What Does It Take to Satisfy the Government?

Recent Developments Regarding Corporate Cooperation in Government Investigations

By Harold K. Gordon

Federal prosecutors and regulators have significant leverage over public companies to induce cooperation in government investigations. As the demise of the international accounting firm Arthur Andersen confirmed for many, the government's filing of criminal charges against a company can frequently portend its end, regardless of whether it eventually prevails in court, as Arthur Andersen did on appeal. *Arthur Andersen LLP v. U.S.*, 544 U.S. 696, 708 (2005). The same result can occur from civil or administrative law enforcement proceedings by the Securities and Exchange Commission ("SEC") or other law enforcement or regulatory agencies. A company's stock price typically falls after a government action, sometimes followed by its credit rating. Key members of management may depart or be forced out, and important customers and vendors may disappear. Adding to the proverbial piling-on, an indictment

or civil government action is likely to attract the attention of other regulators or law enforcement agencies and the plaintiffs' securities bar. Given the collateral consequences of a government action, responsible management and board members must consider the merits of cooperating in the hope of either avoiding an action altogether or negotiating a resolution on more acceptable charges or claims.

In a series of memoranda stretching back to 1999, the Department of Justice ("DOJ") has described the factors federal prosecutors around the country must consider in determining whether to indict corporations for criminal misconduct. One of the factors is the extent of the corporation's cooperation in the government's investigation. Until the DOJ's most recent memorandum on the subject, issued by Deputy Attorney General Paul J. McNulty on December 12, 2006 (the "McNulty Memo"), one element of cooperation was, if a prosecutor deemed it necessary, waiver of the corporation's protections under the attorney-client privilege and the work-product doctrine. Prior to the McNulty Memo, prosecutors also had to consider the extent to which a corporation under investigation appeared to be protecting employees involved in apparent misconduct by, among other things, advancing their attorneys' fees.

By limiting when and how prosecutors can request that a corporation waive its attorney-client or work-product protections, and when they can consider a corporation's advancement of attorneys' fees to its employees, the McNulty Memo endeavors to respond to the criticisms of multiple bar groups, adverse court decisions, and Congress. The concerns were that the DOJ's practice of seeking privileged and work-product protected information had become too pervasive and routine, and that its questioning of corporate practices regarding payment of attorneys' fees had, in certain instances, caused a violation of the constitutional rights of corporate officers and employees under investigation who were left without the funds to pay for counsel.

Though the DOJ should be commended for at least responding to these concerns, reaction to the McNulty Memo remains mixed. Corporate defense counsel now fear that government waiver requests that were previously made expressly will now simply be conveyed more subtly, or that corporations desperate to appease line-level prosecutors will simply volunteer protected information, given that the McNulty Memo still permits prosecutors to credit corporate targets for providing such information and that they are not required to seek approval from senior DOJ officials where a corporation voluntarily offers it.

Like the DOJ, regulatory agencies that govern and police the financial services industry and the stock exchanges, such as the SEC, the Commodity Futures Trading Commission ("CFTC"), and the New York Stock Exchange ("NYSE"), have issued their own criteria to gauge corporate cooperation. Pressure is now being brought to bear on the SEC to amend its statement on cooperation to delete language that the defense bar claims has played a role in the "culture of waiver" of corporate privileges that initially led the DOJ to issue the McNulty Memo.

THE ORIGINS OF CORPORATE CRIMINAL LIABILITY

Under English common law, corporations could not be found liable for criminal misconduct. In the United States, statutes and case law have long held that criminal liability can apply to corporations.*[1] Corporations are "legal persons" that can engage in criminal conduct and be sued. Pursuant to the doctrine of *respondeat superior,* a corporation can be sued and held criminally liable for the illegal acts of its directors, officers, employees, and agents acting within the scope of their responsibilities with the intent to benefit the corporation. Even if a corporate agent acts for selfish reasons, the corporation can be held criminally liable as long as one motivation of the agent was to benefit the corporation. *E.g*., *U.S. v. Potter*, 463 F.3d 9, 25 (1st Cir. 2006) (quoting *U.S. v. Cincotta*, 689 F.2d 238, 241–42 (1st Cir. 1982)). A corporation need not actually benefit from its employee's actions to be exposed to criminal liability. *E.g*., *U.S. v. Automated Med. Labs., Inc*., 770 F.2d 399, 407 (4th Cir. 1985).

