Avoiding Waiver When Disclosing Facts to the Government: Part I

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In his February 12, 2014 “Privilege Points” release, Tom Spahn discusses waiver by disclosing facts to the government during an investigation.

All but a handful of courts find that companies disclosing privileged communications or protected work product to the government waive both of those protections. Courts properly analyzing waiver rules also recognize that disclosing historical facts does not cause a waiver – because historical facts are not privileged.

In two related cases, Judge Francis of the Southern District of New York dealt with the intersection of these basic principles. In In re Weatherford International Securities Litigation, No. 11 Civ. 1646 (LAK) (JCF), 2013 U.S. Dist. LEXIS 170559 (S.D.N.Y. Nov. 5, 2013), Weatherford retained Latham & Watkins and Davis Polk to conduct two separate corporate investigations into material weaknesses in the company's internal controls over financial reporting. The court acknowledged that both investigations deserved work product protection. However, the court also found that the company waived its privilege and fact (but not opinion) work product protection by disclosing information about the investigations to the SEC. In defining the scope of the resulting waiver, the court (1) rejected plaintiffs' argument that the waiver extended to "all materials relevant" to the investigations; (2) found that the waiver covered any material actually given to the SEC, and any oral representations company lawyers made to the SEC; and (3) held that the waiver also extended to any "underlying factual material explicitly referenced" in such material or representations. Id. at *28, *27.

Perhaps not surprisingly, the parties soon disagreed about the company's interpretation of the waiver's scope – which resulted in another opinion one month later. The next two Privilege Points describe that decision.