THE FILIP MEMORANDUM: DOES IT GO FAR ENOUGH?

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Over the past few years, there has been much discussion within the defense bar concerning the pressure placed on corporations and their counsel to waive the attorney-client privilege in order to provide information to the government, and to withhold indemnification for attorney's fees from officers and employees who are also under investigation. While the Department of Justice (DOJ) has seen its ability to influence corporate behavior as an important tool in furtherance of white-collar investigations, defense attorneys have pointed out that this practice ignores the importance of free and open communication between counsel and client, and unnecessarily hinders the ability of company employees to be represented by competent and experienced counsel.

End-of-August Developments

The last week of August brought two significant developments on these issues. First, the DOJ issued a memo authored by Deputy Attorney General Mark R. Filip entitled "Principles of Federal Prosecution of Business Organizations" (the "Filip Memo"),[1] which replaces the McNulty Memo[2] as the DOJ's corporate charging guidelines. The Filip Memo reconsiders corporate cooperation credit in the areas of privilege waiver, employee indemnification, joint defense agreements and employee discipline and termination. Second, the Second Circuit affirmed Judge Lewis Kaplan's decision in the *KPMG* case, holding that government pressure on a company to demonstrate its cooperation by refusing to indemnify officers and directors constituted government action and violated the Sixth Amendment rights of the officers and directors.[3]

In order to assess the significance of these developments, it is necessary to understand the history of the DOJ's corporate charging guidelines and the still-pending legislative challenges to those guidelines. In 1999, amid rising concerns that its charging decisions lacked uniformity, the DOJ issued the Holder Memo,[4] the first in what would be a series of charging guidelines memoranda. The Holder Memo instructed prosecutors evaluating the level of a corporation's

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cooperation to consider the corporation's: (i) willingness to waive attorney-client and work product protection; (ii) decision whether to indemnify officers, directors and employees; (iii) discipline or termination of culpable employees; and (iv) participation in joint defense agreements with employees. On Oct. 23, 2001, the Securities and Exchange Commission (SEC) followed suit with the publication of its Seaboard Report,[5] which permitted SEC attorneys to consider a company's willingness to waive privilege and the discipline or termination of culpable employees in evaluating its cooperation.

In 2003, the DOJ issued the Thompson Memo,[6] updated corporate charging guidelines, which carried forward the aforementioned provisions of the Holder Memo.

The Thompson Memo, like the Seaboard Report, was uniformly reviled by the defense bar and suffered withering criticism from a broad range of organizations and individuals in the legal community, including the ABA, the U.S. Chamber of Commerce, the American Civil Liberties Union, former senior DOJ officials and U.S. attorneys, academics and practitioners. In June 2006, many critics of the Thompson Memo were heartened when Judge Kaplan issued a written decision in *Stein*[7] lambasting prosecutors' use of the Thompson Memo to pressure KPMG not to indemnify any employee who failed to cooperate with the government's investigation. Judge Kaplan found that the government impermissibly coerced KPMG's decision not to indemnify 13 of the officers and directors before him on criminal charges in violation of the Fifth and Sixth amendments.

Attorney Client Privilege Protection Act

A few months later, in December 2006, Senator Arlen Specter, R-Pa., introduced the Attorney-Client Privilege Protection Act of 2006 (now pending as the Attorney Client Privilege Protection Act of 2008) (the Privilege Act) which would not only prohibit government agencies from considering a company's privilege waiver as a factor in granting cooperation credit, but also prevent the government from considering whether the company (i) indemnified its employees, (ii) entered into a joint defense agreement, or (iii) chose not to discipline or terminate an employee who did not cooperate in the investigation.[8]

Shortly thereafter, in an attempt to stave off criticism and prevent the enactment of the proposed Privilege Act, the DOJ issued yet another set of corporate charging guidelines, the McNulty Memo. The McNulty Memo provided greater protection to privilege by mandating that prosecutors could seek privileged material only where they had a "legitimate need" for such information and had obtained high-level approvals. Even then, prosecutors were directed to first seek "Category I" information - "purely factual information relating to the underlying misconduct."[9] Only in the "rare" circumstance that Category I information was insufficient were prosecutors permitted to seek "Category II" information - attorney-client communications or nonfactual work product.

Although prosecutors could consider a corporation's refusal to waive privilege over Category I information against it in assessing cooperation, the refusal to provide Category II information

could not be considered in the charging decision. With respect to either type of information, however, a company's agreement to waive privilege could be considered favorably in determining whether it had cooperated.

In recognition of the *Stein* decision, the McNulty Memo also prohibited prosecutors from considering whether a corporation indemnified its employees, with an exception only where "the totality of the circumstances show that [the employee indemnification] was intended to impede a criminal investigation."[10]

The changes implemented by the McNulty Memo did not satisfy most critics of the Thompson Memo. Corporations often continued to experience tremendous pressure to waive privilege in order to receive "cooperation credit." Moreover, because the McNulty Memo's procedural protections applied only to formal waiver requests by the government and not to voluntary waivers, corporations felt pressure to voluntarily waive privilege to ingratiate themselves with prosecutors deciding the corporation's fate. In addition, the McNulty Memo continued to allow prosecutors to consider a company's participation in joint defense agreements with employees and its discipline or termination of culpable employees in connection with cooperation credit.