A CORPORATION'S ATTORNEY-CLIENT PRIVILEGE AND WORK-PRODUCT PROTECTION

The attorney-client privilege protects client communications with an attorney made for the purpose of obtaining legal advice. *E.g*., *Fisher v. U.S*., 425 U.S. 391, 403 (1976). The policy behind the privilege is to encourage "full and frank communication between attorneys and their clients and thereby

* *Endnotes for this story appear on pages 58 and 59.*

promote broader public interests in the observance of law and the administration of justice." *E.g.*, *Swidler & Berlin v. U.S.*, 524 U.S. 399, 403 (1998) (quoting *Upjohn Co. v. U.S.*, 449 U.S. 383, 389 (1981)). Corporations are legal entities entitled to the attorney-client privilege, which applies in the corporate setting to confidential communications from corporate officers, agents, and employees to the corporation's attorney so that the attorney can render legal advice to his or her corporate client. *E.g.*, *Upjohn Co.*, 449 U.S. at 390–98.

"Attorney work product" refers to documents gathered, selected, or created that reveal an attorney's thought process in preparing his or her client's case for current or likely litigation. *E.g.*, *Hickman v. Taylor*, 329 U.S. 495, 511 (1947). This additional protection from disclosure applies in criminal and civil cases. Fed. R. Crim. P. 16; *U.S. v. Nobles*, 422 U.S. 225, 236–39 (1975).

DOJ MEMORANDA ON CHARGING CORPORATIONS AND CORPORATE COOPERATION

The DOJ has issued at least four memoranda discussing the factors federal prosecutors must weigh in assessing a corporation's cooperation and determining whether criminal charges against a corporation are warranted. Preceding the McNulty Memo were the Holder Memo, the Thompson Memo, and the McCallum Memo.

The Holder Memo was issued in 1999 by Deputy Attorney General Eric H. Holder, Jr., and was intended to give prosecutors guidelines to follow in deciding whether to criminally charge a corporation.[2] Regarding cooperation and disclosure of protected material, the Holder Memo stated that in measuring a corporation's cooperation, a prosecutor could consider whether the corporation was willing to waive its attorney-client privilege and work-product protection on the results of a corporate internal investigation and communications between corporate officers, directors, and employees and the corporation's attorneys. It also recommended that prosecutors consider the extent to which a corporation appeared to be shielding personnel involved in the conduct under investigation by paying their attorneys' fees, sharing information with their counsel pursuant to joint defense agreements, or failing to sufficiently sanction them.

Issued in January 2003 by Deputy Attorney General Larry D. Thompson, the Thompson Memo escalated the scrutiny prosecutors were required to give corporate cooperation by taking the guidance of the Holder Memo and making it mandatory. Whereas the Holder Memo prefaced its suggested factors with the statement that they were "not outcome-determinative and are only guidelines[, which] . . . Federal prosecutors are not required to reference . . . in a particular case,"[3] the Thompson Memo directed that "prosecutors and investigators in every matter involving business crimes must assess the merits of seeking the conviction of the business entity itself."[4] The Thompson Memo was issued against the backdrop of the highly publicized allegations of systemic misconduct at corporations like Enron, WorldCom, and Tyco International and the Executive and congressional response to those accounting and financial reporting scandals, including the enactment of the Sarbanes-Oxley Act on July 25, 2002, and President Bush's Executive Order issued the same month directing Deputy Attorney General Thompson to establish a Corporate Fraud Task Force (Exec. Order No. 13271, 67 Fed. Reg. 46091 (July 9, 2002)).

