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WHITE-COLLAR CRIME

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Justice and Corporate Prosecutions: The Continuing Saga

Not infrequently, the wheels of justice have been observed to grind slowly. The history of the Department of Justice's policies on the prosecution of corporations may be a perfect example of this adage.

The Department of Justice (DOJ) policies, set forth in a series of memoranda, have weakened the corporate attorney-client privilege and threatened employer-employee relations. In addition, the principles advocated by the Justice Department have been adopted by other government agencies and regulators. The authors began chronicling this evolution in a series of articles approximately three years ago.[1]

This article sets forth the latest developments in the saga, which include the recent decision by the U.S. Court of Appeals for the Second Circuit affirming the extraordinary remedy of dismissal of an indictment against defendants deprived of their right to counsel under the Sixth Amendment by government action pursuant to these DOJ policies.[2]

A Brief History

The Department of Justice's Principles of Federal Prosecution of Business Organizations were created to guide federal prosecutors in making decisions whether to seek charges against a business organization. Originally set forth in the Holder Memorandum in 1999, that document was supplanted in 2003 by the Thompson Memorandum authored by then-Deputy Attorney General Larry D. Thompson.

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The Thompson Memorandum encouraged federal prosecutors to seek waivers by corporations of their attorney-client privilege in exchange for favorable treatment by the prosecutor in considering whether to indict the corporation. It also focused on a corporation's relationship with its employees during a government investigation, considering whether the business organization agreed to pay its employee's attorney's fees, shared information with the employee and his counsel outside the context of common interest agreements, or sanctioned the Fifth Amendment assertions of its employees.[3]

'Culture of Waiver'

Many believe that the Thompson Memorandum resulted in a "culture of waiver" in which government agencies believed it was reasonable and appropriate for them to expect a corporation under investigation to waive its privilege. To some extent, corporate entities bought into this as well, believing they were required to waive the privilege in order to obtain favorable treatment.[4] Significantly, the "culture of waiver" extended beyond the Justice Department to include the U.S. Sentencing Commission, the Securities and Exchange Commission (SEC) and other government agencies.

These policies came under fire in 2005 when the ABA passed a resolution opposing the practice by government officials of seeking a waiver of privilege and considering a corporation's nonwaiver as an aggravating factor in favor of charging the corporation with a crime. In addition, in 2006, Judge Lewis Kaplan of the U.S. District Court for the Southern District of New York issued two opinions in *United States v. Stein* strongly criticizing the government's policies vis-à-vis a corporation's relationship with its employees. First, the court found that the government's policies and actions had caused the accounting firm, KPMG, to cease payment of employees' legal fees in violation of the Fifth and Sixth amendments.[5] Further, the court suppressed certain statements of two individual defendants, holding that they had been deliberately coerced by the government attorneys who pressured KPMG to press its employees to submit to government interviews.[6] Ultimately, the indictment was dismissed as to 13 of the 16 individual employees.[7]

On Aug. 28, 2008, as this article was going to press, the Second Circuit affirmed the judgment of the District Court, finding that the government deprived defendants of their right to counsel under the Sixth Amendment.

In September 2006, the Senate Judiciary Committee held hearings on the Thompson Memorandum's Effect on the Right to Counsel in Corporate Investigations. Those testifying charged the government with "overzealousness" in investigating and prosecuting corporations. Former Justice Department officials also accused the Thompson Memorandum's policies of "seriously eroding" the attorney-client privilege.

Response to Mounting Criticism

As a result of these efforts and the decisions issued in the KPMG case, the government instituted a series of changes intended to ease the burden placed on businesses attempting to comply with government demands during an investigation. First, the U.S. Sentencing Commission amended its organizational Sentencing Guidelines by voting unanimously to eliminate guideline commentary stating that an organization's willingness to waive the privilege could be relevant to a determination that the entity was cooperating with the government and

therefore entitled to a reduced penalty.

In June 2007, the Standing Committee on Rules of Practice and Procedure of the Judicial Conference of the United States approved and proposed to Congress the adoption of new Evidence Rule 502. Rule 502 was drafted by the Judicial Conference's Advisory Committee on Evidence in response to "a number of problems with the current federal common law" regarding the waiver of attorney-client privilege and work product. The Advisory Committee specifically expressed concern about the production of confidential or work product material by a corporation subject to government investigation and the waiver implications of such disclosure.[8] The legislation containing the proposed rule has passed the Senate and is awaiting a vote in the House.

