



Letter from America
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WELCOME

Letter from America takes an in-depth look at legal issues in the United States that may have an impact on your business here in Europe.

In this issue we focus on:

- New DOJ Guidelines: Fig Leaf to Avoid Legislation?; and
- Increased and Varied FCPA Enforcement Involving the Energy Sector

New DOJ Guidelines: Fig Leaf to Avoid Legislation?

By [Jeffrey B. Coopersmith \(Seattle\)](#) and [Kevin D. Galbraith \(New York\)](#)

For the fifth time in a decade, the United States Department of Justice (the "DOJ") has issued a new policy for the investigation and prosecution of business organizations. For EU and UK companies doing business within the United States, the new policy will have an impact on them should they become enmeshed in a criminal inquiry led by U.S. prosecutors.

The latest revisions relate primarily to the attorney-client and work product privileges. Deputy Attorney General Mark Filip announced the revisions at a press conference in late August conducted at the New York Stock Exchange--a site chosen to acknowledge the business community's intense interest in the issue.

The new policy, "Principles of Federal Prosecution of Business Organizations," now incorporated as Sections 9-28.000 through 9-28.1300 of the United States Attorney's Manual, reflects the DOJ's further reaction to the sustained criticism from many respected members of the bar including former Attorneys General and other federal prosecutors.

That criticism has focused primarily on the DOJ's policies of measuring an entity's "cooperation" with a criminal investigation in part by its willingness to waive the attorney-client and work-product privileges. The controversy reached its high point with the Stein case¹.

In Stein, United States District Judge Lewis Kaplan found, among other things, that the government's use of the DOJ cooperation policy announced in the 2003 Thompson Memorandum² resulted in a denial of defendants' Sixth Amendment right to counsel. This finding justified dismissal of indictments against 13 former KPMG officials swept up in an abusive tax shelter investigation.

Judge Kaplan's decision in Stein was affirmed by the United States Court of Appeals for the Second Circuit (covering New York, Connecticut and Vermont) on the same day the DOJ announced its new policy (timing that was apparently coincidental)³.

Moreover, for several years, Congress has been considering legislation that would protect the attorney-client and work product privileges that commentators and the business community believe were eroded by the Thompson Memorandum and not sufficiently restored by its 2006 successor, the McNulty Memorandum⁴. Just prior to the announcement of the DOJ's new policy, proposed legislation had passed the House and final action by the Senate appeared potentially imminent.

With the new policy, the DOJ concedes that it hopes to stave off legislative action and argues that a statute would tie its hands as it works to fight corporate malfeasance and to protect the integrity of the markets.

Key Changes of the New DOJ Policy

The most important change concerns attorney-client privilege and attorney work product protection. The new policy seemingly prohibits the Department outright from considering a business organization's decision to waive the attorney-client privilege and attorney work product protection as a factor in assessing the entity's cooperation. The 2003 Thompson Memorandum allowed such consideration, and the perceived abuse of this authority by some federal prosecutors has been a driving force behind efforts to persuade the DOJ or Congress to change the policy.

The 2006 McNulty Memorandum attempted to address and resolve the controversy by creating a fairly complicated system of approval by different levels of senior officials when line federal prosecutors requested that business organizations be allowed to waive the privileges. Waivers could be granted depending on whether the particular waiver request was directed at heavily protected "opinion" work product or more lightly protected "fact" work product.

The McNulty Memorandum did not quell the controversy, leading to continuing debate within the Department, as well as in Congress and the bar.

The new 2008 DOJ policy expressly recognizes that "the attorney-client privilege and attorney work product protection are essential and long-recognized components of the American legal system" and states that "[e]ligibility for cooperation credit is not predicated upon the waiver of attorney-client privilege or work product protection."

The new policy flatly prohibits federal prosecutors from asking a business organization to disclose the mental impressions or legal theories of its lawyers, or communications between the organization's personnel and its counsel "regarding or in a manner that concerns the legal implications of the putative misconduct at issue."

