

Developments in White Collar Criminal Law and the “Culture of Waiver”

“Those who commit crimes - regardless of whether they wear white or blue collars - must be brought to justice. The government, however, has let its zeal get in the way of its judgment. It has violated the Constitution it is sworn to defend.”†

“[Prosecutors] have life and death powers over people and companies. They have tremendous leverage to secure what they want to secure, particularly if what they are offering is not to charge criminally.”‡

INTRODUCTION

Prosecutors have always faced pressure to obtain convictions, and at the same time, to do justice. In the 1960s and 1970s, the federal government focused on the violent crime that was making America’s streets unsafe.¹ “In the 1980s and 1990s, [the focus] was on the destructive effects illicit drugs and drug dealing organizations were having upon our inner cities and families. In this decade the focus is necessarily on terrorism and, particularly after the collapses of Enron and WorldCom, on white collar crime.”² In the wake of corporate scandals that began in 2001, the Bush administration increased the federal government’s focus on corporate fraud in an effort to restore public confidence in America’s markets.³

This increased focus has created much discussion about the effects of the federal government’s efforts to regulate corporate crime—in particular, the pressure placed on corporations to waive the attorney-client privilege or work product protection, and to withhold indemnification for attorneys’ fees from

† United States v. Stein, 435 F. Supp. 2d 330, 336 (S.D.N.Y. 2006).

‡ Interview by Corporate Crime Reporter with Mary Jo White, Partner, Debevoise & Plimpton LLP (Dec. 12, 2005) [hereinafter White Interview], available at <http://www.corporatecrimereporter.com/maryjowhiteinterview010806.htm>.

1. *The Thompson Memorandum’s Effect on the Right to Counsel in Corporate Investigations: Hearing Before the S. Comm. on the Judiciary*, 109th Cong. 110, at 127 (2006), (statement of Edwin Meese III, Ronald Reagan Distinguished Fellow in Public Policy and Chairman, Center for Legal & Judicial Studies, The Heritage Foundation) [hereinafter Thompson Hearing], available at <http://www.heritage.org/Research/LegalIssues/tst091206a.cfm>.

2. *Id.*

3. See, e.g., Exec. Order No. 13,271, 67 Fed. Reg. 46,091 (July 9, 2002), available at <http://www.usdoj.gov/dag/cftf/execorder.htm>.

employees under investigation. Currently, parties on both sides of the political spectrum agree that the United States Department of Justice's enforcement policies are dramatically damaging the attorney-client relationship.⁴ Throughout 2008, there were major changes in white collar law, including significant modifications in Department of Justice ("DOJ") policies that may provide greater protection for corporations that are the target of an investigation.

This paper will address the major developments that took place in white collar criminal law during 2008. In particular, it will focus on three issues. First, it will review the series of memoranda wherein the Department of Justice has enacted policy changes relating to the corporate attorney-client privilege. These changes have been adopted by other government agencies and regulators, such as the SEC.⁵ Second, it will discuss the August 28, 2008, Second Circuit decision in *United States v. Stein*, affirming the dismissal of charges against former KPMG partners and employees because of prosecutorial misconduct.⁶ The Second Circuit's decision supported District Court Judge Lewis A. Kaplan's holding that federal prosecutors, by pressuring KPMG to cut off legal fees for the defendants, had violated their constitutional rights.⁷ Finally, the paper will address other significant developments in white collar criminal law, including investigations conducted by the IRS and SEC, two notable cases, investigations resulting from the subprime mortgage crisis, enforcement of the Foreign Corrupt Practices Act, and the increased use of deferred prosecution agreements.

What is White-Collar Crime?

The phrase "white-collar crime" was coined in 1939 by the American sociologist, Edwin Sutherland.⁸ He defined the term as "crime committed by a person of respectability and high social status in the course of his occupation."⁹ The term no longer focuses on the social status of the defendant, but has

4. See Brian W. Walsh & Stephanie A. Martz, *No Retreat Now*, LEGAL TIMES (Sept. 1, 2008), available at <http://www.law.com/jsp/dc/PubArticleDC.jsp?id=1202424094454>.

5. See U.S. Sec. & Exch. Comm'n, *Report of Investigation Pursuant to Section 21(a) of the Securities Exchange Act of 1934 and Commission Statement on the Relationship of Cooperation to Agency Enforcement Decisions*, Release No. 44969 (Oct. 23, 2001), [hereinafter Seaboard Report], available at <http://www.sec.gov/litigation/investreport/34-44969.htm> (Announcing factors the SEC would "consider in determining whether, and how much, to credit self-policing, self-reporting, remediation and cooperation – from the extraordinary step of taking no enforcement action to bringing reduced charges, seeking lighter sanctions, or including mitigating language in documents we use to announce and resolve enforcement actions.").

6. *United States v. Stein*, 541 F.3d 130 (2d Cir. 2008).

7. *United States v. Stein*, 435 F. Supp. 2d 330, 338 (S.D.N.Y. 2006).

8. John S. Baker, Jr., *The Sociological Origins of "White-Collar Crime"*, The Heritage Foundation (Oct. 4, 2004), available at <http://www.heritage.org/research/legalissues/lm14.cfm>.

9. Cynthia Barnett, *The Measurement of White-Collar Crime Using Uniform Crime Reporting (UCR) Data*, U.S. Dep't of Justice, Fed. Bureau of Investigation, available at <http://www.fbi.gov/ucr/whitecollarforweb.pdf>.

developed to include a variety of nonviolent crimes usually committed in commercial situations for financial gain. The federal government, as opposed to the states, investigates, prosecutes, and punishes most white-collar offenders.¹⁰ And because the broad category of offenses which constitute white-collar crime remains nebulous, federal prosecutors have a wide range of discretion in deciding whom to charge and what charges to bring.¹¹

White collar crimes are difficult to prosecute because the perpetrators have access to sophisticated means to hide their activities¹² and the wrongdoing can be hidden within legitimate economic activity.¹³ According to the Federal Bureau of Investigation ("FBI"), white collar crime is estimated to cost the United States more than \$300 billion annually.¹⁴ Along with the Department of Justice, several federal agencies, including the FBI, the Internal Revenue Service ("IRS"), the Secret Service, the U.S. Postal Service, the Environmental Protection Agency, and the Securities and Exchange Commission ("SEC"), participate in the investigations of white-collar crime.¹⁵

Today, federal prosecutors rely on corporations themselves to assist in investigations of corporate white collar crimes. One of the government's strongest tactics is to leverage possible criminal charges against business organizations to force cooperation with the government. "Because indictment often amounts to a virtual death sentence for business entities, a corporate prosecution provides the government an 'opportunity for deterrence on a massive scale.'"¹⁶ As a result, prosecutors condition leniency for corporations on completion of a thorough internal investigation for fraud and the disclosure of investigatory materials, including information privileged by the attorney-

10. Samuel W. Buell, *Reforming Punishment of Financial Reporting Fraud*, 28 CARDOZO L. REV. 1611, 1613 (2007).

11. *Id.* at 1628.

12. Legal Information Institute, *White-Collar Crime: An Overview*, available at http://topics.law.cornell.edu/wex/White-collar_crime ("The most common white-collar offenses include: antitrust violations, computer and internet fraud, credit card fraud, phone and telemarketing fraud, bankruptcy fraud, healthcare fraud, environmental law violations, insurance fraud, mail fraud, government fraud, tax evasion, financial fraud, securities fraud, insider trading, bribery, kickbacks, counterfeiting, public corruption, money laundering, embezzlement, economic espionage and trade secret theft.").

13. Samuel W. Buell, *Criminal Procedure Within the Firm*, 59 STAN. L. REV. 1613, 1627 (2006-07).

14. See FED. BUREAU OF INVESTIGATION, COLUMBIA, S.C., FBI COLUMBIA-INVESTIGATIVE PROGRAMS, available at <http://columbia.fbi.gov/invest.htm>.

15. TRACFED, <http://tracfed.syr.edu/> (last visited Dec. 2, 2008). During the first 11 months of 2008, the government reported 2,041 new white collar crime prosecutions referred by the Federal Bureau of Investigation, 1,009 referred by the United States Postal Service, 736 referred by the Internal Revenue Service, 102 referred by Justice-Other (TRACFED does not define "Justice-Other."), and one referred by the Environmental Protection Agency (TracReports does not provide information on the Securities and Exchange Commission)..

16. Christopher A. Wray & Robert K. Hur, *Corporate Criminal Prosecution in a Post-Enron World: Thompson Memo in Theory & Practice*, 43 AM. CRIM. L. REV. 1095, 1096 (Jan. 19, 2007) (quoting the Thompson Memorandum).

client and work product doctrines. In a survey conducted by the Association of Corporate Counsel, the National Association of Criminal Defense Lawyers and other organizations, approximately seventy-five percent of respondents agreed that a “culture of waiver” exists “in which governmental agencies believe it is reasonable and appropriate for them to expect a company under investigation to broadly waive attorney-client privilege or work product protections.”¹⁷

Though there is a tendency to link the origins of federal corporate cooperation strategies to the collapse of Enron and the “great awakening to managerial infidelity that followed,”¹⁸ prosecutors have long used a defendant’s willingness to cooperate with the government in prosecutorial and sentencing decisions.¹⁹ The beginning of the current debate over whether cooperation should be considered by prosecutors dates back to the United States Sentencing Commission’s promulgation of the Organizational Sentencing Guidelines in 1991 and the increase in corporate prosecutions that began in the 1990s.²⁰ In the past decade, the DOJ has devised a set of guidelines to provide federal prosecutors with a systematic rubric for determining whether to bring criminal charges against a corporation. In recent years, there has been significant controversy among the white-collar criminal defense bar and the business community over these guidelines. Most of the criticism has focused on the implications of federal prosecutors taking into consideration whether a corporation has agreed to waive its attorney-client privilege and work product protections and whether employers have advanced legal fees to their employees.

