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OPINION

■ INTERNAL INVESTIGATIONS

End the outsourcing

By Aitan Goelman SPECIAL TO THE NATIONAL LAW JOURNAL

THE DIFFICULTY that most companies would have in surviving a criminal indictment has given the government enormous leverage over companies whose employees are suspected of criminal activity. The U.S. Department of Justice has used that leverage to outsource many corporate criminal investigations by pressuring companies to undertake their own, internal investigations, the results of which are promptly reported to DOJ.

Concerns that this dynamic has undermined the attorney-client privilege and violated the rights of individual employees has led to calls for legislation prohibiting DOJ from considering a company's agreement to waive privilege when deciding whether to indict it. Thus far, DOJ has successfully forestalled any action by Congress, and Deputy Attorney General Mark Filip recently wrote a letter to Senator Arlen Specter, R-Pa., who has criticized these tactics, asking that the Senate continue to hold off while DOJ (again) modifies its internal guidelines to address congressional concerns. Specter has indicated reluctance to wait any longer.

He's right. It's time for Congress to act.

Filip letter is insufficient

At first glance, the changes set out in the Filip letter appear to go a long way toward addressing some of the flaws in DOJ's current policy. In evaluating a company's cooperation as part of deciding whether to indict it, DOJ will not consider whether it is paying legal fees for potentially culpable employees, whether it has entered into a joint defense agreement (JDA) with these individuals, or whether it has retained or sanctioned these employees. Instead, "the government's key measure of cooperation" will be "to what extent has the corporation timely disclosed the relevant facts about the misconduct. That will be the operative question—*not* whether the corporation waived attorney-client privilege or work product protection in making its disclosures."

But that "timely disclosure" of "relevant facts about the misconduct" will often still require companies to waive attorney-client privilege. After all, internal investigators will doubtless learn some of these facts through privileged conversations with employees of the company. So when the government considers whether a company is entitled to credit for cooperating with the investigation by timely disclosure of these key facts, it will still be punishing companies that don't waive the privilege and rewarding those companies who do waive. It just won't explicitly be tied to a formal waiver any more.

The pledge not to consider whether the corporation has retained or sanctioned employees in evaluating a company's cooperation is also less meaningful than it first seems. Although not mentioned in the Filip letter, the current rules direct prosecutors to consider whether the company has sanctioned purportedly culpable employees under two separate baskets: an evaluation of the company's cooperation, and a consideration of its "remediation." The changes proposed in the Filip letter appear to address the first but not the second. If the government can consider indicting a company for its refusal to fire an employee who exercises his right to remain silent when questioned by internal investigators (acting in the capacity of junior prosecutors), who cares what basket this falls under?

More fundamentally, it's not a matter of tinkering with the language of an internal DOJ guideline, since it is not really the government's behavior that needs changing here; it's the mindset of corporate America. Consider: DOJ has consistently stated that it only rarely asks companies to waive privilege, but among corporations, there is still a widely held belief that such waiver constitutes a company's best chance of avoiding indictment. And companies have been effectively conditioned to "volunteer" it. With an indictment being tantamount to a corporate death sentence in many cases, lawyers for the company know that they have to do whatever they can to avoid indictment.

With legislation that flatly forbids DOJ from considering whether a company has waived privilege, or fired employees who choose to exercise their Fifth Amendment rights in an internal investigation, you'll start to see the whiff of coercion disperse. Will this cause companies to begin resisting investigations by circling the wagons with all-encompassing JDAs and enforcing corporate omerta? Will it cripple federal law enforcement efforts against business crime and lead to a wave of Enrons? Not likely. Companies will still have a host of reasons to cooperate with the government and to police themselves, civil liability not the least of them. The government will still have the same carrots and sticks that have enabled it to successfully crack open organizations (like the mafia and violent gangs) that presumably have more effective ways of enforcing silence than corporate America.

Allowing internal investigators to work as counsel to the company instead of DOJ appendages will make it easier to get at the truth. Which, after all, is supposed to be the point of internal investigations. NLJ

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