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Rethinking How To Respond To Government Investigations

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What will you do if the government comes knocking? Get ready—because it might be time to rethink your approach when answering the door. Deputy Attorney General Mark Filip announced changes to Department of Justice (DOJ) policies on August 28, which significantly impact waiver of privilege, payment of employees' attorney fees and joint defense agreements. These changes should compel corporations to critically reexamine their approach to responding to government investigations.

Background

In 2003, then Deputy Attorney General Larry Thompson issued a memorandum revising principles for federal prosecutors to follow when investigating and deciding whether to bring criminal charges against a corporation.[1] The Thompson Memo identifies nine factors for consideration, including:

1. The corporation's timely and voluntary disclosure of wrongdoing and its willingness to cooperate in the investigation;

2. The existence and adequacy of the corporation's compliance program; and

3. The corporation's remedial actions.

Under the Thompson Memo, federal prosecutors were authorized to consider whether the corporation waived the attorney-client and/or work-product privileges when judging whether the corporation had cooperated with the government's investigation.

The attorney-client privilege protects communications between the attorney and client, while the work-product privilege protects an attorney's thoughts, opinions and impressions from disclosure.[2] The Thompson Memorandum also allowed prosecutors to consider whether the corporation had advanced attorneys' fees to "culpable employees and agents" when evaluating how much, if any, credit the corporation would receive for cooperation.

In December 2006, then-Deputy Attorney General Paul McNulty substantially revised the Thompson Memo. The McNulty Memo limited federal prosecutors' ability to seek waiver of those privileges to circumstances where prior approval had been obtained from either the U.S. Attorney or the Deputy Attorney General, depending on the nature of the waiver being sought. The McNulty Memo also prohibited federal prosecutors from considering the advancement of attorneys' fees by the corporation except in "extremely rare cases."

The policies advanced by both the Thompson and McNulty Memos generated substantial concern among corporations and white-collar defense lawyers, many of whom asserted that, in practice, federal prosecutors routinely required companies to waive the attorney-client and work-product privileges as a prerequisite to getting credit for cooperation. Congress also became concerned with the government's tactics in corporate

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investigations and initiated legislative efforts for reform.

On August 28, 2008, Deputy Attorney General Mark Filip announced substantial changes to the McNulty Memo. The Filip Memo was immediately incorporated into the DOJ's United States Attorneys' Manual at Chapter 9-28.000, "Principles of Federal Prosecution of Business Organizations."[3] While the changes to DOJ policy set forth in the Filip Memo are substantial, they are only guidance as made clear by the disclaimer: "These Principles provide only internal Department of Justice guidance. They are not intended to, do not, and may not be relied upon to create any rights, substantive or procedural, enforceable at law by any party in any matter civil or criminal." It is important to note that the Filip Memo applies only to the DOJ, thus leaving other federal and state agencies free to decide for themselves whether their attorneys may seek waiver of privilege when conducting investigations.

Waiver of Privilege

In the corporate crime enforcement frenzy following the collapse of Enron and WorldCom, it became common for federal prosecutors to ask a corporation to waive the attorney-client and/or work-product privileges in the course of an investigation. Former Deputy Attorney General Holder, as a defense lawyer in private practice, praised the changes ushered in by the McNulty Memo in light of the frequency with which corporations were being asked to waive the privilege: "Today, it's maddening. You'll go into a prosecutor's office … and fifteen minutes into our first meeting they say, 'Are you going to waive?'"[4]

While the DOJ publicly maintains that waiver of such privileges has never been a prerequisite for a corporation to receive full credit for cooperation, some have argued that under both the Thompson and McNulty Memos, the DOJ coerced business entities into waiving the attorney-client privilege and work-product protection.[5] With the destruction of Arthur Andersen as a fearsome example of the consequences of not cooperating, federal prosecutors were in a powerful bargaining position to inform a corporation that getting full credit for cooperation, even if a privilege were waived, was critical.

The Filip Memo now prohibits federal prosecutors from seeking waiver of either type of privilege, although a corporation may still choose to waive the privilege.[6] The Filip Memo emphasizes that the government's focus is on obtaining from the corporation the facts relevant to the investigation, not privileged materials: "In short, so long as the corporation timely discloses relevant facts about the putative misconduct, the corporation may receive due credit for such cooperation, regardless of whether it chooses to waive privilege or work product protection in the process."[7]

While the Filip Memo prohibits the DOJ from seeking waiver of privileged information, it authorizes federal prosecutors to seek all relevant factual information acquired through a corporation's internal investigation, including all factual information acquired through employee interviews and documents reviewed.[8] This is problematic as it often is difficult, if not impossible, to say what the "facts" are without first sorting through conflicting versions of events, making judgments about witness credibility and drawing inferences from the information gathered. While the underlying facts are not privileged, many aspects of an attorney's mental impressions collected and documented during such investigations are inextricably intertwined with such "facts." This invariably leads to the question of whether it really is possible to fully disclose all relevant facts without waiving at least the work-product privilege.

