NEW FAR RULE ON COMPLIANCE PROGRAMS AND ETHICS: A HIDDEN ASSAULT ON THE CORPORATE ATTORNEY-CLIENT PRIVILEGE

Jeremy A. Goldman

I. INTRODUCTION—THE NEW RULE

On November 12, 2008, the Federal Acquisition Regulation Councils issued a final rule amending Federal Acquisition Regulation (FAR) 52.203-13 to "amplify the requirements for a contractor code of business ethics and conduct, an internal control system, and disclosure to the Government of certain violations of criminal law, violations of the civil False Claims Act, or signifi-

Jeremy A. Goldman (jgoldman77@verizon.net) is a 2009 graduate of the University of Baltimore School of Law, where he earned concentrations in both Intellectual Property and Business Law. *He wishes to thank his professors in the Government Contracts Workshop at UB Law School, Richard C. Loeb, Kelley P. Doran, and William A. Shook. He reserves the greatest thanks for his wife, Allison, and children, Brandon and Mallory, for their unending love and support.*

cant overpayments."[1] The rule provides for the suspension or debarment of a contractor for knowing failure by a principal to disclose in a timely manner certain violations of criminal law, violations of the civil False Claims Act, or significant overpayments.[2] This new rule became effective December 12, 2008, and requires reporting misconduct under contracts until three years after final payment.

The implementing regulation, FAR 3.1004(a), mandates that contracts and solicitations for projects with a value expected to exceed $5 million and with a performance period of 120 days or more include the clause at FAR 52.203-13. The revised FAR 52.203-13 requires contractors to have a code of business ethics and conduct within thirty days of award.[3] If a contractor has not represented itself as a small business concern or if the contract is for the acquisition of a commercial item as defined at FAR 2.101, the contractor, within ninety days after contract award, unless the Contracting Officer establishes a longer time period, must (i) implement "an ongoing business ethics and compliance program"[4] and (ii) develop internal controls to support the code.[5]

The new rule also removes exclusions from compliance program requirements for commercial item contracts and contracts to be performed entirely outside the United States.[6] This means that all FAR-covered contracts performed anywhere in the world must comply with the new requirements unless the contract is expected to be less than $5 million or with a performance period of less than 120 days.[7] The far-reaching implications for contractors and subcontractors of all sizes are obvious, and, based on the public comments published with the final rule, it appears that many contractors may struggle to comply with the burdens imposed by the new requirements.[8]

Contractors and subcontractors must quickly adjust to this new era of ethics compliance, most significantly to the additional time and expense associated with providing "full cooperation" to the Contracting Officer and the agency's Office of the Inspector General any time it has "credible evidence" of certain criminal violations in connection with the award, performance, or closeout of a contract or any subcontract.[9] Failure to disclose can now result

1. Contractor Business Ethics Compliance Program and Disclosure Requirements, FAR Case 2007-006, 73 Fed Reg. 67,064, 67,064 (Nov. 12, 2008).
2. *Id.* at 67,065.
3. FAR 52.203-13(b)(1)(i).
4. FAR 52.203-13(c)(1).
5. *Id.*
6. FAR 3.1004(b).
7. FAR 3.1004.
8. *See* Contractor Business Ethics Compliance Program and Disclosure Requirements, FAR Case 2007-006, 73 Fed Reg. 67,064, 67,066–89 (Nov. 12, 2008); *see also* Rand L. Allen & John R. Prairie, *Now You Have to Tell the Government*, Legal Times, Feb. 9, 2009, *available at* http://www.wileyrein.com/resources/documents/pu4199.pdf ("Some in industry … have struggled to find consistent, practical guidance for effectively implementing the various requirements.").
9. FAR 52.203-13(b)(3), (c)(2)(ii)(F).

in either suspension or debarment.[10] Given this new threat, contractors and subcontractors are left scratching their heads while they try to discern the meaning and scope of "full cooperation" and "credible evidence."

The least-clear aspect of the new rule is how the requirements for "mandatory disclosure" and "full cooperation" will affect the corporate attorney-client privilege. How do contractors balance the desire to protect information with the threat of suspension and debarment for failure to timely disclose and fully cooperate? The new rule's combination of mandatory disclosure and full cooperation gives birth to a new assault on the attorney-client privilege—an issue thought to have been recently resolved. Although the new rule superficially upholds the attorney-client privilege, contractors' in-house attorneys are less sure than ever that they will continue to be protected.

This Note first reviews the longstanding doctrine of the corporate attorney-client privilege. Next, this Note discusses the erosion of that doctrine by the U.S. Department of Justice (DOJ). This Note then considers the terms "full cooperation" and "mandatory disclosure" within the context of the FAR clause. This Note concludes with a discussion of the future of the corporate attorney-client privilege in light of the new FAR clause.

II. THE ATTORNEY-CLIENT PRIVILEGE

The attorney-client privilege (the "Privilege") exists to "encourage full and frank communication between attorneys and their clients and thereby promote broader public interests in the observance of law and administration of justice."[11] The Privilege is one of the oldest legal principles in existence, dating as far back as ancient Rome, when "governors were forbidden from calling their advocates as witnesses out of concern that the governors would lose confidence in their own defenders."[12] English common law first recognized this evidentiary privilege in 1577 as the "attorney-client privilege."[13] This concept was later codified in the American colonies, e.g., through the absorption of English common law into Delaware's Constitution of 1776.[14]

While the soundness of the Privilege has not gone unchallenged, "the [P]rivilege is so ingrained in our law that for centuries it has been steadily upheld."[15] The policy behind the Privilege was summarized by American

10. A suspension may not extend beyond eighteen months in the absence of legal proceedings. FAR 9.407-4(b). If proceedings are commenced within that period, the suspension may extend until such proceedings are completed. FAR 9.407-4(a). Debarments are for "a period commensurate with the seriousness of the cause(s)," usually not more than three years. FAR 9.406-4(a)(1).

11. Upjohn Co. v. United States, 449 U.S. 383, 389 (1981).

12. Shirelle Phelps & Gale Cengage, Attorney-Client Privilege, Encyclopedia of Everyday Law, http://www.enotes.com/everyday-law-encyclopedia/attorney-client-privilege (2003).

13. *See* Christopher B. Mueller & Laird C. Kirkpatrick, Evidence: Practice Under the Rules 430 (2d ed. 1999) (citing Berd v. Lovelace, (1577) 21 Eng. Rep. 33 (Ch.)).

14. *See* Del. Const. of 1776, art. XXV.