However, the new policy provides that, just as individuals typically demonstrate cooperation with government investigations by disclosing their knowledge of facts relating to the alleged wrongdoing, so too must business organizations disclose their "knowledge" of the underlying facts to gain entitlement to cooperation credit.

The policy recognizes that entities frequently gather facts through investigations conducted by lawyers, "a process that may confer attorney-client privilege or attorney work product protection on at least some of the information collected," but also points out that an entity may choose to gather facts through interviews of company personnel by non-lawyers. The new policy purports to leave the choice of the method of fact-gathering to the business organization. The operative question in assigning cooperation credit for the disclosure of information, the policy states, is: "Whichever process the corporation selects, the government's key measure of cooperation must remain the same as it does for an individual: has the party timely disclosed the relevant facts about the putative misconduct?"

A second key change made by the new DOJ policy relates to the issue of joint defense agreements, which allow defendants to share information and strategies in confidence. When determining how cooperative a company had been, prosecutors formerly could hold against it the mere fact that it had entered into a joint defense agreement. The new policy recognizes that there are legitimate reasons why a company might enter into a joint defense agreement in certain circumstances and forbids prosecutors from requesting that a company not do so.

It advises companies, however, that they may want to avoid putting themselves in the position of being unable, as a result of a joint defense agreement, to provide relevant facts, thereby limiting their ability to seek cooperation credit. The Department suggests that companies may want to craft or participate in joint defense agreements that provide flexibility to cooperate when appropriate.

Finally, a third key change concerns a business organization's actions in disciplining or terminating the employment of wrongdoers.

The previous policy allowed prosecutors, when assessing cooperation, to consider whether a company disciplined or terminated the employment of employees. Under the new policy, the government may only consider whether a company has disciplined employees the company has decided were culpable, and then only as part of evaluating the company's remedial measures or its compliance program.

The Impact

Since these new guidelines are very recent, it is difficult to predict their ultimate impact with any degree of certainty.

However, we may note that to date reaction to the changes has been mixed. In July, Deputy Attorney General Filip telegraphed these coming changes in a letter to Senators Patrick Leahy (D-VT) and Arlen Specter (R-PA). Senator Leahy indicated that he was cautiously optimistic about the value of the new guidelines, while Senator Specter expressed a sense that the changes were too little, too late. The senior Pennsylvania senator's response betrayed his frustration with the Department's latest attempt to head off the legislation he has championed, and which appears to have broad bipartisan support.

Reaction in the defense bar has been similarly mixed. Some, perhaps hopefully, thought Deputy AG Filip's letter heralded long awaited, fundamental changes in the way prosecutors would approach these key issues and a newfound recognition that the criticisms were valid and important. Other prominent, longtime critics of the prior policies rejected the proposed changes as a diversion, intended to do just enough to stop Congress from intervening in a way that would secure, once and for all, attorney-client privilege, work product protection and employees' Fifth and Sixth Amendment rights.

Now that the changes have arrived as advertised and the legal and business communities are beginning to respond, there is a general sense that, while the new DOJ policy represents a welcome and important change, legislation may still be necessary. As John Wesley Hall, president of the National Association of Criminal Defense Lawyers put it, "[i]t does look good on paper, but there really ought to be a law."

Those supporting a legislative approach argue that the revised policy falls short in at least three key ways.

First, it is by definition policy, not law, so it could be altered or even reversed at any time by the attorney general, and companies would find themselves back in the place they were prior to August this year..

Second, DOJ policy does not bind other regulatory enforcement agencies. Note, however, that the Securities and Exchange Commission Division of Enforcement issued its own enforcement manual in October of this year; its manual conforms to the new DOJ policy on privilege waivers, although it remains to be seen how this will be carried out in practice.

Third, although the new policy states that a business organization's disclosure to the government of the relevant facts is the test of its cooperation, not its waiver of privileges, in view of the fact that entities are likely to have to continue gathering facts about putative misconduct through internal investigations conducted by lawyers, it is unclear how a company could, in practice, cooperate without waiving at least the protection for "fact" attorney work product. This is particularly so because entities are often unable to make available potentially culpable individuals to the government once those individuals retain their own counsel leaving the company's investigation conducted by counsel as the only immediate source of the facts.

