

# Waivering on Waivers: The Filip Policy and the Possible Demise of “Coerced” Corporate Privilege Waivers

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“The name of the game in corporate fraud prosecutions now is cooperation.”<sup>1</sup> That notion took root in the early to mid-1990s, but became firmly entrenched in our legal system in the aftermath of the Enron and Worldcom corporate scandals. Over the past decade, the Department of Justice has adopted policies to help prosecutors aggressively combat corporate wrongdoing and corruption. In June 1999, Deputy Attorney General Eric H. Holder issued a policy memorandum entitled “Federal Prosecution of Corporations” (Holder Memo).<sup>2</sup> The Holder Memo, although advisory, set forth standards by which a corporation (as opposed to individual employees or officers) would be judged cooperative in a federal criminal investigation. Its progeny, the Thompson and McNulty Memos, so-named after Deputy Attorneys General Larry Thompson and Paul McNulty, respectively, gained notoriety for promulgating policies that were designed to induce corporations to waive applicable attorney-client and work product protections in criminal prosecutions.<sup>3</sup>

The Thompson and McNulty Memos were widely panned for “compelling” corporations to waive privilege protections in order to either avoid indictment or secure leniency. Detractors complained that these policies fomented a “culture of waiver,” which eroded the attorney-client privilege, chilled dialogue between company employees and in-house attorneys, and undermined a lawyer’s ability to counsel compliance with the law. In an effort to blunt legislation designed to address these concerns, Deputy Attorney General Mark Filip released revised corporate charging guidelines on August 28, 2008 (Filip Policy).<sup>4</sup> The Filip Policy retreats dramatically from the waiver policies of its predecessors by effectively barring federal prosecutors from requesting corporate waivers and from considering a company’s refusal to furnish a waiver when deciding whether to press charges. Nevertheless, skepticism abounds in the legal community, as critics clamor for legislators to put an end to ever-shifting DOJ policies and enact lasting change.

Given the recent promulgation of the Filip Policy, however, it may be premature for legislators to take action. The efficacy of the Filip Policy in satisfying the twin goals of arresting further ero-

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<sup>1</sup> David Anders, Former Ass’t U.S. Attorney for the Southern Dist. of NY, Securities Fraud Unit, Speech at the University of Maryland School of Law’s Roundtable on the Criminalization of Corporate Law (Apr. 21, 2006), *reprinted in* 2 J. Bus & TECH. L. 71, 72 (2007).

<sup>2</sup> Memorandum from Eric Holder, Deputy Att’y Gen., U.S. Dep’t of Justice, to Component Heads and United States Attorneys, Bringing Criminal Charges Against Corporations (June 16, 1999) (Holder Memo), *available at* <http://www.usdoj.gov/criminal/fraud/docs/reports/1999/chargingcorps.html>.

<sup>3</sup> Although the series of memos discussed here contain multiple factors prosecutors should consider in determining whether to charge a corporation, the sole focus of this article will be on the guidelines bearing on waiver of the attorney-client privilege.

<sup>4</sup> The revised principles are set forth, not as a memo, but in the United States Attorneys’ Manual. *See* Mark R. Filip, Deputy Att’y Gen., U.S. Dep’t of Justice, Remarks Prepared for Delivery at Press Conference Announcing Revisions to Corporate Charging Guidelines (Aug. 28, 2008), *available at* <http://www.usdoj.gov/dag/speeches/2008/dag-speech-0808286.html>; *see also* UNITED STATES ATTORNEYS’ MANUAL §§ 9-28.000 to 9-28.1300 (2008) (incorporating revisions).

sion of the attorney-client privilege and stamping out corporate malfeasance is unknown. Further, given the current economic downturn and the renewed public outcry against corporate greed, the incoming administration may be loathe to take action that could appear “soft” on corporate crime.