On Dec. 7, 2006, Senator Arlen Specter, R-Pa., introduced to Congress the Attorney-Client Protection Act of 2006. Written in conjunction with the ABA, the NACDL, the ACLU, Association of Corporate Counsel and the U.S. Chamber of Commerce, the legislation is intended to "place on each [government] agency clear and practical limits designed to preserve the attorney-client privilege and work product protections available to an organization and preserve the constitutional rights and other legal protections available to employees of such an organization." The House version of the bill passed on Nov. 13, 2007. The Senate version has stalled in the Senate Judiciary Committee.

Justice Department Reaction

On Dec. 12, 2006, four days after the introduction of the Specter legislation, the DOJ revised the Thompson Memorandum, issuing a new set of guidelines in a memorandum authored by then-U.S. Deputy Attorney General Paul J. McNulty. The McNulty Memorandum limited the circumstances under which the Department of Justice could seek a privilege waiver, adopting a "tiered approach" which distinguished between documents containing legal or nonfactual advice ("Category II" information) versus those containing purely factual information ("Category I" information). Under the revised policy, prosecutors can only seek Category II information in "rare circumstances" and only after obtaining written authorization from the deputy attorney general.

Further, although a corporation's response to a request for waiver of Category I information can still be considered in determining the corporation's level of cooperation, a corporation's unwillingness to waive Category II information can not be considered against the corporation. Finally, prosecutors "may always favorably consider a corporation's acquiescence to the government's waiver request in determining whether the corporation has cooperated with the government investigation."

The DOJ's revised guidelines also provide that prosecutors generally cannot consider a corporation's advancement of attorney's fees to employees when making a decision whether to charge a corporation. The "rare exception" to this rule is when the totality of the circumstances demonstrates that the advancement of attorney's fees was intended to impede the government's investigation.

Generally, the legal community felt that the DOJ's changes as set forth in the McNulty Memorandum were "too little, too late" and said that the Specter legislation was a better solution. In addition, implementation of the McNulty memo did not lessen the pressure on corporations to waive the privilege. Indeed, testimony provided before the House Judiciary Subcommittee on Crime, Terrorism and Homeland Security a few months after the McNulty Memorandum had been issued, indicated that many prosecutors were unfamiliar with the revised guidelines and continued to seek informal waivers. Moreover, those government attorneys familiar with the process were said to use its requirements in a threatening manner, claiming that they would not think fondly of those corporations who required them to seek the required authorizations.[9]

The Latest Developments

Despite complaints, on June 5, 2008, Attorney General Michael Mukasey told reporters that he did not believe the McNulty Memorandum needed revision. "There are some people who favor legislation. We think and continue to think that the McNulty memo is working and has worked."[10] On June 20, 2008, 33 former U.S. attorneys sent a letter to the Senate Judiciary Committee Chair Patrick Leahy, D-Vt., urging him to end the DOJ's "widespread practices and policies that pressure businesses to waive attorney-client privilege in return for avoiding a harsher charging decision" by holding a vote on the Attorney Client Privilege Protection Act proposed by Senator Specter.[11]

With the renewed attention on Senator Specter's legislation, Attorney General Mukasey's tone changed the following month. At an oversight hearing of the Justice Department by the Senate Judiciary Committee, the attorney general stated the DOJ was reconsidering the factors set forth in the McNulty Memorandum. He revealed that Deputy Attorney General Mark Filip was at work on a letter to Senators Specter and Leahy addressing "real significant proposed changes" to the McNulty memo. "There's no such thing as a memo that achieves perfection…. There are adjustments in the McNulty memo that can and will be made. In particular, we will no longer measure cooperation by waiver of the attorney-client privilege."[12]

• ***Filip's Letter to Leahy and Specter.*** On July 9, 2008, Mark Filip wrote to Senators Leahy and Specter, respectively the chairman and ranking member of the Senate Judiciary Committee, to "update you on my review, and to provide you with a summary of certain changes to the principles that the department intends to make in the coming weeks to address issues you have raised and that were echoed during my review."[13] Mr. Filip noted that in the 18 months since the issuance of the McNulty Memorandum, the DOJ has approved no requests by prosecutors to obtain "core attorney-client communications or nonfactual attorney work product."

Nevertheless, Mr. Filip proposed a series of revisions in response to criticism of the government's policies. First, he wrote that the department would measure cooperation by the extent to which a corporation discloses relevant facts and evidence, not its waiver of privileges. Mr. Filip likened this treatment to that used in assessing the cooperation of individuals, asking "to what extent has the corporation timely disclosed the relevant facts about the misconduct?"

Second, Mr. Filip wrote that federal prosecutors would not demand the disclosure of Category II information as a condition for cooperation credit. Category II information is defined in the McNulty Memorandum as nonfactual attorney work product and core attorney-client privileged communications. Excepting those communications made in furtherance of a crime or fraud, Mr. Filip stated that corporations need not disclose Category II information to receive cooperation credit and that the government "may not demand" such information.

