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Between a Rock and a Hard Place:
Navigating Document Privilege Disputes with the SEC

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The Securities and Exchange Commission (SEC) recently filed a subpoena enforcement action challenging privilege assertions made by Navistar International Corp. over documents responsive to SEC subpoenas.[1] Many of the documents at issue relate to advisors (lawyer and non-lawyer) retained by Navistar. The dispute highlights several important issues relating to establishing and preserving the attorney-client privilege and work-product protection, including: the implications of litigating against the SEC over privilege assertions; the consequences of inadvertently producing privileged information; structuring relationships with third-party advisors to best preserve the attorney-client privilege; and preserving privileges over drafts of SEC filings.

Background

Navistar is a public company that manufactures and markets diesel engines and trucks. The subpoena enforcement action arises from the SEC's investigation into whether Navistar improperly disclosed the status of its efforts to obtain a certificate from the U.S. Environmental Protection Agency (EPA) confirming that its heavy-duty diesel engines complied with the Clean Air Act. The SEC issued several subpoenas to Navistar, as well as to certain firms (including law firms) the SEC alleges were retained by Navistar to perform "lobbying" and "communications-related" services (collectively, the "Firms") regarding the EPA certificate issue. Navistar was directly involved with determining which

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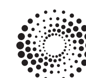
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documents the Firms withheld and redacted as privileged and with preparing privilege logs the Firms submitted to the SEC.

The SEC Staff disagrees with a number of privilege assertions made by Navistar. Specifically, the SEC Staff is challenging privilege assertions relating to: (i) documents involving the Firms; (ii) communications involving non-attorneys only; and (iii) draft SEC filings and communications about the filings. After failed attempts to resolve disputes over these privilege issues, the SEC elected to request a court to force Navistar to produce documents (and redacted portions of documents) the SEC Staff believes are being improperly withheld.

Regardless of which party prevails on the underlying privilege issues, there are several interesting takeaways from this case related to preserving the privileges and protections that apply to documents and the implications of litigating such issues against the SEC.

Lessons Learned

Even if you win, you may lose

SEC investigations generally are confidential and remain so until a settlement is reached, an enforcement action is filed, or the investigation reaches the point that disclosure is required because an enforcement action is imminent. Even where a public company opts to disclose an investigation at an earlier point, the company has control over the disclosure language and ordinarily includes limited and general information about the investigation. However, if a fight emerges over privilege assertions (or over any other document production issue), and the SEC decides to pursue a subpoena enforcement action, the SEC will file in federal district court publicly available papers in which the SEC has the discretion to assert (in excruciating detail if it sees fit) the nature of and basis for its investigation, the violations being pursued, and the evidence it has marshaled.

The Navistar case demonstrates how a privilege dispute can lead to such undesirable public disclosures about an SEC investigation. Two days before the SEC filed its subpoena enforcement action, Navistar filed its annual Form 10-K containing the following general disclosure regarding the SEC investigation:

> **In June 2012, Navistar received an informal inquiry from the Chicago Office of the Enforcement Division of the SEC seeking a number of categories of documents for the periods dating back to November 1, 2010, relating to various accounting and disclosure issues. We received a formal order of private investigation in July 2012. We have received subsequent subpoenas from the SEC in connection with their inquiry, and we continue our full cooperation with the SEC in this matter. At this time, we are unable to predict the outcome of this matter or provide meaningful quantification of how the final resolution of this matter may impact our future consolidated financial condition, results of operations or cash flows.[2]**

In contrast to Navistar's general disclosure (which is similar to the company's disclosures over the previous two years), the SEC's court filings disclose substantially more information about the nature of its investigation. The court filings detail the company's costly and failed efforts to obtain EPA certification for its heavy-duty diesel engines that were using a new type of technology and its retention of advisors (lawyer and non-lawyer) to assist in the process of obtaining EPA certification. The court filings reveal that the SEC is investigating violations of federal securities laws and questioning the veracity of the company's disclosures to the public about its efforts to obtain EPA certification. For example, the SEC court filings state:

> **The SEC Staff is conducting an investigation to determine whether Navistar and others may have violated the federal securities laws by making false or misleading statements or material omissions, including in Navistar's public filings with the SEC.**

> **Th[e] information [the SEC is seeking] bears directly on whether Navistar's understanding of the progress of its efforts to obtain EPA certification, as reflected in its lobbying efforts and its communications with others, was consistent with its public statements regarding this issue."[3]**

The unfortunate reality in situations such as this is that the SEC is able to file court papers disclosing details about its otherwise non-public investigations. This provides the SEC with leverage in disputes with companies over privilege assertions (and over other document production disputes) and presents companies with a difficult dilemma when the SEC threatens to litigate over a company's privilege assertions. While a company ultimately might prevail in court on some or all of its challenged privilege assertions, it could suffer prolonged reputational harm from the statements and allegations made in the SEC's court filings. Moreover, the information in such filings could pique the interest of the plaintiffs' bar. A company should consider these potential negative outcomes when assessing its options and strategy in response to SEC challenges of privilege assertions, even when the company steadfastly believes it will be victorious in court.

Expect the SEC to review inadvertently disclosed privileged documents it has already reviewed to test privilege assertions

The SEC was emboldened to aggressively challenge Navistar's privilege assertions because with respect to certain documents it knew exactly what communications Navistar had withheld as privileged. That is because Navistar had inadvertently produced privileged documents on two occasions during the investigation.

In one instance, Navistar produced redacted documents (claiming privilege over the redacted portions) after the Firms had already produced the same documents unredacted. When the SEC alerted Navistar to this discrepancy, Navistar asserted privilege over the unredacted portions and asked the SEC to destroy the documents. The SEC Staff had already reviewed the portions of these documents that Navistar claimed to be privileged. The SEC Staff re-reviewed these documents "to assess Navistar's privilege claims"[4] and concluded that none of the privilege claims were valid.

In another instance, Navistar alerted the SEC Staff that it had inadvertently produced 56 documents that were protected by privilege and asked that the documents be destroyed or returned. The SEC Staff had already reviewed some of these documents. The Staff agreed to destroy the documents it had not already reviewed and those where the Staff agreed with Navistar's privilege claim. However, yet again, the Staff re-reviewed the documents it had already reviewed to "assess Navistar's privilege claims." As a result of this review, the SEC Staff determined that "few" of Navistar's privilege claims were valid.

This regrettable sequence of events highlights why companies should devote the resources necessary to minimize the risk of inadvertently producing privileged documents. The inadvertent production of privileged information could undermine all of a company's privilege assertions should the SEC Staff review the documents and disagree with those assertions. Indeed, the SEC Staff's skepticism over Navistar's privilege assertions was fueled by the Staff's review of the inadvertently produced documents. As the SEC Staff acknowledged in court filings, its re-review of the inadvertently produced documents to assess Navistar's privilege assertions "informed the SEC's view of Navistar's privilege claims regarding other documents." Moreover, while there are procedures for clawing back from the SEC inadvertently produced privileged documents, a risk remains that the SEC will, as it did to Navistar, refuse to return the documents if the SEC staff believes the privilege has been waived (or is non-existent).

Take precautions to preserve privileges when retaining third-party advisors

The SEC's primary concern here is Navistar's attempt to assert the attorney-client privilege and work-product protection over communications involving third-party advisors (attorneys and non-attorneys) whom the SEC alleged were act-

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ing in lobbying roles. Navistar countered in its court filing that nearly all the communications at issue involved in-house or outside counsel "acting in their capacity as lawyers." However, the SEC disagrees with these privilege assertions based on its assessment of the services requested of and provided by these third-party advisors. Despite Navistar's vehement arguments to the contrary, the SEC has concluded that these advisors were acting in public affairs, communications, and lobbying capacities for Navistar (and were not acting in a legal capacity). Accordingly, the SEC asserts that no privileges apply.