Although most of the analysis and criticism of the DOJ waiver policies have arisen in securities fraud and accounting fraud investigations, those policies govern all prosecutors and apply to all areas of criminal enforcement, including criminal antitrust investigations. However, the Filip Policy, much like its predecessors, cautions that the practices and policies of some of the Department’s divisions may override its own. For example, the Antitrust Division has established its own “Corporate Leniency Policy” (Amnesty Program), which was designed to encourage cartel members to make voluntary disclosures and to cooperate with government investigations. The Amnesty Program provides complete immunity only to the first company to report the illegal activity. Because this “first in” incentive rewards only the first company to come forward and cooperate, the cooperativeness of the remaining cartel members may have little bearing on whether they are charged. In this regard, the Amnesty Program deviates from DOJ policies, which would consider the cooperation of each defendant in making a charging decision, and not just that of the first confessor. Even so, the Filip Policy is still germane to antitrust investigations. Because antitrust immunity to the first corporate confessor is contingent upon its full disclosure and cooperation, the Filip Policy may limit the type of cooperation the government may demand from companies seeking amnesty.

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### **The Progenitor: The Holder Memo**

The Holder Memo, which established internal guidelines for federal prosecutions of corporations, stated that prosecutors “should consider” certain factors in determining whether to charge a corporation, including, among other things, “its willingness to cooperate in the investigation of its agents, including, if necessary, the waiver of the corporate attorney-client and work product privileges.” Although these factors were non-binding, the waiver policies were significant. The DOJ had formally linked a company’s cooperation in a government investigation with its willingness to waive the attorney-client and work product privileges. From a more symbolic standpoint, the Holder Memo constituted the DOJ’s first attempt to develop a uniform approach to corporate investigations, and it reflected the government’s heightened resolve to vigorously combat corporate malfeasance.

Despite issuance of the Holder Memo, the number of criminal prosecutions of business organizations “remained fairly steady,”<sup>6</sup> and a spate of subsequent corporate scandals paved the way for a more aggressive and, ultimately, more controversial DOJ policy.

### **A More Aggressive Stance: The Thompson Memo**

In January 2003, in the wake of the Enron and Worldcom investigations, Congress rallied for stronger enforcement measures to stamp out corporate wrongdoing. In response, Deputy Attorney General Larry Thompson issued a new memo (Thompson Memo), aimed at “increas[ing] empha-

<sup>5</sup> Holder Memo, *supra* note 2.

<sup>6</sup> Christopher A. Wray & Robert K. Hur, *Corporate Criminal Prosecution in a Post-Enron World: The Thompson Memo in Theory and Practice*, 43 AM. CRIM. L. REV. 1095, 1100 n.19 (2006).

<sup>7</sup> See Memorandum from Larry D. Thompson, Deputy Att’y Gen., U.S. Dep’t of Justice, to Heads of Department Components and United States Attorneys, Principles of Federal Prosecution of Business Organizations 1 (Jan. 20, 2003) (Thompson Memo), available at [http://www.usdoj.gov/dag/cftf/business\\_organizations.pdf](http://www.usdoj.gov/dag/cftf/business_organizations.pdf).

sis on and scrutiny of the authenticity of a corporation's cooperation."<sup>7</sup> The Thompson Memo restated the prosecutorial guidelines of the Holder Memo, but placed a heavier emphasis on waiver of privilege as a measure of corporate cooperation. "Such waivers," the Thompson Memo explained, "permit the government to obtain statements of possible witnesses, subjects, and targets, without having to negotiate individual cooperation or immunity agreements."<sup>8</sup> Therefore, prosecutors were encouraged to "request a waiver in appropriate circumstances."<sup>9</sup> Although waiver was not an absolute requirement, the Thompson Memo nevertheless made clear that "the willingness of a corporation to waive such protection" was a key factor for prosecutors to consider in evaluating a company's cooperation.<sup>10</sup>