The Thompson Memo added as an additional factor the requirement that prosecutors determine the sincerity of a corporation's cooperation:

> Another factor to be weighed by the prosecutor is whether the corporation, while purporting to cooperate, has engaged in conduct that impedes the investigation (whether or not rising to the level of criminal obstruction). Examples of such conduct include: overly broad assertions of corporate representation of employees or former employees; inappropriate directions to employees or their counsel, such as directions not to cooperate openly and fully with the investigation including, for example, the direction to decline to be interviewed; making presentations or submissions that contain misleading assertions or omissions; incomplete or delayed production of records; and failure to promptly disclose illegal conduct known to the corporation.[5]

Confirming this additional mandate, the Thompson Memo emphasized that the main purpose of its revisions to the Holder Memo was an "increased emphasis on and scrutiny of the authenticity of a corporation's cooperation. Too often business organizations, while purporting to cooperate with a . . . [DOJ] investigation, in fact take steps to impede the quick and effective exposure of the complete scope of wrongdoing under investigation. The revisions make clear that such conduct should weigh in favor of a corporate prosecution."[6]

The Holder and Thompson Memos were followed in October 2005 by the McCallum Memo, issued by Acting Deputy Attorney General Robert D. McCallum, Jr. Making no revisions to the Thompson Memo, the McCallum Memo took an initial step to at least impose some order and consistency on the manner in which federal prosecutors requested and considered a corporation's waiver of its attorney-client and work-product protections. It required the DOJ, including the various U.S. Attorneys' Offices around the country, to prepare and implement written procedures for prosecutors to obtain approval from their supervisors to request corporate waivers.[7]

ORGANIZATIONAL SENTENCING GUIDELINES REINFORCING THE THOMPSON MEMO

With amendments that some attorneys read as reinforcing the Thompson Memo, in 2004 the United States Sentencing Commission ("the Sentencing Commission") revised the Commentary to its organizational sentencing guidelines to state that an organization's waiver of its attorney-client or work-product protections could affect the organization's sentencing or culpability score under the guidelines:

> Waiver of attorney-client privilege and of work product protections is not a prerequisite to a reduction in culpability score under subdivisions (1) and (2) of subsection (g) unless such waiver is necessary in order to provide timely and thorough disclosure of all pertinent information known to the organization.[8]

Following objections by the American Bar Association ("ABA") and the defense bar, in April 2006 the Sentencing Commission unanimously voted to delete the waiver comment in the guidelines. The change became effective in November 2006.

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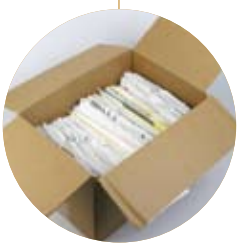

THE McNULTY MEMO

The DOJ's December 2006 McNulty Memo was a response to criticism of the DOJ's conduct in implementing the Thompson Memo. The criticism emanated from all corners of the legal profession. Surveying counsel on the impact of the DOJ's cooperation policies, the Association of Corporate Counsel reported in April 2005 that a substantial percentage of the corporate counsel surveyed agreed that a government culture seeking waivers existed, and that in their view, the government treated waiver as a condition of cooperation.[9] In August 2006, the ABA issued a resolution opposing the government's consideration of a number of the Thompson Memo factors, including whether the company provided counsel to its employees in the investigation, paid employees' legal fees, shared information or documents with current or former employees pursuant to joint defense agreements, or failed to sanction an employee for exercising his legal rights not to cooperate with a government investigation.[10] An earlier ABA Task Force Report emphasized that corporations could not practically refuse to waive their legal protections to demonstrate cooperation because of the significant harm that would occur from criminal charges; that government pressure to cooperate could cause companies to make premature determinations about employee culpability before the facts have been fully determined; and that the government's conduct in seeking cooperation had "unintentionally undermined corporate compliance with the law" by making employees hesitant to speak with or seek the advice of company counsel, knowing there was a good chance the results of their conversations would be provided to government attorneys.[11]

On the legislative front, the same concerns were voiced by former Attorneys General and others in hearings conducted during the 109th Congress by the House and Senate Judiciary Committees. In December 2006, Senator Arlen Specter (R-PA) introduced proposed legislation, the Attorney-Client Privilege Protection Act of 2006, which would have amended the federal criminal code to prohibit the DOJ or other federal law enforcement authorities from seeking waivers of corporate attorney-client or work-product protections, or basing a decision to charge a corporation on the corporation's refusal to waive or on the payment of attorneys' fees for corporate officers or employees. S. 30, 109th Cong. (2006). Senator Specter reintroduced the same proposed legislation in January 2007. The 2007 bill permits the government to request information it believes is not covered by the attorney-client privilege or protected as attorney work product, and would not preclude a company from voluntarily sharing such material with the government. S. 186, 110th Cong. (2007), http://acc.com/public/attyclientpriv/thompsonmemoleg.pdf.