In June 2008, more than 30 former U.S. attorneys expressed their dissatisfaction with the McNulty Memo and their support for the enactment of the Privilege Act in a letter to Senator Leahy, D-Vt.[11] Days later, Senator Specter reintroduced the Privilege Act. In July 2008, hoping to prevent enactment of this legislation, Deputy Attorney General Filip provided Senator Specter with various proposed changes to the McNulty Memo.[12] Senator Specter responded by outlining his various objections to the changes.[13] On Aug. 28, 2008, the DOJ unveiled the Filip Memo. That same day the U.S. Court of Appeals for the Second Circuit issued its decision upholding Judge Kaplan's decision in *Stein*.

The Filip Memo

The Filip Memo introduces several changes. Perhaps most importantly, it alters the framework for requesting and assessing privilege waivers. The Memo focuses on the disclosure of "relevant facts" and mandates that a corporation's cooperation credit be based, not on the waiver of any privilege, but on disclosure of the relevant facts concerning the alleged misconduct, whether or not privileged. The Filip Memo prohibits prosecutors from requesting waivers of "core" attorney-client communications or work product (more or less the Category II information of the McNulty Memo) or from crediting corporations that do waive privilege with respect to this information.

Moreover, the Memo encourages "[c]counsel for corporations who believe that prosecutors are violating such guidance . . . to raise their concerns with their supervisor, including the appropriate United States Attorney or Assistant Attorney General."[14]

Certain aspects of the Filip Memo, particularly its effort to protect corporations from feeling pressure to waive privilege over "core" attorney-client communications and work product,

represent a substantial improvement for corporations under investigation. Notably, the Filip Memo instructs prosecutors not to request protected notes or interview memoranda generated by attorneys during internal investigations, something prosecutors have frequently done in the past. However, the Memo fails to provide sufficient protection to other privileged information.

The thrust of the Filip Memo is that DOJ simply wants the facts, and is indifferent with respect to whether it obtains privileged material. The obvious problem is that the "facts" uncovered in an internal investigation are actually an attorney's distillation of numerous interviews and documents and therefore work product. Moreover, in many instances, such as where different witnesses have provided contradictory accounts, any discussion of the "facts" will involve disclosing what the various witnesses said - i.e., revealing attorney-client communications. Thus, under the Filip Memo, in many instances corporations will still need to waive privilege in order to provide the facts and receive cooperation credit.

Corporations Can Choose

The Filip Memo suggests that corporations can choose to conduct internal investigations in a manner that will not confer attorney-client privilege on the results of an investigation, and that the government's effort to obtain the facts should not suffer merely because a corporation has employed lawyers to conduct its investigation.

This proposition ignores the valuable role that lawyers have traditionally taken in conducting interviews, analyzing the available evidence, determining whether there have been any violations of law, and presenting the results and providing advice to uninvolved senior management, the Board, or a Board Committee.

Companies often have an obligation to undertake an internal review to determine whether there has been any misconduct by officers and employees, and to impose appropriate remedial measures. The attorney-client privilege exists to allow the company to engage with its counsel in open and confidential discussion about their findings and to consider responsible responses. Engaging nonlawyers to conduct internal investigations would often result in less-effective corporate governance and responses to employee misconduct.

Ironically, the Filip Memo may actually lessen the procedural protections that the McNulty Memo offered over a prosecutor's ability to obtain "Category I" information. Under the Filip Memo, no approvals are required for a prosecutor to seek factual material even where its provision may require a privilege waiver. To ensure uniformity and to protect corporations against overzealous requests for privileged information, such requests should require high-level DOJ approval.

A Mixed Bag

Beyond its treatment of privilege waivers, the other changes announced by the Filip Memo are somewhat of a mixed bag. The Memo clearly strengthens the prohibition on prosecutors'

consideration of a corporation's decision to indemnify its employees. But other new protections it announces appear largely illusory.

For example, although the Filip Memo provides that prosecutors can no longer consider a company's retention or discipline of culpable employees as a factor affecting cooperation credit, it allows the government to continue to consider retention or discipline as a factor affecting remediation. Since, under the Filip Memo, both cooperation and remediation are factors affecting the charging decision, it is unclear whether there is any significance to this change.

Similarly, although the Filip Memo generally prohibits the government from considering whether a company entered into a joint defense agreement, it also indicates that if a joint defense agreement prevents a company from disclosing relevant facts, the failure to disclose will weigh against the corporation receiving cooperation credit. Accordingly, companies will either continue to be penalized for entering into joint defense agreements or attempt to negotiate one-sided agreements that permit full disclosure by the company while providing little protection to the individual employees who join the agreement.