Over the next three years, the Thompson Memo faced mounting attacks from defense counsel, former Justice Department officials, legal commentators, bar associations, and legislators alike.<sup>11</sup> Critics complained that companies were routinely coerced into waiving the attorney-client and work product protections in order to obtain maximum cooperation credit from prosecutors and therefore avoid indictment or secure leniency.<sup>12</sup> These "compelled" waivers were troublesome because they had a deleterious effect on the attorney-client privilege. Companies were discouraged from consulting with company lawyers, thereby damaging the relationship between companies and their lawyers. Advocates for the protection of these privileges argued that absent candid dialogue between companies and their attorneys, the lawyers' ability to counsel compliance with the law was materially impeded. The effectiveness of internal compliance programs was thereby compromised, making it more difficult for corporations to detect misconduct and respond effectively. Corporations, their employees, and investors alike suffered from the erosion of the attorney-client privilege.<sup>13</sup>

### A Tactical Retreat: The McNulty Memo

To address the concern that the policies of the Thompson Memo were "discouraging full and candid communications between corporate employees and legal counsel," Deputy Attorney General Paul McNulty "adjust[ed]" certain aspects of the memo and issued revised policy guidelines in December 2006.<sup>14</sup> The McNulty Memo, while imposing certain restrictions on the ability of prosecutors to request corporate waivers, did not preclude prosecutors from considering a company's waiver of the privileges in assessing corporate cooperation.<sup>15</sup> Indeed, voluntary, unsolicited waivers were favorably treated, thus creating tacit pressure on companies to waive their protections.<sup>16</sup>

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<sup>8</sup> *Id.* at 7.

<sup>9</sup> *Id.*

<sup>10</sup> *Id.*

<sup>11</sup> See Elkan Abramowitz & Barry A. Bohrer, *Justice and Corporate Prosecutions: The Continuing Saga*, N.Y.L.J., Sept. 2, 2008, at 1–2.

<sup>12</sup> See *id.* at 1.

<sup>13</sup> See *Examining Approaches to Corporate Fraud Prosecutions and the Attorney-Client Privilege under the McNulty Memorandum*, Hearing Before the S. Comm on the Judiciary, 110th Cong. (2007) (statement of the American Bar Association) [hereinafter Statement of the ABA], available at [http://www.abanet.org/poladv/priorities/privilegewaiver/20070918\\_mcnulty.pdf](http://www.abanet.org/poladv/priorities/privilegewaiver/20070918_mcnulty.pdf).

<sup>14</sup> See Memorandum from Paul J. McNulty, Deputy Att'y Gen., U.S. Dep't of Justice, to Heads of Department Components and United States Attorneys, Principles of Federal Prosecution of Business Organizations 1–2 (Dec. 12, 2006) (McNulty Memo), available at [http://www.usdoj.gov/dag/speeches/2006/mcnulty\\_memo.pdf](http://www.usdoj.gov/dag/speeches/2006/mcnulty_memo.pdf).

<sup>15</sup> See *id.* at 9–10.

<sup>16</sup> See *id.* at 11.

The limitations imposed on prosecutors were twofold. First, prosecutors could only request a waiver when there was a “legitimate need for the privileged information.”<sup>17</sup> Second, prosecutors were required to obtain written authorization from the United States Attorney before seeking such a waiver.

If a legitimate need for a corporate waiver existed, prosecutors were directed first to request purely factual information, relating to the underlying conduct (Category I).<sup>18</sup> If Category I information was deemed insufficient to conduct a thorough investigation, then prosecutors were permitted to request attorney-client communications or non-factual attorney work product (Category II).<sup>19</sup> Waivers for this latter category of information could be sought only in “rare” circumstances.<sup>20</sup>

A corporation’s response to the government’s request for a waiver of Category I information could be considered by prosecutors in determining whether a corporation was cooperative. Prosecutors were prohibited, however, from considering a corporation’s refusal to waive privilege of Category II information in making a charging decision. Regardless, the pressure to furnish such a waiver remained. The McNulty Memo specifically authorized prosecutors to “always favorably consider a corporation’s acquiescence to the government’s waiver request in determining whether a corporation has cooperated in the government’s investigation.”<sup>21</sup> Companies, moreover, could receive credit for unsolicited waivers of the attorney-client privilege and work product protection. The result has been that corporations, fearful of being perceived as uncooperative, continued to waive their attorney-client privilege for Category I materials as a matter of course.<sup>22</sup>

