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White Collar Defense Alert: Department of Justice Revises Corporate Charging Guidelines

9/4/2008

Federal Prosecutors Will Assess Corporate Cooperation Based on Disclosure of Facts, Not Waiver of Privilege

"Culture of Waiver" has come to signify the government's insistence on waiver of the attorney-client privilege as part of a corporation's cooperation or at least the public perception that not offering to waive will be viewed negatively when the government evaluates whether a corporation has sufficiently cooperated to earn immunity or a deferred prosecution.

In reaction to understandable concern about this from impressive quarters including Congress, Judge Lewis Kaplan, and the criminal defense bar, the Department of Justice (DOJ) again revised its "Principles of Federal Prosecution of Business Organizations" (formerly the "Thompson Memo" and, thereafter, the "McNulty Memo") on August 28, 2008. As further discussed below, credit for corporate cooperation will depend on the disclosure of relevant facts, not waiver of the attorney-client and work product protections or a number of other previously considered factors. Nonetheless, Senator Arlen Specter has responded that a legislative fix is still necessary. In any event, the new DOJ corporate charging guidelines should help restore to the corporation the decision whether to waive the attorney-client privilege, so long as the corporation has properly preserved the privilege.

Recent History

On July 9, 2008, Deputy Attorney General Mark Filip sent a letter to Senate Judiciary Committee Chairman Patrick Leahy and Senator Specter, advising them of changes DOJ intended to make to the McNulty Memo and seeking time to implement the changes and review their operation before the Judiciary Committee pursues a legislative solution. DOJ specified a number of intended changes:

- cooperation will be measured by the extent to which a corporation discloses facts, not waiver of privileges;
- DOJ will not demand and corporations need not disclose "non-factual attorney work product and core attorney-client privileged communications;" and
- DOJ will not consider whether a corporation advanced legal fees to employees, sanctioned employees, or participated in a joint defense agreement in assessing the corporation's cooperation.

Senator Specter responded with a letter dated July 10, 2008, expressing concerns about the vagueness of the revisions, the delay and potential prejudice inherent in awaiting their implementation and review, and the need for a permanent fix applicable to federal agencies beyond DOJ. Senator Specter thus recommended that "we move ahead in the Judiciary Committee to either come to some accommodation with the Administration on legislation or have Congress move ahead on its own." Indeed, on June 26, 2008, Senator Specter had reintroduced his Attorney-Client Privilege Protection Act, first introduced in September 2006 in response to the Culture of Waiver issue and reintroduced in January 2007 after being disappointed with the extent of the revisions in the McNulty Memo.

The Filip Memo

On August 28, 2008, Mr. Filip announced a revised DOJ Principles of Federal Prosecution of Business Organizations, effective immediately. Federal prosecutors are required to consider essentially the same nine factors, specifically:

- the nature and seriousness of the offense;
- the pervasiveness of wrongdoing within the corporation;
- the corporation's history of similar conduct;
- the corporation's timely and voluntary disclosure of wrongdoing;
- the existence and effectiveness of the corporation's compliance program;
- the corporation's remedial actions;
- collateral consequences;
- the adequacy of prosecuting individuals; and
- the adequacy of civil and regulatory remedies.

See USAM 9-28.300.

The fourth factor, corporate cooperation, has been modified as foreshadowed by Mr. Filip's July 9 letter. Responding directly to the Culture of Waiver concern, the revised corporate charging guidelines state:

> What the government seeks and needs to advance its legitimate (indeed, essential) law enforcement mission is not waiver of [the attorney-client privilege and work product protection], but rather the facts known to the corporation about the putative criminal misconduct under review. In addition, while a corporation remains free to convey non-factual or "core" attorney-client communications or work product—if and only if the corporation voluntarily chooses to do so—prosecutors should not ask for such waivers and are directed not to do so. The critical factor is whether the corporation has provided the facts bout the events….

USAM 9-28.710.

Further emphasizing this point, the guidelines state that the key question is whether the corporation made a timely disclosure of relevant facts not whether it disclosed attorney-client or work product protected materials. To that end, the same credit is to be rewarded for disclosing facts contained in materials not protected by the attorney-client or work product protections as would be afforded for disclosing materials that are so protected. *See* USAM 9-28.720. Moreover, prosecutors may not request and a corporation need not disclose legal advice or non-factual work product as a condition for cooperation credit. *See* USAM 9-28.720.

In addition to revising the guidelines on the waiver issue, DOJ also made the other changes that it had forecasted. Specifically, in the context of noting that prosecutors may consider whether a corporation has engaged in conduct designed to obstruct an investigation, the guidelines provide that prosecutors may not consider whether a corporation is advancing or reimbursing attorneys' fees and they may not request that a corporation refrain from doing so. Similarly, the guidelines provide that prosecutors may not consider mere participation in joint defense agreements and they may not request that a corporation refrain from participating in such an agreement. The guidelines reserve to prosecutors the right to share information with a corporation with the caveat that the corporation not disseminate that information any further or risk not receiving cooperation credit. *See* USAM 9-28.730.

One other oft discussed requirement of the McNulty Memo was the need for a corporation to dismiss or sanction wrongdoers. The Filip Memo provides that federal prosecutors should consider "whether the corporation appropriately disciplined wrongdoers, once those employees are identified by the corporation as culpable for the misconduct." There is a stated recognition in the memo that while a corporation should treat employees fairly, it also should be committed to the highest standards of legal and ethical behavior. *See* USAM 9-28.900.

Senator Specter's Response

In response to the revised DOJ corporate charging guidelines, also on August 28, Senator Specter stated that the guidelines "are a step in the right direction but leave many problems unresolved so that legislation will still be necessary." Senator Specter gave the example that a corporation may still benefit by waiving the privilege and disclosing facts obtained by corporate attorneys by individuals to obtain a deal for the corporation. He also noted that legislation would be binding on all federal agencies and could only be changed by an act of Congress. *See* Sen. Specter Statement (Aug. 28, 2008).

Conclusion

Clearly, the matter is not resolved. Still, corporations and their counsel now have more freedom to think critically about decisions from waiver of privilege to advancement of fees and other issues impacting both the corporations and their employees.

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