

- Criminal investigations on the rise
- DOJ has revised corporate charging guidelines again
- Will Filip Memorandum be cast aside in 2009?

Waiver of Corporate Attorney-Client Privilege in Government Investigations

Introduction

The number of businesses that have been the subject of federal criminal investigations has steadily increased and there is no decline in sight. In responding to such investigations, it is critically important for the targeted company to retain experienced outside counsel to conduct an internal investigation to determine the underlying facts, negotiate with the government, and provide independent advice regarding the company's options and its future course of conduct. Much of the information and communications generated during this process is protected from disclosure by the attorney-client privilege. A company's best option to avoid a criminal charge often is to cooperate with the government. Under controversial Department of Justice (DOJ) corporate charging guidelines, however, such "cooperation credit" has come at a high price. Prosecutors have increasingly demanded that companies wishing to avoid indictment disclose the results of counsel's internal investigation, including memoranda documenting employee interviews and presentations analyzing whether the facts uncovered during the investigation violate the particular statutes at issue. Companies are thus placed in a quandary concerning whether and how to submit to government requests to turn over privileged materials at the risk of being charged.

The DOJ has recently revised its corporate charging guidelines in the wake of withering criticism of its stated policy and in the hope of avoiding Congressional intervention. While the recent changes are aimed at curbing some of the past excesses of prosecutors in demanding disclosure of privileged communications, companies still may be required to disclose substantial amounts of privileged information in order to earn sufficient "cooperation credit" to avoid indictment. The government's new mantra that it is interested only in disclosure of factual information does not square with the reality of an internal investigation. A company targeted by "the feds" requires a nuanced response in traversing the minefield inherent in DOJ's evolving corporate charging policy.

Background -- The Holder, Thompson, and McNulty Memoranda

In June 1999, then-Deputy Attorney General Eric Holder, Jr. issued a policy document (the "Holder Memorandum") to provide "guidelines" that a federal prosecutor should review in deciding whether to indict a corporation. One important factor was a company's "timely and voluntary disclosure of wrongdoing and its willingness to cooperate in the investigation of its agents, including, if necessary, the waiver of the corporate attorney-client and work product privileges." The Holder Memorandum explained that in evaluating the extent of a corporation's cooperation, prosecutors should consider "the corporation's willingness to

identify the culprits within the corporation, including senior executives, to make witnesses available, to disclose the complete results of its internal investigation, and to waive the attorney-client and work product privileges.” It advised prosecutors to request “in appropriate circumstances” waivers of these privileges “both with respect to its internal investigation and with respect to communications between specific officers, directors, and employees and counsel.”

In January 2003, the DOJ replaced the Holder Memorandum with a document that was issued by then-Deputy Attorney General Larry Thompson (the “Thompson Memorandum.”) The Thompson Memorandum built upon the foundation laid by the Holder Memorandum but it placed greater emphasis on corporate cooperation and compliance programs, and it cautioned prosecutors to scrutinize the “authenticity” of a corporation’s cooperation. The Thompson Memorandum continued DOJ’s focus on waiver of privilege as a benchmark of corporate cooperation but added that prosecutors should consider whether the corporation, “while purporting to cooperate, has engaged in conduct that impedes the investigation,” including overly broad assertions of corporate representation of employees or “inappropriate” directions to employees to decline to be interviewed by government investigators or not to cooperate openly and fully with the investigation.

The Thompson Memorandum generated substantial criticism as fostering a “culture of waiver” in white-collar investigations. A broad array of legal and business groups, including the American Bar Association, the U.S. Chamber of Commerce, and the Association of Corporate Counsel, asserted with justification that the Thompson Memorandum encouraged prosecutors to demand that corporations waive their privileges and divulge the results of internal investigations or else face indictment. These demands inevitably focused on the facts gathered by counsel through document reviews and witness interviews and ultimately on communications between counsel and the company’s employees. Companies were often placed in the untenable position of deciding how much of an internal investigation to turn over to the government in order to earn enough “cooperation credit” to avoid being indicted. It became counsel’s task to walk the legal tightrope in knowing when and where to assert privilege and resist disclosure and when to capitulate to prosecutorial demands.

In the wake of mounting evidence that federal prosecutors continued to use waiver of the corporate attorney-client privilege as the price of non-prosecution, U.S. Senator Arlen Specter (R-Pa) proposed legislation – the Attorney-Client Protection Act of 2006 – that would prohibit any government attorney from requesting disclosure in a criminal or civil enforcement matter of any information protected by the attorney-client privilege.