15. People *ex rel*. Vogelstein v. Warden of County Jail, 150 Misc. 714, 717 (N.Y. Sup. Ct. 1934).

jurist and expert in the law of evidence John Henry Wigmore: "In order to promote freedom of consultation of legal advisers by clients, the apprehension of compelled disclosure by the legal advisers must be removed; hence the law must prohibit such disclosure except on the client's consent."[16]

For much of the 1960s and 1970s the corporate Privilege applied only to a "control group"—i.e., officers and agents responsible for directing the company's actions in response to legal advice.[17] In 1978 the U.S. Court of Appeals for the Eighth Circuit recognized that the inherent problem with applying the Privilege only to high-level corporate officers was that the in-house attorney was often left with a paradox: "If he interviews employees not having 'the very highest authority,' their communications to him will not be privileged. If, on the other hand, he interviews *only* those employees with 'the very highest authority,' he may find it extremely difficult, if not impossible, to determine what happened."[18] In 1981 the U.S. Supreme Court criticized the "control group"[19] test and held that in order to remain consistent with its underlying purposes, the Privilege must protect the communication between a corporation's employees and its in-house counsel from compelled disclosure.[20]

A series of corporate scandals in the 1980s and 1990s brought about an assault against corporate entities from federal prosecutors with little guidance from the DOJ, resulting in a series of policy statements issued by the DOJ, which sought to compel corporations to waive the Privilege in exchange for clemency and proof of cooperation.[21] This strategy was interpreted by the U.S. corporate community as an abuse of the historical understanding of prosecutorial discretion:

> The United States Attorney … is in a peculiar and very definite sense the servant of the law, the twofold aim of which is that guilt shall not escape or innocence suffer. He may prosecute with earnestness and vigor—indeed, he should do so. But, while he may strike hard blows, he is not at liberty to strike foul ones. It is as much his duty to refrain from improper methods calculated to produce a wrongful conviction as it is to use every legitimate means to bring about a just one.[22]

A 2005 survey by the Association of Corporate Counsel ("ACC"), an association of attorneys who practice in the legal departments of corporations, associations, and other private-sector organizations, reported that "approximately 30% of in-house respondents and 51% of outside respondents said

16. 8 John Henry Wigmore, Evidence in Trials at Common Law § 2291 (Little, Brown & Co. 1961).

17. Phila. v. Westinghouse Elec. Corp., 210 F. Supp. 483, 485 (E.D. Pa. 1962).

18. Diversified Indus., Inc. v. Meredith, 572 F.2d 596, 608–09 (8th Cir. 1978) (en banc) (quoting Alan J. Weinschel, *Corporate Employee Interviews and the Attorney-Client Privilege*, 12 B.C. Indus. & Com. L. Rev. 873, 876 (1971)).

19. Upjohn Co. v. United States, 449 U.S. 383, 392 (1981).

20. *Id.* at 395.

21. Joshua G. Berman & Machalagh Proffit-Higgins, *Prosecuting Corporations: The KPMG Case and the Rise and Fall of the Justice Department's 10-Year War on Corporate Fraud*, 2 Am. U. Crim. L. Brief 25, 25 (2007), *available at* http://www.sonnenschein.com/docs/Prosecuting_Corporat.pdf.

22. Berger v. United States, 295 U.S. 78, 88 (1935).

that the government expected waiver in order to engage in bargaining or to be eligible to receive more favorable treatment."[23] Moreover, roughly half of all investigations experienced by survey respondents resulted in Privilege waivers.[24] The Privilege appeared to be eroding before our collective eyes.[25] Where does the Privilege stand given the new FAR rules? Is the threat against it gone or simply hidden from view?

III. THE HISTORY OF THE ASSAULT

During the past twenty-two years the Privilege has come under fire more than it has throughout its entire history. An important step in understanding the future is analyzing the past.

A. *Defense Industry Initiative and Voluntary Disclosure Program (1989)*

In 1986 thirty-two major defense contractors, including The Boeing Company, Lockheed Corporation, Martin Marietta Corporation, Northrop Grumman, and Raytheon Company, drafted and signed the Defense Industry Initiatives on Business Ethics and Conduct (the "DII"). A key principle of the DII was that each signatory company "has the obligation to self-govern by monitoring compliance with federal procurement laws and adopting procedures for *voluntary disclosure* of violations of federal procurement laws and of corrective actions taken."[26] That same year, the Department of Defense (DoD) adopted a Voluntary Disclosure Program that encouraged internal investigations and the early reporting of criminal violations by defense contractors in exchange for leniency.[27] At the time, both the DII and the Voluntary Disclosure Program were thought to have been positive steps; it is now known, however, that these programs unintentionally ignited an assault on the Privilege that would continue for more than two decades.

B. *The Holder Memo (1999)*

In 1999 Eric Holder Jr., then-Deputy Attorney General (currently the U.S. Attorney General),[28] released a guidance memorandum entitled

23. Ass'n of Corporate Counsel et al., The Decline of the Attorney-Client Privilege in the Corporate Context: Survey Results Presented to the United States Congress and the United States Sentencing Commission 3 (2006), *available at* http://www.acc.com/Surveys/attyclient2.pdf [hereinafter Decline].

24. *Id.*

25. William R. McLucas et al., *The Decline of the Attorney-Client Privilege in the Corporate Setting*, 96 J. Crim. L. & Criminology 621, 629 (2006).

26. Def. Indus. Initiative on Bus. Ethics & Conduct, 2006 Annual Public Accountability Report 49 (2007), http://www.defenseethics.org/images/AnnualReport2006.pdf (emphasis added).

27. *Id.*

28. Holder was appointed Deputy U.S. Attorney General by President William Clinton in 1997 and served until 2001. He subsequently worked in private practice until 2009, until he

"Federal Prosecution of Corporations," informally referred to as the "Holder Memo."[29]

In this unprompted memorandum, Holder listed eight factors to be considered by prosecutors in deciding whether to prosecute a corporation for alleged criminal violations.[30] One factor was the corporation's "timely and voluntary disclosure of wrongdoing and its willingness to cooperate in the investigation of its agents, including, if necessary, *the waiver of the corporate attorney-client and work product privileges*."[31] The Holder Memo also advised federal prosecutors that they may "request a waiver in appropriate circumstances" but that the DOJ does not consider waiver of a corporation's privileges "an absolute requirement, and prosecutors should consider the willingness of a corporation to waive the privileges when necessary to provide timely and complete information as only one factor in evaluating the corporation's cooperation."[32]

While the Holder Memo advised that waiver of the Privilege was "only one factor" in evaluating whether a corporation cooperated in a federal criminal investigation, its mere inclusion in the list of factors nonetheless caused great concern for corporations. For example, the ACC[33] sent a letter to the DOJ that stated:

> Legal compliance is a critical aspect of the corporate counsel's job …. To require a waiver of the privilege works against, and not in favor of, sound policy designed to protect the public and to encourage good corporate citizenship. Knowing that sensitive and confidential conversations with their lawyers will be used as bargaining chips by the [G]overnment, clients may be reluctant to create such chips for the [G]overnment's use.[34]

In other words, the ACC posited that the ironic consequence of the Holder Memo would be to create unwillingness on the part of the employee to confide in corporate counsel, and therefore criminal activity within corporations could actually increase. Despite the ACC's argument that the practical result of the Holder Memo would be the antithesis of its intention, the DOJ stood by the memorandum.

---

was appointed Attorney General by President Barack Obama. *See* U.S. Department of Justice, USDOJ: Office of the Attorney General, http://www.usdoj.gov/ag/ (last visited July 28, 2009); WhoRunsGov.com, Eric Holder, http://whorunsgov.com/Profiles/Eric_Holder (last visited July 28, 2009).

