

**Department Of Justice Issues New Guidance On
Prosecution Of Business Organizations: Protects Privilege
And Puts A Premium On Self-Review And Remediation**

September 2008

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On August 28, 2008, Deputy Attorney General Mark R. Filip released revised guidelines concerning the Principles of Federal Prosecution of Business Organizations (the "Filip Principles"). The Filip Principles replace previously issued guidelines by Deputy Attorney General Paul J. McNulty (the "McNulty Memorandum") and the other memoranda on which the McNulty Memorandum was based.¹ The Filip Principles, along with predecessor memoranda issued by previous Deputy Attorneys General, provide insight into the current tenor of the Justice Department, which, like many governmental organizations, evolves with time. The current state of the guidelines are of utmost importance to business organizations, their counsel and other interested parties in determining not only the most appropriate course of conduct when companies are faced with evidence or allegations of wrongdoing but also in determining how to structure compliance programs generally.

This Alert focuses primarily on the changes that the Filip Principles make to the McNulty Memorandum. Perhaps the most widely anticipated aspect of the revised principles concerns the treatment of attorney-client privilege and work product protection in the context of assessing a company's cooperation. While of utmost importance (and discussed in more detail below), the Filip Principles also highlight the more fundamental concept of whether or not a company is required to self disclose potential wrongdoing, and emphasize the importance of self-review and remediation,

¹ For a more complete discussion of the McNulty Memorandum and its predecessors, please consult the published treatise, Abikoff, *Corporate Governance: Avoiding and Responding to Misconduct*, Chapter 8 (Law Journal-Seminars Press, first published July 2007 and updated semi-annually since).

including in situations where a decision is reached not to make a self disclosure. At base, the Filip Principles make clear that while companies are not required to self disclose potential misconduct, companies are expected to conduct thorough internal reviews aimed at discovering and properly remediating any wrongdoing. Doing so through counsel can have the added benefit of conferring attorney-client privilege and/or work product protection on certain information learned during the course of the investigation.

Overview of Prosecutorial Factors

Before assessing the differences between the Filip Principles and the McNulty Memorandum, it is helpful to note briefly the factors that prosecutors are expected to take into account when “conducting an investigation, determining whether to bring charges, and negotiating plea or other agreements” with companies. The nine factors are as follows: (i) the nature and seriousness of the offense, including the risk of harm to the public and applicable policies and priorities, if any, governing the prosecution of corporations for particular categories of crime; (ii) the pervasiveness of wrongdoing within the corporation, including the complicity in, or condoning of, the wrongdoing by corporate management; (iii) the corporation’s history of similar misconduct, including prior criminal, civil, and regulatory enforcement actions against it; (iv) the corporation’s timely and voluntary disclosure of wrongdoing and its willingness to cooperate in the investigation of its agents; (v) the existence and effectiveness of the corporation’s pre-existing compliance program; (vi) the corporation’s remedial actions, including any efforts to implement an effective corporate compliance program or to improve an existing one, to replace responsible management, to discipline or terminate wrongdoers, to pay restitution, and to cooperate with the relevant government agencies; (vii) collateral consequences, including whether there is disproportionate harm to shareholders, pension holders, employees, and others not proven personally culpable, as well as impact on the public arising from the prosecution; (viii) the adequacy of the prosecution of individuals responsible for the corporation’s malfeasance; and (ix) the adequacy of remedies such as civil or regulatory enforcement actions.

These factors are, of course, not exclusive, and may be weighted differently by prosecutors depending on the particular facts of the investigation, but they are illustrative of the calculus that should go into the prosecutor’s decision on whether or not to criminally charge a corporation (or enter into alternatives) and, if so, the extent of those charges.

The Value of Cooperation

The Filip Principles can be read to diverge from the McNulty Memorandum in the value of cooperation and what may or may not be considered in assessing a company's cooperation. The decision of whether or not to cooperate with federal prosecutors is one of the most difficult decisions that a corporation confronted with evidence or allegations of misconduct can face. In order to make the decision in the most informed manner, it is necessary to conduct a thorough review and evaluation of the particular factual circumstances at issue.

The Filip Principles seek to provide clarity to the business community on what it means to cooperate and the impact of that action on the ultimate decision to prosecute the company. It states that:

[S]o long as the corporation timely discloses relevant facts about the putative misconduct, the corporation may receive due credit for such cooperation, regardless of whether it chooses to waive privilege or work product protection in the process. Likewise, a corporation that does not disclose the relevant facts about the alleged misconduct – for whatever reason – typically should not be entitled to receive credit for cooperation. . . . [T]he government cannot compel, and the corporation has no obligation to make, such disclosures. . . . [A] corporation's failure to provide relevant information does not mean the corporation will be indicted. It simply means that the corporation will not be entitled to mitigating credit for cooperation." (footnotes omitted)

The Filip Principles make clear that there exist favorable aspects of cooperation for the government and, potentially, other stakeholders (such as shareholders and employees). For example, the government is often able to conserve resources and avoid delays by having the company cooperate, and similarly a company may be able to avoid serious reputational harm and move more quickly past a potentially difficult time. Nevertheless, as revised, the Filip Guidelines also make clear that a determination of whether to cooperate, including self disclosing wrongful conduct, is a business decision and is not required, albeit with the consequence that the ability to seek mitigation may be impaired.