Prior to 1999, the DOJ did not have a formal policy to evaluate criminal conduct by corporate entities for the purpose of making prosecutorial decisions. In 1999, the DOJ, in an attempt to provide greater guidance, issued the Holder Memorandum, which laid out factors for a prosecutor to consider when deciding whether to charge a corporation.²¹ Then in 2003, amidst a wave of corporate scandals, the DOJ issued the Thompson Memorandum, which drew prosecutorial attention to “whether the corporation, while purporting to cooperate, ha[d] engaged in conduct that impede[d] the investigation.”²² The

17. National Association of Criminal Defense Lawyers, *Corporate Lawyers Launch Attack on “Culture of Waiver”* (March 6, 2006), available at <http://www.nacdl.org/public.nsf/whitecollar/WCnews025>.

18. Sarah Helene Duggin, *The McNulty Memorandum, the KPMG Decision and Corporate Cooperation: Individual Rights and Legal Ethics*, 21 GEO. J. LEGAL ETHICS 341, 350-51 (2007).

19. See U.S. Sentencing Comm’n, *Federal Sentencing Guidelines Manual* §3E1.1 (Nov. 1, 1991).

20. See Duggin, *supra* note 18, at 350.

21. See Memorandum from Eric Holder, Deputy Att’y Gen., to all U.S.D.O.J. Heads of Dep’t Components and U.S. Att’ys, (June 16, 1999), [hereinafter Holder Memorandum], available at <http://www.usdoj.gov/criminal/fraud/docs/reports/1999/chargingcorps.html>, reprinted in Justice Department Guidance on Prosecutions of Corporations, 66 CRIM. L. REP. (BNA) 189 (1999).

22. Memorandum from Larry D. Thompson, Deputy Att’y Gen., to all U.S.D.O.J. Heads of Dep’t Components and U.S. Att’ys, §VI.B (Jan. 20, 2003) [hereinafter Thompson Memorandum],

2005 McCallum Memorandum instructed each United States Attorneys' Office to establish written guidelines governing requests for waiver of corporate attorney-client and work product protections, but did not require those guidelines be made public.²³ The 2006 McNulty Memorandum, however, scaled back the more controversial aspects of the Thompson Memorandum, and required prosecutors to obtain senior supervisory approval before making a waiver demand.²⁴ Finally, the 2008 Filip Memorandum prevents prosecutors from asking companies under investigation to disclose privileged information, and instructs that whether a company is paying legal fees of employees under investigation is irrelevant to a determination of whether the company is "cooperating" with prosecutors.²⁵

I. THE EVOLUTION OF THE DOJ'S GUIDELINES FOR PROSECUTING CORPORATE CRIMES

The DOJ's approach to prosecution of corporate criminals has gradually shifted power from courts and juries to the DOJ and U.S. Attorneys.²⁶ The evolution in this approach has been described "as moving the process governing the American system away from the form the Founders expressly meant it to take—an accusatorial system—and toward something they feared—an inquisitorial system."²⁷ The DOJ's corporate charging guidelines – especially those dealing with waiver of attorney-client and work product privilege – have provoked strong reactions.²⁸ While some claim that these policies threaten the foundation of our system of justice, others respect them as an effective way to protect United States markets.²⁹ The government's stated rationale for its waiver policy is that "the disclosure of otherwise privileged information may sometimes be necessary for the corporation to effectively demonstrate its lack of involvement in criminal activity, or its change in behavior, or its willingness to assist in the prosecution of individual wrongdoers within the organization."³⁰ The principal criticism of the waiver

available at http://www.usdoj.gov/dag/cftf/corporate_guidelines.htm.

23. Memorandum from Robert D. McCallum, Jr., Acting Deputy Att'y Gen., to all U.S.D.O.J. Heads of Dep't Components and U.S. Att'ys (Oct. 21, 2005), [hereinafter McCallum Memorandum], available at <http://www.corporatecrimereporter.com/documents/AttorneyClientWaiverMemo.pdf>.

24. Memorandum from Paul J. McNulty, Deputy Att'y Gen., to all U.S.D.O.J. Heads of Dep't Components and U.S. Att'ys (Dec. 12 2006) [hereinafter McNulty Memorandum], available at http://www.usdoj.gov/dag/speeches/2006/mcnulty_memo.pdf.

25. Memorandum from Mark Filip, Deputy Att'y Gen., to all U.S.D.O.J. Heads of Dep't Components and U.S. Att'ys (Aug. 28, 2008) [hereinafter Filip Memorandum], available at <http://www.usdoj.gov/opa/documents/corp-charging-guidelines.pdf>.

26. Wray & Hur, *supra* note 16 at 1095.

27. *Id.*

28. *Id.* at 1096.

29. *Id.*

30. George M. Cohen, *Of Coerced Waiver, Government Leverage, and Corporate Loyalty: The Holder, Thompson, and McNulty Memos and Their Critics*, 93 VA. L. REV. In Brief 153, 154

policy is that the government can, without sufficient justification, coerce a corporation to waive its attorney-client privilege and work product protection.³¹

It has long been the DOJ's informal policy to give credit to a corporation in exchange for its cooperation in an investigation of corporate wrongdoing.³² Beginning in 1999, the DOJ released five memoranda setting forth its corporate charging guidelines; these guidelines have attempted to answer the question of what a corporation must do to earn "cooperation credit." This section will discuss each of the five memoranda, the varying reactions of the legal and business communities, and other significant events.

A. *Holder Memorandum (1999)*

In 1999, amid concerns that corporate charging guidelines lacked uniformity, the DOJ issued the Holder Memorandum, officially called the "Federal Prosecution of Corporations."³³ This memorandum outlined factors that prosecutors could consider in deciding whether to charge a company, and made clear that waiver of the attorney-client and work product privilege was a key factor to consider.³⁴ It instructed prosecutors evaluating the level of a corporation's cooperation to consider the corporation's willingness to: identify the culprits within the corporation; make witnesses available; disclose the complete results of its internal investigation; and to waive attorney-client and work product privileges.³⁵ Additional factors included whether the corporation appeared to be protecting its culpable employees and agents; "a corporation's promise of support to culpable employees and agents, either through the advancing of attorneys' fees, through retaining the employees without sanction for their misconduct, or through providing information to the employees about the government's investigation pursuant to a joint defense agreement."³⁶ The Holder Memorandum left the determination of whether waiver was necessary in a particular case to the prosecutors' discretion, and did not require them to record the weight they gave specific factors in reaching a decision whether to prosecute.³⁷

The Holder Memorandum was modeled after well-established prosecutorial principles. Prior to the establishment of the memorandum, the analysis for corporate prosecutorial decisions was guided by DOJ policy as set

(2007).

31. *See id.* at 154-55.

32. *See* Mark R. Filip, Deputy Att'y Gen., Press Conference Announcing Revisions to Corporate Charging Guidelines, (Aug. 28, 2008), available at <http://www.justice.gov/archive/dag/speeches/2008/dag-speech-0808286.html>; *see also* U.S. Sentencing Comm'n, *Federal Sentencing Guidelines Manual* §3E1.1 (Nov. 1, 1991).

33. Holder Memorandum, *supra* note 21.

34. *See id.*

35. *Id.*

36. *Id.*

37. *Id.*

forth in the United States Attorney's Manual.³⁸ The Manual's section titled "Principles of Federal Prosecution" stated that prosecutors should consider an individual's willingness to cooperate when making the decision whether to initiate prosecution.³⁹ And in 1991, the United States Sentencing Commission had amended the Federal Sentencing Guidelines, adding a new chapter entitled "Sentencing of Organizations" ("Organizational Guidelines").⁴⁰ The Guidelines served as a model for federal courts sentencing corporate entities,⁴¹ and incentivized cooperation and acceptance of responsibility by corporate defendants.⁴² The Guidelines also called for an effective compliance program, including "appropriate incentives" for employees to perform in accordance with the program and "appropriate disciplinary measures" for employees engaging in criminal conduct.⁴³

Following the DOJ, the SEC,⁴⁴ in 2001, released the Seaboard Report, which is its equivalent to the DOJ's corporate charging guidelines. The Report announced that the SEC would consider many of the same kinds of corporate cooperation factors outlined in the Holder Memorandum in the context of SEC enforcement proceedings.⁴⁵

B. Thompson Memorandum (2003)

In July 2002, amidst a wave of corporate scandals, President Bush

38. See U.S. Dep't of Justice, U.S. Att'ys' Manual §9-27.00 (2002).

39. See *id.* §9-27.230B6 ("A person's willingness to cooperate in the investigation or prosecution of others is another appropriate consideration in the determination whether a Federal prosecution should be undertaken."); *id.* at §9.27.420B1 ("The defendant's willingness to provide timely and useful cooperation as part of his/her plea agreement should be given serious consideration.").

40. U.S. Sentencing Comm'n, *Federal Sentencing Guidelines Manual* §8 (Nov. 1, 1991).

41. See *id.* app. C, amend. 422.

42. See *id.* at § 8C2.5(g).

43. *Id.* at § 8B2.1(b)(6).

44. An SEC investigation begins as an informal inquiry into the facts of the alleged violation. If, at any stage during the investigation, SEC staff attorneys determine that a criminal investigation may be necessary, they may prepare a Criminal Reference Report and forward a recommendation for criminal prosecution to the DOJ. After the case is referred to the DOJ, it is generally assigned to the United States Attorney's Office in the district of the alleged offense. See JOEL ANDROPHY, *SUBSTANTIVE CRIMES: SECURITIES FRAUD, HANDLING INVESTIGATIONS*, 2 *White Collar Crime* § 12:2 (2d ed. 2008).

This paper will not address the investigation policies of the SEC in as much detail as those of the DOJ because most often, it is the policies of the DOJ which determine how a case is prosecuted.