29. Memorandum from Eric H. Holder Jr., Deputy Attorney Gen., to All Component Heads & U.S. Attorneys, Bringing Criminal Charges Against Corporations (June 16, 1999), http://www.usdoj.gov/criminal/fraud/docs/reports/1999/chargingcorps.html.

30. *Id.* § II(A).

31. *Id.* § II(A)(4) (emphasis added).

32. *Id.* § VI(B).

33. Until 2003 the Association of Corporate Counsel ("ACC") was known as the American Corporate Counsel Association. The name change was intended to reflect the increasingly global interests of its members. *See* Association of Corporate Counsel, History of ACC, http://www.acc.com/aboutacc/history/index.cfm (2009).

34. Pritida Desai, Practical Law Company, ACCA Set to Challenge "Quid Pro Quo" Government Policy, http://employment.practicallaw.com/9-101-2248 (June 20, 2000).

During a flurry of corporate scandals between 1999 and 2003, federal prosecutors relied on the Holder Memo to force corporate cooperation.[35]

C. *The Thompson Memo (2003)*

On January 20, 2003, then-Deputy Attorney General Larry D. Thompson[36] issued a memorandum that modified and superseded the Holder Memo's advisory guidelines. The so-called Thompson Memo[37] outlined a revised set of factors to be considered by prosecutors in deciding whether to charge a corporate entity with criminal wrongdoing. The Thompson Memo explained that the revisions were necessary "to put the results of more than three years of experience with the principles [of the Holder Memo] into practice."[38] Further, it explained that the impetus behind the revisions was the need for a higher level of "scrutiny of the authenticity of a corporation's cooperation,"[39] and the "efficacy of the corporate governance mechanisms in place within a corporation" to ensure they weren't just "mere paper programs."[40]

Whatever cynical motivation was put forth as justification for the Thompson Memo, one familiar factor quietly was included: "the corporation's timely and voluntary disclosure of wrongdoing and its willingness to cooperate in the investigation of its agents, including, if necessary, *the waiver of corporate attorney-client and work product protection*."[41] What proved to be the most controversial aspect of the Thompson Memo was the reaffirmation, almost verbatim, of the waiver factor from the Holder Memo.[42] Thompson reinforced Holder's view that waiver of the Privilege was "critical in enabling the [G]overnment to evaluate the completeness of a corporation's voluntary disclosure and cooperation."[43] While the substantive changes to the *advisory* Holder Memo were slight, the Thompson Memo became *mandatory*.

Moreover, the Thompson Memo did more than merely reinforce existing DOJ policy; it appears to have created a culture of waiver, whereby federal

35. Berman & Proffit-Higgins, *supra* note 21, at 26.

36. Thompson was appointed Deputy U.S. Attorney General by President George W. Bush in 2001 and served until 2003. He is currently vice president and general counsel for PepsiCo. *See* Meredith Hobbs, *Why Pepsi Chose Thompson as New GC*, Law.com, Aug. 26, 2004, http://www.law.com/jsp/article.jsp?id=1090180424852.

37. Memorandum from Larry D. Thompson, Deputy Attorney Gen., to Heads of Dep't Components, U.S. Attorneys, Principles of Federal Prosecution of Business Organizations 1 (Jan. 20, 2003), http://www.usdoj.gov/dag/cftf/corporate_guidelines.htm [hereinafter Thompson Memo].

38. *Id.*

39. *Id.*

40. *Id.*

41. *Id.* § II(A)(4) (emphasis added).

42. *See* Ann Graham, *New Memo Won't Ease Attorney-Client Privilege Concerns*, Texas Law., Feb. 11, 2008, *available at* http://www.law.com/jsp/ihc/PubArticleIHC.jsp?id=1202469642951 (discussing concerns of the ABA, the ACC, the National Association of Criminal Defense Lawyers, the American Civil Liberties Union, the U.S. Chamber of Commerce, and Senator Arlen Specter).

43. Thompson Memo, *supra* note 37, § VI(B).

prosecutors seemed to routinely require corporations to choose between waiving the Privilege or exposing the company to increased penalties and indictments.[44] Any reasonable corporate officer faced with this Hobson's choice likely would choose to waive the Privilege. Indeed, in a March 2006 survey of over 1,400 in-house and outside corporate counsel, almost seventy-five percent of the respondents believed that, in the wake of the Thompson Memo, governmental agencies expected a company under investigation to broadly waive attorney-client or work product protections.[45]

D. *U.S. Sentencing Guideline Amendments (2004)*

In May 2004 the U.S. Sentencing Commission followed in lockstep with the Holder and Thompson Memos when it amended the U.S. Sentencing Guidelines. The amendments provide: "[T]he two factors that mitigate the ultimate punishment of an organization are (i) the existence of an effective compliance and ethics program, and (ii) self-reporting, *cooperation*, or acceptance of responsibility."[46] These two factors were crafted in such a way as to hide the Privilege issue; in order to determine whether an organization "cooperated," one would look to whether it waived the Privilege as informed by the guidelines in the Holder and Thompson Memos. While the amendments merely used the term "cooperation," the Holder and Thompson Memos instructed that part of the measure of cooperation was whether a corporation waived the Privilege.

The amendments to the U.S. Sentencing Guidelines stated that waiver of the Privilege "is not a prerequisite to a reduction in culpability score … unless such a waiver is necessary in order to provide timely and thorough disclosure of all pertinent information known to the organization."[47] It seems obvious that during the course of an investigation a competent lawyer would inevitably gain some amount of "pertinent" information. With the amendments in place, the Government was entitled to have "all" of it.

In short, the amendments provided a perfect complement to the Holder and Thompson Memos, i.e., the new U.S. Sentencing Guidelines neither expressly condemned nor approved waivers of the Privilege. Furthermore, now that federal prosecutorial practices regarding waiver were essentially codified by the amendments, prosecutors were vindicated when they ignored protests from target corporations that a waiver of the Privilege was not necessary. The amendments and the memoranda were three pieces of a puzzle that fit together perfectly.

44. *See* Decline, *supra* note 23, at 3.

45. Marty Steinberg, *Coping with a "Culture of Waiver*," 23 Fin. Executive, Sept. 2007, at 46–47, *available at* http://www.allbusiness.com/company-activities-management/company-strategy/5503146-1.html.

46. Amendments to the Sentencing Guidelines for United States Courts, 69 Fed. Reg. 28,994, 29,019 (May 19, 2004) (emphasis added).

47. *Id*. at 29,021.

