Client Advisory

KELLEY DRYE

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Observations on the Holder Confirmation Hearings

The Senate Judiciary Committee held its hearings on the nomination of Eric Holder as Attorney General on January 15 and 16, 2009. Mr. Holder testified before the Committee on January 15, while the following day was reserved for other witnesses. Mr. Holder's testimony provided important clues regarding the direction he is likely to lead the Department of Justice ("DOJ") in certain key areas.

CORPORATE PROSECUTIONS

Mr. Holder authored the 1999 Memorandum which originally set forth guidelines for federal prosecutors to follow in making decisions regarding prosecutions of corporations. The "Holder Memorandum" encouraged prosecutors to weigh whether corporations had waived the attorney-client privilege and attorney work-product protections. It was superseded in 2002 by the "Thompson Memorandum," which more forcefully set forth the Holder Memorandum's policies. After Judge Kaplan's District Court decision in *United States v. Stein*, the Thompson Memorandum was limited and modified by the "McNulty Memorandum." In the face of legislation championed by Senator Arlen Specter, and coinciding with the Second Circuit's affirming of *Stein*, Deputy Attorney General Mark Filip largely eradicated the Holder Memorandum's policies.

Mr. Holder's nomination raised questions about whether there might be a return to the policies of the Holder and Thompson Memos. From the brief questioning of Mr. Holder on this subject, however, a return to the old policies does not seem likely.

Toward the end of Mr. Holder's testimony, Senator Specter alluded to a "get acquainted" meeting he had with Mr. Holder in which the Holder Memorandum was discussed. Senator Specter stated, in part:

> "One [issue] is the right to counsel, Sixth Amendment, right to counsel, and an integral, indispensable part of that is freedom of communications to a lawyer. The second principle is the state or the commonwealth . . . has the obligation of the burden of proof...And I don't know if you anticipated where your [1999] memorandum would lead, but it has led to some pretty tough situations [such as *Stein*]. . ."

Senator Specter asked Mr. Holder to submit additional written comments on this subject, to which Mr. Holder agreed. However, Mr. Holder added, "But I will note that I think the progress that we made in this area in walking it back from what I think people in the fields[*sic*] have done was largely as a result of the work that you and Chairman Leahy did in expressing concerns about positions the Justice Department was taking, but, frankly, I think were inconsistent with that initial memo of my mine . . ." Thus, it appears that as Attorney General, Mr. Holder does not wish to re-visit the controversy and negative publicity associated with the DOJ's former policy and the *Stein* decisions.

FALSE CLAIMS ACT AND WHISTLEBLOWER PROTECTION

During the confirmation hearings, Senator Grassley briefly touched on the False Claims Act and noted that it has been "a very, very important tool for us to root out fraudulent use of taxpayers' money and gaining [sic] the system for personal benefit" in health care and defense, and expressed the hope that DOJ would continue to use it as a tool under Mr. Holder. Mr. Holder

agreed and assured the Senator and the Committee that DOJ would continue to rely on it as an anti-fraud weapon.

An issue that was obviously important to Senator Grassley is whistleblower protection. He aimed to get Mr. Holder to confirm, or "pledge" that whistleblowers—especially those in the Federal government and within the agencies subordinate to the DOJ—receive protection and that there is accountability should there be retaliation: ". . . many whistleblowers who often come forward, they face tremendous retaliations in agencies. . .A whistleblower who raises concern to many, who'll bring concerns to Congress and cooperate with congressional oversight efforts should be protected, not retaliated against. So, can you give me a commitment that you . . . shall not retaliate against Justice Department whistleblowers? And instead work with them to address concerns that they raised? Will you commit to ensuring that every whistleblower is treated fairly and that those who retaliate against whistleblowers are held accountable and particularly on that last point? [*sic*]"

Mr. Holder confirmed his allegiance to this principle, "Yes, I can make those pledges both to ensure that people are given the opportunity to blow the whistle and they will not be retaliated against, and then, to hold accountable, anybody who would attempt to do that. . ."

