JONES DAY | One Firm Worldwide℠

DOJ CHANGES ITS RULES FOR ASSESSING CORPORATE COOPERATION

R. Christopher Cook and Joseph W. Clark

The Department of Justice (DOJ) has amended significantly its official position regarding the corporate attorney-client privilege and the manner in which it expects organizations to treat employees suspected of wrongdoing. These changes, announced by Deputy Attorney General Mark Filip on August 28, 2008, promise to have a profound effect on the manner in which organizations are treated by DOJ when employees are alleged to have violated the law. Under these new guidelines, organizations should have a greater ability to investigate potential wrongdoing without fear that legitimately privileged communications will be subject to a forced waiver. Likewise, organizations should be free to treat employees fairly when deciding whether to pay for their legal costs or continue employment while an investigation is pending, confident that such equitable treatment will not be seen by DOJ as a sign of obstruction.

This new approach by DOJ is welcome news for the health care industry, whose organizations have been the subject of a disproportionate number of criminal investigations in the last decade. As with other organizations that have been the target of DOJ investigations recently, health care companies often have been the subject of heavy-handed tactics. Prosecutors have routinely demanded waivers of the attorney-client privilege as a condition of treating an organization as "cooperative" in an investigation,

A version of this article originally appeared in *HCCA Compliance Today*, February 2009.

while also insisting that employees accused, but not convicted, be cut loose from all financial support. The long-term consequences of such policies are predictable—erosion of the privilege, an inability of corporations to seek counsel for fear of having those communications breached, and employees forced to plead guilty rather than face financial ruin from defending a complex white collar criminal investigation.

Coincidentally, the need for these new guidelines was echoed by a decision issued on the same day by the Second Circuit Court of Appeals, only blocks away from where Deputy Attorney General Filip was speaking before the New York Stock Exchange. The decision in *United States v. Stein*[1] (the "KPMG Decision") held that certain tactics by DOJ in its investigation of allegedly illegal tax shelters violated the rights of the individual defendants, violated the Constitution, and required the dismissal of the charges against them. Those tactics are now prohibited under the new DOJ guidelines, including the practice of pressuring an organization to refuse payment of legal fees in an attempt to squeeze employees into cooperating.

The implication of this new policy for counsel and compliance officers is clear: Internal investigations can now be structured with greater predictability regarding what is confidential and what will be subject to disclosure to the government. Generally speaking, organizations can seek the advice of counsel with reasonable assurances that those conversations will be protected by privilege. To the extent that the organization conducts an internal investigation—a decision that should itself be informed by confidential advice of counsel—it should be aware that the facts uncovered in that inquiry must be disclosed to the government if the organization ever seeks credit from DOJ for cooperating fully in an investigation. Even if the decision is made to cooperate, the issue of whether, when, and how to discipline employees, including whether to pay their legal fees while an investigation is pending, will remain within the discretion of the organization itself.

DOJ POLICY FOR EVALUATING CORPORATE COOPERATION

It is instructive to examine how DOJ policy for evaluating corporate cooperation has evolved over the last decade. What follows is a brief history of the memoranda issued by DOJ regarding waiver of attorney-client privilege and corporate contractual arrangements to advance attorneys' fees to employees under investigation.

The Holder Memorandum

DOJ's practice of announcing formal guidelines for how it would handle corporate prosecutions, including assessments of cooperation, began approximately 10 years ago. On June 16, 1999, then-Deputy Attorney General Eric Holder issued a memorandum entitled "Federal Prosecution of Corporations" (the Holder Memo). The Holder Memo established factors that prosecutors should consider when determining whether to charge a corporation. One factor in particular required prosecutors to consider "the corporation's cooperation and voluntary disclosure." Specifically, the Holder Memo explained:

> In determining whether to charge a corporation, that corporation's timely and voluntary disclosure of wrongdoing and its willingness to cooperate with the government's investigation may be relevant factors. In gauging the extent of the corporation's cooperation, the prosecutor may consider the corporation's willingness to identify the culprits within the corporation, including senior executives, to make witnesses available, to disclose the complete results of its internal investigation, and to waive the attorney-client and work product privileges.[2]

This was the first time that official DOJ policy called for waiver of the attorney-client privilege as a condition of lenient treatment.