Pressure for revisiting the Thompson Memo also arose in the courts. In 2006, a Manhattan federal district judge determined that the DOJ's use of the Thompson Memo to force accounting firm KPMG to terminate payment of legal fees for certain employees who refused to cooperate in the government's criminal tax investigation violated the employees' Fifth Amendment substantive due-process rights, along with their privilege against self-incrimination and their Sixth Amendment right to the assistance of counsel. *U.S. v. Stein*, 435 F. Supp. 2d 330, 381–82 (S.D.N.Y. 2006). In a subsequent decision, the same judge suppressed certain employee statements, finding that the government's conduct in forcing KPMG to pressure employees to cooperate or risk termination of their jobs or further payment of their lawyers had improperly coerced the statements. *U.S. v. Stein*, 440 F. Supp. 2d 315, 337–38 (S.D.N.Y. 2006).

In addition, the courts have yet to settle the quandary confronting many corporations deciding whether to waive legal protections to cooperate with the government, which is the risk that by selectively waiving those protections and producing protected material to the government, a corporation will be deemed to have waived its privileges and protections with regard to everyone else, including plaintiffs seeking the same information in private securities or derivative litigation against the company. A number of courts have held that a corporation's selective production of privileged or work-product protected material to the government triggers a waiver in favor of third parties.[12]

Efforts to amend the Federal Rules of Evidence to provide corporations involved in government investigations with selective waiver protection are in doubt. Proposed Federal Rule of Evidence 502(c) would provide that a corporation's disclosure of privileged or work-product protected information to a

federal office or agency pursuant to the government's regulatory, investigative, or law enforcement authority would not trigger a waiver of those protections in favor of nongovernmental individuals or entities. Objections to the proposed rule from plaintiffs and defense attorneys and the government appear likely to block its approval.[13]

Responding to the growing criticisms of the DOJ's practices under the Thompson Memo, the McNulty Memo, issued on December 12, 2006, less than a week after Senator Specter introduced his proposed Attorney-Client Privilege Protection Act, supersedes the Thompson Memo and the McCallum Memo.[14] In his covering memorandum accompanying the McNulty Memo, Deputy Attorney General McNulty stated:

> We have heard from responsible corporate officials recently about the challenges they face in discharging their duties to the corporation while responding in a meaningful way to a government investigation. Many of those associated with the corporate legal community have expressed concern that our practices may be discouraging full and candid communications between corporate employees and legal counsel.[15]

The McNulty Memo states that a corporation's waiver of the attorney-client and work-product protections is not a prerequisite to determining that the corporation has provided the government with sufficient cooperation, although it adds that a company's disclosure of protected material may assist the government in expediting an investigation and in evaluating the accuracy and completeness of the company's other voluntary disclosure.

Under the McNulty Memo, prosecutors may request a waiver of privileged or protected material only if there is a "legitimate need" for it. Factors in determining whether a legitimate need exists include: (i) the likelihood and degree to which the privileged information will benefit the government's investigation; (ii) whether there are alternative means to obtain the same information; (iii) the completeness of the voluntary disclosure already provided; and (iv) the collateral consequences to a corporation from waiver.

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If a legitimate need exists, prosecutors are instructed under the McNulty Memo to first seek factual information, which may or may not be privileged; this is referred to as "Category I" material. Category I material includes such documents as witness statements, "purely factual interview memoranda," and organizational charts and chronologies created by counsel. Prior to requesting a corporation to waive privileges or protections for Category I information, prosecutors must first obtain written authorization from their United States Attorney, who must then provide a copy of the request to, and confer with, the Assistant Attorney General for the DOJ's Criminal Division before the request is granted or denied. A corporation's response to the government's request for Category I material may be considered in determining whether a corporation has cooperated in the government's investigation.