E. *The McCallum Memo (2005)*

In October 2005 Robert D. McCallum Jr., then-Associate U.S. Attorney General,[48] issued what informally is referred to as the "McCallum Memo."[49] The McCallum Memo boldly flew in the face of those critical of the Thompson Memo by failing to denounce the waiver of the Privilege as a factor in determining corporate cooperation.[50] In his one-page memorandum, McCallum merely added the requirement that each U.S. Attorney's Office ("USAO") disseminate a set of protocols before a waiver request could be made to a corporation.[51] In-house attorneys were advised to ask the Government to confirm whether the protocols required by the McCallum Memo regarding waiver were observed, and to make a record when those protocols were ignored.[52]

McCallum testified before the House Subcommittee on Crime, Terrorism, and Homeland Security on March 7, 2006, regarding his memorandum.[53] McCallum stated that his memorandum "ensure[d] that no Federal prosecutor may request a waiver without supervisory review," and "require[d] each United States Office to institute a written waiver review policy governing such requests."[54] He explained:

> The Thompson Memorandum carefully balances the legitimate interests furthered by the privilege, and the societal benefits of rigorous enforcement of the laws supporting ethical standards of conduct ….
>
> [V]oluntary disclosure is but one factor in assessing cooperation, and cooperation in turn is but one factor among many considered in any charging decisions ….
>
> Nor can the Government compel corporations to give waivers. Corporations are generally represented by sophisticated and accomplished counsel who are fully capable of calculating the benefits or harms of disclosure.[55]

While McCallum's testimony attempted to quell concerns over the McCallum Memo and legitimize the purpose for requesting waivers, it did little towards achieving those goals.

48. McCallum served as Associate U.S. Attorney General from 2003 to 2006, and subsequently served as U.S. Ambassador to Australia from 2006 to 2009. *See* U.S. Department of State, McCallum Robert D., http://www.state.gov/outofdate/bios/68646.htm (last visited July 28, 2009).

49. Memorandum from Robert D. McCallum Jr., Acting Deputy Attorney Gen., to Heads of Dep't Components, U.S. Attorneys, Waiver of Corporate Attorney-Client and Work Product Protection (Oct. 21, 2005), *available at* http://lawprofessors.typepad.com/whitecollarcrime_blog/files/AttorneyClientWaiverMemo.pdf.

50. *Id.*

51. *Id.*

52. *Id.*

53. *White Collar Enforcement: Attorney-Client Privilege and Corporate Waivers: Hearing Before the Subcomm. on Crime, Terrorism, and Homeland Security, H. Comm. on the Judiciary*, 109th Cong. 5 (2006), *available at* http://bulk.resource.org/gpo.gov/hearings/109h/26409.pdf [hereinafter *White Collar Enforcement*].

54. *Id.*

55. *Id.* at 6–7.

In a statement before the same House Subcommittee, former U.S. Attorney General Dick Thornburgh[56] wondered "what has changed in the past decade to warrant such a dramatic encroachment on the attorney-client privilege."[57] He criticized the McCallum Memo as setting forth protocols without consistency and as "striking a defiant tone that can only embolden prosecutors."[58] Thornburgh continued:

> … [I]n order to be deemed cooperative, an organization under investigation must provide the government with all relevant factual information in its possession …. But in doing so, it should not have to reveal privileged communications or attorney work product.
>
> That limitation is necessary to maintain the primacy of these protections in our system of justice. It is a fair limitation on prosecutors, who have extraordinary powers to gather information for themselves. This balance is one I found workable in my years of federal service, and it should be restored.[59]

As the Subcommittee's questioning of Mr. McCallum became more heated, Rep. William Delahunt (D-Mass.)[60] asked Mr. McCallum what had changed recently to warrant such a drastic departure from existing protocols:

> Mr. MCCALLUM: Let me respond to the first question, Mr. Delahunt, and that is what has happened recently over the years? I think we only have to look back to the 1997 through 2006 era to see a spate of very complicated, very complex, very arcane, very difficult to determine corporate frauds of immense proportions in terms of the dollar amounts involved which also …
>
> Mr. DELAHUNT: With all due respect, Mr. McCallum, I got to tell you something. That just doesn't—that doesn't hold water. You know, I am sure immense complex fraud has been being [sic] perpetrated, you know, since the days of the robber barons. If we don't have the resources in the Department of Justice to conduct the necessary investigations to deal with it, then let's assess it on a resource basis. Let's not do it the easy way that erodes, I believe, a fundamental principal of American jurisprudence.[61]

It is because of the ambiguous terminology and conflicting mandates (*see* Part IV, The Attorney-Client Privilege Protection Act, *infra*) that attorneys are becoming increasingly frustrated with the Government's incessant pursuit of a mandatory waiver of the Privilege.

56. Thornburgh was appointed as U.S. Attorney General by President Ronald Reagan in 1988, where he served until 1991. *See* Dick Thornburgh, http://dickthornburgh.com (last visited July 28, 2009).

57. *White Collar Enforcement*, *supra* note 53, at 14.

58. *Id.*

59. *Id.*

60. Delahunt, who represents the 10th District of Massachusetts, was first elected to the U.S. House of Representatives in 1997. *See* House.gov, Congressman Bill Delahunt, Proudly Serving the People of the 10th District of Massachusetts, http://www.house.gov/delahunt/about.shtml (follow "About Bill Delahunt" hyperlink; then follow "Biography" hyperlink) (last visited July 28, 2009).

61. *White Collar Enforcement*, *supra* note 53, at 46–47.

F. United States v. Stein *(The KPMG Case)*

Corporations across the country had been waiting for help since the 1999 Holder Memo and were hoping for some assistance from the courts. It was not long before a case highlighted the Thompson Memo's coercive and unconstitutional power when in the hands of certain prosecutors. The fight over the extent to which federal prosecutors could demand cooperation and insist on privilege waivers reached a climax in the tax and fraud investigation of KPMG, an accounting firm, and the ultimate prosecution of many of its executives and employees. Components of the Thompson Memo were held to be unconstitutional in *United States v. Stein*, a case arising out of allegedly illegal tax shelters promoted by KPMG.[62] The district court issued two opinions holding that the Government acts unconstitutionally when it relies on the Thompson Memo to pressure companies to stop advancing legal fees to their employees, and to cause companies to coerce their employees into incriminating themselves.[63]

The *Stein* case centered on an Internal Revenue Service investigation into allegedly illegal, KPMG-sponsored tax shelters.[64] In early 2004 the IRS made a criminal referral to the DOJ, which in turn passed it on to the USAO in Manhattan.[65] KPMG had good reason to fear that the reputational damage associated with an indictment would be enough to destroy the firm. Attorneys for KPMG made it known to the Government that they believed an indictment "would result in the firm going out of business."[66]

In its two decisions the district court ruled in favor of KPMG. In the first opinion the court found that the Government, through its use of the Thompson Memo and the USAO's action, violated the Fifth and Sixth Amendment rights of the KPMG defendants by causing KPMG to cut off payment of legal fees and other defense costs upon indictment.[67] In the second opinion the court ruled that the Government similarly violated the Fifth Amendment rights of two of the KPMG defendants by causing KPMG to coerce them into making incriminating statements to the Government.[68] The court was not asked specifically to assess the constitutionality of the Thompson Memo's privilege-waiver provision. The KPMG defendants appealed to the U.S. Court of Appeals for the Second Circuit and a decision was issued in August 2008.[69]

62. United States v. Stein (*Stein I*), 435 F. Supp. 2d 330, 338 (S.D.N.Y. 2006), *aff'd*, United States v. Stein (*Stein III*), 541 F.3d 130 (2d Cir. 2008); United States v. Stein (*Stein II*), 440 F. Supp. 2d 315 (S.D.N.Y. 2006).
63. *Stein I*, 435 F. Supp. 2d at 382.
64. *Id*. at 353.
65. *Id*. at 339.
66. *Id*. at 341.
67. *Id*. at 382.
68. *Stein II*, 440 F. Supp. 2d 315, 337 (S.D.N.Y. 2006).
69. *See Stein III*, 541 F.3d 130 (2d Cir. 2008); discussion *infra* Part IV.A.