1 No. 07-3042-cr, 2008 WL 3982104 (2d Cir. Aug. 28, 2008).

2 Memorandum from Eric H. Holder, Federal Prosecution of Corporations (June 16, 1999), available at http://www.usdoj.gov/criminal/fraud/docs/reports/1999/chargingcorps.html. (All web sites herein last visited March 30, 2009.)

The Holder Memo created a sea change in federal corporate prosecution. Traditionally, prosecutors would issue grand jury subpoenas and investigate corporations from the outside. Cooperative corporations would often assist the government in uncovering wrongdoing, but very seldom shared privileged communications or the results of internal investigations. If a privilege waiver was requested, it almost always was limited in scope and came at the end of the investigation. After the Holder Memo, however, prosecutors began seeking broad waivers of the attorney-client privilege and work product protection with increasing regularity. Moreover, these requests were being made at the beginning of an investigation.

Further, the Holder Memo's emphasis on a "timely" disclosure created a conundrum for corporations. Although the government asserted that a corporation was not required to waive any privilege or work product protection, the prosecutors sometimes viewed the corporation's failure to disclose privileged information as an effort to conceal otherwise incriminating facts. And, to make a timely disclosure, counsel for corporations often felt compelled to waive the privilege at the outset of an investigation in order to meet the government's expectation of timeliness. This practice threatened to turn counsel for a corporation into agents for the government's investigation. Counsel for corporations, whether in-house or outside counsel, would conduct an internal investigation, gather documents and notes, and interview witnesses—all the while knowing that the results of the investigation would be turned over to the federal government so that the corporation could either avoid prosecution or be charged with a lesser offense.

In response to the government's demands for employee statements, corporate counsel developed the practice of conducting internal investigations, warning employees that their statements might (or would) be provided to the government if the corporation decided to waive the attorney-client privilege. These warnings in turn created the risk to employees that any misstatements to counsel would themselves be prosecuted as false statements to the government. Indeed, in September 2004 DOJ famously obtained guilty pleas from three executives based on allegedly misleading statements they had made to counsel conducting an internal investigation.[3]

The Thompson Memorandum

DOJ continued to refine its policies regarding corporate cooperation, and in January 2003, then-Deputy Attorney General Larry Thompson distributed a memorandum entitled "Principles of Federal Prosecution of Business Organizations" (the Thompson Memo). The Thompson Memo reinforced the policy articulated in the Holder Memo and established a binding model for prosecutors to use in evaluating corporate conduct and deciding whether to bring charges against a corporation. Under the Thompson Memo, corporations perceived as not fully cooperating with a government investigation were more likely to face prosecution.[4] Compared to the Holder Memo, however, the Thompson Memo advanced deeper into the corporation's relationship with its employees and attorneys.

Among other factors, the Thompson Memo instructed prosecutors to weigh the extent and value of a corporation's cooperation by assessing the completeness of the corporation's disclosure, "including, if necessary, a waiver of the attorney-client and work product protections, both with respect to its internal investigation and with respect to communications between specific officers, directors and employees and counsel." Further, prosecutors were directed to consider whether the corporation "appears to be protecting its culpable employees and agents" through "the advancing of attorneys fees." Effectively, the Thompson Memo required corporations to give the government unprecedented access to privileged and potentially inculpatory statements while refusing the advancement of attorneys' fees to employees whom the government considered to be culpable and noncooperative.

The Thompson Memo created a practical dilemma for many corporations with respect to advancing attorneys' fees and protecting attorney-client communications. First, the corporation was put in the untenable position of deciding which employees were culpable and which were cooperative.