Additional proposed changes focused on the corporation's relationship with its employees. For instance, Mr. Filip stated that federal prosecutors would not consider whether the corporation had advanced attorney's fees to its employees in evaluating cooperation, nor would they consider whether the corporation had entered into a joint defense agreement with its employees. Finally, Mr. Filip wrote that federal prosecutors would not consider whether the corporation has retained or sanctioned employees in evaluating cooperation. Although "[h]ow and whether a corporation disciplines culpable employees may bear on the quality of its remedial measures or its compliance program, it will not be taken into account for the purposes of evaluating cooperation."

In closing, Mr. Filip said that the proposed revisions to the McNulty Memorandum were "preferable to any legislation, however well-intentioned and diligently drafted, that would seek to address the same core set of issues." Further, he requested that the senators allow the DOJ sufficient time to implement the proposed changes and review their impact before pursuing legislation.

• ***Specter Response to the Filip Letter.*** The following day, Senator Specter issued a response.[14] In opening, he expressed his concern about delaying the legislation to wait for the DOJ to revise and implement changes to the McNulty Memorandum. He noted that

almost immediately after the legislation was introduced in 2006, the DOJ had attempted to address concerns by supplanting the Thompson Memorandum with the McNulty Memorandum. He said that further delay to allow the DOJ another attempt would seriously prejudice corporate defendants and their employees.

In addition, Senator Specter noted the extraordinarily high legal fees incurred in defending cases brought by the government, citing the KPMG prosecution and estimates ranging between $20 million to $40 million per defendant. "In the context of these lengthy delays and the potential prejudice which is involved in these matters, I think it is too much to ask for the legislative process to await a written revision of McNulty and then await a review of the implementation of a new memorandum for a 'reasonable amount of time' which could be very long."

Senator Specter then turned to address the specific changes listed in Mr. Filip's letter, criticizing them as "unsatisfactorily vague." With respect to those changes intended to address concerns about maintenance of the attorney-client privilege and work product, Senator Specter noted that the proposed revisions failed to address that area where Category I and Category II information may overlap. He argued that certain types of Category I factual information may have been obtained from individuals expecting their disclosures would be protected by the privilege and therefore would not be subject to disclosure as Mr. Filip's letter and the McNulty memo assume.

With respect to revisions targeted at employer-employee relations, Senator Specter inquired whether Mr. Filip's statement that federal prosecutors would not consider the advancement of attorney's fees to employees against the corporation meant that the Justice Department intended to abandon its appeal in the *Stein* case. As for federal prosecutors not considering whether the corporation has entered into joint defense agreements with its employees or taken action against employees for alleged misconduct, Senator Specter asked Mr. Filip to tell the committee "what relevance [these issues] ever had and what the DOJ has done on [those] matters in past cases."

Finally, Senator Specter expressed his concern that revisions to the McNulty Memorandum would not bind any other federal agency, such as the IRS or SEC. Moreover, "any Department of Justice statement of Principles would be subject to modification by subsequent Attorneys-General unlike legislation." In closing, Senator Specter recommended to Chairman Leahy that the Judiciary Committee proceed with the legislation as originally intended "to either come to some accommodation with the administration on legislation or have Congress move ahead on its own."

Senator Leahy's reaction to Mr. Filip's letter is somewhat less clear. He issued a press release stating that he was pleased that the DOJ was seriously analyzing its policies in this regard and that Mr. Filip's letter "appears to be an encouraging development."[15] In conclusion, he promised to study Mr. Filip's suggestions and "review thoroughly the promised policy memorandum when that is issued, which I trust and hope will be very soon."

• ***Filip Announces Revisions to DOJ Policy.*** On the same day last week that the Second Circuit affirmed the dismissal of indictments against 13 defendants for government violations of their Sixth Amendment rights, Mr. Filip announced "significant revisions to its policy for the investigation and prosecution of corporate crimes."[16]

Although undoubtedly formulated before the Court of Appeals decision in *Stein,* the revisions reflect a change to correct the ill-fated course that undermined that prosecution.

First, credit for cooperation will not depend on whether a corporation has waived attorney-client privilege or work product protection, or produced materials protected by attorney-client or work-product protections. It will depend on the disclosure of facts. Corporations that timely disclose relevant facts may receive due credit for cooperation, regardless of whether they waive attorney-client privilege or work product protection in the process.

Moreover, the new policy forbids prosecutors from asking for nonfactual attorney-client privileged communications and work product, such as legal advice—what the old guidelines designated "Category II" information—with only two exceptions, both of which are well-recognized in existing law. Furthermore, the new policy instructs prosecutors not to consider whether a corporation has advanced attorney's fees to its employees, officers, or directors when evaluating cooperativeness.