45. See U.S. Sec. & Exch. Comm'n, *Report of Investigation Pursuant to Section 21(a) of the Securities Exchange Act of 1934 and Commission Statement on the Relationship of Cooperation to Agency Enforcement Decisions*, Release No. 44969 (Oct. 23, 2001), available at <http://www.sec.gov/litigation/investreport/34-44969.htm> (announcing factors the SEC would "consider in determining whether, and how much, to credit self-policing, self-reporting, remediation and cooperation – from the extraordinary step of taking no enforcement action to bringing reduced charges, seeking lighter sanctions, or including mitigating language in documents we use to announce and resolve enforcement actions.").

established a Corporate Fraud Task Force,⁴⁶ which was charged with providing direction for the investigation and prosecution of financial crimes committed by corporations and their employees.⁴⁷ Within a six-month period, the DOJ opened more than 150 investigations, filed criminal charges against more than 200 individuals, and delivered more than sixty guilty pleas in federal criminal proceedings against business entities.⁴⁸ As part of the Task Force's mission, in January 2003, then-Deputy Attorney General Larry Thompson issued a memorandum entitled "Principles of Federal Prosecution of Business Organizations," which focused on increasing the "emphasis on and scrutiny of the authenticity of a corporation's cooperation."⁴⁹ Deputy Attorney General Larry Thompson explained that the increased scrutiny was necessary because some business organizations, while purporting to cooperate with a DOJ investigation, took steps that actually impeded government investigations, such as giving inappropriate instructions to employees, delaying the production of records or failing to promptly disclose wrongdoing.⁵⁰

The Thompson Memorandum mirrored the Holder Memorandum, deviating only in that it was intended to serve as a mandatory guideline for all prosecutors.⁵¹ The memorandum set out two primary objectives: to increase focus on (1) the authenticity of corporate cooperation with investigations and (2) corporate governance and compliance programs. The memorandum directed prosecutors to apply the same factors in determining whether to charge a corporation as they did with respect to individuals. In addition, due to the nature of the corporate "person," the memo listed the following nine factors to be considered when making charging determinations:

- (i) the nature and seriousness of the offense, including the risk of harm to the public, and applicable policies and priorities, if any, governing the prosecution of corporations for particular categories of crime;
- (ii) the pervasiveness of wrongdoing within the corporation, including the complicity in, or condonation of, the wrongdoing by corporate management;
- (iii) the corporation's history of similar conduct, including prior criminal, civil and regulatory enforcement actions against it;
- (iv) the corporation's timely and voluntary disclosure of wrongdoing and its willingness to cooperate in the investigation of its agents, including, if necessary, the waiver of corporate attorney-client

46. See Exec. Order No. 13,271, 67 Fed. Reg. 46,091 (July 9, 2002), available at <http://www.usdoj.gov/dag/cftf/execorder.htm>.

47. See *id.*

48. Duggin, *supra* note 18, at 352.

49. Thompson Memorandum, *supra* note 22.

50. *Id.*

51. See *id.* According to the Justice Department, the Thompson Memorandum "sought to achieve the effective prosecution of white-collar crime and to prevent companies from deliberately or inadvertently obstructing the investigation and prosecution of criminal offenses by misusing the attorney-client privilege or through the payment of employees' attorney fees." Thompson Hearing, *supra* note 1.

and work product protection; (v) the existence and adequacy of the corporation's compliance program; (vi) the corporation's remedial actions, including any efforts to implement an effective corporate compliance program or to improve an existing one, to replace responsible management, to discipline or terminate wrongdoers, to pay restitution, and to cooperate with the relevant government agencies; (vii) collateral consequences, including disproportionate harm to shareholders, pension holders and employees not proven personally culpable and impact on the public arising from the prosecution; (viii) the adequacy of the prosecution of individuals responsible for the corporation's malfeasance; and (ix) the adequacy of remedies such as civil or regulatory enforcement actions.⁵²

Because the Thompson Memorandum required federal prosecutors to take each of these factors into consideration when deciding whether to indict a business organization, it placed pressure on companies to waive attorney-client and work product protection and to cooperate in the investigation of its agents. Corporations perceived as having not fully cooperated with a government investigation would be more likely to face criminal indictment, prosecution and criminal sanctions.

C. *McCallum Memorandum (2005)*

In an attempt to address growing concerns expressed about government-coerced waiver, then-Acting Deputy Attorney General Robert McCallum issued a memorandum in October 2005. The McCallum Memorandum directed that "consistent with" the practice used by some U.S. Attorneys' Offices, each individual office should "establish a written waiver review process for [their] district or component." However, it did not establish any minimum standards for, or require national uniformity regarding privilege waiver demands by prosecutors. The memorandum, therefore, allowed U.S. Attorneys' Offices throughout the country to develop different waiver policies. More importantly, despite its efforts, the McCallum Memorandum failed to acknowledge the problems arising from government-coerced waiver. It did not require the written waiver processes established by each U.S. Attorney be made publicly available, and did not put in place any oversight to ensure that individual prosecutors followed the DOJ's policies for requesting waiver.

D. *Proposed Legislation (2006)*

In September 2006, the Senate Judiciary Committee held a hearing to discuss the effects of the Thompson Memorandum.⁵³ Then in December 2006,

52. Thompson Memorandum, *supra* note 22, at II.A.

53. *The Thompson Memorandum's Effects on the Right to Counsel in Corporate Investigations: Hearing Before the S. Comm. on the Judiciary*, 110th Cong. 2 (Sept. 12, 2006), available at <http://judiciary.senate.gov/hearings/hearing.cfm?id=2054>.

Senator Arlen Specter (R-Pa.) introduced legislation designed to address the corporate cooperation debate.⁵⁴ The bill, which would have established the Attorney-Client Privilege Protection Act,⁵⁵ sought to create “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.”⁵⁶ The bill would have prohibited government agencies from considering a corporation’s willingness to require its employees to answer questions in regulatory matters, to waive privilege and work-product protection, or to decline to indemnify employees for attorneys’ fees.⁵⁷ It would also have prevented the government from considering whether the firm entered into a joint defense agreement or chose not to discipline or terminate an employee who did not cooperate in the investigation.⁵⁸

E. McNulty Memorandum (2006)

Less than a week after Senator Specter introduced his bill, then-Deputy Attorney General Paul McNulty revised the DOJ’s policy, modifying, but not reversing, the privilege waiver policy.⁵⁹ Instead of eliminating the practice of encouraging companies to waive their attorney-client privilege and work product protections in return for cooperation credit, the McNulty Memorandum set forth procedures for seeking corporate waivers of privilege, and barred prosecutors, except in exceptional circumstances, from considering corporate payment or advancement of attorney fees in evaluating corporate cooperation.⁶⁰

The McNulty Memorandum provided a multi-step approach for seeking privileged materials beginning with “the least intrusive waiver necessary to conduct a complete and thorough investigation.”⁶¹ Under this approach, requests for protected materials would only be made where there was a “legitimate need” for privileged information, to be determined by: (i) the likelihood and degree to which the privileged information would benefit the government’s investigation; (ii) whether the information could be obtained in a timely and complete fashion by using alternative means that did not require waiver; (iii) the completeness of a voluntary disclosure already provided; and

54. Attorney-Client Privilege Protection Act, S. 30, 109th Cong. (as received by S. Comm. on the Judiciary, Nov. 14, 2007).

55. At the end of each session of Congress all proposed bills and resolutions that have not passed are cleared from the books. At the close of the 109th Congress, the Attorney-Client Privilege Protection Act of 2006 was cleared, though it was then reintroduced in the 110th and 111th sessions of Congress.

56. Attorney-Client Privilege Protection Act, S. 30, 109th Cong.

57. *See id.*

58. *See id.*

59. *See* McNulty Memorandum, *supra* note 24.

60. *See id.*

61. *Id.* at 9.

(iv) the collateral consequences to a corporation resulting from a waiver.⁶² Prosecutors were directed first to seek “Category I” information—“purely factual information, which may or may not be privileged, relating to the underlying misconduct.”⁶³ In the “rare” circumstance that Category I information was insufficient, prosecutors were permitted to seek “Category II” information—attorney-client communications or nonfactual work product materials.⁶⁴ For both types of information, a waiver was not a “prerequisite” to a finding that a firm had cooperated in an investigation,⁶⁵ but prosecutors could “always favorably consider” a firm’s agreement to such a request.⁶⁶

Under the McNulty Memorandum, prosecutors “generally should not take into account” whether a firm was advancing litigation costs to individual employees when evaluating a corporation’s cooperation.⁶⁷ The memorandum provided a limited exception in the “extremely rare” cases where “the totality of the circumstances show that [the advancement of attorneys’ fees was] intended to impede a criminal investigation.”⁶⁸ In such a case, the fee arrangement would be a factor in making a determination that the corporation was acting improperly. Where prosecutors determined that such circumstances existed, the Deputy Attorney General had to give approval before this factor could be considered for charging purposes.

The changes implemented by this memorandum did not satisfy the defense bar. Most criticism focused on three practices: the use of employer coercion of employees to waive their rights to silence; negotiation with firms over indemnification of their agents for litigation expenses; and negotiation with firms over the scope and waiver of attorney-client privilege.⁶⁹ American Bar Association President Karen J. Mathis stated that the guidelines “fall far short of what is needed to prevent further erosion of fundamental attorney-client privilege, work product, and employee protections during government investigations.”⁷⁰ Others claimed that the state was “doing violence to basic procedural protections for the individual” and “tilting the adversary process between itself and firms out of balance, by depriving *firms* of information control and bargaining power.”⁷¹

62. *Id.*

63. *Id.* at 11.

64. *Id.* at 12.

65. *Id.* at 10.

66. *Id.* at 12.

67. *Id.*

68. *Id.* at 13 n.3.

69. *See id.*

70. Statement by ABA President Karen J. Mathis regarding revisions to the Justice Department’s Thompson Memorandum, American Bar Association, Dec. 12, 2006, <http://www.abanet.org/abanet/media/statement/statement.cfm?releaseid=59>.