Payment of Employee Attorneys' Fees

Many corporations pay attorneys' fees for current and former employees who need or request separate representation during an investigation. Provisions addressing such payments are often found in a corporation's by-laws. The Filip Memo instructs that federal prosecutors "should not take into account whether a corporation is advancing or reimbursing attorneys' fees or providing counsel to employees, officers or directors under investigation or indictment" and "may not request that a corporation refrain from taking such action."[9]

On the very same day that the Filip Memo was unveiled, a federal appellate court issued a decision condemning the DOJ for having pressured a corporation

to not pay employee attorneys' fees. The court dismissed indictments against several individuals on the basis that the government had deprived them of the right to counsel by causing their former employer to place conditions on the advancement of legal fees to them, capping and ultimately ending the fees.[10]

Joint Defense Agreements

Joint defense agreements are commonly utilized when the government is investigating corporate wrongdoing. While the specific details of such agreements vary significantly, at its core a joint defense agreement allows attorneys to share privileged information obtained from their respective clients without waiving privilege. The government dislikes joint defense agreements because they undermine the "divide and conquer"/ "witness flipping" strategy that often serves as the bedrock upon which the government builds major corporate criminal prosecutions. Under previous DOJ policies, federal prosecutors were permitted to consider joint defense agreements as a failure of the corporation to cooperate. Under the Filip Memo, "the mere participation by a corporation in a joint defense agreement does not render the corporation ineligible to receive cooperation credit, and prosecutors may not request that a corporation refrain from entering into such agreements."[11]

Action Against Culpable Employees

For many justifiable reasons, corporations often take disciplinary action against employees who have been involved with misconduct. The Filip Memo directs prosecutors to consider and weigh whether the corporation took disciplinary action against individuals who the corporation has identified as culpable wrongdoers in assessing the company's remedial action taken in response to misconduct.[12] This is a favorable change from prior DOJ policies which allowed prosecutors to consider the corporation's handling of individual employees *before* the corporation had reached any conclusion about that individual's culpability.

Push for Legislation Regulating Government Investigations

Despite recent developments that have pruned back government powers, many continue to urge passage of Senate Bill 3217, The Attorney-Client Privilege Protection Act of 2008.[13] This legislation would prohibit any agent or attorney of the United States from demanding, requesting or otherwise pressuring any company or other organization to:

- Disclose information that is protected by the attorney client privilege or attorney work-product doctrine;
- Refuse to provide counsel to, or contribute to the legal expenses of, an employee;
- Refuse to enter into a joint defense, common interest or information sharing agreement with an employee;
- Withhold information from employees that would be relevant to their defense, or
- Terminate or sanction an employee for exercising his or her constitutional rights or other legal protections.

Passage of the Act would give the changes set forth in the Filip Memo the force of law, restore the sacrosanct nature of the attorney-client privilege, and end the culture of waiver created by past practices. As noted above, the Filip Memo applies only to the DOJ and does not apply to other federal or state agencies.

Where Do We Go from Here?

It is too early to tell the full extent to which the Filip Memo may change the process and outcome of government investigations—that will depend largely on how local U.S. Attorney's Offices implement the policies in their daily practice. The significant developments articulated in the Filip Memo, however, make the time right for corporations to reevaluate internal policies and practices relating to government investigations. Rational decisions regarding these issues are best made when the company is not under investigation.

While the Filip Memo reallocates the weight that the government will give to specific aspects of a corporation's response to misconduct and a government investigation, the fundamental questions the government will ask in judging the corporation's culpability remain essentially the same: 1) what steps did the corporation take to prevent the misconduct; and 2) what steps did the corporation take after learning of the misconduct to prevent it from happening again. The answers to these questions lay in existing corporate compliance programs. Once an investigation has begun, it is most likely too late to make changes that will have a positive impact on the government's evaluation of the corporation's compliance program. Compliance policies should be proactively reviewed and fine-tuned to ensure they are robust and implemented to create not only effective systems, but a real culture of compliance. Having an outside entity periodically test the compliance program is one way to objectively assess the program's effectiveness. This preventative measure protects not only the corporation, but also the compliance officer or in-house lawyer. Individuals in these roles are increasingly

the targets of investigations because they are ultimately responsible for the compliance program.