Impact on Attorney-Client Privilege and Work Product Protection

The Filip Principles explicitly indicate that "waiving the attorney-client and work product protections has never been a prerequisite under the Department's prosecution guidelines for a corporation to be viewed as cooperative." The Filip Principles make

clear that although a corporation is always free to waive such protections on its own, federal prosecutors need *facts*, not privileged information, to advance their law enforcement goals. For this reason, the Filip Principles state that “prosecutors should not ask for such waivers and are directed not to do so.”²

The Filip Principles state that the most valuable type of information for prosecutors, and indeed what will ultimately determine whether or not a corporation receives cooperation credit, is the disclosure of factual information. The guidelines recognize that the process of collecting relevant factual information can take many forms, including through an internal investigation conducted by attorneys. Properly conducting an investigation in such a manner may confer attorney-client or work product protection on certain aspects of the investigation, a factor that a company should closely consider when determining how to structure their investigation. For example, the Filip Principles state that “corporate personnel are typically interviewed during an internal investigation. If the interviews are conducted by counsel for the corporation, certain notes and memoranda generated from the interviews may be subject, at least in part, to the protections of attorney-client privilege and/or attorney work product.” Cooperation credit is not predicated on turning over these items, but rather depends on whether or not the company has disclosed certain of the factual information obtained in connection with those interviews. It is therefore crucial that a company wishing to retain the benefits of the attorney-client and work product protections appropriately structure such reviews, including ensuring that they are conducted through qualified counsel.

Attorney’s Fees and Joint Defense Agreements

The Filip Principles also make clear that prosecutors are not to take into account when assessing cooperation whether a corporation is paying or advancing attorneys’ fees for an employee, nor may they request a corporation not to do so. The participation by a corporation in a joint defense agreement is also not to be taken into account when assessing cooperation. Of course, the Filip Principles indicate that to the extent such joint defense agreements prevent the disclosure of relevant factual information, this may be taken into account when assessing a company’s cooperation. To this end, it is advisable that companies considering joint defense agreements craft them in a manner that provides appropriate flexibility.

² Two well-recognized exceptions to this general rule exist. The first is when a company asserts an “advice-of-counsel” defense, and the second is when the communications are made in furtherance of a crime or fraud.

Emphasis on Appropriate Remediation

In keeping with past guidance, the Filip Principles also place emphasis on taking appropriate remedial measures, including the discipline or termination of employees who may be culpable of misconduct. They state that “[a] corporation’s response to misconduct says much about its willingness to ensure that such misconduct does not recur.” Recognizing the difficulty associated with making adverse personnel decisions, the Filip Principles indicate that “[a]lthough corporations need to be fair to their employees, they must also be committed, at all levels of the corporation, to the highest standards of legal and ethical behavior. Effective internal discipline can be a powerful deterrent against improper behavior by a corporation’s employees.”

Take-Aways

Key guidance to be gleaned from the Filip Principles include:

- *No General Duty to Self Disclose* – the Filip Principles make clear that companies do not have a general duty to self disclose evidence or allegations of wrongdoing. Doing so may be considered when assessing whether or not a company cooperated with federal prosecutors, but it is not required.
- *Importance of Properly Conducting a Self-Review* – the Filip Principles highlight the importance of conducting a thorough self-review, particularly for companies that choose not to self disclose. A thorough investigation allows companies to fully understand the nature and extent of the potential wrongdoing, and may serve as a means by which the company can not only remediate issues that are discovered (retroactively and proactively) but also can communicate relevant factual information to federal prosecutors should it decide to cooperate with authorities. Additionally, structuring a review through counsel may provide attorney-client and work product protections to information that would not receive such protections if company personnel conducted the review.
- *Appropriate Remediation Expected* – federal prosecutors expect that companies will take appropriate remedial action after becoming aware of evidence or allegations of misconduct, including possible termination of culpable employees. Such actions send a clear message that misconduct will not be tolerated.
- *Attorney-Client Privilege and Work Product Implications* – the Filip Principles reinforce the fundamental importance of the attorney-client privilege and work product protection and make clear that waiver of such protections will not be considered when assessing a company’s cooperation.

- *Recognition of Non-Prosecution and Deferred Prosecution Agreements* – the Filip Principles recognize that non-prosecution and deferred prosecution agreements may be a suitable “third option, besides a criminal indictment, on the one hand, and a declination, on the other.” This recognition reflects an increase in such agreements in recent years, particularly in the context of certain enforcement activity, such as that associated with the Foreign Corrupt Practices Act.

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September 2008

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