



Government Investigations & White Collar Defense Alert

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The sanctity of internal investigations

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The sanctity of internal investigations received an endorsement from a federal district court judge on December 8, 2009, when Judge James V. Selna ruled that former executives from Control Components, Inc. (CCI) could not obtain documents collected during CCI's corporate internal investigation through a motion to compel to the government pursuant to Fed. R. Crim. P. 16.

Background

In April of this year, the government indicted six former executives, including the former manager and director of Sales for China and Taiwan and the former CEO, charging them with violations of the Foreign Corrupt Practices Act (FCPA) and the Travel Act. The allegations in the indictment cited numerous payments to state-owned customers around the world. This past July, CCI pled guilty to similar charges and agreed to pay a criminal fine of \$18.2 million. The case against the defendant executives continues. As part of its pretrial discovery litigation, the defendant executives made a number of arguments in support of their motion to compel, including a claim of constructive custody by the government of CCI documents and a waiver of the attorney-work product doctrine and attorney-client privilege of CCI documents.

“Constructive custody”

During its internal investigation, CCI turned over only a small percentage of the millions of pages of documents it collected to the government. As part of discovery, the government produced the non-privileged documents it received from CCI to the defendant executives. The defendants, though, moved to compel production by the government of the remaining pages that were solely in CCI's possession, claiming that the government arguably had control over these, pursuant to the terms of the plea agreement. In support of their position, the defendants cited Fed. R. Crim. P. 16, stating that they were entitled to documents “within the government's possession, custody, or control,” and relied on the decision in *United States v. Stein*, 488 Supp.2d 350 (S.D.N.Y. 2007), which ordered production of documents over which the government had control, pursuant to the government's rights under the Deferred Prosecution Agreement (DPA) with the defendants' employer, KPMG.

Judge Selna rejected the defendants' argument by stating that “by no stretch of the imagination did CCI enter into an agreement allowing the Government to request anything in the possession of CCI.” *U.S. v. Carson*, No. 09-00077, slip op. at 5 (C.D. Cal. Dec. 8, 2009). Judge Selna further contrasted the “sweeping and open[-]ended” language in KPMG's DPA (“completely and truthfully

disclosing all information in its possession to the Office and the IRS ... including but not limited to all information about activities of KPMG, present and former partners ...”) with the more-narrow one in CCI’s plea agreement (“cooperate fully with the Department [of Justice (DOJ)] and the Federal Bureau of Investigation, in a manner consistent with the non-waiver agreement between the parties” and “disclose to the [DOJ] all non-privileged information ... concerning all matters relating to the corrupt payments to foreign officials which [DOJ] ... shall inquire”). Id. at 2, 5.

The privilege issue

Another issue raised by the former executives was whether CCI waived privileged materials when it produced certain work-product and attorney-client privilege documents to the government during its internal investigation. Counsel for CCI produced four charts for the government that included privileged materials. These charts were then provided to the defendant executives. The defendant executives argued that this partial production waived the privilege as it might apply to any other documents in CCI’s actual possession.

Courts have been split on the doctrine of selective waiver, which protects the attorney-client privilege and work-product doctrine against disclosure to third parties when the materials have been previously disclosed to a government agency. In this case, Judge Selna emphasized that the “tenor of the CCI Confidentiality and Non-Waiver Agreement is to maintain confidentiality,” thus suggesting an adoption of a selective waiver. However, the court ultimately deferred ruling on the waiver issue by suggesting that the better mechanism for this challenge would be seeking enforcement of a subpoena to CCI, rather than seeking the information from the government. Id. at 8. Discovery battles will continue to play out over the next year as trial for these former executives is set for November 2, 2010.

Navigating legal challenges

The attorneys in Nixon Peabody’s Government Investigations and White Collar Defense Practice Group are able to help companies and individuals navigate through the legal and ethical issues that arise during the course of internal investigations, and protect privileges and maintain confidentiality where appropriate, so companies and individuals are able to exercise their full rights under the law.

Contact us

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