

Under Scrutiny:

SHB's Government Enforcement & Compliance Update

AUGUST 29, 2008



DEPARTMENT OF JUSTICE CRIES UNCLE IN ITS ASSAULT ON THE CORPORATE ATTORNEY-CLIENT PRIVILEGE

Yesterday, the Department of Justice (DOJ) issued a revised version of its *Principles of Federal Prosecution of Business Organizations* (Revised Principles), formally incorporating the expected changes set forth in Deputy Attorney General Mark Filip's July 9, 2008, letter to the Senate Judiciary Committee. The Filip letter identified the following changes:

- Cooperation will not be measured by waiver of privileges, but rather by the extent to which a corporation discloses relevant facts and evidence about misconduct;
- Federal prosecutors will not seek the disclosure of attorney work product or attorney-client privileged communications;
- Federal prosecutors will not consider whether a company has advanced attorneys' fees for employees under investigation in evaluating cooperation;
- Federal prosecutors will not consider whether a company has entered joint defense, common interest or similar agreements in evaluating cooperation.

The Revised Principles provide a more detailed commentary on the scope of the changes identified in the Filip letter. For example, as to the first principle, the Revised Principles make it clear that the "operative question in assigning cooperation credit" is whether the corporation has "timely disclosed relevant facts" about the misconduct, not whether the corporation discloses attorney-client or work product materials. Therefore, if a corporation timely discloses relevant facts about the alleged misconduct, the corporation may receive cooperation credit regardless of whether it waived the attorney-client or work-product privileges.

GOVERNMENT ENFORCEMENT & COMPLIANCE

Our clients face unprecedented enforcement scrutiny and novel legal theories. Today, government enforcement actions can include civil as well as criminal investigations and litigation. They can involve a host of independent actors including federal and state prosecutors, regulators, whistleblowers and their counsel, and class-action attorneys. These cases must be defended under the watchful eye of investors and the public.

Our Government Enforcement & Compliance Practice consists of former prosecutors -- including a former U.S. Attorney, former Justice Department officials and even former corporate executives -- who counsel and defend companies, their executives and employees in the full range of criminal, civil and regulatory government enforcement actions at the state and federal level. We counsel clients on how to avoid enforcement scrutiny. When investigations do arise, however, we work with our clients to resolve it as efficiently, cost-effectively and quietly as possible.

The Revised Principles, which took effect immediately, are a clear step back from the principles established in the 1999 memorandum issued by then Deputy Assistant Attorney General Eric Holder, which instructed prosecutors to consider a "corporation's timely and voluntary disclosure and its willingness to cooperate in the investigation of its agents, including, if necessary, the waiver of the attorney-client and work product privileges."

The Revised Principles suggest that the DOJ is attempting to resolve the controversy concerning its previous waiver policies by shifting the object of the department's focus from waiver to disclosure. While previous memoranda implicitly assumed that attorneys will typically, if not always, conduct the internal investigation, the new policy explains that organizations have the ability to choose how to determine the relevant facts, which is not necessarily in a manner that implicates the attorney-client or work-product privileges.

In practice, conducting an investigation so as to avoid implicating relevant privileges may increase the risks and consequences for corporations attempting to cooperate with the department. For example, there is, of course, no protection for non-privileged facts. Thus, facts gathered in a way that enables disclosure to the department without waiving privilege are vulnerable to discovery in private party litigation. The DOJ's new policy may have solved its problem but not those facing corporate defendants attempting to cooperate.

The Revised Principles also reaffirm the Filip letter's commitment not to consider whether a corporation is advancing or reimbursing attorneys' fees or providing counsel to employees, officers or directors under investigation or indictment and clarify that prosecutors cannot request that a corporation refrain from taking such action. This is especially important in light of Second Circuit's August 28 decision in *United States v. Stein*, Docket No. 07-3042-cr, in which the court upheld the district court's dismissal of the indictment, finding that the government deprived defendants of their right to counsel under the Sixth Amendment by causing their former employer to place conditions on the advancement of legal fees to defendants, and to cap the fees and ultimately end them.

On August 28, the American Bar Association (ABA) responded to the DOJ's Revised Principles. While noting that the revisions certainly improved the McNulty Memorandum, the ABA emphasized that this was the DOJ's fifth such policy in ten years. The ABA also noted that the DOJ policy does not change similar waiver

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policies adopted by the Securities and Exchange Commission, the Environmental Protection Agency and the Department of Housing and Urban Development. Consequently, the ABA statement advocates for the passage of legislation like S. 3217 and H.R. 3013 to resolve the problem of government-coerced waiver.

In light of the Revised Principles, companies should revisit several issues. Companies that revised their policies on reimbursing employees for legal expenses in light of the earlier iteration of the Principles should re-evaluate them. Companies that have refused to enter joint defense agreements in criminal matters or civil cases that arise from allegations in a criminal prosecution, may now wish to re-consider the advisability of that practice. Lastly, companies should consider how the Revised Principles, as they relate to privilege waivers, will affect their current practices on structuring and conducting internal investigations. The announcement of the revised policy is available at <http://www.usdoj.gov/opa/pr/2008/August/08-odag-757.html>

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