Cross-border overview: maximising privilege protection under US and English law

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When learning of a potential regulatory issue – whether through receipt of an information request from the authorities or through an internal mechanism – a firm will usually conduct an internal investigation, whose purpose is to understand the scope of the issue, remediate the problem, and to formulate a response to regulators, civil plaintiffs and other constituencies.

It is imperative that the internal investigation be conducted so as to maximise the protections of legally applicable privileges. If the privilege is protected from the outset, the company can then determine the extent to which privileged materials should be withheld from regulators or the extent to which the company will waive the privilege.

This article examines the differences in approach to privilege issues under US and English law, and suggests some measures companies can take to maximise the privilege protections in the conduct of internal investigations.

Privilege in the US – applicability of privilege doctrines to internal investigations

Under US law there are two key privileges: the attorney–client privilege, and the attorney work-product doctrine.

The attorney–client privilege

The attorney–client privilege protects from disclosure confidential attorney–client communications for the purpose of giving or receiving legal advice. In the context of an internal investigation, attorney–client privilege will be available where one of the significant purposes of the internal investigation was to obtain or provide legal advice.1 In a recent decision, a US federal appellate court held that:

In the context of internal investigations, if one of the significant purposes of the investigation was to obtain or provide legal advice the privilege will apply. That is true regardless of whether an internal investigation was conducted pursuant to a company compliance program required by statute or regulation, or was otherwise conducted pursuant to company policy.2

It is well established that attorney–client privilege can apply to any employee of a company directly involved in providing information for the company’s attorneys to use in advising the company (in contrast to the English law position, discussed below). As a result, notes of witness interviews carried out by counsel with employees of their client company will generally be regarded as protected by attorney–client privilege.3 This issue was examined in the recent General Motors case, in which the court considered an application by plaintiffs in a product liability dispute for access to interview notes underlying an internal investigation report prepared by General Motors’ counsel but then provided to regulators and made publicly available.4 The court determined that the interview notes were protected under both the attorney–client privilege and work product doctrines because the interviews were conducted to assist counsel in providing legal advice to the company and in contemplation of litigation. The court held that privilege covering the interview notes had not been waived by General Motors’ public disclosure of external counsel’s investigation report. Since General Motors had produced a significant volume of additional documentation to the plaintiffs, the court found that the case did not present ‘the unusual and rare circumstances in which fairness requires a judicial finding of waiver with respect to related, protected information.’

The attorney–client privilege also generally extends to protect communications between an attorney and third-party experts working on an investigation, provided the investigation is being directed by counsel. However, there have been outlier cases where protection has been lost. For example, in Wultz v Bank of China Ltd, the plaintiffs sought disclosure of documents relating to an internal investigation conducted by a bank’s compliance team.5 The court found that there was no evidence that the documents had been created ‘at the “direction” of an attorney in order to allow the attorney to render legal advice’ but that the investigation was instead carried out by non-lawyers, and therefore rejected the bank’s privilege claim.

The attorney work-product doctrine

The work-product doctrine protects attorneys’ mental impressions formed, conclusions reached or legal theories developed in anticipation of litigation. The work-product doctrine does not, however, offer a complete protection from disclosure. To the extent that an attorney’s work contains relevant and non-privileged facts, it is disclosable in cases where the plaintiff has a substantial need for the information and cannot otherwise obtain equivalent information without undue hardship.

The US adopts a broad interpretation of the requirement that litigation be anticipated. Thus, courts have routinely held that an ‘investigation by a federal agency presents more than a remote prospect of future litigation’ for the purposes of the work product doctrine.6 However, any materials alleged to be the subject of work-product protection must have been prepared because of such litigation. In Wultz v Bank of China, the court held that the documents were also outside the scope of work-product protection since the bank did not demonstrate that the investigation had been carried out because of litigation; the company’s internal procedures would have required that an investigation be carried out, and documents produced in the same way, without any threat of litigation.