Only if Category I information, to the extent required, still leaves the government with an incomplete investigation are prosecutors authorized to seek what the McNulty Memo refers to as "Category II" material, which includes notes, memoranda, or other documentation reflecting the advice, impressions, and conclusions of a corporation's attorneys. The McNulty Memo cautions that Category II information may be sought only in "rare circumstances." A request for Category II information first requires that the appropriate United States Attorney obtain written authorization from the Deputy Attorney General. The McNulty Memo states that

a prosecutor must not consider a corporation's decision to decline to provide a waiver of Category II information in determining whether to bring criminal charges against the corporation. It does provide, however, that prosecutors may always favorably consider a corporation's agreement to waive privileges in assessing cooperation, and that prosecutors need not obtain the authorization of their supervisors if a corporation voluntarily offers privileged or protected material without a waiver request.

Addressing the criticism of the DOJ's scrutiny of corporations advancing attorneys' fees to employees, the McNulty Memo states that prosecutors should not generally take that into consideration, regardless of whether an employee is under investigation or indictment, especially since many corporations contractually agree, pursuant to state indemnification statutes, to advance attorneys' fees to officers and employees through provisions in their corporate charters, bylaws, or employment agreements. It provides that in "extremely rare cases," prosecutors may, with the approval of the Deputy Attorney General, consider a corporation's payment of attorneys' fees for officers or employees when the totality of the circumstances indicates such payments were intended to impede the government's investigation.

In recent remarks, Deputy Attorney General McNulty said that Senator Specter's proposed Attorney-Client Privilege Protection Act was unnecessary. He pointed to DOJ statistics indicating that since the DOJ issued the McNulty Memo in December 2006, his office had not received a single request for Category II privileged information and had received only five requests to approve waiver of Category I factual information.[16]

REMAINING CONCERNS

Deciding whether a corporation should waive its protections from disclosure and cooperate with the DOJ or a government law enforcement agency is necessarily a fact-specific analysis. There will be instances where cooperation to the extent of producing protected material should help avoid or reduce potential charges or claims by further demonstrating that a corporation is a good corporate citizen and has followed through on its promise to cooperate. In other situations, an investigation may involve a government regulator with which a corporation interacts frequently in its industry and will continue to do so for the foreseeable future. In some cases, the risk of a selective waiver in the government's favor will be minimized because the company will have resolved related private securities or other litigation against it or because the statute of limitations on such litigation will have run.

For corporations enmeshed in DOJ investigations, it remains far from clear that the McNulty Memo reduced the pressure to evidence cooperation by providing protected material or by refusing to pay an employee's attorneys' fees. Part of the problem stems from the vagueness of some of the McNulty Memo's standards and procedures. For instance, what constitutes a "legitimate need" by a prosecutor for protected information is still unclear, and the fact that the "completeness of the voluntary disclosure already provided" is listed as one of the criteria for determining when a legitimate need exists will be interpreted by some corporations to mean that if protected material is not voluntarily produced to the prosecutor, which the prosecutor is entitled to accept and credit on the cooperation ledger without approval, a waiver may be sought. What differentiates Category I material from Category II material is also far from clear. It is easy to imagine how the "key documents," witness statements, and attorney charts or chronologies labeled "Category I material" could readily reveal corporate counsel's thought process, conclusions, and impressions—that is, information falling in Category II.

Further, the fact that the McNulty Memo states that disclosure of protected information may "permit the government to expedite its investigation" and "may be critical in enabling the government to evaluate the accuracy and completeness of the company's voluntary disclosure," while indicating that the government may still consider it in measuring a corporation's cooperation, has raised a concern among some corporate defense attorneys that all the McNulty Memo will do is convert the prior Thompson Memo waiver request practice into a subtle "don't ask, don't tell" policy or "unspoken wink and nod" process where an aggressive prosecutor makes it abundantly clear without asking that sufficient cooperation will entail a voluntary privilege waiver.[17]

The same subtle pressure may be brought to bear under the McNulty Memo on the subject of a corporation's payment of an officer's or employee's attorneys' fees. It provides that although

prosecutors generally should not take such payments into account, they are still free to ask questions about the subject.