Of course, much of the impact of the DOJ's new policy will have to be assessed based on the way individual federal prosecutors and United States Attorney's Offices around the country put it to use, if legislation is not enacted first. At the least, however, the ability of the government to deploy cooperation credit as a bludgeon to force privilege waivers appears to be in the past. But as a practical matter, companies may well see the disclosure of facts collected by lawyers as the only alternative to satisfy the Department's policy that will earn cooperation credit.

It seems quite possible, perhaps even likely, that the new DOJ policy will not result in fundamental change, with one exception: business organizations will now be able to more fully shield their lawyers' analyses of the facts—that is, mental impression and opinion work product—from the DOJ, if not from the civil regulatory agencies.

Best Practices

At the first sign of criminal wrongdoing with implications inside the U.S. (e.g., insider trading within a company whose stock is listed on a U.S. exchange, or a fraud whose alleged victims reside in the U.S.), it is critical that a UK or EU company seek counsel well versed in federal grand jury investigations and prosecutions. Such counsel may provide crucial advice on how best to proceed, from the initial steps of the inquiry through to final resolution.

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An earlier version of this article appeared in Securities Law360 on September 2, 2008.

¹ United States v. Stein, 435 F. Supp. 2d 330 (S.D.N.Y. 2006). Stein focused on another controversial aspect of prior DOJ policy (incorporated in

the Thompson Memorandum) involving the denial of cooperation credit to a business organization for voluntarily advancing fees to alleged wrongdoers, but the case became the leading edge of a wave of broader criticism of DOJ policy.

² The Thompson Memorandum is available [here](#)

³ United States v. Stein --- F.3d ----, 2008 WL 3982104 (2d Cir. Aug 28, 2008).

⁴ The McNulty Memorandum is available [here](#)

Increased And Varied FCPA Enforcement Involving the Energy Sector

by [Palmina M. Fava](#) and [Keren Tenenbaum](#) (New York)

Energy companies face increased prosecutions under the Foreign Corrupt Practices Act (FCPA), with severe consequences.

Notably, the enforcement focus appears to be shifting from investigations into the United Nations Oil-for-Food Programme to investigations in new geographical areas where oil resources are being developed and where corruption is perceived to be a high risk.

In addition, more enforcement actions have been initiated against oilfield services providers rather than oil companies. In fact, the largest monetary penalty imposed by regulators in any FCPA case to date was imposed on an oilfield service company. That fine – totaling over \$44 million – involved allegations of bribing officials in Kazakhstan's national oil companies.

The energy sector is particularly vulnerable to FCPA violations for two reasons. First, government licenses are critical to operations. Second, many oil-rich countries are developing economies that lack the infrastructure and controls necessary to combat corruption, thereby creating more opportunities for undetected bribery in the public and commercial sectors.

Recent Settlements

Last month, an oilfield construction services provider and its subsidiary entered a deferred prosecution agreement with the Department of Justice (the DOJ) and a settlement with the Securities and Exchange Commission (the SEC) over allegations that its former employees and partners had made improper payments in Africa and Central America. The company paid a criminal fine and had to make disgorgement, which is the payment back of illegal profits of over \$8 million.

Similarly, in November 2007, an oil and gas company reached a settlement with the SEC in which it agreed to pay a civil fine and to disgorge \$25 million in profits in connection with allegations that its subsidiary's employees or agents had made unlawful payments to Iraqi officials for oil purchased in 2001 and 2002 under the Oil-for-Food Programme.

The penalty imposed on the oil company was larger than the penalty imposed on four other corporations implicated in the Oil-for-Food scandal, who all settled similar charges involving alleged violations of the books and records and internal controls provisions of the FCPA when their subsidiaries allegedly paid, or promised to pay, kickbacks to Iraqi government officials through third-party agents.