71. Buell, *supra* note 13, at 1615 (emphasis added).

F. Privilege Protection Act Revisited

In a June 2008 letter to the chairman of the Senate Judiciary Committee, Senator Patrick Leahy (D-Vt) and thirty-three former U.S. Attorneys expressed their dissatisfaction with the McNulty Memorandum in their support for the enactment of the Attorney-Client Privilege Protection Act.⁷² The letter explained that “[t]he widespread practice of requiring waiver has led to the erosion not only of the [attorney-client] privilege itself, but also to the constitutional rights of the employees who are caught up, often tangentially, in business investigations.”⁷³ On June 26, 2008, Senator Specter reintroduced the Privilege Act⁷⁴ (the bill died at the end of the 110th Session of Congress, but was reintroduced in February 2009⁷⁵).

In July 2008, hoping to prevent enactment of this legislation, Deputy Attorney General Mark Filip provided Specter with proposed changes to the McNulty Memorandum.⁷⁶ Specter responded by outlining his concerns with the DOJ’s proposed changes.⁷⁷

G. Filip Memorandum (2008)

On August 28, 2008, the DOJ issued a memo authored by Deputy Attorney General Mark R. Filip entitled “Principles of Federal Prosecution of Business Organizations,” also known as the Filip Memorandum, which replaced the McNulty Memorandum as the DOJ’s corporate charging guidelines.⁷⁸ The memo reconsiders corporate cooperation credit in the areas of privilege waiver, employee indemnification, joint defense agreements, and employee discipline and termination.

The Filip Memorandum focuses on the disclosure of “relevant facts” and mandates that a corporation’s cooperation credit be based, not on the waiver of privilege, but on disclosure of the relevant facts concerning the alleged

72. Letter from U.S. Att’ys re: S. 186, the Attorney Client Privilege Protection Act, available at [http://www.nacdl.org/public.nsf/whitecollar/WCnews094/\\$FILE/USAs_Letter.pdf](http://www.nacdl.org/public.nsf/whitecollar/WCnews094/$FILE/USAs_Letter.pdf).

73. *Id.*

74. Attorney-Client Privilege Protection Act of 2008, S. 3217, 110th Cong. (2008)

75. Attorney-Client Privilege Protection Act of 2009, S. 445, 111th Cong. (2009) (referred to S. Comm. on the Judiciary).

76. See Letter from Mark Filip, Deputy Att’y Gen., to Patrick J. Leahy, U.S. Senator of Vermont and Arlen Specter, U.S. Senator of Pennsylvania (July 9, 2008) (<http://www.gibsondunn.com/publications/Documents/FilipLetter070908.pdf>).

77. See Letter from Arlen Specter, U.S. Senator of Pennsylvania, to Mark Filip, Deputy Attorney General (July 10, 2008) (http://specter.senate.gov/public/index.cfm?FuseAction=NewsRoom.NewsReleases&ContentRecord_id=09EE0CFC-978B-D2CB-C6E6-511BEC8EA4EA). Specter explained that the revisions set forth in Filip’s letter were “unsatisfactorily vague.” For example, in response to Filip’s statement that federal prosecutors would not consider the advance of attorneys’ fees, Specter asked whether that standard would lead the DOJ to abandon its appeal in the case of *United States v. Stein*. Specter also explained his concern that the revised DOJ guidelines would not bind any other federal agency, such as the SEC and IRS.

78. See Filip Memorandum, *supra* note 25.

misconduct, regardless of whether they are privileged. The memorandum prohibits prosecutors from requesting waivers of “core” attorney-client communications or work product and encourages “[c]ounsel for corporations who believe that prosecutors are violating such guidance . . . to raise their concerns with their supervisor, including the appropriate United States Attorney or Assistant Attorney General.”⁷⁹

Aspects of the Filip Memorandum, particularly its effort to protect corporations from feeling pressure to waive privilege over “core” attorney-client communications and work product, provide more protection for corporations under investigation. The memorandum instructs prosecutors not to request protected notes or interview memoranda generated by attorneys during internal investigations. It suggests that corporations can choose to conduct internal investigations in a manner that will not confer attorney-client privilege on the results of an investigation, and that the government’s effort to obtain the facts should not suffer merely because a corporation has employed lawyers to conduct its investigation.

While the Filip Memorandum allows for more protection of privileged information, it still may not offer corporations complete certainty as to the DOJ policies. For example, although the memorandum provides that prosecutors can no longer consider a company’s retention or discipline of culpable employees as a factor affecting cooperation credit, it allows the government to continue to consider retention or discipline as a factor affecting remediation. And although the memorandum generally prohibits the government from considering whether a company entered into a joint defense agreement, it also indicates that if such an agreement prevents a company from disclosing relevant facts, the failure to disclose will weigh against the corporation.

The memorandum also does not apply to prosecutions originated by federal agencies other than the DOJ, such as the SEC and other regulatory bodies⁸⁰; in fact, the new guidelines seem to explicitly condone the use of coercive techniques outside of the DOJ.⁸¹ And the memorandum is not in fact binding on the DOJ, but provides only suggested guidelines.

II. ANALYSIS OF DOJ’S CORPORATE CHARGING POLICIES

A. *Criticism of the DOJ Policies*

These practices have ignited widespread criticism from the business community, the judicial and legislative branches and civil rights advocates. Senator Specter raised concerns that the Filip Memorandum does not go far enough. “There is still a pressure to waive attorney-client privilege if you have

79. *Id.* at 9-28.

80. For more on investigations by non-DOJ agencies, *see infra* section IV.A.

81. *See* Filip Memorandum, *supra* note 25, at § 9-28.750

'relevant factual information' covered by attorney-client privilege . . . [a]nd quite a bit of 'relevant factual information' is subject to privilege claims."⁸² Specter commented that the memorandum continues to give credit "to corporations [who] waive the privilege by giving facts obtained by the corporate attorneys from the individuals to the government."⁸³

There are significant differences between Specter's proposed legislation, and the guidelines set forth in the Filip Memorandum. The memorandum does not address whether prosecutors can weigh in on whether an employee should be fired for invoking the Fifth Amendment privilege against self-incrimination, while Specter's legislation would prohibit prosecutors from doing so. The memorandum also does not have the binding effect of law and only applies to the DOJ and not to other agencies, unlike the proposed legislation. Further, prosecutors may still give cooperation credit to a corporation that voluntarily waives its privileges without a governmental request; thus, there is still an incentive for corporations to waive privileges. The legislation would prevent consideration of a corporation's privilege waiver in assessing cooperation, even if done without a request by prosecutors.

The American Bar Association ("ABA") has been an outspoken critic of the DOJ's memoranda. It has called for the adoption of a government policy which bans prosecutors, "in making a determination of whether an organization has been cooperative in the context of a government investigation" from considering "that the organization provided counsel to, or advanced, reimbursed or indemnified the legal fees and expenses of, an [e]mployee."⁸⁴ The ABA claims that, even after the Filip Memorandum's revisions, the privilege waiver policy will continue to lead to the routine compelled waiver of attorney-client privilege and work product protections.⁸⁵ The ABA views this as unacceptable because, as the U.S. Supreme Court noted in the case of *Upjohn Co. v. United States*, "an uncertain privilege . . . is little better than no privilege at all."⁸⁶ The ABA also finds that the DOJ policies will weaken the confidential attorney-client relationship between companies and their lawyers, resulting in harm to both companies and the public.⁸⁷ And finally, according to

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

83. Press Release, Sen. Arlen Specter, Specter Responds to DOJ's Revisions of Attorney-Client Privilege Guidelines (Aug. 28, 2008), http://specter.senate.gov/public/index.cfm?FuseAction=NewsRoom.NewsReleases&ContentRecord_id=0aa887f0-f40c-f557-5dbb-4aef8032b8f9.

84. American Bar Association, Task Force on Attorney-Client Privilege, Report to House of Delegates, Recommendation (2005), http://www.abanet.org/buslaw/attorneyclient/materials/hod/emprights_recommendation_adopted.pdf.

85. See Letter from Karen J. Mathis, Former President, American Bar Association (Feb. 5, 2007) [hereinafter Mathis Letter], available at http://www.abanet.org/poladv/letters/attclient/2007feb05_privwaivsec_1.pdf.

86. 449 U.S. 383, 393 (1981).

87. See Mathis Letter, *supra* note 85.

the ABA, while these policies were intended to aid government prosecution of corporate criminals, they will continue to make detection of corporate misconduct more difficult by undermining companies' internal compliance programs and procedures.⁸⁸

According to Jorge DeNeve, Of Counsel with O'Melveny & Myers LLP and a member of its Securities Litigation Practice, companies will still feel pressure particularly on the issue of joint defense agreements.⁸⁹ He has found that, because of the DOJ's policies, companies rely on oral agreements instead of officially entering into a joint defense agreement; oral agreements, however, do not give nearly the same level of protection.⁹⁰ While this allows companies to take advantage of some of the benefits that result from a joint privilege, there is still a significant risk.⁹¹

B. Support for the DOJ Policies

The practice of crediting defendants for waiving rights guaranteed under the Constitution is widely accepted in the criminal justice system, and DOJ representatives consistently cite corporate scandals such as Enron and Adelphia to justify waiver demands and similar prosecutorial strategies. Former Deputy Attorney General Paul McNulty, in September 2006 hearings before the Senate Judiciary Committee, asserted that corporate cooperation strategies are essential tools in holding corporate wrongdoers accountable⁹² and that the policies embodied in the Thompson Memorandum provided "an effective balance between the interests of the business community and the investing public."⁹³ McNulty also defended the Thompson Memorandum as promoting transparency in the charging process, and that without such guidance "each individual prosecutor [would be] free to exercise his own unguided discretion about which corporation to charge and which not to[]." ⁹⁴

Further, a criminal indictment can have devastating effects on a

88. *See id.*

89. *See* Telephone Interview with Jorge DeNeve, Of Counsel, O'Melveny & Myers LLP (Nov. 7, 2008). Mr. DeNeve served as a staff attorney at the U.S. Securities & Exchange Commission's Pacific Regional Office in Los Angeles where he investigated cases involving allegations of financial fraud, disclosure fraud, market timing, offering fraud, and misconduct by independent accountants. At O'Melveny & Myers, he has focused on complex criminal and civil litigation.