Consequently, despite the McNulty Memo’s retreat from the unpopular policies of the Thompson Memo, it fared little better than its predecessor. Although the DOJ insisted that it had not granted authorization for Category II waiver requests since the inception of the McNulty Memo,<sup>23</sup> prosecutors continued to *informally* demand waivers, so as to circumvent the memo’s procedural requirements.<sup>24</sup> Companies, moreover, continued to feel that such waivers were implicitly expected, regardless of whether they were actually solicited. As a result, most of the legal community viewed the McNulty Memo as little better than its predecessors.

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<sup>17</sup> *Id.* at 8. Whether a legitimate need for a waiver existed depended on four factors: “(1) the likelihood and degree to which the privileged information will benefit the government investigation; (2) whether the information sought can be obtained in a timely and complete fashion by using alternative means that do not require waiver; (3) the completeness of the voluntary disclosure already provided; and (4) the collateral consequences to a corporation of a waiver.” *Id.* at 8–9.

<sup>18</sup> 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 containing investigative facts documented by counsel fall into this category. *See id.* at 9.

<sup>19</sup> Attorney notes, memoranda or reports containing counsel’s mental impressions and conclusions, legal determinations reached as a result of internal investigation, or legal advice given to the corporation fall into this category. *See id.* at 10.

<sup>20</sup> *Id.*

<sup>21</sup> *See id.* at 10.

<sup>22</sup> *See Editorial, Is the Thompson Memo Dead? Not Yet*, 17 N.J. LAW.: WKLY. NEWSPAPER 1638, Aug. 25, 2008.

<sup>23</sup> Letter from Mark Filip, Deputy Att’y Gen., U.S. Dep’t of Justice, to Patrick J. Leahy, Chairman of the Comm. on the Judiciary, and Arlen Specter, Ranking Member on the Comm. on the Judiciary (July 9, 2008).

<sup>24</sup> *See Statement of the ABA, supra note 13*, at 10 n.23; *see also* Letter from Norman Veasey, Former Del. Chief Justice, to Patrick J. Leahy, Chairman of the Comm. on the Judiciary, and Arlen Specter, Ranking Member on the Comm. (Sept. 13, 2007), available at <http://www.abanet.org/poladv/priorities/privilegewaiver/cjveaseyletter.pdf>.

### An Attempt to Override DOJ Policies : Proposed Legislation

Senator Arlen Specter, the ranking Republican on the Senate Judiciary Committee, and a staunch critic of the DOJ's guidelines on the attorney-client privilege, introduced the Attorney-Client Privilege Act of 2006 (S. 186) to combat the DOJ's perceived coercion of corporate waivers.<sup>25</sup> The proposed bill prohibited any agent of the United States from (1) requesting information protected by the attorney-client privilege or the work product doctrine and (2) conditioning an assessment of cooperation on whether a corporation made a valid assertion of those protections, among other things.<sup>26</sup> Although the House version of the bill passed on November 13, 2007, the bill stalled before the Senate Judiciary Committee.

In June 2008, Senator Specter introduced the Attorney-Client Protection Act of 2008 (S. 3217), a modified version of its predecessor.<sup>27</sup> S. 3217 prohibits any agent of the United States from (1) asking a corporation to waive the attorney-client and work product protections, and (2) threatening adverse treatment or penalizing a corporation for refusing to waive those protections.<sup>28</sup> The new bill goes one step further than S. 186 by precluding federal prosecutors who are making a charging decision from considering whether a corporation has asserted the attorney-client privilege or work product protection.