3 See "Former Computer Associates Executives Indicted on Securities Fraud, Obstruction Charges" DOJ Press Release (Sept. 22, 2004) at http://www.usdoj.gov/opa/pr/2004/September/04__crm__642.htm.

4 Memorandum from Larry D. Thompson, Principles of Federal Prosecution of Business Organizations (Jan. 20, 2003), available at http://www.usdoj.gov/dag/cftf/corporate__guidelines.htm.

Or, more accurately, the corporation was forced to predict whether advancing attorneys' fees to individual employees accused of wrongdoing would be perceived by the government as "protecting its culpable employees and agents," as the Thompson Memo discouraged. This desire to protect the corporation often clashed with the desire to treat employees with fairness and a presumption of innocence. It also ran the risk of leaving employees without access to legal advice on matters crucial to the corporation's continued well-being.

As to the attorney-client privilege, the Thompson Memo's broadened demand for waiver ran the risk of turning corporate counsel into witnesses in future criminal proceedings. Whereas the Holder Memo focused on waiver of the privilege as to internal investigations, the Thompson Memo explicitly called for waiver of prior communications with counsel. From DOJ's perspective, such communications could provide evidence to show that individual executives or other employees had knowledge that certain actions were or may be unlawful. Waiver of the corporation's privilege, therefore, made it easier for DOJ to convict such individuals, using corporate counsel as a witness at trial. From the corporation's perspective, however, the specter of future waiver made it less likely that individuals would consult with corporate counsel on risky behavior for fear that such an inquiry would itself be evidence of wrongdoing.

The McNulty Memorandum

DOJ received much criticism for its policies on corporate prosecutions under the Thompson Memo. Accordingly, on December 12, 2006, Paul J. McNulty, then-Deputy Attorney General, revised the policies by issuing the so-called McNulty Memo.[5] The McNulty Memo contained the same nine broad factors articulated in prior iterations of DOJ's policy on charging corporations. But the McNulty Memo made significant changes to the two portions of the Thompson Memo relating to the production of privileged materials and consideration of the corporation's payment of attorneys' fees for employees.

With regard to privileged materials, the McNulty Memo authorized prosecutors to request privileged material only "when there is a legitimate need for the privileged information to fulfill their law enforcement obligations." The McNulty Memo affirmed that there must be "a careful balancing of important policy considerations underlying the attorney-client privilege and work product doctrine and the law enforcement needs of the government's investigation." To accomplish this balance, the McNulty Memo recognized two categories of privileged materials. Category I materials consisted of "copies of key documents, witness statements, or purely factual interview memoranda regarding the underlying misconduct, organization charts created by company counsel, factual chronologies, factual summaries, or reports (or portions thereof) containing investigative facts documented by counsel." To request Category I materials, prosecutors were required to secure approval from the United States Attorney in consultation with the Assistant Attorney General for the Criminal Division. Approval would be granted when the prosecutor demonstrated a legitimate need for the information and set forth the scope of the waiver sought.

By contrast, Category II materials included "attorney-client communications or non-factual attorney work product," including "legal advice given to the corporation before, during, and after the underlying misconduct occurred." Examples of Category II materials included "attorney notes, memoranda or reports (or portions thereof) containing counsel's mental impressions and conclusions, legal determinations reached as a result of an internal investigation, or legal advice given to the corporation." Prior to requesting Category II materials, prosecutors were required to secure the approval of the U.S. Attorney in consultation with the Deputy Attorney General for the Criminal Division. Overall, the McNulty Memo made clear that prosecutors should seek Category II materials in rare circumstances and were not permitted to consider a corporation's decision to withhold Category II materials when determining whether to charge the corporation.