In each instance, the United States government examined the scope of the company's compliance program and the resources the company devoted to compliance. The findings of these examinations clearly affected the outcomes.

The government's conduct demonstrates that a robust compliance program is essential. Companies must be able to prove that their culture is inimical to corruption. A policy without teeth will not protect a company from prosecution, much less prevent misconduct.

Company executives also must be mindful of the risks of personal liability in connection with FCPA violations. In November 2007, a former executive of an oilfield construction services provider entered into an agreement with the DOJ, in which he pled guilty to violations of the FCPA, namely conspiring to give Nigerian officials more than \$6 million in bribes to secure gas pipeline construction business. The executive faces five years in prison and a \$250,000 fine. On May 14, 2008, the executive settled a related FCPA action brought against him by the SEC.

Ongoing Investigations: An Industry-Wide Probe

The DOJ is currently investigating possible FCPA violations at more than a dozen large oil and gas services companies, including the world's largest oilfield services provider and the world's largest offshore oil and gas driller, as part of an industry-wide probe. This emerging trend of conducting industry-wide investigations of multiple companies may have significant implications for companies that currently are not under investigation. Such inquiries allow the DOJ and the SEC to obtain information on companies that were not initially targeted and thus widen their investigation.

The DOJ is now investigating a Swiss-based freight company for making improper payments to customs agents in Nigeria. As part of that investigation, it has sent letters to oil and services companies. Many of these companies have commenced internal investigations into payments made through the freight company as their agent. For example, in March 2008, a global group of energy and petrochemicals companies disclosed in its Annual Report and Form 20-F for the year ended December 31, 2007 that it has started its own internal investigation following an inquiry by the DOJ regarding its use of the freight company's services.

Companies that have reason to believe they are subject to investigation should examine their compliance and internal audit programs, review their transactions with government officials and consider self-reporting possible violations. Such voluntary action may help ameliorate potential enforcement actions.

International Enforcement Growing More Aggressive

More aggressive international enforcement and cross-border cooperation are other emerging trends of which companies must be aware. In a recent case, the DOJ asserted jurisdiction over a company whose principal place of business is outside the United States, whose alleged improper conduct occurred outside the United States and who had been fined in Europe in connection with such misconduct.

This case is a precursor for a future in which international oil companies may face the increased likelihood of multiple enforcement actions in multiple country jurisdictions. Notably, the United States and Nigeria are reportedly conducting a joint investigation of alleged improper payments made by United States oilfield service companies to Nigerian government officials.

Energy Sector Companies Must Adopt a Proactive Approach

With FCPA enforcement against the energy sector on the rise, companies should be aware of certain areas of potential risk and take a proactive approach toward compliance.

A primary area of risk involves mergers and acquisitions in which the acquiring companies may assume successor liability for FCPA violations if they fail to conduct appropriate due diligence. Under the "willful blindness" doctrine, a prosecution can be brought against a party that had no "knowledge" of corrupt payments if the company was aware of potential "warning signs" and consciously failed to conduct adequate due diligence. As a consequence, companies should undertake FCPA-sensitive due diligence whenever they acquire a significant stake in another entity.

Another common risk involves third-party agents, whose activities can impose FCPA liability on the companies for whom they act. Accordingly, it is critical for companies to develop strict due diligence procedures for vetting and approving relationships with third parties including consultants, joint venture and teaming partners, distributors and sub-contractors. Contracts with third parties must set forth the FCPA's prohibitions and requirements and demand compliance.

To ensure compliance with the FCPA, it is crucial for companies to maintain up-to-date corporate policies on the FCPA, implement a strong compliance program, monitor activities of its agents and employees involving government officials and conduct intensive training.

In the event that a company learns of a potential FCPA violation, it must act promptly and efficiently to minimize the impact on its business. The company should obtain legal assistance on a range of issues including how to conduct an internal investigation, whether to voluntarily disclose the violations to the authorities, and what remedial actions to take.

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