Another fundamental question the government will continue to ask is whether the corporation helped the government understand the nature, extent and cause of the misconduct. It seems unlikely that the government would give a corporation full credit for cooperation if the corporation has not essentially helped the government "catch the bad guys." This cooperation, however, no longer includes the need to expressly waive any privilege, or deprive an employee of a defense.

Unfortunately, most corporations will, at some point, face a government investigation, even when the corporation has done everything within its power to prevent misconduct. A corporation should, therefore, proactively consider how it will conduct an internal investigation and respond to a government investigation so that the company will be in the best position to be able to fully disclose facts without invading privilege. For example, steps taken at the direction of outside counsel for the purpose of providing legal advice are usually privileged.

A corporation should also proactively consider the potential ramifications of participation in joint defense agreements. A joint defense agreement could benefit the corporation by giving it access to witnesses, facts, and documents that it might not otherwise be able to review as part of its investigation. On the other hand, a joint defense agreement could harm the corporation by restricting its ability to cooperate. For example, a joint defense agreement could prevent a corporation from being able to make full disclosure to the government of all facts learned during the investigation.

A corporation should also proactively evaluate the issue of payment of employee attorneys' fees. The threshold question is whether the company will pay attorneys' fees for current and former employees who need counsel during a government investigation. If so, an additional consideration is whether the payment of fees will be mandatory or permissive. If mandatory, the company may consider including a "claw-back" provision that would enable the company to recover fees paid on behalf of an individual who is later found guilty.

However the corporation decides to handle these issues, these decisions are more prudently and rationally made now rather than when an employee has been subpoenaed to testify before the grand jury and needs to know immediately whether the company will pay the attorneys' fees.

In many cases, the government will seek a deferred prosecution agreement or corporate integrity agreement in lieu of indictment if the investigation has revealed a significant degree of corporate culpability. At the beginning of the investigation, it is therefore important to understand the potential consequences associated with cooperating, and develop a strategy to minimize such exposure. Remember that the risks run beyond enforcement by DOJ, and that DOJ policies are not binding on other federal regulatory enforcement agencies, such as the Food and Drug Administration (FDA) and the Department of Health and Human Services (HHS), that have the authority to impose sanctions.

As evidenced by three major revisions to DOJ policy regarding corporate investigations and prosecutions in less than 10 years, the rules of engagement for government investigations will remain uncertain and in flux absent legislation addressing the critical issues. A corporation should consider whether to advocate for passage of the pending Attorney Client Privilege Protection Act, or some other permanent solution to the uncertainties and inconsistencies associated with government investigations of corporations.

Conclusion

The revisions to the DOJ's corporate prosecution guidelines set forth in the Filip Memo are substantial and represent an important change in the Department's policies. They are, however, only internal policies which are subject to change at any time. Future conduct of line-level federal prosecutors will determine whether the policies articulated in the Filip Memo become reality. By proactively rethinking how to respond to a government investigation, a corporation can take action today that will help it when the government comes knocking.

1 The Thompson Memo revised and elaborated upon guidance from the 1999 "Holder Memo" which is usually cited as the DOJ's first attempt to formally adopt uniform standards for investigating and prosecuting corporations.
2 *See* Upjohn v. United States, 449 U.S. 383 (1981).
3 *Available at* http://www.usdoj.gov/usao/eousa/foia_reading_room/usam/title9/28mcrm.htm.
4 *Available at* http://blogs.wsj.com/law/2006/12/13/the-holder-memo/.
5 *See, e.g.*, ABA Task Force on the Attorney-Client Privilege, Report of the American Bar Association's Task Force on the Attorney-Client Privilege, 60 Bus. Law. 1029 (2005).
6 U.S.A.M. § 9-28.710.
7 U.S.A.M. § 9-28.720.
8 See U.S.A.M. § 9-28.710 n.3.
9 U.S.A.M. § 9-28.730.
10 *See* United States v. Stein, 2008 WL 3982104 (2d Cir. (Aug. 28, 2008)).
11 U.S.A.M. § 9-28.730.
12 U.S.A.M. § 9-28.900.
13 *Available at* http://thomas.loc.gov/cgi-bin/query/z?c110:s3217.