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WHITE COLLAR COMPLIANCE & DEFENSE PRACTICE AREA

ALERT

Senate Judiciary Committee Hearings Highlight Debate over Justice Department's Guidelines on Attorney-Client Privilege in the Corporate Context

By Patrick J. Egan and Eric E. Reed

Attorney-client privilege in the corporate context and corporate employees' right to counsel were again the center of attention on September 18, 2007, when the Senate Judiciary Committee resumed its consideration of Department of Justice (DOJ) guidelines for charging business organizations with criminal offenses and legislation that would narrow DOJ's latitude in such areas.

The September 18 hearing is the latest development in an ongoing exchange between DOJ officials and legislators over whether and to what extent a corporate entity's waiver of attorney-client privilege and work product protection – or the organization's payment of a target employee's attorney fees – should factor into the decision of whether the company has cooperated with prosecutors. Whether the entity is deemed "cooperative" determines, in part, whether the business organization will be charged.

Background

The controversy began in 1999, when DOJ released "Federal Prosecution of Business Organizations" guidelines authored by then-Deputy Attorney General Eric Holder. This document was modified in January 2003 by another memorandum authored by then-Deputy Attorney General Larry D. Thompson. Both the Holder and Thompson memoranda stated nine factors to consider in reaching a charging decision, including such items as the nature and seriousness of the offense, and the existence and adequacy of the corporation's compliance program. Among these considerations are the corporation's "willingness to cooperate" in the federal investigation, including "if necessary, the waiver of corporate attorney-client and work product protection." The Thompson Memorandum also states that the corporation's advancement of attorney fees to "culpable employees and agents" may be considered when weighing a company's cooperation.

The Thompson Memorandum prompted an outcry in much of the legal community, particularly the corporate defense bar. A federal judge found that prosecutors violated former KPMG partners' Sixth and Fourteenth Amendment rights by pressuring the company not to pay their legal bills in a tax-shelter case. *U.S. v. Stein*, 05-0888 (S.D.N.Y. June 26, 2006). The situation prompted Senator Arlen Specter to sponsor the Attorney-Client Privilege Protection Act (ACPPA). The pending legislation would, among other things, prohibit federal prosecutors from requesting a waiver of privilege, or even considering waiver or the advancement of attorney fees to employees in the charging decision.

Perhaps seeking to take some of the wind from Sen. Specter's sails, DOJ retreated somewhat from the Thompson Memorandum with the December 2006 issuance of new charging rules authored by

then-Deputy Attorney General Paul McNulty. These new rules, known as the McNulty Memorandum, divide potentially privileged materials into two categories: "purely factual" materials, such as copies of documents, interview memoranda, and other documentation of counsel's internal investigation (Category I); and attorney-client communications and non-factual attorney work product (Category II). While prosecutors must show a "legitimate need" to request privileged materials, a waiver request for either category of information requires permission of the U.S. Attorney and Assistant Attorney General for the Criminal Division of DOJ. A Category II request should be made only if the Category I information "provides an incomplete basis to conduct a thorough investigation." A company's denial of a Category II waiver request cannot be held against the company in the prosecutor's charging decision, but the same is not true for Category I information.

With limited exceptions, the McNulty Memorandum also prohibits prosecutors from considering a corporation's advancement of attorney fees to employees when assessing cooperation.

The September 18, 2007 Hearing

As stated by Senator Patrick Leahy, Senate Judiciary Committee Chairman, the purpose of the September 18 hearing was to consider whether, with the McNulty Memorandum in place, DOJ "has struck the right balance between robust prosecution of corporate fraud and the bedrock legal principle of fairness protected by the attorney-client privilege."

Karin Immergut, the U.S. Attorney for the District of Oregon who also chairs the White Collar Subcommittee of the Attorney General's Advisory Committee, testified at the hearing. Immergut expressed DOJ's opposition to ACPPA, stating that the legislation "will greatly harm our efforts to eradicate corruption in corporate boardrooms and protect our nation's financial markets." By prohibiting requests for or consideration of privilege waivers in charging decisions, Immergut argued, ACPPA "removes the incentive to disclose by the corporation," leaving "culpable employees … better able to better conceal evidence of their misconduct from the government."

Immergut also suggested that ACPPA would chill prosecutors' ability to work with corporate counsel and otherwise investigate cases by prohibiting requests for counsel's investigative materials unless the prosecutor "reasonably believes" the materials are not subject to the attorney-client privilege or attorney work product doctrine.

Immergut rejected suggestions that the McNulty Memorandum allows a "culture of waiver" to persist such that business organizations are coerced to waive privileges with or without a prosecution waiver request. Even when waiver is requested, Immergut stressed that "[c]ooperation is just one of the nine factors a prosecutor weighs in determining whether to charge a corporation," and that waiver of attorney-client privilege and work product protection "is simply one sub-factor that might come into play in evaluating" this part of the cooperation analysis under the McNulty Memorandum.

In addition to chilling prosecutorial efforts, Immergut suggested that ACPPA is unnecessary because waiver requests are not as common as one might expect. Since the December 2006 release of the McNulty Memorandum, DOJ has received 10 approval requests for "Category I" inquiries, of which she said only five involved documents actually covered in that category. The Deputy Attorney General's office received no requests for "Category II" inquiries following the McNulty Memorandum's release.

Attorney General Dick Thornburgh rejected Immergut's suggestion that the McNulty Memorandum remedied any coercive effects associated with waiver requests. "No matter what its procedural requirements or how reasonably the Justice Department may promise to implement it, a waiver policy poses overwhelming temptations to target organizations, often desperate to save their very existence." ACPPA would not impair prosecutors' ability to develop cases, Thornburgh testified, because prosecutors could still "accept voluntary submissions by companies of the results of internal investigations," could request non-privileged communications and materials, and could otherwise use traditional prosecutorial tools of grand jury subpoenas, immunity agreements, etc. For these reasons, and because the McNulty Memorandum "retains most of the basic flaws of its predecessors," Thornburgh urged the Committee to proceed with ACPPA.

What's Next?

What the future holds for ACPPA and the McNulty Memorandum remains unclear. Senator Leahy noted that, while seeking to curb prosecutorial overreaching, legislators "must be mindful not to cripple law enforcement efforts to eradicate the scourge of corporate fraud." Senator Leahy also noted that the McNulty Memorandum has been in place for less than a year.

Based on these remarks, one could expect that there will be no major developments for ACPPA and the McNulty Memorandum in the near future, at least not until the confirmation of a new Attorney General. However, Senator Specter has made it clear that he intends to push for legislation despite the McNulty Memorandum. Thus, it is virtually certain that Attorney General nominee Michael Mukasey will face pointed questioning from the Judiciary Committee on these issues.

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