In assessing corporate cooperation, the McNulty Memo reversed the government's position on the issue of attorneys' fees. Previously, prosecutors were permitted to weigh or consider whether the corporation appeared to be protecting culpable employees and agents through the payment of attorneys' fees. Pursuant to the McNulty Memo, however, "[p]rosecutors generally should not take into account whether a corporation is advancing attorneys' fees

5 Memorandum from Paul J. McNulty, Principles of Federal Prosecution of Business Organizations (Dec. 12, 2006), available at http://www.usdoj.gov/dag/speeches/2006/mcnulty__memo.pdf.

to employees or agents under investigation and indictment." Rather, the McNulty Memo stated, "In extremely rare cases, the advancement of attorneys' fees may be taken into account when the totality of the circumstances show that it was intended to impede a criminal investigation."

In recognition of a corporation's obligation under state law or contractual arrangements to advance attorneys' fees, the McNulty Memo concluded that such payments "cannot be considered a failure to cooperate."

REVISIONS TO THE UNITED STATES ATTORNEYS' MANUAL

In response to each iteration of DOJ's policy regarding the charging of corporations, Congress and the business and legal communities placed increasing pressure on DOJ to ensure that corporations were not forced to waive the protections of the attorney-client privilege and the work product doctrine in order to receive full cooperation credit in a DOJ investigation. In an open letter to then-Attorney General Alberto Gonzales in May 2006, the American Bar Association criticized the practice and called for a revision of the policy.[6] Two years later, in July 2008, Attorney General Michael Mukasey acknowledged in his testimony before the U.S. Senate Judiciary Committee that DOJ would no longer measure cooperation by waiver of the attorney-client privilege. Members of the Senate Judiciary Committee were skeptical. In particular, Senator Arlen Specter questioned the justification for coercing a waiver of the privilege and raised the possibility that legislation may be necessary. To that end, Senator Specter has introduced legislation that would expressly prohibit U.S. Attorneys or agents, within all federal agencies, from considering a valid assertion of the attorney-client privilege or attorney work product in deciding whether to treat an organization or person as cooperative.

By now it was clear that Congress was on the verge of taking from DOJ significant aspects of its discretion in evaluating corporate cooperation. It was thus no surprise that, on August 28, 2008, Deputy Attorney General Mark Filip announced comprehensive changes to the factors prosecutors may consider in determining whether to bring charges against a corporation (the August 2008 Revision). Underscoring the significance of these changes, Deputy Attorney General Filip declined to issue the policy in the form of a memo bearing his name. Instead, DOJ committed the revisions and policy changes to the United States Attorneys' Manual, which is binding on all federal prosecutors within the Department of Justice. The revisions and policy changes became effective immediately.

The August 2008 Revision reflected dramatic departures from the McNulty Memo with regard to:

(1) The attorney-client privilege and the work product protection;
(2) The treatment of Category II materials described above;
(3) The advancement of attorneys' fees;
(4) The existence of a joint defense agreement and the treatment of employees accused of wrongdoing; and
(5) Requests for certain categories of information.

First, the August 2008 Revision seeks to reverse the perceived erosion in the attorney-client privilege and the work product protection that occurred under prior iterations of DOJ's policy on whether to charge corporations. DOJ recognized that its position on "attorney-client privilege and work product protection waivers has promoted an environment in which those protections are being unfairly eroded to the detriment of all."[7] Prosecutors are now explicitly forbidden from conditioning cooperation credit on waiver of attorney-client privilege or work product protection. Rather, the government's key measure of cooperation is whether the corporation has "timely disclosed the relevant facts about the putative misconduct," not "whether the corporation discloses attorney-client or work product materials."[8] Under the August 2008 Revision, corporations receive the same credit for the timely disclosure of facts not otherwise protected that they would for disclosing identical facts contained in protected materials.

6 Letter from American Bar Association to Attorney General Alberto Gonzales (May 2, 2006), available at http://www.scribd.com/doc/210828/Alberto-Gonzales-Files-American-Bar-Association-to-Gonzales-Letter.
7 See United States Attorneys' Manual § 9-28.000, available at http://www.usdoj.gov/usao/eousa/foia_reading_room/usam/title9/28mcrm.htm#9-28.710.
8 United States Attorneys' Manual, § 9-28.720.