COOPERATION STATEMENTS BY FINANCIAL REGULATORS

The SEC, CFTC, and NYSE have each issued their own statements regarding cooperation in agency and stock exchange investigations.[18] The CFTC recently amended its 2004 Enforcement Advisory on Cooperation specifically to clarify that the considerations in that advisory are designed to encourage cooperation among individuals or entities involved in CFTC enforcement investigations "without eroding the protections of the attorney-client or work product privileges."[19] Pressure is now being put on the SEC to make similar changes to its principles governing cooperation.

The SEC's statement on cooperation, known as the "Seaboard Report," lists 13 factors the SEC will consider in determining the amount of credit to be given for "self-policing, self-reporting, remediation and cooperation—from the extraordinary step of taking no enforcement action to bringing reduced charges, seeking lighter sanctions, or including mitigating language in documents [the SEC] use[s] to announce and resolve enforcement actions."[20] In January 2006, the SEC reiterated the importance with which it regards cooperation in its investigations by including the extent of a corporation's cooperation, including the degree to which it self-reported an offense or otherwise cooperated with the investigation and remediation of the offense, in a statement discussing the factors it will consider in determining whether to seek a financial penalty against a corporation.[21] (For a related article on the SEC's penalties statement, see page 24 of this publication.)

With language that evokes the Thompson Memo, the 11th factor in the SEC's Seaboard Report examines whether a company promptly provided the SEC Staff ("Staff") with the results of an internal investigation and the company's response, including "a thorough and probing written report detailing the findings of its review."[22] It further reviews whether a company voluntarily disclosed information the Staff did not request, asked its employees to cooperate with the Staff, and made "all reasonable efforts" to obtain such cooperation. In a footnote, the SEC stated that in certain cases, a company may choose to waive its attorney-client privilege and work-product protections to provide information to the Staff.[23]

In a recent speech, SEC Commissioner Paul S. Atkins noted that although the Seaboard Report did not include waiver as a factor to be considered in evaluating cooperation, the practice of corporate waivers "creeps in" through that footnote. He stated that "[i]n the six years since Seaboard was issued, this footnote has become the backdoor through which credit has been afforded for waiver," and he recommended that the SEC consider the McNulty Memo approach by requiring all formal Staff waiver requests to be reviewed at the "highest levels" at the SEC and to be subject to specific policies and procedures.[24] In a letter sent four days before Commissioner Atkins' speech, ABA President Karen J. Mathis asked SEC Chairman Christopher Cox to amend the Seaboard Report to end the Staff's practice of requiring companies to waive privileges or protections to receive Staff credit for cooperation. Her letter contained an edited version of the Seaboard Report with the ABA's desired changes.[25]

CONCLUSION

The widespread criticisms of the DOJ's practices regarding corporate cooperation preceding the McNulty Memo and certain statements in the memorandum may in some cases provide additional ammunition to corporations that choose to preserve their privileges and protections. The cooperation credit that remains, however, for voluntary production of protected material leaves corporations with cause for concern that the McNulty Memo's changes may be form over substance in the day-to-day interactions their attorneys have with line-level prosecutors, given the immense pressure on corporations to evidence sufficient cooperation with the government. Until the SEC makes changes in the language of its Seaboard Report like those the ABA has recently proposed, corporate counsel involved in SEC investigations should expect to continue to confront the merits of waiving their clients' privileges and protections, as well as questions regarding advancement of attorneys' fees for corporate personnel, in struggling to garner sufficient cooperation points with the SEC Staff. ■

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[1] *E.g.*, *N.Y. Cent. & Hudson River R.R. Co. v. U.S.,* 212 U.S. 481, 495–96 (1909) ("While the law should have regard to the rights of all, and to those of corporations no less than to those of individuals, it cannot shut its eyes to the fact that the great majority of business transactions in modern times are conducted through those bodies, and particularly that interstate commerce is almost entirely in their hands, and to give them immunity from all punishment because of the old and exploded doctrine that a corporation cannot commit a crime would virtually take away the only means of effectually controlling the subject-matter and correcting the abuses aimed at."); 1 U.S.C. § 1 (2005) ("In determining the meaning of any Act of Congress, [including criminal liability statutes,] unless the context indicates otherwise . . . the words 'person' and 'whoever' include corporations, companies, associations, firms, partnerships, societies, and joint stock companies, as well as individuals[.]").

