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McNulty Revisited

How the Filip Memorandum Changes the DOJ's Approach To Corporate Investigations And Prosecutions

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On Aug. 28, 2008, Deputy Attorney General Mark Filip released the latest in a series of memoranda that guide the Department of Justice's ("DOJ") approach to the investigation and prosecution of corporate crimes. Issued primarily in response to criticism from legal scholars who bemoaned prosecutors' attacks on the attorney-client and work product privileges and institutional prejudice against advancement and joint defense agreements, the Filip Memo represents the government's attempt to balance these concerns with its obligation to enforce the law aggressively and its goal of promoting responsible corporate behavior. This article briefly reviews the history of the DOJ's corporate charging guidelines, discusses the policy changes from the DOJ's earlier charging guidelines, and analyzes the Filip Memo's impact on corporate investigations and prosecutions.

From Holder to McNulty

Almost a decade ago, the DOJ issued the first in a series of memoranda, designed to bring uniformity to federal investigations and prosecutions of corporate misconduct. The Holder Memo, named for then Deputy Attorney General Eric Holder and issued on June 16, 1999, emphasized the value of corporate cooperation in federal investigations and identified several factors that prosecutors could consider on an advisory basis in addressing mitigation of a company's exposure to criminal liability: 1) waiving attorney-client and work product privileges; 2) refusing to provide advancement/indemnification to officers and directors charged with or suspected of misconduct; 3) implementing remedial/restitution programs; 4) disciplining culpable employees; and 5) avoiding joint defense agreements. In the wake of Enron, Worldcom, Adelphia, Tyco and other corporate scandals, Deputy Attorney General Larry Thompson issued his own memorandum ("the Thompson Memo") on Jan. 20, 2003, which made the advisory principles outlined in the Holder Memo mandatory on federal prosecutors.

Faced with widespread opposition from the corporate legal community that criticized the Thompson Memo for "discouraging full and candid communications between corporate employees and legal counsel," Deputy Attorney General Paul McNulty released the McNulty Memo on Dec. 12, 2006. Although the McNulty Memo liberalized DOJ's treatment of a company's refusal to waive evidentiary privileges and limited consideration of advancement and indemnification practices, broad exceptions left prosecutors free to continue many of the practices condoned by the Thompson Memo. Criticism, from both within and without the DOJ, coupled with the threat of congressional action led to the issuance of the Filip Memo on Aug. 28, 2008.

DOJ's Revisions

The Filip Memo is a misnomer because, unlike its predecessors, the principles it announced were included for the first time in the United States Attorneys' Manual. This change is more style that substance, however, as the Filip Memo retained the basic structural framework set forth in the McNulty Memo, continuing to identify the same nine factors that prosecutors should consider when deciding whether to charge a corporation with a criminal violation. The majority of the Filip Memo's revisions focus on the "Value of Cooperation," which, in recognition of the corporation's unique ability promptly to provide information that could aid the government's investigation and minimize injury to the public and other corporate constituencies, mitigates against potential liability. During a press conference announcing the Filip Memo, Deputy Attorney General Mark Filip highlighted the five principal policy changes from the McNulty Memo:

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Focus on Facts: Cooperation credit no longer depends on the waiver of the attorney-client and work product protections, rather prosecutors must focus on the willingness and sufficiency of a corporation's disclosure of facts that would aid the government's investigation.

Attorney-Client Privilege: Prosecutors are now prohibited from requesting that companies provide attorney-client communications or non-factual attorney work product (known as Category II information in the McNulty Memo). This rule is subject to two exceptions: 1) where the company or its agents assert an advice of counsel defense; or 2) where the communications between a corporation and counsel are made in furtherance of a crime or fraud.

Advancement of Attorneys Fees: DOJ relinquished the right, reserved in the McNulty Memo, to consider advancement payments negatively in awarding cooperation credit to a company. Absent the rare case where advancement plays a role in a broader, criminal effort to obstruct justice, a corporation's advancement of attorneys' fees to its directors, officers, and employees is not relevant to the cooperation credit analysis.

Joint Defense Agreements: Recognizing the legitimate reasons why a business might choose to enter a joint defense agreement, prosecutors cannot consider a corporation's participation in a joint defense agreement in evaluating the propriety of the cooperation credit. DOJ did reserve the right to request that the company refrain from disclosing information provided by the government to third parties.

Discipline/Termination of Employees: A company's decision to discipline or terminate employees is no longer an independent factor in the cooperation credit analysis. Rather, analysis of this factor must occur, if at all, within the context of evaluating the company's remedial measures or compliance program. Refusal or unwillingness to terminate or discipline employees does not, in and of itself, prevent a company from receiving cooperation credit.

Filip Memo's Practical Implications

Attorney-Client Privilege/Work Product Protection

Far and away the most substantial revision to the McNulty Memo concerns the attorney-client privilege. Recognizing that DOJ policies "have been used, either wittingly or unwittingly, to coerce business entities into waiving attorney-client privilege and work-product protection," the Filip Memo shifts the prosecutorial focus from waiver to the disclosure of relevant facts about the alleged misconduct, regardless of the source. In other words, a company could receive the same cooperation credit if it disclosed facts contained in non-privileged materials as it would if it disclosed facts contained in privileged materials, so long as the company discloses all relevant facts known to it. By moving to a results-oriented approach, from a process-oriented one, the guidelines try to avoid the waiver problem altogether.

