

CLIENT ALERT

Avoiding Waivers of Privilege in Corporate Disclosures to the Government

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In a per curiam, unpublished decision in *In re Fluor Intercontinental, Inc.*, issued on March 25, 2020, the Fourth Circuit has provided some valuable guidance concerning how companies may avoid waivers of the attorney-client privilege when making disclosures to the government after privileged internal investigations. While the decision is non-precedential even within the Fourth Circuit, it reinforces the legal and policy reasons for allowing such disclosures to occur without mandating waiver of underlying privileged communications.

Fluor Intercontinental, Inc. sought a writ of mandamus from the Fourth Circuit to reverse a district court's ruling that Fluor had waived the attorney-client privilege when it made disclosures to the government pursuant to the Mandatory Disclosure Rule (48 C.F.R. § 52.203-13) that applies to federal government contractors. The district court's determination turned on its finding that certain statements in Fluor's written disclosure constituted "conclusions which only a lawyer is qualified to make." In granting the writ and vacating the district court's ruling, the Fourth Circuit held that "the district court's conclusion was clearly and indisputably incorrect."

The Fourth Circuit explained that a waiver cannot be inferred "merely because a party's disclosure covers 'the same topic' as that on which it had sought legal advice." The correct test, rather, is whether "there has been disclosure of *protected communications*."

In expounding upon these principles, the court drew a critical distinction between disclosures that "quote[] privileged communications or summarize[] them in substance and format," and disclosures that "do no more than describe . . . general conclusions about the propriety" of the conduct at issue. Fluor's disclosures fell into the latter category, and the fact that "Fluor's statements were based on the advice of counsel" was "clearly and indisputably insufficient to show waiver."

The court buttressed its ruling on public policy grounds, citing its concern that "the district court's decision has potentially far-reaching consequences for companies subject to [the Mandatory Disclosure Rule] and other similar disclosure requirements." The court explained: "We struggle to envision how any company could disclose credible evidence of unlawful activity without also disclosing its conclusions, often based on the advice of its counsel, that such activity has occurred. More likely, companies would err on the side of making vague or incomplete disclosures, a result patently at odds with the policy objectives of the regulatory disclosure regime at issue in this case."

While the Fourth Circuit's decision in *Fluor* arose in the context of the Mandatory Disclosure Rule, its reasoning extends to voluntary corporate disclosures pursuant to the U.S. Department of Justice's Corporate Enforcement Policies—including, among others, those that relate to the [Foreign Corrupt Practices Act](#) and the [False Claims Act](#)—which encourage and reward such disclosures, for two reasons. First, the court's articulation of the correct standard for waiver determinations in the corporate disclosure context was in no way limited to mandatory disclosures. Second, its public-policy rationale referred not only to the Mandatory Disclosure Rule but to "other similar disclosure requirements." DOJ's policies strongly encouraging corporate self-reporting are "similar" to the mandatory-disclosure regime that applies to government contractors.

Thus, in either setting, companies disclosing employee wrongdoing to the government based on the results of privileged internal investigations would be well advised to couch those disclosures in terms of “general conclusions” and avoid “quot[ing] privileged communications or summariz[ing] them in substance and format,” There is, of course, a wide gulf between those two extremes, and thus corporate counsel must continue to tread carefully in walking the line between adequate disclosure and waiver of privilege.

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