Privilege waiver as cooperation with US authorities

The extent to which US authorities make ‘credit’ for cooperation conditional on a company’s willingness to waive the privilege has been a subject of intense debate over recent years. The current
version of the US Attorney’s Manual (USAM) states that waiving the attorney–client or attorney work product protections is not a prerequisite under the Department of Justice’s prosecution guidelines for a company to be viewed as cooperative. In fact, the current version of the manual states that ‘while a corporation remains free to convey non-factual or “core” attorney–client communications or work product – if and only if the corporation voluntarily chooses to do so – prosecutors should not ask for such waivers and are directed not to do so.’

Eligibility for cooperation credit is not predicated upon the waiver of attorney–client privilege or work product protection but rather on the company’s disclosure of relevant facts.

The enforcement manual of the Securities and Exchange Commission (SEC) states that staff ‘may not ask a party to waive the attorney–client privilege or work product protection without prior approval of the Director or Deputy Director.’ It also notes that voluntary disclosure of information ‘need not include a waiver of privilege to be an effective form of cooperation.’ While the guidance sounds similar, in practice, it is more common for the SEC staff to request privilege waivers than for the criminal authorities to do so. Companies should expect that if the SEC requests a privilege waiver and the company provides the requested material, it will in turn be provided to the criminal authorities.

The above guidance would suggest that companies self-reporting to US regulators have stronger arguments against disclosure of otherwise privileged material than has been the case in the past. Nonetheless, a disclosure of ‘facts’ may require a disclosure of privileged material. For example, questions arise about the treatment of interview notes. Although notes of interviews conducted by attorneys would generally be protected, these are the documents in which relevant factual information is likely to be found. A full disclosure of the facts may therefore require that the privilege over such interviews be waived. Key considerations in any internal investigation will therefore be the extent to which attorney–client and work product material can be separated from purely factual documentation and whether and how any attorney–client and work product material which does contain relevant facts should be disclosed.

A decision to waive privilege in the US may have far-reaching consequences. The US courts have generally refused to recognise limited or selective waivers of privilege. Therefore, any waiver of privilege over investigation documentation to provide documents to a regulator may result in a complete loss of privilege as against third parties. This risk should be weighed against the benefits to be obtained through cooperation.

Privilege in England & Wales

English law recognises two main heads of privilege: the legal advice privilege, which applies to confidential communications between a lawyer and client for the purpose of giving or receiving legal advice; and the litigation privilege, which applies to confidential communications between a lawyer and client, or between either of them and a third party, for the sole or dominant purpose of gathering evidence for use in legal proceedings, or for giving legal advice in relation to such proceedings. Litigation privilege only applies where litigation has commenced or is reasonably anticipated.

While these two concepts are broadly analogous to the US attorney–client privilege and work product doctrines, there are some important differences.

The legal advice privilege

The legal advice privilege is similar to the US attorney–client privilege in that it protects communications for the purposes of giving and receiving legal advice. However, the doctrine is narrower because it only covers lawyer–client communications and therefore does not protect communications with a third party. In an investigation, this means that reports prepared for a company by third parties (such as forensic accountants or IT experts) will not be protected by legal advice privilege (although they may be covered by the litigation privilege). The Supreme Court confirmed in 2013 that the legal advice privilege does not apply to any professional other than a qualified lawyer, rejecting an argument that documents containing legal advice on tax matters from an accounting adviser were privileged.