Second, the August 2008 Revision prohibits prosecutors from requesting the disclosure of nonfactual attorney-client communications and attorney work product. In other words, DOJ will not under ordinary circumstances demand that corporations reveal the advice given by counsel to officers, employees, or directors. The government recognized that these communications lie at the core of the attorney-client privilege and can facilitate "a corporation's effort to comply with complex and evolving legal and regulatory regimes." Accordingly, the August 2008 Revision expressly authorizes a corporation to decline disclosure of these communications except where the corporation or one of its employees asserts an advice-of-counsel defense or the communication is in furtherance of a crime of fraud (both of which are rare and time-honored exceptions to the attorney-client privilege).

Third, with regard to attorneys' fees, the August 2008 Revision limits the circumstances under which a prosecutor may ask about an attorney's representation of a corporation or its employees, officers, and directors. A prosecutor may ask questions regarding attorneys' fees when such an inquiry is permitted under the law or if the payment of attorneys' fees constitutes criminal obstruction of justice. Otherwise, prosecutors may no longer consider whether a corporation is advancing or reimbursing attorneys' fees or providing counsel to its employees under investigation or indictment. This policy shift is consistent with the Second Circuit Court of Appeals' unanimous rejection of the prior practice under the Thompson Memo as a violation of a defendant's constitutional right to counsel in *United States v. Stein*.

Fourth, in assessing cooperation, the August 2008 Revision removes from consideration whether the corporation has entered into a joint defense agreement or whether the corporation has disciplined or terminated its employees. The government may consider company action against employees only in assessing the strength of the corporation's compliance program and remedial measures, or the sufficiency of its internal controls. These factors are relevant to the government's charging decision as opposed to an assessment of whether the corporation is cooperating with the government.

A final distinction between the McNulty Memo and the August 2008 Revision centers on a prosecutor's access to certain categories of information. As discussed above, the McNulty Memo required prosecutors to secure approval from the United States Attorney in collaboration with the Assistant Attorney General for the Criminal Division prior to requesting certain types of information from a corporation. Because the August 2008 Revision forbids requests for most of the information previously accessible, the policy no longer contains a process for federal prosecutors to secure approval from Main Justice. Instead, the policy encourages defense counsel to report violations of the new policy to the local United States Attorney or the appropriate Assistant Attorney General.

The August 2008 Revision will have a foreseeable and immediate impact on how corporations respond to investigations by DOJ. No longer are corporations required to waive attorney-client privilege and refuse to support employees with legal counsel. Instead, companies have the flexibility to investigate allegations of wrongdoing responsibly and to fashion ways to cooperate with the government that will protect the attorney-client privilege. Perhaps most important, corporations have received greater assurance that the advice attorneys provide to their officers, directors, and employees will remain confidential in all but the most extraordinary circumstances. This confidentiality lies at the heart of the privilege and can now continue to encourage frank and full discussions with corporate counsel.

CONTINUING RISKS AND CONSIDERATIONS

To the extent that a corporation is seeking to obtain credit for cooperation under this new DOJ policy, some words of caution are in order. Even under these revised policies, corporations face some risk of waiver arising from the disclosure of relevant facts gathered through an attorney-led internal investigation. Such a disclosure, even if carefully designed to avoid revealing privileged communications, may weaken a future claim of privilege or assertion of work product protection in later civil litigation. For example, the disclosure to the government of facts learned during an

attorney's interview of a corporate employee may result in a claim that any privilege or protection has been waived for other aspects of the employee interview or with regard to the underlying subject matter.

Counsel for corporations also must pay close attention to joint defense agreements to make certain that they do not contain provisions that could prove problematic under this new policy. For example, the August 2008 Revision continues to emphasize the "timely" disclosure of relevant facts, and obligations assumed under a joint defense agreement could conceivably interfere with the timing of such a disclosure. In addition, the government might still penalize a corporation for sharing with third parties information it has acquired from the government during the course of the company's cooperation, even if such sharing was mandated by a joint agreement. Conversely, if a joint defense agreement limits the information the corporation can provide to the government, the government might not consider the corporation fully cooperative.