G. *The McNulty Memo (2006)*

In December 2006 then-Deputy Attorney General Paul McNulty[70] issued a memorandum that modified the 2003 Thompson Memo by, among other things, removing waiver of the Privilege as a factor in determining cooperation.[71] One reason for this change was McNulty's awareness that "the corporate legal community [had] expressed concern that [DOJ] practices may be discouraging full and candid communications between corporate employees and legal counsel."[72] McNulty stated, "[I]t was never the intention of the [DOJ] for our corporate charging principles to cause such a result."[73]

The McNulty Memo categorized attorney-client privilege and attorney work product material into two groups. Category I material included factual attorney work product and noncore attorney communications, e.g., copies of key documents, witness statements, purely factual interview memoranda regarding the underlying misconduct, organization charts created by company counsel, factual chronologies, factual summaries, and reports containing investigative facts documented by company counsel.[74] Category II material included nonfactual attorney work product and core attorney-client privileged communications, e.g., attorney notes, memoranda or reports containing company counsel's mental impressions and conclusions, legal determinations reached as a result of an internal investigation, and legal advice given to the corporation.[75] The McNulty Memo cautioned, "Category II information should only be sought in rare circumstances."[76]

McNulty did not expressly prohibit waiver demands but rather placed significant obstacles before any federal prosecutor seeking a Privilege waiver from a corporation. First, prosecutors requesting Category I information "must obtain written authorization from the United States Attorney who must provide a copy of the request to, and consult with, the Assistant Attorney General for the Criminal Division before granting or denying the request."[77] Second, and only if the Category I information "provides an incomplete basis to conduct a thorough investigation," prosecutors may request Category II information, only after obtaining "written authorization from the Deputy Attorney General."[78]

70. McNulty was appointed Acting Deputy U.S. Attorney General by President George W. Bush in 2005 and sworn in as Deputy U.S. Attorney General on March 17, 2006, where he served until 2007. *See* U.S. Department of Justice, COPS Office: Paul J. McNulty, http://www.cops.usdoj.gov/default.asp?Item=1735 (last visited July 28, 2009).

71. Memorandum from Paul J. McNulty, Deputy Attorney Gen., to Heads of Dep't Components, U.S. Attorneys, Principles of Federal Prosecution of Business Organizations (Dec. 2006), http://www.usdoj.gov/dag/speeches/2006/mcnulty_memo.pdf [hereinafter McNulty Memo].

72. *Id.*

73. *Id.*

74. *Id.* at 9.

75. *Id.* at 10.

76. *Id.*

77. *Id.* at 9.

78. *Id.* at 10.

Even after the McNulty Memo modified existing guidelines, DOJ policy still permitted prosecutors to measure a corporation's willingness to cooperate in a federal investigation by considering its willingness to waive the Privilege for Category I materials. The result has been that corporations, fearful of being perceived as noncooperative, continue to waive the Privilege for Category I materials, effectively becoming assistants in government investigations.

In August 2006 the American Bar Association (ABA) House of Delegates approved recommendations supporting the preservation of the Privilege and opposing government policies and procedures that "have the effect of eroding constitutional and other legal rights of employees, past or present, if that employee decides to exercise his or her Fifth Amendment right against self-incrimination."[79] Similarly, in May 2006 the ABA's Task Force on the Attorney-Client Privilege wrote to then-Attorney General Alberto Gonzalez expressing concerns over the DOJ's Privilege waiver policy and urging it to adopt specific new language,[80] a strategy affirmed in September 2006 by at least one former high-ranking DOJ official.[81] It appears that Gonzalez failed to respond in light of comments made in September 2006 by then-ABA president Karen Mathis, who said the response from the DOJ "was most disappointing"; she added: "They failed to address the specific concerns we raised and just reasserted the DOJ policy."[82]

IV. THE ATTORNEY-CLIENT PRIVILEGE PROTECTION ACT

In response to the growing outrage over the Thompson Memo and the concern over the erosion of the Privilege, Senator Arlen Specter (R-Pa.)[83] introduced the Attorney-Client Privilege Protection Act of 2006.[84] Senator Specter commented, "Cases should be prosecuted on their merits, not based

79. Press Release, Am. Bar Ass'n, ABA Adopts New Policy on Presidential Signing Statements, Attorney-Client Privilege and Inspector General for the Federal Judiciary (Aug. 8, 2006), http://www.abanet.org/media/releases/news080806_1.html (internal quotation marks omitted).

80. *See* Letter from Michael S. Greco, President, Am. Bar Ass'n, to Alberto Gonzalez ("Colleague") (May 2, 2006), http://www.abanet.org/buslaw/attorneyclient/materials/stateandlocalbar/20060502000000.pdf.

81. *The Thompson Memorandum's Effect on the Right to Counsel in Corporate Investigations: Hearing Before the S. Comm. on the Judiciary*, 109th Cong. 18–19 (2006), *available at* http://judiciary.senate.gov/hearings/testimony.cfm?id=2054&wit_id=5741 (statement of Edwin Meese III, former U.S. Attorney General).

82. Melissa Klein Aguilar, *DOJ Defends Thompson Memo Amid Clamor*, Compliance Wk., Oct. 11, 2006, *available at* http://www.complianceweek.com/article/2787/doj-defends-thompson-memo-amid-clamor.

83. At the time this bill was proposed, Senator Specter was a member of the Republican Party. He has since announced that he will run for reelection as a member of the Democratic Party. The Democratic Party, *DNC Chairman Tim Kaine Welcomes Arlen Specter to Democratic Party with "Open Arms,"* Apr. 28, 2009, http://www.democrats.org/a/2009/04/dnc_chairman_ti_8.php.

84. *See* Attorney-Client Privilege Protection Act of 2006, S. 30, 109th Cong. (2006), *available at* http://thomas.loc.gov/cgi-bin/query/z?c109:S.30:.

on how well an organization works with the prosecutor."[85] The preface to the bill stated: "It is the purpose of this Act to place on each agency clear and practical limits designed to preserve the attorney-client privilege and work product protections available to an organization and preserve the constitutional rights and other legal protections available to employees of such an organization."[86] The Act, in its proposed form, prohibited government lawyers from forcing organizations into disclosing information protected by the Privilege or work product doctrine.[87] The Act accused the DOJ and other agencies of creating and implementing policies that undermined the adversarial system of justice, such as encouraging organizations to waive the Privilege to avoid indictment or other sanctions, despite the existence of numerous investigative tools that do not impact the attorney-client relationship.[88] The proposed Act recognized that waiver demands and related policies of government agencies encroached on the constitutional rights and other legal protections of employees.[89]

The 2006 proposed Act died in the Senate; an identical Act was reintroduced to the Senate in January 2007,[90] where it again died. In June 2008 Senator Specter introduced a redesigned, but substantially similar, bill, cosponsored by Senators Biden, Carper, Cochran, Cornyn, Dole, Feinstein, Graham, Kerry, Landrieu, McCaskill, and Pryor.[91] One noticeable change was that the 2008 bill divided the provision prohibiting the Privilege waiver demands into three sections:

> [A]n agent or attorney for the United States shall not … (A) demand or request [waiver of] … ; (B) offer to reward or actually reward an organization … for waiving … ; or (C) threaten adverse treatment or penalize an organization … for declining to waive … the attorney-client privilege [and work product protections].[92]

The 2008 bill died in committee after being read twice.[93] The U.S. House of Representatives, meanwhile, passed its own version of the Attorney-Client Privilege Protection Act in 2007.[94] It too died in the Senate, in response to what some refer to as the "Filip Memo."[95]

85. Berman & Proffit-Higgins, *supra* note 21, at 31.
86. S. 30, § 2(b).
87. *Id.* § 3(b).
88. *Id.* § 2(a)(5)–(6).
89. *Id.* § 2(a)(8).
90. *See* Attorney-Client Privilege Protection Act of 2007, S. 186, 110th Cong. (2007), *available at* http://thomas.loc.gov/cgi-bin/query/z?c110:S.186:.
91. Attorney-Client Privilege Protection Act of 2008, S. 3217, 110th Cong. (2008), *available at* http://thomas.loc.gov/cgi-bin/query/z?c110:S.3217:.
92. *Id.* § 3014(b)(1)(A)–(C); *see also* Andrew Gilman, *The Attorney-Client Privilege Protection Act: The Prospect of Congressional Intervention into the Department of Justice's Corporate Charging Policy*, 35 Fordham Urb. L.J. 1075, 1101 (2008).
93. U.S. Library of Congress, All Congressional Actions, http://thomas.loc.gov/cgi-bin/bdquery/z?d110:SN03217:@@@X (last visited July 28, 2009).
94. Attorney-Client Privilege Protection Act of 2007, H.R. 3013, 110th Cong. (2007), *available at* http://thomas.loc.gov/cgi-bin/query/z?c110:HR.3013:.
95. *Id.*; *see* U.S. Library of Congress, All Congressional Actions, http://thomas.loc.gov/cgi-bin/bdquery/z?d110:HR03013:@@@X (last visited July 28, 2009).

A. *U.S. Attorneys' Manual § 9-28.760 (The Filip Memo) (2008)*

In response to the numerous proposed bills, in August 2008 then-Deputy U.S. Attorney General Mark Filip[96] issued modifications to section 9-28.000 *et seq*. of the U.S. Attorneys' Manual, prohibiting prosecutors from seeking a waiver of the Privilege.[97] Ironically these new guidelines were issued the same day that the U.S. Court of Appeals for the Second Circuit issued its opinion affirming the dismissal of the KMPG case, holding "the [G]overnment … unjustifiably interfered with defendants' relationship with counsel and their ability to mount a defense, in violation of the Sixth Amendment …."[98]

Filip stated in his memorandum that this latest set of principles "should not bear the name of any particular individual at the [DOJ], as prior iterations sometimes became known."[99] He argued that this naming convention (e.g., Holder Memo, Thompson Memo, etc.) led to the implication that DOJ policy was "subject to revision with every changing of the guard."[100] In another departure from previous memoranda, Filip published his modifications in the U.S. Attorneys' Manual so that the principles would become binding on all federal prosecutors. The most notable substantive modification to the previous guidelines concerned "what measures a business entity must take to qualify for the long-recognized 'cooperation' mitigating factor …."[101] Section 9-28.720 states: "Eligibility for cooperation credit is not predicated upon the waiver of attorney-client privilege or work product protection," but rather upon "disclosure of the relevant *facts* concerning [the] misconduct."[102] Subsection (b) states that, except in cases of an advice-of-counsel defense or in

96. Filip was appointed as Deputy U.S. Attorney General by President George W. Bush in 2008 and served until 2009. *See Former Federal Judge Back in Private Practice*, Chi. Trib., May 6, 2009, at 28, *available at* 2009 WLNR 8591539.

97. Section 9-28.760 of the U.S. Attorneys' Manual, entitled "Oversight Concerning Demands for Waivers of Attorney-Client Privilege or Work Product Protection by Corporations Contrary to This Policy," states:

> The Department underscores its commitment to attorney practices that are consistent with Department policies like those set forth herein concerning cooperation credit and due respect for the attorney-client privilege and work product protection. Counsel for corporations who believe that prosecutors are violating such guidance are encouraged to raise their concerns with supervisors, including the appropriate United States Attorney or Assistant Attorney General.

U.S. Dep't of Justice, United States Attorneys' Manual § 9-28.760 (2008) [hereinafter U.S. Attorneys' Manual].

98. *Stein III*, 541 F.3d 130, 136 (2d Cir. 2008).

99. Memorandum from Mark Filip, Deputy Attorney Gen., to Heads of Dep't Components, U.S. Attorneys, Principles of Federal Prosecution of Business Organizations 2 (Aug. 28, 2008), http://www.usdoj.gov/dag/readingroom/dag-memo-08282008.pdf [hereinafter Filip Memo]. With all due respect to Mr. Filip and his preference for nomenclature, for the purposes of this Note the memorandum containing his modifications will be referred to as the Filip Memo.

100. *Id*. at 1.

101. *Id*.

102. U.S. Dep't of Justice, Principles of Federal Prosecution of Business Organizations § 9-28.720 (2008), *available at* http://www.usdoj.gov/opa/documents/corp-charging-guidelines.pdf.

furtherance of a crime or fraud, "a corporation need not disclose and prosecutors may not request the disclosure of such communications as a condition for the corporation's eligibility to receive cooperation credit."[103]

On its face, the principles outlined in Filip's memorandum satisfied the congressional concern over the continued erosion of the Privilege. The prohibition against Privilege waiver demands, however, was limited. The Filip Memo left the door open to Privilege waiver demands for other purposes; it only prohibited waiver demands as a condition for a corporation to receive cooperation credit.

B. *The 2009 Act*

Notwithstanding Filip's modification to the U.S. Attorneys' Manual, in February 2009 Senator Specter proposed the Attorney-Client Privilege Protection Act a fourth time; this newest version was nearly identical to the 2008 bill.[104] In his remarks, Senator Specter discussed evidence of the insufficiency of the Filip Memo because, although requests for privilege waivers were prohibited, the guidelines failed to carry the force of law:

> [A]s evidenced by the numerous versions of the Justice Department's corporate prosecution guidelines over the past decade, the Filip reforms cannot be trusted to remain static .... Though an improvement over past guidelines, there is no need to wait to see how the Filip guidelines will operate in practice. There is similarly no need to wait for another Department of Justice or executive branch reform that will likely fall short and become the sixth policy in the last 10 years. Any such internal reform may prove fleeting and might not address the privilege waiver policies of other government agencies that refer matters to the Department of Justice, thus allowing in through the window what isn't allowed through the door .... The prosecutor has enough power without the coercive tools of the privilege waiver, whether that waiver policy is embodied in the Holder, Thompson, McCallum, McNulty, or Filip memorandum.[105]

The 2009 proposed Act is cosponsored by Senators Carper (D-Del.), Cochran (R-Miss.), Kerry (D-Mass.), Landrieu (D-La.), and McCaskill (D-Mo.). As this Note went to publication, the proposed Act had been referred to the Senate Judiciary Committee. Should the 2009 version of the bill become law, it could clash with the new FAR rules and the Filip Memo. It sends an unclear message for the Government simultaneously to (1) require mandatory disclosure and full cooperation (see discussion *infra*), (2) limit Privilege waiver demands to a corporation's cooperation credit, and (3) pass legislation that altogether protects the Privilege. Once the new FAR rules, the

103. *Id.* § 9-28.720(b).