90. *See id.*

91. *See id.*

92. *See The Thompson Memorandum's Effects on the Right to Counsel in Corporate Investigations: Hearing Before the S. Comm. on the Judiciary*, 110th Cong. 2 (Sept. 12, 2006) (statement of Deputy Att'y General Paul J. McNulty), available at http://judiciary.senate.gov/hearings/testimony.cfm?id=2054&wit_id=2742 [hereinafter McNulty Testimony].

93. *Id.* at 4. In 2006, former Asst. Att'y General Christopher Wray and Richard Hur suggested that the Thompson Memorandum could "continue to serve as a valuable tool for maintaining the integrity and prosperity of the American marketplace and for ensuring fairness and consistency in corporate criminal enforcement." Wray & Hur, *supra* note 16, at 1095.

94. McNulty Testimony, *supra* note 92, at 3.

corporation. Those in support of the DOJ policies argue that anything the government may consider which lessens the chance of indictment is coercive because corporations feel intense pressure to avoid indictment.⁹⁵ Removing opportunities for a firm to earn leniency would therefore not be a more desirable alternative from the corporation's standpoint.⁹⁶

III. *UNITED STATES V. STEIN*: SECOND CIRCUIT DISMISSAL OF CHARGES AGAINST FORMER KPMG EMPLOYEES

The Southern District of New York's ruling in *United States v. Stein* was "the first judicial challenge to a tactic that had been in the government's playbook for years and had been wielded especially aggressively since the Enron and other corporate scandals early in this decade."⁹⁷ The decision was affirmed by the Court of Appeals for the Second Circuit.

A. *KPMG Gets the Prosecutors' Message*

In early 2004, the Internal Revenue Service made a criminal referral to the DOJ related to its investigation of tax shelters created by KPMG and others.⁹⁸ The DOJ gave the case to the U.S. Attorney's Office for the Southern District of New York ("USAO"), which had to decide whether to indict KPMG and the individuals under investigation for the alleged misconduct.⁹⁹ In order to persuade the government not to indict the firm, KPMG and its lawyers focused on convincing USAO that KPMG was cooperating with the government's investigation and was in "full compliance with the Thompson Guidelines."¹⁰⁰ KPMG instructed its counsel to find "a new cooperative approach" to save the firm,¹⁰¹ and "cleaned house" by terminating several senior personnel.¹⁰²

During initial meetings between the federal prosecutors and attorneys for KPMG, the prosecutors asked whether KPMG intended to pay the attorneys' fees of present and former employees who were under investigation.¹⁰³ Later, it was discovered that the prosecutors told KPMG that they planned to examine

95. See *The Thompson Memorandum's Effects on the Right to Counsel in Corporate Investigations: Hearing Before the S. Comm. on the Judiciary*, 110th Cong. 2 (Sept. 12, 2006) (statement of Andrew Wiessman, Former Asst. U.S. Att'y), available at <http://www.acc.com/public/attyclientpriv/weissmann.pdf>

96. See McNulty Testimony, *supra* note 92, at 3. "The irony of the attacks on the Thompson Memo is that the federal criminal justice system would be a much harsher, less predictable, and less transparent environment for corporations and their counsel in the absence of this guidance."

97. See Kevin J. O'Brien, 'Stein' OKs the Nixing of Government's Charging Powers, N.Y.L.J., Sept. 17, 2008 (citing Nathan Koppel, *U.S. Pressures Firms Not to Pay Staff Legal Fees*, WALL ST. J., March 28, 2006, at B1).

98. See *United States v. Stein*, 435 F. Supp. 2d 330, 338 (S.D.N.Y. 2006).

99. See *id.* at 339.

100. See *id.* at 348.

101. See *id.* at 338-39.

102. See *id.*

103. See *id.* at 341.

the payment of attorneys' fees "under a microscope."¹⁰⁴ KPMG responded with three measures; it capped the amount of attorneys' fees that it would advance to employees, conditioned the limited pre-indictment payment of legal fees on cooperation with the government, and made clear that these payments would cease if the individual were indicted.¹⁰⁵

The firm's efforts were successful. In August 2005, KPMG entered into a Deferred Prosecution Agreement ("DPA") with the government, whereby the government agreed not to prosecute KPMG in exchange for KPMG's admission of wrongdoing, accepting of restrictions on its practice and paying a \$456 million fine.¹⁰⁶ The DPA also required KPMG to continue to cooperate "fully and actively" with the USAO in its investigation.¹⁰⁷ The government then indicted individual defendants, and KPMG stopped paying the legal fees of each defendant.¹⁰⁸ In response, the KPMG employees moved to dismiss the indictment on the grounds that the government had violated their constitutional rights by improperly interfering with KPMG's advancement of attorneys' fees.¹⁰⁹

B. Judge Kaplan Finds Constitutional Violations

In June 2006, in *United States v. Stein*, United States District Court Judge Lewis Kaplan concluded that the government, through the actions of the federal prosecutors, in combination with the impact of the Thompson Memorandum, had violated the constitutional rights of several of the defendants.¹¹⁰ Specifically, Judge Kaplan criticized the Thompson Memorandum and federal prosecutors for taking into account, "in deciding whether to indict KPMG, whether KPMG would advance attorneys' fees to present or former employees in the event they were indicted for activities undertaken in the course of their employment."¹¹¹ This interfered with the employees' rights to a fair trial and to the effective assistance of counsel and therefore violated the Fifth Amendment's due process clause and the Sixth Amendment right to counsel.¹¹² Kaplan found that the federal prosecutors, during discussions with KPMG, had "deliberately, and consistent with DOJ policy, reinforced the threat inherent in the Thompson Memorandum" by inquiring about KPMG's plans for advancing

104. *Id.* at 344.

105. *See id.* at 345-46.

106. *See id.* at 349. KPMG admitted "that it engaged in a fraud that generated \$11 billion dollars in phony tax losses which, according to court papers, cost the United States at least \$2.5 billion in evaded taxes." Press Release, Dep't of Justice, *KPMG to Pay \$465 Million for Criminal Violations in Relation to Largest-Ever Tax Shelter Fraud Case* (Aug. 29, 2005), available at http://www.usdoj.gov/opa/pr/2005/August/05_ag_433.html.

107. *See Stein*, 435 F. Supp. 2d at 349-50.

108. *See id.* at 350.

109. *Id.*

110. *Id.* at 382.

111. *Id.*

112. *Id.*

fees to KPMG employees under investigation and indicating such plans were inconsistent with the firm's cooperation.¹¹³ "KPMG refused to pay because the government held the proverbial gun to its head."¹¹⁴

Judge Kaplan held that the government had violated the defendants' Fifth Amendment right to fairness in the criminal process.¹¹⁵ The Thompson Memorandum infringed on the fundamental right to "obtain and use in order to prepare a defense resources lawfully available to [a defendant], free of knowing or reckless government interference."¹¹⁶ Judge Kaplan stated that the Thompson Memorandum and the prosecutors' actions failed under the strict scrutiny standard because they were not the least restrictive alternative to achieve a compelling government interest.¹¹⁷ Therefore, Judge Kaplan found, the Thompson Memorandum "burdens excessively the constitutional rights of the individuals whose ability to defend themselves it impairs," and thus violates the Fifth Amendment.¹¹⁸

The court also held that the Thompson Memorandum and the prosecutors' actions violated the defendants' Sixth Amendment right to counsel.¹¹⁹ Judge Kaplan found that KPMG had an "unbroken track record" of paying the legal costs of its employees,¹²⁰ and that the defendants had "every reason to expect" KPMG to cover their legal expenses.¹²¹ However, the prosecutors' actions, pursuant to the Thompson Memorandum, caused KPMG to depart from its long-standing policy of paying legal fees in all cases.¹²² "[T]hat advancement of legal fees might occasionally be part of an obstruction scheme or indicate a lack of full cooperation . . . is insufficient to justify the government's interference with the right of individual criminal defendants to obtain resources lawfully available to them in order to defend themselves."¹²³

Judge Kaplan rejected the government's argument that the Sixth Amendment, protecting an individual's right to counsel, had not yet attached at the time the KPMG employees were indicted. The court found that the prosecutors had violated the defendants' Sixth Amendment rights because, before the indictment, the prosecutors had set in motion events intended to have an unconstitutional effect upon indictment. The court also rejected the government's argument that "KPMG Defendants [had] no right, under the

113. *Id.* at 352-53.

114. *Id.* at 336.

115. *Id.* at 356-60.

116. *Id.* at 361; 364-65.

117. *See id.* at 364-65.

118. *Id.* at 365.

119. *Id.* at 365-70 (citing U.S. Const. amend. VI).

120. *See id.* at 356.

121. *See id.* at 355. Kaplan suggested that defendants may have "contractual and other legal rights to indemnification and advancement of defense costs," but declined to decide that matter in this decision. *Id.*

122. *See id.* at 353.

123. *Id.* at 369.

Sixth Amendment or otherwise, to spend ‘other people’s money’ on expensive defense counsel.”¹²⁴ Here, the defendants had an expectation that KPMG would pay their expenses in defending any claims or charges brought against them by reason of their employment.¹²⁵

Then in July 2007, Kaplan dismissed the indictments against 13 of the 16 individual KPMG defendants, stressing “that prosecutors can and should be aggressive in the pursuit of the public interest. . . . But there are limits on the permissible actions of even the best prosecutors.”¹²⁶

C. *Second Circuit Agrees with the District Court*

In upholding the district court’s dismissal of the indictments, the Second Circuit relied only on the Sixth Amendment right to counsel, and did not address the Fifth Amendment due process issue. The court stated that the Sixth Amendment “protects against unjustified governmental interference with the right to defend oneself using whatever assets one has or might reasonably and lawfully obtain.”¹²⁷

The Second Circuit also addressed the question of whether the district court’s dismissal of the indictment, an action of last resort, was appropriate. Judge Kaplan had found that no other remedy would restore the defendants to their pre-violation condition, largely because of the enormous resources necessary to defend against the tax shelter charges. The Second Circuit held that the

appropriate remedy for a constitutional violation is ‘one that as much as possible restores the defendant to the circumstances that would have existed had there been no constitutional error.’ Since it has been found that, absent governmental interference, KPMG would have advanced unlimited legal fees unconditionally, only the unconditional, unlimited advancement of legal fees would restore defendants to the status quo ante.¹²⁸

The government claimed that it had cured any Sixth Amendment violation when it stated that KPMG was free to “exercise [its] business judgment” as to whether to advance the defendants’ fees. The Second Circuit, however, found that KPMG would have advanced fees to the employees without any condition if it had not been for the Thompson Memorandum and the prosecutors’ conduct; even after this statement by the prosecutors, it was unrealistic to expect KPMG to reverse course and exercise judgment as if it had never been pressured by the prosecutors. “KPMG was never ‘free to define’ cooperation

124. *Id.* at 367.