And, when a corporation discovers misconduct, it must act appropriately in its relationship with its employees. Under the August 2008 Revision, when a corporation seeks credit for cooperating with the government, DOJ will still scrutinize the adequacy of its compliance program. DOJ has made clear that the discipline meted out to employees who have engaged in misconduct—up to and including dismissal—remains a factor the government will consider in evaluating the strength of the company's compliance program. The fact that such discipline can no longer be used as leverage by DOJ does not lessen the corporation's responsibility to discipline employees for illegal conduct.

THE KPMG DECISION

The importance of DOJ's new policies was reinforced by a landmark decision issued on the same day as Deputy Attorney General Filip's announcement. In *United States v. Stein*, the Second Circuit rejected as unconstitutional the government's interference with the defendants' right to counsel in the form of advancement of legal fees from their employer, KPMG. Specifically, the circuit court held that the government inappropriately influenced KPMG to adopt and enforce a policy under which KPMG "conditioned, capped, and ultimately ceased advancing legal fees to defendants."[9] The court found that KPMG's conduct amounted to state action and that the government had "unjustifiably interfered with defendants' relationship with counsel and their ability to mount a defense, in violation of the Sixth Amendment." The circuit court unanimously affirmed the district court's extraordinary remedy of dismissing the indictment against the former KPMG partners and employees.

The indictment of these KPMG employees stemmed from the government's investigation of the firm's possible involvement in creating and marketing fraudulent tax shelters. The timing of the government's investigation coincided with the application of the Thompson Memo, which directed prosecutors to inquire about a corporation's protection of culpable employees "through the advancing of attorneys fees," among other factors. According to the Second Circuit, KPMG learned in February 2004 that the firm and 20 to 30 of its top partners and employees were subjects of the grand jury investigation of fraudulent tax shelters. KPMG elected to cooperate with the government's investigation. In a 2004 memorandum to all partners, KPMG's CEO acknowledged the existence of the government's investigation and, consistent with its partnership structure, advised KPMG partners that "[a]ny present or former members of the firm asked to appear will be represented by competent coun[sel] at the firm's expense." KPMG also opted to advance legal fees to counsel for employees whom the government interviewed or subpoenaed to appear before the grand jury.

The parameters of KPMG's cooperation were negotiated through a series of meetings and memorialized in notes and in correspondence between counsel for KPMG and the government. The advancement of attorneys' fees became a focal point in these negotiations, as the government insisted that culpable employees should not receive a benefit for their "misconduct" under the "federal guidelines." The court found that the government had used the prospect of indictment—fatal to an accounting firm—to force KPMG to adopt and apply a policy that conditioned the payment of

9 See *United States v. Stein*, No. 07-3042-cr, 2008 WL 3982104, at *1 (2d Cir. Aug. 28, 2008).

attorneys' fees on cooperation with the government. (Factually, the district court also found that the government used KPMG to discourage employees from retaining counsel at all.) Specifically, KPMG conditioned payment of attorneys' fees on cooperation, capped attorneys' fees at a certain amount, and terminated the payment of attorneys' fees for any employee who refused to be interviewed or who was subsequently indicted.

To implement this policy, KPMG invited the government to inform KPMG counsel whenever an employee had failed to cooperate with the government's investigation. The court found that over the course of the government's investigation, whenever the government complained that an employee had failed to cooperate, KPMG advised counsel for the employee that KPMG would stop advancing attorneys' fees if the employee did not cooperate. KPMG also made clear to the government and to employees its intention to terminate any employee who failed to cooperate. By acquiescing to the government's pressure, KPMG obtained a Deferred Prosecution Agreement with the government in August 2005. The agreement required KPMG to continue its cooperation with the ongoing investigations and prosecutions of its employees. Otherwise, KPMG would lose the benefit of the agreement and face indictment.