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### Further Retreat, Possible Defeat: The Filip Policy

The DOJ tried once again to mollify complaints “from a broad array of voices” 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.”<sup>29</sup>

On August 28, 2008, Deputy U.S. Attorney General Mark Filip, in an effort to arrest movement on S. 3217, unveiled new charging guidelines<sup>30</sup> that retreated even further from the waiver guidelines set forth in the McNulty Memo. Most notably, the Filip Policy emphasizes that disclosure of relevant *facts*—not waiver of the attorney-client privilege and work product protection—is the hallmark of cooperation.<sup>31</sup> Therefore, corporations that timely disclose relevant facts may receive credit for cooperation, regardless of whether they waive the attorney-client privilege or work product protection. In another marked departure from its predecessors, the Filip Policy prohibits prosecutors from requesting waivers and even from considering whether they are given, in assessing a corporation's level of cooperation.<sup>32</sup> The Filip Policy also bars prosecutors from requesting not only waivers, but also certain protected information.<sup>33</sup>

<sup>25</sup> Attorney-Client Privilege Protection Act of 2007, S. 186, 110th Cong. (2007).

<sup>26</sup> *See id.*

<sup>27</sup> Attorney-Client Privilege Protection Act of 2008, S. 3217, 110th Cong. (2008).

<sup>28</sup> *See id.*

<sup>29</sup> UNITED STATES ATTORNEYS' MANUAL, *supra* note 3, § 9-28.710.

<sup>30</sup> *See* Filip, *supra* note 3; *see also* UNITED STATES ATTORNEYS' MANUAL, *supra* note 3, §§ 9-28.000 to 9-28.1300 (incorporating revisions).

<sup>31</sup> *See* UNITED STATES ATTORNEYS' MANUAL, *supra* note 3, § 9-28.720 (“Has the party timely disclosed the relevant facts about the putative misconduct? That is the operative question in assigning cooperation credit for the disclosure of information—not whether the corporation discloses attorney-client or work product materials.”).

<sup>32</sup> *See id.* § 9-28.710 (“[W]hile a corporation remains free to convey non-factual or ‘core’ attorney-client communications or work product—if and only if the corporation voluntarily chooses to do so—prosecutors should not ask for such waivers and are directed not to do so.”).

<sup>33</sup> *See id.* § 9-28.720 n.3 (“To receive cooperation credit for providing factual information, the corporation need not produce, and prosecutors may not request, protected notes or memoranda generated by the lawyers’ interviews.”); *see also id.* § 9-28.720(b) (“[A] corporation need not disclose and prosecutors may not request” legal advice regarding the misconduct at issue or attorney work product, i.e., an attorney’s mental impressions or legal theories, as a condition for the corporation’s eligibility to receive cooperation credit.”).

Though lauded as a “clear and substantive improvement,”<sup>34</sup> detractors contend that the Filip Policy fails to resolve the problem of “coerced” corporate waivers. In an unlikely and ironic convergence of opinion, former deputy Attorney General Paul McNulty (now in private practice) and Senator Specter have criticized the Filip Policy on similar grounds. They assert that companies will continue to feel pressure to furnish waivers whenever they have relevant factual information covered by attorney-client privilege. “The key problem,” according to McNulty, “is when you have factual information that can only be provided by waiving [privilege]—what happens then? . . . If the answer is you don’t provide it, then you don’t get [the government’s] full cooperation credit.”<sup>35</sup> Therefore, so long as companies can obtain cooperation credit by furnishing the government with privileged information, companies will feel pressure to waive the attorney client privilege in order to garner favorable treatment.

Though the Filip Policy will be binding on all federal prosecutors within the Department of Justice (including the Antitrust Division), it is not binding on other federal agencies with enforcement powers, such as the EPA and IRS, all of which may request privilege waivers during official investigations.<sup>36</sup> As Senator Specter has observed: “The new guidelines expressly encourage corporations to comply with the waiver and disclosure programs of other agencies including the SEC and EPA.”<sup>37</sup> Another problem is that Filip’s new policies are not permanent and could be revised or rescinded by a subsequent attorney general.