In December 2006, hoping to avoid Congressional intervention, the DOJ replaced the Thompson Memorandum with a new memorandum issued by then-Deputy Attorney General Paul J. McNulty (the “McNulty Memorandum.”) The McNulty Memorandum instructed prosecutors to request waivers of the attorney-client privilege only when there was a “legitimate need” for privileged information. If such a need existed, then prosecutors were to initially request “purely factual information” – so-called Category I information – that included, for example, key documents, witness statements, memoranda of witness interviews, factual chronologies or summaries, and then only after securing written approval from the local U.S. Attorney. Significantly, prosecutors were authorized to consider how a corporation responded to this request in evaluating the corporation’s cooperation. The McNulty Memorandum further stated that if this information provided an “incomplete basis” to conduct a thorough investigation, then prosecutors could request attorney-client communications or non-factual attorney work product – so-called Category II information – that included, for example, attorney notes or documents containing counsel’s mental impressions, conclusions, or legal advice. In this instance, prosecutors were required to secure written approval from the Deputy Attorney General in Washington. Prosecutors were instructed not to consider a corporation’s declination to provide such information in evaluating cooperation.

Recent Developments – The Filip Memorandum

While the McNulty Memorandum sounded a retreat from the Thompson Memorandum and the perceived prosecutorial excesses it engendered, it did not blunt the criticism from numerous legal, business, and civil liberties groups. That criticism asserted that, even without a formal prosecutorial request for waiver, corporations and their counsel remained under significant pressure to waive privilege in order to receive the prosecutorial incentive of “cooperation credit.” In addition, many defense attorneys asserted that prosecutors in the field often skirted or avoided the procedural protections afforded by a policy memorandum and that federal legislation was needed

to provide a clear and unmistakable prohibition. Finally, critics noted that the McNulty Memorandum did not govern investigations undertaken by other federal agencies not encompassed by DOJ, most notably the SEC.

In June 2008, 32 former U.S. Attorneys wrote to Senator Patrick Leahy (D-Vt.), chairman of the Senate Judiciary Committee, criticizing the McNulty Memorandum as continuing the DOJ policy to pressure corporations to waive their privilege, and supporting Senator Specter's bill. Later that month, Senator Specter introduced a revised bill (S. 3217) that addressed certain concerns expressed by DOJ regarding the earlier bill. The revised bill, which has 12 co-sponsors, including 8 Democrats, is still pending before the Senate Judiciary Committee (the House overwhelmingly approved a similar bill in November 2007).

On August 28, 2008, the DOJ announced yet-another revision to its corporate charging guidelines in a document issued by Deputy Attorney General Mark R. Filip (the "Filip Memorandum.") The Filip Memorandum replaces the McNulty Memorandum and represents the current DOJ policy in conducting white-collar investigations.

Noting the vocal criticism concerning government pressure on business entities to waive their privilege, the Filip Memorandum states that eligibility for "cooperation credit" is not predicated upon the waiver of privilege and that the key measure of cooperation is a corporation's disclosure of "the relevant facts about the putative misconduct." Thus, a corporation "should receive the same credit for disclosing facts contained in materials that are not protected by the attorney-client privilege ... as it would for disclosing identical facts contained in materials that are so protected." It declared that prosecutors are forbidden from asking for non-factual or "core" attorney-client communications (Category II information under the McNulty Memorandum) and from basing "cooperation credit" on the disclosure of such information. Thus, for example, a corporation need not produce counsel's notes or memoranda generated during employee interviews but does need to produce "relevant factual information" acquired through those interviews as well as non-privileged emails and records. The

DOJ's new policy is that it simply wants the facts from cooperating companies; it expressly disavows any attempt to equate cooperation with a waiver of privilege.

Conclusions

It remains to be seen whether the government has successfully avoided Congressional intervention in this hotly-debated area or whether the incoming administration will cast aside the Filip Memorandum (it should be noted that President-Elect Obama's top choice for Attorney General is Eric Holder, the DOJ official who started the debate). The government's new mantra has a surface plausibility but ultimately rings hollow when one considers the reality of an internal investigation. The "facts" are often revealed through counsel's analysis of the documents and the (sometimes contradictory) employee accounts. Indeed, the reason to have counsel conduct an internal investigation is to analyze the raw documentary and testimonial data to determine the relevant "facts" and to advise the company whether there have been violations of the law. If, for example, the government asserts that, in order for a company to be entitled to "cooperation credit," it must disclose the "facts" communicated by employees to counsel (as opposed to making the employees available for government interview), then it is clearly seeking a waiver of the attorney-client privilege in the guise of requesting disclosure of the facts. While the Filip Memorandum places a company under federal investigation in a better position to defend itself, the company still must face nuanced and difficult decisions regarding how much of its internal investigation to disclose in order to satisfy the government's demand for "the facts" before it will bestow "cooperation credit" on the company. Counsel's assistance in negotiating with the government over the limits of its new charging policy is imperative.

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