

INTERNAL INVESTIGATIONS & COMPLIANCE *Update*

NEWS FOR THE CLIENTS AND FRIENDS OF BASS, BERRY & SIMS PLC

The Pendulum Swings Back: New DOJ Guidance on Waiver and Defense Issues

September 12, 2008

A recent announcement by the United States Department of Justice (DOJ) and a recent court decision issued by the Second Circuit represent a positive shift in the protection of the attorney-client privilege for companies dealing with government investigations. Companies and their counsel now have more reassurance that they will not be asked to waive privilege in an investigation. In addition, companies now have more protection when they advance attorneys' fees to employees involved in the investigation.

The New DOJ Guidance

On August 28, 2008, Deputy Attorney General Mark R. Filip announced that, effective immediately, the DOJ will no longer consider whether a corporation has waived the attorney-client privilege or work product protection in determining whether a corporation has cooperated with the government's investigation under the corporate charging guidelines.¹ Prosecutors are now instructed not to request a waiver of the privilege.² As will be discussed in more detail below, the recent guidance is a shift from earlier DOJ guidance that expressly permitted prosecutors to request a waiver so long as they followed applicable DOJ procedures in obtaining approval for such a request.³

¹ Principles of Federal Prosecution of Business Organizations, United States Attorney Manual ch. 9-28.000 (August 2008). The revised guidance lists nine different factors that the DOJ will consider in deciding whether to prosecute and investigate a corporation. The complete set of factors considered by the DOJ can be found at <http://www.usdoj.gov/opa/documents/corp-charging-guidelines.pdf>. One of the factors is "the corporation's timely and voluntary disclosure of wrongdoing and its cooperation with the government's investigation." USAM 9-28.700.

² USAM 9-28.710.

³ Mem. from Paul J. McNulty, Deputy Att'y Gen., U.S. Dep't of Justice, Principles of Federal Prosecution of Business Organizations (Dec. 12, 2006). In the McNulty Memo, the DOJ established categories of protected information and the process for obtaining written approval to request the information. Category I information included documents such as witness statements and charts created by company counsel, while Category II information included legal advice, such as attorney notes. In order to obtain approval to request Category I information, the prosecutor had to obtain written approval from the United States Attorney,

Additionally, under the new DOJ guidance, prosecutors are now directed not to make decisions regarding credit for cooperation based on whether the corporation has advanced attorney's fees to its employees, entered into a joint defense agreement, or disciplined employees.⁴ These new guidelines replace guidance issued in 2006 by Deputy Attorney General Paul J. McNulty (McNulty Memo), in 2003 by then Deputy Attorney General Larry Thompson in response to the Enron and WorldCom accounting scandals (Thompson Memo), and in 1999 by then Deputy Attorney General Eric Holder (Holder Memo).⁵

Use of Privilege Waiver as Cooperation Consideration

The question of waiver of attorney-client privilege and work product protection became a topic of debate when the Holder and Thompson Memos described the cooperation factor as "the corporation's timely and voluntary disclosure of wrongdoing and its willingness to cooperate in the investigation of its agents, including, if necessary, the waiver of corporate attorney-client and work product protection."⁶ When determining the question of cooperation, the Holder and Thompson Memos instructed prosecutors to consider if 1) a company would agree to waive attorney-client privilege in regard to conversations had by its employees, 2) whether a company had declined to pay attorney's fees for its employees, 3) the existence of a joint defense agreement, and 4) the failure of the corporation to discipline employees for their misconduct.⁷

In reaction to the firestorm of complaints that resulted from the issuance of the Holder and Thompson Memos, the McNulty Memo removed language referencing a waiver of the attorney-client and work product privileges from the cooperation factor.⁸ However, the McNulty Memo continued to allow prosecutors to request waiver of attorney-client privilege and work product protection if they complied with certain DOJ requirements.⁹

Following the implementation of the McNulty Memo, the legal community continued to express concern that prosecutors were unfairly demanding that corporations produce privileged material as a precondition for obtaining credit for cooperating. Congress reacted and proposed the Attorney-Client Privilege Act of 2007, a legislative solution intended to address the erosion of the attorney-client privilege, the work product doctrine and employee rights.¹⁰ This legislation passed the House in 2007 and is still being considered by the Senate. Thirty-three former U.S. Attorneys have offered support for this legislation in a letter to Senate Judiciary Committee Chair Patrick Leahy asking him to address the "widespread practices and policies that pressure business to waive the attorney-client privilege in return

whereas requests for Category II required written approval from both the United States Attorney and the Deputy Attorney General.

⁴ USAM 9-28.730, USAM 9-28.900.

⁵ Mem. From Larry D. Thompson, Deputy Att'y Gen., U.S. Dep't of Justice, Principles of Federal Prosecution of Business Organizations (Jan. 20, 2003). The Thompson Memo replaced the Memo from Eric H. Holder, Deputy Att'y Gen., U.S. Dep't of Justice Federal Prosecution of Corporations (Jun. 16, 1999), where Holder sets out the principle of credit for cooperation including the waiver of attorney-client privilege and work product protection.

⁶ Holder Memo, Section II Charging Corporations: Factors to Be Considered; Thompson Memo Section II, Charging a Corporation: Factors to be Considered.