Meanwhile, the government indicted a number of KPMG employees. It was these defendants who subsequently challenged the government's conduct as unconstitutional. Specifically, the employees moved to dismiss the indictment on the grounds that the government's conduct deprived them of their right to counsel in violation of the Sixth Amendment and their right to due process in violation of the Fifth Amendment. The district court agreed and dismissed the indictment; the circuit court affirmed. Effectively, the circuit court's decision repudiates the government's prior practice of considering the advancement of attorneys' fees as a factor in measuring cooperation. That practice, of course, has now been abandoned under DOJ's new policies.

PENDING LEGISLATION

As noted above, DOJ's policies regarding the corporate attorney-client privilege also have resulted in legislative initiatives. At least one such bill now pending in Congress may yet become law.

On November 13, 2007, the U.S. House of Representatives passed H.R. 3013, the Attorney-Client Privilege Protection Act of 2007, to provide appropriate protection to assertions of attorney-client privilege and attorney work product.[10] The House bill prohibits U.S. Attorneys or agents from considering five factors in determining whether an organization or person is cooperating with the government:

(1) A valid assertion of the attorney-client privilege or attorney work product;
(2) The advancement of attorneys' fees and expenses of an employee;
(3) Entry into a joint defense, information-sharing, or common interest agreement with an employee;
(4) The sharing of relevant information with an employee; and
(5) Failure to terminate or sanction an employee who has exercised a constitutional right or legal protection in response to a government request.

Senator Arlen Specter introduced a similar measure, the Attorney-Client Privilege Protection Act, on June 26, 2008.

Even before the August 2008 Revision was issued by DOJ, Senator Specter signaled that legislation might be unavoidable. In a July 10, 2008, letter to Deputy Attorney General Filip, Senator Specter questioned whether it was sufficient to measure cooperation on the facts and evidence provided when such facts or evidence may have been obtained from individuals who were relying on the attorney-client privilege when they disclosed certain facts or information to counsel.[11] Recognizing the possibility that factual and nonfactual attorney work product may overlap, Senator Specter

10 See H.R. 3013—110th Congress (2007): Attorney-Client Privilege Protection Act of 2007, GovTrack.us (database of federal legislation), available at http://www.govtrack.us/congress/bill.xpd?bill=h110-3013.

11 Letter from Senator Arlen Specter to the Honorable Mark Filip (July 10, 2008), available at http://specter.senate.gov/public/index.cfm?FuseAction=NewsRoom.NewsReleases&ContentRecord__id=09ee0cfc-978b-d2cb-c6e6-511bec8ea4ea&Region__id=&Issue__id=&IsPrint=rruc.

explained that the government's proposed revision failed to address this area. Further, Senator Specter questioned the relevance of joint defense agreements and adverse employee action in measuring cooperation. Before closing his letter, Senator Specter expressed concern that the proposed revisions could be subject to modification by any subsequent Attorney General and were not binding on other federal agencies.

Following the announcement of DOJ's revised policies, Senator Specter again expressed his concern that DOJ's changes do not go far enough. In his August 28, 2008, statement responding to the revised guidelines, Senator Specter recognized that the revisions were "a step in the right direction" but were lacking in several respects.[12] Senator Specter stated, by way of example, that "there is no change in the benefit to corporations to waive the privilege by giving facts obtained by the corporate attorneys from the individuals in order to escape prosecution or to have a Deferred Prosecution Agreement."

As compared to DOJ's revisions, the proposed legislation would strengthen the attorney-client privilege by expressly forbidding government counsel or agents from considering a valid assertion of attorney-client privilege or attorney work product. Similarly, the proposed legislation does not restrict a corporation's ability to share information it has received from the government with others who are part of a joint defense agreement or common interest agreement. Further, the government would be prohibited from assessing employee termination or sanction as a measure of cooperation. Congressional legislation would have a binding effect on government agencies other than DOJ, none of which are bound by the August 2008 Revision.