For these reasons, critics of the DOJ’s policies on the attorney-client privilege, including Senator Specter, continue to insist that only legislation can remedy the problem. As one interest group explains: “The Justice Department’s track record of 5 different policies in 10 years cries out for a permanent legislative solution that cannot be revised at the whim of each new deputy attorney general. The only way to ensure compliance is to make the policy law.”<sup>38</sup> Moreover, “[l]egislation . . . would bind all federal agencies and could not be changed except by an Act of Congress.”<sup>39</sup>

### The Impact of DOJ Waiver Policies on Antitrust Investigations

The Holder-Thompson-McNulty Memos applied to all federal criminal enforcement actions, including antitrust investigations. The effect of the Memos’ waiver policies on criminal antitrust actions has not generated much discussion, however. This is undoubtedly because of the Antitrust Division’s own amnesty program, which embraces cooperation as a means for securing leniency, and which trumps certain facets of the foregoing Memos. Indeed, given the unique nature of

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<sup>34</sup> Federal Ruling: Attorney Talk Confidential, Aug. 28, 2008, [http://money.cnn.com/2008/08/28/news/companies/corp\\_prosecutions](http://money.cnn.com/2008/08/28/news/companies/corp_prosecutions) (quoting the Coalition to Preserve Attorney-Client Privilege).

<sup>35</sup> Brian Baxter, *With Thompson Trashed & McNulty Moot, Filip Memo’s Time Has Come*, AM. L. DAILY, Aug. 28, 2008, available at <http://amlawdaily.typepad.com/amlawdaily/2008/08/with-thompson-t.html>.

<sup>36</sup> Posting of the National Association of Criminal Defense Lawyers, <http://www.nacdl.org/public.nsf/PrinterFriendly/2008mn20?open> (Aug. 28, 2008). The SEC, however, may have followed the DOJ’s lead on waiver and privilege issues. Recently, the SEC released its enforcement manual, which, in language markedly similar to that of the Filip Policy, prohibits SEC staff from requesting a waiver of the attorney-client and work product protections. See Marcia Coyle, *SEC Changes Tune on Privilege*, NAT’L L.J., Oct. 20, 2008, available at <http://www.law.com/jsp/article.jsp?id=1202425367396&rss=newswire>.

<sup>37</sup> Press Release, Sen. Arlen Specter, Specter Responds to DOJ’s Revisions of Attorney-Client Privilege Guidelines (Aug. 28, 2008), available at [http://specter.senate.gov/public/index.cfm?FuseAction=NewsRoom.NewsReleases&ContentRecord\\_id=0aa887f0-f40c-f557-5dbb-4aef8032b8f9](http://specter.senate.gov/public/index.cfm?FuseAction=NewsRoom.NewsReleases&ContentRecord_id=0aa887f0-f40c-f557-5dbb-4aef8032b8f9).

<sup>38</sup> Federal Ruling: Attorney Talk Confidential, *supra* note 34 (quoting the Coalition to Preserve Attorney-Client Privilege).

<sup>39</sup> Press Release, Sen. Arlen Specter, *supra* note 37.

antitrust conspiracy cases, each Memo acknowledged the variable role cooperation may play in the Amnesty Program, and that the Antitrust Division's treatment of cooperation may diverge from, and override, its own.<sup>40</sup>

Created in 1978, and expanded in 1993, the Amnesty Program provides immunity to the first corporation to confess its role in illegal cartel activities, fully cooperate with the Antitrust Division, and meet other specified conditions.<sup>41</sup> Because such leniency is generally not afforded to subsequent confessors, regardless of the cooperation offered, the Amnesty Program creates a powerful incentive for corporations participating in a conspiracy to be the first to self-report. Immunity to the first confessor, however, is contingent on its "full, continuing and complete cooperation."<sup>42</sup> In gauging cooperation, the Amnesty Program departs from the waiver policies of the Holder-Thompson-McNulty Memos. Where those Memos tie cooperation credit, in varying degrees, to waiver of privileges, the Antitrust Division has made clear that it "will not consider disclosures made by counsel in furtherance of the amnesty application to constitute a waiver of the attorney-client privilege or the work-product privilege."<sup>43</sup> The Amnesty Program, in other words, negates waiver of privilege as a measure of a company's cooperation.