⁷ Id. at Section VI, Charging Corporation: Corporation and Voluntary Disclosure.

⁸ McNulty Memo Section III, Charging a Corporation: Factors to be Considered.

⁹ See FN 4 supra.

¹⁰ S.186 and H.R. 3013, The Attorney-Client Privilege Act of 2007.

for avoiding a harsher charging decision."¹¹ It is unclear whether the issuance of the new DOJ guidance will serve to alter or derail this legislation.

In response to these continued concerns, the new DOJ guidance emphasizes that the DOJ is committed to safeguarding the attorney-client privilege and that the key measure of credit given for cooperation is the disclosure of facts, not the disclosure of privileged and protected documents.¹² The DOJ indicates that it wants to encourage communications between clients and their attorneys since "[p]ermitting and respecting the need for such attorney-client communications is particularly important because such dialogue is often a necessary, and typically a salutary, part of a company's effort to obey the law on an ongoing basis."¹³

In explaining the DOJ's consideration of a corporation's cooperation, the new guidance notes that prosecutors cannot request interview notes and memoranda resulting from an interview conducted by counsel during an internal investigation since such documents would be privileged.¹⁴ However, prosecutors are not forbidden from requesting relevant facts from internal investigations, including facts gained during interviews. To receive credit for cooperation, a corporation will need to release this factual information.¹⁵ The DOJ encourages companies to conduct internal investigations and to disclose relevant facts to the appropriate authorities, noting that such conduct may qualify the company for amnesty or reduced sanctions.¹⁶ Despite this positive move forward, there is still concern about the practical application of this new guidance. For example, companies will likely struggle with how to disclose "facts" to the government without jeopardizing the attorney-client privilege when these facts are learned through attorney-client privileged communications.

Payment of Employee Legal Fees, Joint Defense and Discipline of Employees

The new DOJ guidance also notes that "[in] evaluating cooperation prosecutors should not take into account whether a corporation is advancing or reimbursing attorney's fees or providing counsel to employees, officers, or directors under investigation or indictment."¹⁷ The guidance also instructs prosecutors that "the mere participation by a corporation in a joint defense agreement does not render a corporation ineligible to receive cooperation credit."¹⁸ Further, prosecutors "may only consider whether a corporation has disciplined employees that the corporation identifies as culpable, and only for the purpose of evaluating the corporation's remedial measures or compliance program."¹⁹

On the same day that the DOJ issued its guidance, the U.S. Court of Appeals for the Second Circuit provided additional support for a corporation's payment of attorney's fees for

¹¹ Letter from former representatives of the Department of Justice to Patrick Leahy, Chair of Judiciary Committee regarding Attorney-Client Privilege Protection Act (Jun. 20, 2008).

¹² Deputy Att'y Gen. Mark R. Filip Remarks at DOJ Press Conference available at <http://www.usdoj.gov/opa/pr/2003/August/03-odaq.html>

¹³ *Id.*

¹⁴ USAM 9-28.710; USAM 9-28.720.

¹⁵ *Id.*

¹⁶ USAM 9-28.750.

¹⁷ USAM 9-28.730

¹⁸ *Id.*

¹⁹ USAM 9-28.900.

employees in the decision of *U.S. v Stein*.²⁰ In this decision, the Second Circuit upheld the dismissal of the indictments against 13 former KPMG employees for their alleged participation in a tax shelter fraud. The court found that the government violated the Sixth Amendment right to counsel by putting pressure on the KPMG defendant to cut off attorney's fees to the indicted KPMG partners.²¹ Because the government failed to cure the Sixth Amendment violation, the court affirmed the dismissal.

Compliance Programs

The new DOJ guidance continues the DOJ's emphasis on the importance of an effective compliance program rather than a mere "paper program." The guidance notes that the mere existence of a corporate compliance program will not absolve a corporation of liability.²² Instead, prosecutors are encouraged to dig behind the paper and ask questions to determine if the compliance program is functioning in an effective manner.

The guidance suggests that prosecutors ask:

- Is the corporation's compliance plan well designed?
- Is the program being applied in good faith?
- Does the program really work?

The DOJ guidance acknowledges that prosecutors should seek input from the agencies that provide regulatory oversight to the specific industries. Many of the agencies, such as the Department of Health and Human Services (HHS), have published model compliance program guidance.²³ While this model compliance guidance is not mandatory, many companies have used the model guidance as a tool to develop their own compliance programs. The DOJ's specific mention of HHS' compliance program guidance arguably will lend it even further weight in companies' minds.

Conclusion

The new DOJ guidance should be welcomed as a step in the right direction. Companies can have more confidence that they will not be asked to waive the attorney-client privilege as a condition of cooperation. Companies also should use this guidance to strengthen their compliance programs and ensure that any potential issues are thoroughly investigated with the involvement of legal counsel, as appropriate.

If you have any questions about this Internal Investigations and Compliance Update, please contact one of the Bass, Berry & Sims attorneys listed at the end of this update.

²⁰ United States v. Stein, 2008 US. App. LEXIS 18524 (2d Cir. Aug. 28 2008).

²¹ Id. at *67.

²² USAM 9-28.800

²³ Id.

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