125. *Id.*

126. *United States v. Stein*, 495 F.Supp.2d 390, 426 (S.D.N.Y. 2007)

127. *United States v. Stein*, 541 F.3d 130, 156 (2d Cir. 2008).

128. *Id.* at 146 (internal citations omitted).

independently.”¹²⁹ The Second Circuit found that the government had forced KPMG to cut off fees, and that this conduct amounted to impermissible state action.

The government did not request en banc review by the Second Circuit, nor did it file for certiorari.

D. Implications of *Stein*

Post-*Stein*, federal prosecutors are careful not to be perceived as pressuring companies to withdraw attorneys’ fees for their employees, according to Melinda Haag, a white collar criminal defense attorney with Orrick, Herrington & Sutcliffe LLP.¹³⁰ “Judge Kaplan sent a very clear message that there will be serious consequences if prosecutors involve themselves in decisions regarding indemnification.”¹³¹ However, the government can still signal, without using explicit language, that they expect companies to waive attorneys’ fees, and defendants are unable to challenge a corporation’s actions if it voluntarily cuts attorneys’ fees or waives the protections of the attorney-client or work product doctrine. According to criminal defense attorney Mike Anderson, if the government had used less aggressive tactics in *Stein*, the district court would have been less likely to find that KPPG’s actions amounted to state action.¹³² The Second Circuit’s decision also suggests that “the judiciary is no longer giving [United States Attorneys’ Offices] and the DOJ the benefit of the doubt they used to enjoy.”¹³³

It remains to be seen whether other courts will agree with the *Stein* decision. At least one district court has disagreed with Judge Kaplan’s analysis. In *United States v. Stodder*,¹³⁴ the United States District Court for the Central District of California found the *Stein* decision “scholarly but ultimately

129. *Id.* at 149.

130. Telephone Interview with Melinda Haag, Partner, Orrick, Herrington & Sutcliffe LLP (Nov. 11, 2008) [hereinafter Haag Interview]. Ms. Haag is currently a partner specializing white collar criminal defense and corporate investigations in the San Francisco office of Orrick, Herrington & Sutcliffe LLP. Previously, she served as an Assistant United States Attorney in the Northern District of California, where she oversaw the prosecution of white collar offenses and worked with federal and local agencies, including the FBI, EPA, U.S. Customs Service and United States Coast Guard.

131. *Id.*

132. See Telephone Interview with Mike Anderson of Arguedas, Cassman & Headley, LLP (Nov. 8, 2008) [hereinafter Anderson Interview]. Mr. Anderson is currently an associate specializing in criminal defense at Arguedas, Cassman & Headley, LLP.

133. E-mail from Diana D. Parker, Law Offices of Diana D. Parker (Nov. 14, 2008 7:45 EST) (on file with author). Ms. Parker has been a criminal defense attorney in New York for over 20 years. Ms. Parker represents corporations and individuals before regulatory bodies; litigates federal and state white-collar criminal and complex commercial matters; and represents and advises international and foreign financial institutions and businessmen.

134. See 2006 WL 3066196 (C.D. Cal. 2007) (finding that a company’s decision to discontinue advancement of attorneys’ fees was a response to employee’s conduct and a threat to embarrass company rather than a product of government coercion).

unpersuasive,”¹³⁵ because the court “found no support for [the Stein holding] either in the Supreme Court decisions cited in Stein or in any appellate court decisions.”¹³⁶ Further, the court found that in the particular context of *Stein*, it was clear that Judge Kaplan’s decision was based on the direct link between the Thompson Memorandum and the prosecutors’ actions. Much of the impact of the DOJ memoranda occurs in situations where the link between a federal policy and an employer’s conduct is far less direct, and thus a finding of improper state action is unlikely.

IV. OTHER DEVELOPMENTS IN WHITE COLLAR CRIMINAL LAW

In addition to the changes in corporate charging guidelines, there were other significant developments in white collar criminal law in 2008. Due to the steep decline of the U.S. stock market, other federal agencies, including the IRS and SEC, have stepped in to assist the DOJ with investigations of white collar crimes. Such investigations led to case law which addresses the ability of the DOJ and SEC to conduct parallel investigations, and a dramatic growth in prosecutions of Foreign Corrupt Practices Act violations.

A. *Investigations by the IRS & SEC*

While the lead investigative agency for white collar criminal prosecutions is the Federal Bureau of Investigation, other agencies—including the IRS and, to a limited extent, the Securities and Exchange Commission (“SEC”)—are sometimes involved.¹³⁷ For example, in the Central District of California, from January to July 2008, the FBI accounted for 38.4% of white collar criminal prosecutions referred. “Postal Service” accounted for 14.6%, “Justice—Other” accounted for 12.2% and “Treasury—Internal Revenue Service” accounted for 10.2%.¹³⁸ In the Northern District of California, during the same time period, the FBI accounted for 31.4% of white collar criminal prosecutions referred. “Treasury—Internal Revenue Service” accounted for 20%, while “Homeland Security—Secret Service” accounted for 14.3%.¹³⁹

The Criminal Investigation Division of the IRS brings prosecutions

135. *Id.* at *2.

136. *Id.*

137. *See* Interview with Ted Cassman, Partner, Arguedas, Cassman & Headley, in Berkeley, Cal. (Nov. 21, 2008) [hereinafter Cassman Interview]. In recent years, Mr. Cassman’s practice has included white collar cases, including tax and trade secret theft prosecutions, as well as alleged backdating of stock options.

138. White Collar Criminal Prosecutions through July 2008, Central District of California, search conducted through TracReports. (“The comparisons of the number of defendants charged with white collar criminal offenses are based on case-by-case information obtained by TRAC under the Freedom of Information Act from the Executive Office for United States Attorneys.”)

139. White Collar Criminal Prosecutions through July 2008, Northern District of California, search conducted through TracReports.

through the USAOs, and thus follows the DOJ's corporate charging policies.¹⁴⁰ Since its establishment in 1934 until 2008, the SEC had never had a manual that described its internal policies and procedures as the U.S. Attorneys' Manual does for the USAO's.¹⁴¹ However, on October 6, 2008, the SEC's Division of Enforcement issued an Enforcement Manual that addresses a variety of subjects, including waiver of the attorney-client privilege.¹⁴² "Although some of the practices described in the manual are already mandated by federal law, the manual articulates many policies and procedures that until now, have been gleaned only through informal conversations with SEC staff attorneys and the lore that has developed from the collective experience of those practicing before the SEC."¹⁴³

The SEC Manual does not address whether prosecutors should take into account a corporation's advancement or reimbursement of attorneys' fees to its employees; it does, however, advise its staff attorneys on how to avoid the issues arising out of the state actor doctrine,¹⁴⁴ as addressed in *United States v. Stein*. The Manual directs SEC staff not to ask a party to waive the attorney-client or work product privileges; it explains that entities and individuals can cooperate in investigations by voluntarily disclosing relevant information, which "need not include a waiver of privilege to be an effective form of cooperation, as long as all relevant facts are disclosed."¹⁴⁵ According to the Manual, the waiver of privilege "is not a prerequisite to obtaining credit for cooperation," and a "party's decision to assert a legitimate privilege will not negatively affect their claim to credit for cooperation."¹⁴⁶ It is not yet clear whether the SEC will broaden this movement toward greater transparency, or how these guidelines will in fact impact SEC practices.

B. Notable Cases

This section will describe two recent cases that are significant in the development of white collar criminal law. The first, *United States v. Stringer*, concerned parallel civil and criminal prosecutions, whereby suspected violations are investigated by a government agency, such as the SEC, and at the same time, DOJ prosecutors are building a criminal case against the same targets. The second, *United States v. Olis*, involves allegations of unacceptable prosecutorial conduct such as that identified by Judge Kaplan in *United States v. Stein*.

140. See Cassman interview, *supra* note 137.

141. See Amy Walsh, *New SEC Enforcement Manual: Better Late Than Never*, N.Y.L.J., Oct. 30, 2008, <http://www.law.com/jsp/ihc/PubArticleIHC.jsp?id=1202425785835>.

142. Sec. & Exch. Comm'n Div. of Enforcement, Enforcement Manual (Oct. 6, 2008), available at www.sec.gov/divisions/enforce/enforcementmanual.pdf [hereinafter SEC Manual].

143. Walsh, *supra* note 141.

144. See SEC Manual, *supra* note 142.

145. *Id.* at 98.