An important limitation of the legal advice privilege is the limited definition of ‘client’ established by the English courts. The Court of Appeal’s decision in Three Rivers (No. 5) placed restrictions on who may be considered to be the client and gives rise to uncertainty over the scope of legal advice privilege for corporate clients. The Court of Appeal limited the definition of the ‘client’ to the small group of employees who had been given responsibility for coordinating communications with the lawyers, meaning that all other employees were regarded as third parties and that legal advice privilege could not be claimed over their communications. Although there are no subsequent cases where the Court of Appeal’s reasoning has been applied, there remains a risk that the courts could apply a narrow definition of ‘client’ to future cases. It is therefore advisable for companies conducting internal investigations to consider expressly nominating the individuals who will be responsible for communicating with outside counsel. To the extent that interviews are conducted with individuals outside the nominated ‘client’ group, these are unlikely to be covered by the legal professional privilege (since they are communications between a lawyer and third party) and notes of such interviews may be disclosable, unless litigation privilege applies.

The litigation privilege

In the context of internal investigations, there are substantial limitations on the scope of litigation privilege. The scope of this doctrine is unclear in the context of regulatory investigations since the litigation privilege has been held only to apply in circumstances where the contemplated proceedings are adversarial, rather than inquisitorial.

This distinction was considered by the Competition Appeal Tribunal (CAT) in 2012 in the context of an investigation involving the Office of Fair Trading (OFT) and Tesco. The CAT determined that the proceedings were ‘sufficiently adversarial’ by the time the company began to gather its evidence since the OFT had already issued two ‘statements of objections’ alleging competition violations and Tesco was contesting the OFT’s case. Some commentators have sought to apply this decision to other regulatory investigations by analogy arguing, for example, that a Financial Conduct Authority (FCA) investigation in which it has issued a warning notice would likely be regarded as ‘sufficiently adversarial’ in the same way as the OFT proceedings. However, this argument has not been considered by any court, leaving companies with some uncertainty as to whether litigation privilege can be claimed in the context of regulatory investigations that have not yet reached the stage of criminal or civil proceedings.

A second limitation on the scope of the litigation privilege arises in the context of the ‘dominant purpose’ requirement. The English courts highlighted the narrow scope of this requirement in a recent case involving the production of reports prepared by a firm of accountants on the instruction of joint liquidators of a group of companies owned by the Chenguiz brothers and used to...
hold investments and carry out derivatives and futures trading. The liquidators provided the reports to the Serious Fraud Office (SFO) in connection with its investigation into the brothers. The Tchenguiz brothers subsequently brought a claim against the SFO for allegedly unlawful raids on their premises and sought disclosure of the reports. The liquidators argued that the reports were covered by litigation privilege. The Court of Appeal held that it was not possible to establish that the reports were prepared for the dominant purpose of litigation where they had been commissioned for dual purposes: both to obtain advice in relation to litigation and to carry out the liquidators’ statutory duty to assess the relevant companies’ assets and liabilities. The Court of Appeal stated that the real difficulty was that ‘in circumstances which call for clarity and precision’ the liquidators had ‘made no effort to grapple with the obvious need to establish which of dual or even multiple purposes was dominant if a plausible claim to privilege was to be made out.’

In the context of internal investigations, the onus will be on the party seeking to assert litigation privilege to establish that litigation was the ‘dominant’ purpose. It may be difficult to claim litigation privilege over documents created as part of an internal investigation in certain circumstances, for example those prepared in connection with an investigation conducted: pursuant to a regulatory or statutory obligation; for the purpose of reporting to shareholders; or to respond to complaints where it is unclear that the complainant intends to bring legal proceedings.

Waiver of privilege as a ‘badge of cooperation’?

Recent statements by UK regulators have demonstrated a determination that companies waive the privilege over their internal investigations to demonstrate cooperation. For example, senior SFO officials have suggested that they intend to take a more aggressive approach to claims of privilege by companies who self-report serious fraud or corruption. In public speeches, senior SFO personnel have expressed their displeasure with broad assertions of privilege by companies seeking to cooperate with the SFO in the interests of obtaining a favourable resolution, especially where the privilege is asserted to cover a witness’s first account (or initial interview). For example, Stuart Alford QC, Joint Head of Fraud, recently said:

[The SFO] see[s] occasions (perhaps too many), when privilege is asserted too readily or wrongly; asserted over the underlying factual material or a witness’s first account. We certainly wouldn’t hold against a party any decision to properly claim privilege; but what better way to demonstrate ‘cooperation’ than by an open and frank view of privilege claims.16

This sentiment was echoed by the SFO’s Director, David Green CB QC, at a recent Herbert Smith Freehills conference, where he noted that the SFO will challenge companies who wrongly assert privilege over the product of internal investigations and that, although the SFO could not and should not require a company to waive properly claimed privilege, a waiver of privilege over first witness accounts would be seen as a ‘badge of cooperation’ (although it is not the only such badge).17 This is consistent with the SFO’s statement on the self-reporting process which indicates that ‘all supporting evidence including but not limited to emails, banking evidence and witness accounts’ must be provided as part of the self-reporting process.18

The FCA has taken a similar approach. Director of Investigations Jamie Symington observed at the same HSF conference that, while companies may withhold documents created during internal investigations on the basis of privilege, that approach is not always helpful from the FCA’s perspective, particularly in respect of interview notes.19 He said that, if a company is carrying out its own interviews, the product of those interviews should be prepared so that the information can be shared with the regulator.

Under English law (in contrast to the US position), provided that confidentiality is not waived in respect of privileged communications, privilege can be maintained against the rest of the world following a specific waiver in favour of a regulator or third party.20

Conclusions for multinational investigations

We have set out above some of the key differences between US and English law in relation to the availability of privilege claims in internal investigations. Managing internal investigations that involve multiple jurisdictions necessarily involves the consideration of complex issues arising from different legal systems and regulatory expectations. Differing privilege standards are a key area to consider when managing a cross-border investigation. In light of the increased cooperation and information-sharing between different regulators, a company cooperating with one body should expect to share the same information with investigatory agencies in different countries. In this context, privilege issues should be considered with great care since a limited waiver of privilege when providing information to one regulator (in line with its expectations of cooperation) may lead to collateral privilege waivers in respect of other regulators in other jurisdictions.

As companies conduct internal investigations, they should:

• involve counsel at the outset of the investigation and ensure that counsel is responsible for directing the investigation;
• create a written record demonstrating that the investigation is being conducted for the purpose of the company obtaining legal advice in connection with anticipated litigation;
• ensure that all non-legal advisers are retained or supervised by counsel overseeing the investigation;
• ensure that the record reflects that key decision-makers at the company are within the client group so that there is no doubt that their communications with counsel are protected;
• in creating written reports of the investigation or witness interviews, be mindful of the distinction between ‘facts’ on the one hand, and ‘legal advice, mental impressions or analysis’ on the other hand; and
• take steps to avoid inadvertent waiver by ensuring the investigation and any related documents or reports are treated as confidential and not disclosed outside the investigation team.

Companies conducting internal investigations should strive to protect the privilege at the outset so as to retain the flexibility to decide later whether and to what extent a privilege waiver is advisable. Where a company has structured its internal investigation to maximise its privilege, the company will have more control over how and when to disclose the relevant information.
Summary of key differences between US and English privilege law