Since waiver is not a factor bearing on the Antitrust Division's decision to indict a corporation, the waiver policies promulgated through the Holder-Thompson-McNulty Memos may not have significantly affected the Division's approach to corporate cooperation. That does not mean, however, that the Amnesty Program is free of privilege-eroding effects. Indeed, because the Filip Policy and Amnesty Program mirror one another in a key regard, the shortcomings of the former will be reflected, to an extent, in the latter.

The Amnesty Program's emphasis on the disclosure of information, and not the waiver of privileges, echoes the cooperation policy of the Filip Policy. Unlike the Filip Policy, however, nothing in the Amnesty Program bars its prosecutors from seeking out or considering privileged information in assessing cooperation; it merely provides that disclosure of such information will not result in a waiver of privilege. Regardless of whether a waiver occurs, the bottom line is that production of privileged information may still be demanded and expected. Arguably, the Amnesty Program

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<sup>40</sup> "[P]rosecution and economic policies specific to the industry or statute may require prosecution notwithstanding a corporation's willingness to cooperate." Holder Memo, *supra* note 4, § VI(B); Thompson Memo, *supra* note 7, at § VI(B); McNulty Memo, *supra* note 14, § II(B)(1); *see also* UNITED STATES ATTORNEYS' MANUAL, *supra* note 3, § 9-28.750. While "it is entirely proper . . . to consider the corporation's pre-indictment conduct, e.g., voluntary disclosure, cooperation . . . in determining whether to seek an indictment . . . this would not necessarily be appropriate in an antitrust investigation, in which antitrust violations, by definition, go to the heart of the corporation's business and for which the Antitrust Division has therefore established a firm policy . . . that credit should not be given at the charging stage for a compliance program and that amnesty is available only to the first corporation to make full disclosure to the government." Holder Memo, *supra* note 4, § III(B); Thompson Memo, *supra* note 7, § III(B); McNulty Memo, *supra* note 14, § IV(B); *see also* UNITED STATES ATTORNEYS' MANUAL, *supra* note 3, § 9-28.400(B).

<sup>41</sup> Leniency will be granted to a corporation reporting illegal activity before an investigation has begun, if the following six conditions are met: (1) At the time the corporation comes forward to report the illegal activity, the Division has not received information about the illegal activity being reported from any other source; (2) the corporation, upon its discovery of the illegal activity being reported, took prompt and effective action to terminate its part in the activity; (3) the corporation reports the wrongdoing with candor and completeness and provides full, continuing and complete cooperation to the Division throughout the investigation; (4) the confession of wrongdoing is truly a corporate act, as opposed to isolated confessions of individual executives or officials; (5) where possible, the corporation makes restitution to injured parties; and (6) the corporation did not coerce another party to participate in the illegal activity and clearly was not the leader in, or originator of, the activity. *See* U.S. DEP'T OF JUSTICE, ANTITRUST DIV., CORPORATE LENIENCY POLICY (1993), *available at* <http://usdoj.gov/atr/public/guidelines/0091.pdf>.

<sup>42</sup> *Id.* § A(3).

<sup>43</sup> Gary R. Spratling, Deputy Ass't Att'y Gen., Antitrust Div., U.S. Dep't of Justice, The Corporate Leniency Policy: Answers to Recurring Questions § IV (Apr. 1, 1998), *available at* <http://www.usdoj.gov/atr/public/speeches/1626.htm>.

intensifies the pressure on companies to disclose protected information because the primary obstacle to obtaining such information—a company's refusal to waive privilege—is no longer relevant. Companies would have fewer grounds for withholding protected information, if such information were requested. In that regard, the Filip Policy could actually constrain the Antitrust Division, by preventing its prosecutors from requesting privileged materials that they would otherwise be at liberty to request under the Amnesty Program.<sup>44</sup>

