

DOJ to Issue Revisions to Principles of Federal Prosecution of Business Organizations

In a July 9, 2008 letter to Senators Patrick Leahy and Arlen Specter, the Chairman and Ranking Member, respectively, of the Senate Judiciary Committee, Deputy Attorney General Mark Filip announced that the Department of Justice will shortly issue significant revisions to the DOJ's "Principles of Federal Prosecution of Business Organizations" (commonly referred to in their present form as the "McNulty Memorandum"). The revisions Deputy Attorney General Filip described in what is now referred to as the "Filip Letter" are a response to Congress' consideration of legislation which would restrict the DOJ's and other governmental agencies' conduct in investigations and proceedings regarding corporations and organizations.

Corporations and other organizations currently dealing with federal investigations, as well as entities that are conducting, or considering undertaking, internal investigations into potential employee wrongdoing, should be aware of these developments.

BACKGROUND

On January 20, 2003, then-Deputy Attorney General Larry Thompson issued the initial version of the "Principles of Federal Prosecution of Business Organizations," which quickly became known as the "Thompson Memorandum." The Thompson Memorandum set forth the factors to be considered in weighing whether a corporation should be criminally charged. Among the factors to be considered was the extent of cooperation and its voluntary disclosure of wrongdoing. The Thompson

Memorandum explicitly stated that in assessing this factor, prosecutors should, among other things, (i) consider whether to request a waiver of the attorney-client privilege from the corporation with respect to any internal investigations conducted by the corporation, as well as communications between specific officers, directors and employees and counsel; (ii) whether the corporation has advanced attorney's fees to certain of its employees and agents; (iii) whether the corporation has retained employees believed to have engaged in misconduct; and (iv) whether the corporation has entered into any joint-defense agreements with any employees.

The Thompson Memorandum came under severe criticism for the effect it had on corporations under investigation, as well as those corporations' employees. Perhaps most notably, in *United States v. Stein*, 435 F.Supp.2d 330 (S.D.N.Y. 2006) ("Stein I"), Judge Lewis A. Kaplan held that the Thompson Memorandum violated the substantive due process rights of the defendants by coercing their employer, KPMG, into denying them the advancement of attorney's fees. Soon after *Stein I* was issued, the Thompson Memorandum was replaced by the McNulty Memorandum, which was issued by then-Deputy Attorney General Paul McNulty on December 12, 2006.

With respect to waivers of the attorney-client privilege, the McNulty Memorandum provided that prosecutors should seek a waiver only if a legitimate need for it exists, and then in the least intrusive manner. It directed prosecutors to first seek purely factual,

or “Category I” information, such as key documents, witness statements, memoranda or other similar materials through a waiver. It further permitted prosecutors to consider a corporation’s response to a request for a waiver of Category I information in determining whether the corporation had cooperated in the investigation. “Category II” information consisted of non-factual, privileged information, which included legal advice given to the corporation and the mental impressions of counsel. The McNulty Memorandum directed prosecutors to obtain written authorization from the Deputy Attorney General before seeking a waiver regarding Category II information. The McNulty Memorandum forbade prosecutors from considering a corporation’s refusal to provide Category II information as a factor in prosecutorial decisions, but expressly authorized them to favorably consider a corporation’s acquiescence to such a request.

The McNulty Memorandum continued to permit prosecutors to consider, in their prosecutorial decisions, a corporation’s retention of employees believed to have committed wrongdoing, as well as whether a corporation had entered into a joint defense agreement with any of its employees. However, it directed prosecutors in most instances not to consider a corporation’s advancement of legal fees to its employees as a factor.

Despite its attempt to alleviate some of the Thompson Memorandum’s perceived wrongs, the McNulty Memorandum itself came under substantial criticism. Most recently, a bi-partisan group of Senators introduced S.3217, entitled the “Attorney-Client Privilege Protection Act of 2008,” which, if enacted, would prevent prosecutors and agencies from requesting waivers of the attorney-client and work product privileges; and from considering, in their decision-making processes, the assertion of the attorney-client privilege, the existence of joint defense agreements, the

advancement of attorney’s fees, and the retention of employees by an organization.

THE “FILIP LETTER”

The Filip Letter, and its expected successor to the McNulty Memorandum, are in response to the legislation under consideration. Namely, Deputy Attorney General Filip’s letter states that:

- “Cooperation will be measured by the extent to which a corporation discloses relevant facts and evidence, not its waiver of privileges.”
- “Federal prosecutors will not demand the disclosure of ‘Category II’ information [i.e., “non-factual attorney work product and core attorney-client privileged communications,”] as a condition for cooperation credit.” However, the Filip letter does not herald any changes from the McNulty Memorandum’s policy regarding “Category I” information.
- “Federal prosecutors will not consider whether the corporation has advanced attorneys’ fees to its employees in evaluating cooperation.”
- “Federal prosecutors will not consider whether the corporation has entered into a joint defense agreement in evaluating cooperation.”
- “Federal prosecutors will not consider whether the corporation has retained or sanctioned employees in evaluating cooperation.”

The Filip Letter did not specifically state when the DOJ would issue a document superseding the McNulty Memorandum.

In the short time since its release, the Filip Letter has met with some skepticism. Specifically, in a July 10th response to Deputy Attorney General Filip, Senator Specter expressed reluctance to delay the proposed legislation pending the issuance of a memorandum which would supersede the McNulty Memorandum.

WHAT CAN WE EXPECT?

Given Senator Specter's dissatisfaction with the Filip Letter, and the DOJ's presumed desire not to have Congress legislate its investigative policies, we can anticipate that the Filip Letter will be transformed into the "Filip Memorandum" within a relatively short time. Whether this will satisfy Congressional leaders and forestall legislation remains to be seen.

It also remains to be seen what effect a Filip Memorandum will have on line prosecutors currently conducting investigations. The Thompson Memorandum brought about new strategies in how corporations deal with criminal investigations. KPMG's denial of attorney's fees to employees who were deemed uncooperative is only one well-known manifestation of this. A skeptic might wonder whether the McNulty and expected Filip Memoranda's outward efforts to retract some of the Thompson Memorandum's excesses represent attempts to "put toothpaste back into the tube."

Given this changing environment, it is important for the corporation and its counsel to stay abreast of these developments and to develop strategies which do not needlessly relinquish vital rights and privileges.

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