To receive the cooperation credit, companies still will have to disclose relevant facts that could be subject to the attorney-client privilege or protected under the work-product doctrine. For example, many companies turn to their counsel to conduct internal investigations and administer compliance programs. Facts learned incident to such programs, and more importantly distilled by counsel into coherent understandings of potential misconduct capable of disclosure, inherently incorporate mental and legal impressions protected by the work-product doctrine. Additionally, it may be difficult to separate facts learned through interviews with attorneys from communications subject to the attorney-client privilege. In light of the broad discretion granted to federal prosecutors and the coercive tactics used in the past, some critics suggest that the Filip Memo does not do enough to resolve the waiver problem.

Despite its weaknesses, the Filip Memo provides substantially more respect for the attorney-client and work-product doctrines than did any of its successors. First, it prohibits prosecutors from requesting that companies waive these protections, although voluntary waiver is still permitted. In the context of a high profile, pressure filled investigation, however, there is potential for the line separating voluntary waiver from coercion to get blurred. Second, the Filip Memo explicitly distinguishes notes, memoranda, and communications made for the purpose of seeking or dispensing legal advice (even if made during or as a result of the fact-finding investigation) that do not implicate eligibility for the cooperation credit from other, non-privileged documents like accounting and financial records that could cost a company the cooperation credit. This formal distinction gives companies more leeway to justify withholding certain privileged documents from disclosure without losing the benefit of cooperation. Third, the DOJ guidelines emphasize that incomplete disclosure is just one of several, non-dispositive factors in the cooperation analysis, making it possible, albeit unlikely, for a company that cannot disclose facts without waiving privilege to receive the benefit of cooperation credit.

Contractual Limitations on Cooperation

The Filip Memo clarifies that contractual agreements that may

impede a company's ability to cooperate fully with a federal investigation cannot be considered in the cooperation credit analysis unless they are intended to impede the investigation. Potentially both a sword and a shield, the obstruction policy is written broadly enough that even innocuous reactions to a government investigation could cost a company the benefit of the cooperation credit. For example, making incomplete or delayed production, misleading assertions, and material omissions, which might have legitimate, even innocent, justifications could form the basis for obstruction charges. The dual demands of making timely but complete and accurate disclosure make cooperation a potentially risky endeavor, and one companies should undertake with care.

The Filip Memo makes clear that a company's decision to advance attorneys' fees to its officers, directors, and employees cannot be considered obstructionist, unless advancement was conditioned on the officer, director, or employee's false testimony. This policy reflects a relaxed approach to advancement provisions that are, the Filip Memo observed, now commonplace benefits and require payment of fees before any consideration of culpability. The DOJ also revised its policy toward joint defense agreements, which no longer prevent a company from receiving cooperation credit. Despite a liberalized policy, companies should enter into joint defense agreements at their own peril. Corporations should be particularly wary of provisions in joint defense agreements that limit their ability to make disclosures to the government or require them to share information provided by the DOJ, which could make it impossible to cooperate sufficiently with government to receive the cooperation credit. Flexibility in joint defense agreements is essential if corporations wish to receive the full benefit of the cooperation credit. Unfortunately, such flexibility undermines the purpose of joint defense agreements and may ultimately minimize their utility. Nevertheless, the Filip Memo's retreat from outright hostility towards joint defense agreements should be welcomed by the corporate governance community.

Discipline/Termination of Employees

The Filip Memo's limitation on prosecutorial consideration of employee discipline/termination in the cooperation credit analysis may not have any practical impact because the government is free consider such action in the evaluation of a company's restitution and remediation program. Based on the theory that a company's response to misconduct demonstrates acceptance of responsibility and mitigates the risk of future criminal violations, the charging guidelines look suspiciously upon companies that refuse to discipline or terminate employees suspected or accused of wrong doing. There may, however, be a variety of practical considerations that counsel against the termination of such employees prior to their conviction. First, the company may incur liability for improperly terminating an employee where misconduct is suspected but not substantiated. Second, particularly with high ranking officials, termination or discipline may trigger expensive benefit obligations that it would not have to absorb with a discharge for cause. Third, the employee may play a key role in the company's business and locating a suitable replacement could be difficult and time consuming. Although none of these scenarios indicates avoidance of responsibility or refusal to cooperate, the Filip Memo does nothing to remove such considerations from the cooperation credit analysis. Prosecutors may still evaluate a company's efforts to "shield culpable employees" in the context of a review of remedial provisions and may still refuse the cooperation credit on that basis.

Conclusion

While the Filip Memo makes significant strides to address the deficiencies identified in the earlier iterations of the DOJ's corporate charging guidelines, the potential for prosecutorial misconduct and overreaching still exists. Nevertheless, it is important to remember that cooperation with federal investigations neither justifies nor eliminates criminal liability and no company is obligated to seek cooperation credit. To the extent the benefits of mitigation are outweighed by the limitations on corporate decision-making and the protections of the attorney-client privilege, corporations are free to decline to work with the government. As the frequency of federal investigations and prosecutions increase, after the fallout from the turmoil confronting the financial markets, the government must balance the interests of multiple constituencies with the requirements of justice set forth in the Filip Memo. Lessons learned during these cases will undoubtedly influence the next revision of the DOJ's corporate charging guidelines.