[2] Memorandum from Eric H. Holder, Jr., Deputy Att'y Gen., on Bringing Criminal Charges Against Corporations to All Component Heads and U.S. Attorneys (Jun. 16, 1999), http://www.usdoj.gov/criminal/fraud/docs/reports/1999/chargingcorps.html. The Congressional Research Service (CRS) has recently published a detailed resource paper on the DOJ memoranda regarding corporate charging decisions and related issues. *See generally Cong. Research Serv., The Thompson Memorandum: Attorneys' Fees and Waiver of Corporate Attorney-Client and Work Product Protection* (2007), http://opencrs.cdt.org/rpts/RL33842__20070129.pdf.

[3] Holder Memo, *supra* note 2.

[4] Memorandum from Larry D. Thompson, Deputy Att'y Gen., on Principles of Fed. Prosecution of Bus. Orgs. to Heads of Dep't Components, U.S. Attorneys (Jan. 20, 2003), http://www.usdoj.gov/dag/cftf/corporate__guidelines.htm.

[5] Thompson Memo, *supra* note 4.

[6] *Id*.

[7] Memorandum from Robert D. McCallum, Jr., Acting Deputy Att'y Gen., on Waiver of Corporate Attorney-Client and Work Product Protection to Heads of Dep't Components, U.S. Attorneys (Oct. 21, 2005), *see* http://lawprofessors.typepad.com/whitecollarcrime__blog/2005/10/new__memo__on__att.html.

[8] *U.S. Sentencing Guidelines Manual* § 8C2.5 cmt. 12 (2004). Federal district judges are no longer required to follow the guidelines in sentencing pursuant to the Supreme Court's decision in *U.S. v. Booker*, 543 U.S. 220 (2005). A federal sentencing judge has the discretion regarding whether to reduce a sentence under the guidelines, as long as the judge's decision is "reasonable." *Booker*, 543 U.S. at 261–62.

[9] Assoc. of Corp. Counsel, *Is the Attorney-Client Privilege Under Attack?* 5 (2005), http://www.abanet.org/buslaw/attorneyclient/publichearing20050421/testimony/hackett1.pdf.

[10] ABA Task Force on Attorney-Client Privilege, *Report* (Aug. 2006), http://www.abanet.org/buslaw/attorneyclient/materials/hod/emprights__report__adopted.pdf.

[11] *Id*. at 6 (citing ABA Task Force on Attorney-Client Privilege, *Report in Support of Recommendation 111* (Aug. 2005)).

[12] *E.g., In re Qwest Communications Int'l Inc*., 450 F.3d 1179 (10th Cir. 2006); *Westinghouse Elec. Corp. v. Republic of the Phil*., 951 F.2d 1414 (3d Cir. 1991).

[13] J.P. Finet, *Selective Waiver of Privilege Provision Likely to Be Pulled from Proposed Rule of Evidence*, 5 BNA Corp. Accountability Rep. No. 5, at 115 (Feb. 2, 2007).

[14] Memorandum from Paul J. McNulty, Deputy Att'y Gen., on Principles of Fed. Prosecution of Bus. Orgs. to Heads of Dep't Components, U.S. Attorneys (Dec. 12, 2006), http://www.usdoj.gov/dag/speech/2006/mcnulty__memo.pdf.

[15] *Id*.

[16] Rachel McTague, *DOJ's McNulty: Level of Waiver Requests Doesn't Justify Bill to Limit Agency Discretion*, 5 BNA Corp. Accountability Rep. 16, 405 (Apr. 20, 2007).

[17] *E.g*., Pamela A. MacLean, *McNulty Memo on Attorney-Client Privilege Blasted for Lack of Change*, Nat'l L.J., Jan. 26, 2007, http://www.law.com/jsp/ihc/PubArticleIHC.jsp?id=1169719351771.

