

Congressional Scrutiny of the Thompson Memorandum

by Andrew Weissmann and Ana R. Bugan

The DOJ's Thompson Memorandum has again come under fire. The Memorandum, formally known as *Principles of Federal Prosecution of Business Organizations*, enumerates a list of factors a federal prosecutor must consider in determining whether to indict a corporation.¹ The Memorandum requires prosecutors to consider, as possible evidence of a company's non-cooperation with the government, a company's payment of employees' legal fees, its retention of personnel who assert the Fifth Amendment privilege against self-incrimination during a government investigation, and a company's refusal to waive the attorney-client privilege.

Recent scrutiny of these factors by Congress and one court may result in a revision of the Memorandum or in new guidance to prosecutors as to its implementation. The United States Senate, in light of two decisions written by Judge Lewis Kaplan of the Southern District of New York (which were the subject of two prior Client Alerts, "[District Court Rules the Government's Use of the Threat of Corporate Indictment Was Unconstitutional](#)" and "[United States v. Stein](#)"), recently held a hearing on the propriety of the Thompson Memorandum provisions.

The Senate Hearing

On September 12, 2006, the Senate Judiciary Committee held a hearing entitled "The Thompson Memorandum's Effect on the Right to Counsel in Corporate Investigations." (To read the witnesses' written testimony, [click here](#).)

Judiciary Committee chairman Senator Arlen Specter and ranking member Patrick Leahy expressed concern over the Memorandum's corrosive effect on the attorney-client privilege. Senator Specter stated

that the Memorandum had the effect of "significantly modifying the traditional balance in a criminal prosecution where the government has the burden of proof because of the government's power in establishing a criminal case." He expressed his belief that a company should not get "credit" for waiving a constitutional right and should not receive a "demerit" for asserting one. Senator Specter noted that, during the Supreme Court confirmation hearings of Chief Justice John Roberts and Justice Samuel Alito, the White House withheld certain documents on the basis of attorney-client privilege, yet the President was not considered "uncooperative."

Senator Leahy acknowledged that, historically, the attorney-client privilege "has been balanced with competing objectives, including the need to ensure cooperation with the government in criminal or regulatory probes." As he put it, the present question is whether DOJ has "this balance right," and he expressed fear that the "erosion of the right to counsel undermines the fairness of our criminal justice system."

Under intense and sometimes acrimonious questioning by Senators Specter and Leahy, Deputy Attorney General Paul McNulty defended the Thompson Memorandum's challenged provisions. He testified that corporations are anxious to cooperate with the government because they want to come "out from under the dark clouds of criminal wrongdoing as quickly as possible." Companies recognize that cooperation best serves their interests and that of their shareholders by expediting an investigation's conclusion. Disclosure of the results of a company's internal investigation is "one of the most productive ways [for the government] to get the facts." Mr. McNulty defended the credit given to corporations

that waive the privilege by arguing that corporations that provide such assistance will demand to be treated more favorably than a corporation that “circled the wagons.” According to his testimony, whether a company has waived the attorney-client privilege is a “charging issue,” not an “investigation issue.” It only comes into play once the government has determined that a criminal violation has occurred and is deciding whether or not to indict.

Andrew Weissmann, a partner in Jenner & Block’s New York office, testified at the hearing and provided written testimony. Other panelists included former Attorney General Edwin Meese; Thomas J. Donohue, CEO and President of the United States Chamber of Commerce; Karen J. Mathis, President of the American Bar Association; and Mark B. Sheppard of the law firm Sprague & Sprague.

Mr. Weissmann testified that there is a greater need for uniformity in interpretation and implementation of the Thompson Memorandum. He noted a wide divergence in how prosecutors in the 93 independent offices of the United States Attorneys and at Main Justice implement the Thompson Memorandum’s directives. Some prosecutors, for example, believe it is appropriate to seek a blanket waiver from a company at the very outset of an investigation. Such a waiver is sought even though the government could obtain the information itself through, for example, interviewing witnesses.

According to Mr. Weissmann, the controversy surrounding the Thompson Memorandum is symptomatic of a more deeply-rooted problem—the current standard for corporate criminal liability under federal common law. Under the current law, a company can be liable for the criminal acts of a single, low-level employee if just two conditions are met: the employee acted within the scope of his employment, and the employee was motivated, at least in part, to benefit the company. The company can be prosecuted even if it has instituted policies aimed at thwarting the

very criminal conduct at issue. Given the ease with which criminal liability can be triggered—combined with corporate America’s understanding that a corporate indictment can be the equivalent of a death sentence, even before the company gets its day in court—the Thompson Memorandum affords prosecutors disproportionate leverage.

Mr. Weissmann urged a rethinking of corporate criminal law. He suggested that the standard for criminal corporate liability take into account a company’s attempts to deter the criminal conduct of its employees. A corporation’s criminal liability should depend on the government’s being able to prove an additional element: that the company did not implement reasonably effective policies and procedures to deter employee misconduct.

Finally, Mr. Weissmann recommended a revision of the Thompson Memorandum so that it “no longer encourages an environment where employees risk losing their jobs or legal defense merely for exercising their constitutional right not to speak to the government.” The DOJ should not base its decision to prosecute a company on whether the company has punished an employee who has asserted his Fifth Amendment privilege. He argued that payment of employees’ legal fees should only count against a company “if the payment is part of a scheme to obstruct the government’s investigation.” (See [“No Choice: It’s Time to Reverse the DOJ’s ‘Principles of Federal Prosecution of Business Organizations’,”](#) *The Deal*, August 7, 2006.)

Former Attorney General Edwin Meese also advocated a revision of the Thompson Memorandum to eliminate the consideration of whether a company pays its employees’ legal fees, retains employees who do not cooperate with the government’s investigation, or agrees to waive its attorney-client privilege. He told the Committee that the attorney-client privilege is “most needed” in corporate investigations and prosecutions because it is often a matter of dispute

whether certain conduct constitutes a crime. He expressed concern that an erosion of the privilege will actually hinder corporate compliance with the law because companies will be more reluctant to initiate internal investigations if the results can later be used as evidence against them by the government.

Mathis, Donohue, and Sheppard also testified about the ill effects of the Thompson Memorandum and concurred in the need to revise it.

Future Legislation or DOJ Revision Possible

During the Judiciary Committee hearing, Senator Specter suggested that legislation may be forthcoming “as a last resort” if the DOJ itself does

not take action to revise the Memorandum. Notably, two days after the Senate Hearing, Senator Specter announced at a NACDL–White Collar Crime meeting that he plans to introduce legislation addressing the Thompson Memorandum.

In the opinion of the authors of this Client Alert, some action by DOJ is likely in response to the hearing and to ward off further hearings or possible legislation. It is also worth keeping a close eye on the Senate’s follow-up questions to the DOJ and any responses to see the direction DOJ and the Senate may soon take.

¹To Read the Thompson Memorandum, [click here](#).

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