Criticism

Criticism of the Filip Memo is already emerging. Both Senator Specter and former Deputy Attorney General McNulty (the McNulty Memo's namesake) have raised concerns that the Filip Memo does not go far enough. As former Deputy Attorney General McNulty explained, "there is still a pressure to waive attorney-client privilege if you have 'relevant factual information' covered by attorney-client privilege . . . [a]nd quite a bit of 'relevant factual information' is subject to privilege claims."[15] Senator Specter similarly remarked that the new guidelines troublingly continue to give credit "to corporations [who] waive the privilege by giving facts obtained by the corporate attorneys from [] individuals" to the government.[16]

Leaving aside the specific content of the Filip Memo, the very nature of the memo, like those that preceded it, prevents it from being a full fix to the culture of waiver that has pervaded corporate investigations.

• First, and perhaps obviously, the Filip Memo is limited in application to the DOJ and accordingly, does nothing to stem the waiver pressure created by the SEC and other regulatory bodies.

• Second, the Filip Memo is not binding on the DOJ but provides only suggested "guidelines." Because there is no mechanism by which the guidelines can be enforced they are only as good as the prosecutors who enforce them. For today's generation of prosecutors raised in an aggressive culture of waiver, that sometimes may not be enough.

Conclusion

Only time will tell whether the Filip Memo and the lessons of the *Stein* decision will result in greater respect for a company's need for confidential consultation with its attorneys and its ability to independently determine appropriate levels of employee indemnification, discipline and communication during a government investigation. Despite the DOJ's encouraging movement towards better protection for privilege and corporate decision making, it may be that only binding legislation will ensure a substantive difference.

Endnotes:

1. "Principles of Federal Prosecution of Business Organizations," Memorandum from Mark R. Filip, Deputy Attorney General, to Heads of Department Components and United States Attorneys (Aug. 28, 2008) (available at http://www.usdoj.gov/opa/documents/corp-charging-guidelines.pdf).

2. "Principles of Federal Prosecution of Business Organizations," Memorandum from Paul J. McNulty, Deputy Attorney General, to Heads of Department Components and United States Attorneys (Dec. 12, 2006) (available at http://www.usdoj.gov/dag/speeches/2006/mcnulty_memo.pdf).

3. *United States v. Stein*, no. 07-3042-cr (2d Cir. Aug. 28, 2008).

4. "Principles of Federal Prosecution of Business Organizations," Memorandum from Eric H. Holder Jr., Deputy Attorney General, to Heads of Department Components and United States Attorneys (June 16, 1999).

5. Report of Investigation Pursuant to Section 21(a) of the Securities Exchange Act of 1934 and Commission Statement on the Relationship of Cooperation to Agency Enforcement Decisions, Exchange Act Rel. No. 34-44969 (Oct. 23, 2001), available at http://www.sec.gov/litigation/investreport/34-44969.htm.

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

7. *United States v. Stein*, 435 F. Supp. 2d 330 (SDNY 2006).

8. Press Release, U.S. Senate Judiciary Committee, "Specter Introduces Attorney-Client Privilege Protection Act of 2006," (Dec. 7, 2006).

9. "Principles of Federal Prosecution of Business Organizations," Memorandum from Paul J. McNulty, Deputy Attorney General, to Heads of Department Components and United States

Attorneys (Dec. 12, 2006) at VII.B.2 (available at http://www.usdoj.gov/dag/speeches/2006/mcnulty_memo.pdf).

10. Id. at VII.B.3.

11. Letter from Rebecca A. Betts, former U.S. Attorney for the Southern District of West Virginia, et al, to Senator Leahy, Chair of the Judiciary Committee (June 20, 2008).

12. Letter from Deputy Attorney General Mark R. Filip to Senator Arlen Specter (July 9, 2008).

13. Letter from Senator Arlen Specter, to Deputy Attorney General Mark R. Filip, Deputy Attorney General (July 10, 2008) (available at http://specter.senate.gov/public/index.cfm?FuseAction=NewsRoom.NewsReleases&ContentRecord_id=09EE0CFC-978B-D2CB-C6E6-511BEC8EA4EA).

14. "Principles of Federal Prosecution of Business Organizations," Memorandum from Mark R. Filip, Deputy Attorney General, to Heads of Department Components and United States Attorneys (Aug. 28, 2008) at 9-28.760 (available at http://www.usdoj.gov/opa/documents/corp-charging-guidelines.pdf).

15. Brian Baxter, "With Thompson Trashed & McNulty Moot, Filip Memo's Time Has Come," The Am Law Daily, Aug. 28, 2008 (available at http://amlawdaily.typepad.com/amlawdaily/2008/08/with-thompson-t.html).

16. Press Release by Senator Arlen Specter, Aug. 28, 2008 (available at http://specter.senate.gov/public/index.cfm?FuseAction=NewsRoom.NewsReleases&ContentRecord_id=0aa887f0-f40c-f557-5dbb-4aef8032b8f9).