104. Attorney-Client Privilege Protection Act of 2009, S. 445, 111th Cong. (2009), *available at* http://thomas.loc.gov/cgi-bin/query/z?c111:S.445:.

105. 154 Cong. Rec. S2331–32 (daily ed. Feb. 13, 2009), *available at* http://frwebgate.access.gpo.gov/cgi-bin/getpage.cgi?dbname=2009_record&page=S2331&position=all (statements of Sen. Specter).

Filip Memo, and the 2009 Act (if passed) reach their first conflict, one of them will require amendment.[106]

V. MANDATORY DISCLOSURE

The new FAR rule establishes three different disclosure obligations: (1) disclosure to avoid suspension and/or debarment,[107] (2) disclosure required by the contract clause,[108] and (3) disclosure required by internal control systems.[109] The most critical disclosure obligation is the disclosure to avoid suspension and/or debarment because it applies to all contracts regardless of their value or duration.

The new mandatory disclosure requirements are muddied when read alongside the DOJ's charging guidelines. The Filip Memo only prohibits prosecutors from demanding a corporation waive the Privilege in order to be eligible for cooperation credit. That certainly is not an outright prohibition against Privilege waivers. When facing a mandatory disclosure rule and limited prohibition against Privilege waiver, most corporations would voluntarily waive the Privilege. The new mandatory disclosure requirement does not distinguish between protected and nonprotected communications; it merely requires the disclosure of all relevant documents.

Additionally it has not been determined exactly what needs to be disclosed, or when, under the new FAR rules. The rules state that a disclosure must be made where "credible evidence" of a criminal violation exists. When does "credible evidence" become ripe for reporting? Is it upon receipt of mere allegations, upon conclusion of an internal investigation, or some other point along the timeline? What if the DOJ or a *qui tam* relator[110] alleges a violation that the contractor did not discover during an internal investigation? Must a corporation disclose only a summary of the possible violation, or must it produce every factual detail, document, and employee who might have information that, analyzed collectively, gives rise to "credible evidence"? And what if the "credible evidence" is protected by the Privilege?

An example highlights the need for additional clarity. With the appropriate set of facts, creative *qui tam* counsel or the DOJ could reshape an otherwise

106. Some may argue that because the Act will apply to corporate criminal activities and the new FAR rules apply strictly to government contractors, companies may avoid the FAR's mandatory disclosure requirement simply by declining to bid on government contracts. However, this is not a viable business option for any government contractor whose existence is based in large part on contracting with the Federal Government.

107. *See* FAR 3.1003(a)(2)–(3).

108. *See* FAR 3.1004(a), 52.203-13(a).

109. *See* FAR 52.203-13(c)(2)(ii)(F).

110. *Qui tam* is from a Latin phrase meaning "he who brings a case on behalf of our lord the King, as well as for himself." This legal device allows for a private citizen, known as a "relator," to bring a lawsuit on behalf of the United States for suspected violations of the False Claims Act. These legal actions are colloquially referred to as "whistleblower suits." U.S. Dep't of Justice, False Claims Act Cases: Government Intervention in Qui Tam (Whistleblower) Suits, http://www.usdoj.gov/usao/pae/Documents/fcaprocess2.pdf (last visited Aug. 1, 2009).

simple contract breach into a False Claims Act matter. In such a scenario, the Government would argue that a contractor who fails to disclose every instance of nonconforming contract performance does not meet its disclosure obligation. As noted above, failing or refusing to fulfill this obligation is a factor in denying cooperation credit under the U.S. Attorneys' Manual and supports the possibility of suspension and/or debarment under FAR Part 9. Thus, notwithstanding the DOJ's claim that it does not seek to assault the Privilege, past practices and beliefs, coupled with unclear limits and requirements, suggest that contractors might still feel compelled to undermine their position by disclosing more than is necessary or appropriate. Absent further clarification, and for the avoidance of prosecution, most corporations will continue to provide privileged documents, even in light of the new FAR rules and the Filip Memo.

VI. FULL COOPERATION

The new rule requires contractors and subcontractors (other than small businesses and commercial-item contractors) to "fully cooperate" with government investigations. On its face the regulation suggests that the full-cooperation element might be satisfied once a contractor discloses "information sufficient for law enforcement to identify the nature and extent of the offense and the individuals responsible for the conduct," and provides "timely and complete responses to government investigators' requests for documents and access to employees with information."[111] Such cooperation specifically does not require a contractor to "waive its attorney-client privilege or the protections afforded by the attorney work product doctrine."[112] Nor does it require officers, directors, owners, or employees to waive their Fifth Amendment rights.[113] These requirements mirror the posture of the Filip Memo.

Nevertheless, questions remain concerning the practical boundaries of full cooperation. While "full cooperation" does not expressly require disclosure of information covered by the Privilege, contractors may still feel obligated to disclose Privileged material as the threat of prosecution looms. A contractor may still "cooperate" if it conducts an internal investigation and defends proceedings or disputes relating to potential or disclosed violations,[114] provided that it fully cooperates by disclosing the essential facts underlying the violations.

Neither the clause nor the U.S. Attorneys' Manual provides a roadmap for determining whether a contractor's cooperation may be deemed "full." Without a clear boundary contractors likely will release everything and waive the Privilege, intentionally or otherwise, simply to secure the sought-after

111. FAR 52.203-13(a)(1).
112. FAR 52.203-13(a)(2).
113. *Id.*
114. FAR 52.203-13(a)(3).

mitigation credit. This ambiguity allows DOJ to have its cake and eat it too: on the one hand DOJ declares that it "respects the rights of criminal defendants and others involved in the criminal justice process"[115] and protects the Privilege as "one of the oldest and most sacrosanct privileges under the law,"[116] while on the other hand DOJ continues to tacitly offer credit for receiving privileged information.

It is entirely possible that the FAR Councils did not intend to require waiver of the Privilege through their use of the phrase "full cooperation." Absent additional clarifying language, however, contractors likely will ignore the exemption and continue releasing otherwise protected information in the hope that it will receive more favorable treatment by the DOJ.

In sum, further revisions are necessary to clarify the boundaries of, and expectations regarding, "full cooperation." How does one know whether an internal investigation was thorough enough? What if an internal investigation identified—and the contractor fully disclosed—only one of two violations? These and other questions must be answered so that all interested parties can take the appropriate steps to fully and fairly comply with the law. Until the key terms and concepts discussed in this Note are clarified, doubts will remain as to the status of the corporate Privilege.

