Avoiding Waiver When Disclosing Facts to the Government: Part III

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In his February 26, 2014 “Privilege Points” release, Tom Spahn discusses tailoring disclosures to the government to avoid claims of broad waiver:

The last two Privilege Points (Part I & Part II) discussed the scope of a privilege and fact work product waiver caused by a company's presentations to the SEC about two internal corporate investigations. The Southern District of New York held that the waiver covered materials or oral representations given to the SEC, as well as "any underlying factual material explicitly referenced in" the materials or representations – but then had to provide additional guidance. In re Weatherford Int’l Sec. Litig., No. 11 Civ. 1646 (LAK) (JCF), 2013 U.S. Dist. LEXIS 170559, at *27 (S.D.N.Y. Nov. 5, 2013).

In In re Weatherford International Securities Litigation, No. 11 Civ. 1646 (LAK) (JCF), 2013 U.S. Dist. LEXIS 176278, at *10 (S.D.N.Y. Dec. 16, 2013), the court addressed plaintiffs' complaint that the company had not fully produced those witness interview summaries that were "explicitly identified, cited, or quoted in information disclosed to the SEC." The company explained that it had produced "only the portions of summaries . . . that were . . . read or conveyed in substantial part to the SEC,“ and redacted the rest. Id. at *12 (internal citation omitted). Criticizing that as a "crabbed view of their discovery obligations," the court ordered the company to produce all factual portions of any such interview summaries -- redacting "only material that reflects an attorney's 'explicit mental impressions, conclusions, opinions or legal theories.'“ Id. at *12-13 (citation omitted). In other words, the company had to produce all non-opinion portions of any witness interview summaries the company had quoted to the SEC.

It can be very difficult to reconcile two basic principles: (1) disclosure of privileged communications or work product to the government generally waives those protections; and (2) disclosing historical facts does not waive either protection. As explained in these opinions by widely-respected S.D.N.Y. Judge Francis, companies hoping to avoid a broad waiver when making disclosures to the government should limit their presentations to historical facts – without explicitly referencing, identifying, citing, or quoting any underlying material or witness interviews.