[18] *See* Rep. of Investigation Pursuant to Section 21(a) of the Sec. Exch. Act of 1934 and Comm'n Statement on the Relationship of Cooperation to Agency Enforcement Decisions, Exch. Act Release No. 44969 (Oct. 23, 2001) [hereinafter *SEC Report*], http://www.sec.gov/litigation/investreport/34-44969.htm; Press Release, Commodity Futures Trading Comm'n, Commodity Futures Trading Comm'n's Div. of Enforcement Clarifies Cooperation Advisory with Respect to the Attorney-Client and Work Product Privileges (Mar. 1, 2007), http://cftc.gov/opa/enf07/opa5296-07.htm; Memorandum from the NYSE on Cooperation, No. 05-65 (Sept. 14, 2005), http://www.nyse.com/RegulationFrameset.html?displayPage=http://apps.nyse.com/commdata/PubInfoMemos.nsf/AllPublishedInfoMemosNyseCom?openview&count=250&RestrictToCategory=currentyear; Memorandum from the NYSE on Factors Considered by the N.Y. Stock Exch. Div. of Enforcement in Determining Sanctions, No. 05-77 (Oct. 7, 2005), http://www.nyse.com/RegulationFrameset.html?displayPage=http://apps.nyse.com/commdata/PubInfoMemos.nsf/AllPublishedInfoMemosNyseCom?openview&count=250&RestrictToCategory=currentyear.

[19] Commodity Futures Trading Comm'n, *supra* note 18.

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[20] *SEC Report, supra* note 18.

[21] Press Release, Sec. & Exch. Comm'n, Statement of the Sec. & Exch. Comm'n Concerning Fin. Penalties (Jan. 4, 2006), http://www.sec.gov/news/press/2006-4.htm.

[22] *SEC Report*, *supra* note 18.

[23] *Id*. at n.3.

[24] Paul S. Atkins, Comm'r, U.S. Sec. & Exch. Comm'n, Remarks Before the SEC Speaks in 2007 (Feb. 9, 2007), http://sec.gov/news/speech/2007/spch020907psa.htm.

[25] Letter from Karen J. Mathis, Am. Bar Assoc. President, to the Honorable Christopher Cox (Feb. 5, 2007), *see* http://www.abanet.org/poladv/letters/attyclient/2007feb05__privwaivsec__l.pdf.

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legislative history that describes the discretion the Commission has and the way that Congress intended that we utilize that discretion[.]" (An audio recording of the SEC's press conference is available at http://www.connectlive.com/events/secnews/.)

Hoping to achieve "clarity, consistency, and predictability" in the way in which the SEC's corporate-penalty authority is used, the SEC listed the considerations it will examine in determining when a corporate penalty is justified, noting that each of the factors was reflected in the statute and its legislative history. It stated that the appropriateness of a penalty against a corporation in a particular case would turn primarily on two factors: the presence or absence of a direct benefit to the corporation as a result of the violation, and the degree to which any shareholders harmed by the corporation's violation would benefit or suffer further harm from a penalty.

In addition to the two principal considerations, the SEC listed additional factors it will consider in determining whether a corporate penalty is justified, including the need for deterrence; the extent of injury to innocent parties; whether participation in the violation was widespread at the corporation; the degree of intent of the individuals involved; the degree of difficulty in detecting the particular violation at issue; the extent to which the corporation undertook remedial steps; and the corporation's cooperation with the SEC and, if applicable, other law enforcement agencies. The SEC did not indicate in the Statement that each of its secondary considerations will be applicable in each case. As courts have done with other multifactor tests applied to SEC requests for particular remedies or relief, which other factors beyond the two primary ones should be applied will depend on the specific facts and circumstances, as the SEC's penalty analysis requires.

In his press-conference remarks, SEC Chairman Cox said that the Statement's penalty guidelines will "inform . . . [the SEC's] future actions" regarding when it seeks corporate penalties. Acknowledging the concerns of Commissioners Glassman and Atkins, Cox said that it was "important not to compound the harm already caused to investors." Cox added that he

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