In addition, under the new policy, federal prosecutors may not consider whether the corporation has entered into a joint defense agreement in evaluating whether to give the corporation credit for cooperating.

Finally, prior guidance allowed prosecutors to consider whether a corporation disciplined or terminated employees for the purpose of evaluating cooperation. That is now disallowed. No corporation is obligated to cooperate or to seek cooperation credit by disclosing information to the government. Refusal by a corporation to cooperate, just like refusal by an individual to cooperate, is not evidence of guilt.

Put differently, if a business decides not to cooperate, that does not, in itself, support or require the filing of charges in any way. The revised principles will be set forth for the first time not as a memo, but in the United States Attorneys' Manual. They will be binding on all federal prosecutors within the Department of Justice, effective immediately. Some might say that, particularly in light of the *Stein* decision, these changes have come too late.

Conclusion

Prior to the most recent Filip announcement, many observers, including business, civil rights and defense organizations, expressed the view that any new policy statements from the DOJ are pointless and real change can come only through the passage of Senator Specter's legislation. Indeed, some expressed the view that the policy encouraging the coercive demand for waiver as a sign of cooperation "has gone viral. It has spread to enough federal agencies that anything the Justice Department does isn't going to be enough to change the others."[17]

Time will tell.

1. Elkan Abramowitz and Barry A. Bohrer, "Waiver of Corporate Attorney-Client and Work Product Protection," The New York Law Journal (Nov. 1, 2005); Elkan Abramowitz and Barry A. Bohrer, "Assault on Thompson Memo: KPMG and Beyond," The New York Law Journal (Sept. 5, 2006); Elkan Abramowitz and Barry A. Bohrer, "The Defense of Corporate America: The Year in Review," The New York Law Journal (Jan. 2, 2007); Elkan Abramowitz and Barry A. Bohrer, "Privilege Waivers: The Pendulum Swings," The New York Law Journal (Sept. 4, 2007).

2. *United States v. Stein,* Dkt. No. 07-3042 (2d Cir., Aug. 28, 2008). Because the case was decided as this article was going to press, time constraints preclude an analysis of the 68-page decision.

3. Memorandum from Larry D. Thompson, Deputy Attorney General, to Heads of Department Components and United States Attorneys on Principles of Federal Prosecution of Business Organizations (Jan. 20, 2003).

4. Letter from former senior Justice Department officials to Attorney General Alberto Gonzales (Sept. 5, 2006) (citing study of over 1,200 in-house and outside corporate counsel, almost 75 percent of whom stated that they believed the Thompson Memorandum created a "culture of waiver").

5. *United States v. Stein,* 435 F.Supp.2d 330 (S.D.N.Y. 2006).

6. 440 F. Supp.2d 315 (S.D.N.Y. 2006).

7. 495 F. Supp.2d 390 (S.D.N.Y. 2007).

8. Report of the Advisory Committee on Evidence Rules to the Standing Committee on Rules of Practice and Procedure (May 15, 2007).

9. Testimony of Richard White, Chairman of the Board of Directors of the Association of Corporate Counsel, Hearing Before the House Judiciary Subcommittee on Crime, Terrorism, and Homeland Security (March 8, 2007).

10. Pedro Ruz Gutierrez, "Mukasey: No Need to Fix McNulty Memo," BLT: The Blog of Legal Times (June 5, 2008).

11. Letter from representatives of the Department of Justice to Senator Patrick Leahy (June 20, 2006) (available at http://online.wsj.com/public/resources/documents/leahy.pdf).

12. Pedro Ruz Gutierrez, "Mukasey Hints at Revisions of McNulty Memo, Spars With Senators at Hearing," BLT: The Blog of Legal Times (July 9, 2008).

13. Letter to Patrick J. Leahy and Arlen Specter from Mark Filip (July 9, 2008).

14. Press Release, "Specter Response Letter to Deputy Attorney General" (July 9, 2008).

15. Press Release, "Comment of U.S. Senator Patrick Leahy (D-Vt.), Chairman, Senate Judiciary Committee, on Deputy Attorney General Filip's Letter Regarding the Corporate Attorney-Client Privilege" (July 9, 2008).

16. Remarks Prepared for Delivery by Deputy Attorney General Mark R. Filip at Press Conference Announcing Revisions to Corporate Charging Guidelines, www.usdoj.gov/dag/speeches/2008/dag-speech-0808284.html.

17. Marcia Coyle, "Senator Issues Ultimatum on Privilege Measure," New York Law Journal (July 10, 2008), quoting Stephanie Martz, Director of White-Collar Crime Project of the National Association of Criminal Defense Lawyers.