146. *Id.*

i. United States v. Stringer

On April 4, 2008, the Ninth Circuit reversed an Oregon federal district court's decision, *United States v. Stringer*. The court in *Stringer* dismissed a criminal indictment due to the government's violation of the defendant's due process rights resulting from "egregious" behavior in conducting a parallel civil-criminal investigation.¹⁴⁷ The district court's ruling drew nationwide attention in finding that the government used "trickery or deceit" in concealing the DOJ investigation, and concluding that the DOJ and SEC had used the civil investigation only to facilitate a later criminal prosecution.¹⁴⁸ The court explained that the U.S. Attorney's Office had chosen to gather information through the SEC rather than conduct its own investigation, and that the SEC avoided the telling the defendants whether, while cooperating with the SEC, they were targets of a criminal investigation.¹⁴⁹

Prior to the Ninth Circuit's decision, commentators suggested the case could impact the way in which the DOJ and the SEC coordinate their investigations.¹⁵⁰ Some even thought the case indicated that federal courts would begin more closely monitoring the DOJ and the SEC in the conduct of such parallel investigations. The Ninth Circuit, however, vacated the dismissal of the criminal indictments against the defendants, for violations of federal securities laws, and reversed the district court's order suppressing statements the defendants made to the SEC.¹⁵¹ The court found that the SEC made no "affirmative misrepresentations" to lead the defendants to believe that the investigation was only civil and would not lead to future criminal charges.¹⁵² The court pointed out that the SEC provided the defendants with Form 1662, which states that the SEC "often makes its files available to other governmental agencies, particularly the United States Attorneys and state prosecutors."¹⁵³ This was sufficient to put the defendants on notice that the DOJ might undertake its own investigation. The Ninth Circuit's decision is particularly important in its affirmation of the broad discretion courts afford the SEC and DOJ in pursuing parallel civil and criminal proceedings.

ii. United States v. Olis

The case of *United States v. Olis* gained national attention when the defendant, Jamie Olis, was sentenced to 24 years in prison in 2004 for helping

147. *United States v. Stringer*, 408 F. Supp. 2d 1083 (D. Or. 2006), rev'd, 535 F.3d 929 (9th Cir. 2008).

148. *See* 408 F. Supp. 2d 1083 (D. Or. 2006).

149. *See id.*

150. *See* David Z. Seide, *Improper SEC and DOJ Cooperation Can Get Charges Dismissed*, LEGAL TIMES, Mar. 3, 2006.

151. *See* 535 F.3d 929 (9th Cir. 2008).

152. *Id.* at 940-41.

153. *Id.* at 934.

to engineer a sham financial transaction at Dynegy, an Houston energy company. Pressed by the government, Dynegy cut off Mr. Olis's legal fees after he was indicted on fraud and conspiracy charges for "helping arrange a \$300 million loan disguised to look like normal corporate cash flows."¹⁵⁴ Dynegy had traditionally paid legal fees for employees caught up in company-related investigations.¹⁵⁵

Olis's sentence was one of the most severe prison terms for white-collar crime. During Olis's sentencing, Judge Sim Lake, the district judge in Houston said "he was acting under strict sentencing guidelines enacted in part because of Congressional concerns that executives convicted of business crimes were not being punished thoroughly enough."¹⁵⁶ In 2005, Olis's original sentence was overturned on appeal, and he is now serving a six-year sentence at a federal prison in Texas. The original sentence was thrown out by a panel of the United States Court of Appeals for the Fifth Circuit, which deemed it unreasonable.¹⁵⁷ "'Olis had become the poster child for what some perceived as excessive punishment for white-collar crime,' said Frank O. Bowman, author of a treatise on sentencing law and a professor of law at the University of Missouri in Columbia."¹⁵⁸

In October 2007, Olis filed a motion to vacate, citing evidence of prosecutorial misconduct. The petition claims that federal prosecutors "acted purposefully to sabotage" Olis's ability to mount a defense by pressuring Dynegy to block his access to legal fees, a violation of his Fifth and Sixth Amendment rights.¹⁵⁹ The petition, which was denied, relied in substantial part on Judge Kaplan's rulings in *United States v. Stein*.

C. Fall-Out from Subprime Mortgage Crisis

The United States is in the midst of an economic crisis fueled largely by the collapse of the subprime housing market. The crisis in the subprime market has already resulted in significant litigation¹⁶⁰ and will likely result in

154. See Paul Davies & David Reilly, *In KPMG Case, the Thorny Issue of Legal Fees*, WALL ST. J. (June 12, 2007), available at <http://www.nacdl.org/public.nsf/whitecollar/WCnews074?OpenDocument>.

155. See Anderson Interview, *supra* note 132.

156. Simon Romero, *Ex-Executive of Dynegy Is Sentenced to 24 Years*, N.Y. TIMES (March 26, 2004), <http://query.nytimes.com/gst/fullpage.html?res=9D00E3DD1330F935A15750C0A9629C8B63>.

157. See *U.S. v. Olis*, 429 F.3d 540 (5th Cir. 2005).

158. Simon Romero, *Revision of 24-Year Prison Term Ordered in Accounting Fraud*, N.Y. TIMES (Nov. 2, 2005), <http://www.nytimes.com/2005/11/02/business/02dynegy.html>.

159. See Memorandum of Points and Authorities in Support of Jamie Olis' Motion to Set Aside His Conviction Pursuant to 28 U.S.C. § 2255, <http://blog.kir.com/archives/images/3F%20Olis%20Memo%20in%20support%20of%20mtn%20to%20set%20aside.pdf>.

160. Business Wire, *Subprime Mortgage Litigation Reaches Record Levels in the First Quarter of 2008, According to Navigant Consulting Study*, April 23, 2008, available at http://findarticles.com/p/articles/mi_m0EIN/is_2008_April_23/ai_n25343085/.

additional suits against investment banks, accounting firms, ratings agencies, commercial banks, law firms and homebuilders. The FBI is investigating Fannie Mae, Freddie Mac, Lehman Brothers and American International Group, and their executives, as part of a broad look into possible mortgage fraud.¹⁶¹ Institutional investors and subprime-lender shareholders have already initiated litigation against subprime lenders in California and elsewhere.¹⁶²

The current crisis is a result of a proliferation of subprime loans, which are non-traditional, higher-risk loans carrying higher interest rates and made to buyers who cannot qualify for traditional loans. These loans include mortgages with low “teaser” interest rates that increase after a few years, zero-down loans, variable-interest-rate loans, and stated-income loans requiring little or no income documentation. “In 2000, only about 2.6 percent of mortgages originated in the United States were categorized as subprime. By 2006, that number had risen to 13.5 percent. Subprime mortgages now account for approximately 20 percent of the \$3 trillion mortgage market.”¹⁶³

According to FBI spokesman Special Agent Richard Kolko, twenty-six firms are currently under investigation as part of the Bureau’s mortgage fraud inquiry.¹⁶⁴ In September of 2008, then-FBI Director Robert Mueller told Congress that 1,400 individual real estate lenders, brokers and appraisers were under investigation in addition to two dozen corporations.¹⁶⁵ It is evident that the implications of the subprime mortgage crisis have not yet reached their full effect; the Mortgage Asset Research Institute found that incidents of mortgage fraud in the U.S. increased by forty-two percent in the first three months of 2008 compared with the same period in 2007.¹⁶⁶

The FBI’s agents and resources are strained to investigate sufficiently criminal wrongdoing relating to this crisis.¹⁶⁷ The Bureau plans to double the number of agents working financial crimes in order to investigate some of the largest players in the financial collapse.¹⁶⁸ Currently, 200 FBI agents have been assigned to investigate the mortgage crisis; this, however, pales in comparison with the number of FBI agents assigned to investigate the Savings

161. See Eric Lichtblau, *F.B.I. Looks Into 4 Firms at Center of the Economic Turmoil*, N.Y. TIMES (Sept. 23, 2008), <http://www.nytimes.com/2008/09/24/business/24inquiry.html>.

162. Perkins Coie LLP, *Subprime Lending Troubles Spawn Widespread Litigation* (June 8, 2007), http://www.perkinscoie.com/news/pubs_Detail.aspx?publication=9a893672-68c9-423b-95a6-bd802633250d&RSS=true.

163. *Id.*

164. Kelli Arena, *FBI probing bailout firms*, CNNMoney.com, http://money.cnn.com/2008/09/23/news/companies/fbi_finance/?postversion=2008092412.

165. *Id.*

166. ChoicePoint, *Mortgage Fraud Reports Jump 42% in US, MARI Finds* (Aug. 25, 2008), <http://phx.corporate-ir.net/phoenix.zhtml?c=95293&p=irol-newsArticle&ID=1189832&highlight=>

167. See Eric Lichtblau, David Johnston & Ron Nixon, *F.B.I. Struggles to Handle Financial Fraud Cases*, N.Y. TIMES (Oct. 18, 2008), <http://www.nytimes.com/2008/10/19/washington/19fbi.html>.

168. *Id.*

and Loan crisis in the late 1980s—approximately 1,000.¹⁶⁹ Furthermore, the Bush administration repeatedly denied requests from the FBI “for more money to replenish the ranks of agents handling nonterrorism investigations.”¹⁷⁰ “[T]he cutbacks have been particularly severe in staffing for investigations into white-collar crimes like mortgage fraud, with a loss of 625 agents, or 36 percent of its 2001 levels.”¹⁷¹

The Justice Department is increasingly relying on state and local authorities to pick up the extra work through joint task forces.¹⁷² According to the *New York Times*, companies suffering fraud are turning to private investigators because they are unable to obtain assistance from the FBI.¹⁷³ “In some instances, private investigative and accounting firms are now collecting evidence, taking witness statements and even testifying before grand juries, in effect preparing courtroom-ready prosecutions they can take to the F.B.I. or local authorities.”¹⁷⁴

D. Enforcement of the Foreign Corrupt Practices Act

The Foreign Corrupt Practices Act of 1977 is a federal law containing antibribery and accounting requirements.¹⁷⁵ It was enacted to bring a halt to the bribery of foreign officials. As a result of SEC investigations in the mid-1970’s, over 400 U.S. companies admitted making questionable or illegal payments in excess of \$300 million to foreign government officials, politicians, and political parties.¹⁷⁶ The antibribery provisions of the FCPA make it unlawful for any U.S. person (and certain foreign issuers) to make a payment to a foreign official for the purpose of obtaining or retaining business for, or with, or directing business to, any person. The FCPA also added accounting requirements to the Securities and Exchange Act of 1934, which require publicly-traded companies to maintain records that accurately and fairly represent the company’s transactions.