Nor are waiver issues entirely eliminated by the Amnesty Program. Even if the Antitrust Division does not assert that a waiver has occurred, nothing prohibits third parties from asserting to the contrary. Privileged information disclosed to the government might still be discoverable by third parties.<sup>45</sup> Further, the Amnesty Program and the Filip Policy's emphasis on disclosure of relevant facts, and not waiver of privilege, fails to remedy a core concern underlying the culture of waiver—that is, the curtailment of frank dialogue between attorneys and their clients. If employees of a corporation are aware that information provided to in-house lawyers may be turned over to the government, they may be less likely to seek out legal advice, thereby undermining the ability of attorneys to counsel compliance and prevent illegal conduct from occurring or progressing. So long as cooperation is gauged, in any way, by the production of privileged information, companies will most likely feel pressure to disclose that information, regardless of whether a waiver is requested or deemed to have occurred.

## Conclusion

If the core problem is one of remedying DOJ policies that encourage “coerced” waivers, then the Filip Policy has retreated almost as far as it reasonably can. Prosecutors are forbidden from requesting waivers, and from considering a waiver, or a refusal to furnish one, in their assessment of cooperation. Nor are prosecutors allowed to circumvent these prohibitions by requesting the production of privileged materials. The proposed legislation, S. 3217, apart from making such policies binding and permanent, contains nearly the same prohibitions on prosecutors as the Filip Policy. The Filip Policy and S. 3217, in other words, mirror one another in material respects. Therefore, while legislation may well be in order to establish uniformity and a sense of stability in the business and legal communities, it will not stamp out the tacit expectation of waiver.

The Filip Policy and S. 3217 are inadequate, not because they lack appropriate protections for the attorney-client privilege, but because they skirt the underlying source of the problem. An inherent tension exists between the cooperation expected from a corporation under investigation and the right of the corporation to guard information that is protected by the attorney-client privilege and work product protection. McNulty captured the essence of the dilemma best when he

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<sup>44</sup> Given that the Filip Policy cautions prosecutors to heed the specific policies of the Antitrust Division, it is unclear whether the Filip Policy's prohibition on requesting privileged materials will circumscribe the ability of prosecutors to do so in the antitrust context.

<sup>45</sup> In *In re Columbia/HCA Healthcare Corp. Billing Practices Litigation*, 293 F.3d 289, 292 (6th Cir. 2002), a health care fraud case, Columbia/HCA turned over privileged documents to the DOJ after reaching an agreement that doing so “does not constitute a waiver of any applicable privilege or claim under the work product doctrine.” After a settlement was reached, private parties brought suit against the company and sought access to the privileged documents voluntarily disclosed to the DOJ. Rejecting the doctrine of selective waiver, the Sixth Circuit affirmed the trial court's order to produce the materials, and held that the company's voluntary disclosure of privileged material to the DOJ waived the attorney-client privilege and work product protection as to the materials produced. *See id.* at 294–307. The *Columbia/HCA* case demonstrates the adverse consequences a company may face by producing privileged materials to the government, notwithstanding the government's concession that doing so will not be deemed a waiver.

remarked: “I don’t know if there’s a policy that anybody can develop that will really take that pressure away, other than not expecting corporations to cooperate as much.”<sup>46</sup>

So long as cooperation is “the name of the game” in corporate fraud investigations, companies will most likely continue to feel pressure to furnish waivers to secure favorable treatment. That pressure will persist, regardless of whether waivers are requested, or official cooperation credit may be earned, and regardless of DOJ proclamations or legislation designed to ameliorate that pressure. This is particularly true in the antitrust context, where the remarkable success of the Amnesty Program suggests that the era of corporate cooperation is far from over.<sup>47</sup> ●

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<sup>46</sup> Baxter, *supra* note 35.

<sup>47</sup> Gary R. Spratling, Deputy Ass’t Att’y Gen., Antitrust Div., U.S. Dep’t of Justice, Making Companies an Offer They Shouldn’t Refuse; The Antitrust Division’s Corporate Leniency Policy—An Update (Feb. 16, 1999) (stating that the Amnesty Program is “the Department’s most successful leniency program” and that applications for leniency had increased twenty-fold since 1993, when the Amnesty Program was revised and expanded).