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Department of Justice Updated Guidance on Seeking Waivers of Attorney-Client Privilege May Not Go Far Enough

On July 9, 2008, Deputy Attorney General ("DAG") Mark Filip submitted revised guidance to Congress (the "Filip Letter") regarding the Department of Justice's Principles of Federal Prosecution of Business Organizations ("Principles"). Mr. Filip's predecessors' guidance on these Principles are commonly referred to and known as the Thompson and McNulty Memos, respectively. Although the current DAG discusses a scaling back of some of the intrusive tactics authorized by these prior Memos, serious concerns remain for business organizations facing criminal prosecution by the DOJ.

Background: In 2003, then-DAG, Larry D. Thompson, issued guidelines to DOJ prosecutors advising them that when considering charging a business organization, they should consider whether the organization cooperated in the investigation by waiving the attorney-client and/or work-product privileges. Moreover, the failure to waive such privileges could lead to indictment, additional charges, and/or lack of credit under the sentencing guidelines. As a result, many organizations felt compelled to waive the attorney-client and work-product protections that would otherwise remain privileged. The business community, defense attorneys and others strongly criticized the guidelines, contending that the waiver of these privileges discouraged open and candid communications among employees, officers and directors with the company's counsel.

In response to the criticism, in December 2006, then-DAG, Paul J. McNulty issued guidance that claimed to lessen the controversial aspects of the Thompson Memo, however, the McNulty Memo continued to allow prosecutors to seek waivers of the attorney-client privilege where a "legitimate need" existed. Additionally, the McNulty Memo specifically stated that "this is not to say that if the corporation decides to give [DOJ] the information, we will not consider it favorably." To many, the McNulty Memo simply recast a company's refusal to disclose privileged information from being a negative factor in a charging decision, to such disclosures being a positive factor in averting indictment – a distinction without a true difference.

The Filip Letter: Perhaps in response to pending legislation, in the Filip Letter, the current DAG recognized Congress' and the business communities' continued concern over the erosion of the attorney-client and work-product privileges. In response to these concerns, the Filip Letter was developed after meeting with the business community, criminal defense attorneys, in-house counsel, and civil liberties advocates.

The Filip Letter provides DOJ prosecutors with five guidelines to be followed in evaluating whether a company has cooperated in an investigation:

1. Cooperation will be measured by the relevant facts and evidence disclosed by the corporation and not by the waiver of the attorney-client or work-product privileges.
2. Federal prosecutors will not demand the disclosure of "Category II" information as a condition for credit.
3. Federal prosecutors will not consider whether the corporation has advanced attorneys' fees to its employees.
4. Federal prosecutors will not consider whether the corporation has entered into a joint defense agreement.
5. Federal prosecutors will not consider whether the corporation has retained or sanctioned employees.

Although guidelines three through five are significant changes to the earlier Memos, to many the first two guidelines do not go far enough to protect the attorney-client and work-product privileges.

The Filip Letter's first guideline claims that it does not seek the waiver of the attorney-client or work-product privileges and explains that the "government's key measure of cooperation will be . . . to what extent has the corporation timely disclosed the relevant facts about the misconduct." The guideline then, however, effectively requires the waiver of the attorney-client and/or work-product privilege since many internal investigations within business organizations, which reveal misconduct, are at the behest of counsel and subject to the attorney-client and work-product privileges.

The term "timely" also presents concerns. The Filip Letter lacks any guidance as to what is meant by timely, leaving the determination of "timely" to the discretion of federal prosecutors. This ambiguity presents a problem for companies by pushing them to make an early, and possibly premature, decision of whether to disclose information in order to be considered "timely." On the other hand, a prudent organization, which conducts a thorough investigation to determine the facts surrounding possible misconduct, could be penalized for not disclosing some, part, or all of the information in a timely fashion, as subjectively determined by a federal prosecutor.

The second guideline at first blush appears to scale back the reach of previous practices by not allowing federal prosecutors to demand "Category II information." The guideline defines Category II information as "non-factual attorney work-product and core attorney-client privileged communications." Yet, it again draws a line at "non-factual," thus giving federal prosecutors carte blanche

to request factual information, regardless of whether it was discovered through an internal investigation performed by counsel. Furthermore, the Filip Letter provides no additional explanation of "non-factual attorney work-product and core attorney-client privileged communications." In many instances the line may be blurred between "factual" and "non-factual" information, and without further guidance, the business community will have little support to rebuff a zealous federal prosecutor. Finally, rather than extend protections to all attorney-client communications, the Filip Letter only limits federal prosecutors from seeking "core" communications, without clarifying what kinds of communications are considered "core."

Practitioner Tips: Despite the new guidance contained in the Filip Letter, federal prosecutors may continue to seek waivers of the attorney-client and attorney work-product privileges. Accordingly, practitioners and corporations should consider the following:

- When conducting internal investigations, business organizations should consider that the government may ask for copies of any investigation reports, witness statements, and related documents.

- If the organization wishes to cooperate fully with the government's investigation, but also wants to avoid disclosing internal legal advice and other attorney work-product, take reasonable steps, such as those outlined below, to ensure that documents such as investigation reports and witness statements do not include any privileged material. Preparing documents in this fashion may enable the company to provide the government the facts it needs to complete its investigation.

- Include only information that is "factual" in nature in such documents, and consider not reducing initial observations and information to writing until after key facts can be confirmed.

- Avoid including attorney impressions, conclusions, or legal advice in such documents.

- The government is unlikely to waive prosecution or adverse administrative action in exchange for privileged information where the facts appear to establish a violation. This factor favors not waiving the attorney-client and work-product privileges so that the company's legal advice and strategies remain confidential throughout the course of any investigation as well as any ensuing judicial or administrative proceedings.

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