FCPA enforcement has been at historically high levels for the past several years. In 2007, the enforcement rate of the FCPA jumped dramatically from previous years, and this trend continued in 2008. In the first six months of 2008, there were more FCPA prosecutions than in any other full year prior to 2007.¹⁷⁷ According to Mark F. Mendelsohn, deputy chief of the DOJ’s fraud

169. Haag Interview, *supra* note 130.

170. Lichtblau, *supra* note 167.

171. *Id.*

172. *See id.*

173. *See id.*

174. *Id.*

175. Foreign Corrupt Practices Act of 1977, 15 U.S.C. §§ 78dd-1 (1977).

176. *See* U.S. Dep’t of Justice & U.S. Dep’t of Commerce, *Lay-Person’s Guide to FCPA*, <http://www.usdoj.gov/criminal/fraud/docs/dojdocb.html>.

177. Gibson, Dunn & Crutcher LLP, *2008 Mid-Year FCPA Update* (July 7, 2008), <http://www.gibsondunn.com/Publications/Pages/2008Mid-YearFCPAUpdate.aspx>.

section, pursuing anticorruption cases has become “a significant priority in recent years.”¹⁷⁸ Mendelsohn explained that when U.S. companies pay bribes to foreign officials, it undermines government institutions worldwide and is a hugely destabilizing force.¹⁷⁹

There were several noteworthy developments in FCPA enforcements in 2007 and 2008.¹⁸⁰ Voluntary disclosures of FCPA violations increased, “probably due to the combined effects of Sarbanes-Oxley and the encouragement enforcement agencies have given to such disclosures.”¹⁸¹ Both jail terms and financial penalties also increased. Recent FCPA enforcements reflect the fact that the DOJ and SEC have discretion whether to prosecute a parent company, its subsidiaries, including foreign subsidiaries, employees or agents and can use a variety of tools, such as deferred prosecution agreements, non-prosecution agreements, consent decrees and pleas.¹⁸² Further, the agencies developed a practice of targeting specific industries doing business in countries where bribery is believed to be part of the local business culture.¹⁸³

Currently, there is no private right of action under the FCPA, and as such, shareholders are unable to sue companies directly for FCPA violations. Thus, there has been a recent trend of shareholders pursuing claims based on FCPA violations in the form of follow-on civil lawsuits.¹⁸⁴ And on June 4, 2008, Rep. Ed. Perlmutter (D. Colo.) introduced the “Foreign Business Bribery Prohibition Act of 2008,”¹⁸⁵ which would provide for a limited private right of action under the FCPA. Potential litigation targets are limited to “foreign concerns,” so the class of potential defendants is restricted to foreign persons unaffiliated with U.S. stock exchanges. The bill represents yet another part of the increasing focus on corrupt activity and the increasing risk of civil litigation arising out of

178. Posting of Dan Slater to WSJ.com Law Blog, *And the FCPA Party Continues...*, <http://blogs.wsj.com/law/2008/09/12/and-the-fcpa-party-continues/> (Sept. 12, 2008, 9:19 EST).

179. *Id.*

180. See Lucinda A. Low, Owen Bonheimer, Negar Katirai & Michael Lieberman, *The Foreign Corrupt Practices Act: Coping with Heightened Enforcement Risk*, 1619 PLI/Corp 95 (Sept. 17, 2007). There are five noteworthy developments in FCPA enforcement thus far in 2008: “(1) the outburst of civil litigation collateral to FCPA investigations; (2) the introduction of legislation that would provide for a private right of action under the FCPA; (3) the increasing number of foreign corruption investigations; (4) the growing importance of FCPA due diligence in business transactions, particularly acquisitions; and (5) substantial jail terms for individual defendants convicted under the FCPA.” Gibson, Dunn & Crutcher LLP, *2008 Mid-Year FCPA Update* (July 7, 2008), <http://www.gibsondunn.com/Publications/Pages/2008Mid-YearFCPAUpdate.aspx>.

181. *Id.* at 124.

182. See Low, *supra* note 180.

183. Kevin M. LaCroix, *The Foreign Corrupt Practices Act: A '70s Revival*, OAKBRIDGE INSIGHTS (June/July 2008), available at <http://www.oakbridgeins.com/newsletters/Vol%20III%20Issue%20Three%20The%20Foreign%20Corrupt%20Practices%20Act%20A%20%2770s%20Revival.pdf>

184. See *id.*

185. Foreign Business Bribery Prohibition Act of 2008, H.R. 6188, 110th Cong. (2008). The bill died at the end of the 110th session of Congress.

that process.

E. Deferred Prosecution Agreements

In recent years, the use of deferred prosecution agreements (“DPA”) and non-prosecution agreements (“NPA”) has increased.¹⁸⁶ The first DPA involving a major company took place in 1994.¹⁸⁷ Since then, the number of corporate pre-trial agreements has increased, rising from twenty corporate pre-trial agreements in 2006 to thirty-five in 2007.¹⁸⁸ A deferred prosecution agreement is usually granted after a prosecutor files a criminal charge against a company, and then agrees not to prosecute the claim so long as the entity complies with the terms of a deferral agreement. The company avoids indictment by voluntarily entering a probationary period during which it will (i) enact substantial internal reforms and (ii) cooperate with the government, helping prosecutors to build a case against individual employees.¹⁸⁹

The DOJ’s indictment of Arthur Andersen LLP, which caused the accounting firm to destruct, led prosecutors to focus on the collateral consequences of moving against an entire entity criminally. “That caused prosecutors to be more cautious about, and reluctant to, indict companies, and led to an increase in the use of deferred prosecution agreements instead.”¹⁹⁰ They turned to lesser sanctions, such as deferred prosecution agreements. Some praise the use of DPAs, which protect shareholders and employees who were uninvolved in the wrongdoing.¹⁹¹ However, others express concern that the automatic alternative to indictment is a DPA. “The alternative instead should be a decision not to proceed against the company,” according to Mary Jo White, former U.S. Attorney for the Southern District of New York and head of the litigation group at Debevoise & Plimpton LLP.¹⁹² “Prosecutors are thinking – before we close out this case that involves any kind of corporate crime, we should get something from the companies.”¹⁹³

As DPAs become more common, federal prosecutors may need to develop guidelines for when these agreements can be used. In the meantime, DPAs can be very advantageous for a company looking to avoid indictment.

186. See Peter Spivack & Sujit Raman, *Regulating the ‘New Regulators’: Current Trends in Deferred Prosecution Agreements*, 45 AM. CRIM. L. REV. (forthcoming 2008), available at http://papers.ssrn.com/sol3/papers.cfm?abstract_id=1096726.

187. White Interview, *supra* note †.

188. Spivack & Raman, *supra* note 186 (citations omitted).

189. See *id.*

190. Haag Interview, *supra* note 130.

191. See Cassman Interview, *supra* note 137. Mr. Cassman noted that corporations should still have to disgorge profits earned as a result of the wrongdoing.

192. White Interview, *supra* note †.

193. *Id.*

CONCLUSION

While it remains to be seen how the Filip Memorandum and *United States v. Stein* will impact the practice of federal prosecutors, it is clear that the judiciary, the media and the public will continue to advocate for greater protections for the attorney-client privilege and work-product protections. It is likely that critics of the DOJ policies will continue to press for legislation, which may force the Justice Department to provide greater protections for corporations. Though President-Elect Barack Obama took office in January 2009, it is not clear that he will materially alter present corporate cooperation policies. The Holder Memorandum originated during the Democratic Clinton Administration, while the Thompson, McNulty and Filip Memoranda are products of the Republican Bush Administration. Traditionally, Republicans have been less aggressive in prosecuting businesses, while Democrats tend to pursue more white collar criminal litigation.¹⁹⁴ Still, criminal defense attorney Ted Cassman expects that Democrats will likely be sensitive to the issues raised in *Stein*.¹⁹⁵

As the Bush administration came to a close, many are looking back to evaluate the effects of the policies enacted over the past eight years. According to Laurie Levenson, a criminal law professor at Loyola Law School, some of the most important mistakes made by the DOJ during the Bush administration relate precisely to the issues addressed in this paper: first, the unilateral setting of prosecutorial priorities and second, failing to maintain good relations with the judiciary.¹⁹⁶ Levenson explained that “while there are some prosecutorial priorities that are national in scope . . . a great deal of deference should be afforded to local districts to set prosecutorial priorities.”¹⁹⁷ Therefore, though it is helpful for the DOJ to set standards for USAOs, there should also be discretion allowed at the local level. Levenson also suggested that the DOJ should prioritize improving relations with the judiciary in the coming years. “Both the judiciary and the defense bar should be surveyed for concerns they think should be addressed in the new [DOJ].”¹⁹⁸ This strain has been evident in reactions to the DOJ’s prosecutorial guidelines; the legislature has proposed the Attorney-Client Privilege Act several times, while the judiciary, in cases such as *Stein*, has expressed its discomfort with tactics of the country’s federal prosecutors.

In 2009, the focus in white collar crime will likely shift to investigations relating to the subprime mortgage meltdown and stock market crisis. Each

194. See Cassman Interview, *supra* note 137.

195. *Id.*

196. See Laurie Levenson, Professor of Law, William M. Rains Fellow and Director of the Center for Ethical Advocacy at Loyola Law School, Remarks at The Next Department of Justice (Nov. 24, 2008).

197. *Id.*

198. *Id.*

week, the number of investigations against companies who allegedly provided misleading information about their financial health is growing. While many believe that executives who lied to investors about securities linked to subprime mortgages should be prosecuted to the fullest extent allowed by law, others note that this will not cure the country's economic crisis. "[E]ven if we start seeing CEO perp walks on the evening news, the burgeoning credit crisis will not abate, moribund home values will not rise, foreclosure rates will not slow and the economic woes that many Americans are experiencing will not be alleviated."¹⁹⁹ In this coming year, we will see how the government attempts to balance the country's competing needs.

199. Harlan Protass, *The Misguided CEO Blame Game*, CHICAGO TRIBUNE (Oct. 16, 2008), available at <http://www.chicagotribune.com/news/nationworld/chi-oped1016blameoct16,0,7350660.story>.