VII. THE FUTURE OF THE PRIVILEGE

The FAR Councils acknowledge "[t]here is no doubt that mandatory disclosure is a 'sea change' and 'major departure' from voluntary disclosure ...."[117] According to the DOJ, the requirement for mandatory disclosure is necessary because few companies have actually responded to the invitations of the past to voluntarily disclose suspected instances of violations of federal criminal law relating to the contract or subcontract. The FAR Councils stated:

> It is doubtful any regulation or contract clause could legally compel a contractor or its employees to forfeit [their attorney-client privilege or Fifth Amendment] rights. However, the Councils have revised the final rule to provide such assurance. To address concern that cooperation might be interpreted to require disclosure of materials covered by the work product doctrine, the Councils have added a definition of "full cooperation" at 52.203-13(a) to make clear that the rule does not mandate disclosure of materials covered by the attorney work product doctrine ....
>
> Waiver of attorney-client privilege and of work product protections is not a prerequisite to a reduction ... *unless such waiver is necessary in order to provide timely and thorough disclosure of all pertinent information known to the organization*.

115. Filip Memo, *supra* note 99.

116. U.S. Attorneys' Manual, *supra* note 97, § 9-28.710 (quoting Upjohn Co. v. United States, 449 U.S. 383, 389 (1981)).

117. Contractor Business Ethics Compliance Program and Disclosure Requirements, FAR Case 2007-006, 73 Fed Reg. 67,064, 67,069 (Nov. 12, 2008).

> It also is worth pointing out the [DoD] Voluntary Disclosure Program never required waiver as a condition of participation. Contractors in that program routinely found ways to report wrongdoing without waiving the attorney-client privilege or providing their attorney memoranda reflecting their interviews that normally are covered by the work product doctrine.
>
> Any limitation in this rule should not be used as an excuse by a contractor to avoid disclosing facts required by this rule. Facts are never protected by the attorney-client privilege or work product doctrine.[118]

Nevertheless, concerns remain. Contractors fear the italicized "unless" statement in the above quotation. While a waiver of the Privilege is not required and is not in the definition of "full cooperation," it is clear from this statement that a waiver may be necessary in order to provide timely and thorough disclosure of all pertinent information known to the organization. Such doubletalk is the source of contractors' distress.

Mandatory disclosure and full cooperation raise serious concerns about whether waiver of the Privilege will be necessary. Although the 2008 revisions to the U.S. Attorneys' Manual generally make it more difficult for federal prosecutors to extract Privilege waivers from corporations, many companies still feel pressure to waive the Privilege to demonstrate cooperation and avoid more onerous sanctions. The Filip Memo provides that prosecutors may not condition cooperation credit upon waiver of the Privilege. The new FAR rules, however, increase the existing pressure on contractors to waive the Privilege by requiring mandatory disclosure and full cooperation.

Knowing that their employers could be required to disclose any information they provide to the Government, employees may be less inclined to cooperate with internal investigations. Moreover, the combined requirements of mandatory disclosure and full cooperation could implicate employees' constitutional rights against self-incrimination when they are interviewed by company counsel as part of an internal investigation that is effectively conducted at the Government's behest.[119]

Several recent actions seek to counter the erosion in the Privilege. As noted in Part IV, *supra*, both the 2008 revisions to the U.S. Attorneys' Manual and Senator Specter's continuing push to pass some form of an Attorney-Client Privilege Protection Act are positive steps towards reestablishing the strength of the corporate Privilege.

Another positive step was almost seen with the implementation of new Federal Rule of Evidence 502 ("Rule 502"),[120] which primarily protects against waivers for inadvertent disclosures.[121] In drafting Rule 502, the Advisory

118. *Id*. at 67,077 (emphasis added) (quotations omitted).

119. Lisa Kern Griffin, *Compelled Cooperation and the New Corporate Criminal Procedure*, 82 N.Y.U. L. Rev. 311, 352–78 (2007) (arguing that the Fifth Amendment should afford employees some protection against coerced disclosures, even when an agent of the corporation poses the questions).

120. Fed. R. Evid. 502.

121. Fed. R. Evid. 502 advisory committee's note.

Committee considered adding language that would allow persons and entities to cooperate with government agencies without waiving all privileges as to other parties in subsequent litigation, i.e., "selective waiver."[122] In other words, disclosure of protected information would waive the Privilege only to the Government and not to any other person or entity. This section was removed from the final version of the rule because of the controversy surrounding the proposed rule.[123]

Contractors seeking to cooperate with government investigations were disappointed first by the Filip Memo, then by the failure to enact previous versions of the Attorney-Client Privilege Protection Act, and now by Rule 502. Corporations under investigation may choose to waive the Privilege in the face of indictment and other penalties. But later those corporations may find themselves defending against a plaintiff claiming that the Privilege was waived when disclosed to the Government. Unfortunately, a "selective waiver" clause was not included in Rule 502 to protect against disclosures made during the course of a criminal investigation. Once again, contractors face the uncertainty surrounding how their quasi-required waivers to a governmental official will be treated in subsequent litigation.

This is a subject that is being closely monitored by all contractors and subcontractors, in-house and outside attorneys, and those interested in the protection of one of the oldest legal principles in practice.[124] The series of DOJ memoranda that specifically spelled out waiver of the Privilege as a factor in determining cooperation prompted much criticism. In response the new FAR rules leave terms vague, unexplained, and open to misinterpretation absent additional clarification. By requiring both mandatory disclosure and full cooperation without explicitly mandating against corporate waivers of the Privilege, the FAR has created a new hidden assault on the Privilege that will take some time to understand and interpret.

The only recommendations with which contractors may proceed are to review and revise existing corporate procedures for internal investigations and reporting, or create new procedures specifically designed to comply with the new FAR rules. It is the contractors themselves who will be forced to interpret the practical meanings of the new requirements. They must decide whether to hold strong against waivers of the Privilege and find other ways in which to comply, or to entertain the willingness to voluntarily waive the Privilege to avoid potential noncompliance. Either way, the interested parties need to come to a resolution that will protect the Privilege and reduce both the

122. *See id*. at subdiv. (a).

123. Letter from Lee H. Rosenthal, Chair of Comm. on Rules of Practice and Procedure of the Judicial Conference of the U.S., to Patrick J. Leahy and Arlen Specter, U.S. Senate Comm. on the Judiciary (Sept. 26, 2007), *available at* http://www.uscourts.gov/rules/Hill_Letter_re_EV_502.pdf.

124. *See generally* Graham, *supra* note 42 (listing the American Bar Association, the Association of Corporate Counsel, the National Association of Criminal Defense Lawyers, the American Civil Liberties Union, and the U.S. Chamber of Commerce, among others, as groups monitoring these developments).

number and expense of corporate criminal investigations. This is a goal that is attainable, but not likely in the short term.

Perhaps interested parties on both sides of the debate would benefit from a reminder from the 1935 U.S. Supreme Court:

> The United States Attorney is the representative not of an ordinary party to a controversy, but of a sovereignty whose obligation to govern impartially is as compelling as its obligation to govern at all; and whose interest, therefore, in a criminal prosecution is not that it shall win a case, but that justice shall be done.[125]

125. Berger v. United States, 295 U.S. 78, 88 (1935).