

# THOMPSON GUNNERS

DOJ VS. THE SENATE JUDICIARY COMMITTEE: THE NEW RULES ON HOW TO INDICT CORPORATIONS

BY ANDREW WEISSMANN WITH ANA R. BUGAN

On the heels of mounting criticism, the Department of Justice recently made revisions to its guidelines for determining when to seek to charge a corporation. The Thompson Memorandum had come under fire from several sectors, including the business and legal communities, a federal judge and Congress. They complained the guidelines were eroding attorney-client privilege and infringing on the Fifth and Sixth Amendment rights of employees who refused to cooperate with government investigations.

In September 2006, the Senate Judiciary Committee held hearings on the Thompson Memorandum. There was a remarkable consonance in the criticisms expressed by Democratic Sen. Patrick Leahy and Republican Sen. Arlen Specter. To forestall Senate action—and a bill introduced by Senator Specter after the hearing—DOJ revised the memorandum. The revisions may be insufficient, however, to thwart congressional action, as Specter has reintroduced his bill.

The Thompson Memorandum required prosecutors to consider several factors in determining whether to

indict a company. Most controversial among them was whether the company had cooperated by agreeing to waive the attorney-client and work-product protections when asked to by the government. The new policy requires prosecutors to follow various procedures before seeking a privilege waiver. The prosecutor must first establish a “legitimate need” for the protected materials. That the waiver may make the prosecutor’s job easier and consequently it may be convenient to obtain the waiver is explicitly rejected as constituting a “legitimate need.” Further, where attorney-client or nonfactual work-product information is sought, Justice must approve the request. And a company’s refusal to waive in these circumstances may not count against it. The new memorandum also virtually eliminates another controversial provision—whether a company is paying the legal fees of employees.

Despite salutary provisions, the new policy does not go far enough. It falls short of the recommendations of critics, such as the American Bar Association, the Heritage Foundation and

even former senior DOJ officials, who called for the complete elimination of waivers. Nor does the policy go as far as legislation Specter first proposed in December 2006 and reintroduced in January. The Attorney-Client Privilege Protection Act categorically prohibits prosecutors from conditioning a charging decision on any valid assertion of the attorney-client privilege or work-product protection.

Under the new DOJ policy, companies will continue to feel pressure to waive the privilege because the policy still permits a prosecutor to consider a company’s refusal to waive in various circumstances and also still gives “credit” to those companies that do waive. While a refusal to disclose legal advice and attorney-client communications may not count against a company, the same does not hold true for information the government deems “purely factual.” In practice, the line between what is “purely factual” and what contains attorney work product is rarely clear-cut.

Moreover, prosecutors can still “favorably consider” a company’s acquiescence to a waiver request in charg-

ing decisions. As long as waiver weighs favorably in the balance, coercive pressures will remain, as will the negative impact on the ability of employees to have full and candid discussions with counsel. Companies may at first blush consider the ability to receive credit a positive opportunity, but in reality it serves to encourage waivers with little or no concomitant benefit. In our experience, it is simply not the case that a company's voluntary waiver of the privilege will be the deciding factor in whether to charge a corporation. Such a factor is overwhelmed by others, such as the nature, severity and scope of the criminal conduct and the company's history of recidivism.

The new DOJ policy also fails to address another criticism of Thompson. In the KPMG case, Judge Lewis Kaplan found that DOJ policy requiring

prosecutors to consider whether the company fired or otherwise sanctioned employees who refused to cooperate with the government's investigation impinged on the Fifth Amendment. Specter's bill—taking up a proposal made by us in testimony before the Judiciary Committee—prohibits conditioning a charging decision on a company's not firing an employee who exercises her constitutional rights to remain silent.

Finally, the new policy does not require DOJ approval of the decision whether to prosecute a company. That determination remains in the hands of line prosecutors. The DOJ recognizes the importance of uniformity and Justice approval in numerous other contexts, such as the decision whether to seek the death penalty for individuals. It is thus anomalous that even though

a corporate indictment could be tantamount to a death sentence that the decision to prosecute a company does not receive the same review.

Specter has fortunately not been deterred by the DOJ pre-emptive strike. He reintroduced his bill in January, calling the DOJ's changes "insufficient." If the new DOJ policy succeeds in dampening congressional resolve, its limited concessions will have unfortunately staved off much-needed reforms. ■

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AS FEATURED IN

**The Deal**

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