When companies retain third-party advisors, it is often prudent to seek to shroud the advisor's work in privilege to the largest extent possible. This case is a stark reminder that when establishing such relationships with non-lawyers and lawyers alike, precautions should be taken to effectively establish and preserve the privilege.

First, have outside counsel directly retain and manage third-party advisors. Structuring the engagement and advisor actions in this manner will better enable the company to make valid and colorable claims that communications and work-product involving the advisors are privileged. Navistar sought to assert privilege over communications it had with a public relations firm it retained to assist with its litigation strategy. The SEC took the position that no communications involving the public relations firm were privileged because the firm was not retained to provide or assist with legal advice. While impossible to know for certain, perhaps the SEC would have been less inclined to challenge these privilege assertions had the public relations firm been retained by outside counsel.

Second, when retaining an advisory firm that provides both legal and lobbying services, companies should clearly identify in an engagement letter the legal services to be provided and ensure that the advisor in fact provides those legal services. The Navistar case demonstrates the risk that the SEC could challenge privilege claims over activities and communications involving an advisory firm (including a law firm) relating to any services the SEC deems are non-legal. Here, Navistar argued that its engagement letters with two law firms confirmed that the law firms were providing legal services. However, the SEC alleges that no privilege applies to communications or notes involving the law firms because the services provided were lobbying services, not legal. The SEC further alleged that no evidence existed of the relevant lawyer/lobbyist being involved in "developing litigation strategy",[5] analyzing legislation, or otherwise providing legal services for Navistar. The existence of an engagement letter stating that a law firm was providing legal services could not by itself, according to the SEC, "reclassify" non-legal services as legal services in order to invoke the attorney-client privilege.

Third, precautions should be taken to clearly designate communications intended to be privileged and to avoid waiving a document's privilege status. To be sure, not every communication with a lawyer is privileged. To best protect those documents that are privileged, efforts should be taken to clearly designate them as such—for example, by marking each document "Privileged and Confidential," "Communication with Counsel" and/or "Request for Legal Advice." Equally important, companies should take measures to avoid disseminating privileged communications in a manner that will trigger a waiver. Here, the SEC alleged that Navistar waived the privilege by disseminating certain communications to employees and third-party advisors who were not providing legal advice. A communication is more likely to retain its privileged status if its dissemination is limited to persons directly involved in providing or assessing the legal advice being communicated. Special precautions should be taken when disseminating privileged communications to third-party advisors who were not expressly retained to provide legal services.

Fourth, companies should be careful not to undermine their privilege assertions involving legal advisors by inaccurately characterizing their role. A reason the SEC challenged Navistar's assertion of privilege over documents relating to a lawyer/lobbyist was because in emails Navistar employees characterized that advisor's activities as "lobbying" work on the company's behalf.

Be prepared for the SEC to challenge privilege claims over a company's draft SEC filings

The SEC's court filings reiterate the SEC's general litigation position that draft corporate filings with the SEC are not covered by the attorney-client privilege. Furthermore, the Navistar case reveals the SEC's skepticism that communications involving draft SEC filings can be privileged, especially when those communications involve non-lawyer advisors.

While the SEC may ultimately lose its argument that draft SEC filings are not privileged (as there is precedent to the contrary), this case presents a good opportunity for company counsel to re-evaluate current practices regarding the creation and dissemination of SEC filings with an eye towards best withstanding a privilege challenge by the SEC.

NOTES

1. See *SEC v. Navistar Int'l Corp.*, No. 14-cv-10163 (N.D. Ill.).
2. Navistar Int'l Corp., 8-K, filed with the SEC, July 31, 2012; Item 7.01, Regulation FD Disclosure.
3. *SEC v. Navistar*, pp. 9-10.
4. *SEC v. Navistar*, p. 14.
5. *SEC v. Navistar*, p. 41.

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