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<th>US approach</th>
<th>English approach</th>
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<tr>
<td><strong>Internal investigations with multiple purposes</strong></td>
<td>Protected by attorney–client privilege where one of the purposes is to obtain or provide legal advice.</td>
<td>Litigation privilege not available unless the investigation’s dominant purpose relates to litigation. Company will instead be reliant on legal advice privilege which only protects lawyer–client communications.</td>
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<td><strong>Internal investigations in response to government inquiries</strong></td>
<td>Government investigations present sufficient possibility of litigation for work product doctrine to apply. Also protected by attorney–client privilege.</td>
<td>Unclear whether certain regulatory investigations are sufficiently adversarial to invoke litigation privilege.</td>
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<td><strong>Protection of communications with third parties</strong></td>
<td>Protected where documents prepared by third parties who are retained or supervised by counsel and their work is to enable counsel to advise the company.</td>
<td>Protected by litigation privilege if communications are for the dominant purpose of litigation which is reasonably in prospect; otherwise legal advice privilege only protects lawyer–client communications.</td>
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<td><strong>Treatment of employee interview notes</strong></td>
<td>Protected by attorney–client privilege where interviews carried out by or at the direction of counsel and protected by work product doctrine where the interviews are conducted in anticipation of litigation.</td>
<td>Protected if litigation privilege is available. Unclear that legal advice privilege will apply unless interviewees are part of the ‘client’ group.</td>
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<td><strong>Availability of selective waiver when documents disclosed to regulator</strong></td>
<td>Not generally available.</td>
<td>Generally available provided documents remain confidential.</td>
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<td><strong>Regulatory expectations around waivers</strong></td>
<td>Regulators are generally limited as to when they can request a waiver, but they can request disclosure of all ‘relevant facts’.</td>
<td>Regulators view privilege waiver as an indication of cooperation, particularly in relation to first accounts.</td>
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**Notes**

2. Id. at 760.
3. See Upjohn v United States 449 US 393 (1981) in which the Supreme Court stated that ‘privilege exists to protect not only the giving of professional advice to those who can act on it but also the giving of information to the attorney to enable him to give sound and informed advice.’
9. Some federal circuit courts have left open the possibility that selective waivers could be possible in particular circumstances. For examples of circuit courts which have rejected the concept of selective waiver, see In re Pacific Pictures 679 F. 3d 1121 (9th Cir. 2012) and Westinghouse Electric Corp. v Republic of the Philippines 951 F.2d 1414 (3rd Cir. 1991). The Eighth Circuit expressly permitted a selective waiver in the form of disclosure to the SEC in response to a subpoena in Diversified Industries v Meredith 572 F.2d 596 (8th Cir. 1978).
12. See also Managing General Partner Ltd and others v Babcock & Brown Global Partners [2010] EWCH 2176 (Ch) in which the High Court declined to apply the Court of Appeal’s reasoning in Three Rivers (No. 5).
20. See Gothic City v Sotherby’s [1998] 1 WLR 114, in which privileged information was found to remain so after it had been shared with a third party on the understanding that they would keep the communications in confidence and Property Alliance Group v The Royal Bank of Scotland plc [2015] EWHC 1557 (Ch) in which documents provided to regulators on a confidential ‘non-waiver’ basis and pursuant to agreements under which privilege and confidence were expressly maintained remained privileged as against a civil litigant.
Scott Balber is a partner in Herbert Smith Freehills’ New York office and is the firm’s first US head of investigations and financial services litigation. Scott’s practice focuses on internal investigations, securities, general commercial litigation, white-collar criminal defence, and bankruptcy.

He has extensive experience representing companies and financial institutions and their employees in connection with investigations by US federal and state criminal and regulatory bodies, as well as in connection with civil litigation in trial courts and appellate courts around the country. He has handled dozens of investigations, involving issues of insider trading, financial fraud, violations of the Foreign Corrupt Practices Act and of the federal securities laws, money laundering, tax evasion, import-export violations, and anti-competitive conduct.

John O’Donnell is a partner in Herbert Smith Freehills’ New York office, and specialises in white-collar and regulatory matters and commercial litigation. Prior to joining Herbert Smith Freehills, John spent 10 years as an Assistant United States Attorney in the Criminal Division of the Southern District of New York, five of which were in the Office’s securities fraud unit, and nearly five years in the Enforcement Division at the Securities and Exchange Commission. During his time in public service, John acted as counsel in 17 jury trials, conducted numerous hearings and arguments in federal court and argued over a dozen appeals before the US Court of Appeals for the Second Circuit.

Elizabeth Head is a senior associate who advises and represents clients on financial crime matters, in particular in respect of fraud, corruption and money laundering. She also advises on sanctions issues and financial crime compliance programmes.

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