HOW CORPORATIONS SHOULD RESPOND

DOJ's revisions to its corporate charging guidelines provide an excellent opportunity for corporate counsel and compliance professionals to examine their policies regarding internal investigations and employee relations. In undertaking such a review, organizations should start with the following three fundamental policies.

The role of counsel in conducting internal investigations

As always, a critical component of corporate policy on internal investigations is whether and when counsel should direct the investigation. When the issues involved in an investigation are sufficiently serious, attorney involvement is, of course, necessary to protect appropriately the company's interests. DOJ's new policy on corporate cooperation provides additional assurances that, even when counsel directs an investigation, privileged communications likely will remain confidential. The policy does not, however, change the fact that revealing the conclusions of an attorney-led investigation might risk waiver of the privilege. Accordingly, corporations cannot simply assume that everything counsel does in an internal investigation will remain confidential and privileged. With the help of qualified counsel, corporations still must weigh these competing considerations and fashion counsel's role carefully.

When to discipline employees

Under the revised guidelines, DOJ allows corporations more flexibility and discretion in employment matters arising from alleged illegal conduct. Corporate leadership may exercise discretion in determining whether to keep an individual employed until the government's investigation has been resolved or, instead, to terminate the employee immediately. Corporations also may steer a middle course and adopt policies that provide for paid or unpaid leave during the course of an investigation. When deciding how to discipline employees, though, a corporation must always remain cognizant that the reasonableness of its actions will continue to be a factor in the government's analysis of the effectiveness of its compliance program.

Whether to indemnify and advance legal fees

Under DOJ's new policy, a company may advance legal fees to employees in good faith without concern that the action will harm the company's ability to cooperate with the

12 See Senator Arlen Specter Press Release (Aug. 28, 2008), available at http://specter.senate.gov/public/index.cfm?FuseAction=NewsRoom.NewsReleases&ContentRecord__id=0aa887f0-f40c-f557-5dbb-4aef8032b8f9.

government. Under DOJ's prior policies, some companies had instituted bylaws providing for mandatory advancement of legal fees. Such policies were intended to avoid any accusation by DOJ that the choice to advance legal fees to any particular individual was an indication that the company was uncooperative. The downside to such a mandatory policy was that the corporation might find itself advancing legal fees to a malefactor who clearly should not receive the organization's support. Under DOJ's new policy, however, a corporation can retain the discretion to advance (or not advance) legal fees without risk of harming its standing with the government.

CONCLUSION

DOJ's revised policies on corporate cooperation provide a welcome change of direction for the government in its attempts to shape responsible conduct by organizations. These policies have always been based, at least in part, on a desire to cause corporations to police their own ranks and to assist the government in bringing individual lawbreakers to justice. In the past, however, DOJ has often overstepped the bounds of wise policy and injured important legal protections, such as the attorney-client privilege and the constitutional right to counsel. Now that Deputy Attorney General Filip has brought DOJ policy more closely in line with these principles, corporations and their attorneys must reconsider how best to structure compliance programs and policies that likewise strike the proper balance between protecting the organization, treating employees fairly, and ensuring that the laws governing corporate conduct are followed appropriately.

LAWYER CONTACTS

For further information, please contact one of the authors listed below. General email messages may be sent using our "Contact Us" form, which can be found at www.jonesday.com.

R. Christopher Cook
1.202.879.3734
christophercook@jonesday.com

Joseph Clark
1.202.879.3697
jwclark@jonesday.com

Christopher Cook is a partner in the Washington Office of Jones Day, where he represents health care companies in criminal investigations and civil litigation. Chris came to Jones Day from the Chicago U.S. Attorney's Office in 1997.

Joseph Clark is a partner in the Washington Office of Jones Day. Joe left the Washington, D.C., U.S. Attorney's Office in 2005 and is active in Jones Day's white collar practice.