reveal from an evident process of selection the trend of legal advice being given . . ." may be protected as privileged lawyers' working papers. *Id.* ¶ 105.
5 *Three Rivers District Council v Governor and Company of the Bank of England (No 5)* [2003] Q.B. 1556.
6 [2017] EWHC 1017, ¶ 154.
7 *Id.* ¶ 166-67.
8 [2017] EWHC 3535, ¶ 62.
9 *Id.* ¶ 66.
10 *Upjohn Co. v. United States*, 449 U.S. 383, 390 (1981).
11 *In re Gen. Motors LLC Ignition Switch Litig.*, 80 F. Supp. 3d 521, 529 (S.D.N.Y. 2015).
12 USAM § 9-28.720.
13 USAM § 9-47.120(2)(b). See also Memorandum from Deputy Attorney General Sally Yates (Sept. 9, 2016) (stating that companies needed to disclose all facts relating to the individuals responsible for the misconduct in order to receive cooperation credit).
14 *SEC v. Vitesse Semiconductor Corp.*, 2017 WL 2899082, *3 (S.D.N.Y. July 14, 2011).
15 *SEC v. Herrera*, 17-20301 (S.D.Fl. Dec. 5, 2017).