ANTITRUST

In response to questions from Senator Kohl, Mr. Holder stated that "antitrust enforcement will be something that we will devote a lot of attention to. We'll get an assistant attorney general who understands the . . . historic mission of that division, and I expect it will be more active." At least in the area of M&A, however, it remains to be seen whether the depressed economy will take precedence over potential anticompetitive effects for the time being.

Mr. Holder got more specific when asked about the recent Supreme Court decision in *Leegin*, which dropped the longstanding position that minimum resale price maintenance was a *per se* violation of the antitrust laws in favor of a reasonableness standard. He said he is "very disturbed by that decision" and wants to work with Congress to "bring back the competitiveness . . . that the Supreme Court . . . removed from the system."

INTERNET GAMBLING

In a whirlwind exchange between Senator Kyl and Mr. Holder in the waning last hour of the hearing, Senator Kyl asked Mr. Holder if he would "continue to aggressively enforce the law against the forms of Internet gambling that DOJ considers illegal." Mr. Holder responded affirmatively. Senator Kyl then reiterated statements that Mr. Holder had previously made outside the hearings relating to regulations issued recently jointly by the Federal Reserve Board and the Treasury Department to thwart payments for unlawful Internet gambling confirming that Mr. Holder would indeed "oppose efforts to modify or to stop those regulations, and, of course, continue to be vigilant in enforcing those regulations to shut off the flow of cash from this illegal activity."

FISA FOR TELECOMMUNICATIONS AND ISPS

Senator Kyl brought up liability protection for telecommunications companies under FISA, and asked that Mr. Holder confirm his position to "honor the certificate issued by Attorney General Mukasey that allowed the companies to claim the liability protections unless there were compelling circumstances," which he did. In another exchange, the answers were not as clear. Senator Kyl pressed Mr. Holder for any compelling reasons why he might consider repealing Attorney General Michael Mukasey's certification on telecom companies receiving retroactive immunity:

> **KYL**: OK. Now, the certification by General Mukasey was based on an investigation of the previous conduct of the telephone communication—telecommunication companies prior to the revisions in the law in order to determine whether they were entitled to receive retroactive immunity. In other words, the lawsuits had been filed based upon their earlier conduct. The new law provides explicitly a

> protection for conduct prospectively. So, the question, obviously, that arises then is what conceivable compelling circumstances could you conceive of that would relate to this previous investigation that caused General Mukasey to issue the certification?
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> **HOLDER**: Senator, I'm not sure that I can come up with what those compelling circumstances might be. I guess, maybe I was being a little too lawyerly in trying to get myself some wiggle room.
>
> I can't imagine what set of circumstances there would be that would have us go back and undo those certifications. I can't imagine. I don't know.
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> **KYL**: And you are aware that the Department of Justice, of course, has taken a position in the litigation involving AT&T in support of the liability protections that have been invoked by AT&T?
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> **HOLDER**: Yes.
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> **KYL**: And it would be quite unusual where constitutional issues are involved for the department just because of a change administration to take a different position.

There were broader discussions of FISA outside the context of telecommunications liabilities, which we will not discuss in this advisory.

CONGRESSIONAL OVERSIGHT AND DOJ

On Congressional oversight, Senator Spector cited a letter he sent to Holder which referred to a Congressional research report, stating that "DOJ consistently obliged to submit the congressional oversight regardless of whether litigation is pending so the Congress is not delayed unduly in investigating misfeasance, malfeasance or maladministration, DOJ or elsewhere [*sic*]." Holder hedged in his answer, stating:

> "Congressional oversight of Justice Department activities is obviously very important, but I will respect the Congress' rule. In general, I work to keep the committee fully informed of the department's policies and programs.
>
> Now, there are limits I think to what we can say about ongoing law enforcement matters, including Grand Jury testimony that might jeopardize an investigation. That would be a concern I would have and also a concern about the impact of revealing that kind of information and the chilling effect it might have on lawyers. But we'll work to cooperate with you to make sure that you have access to the materials that you need so that the oversight that you conduct would be meaningful."

As the new administration and policies begin to take shape, Kelley Drye will continue to keep our clients and friends updated on the legal and business issues that impact you.

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