

**The “Filip Memorandum” and *Stein*: Relevance to Healthcare Providers**

**Michael W. Peregrine, Esquire**  
McDermott Will & Emery LLP  
Chicago, IL

**Patrick S. Coffey, Esquire**  
Locke Lord Bissell & Liddell LLP  
Chicago, IL

Two recent, highly publicized developments relating to the attorney–client privilege have important collateral implications for healthcare providers. The revised Department of Justice (DOJ) Guidelines for Prosecuting Corporate Fraud,<sup>1</sup> and the Second Circuit decision in *U.S. v. Stein*,<sup>2</sup> combine to prompt provider leadership to re-evaluate existing practices with respect to the structure, operation, and oversight of corporate compliance plans; application of the attorney–client privilege; and the scope of director/officer indemnification arrangements. The organizational benefits of responding to these new developments apply regardless of whether a provider is organized on a for-profit or nonprofit basis.

**The “Filip Memorandum”**

On Thursday, August 28, Deputy U. S. Attorney General Mark R. Filip announced a revision of the Department of Justice’s existing guidelines for the investigation and prosecution of corporate fraud. Officially entitled “Principles for Federal Prosecution of Business Organizations,” the guidelines govern how all federal prosecutors investigate,

---

<sup>1</sup> The Department of Justice, “Principles of Federal Prosecution of Business Organizations.” This guidance is *available at* [www.usdoj.gov/opa/documents/corp-charging-guidelines.pdf](http://www.usdoj.gov/opa/documents/corp-charging-guidelines.pdf); *see also*, The Justice Department’s press release: [www.usdoj.gov/opa/pr/2008/August/08-odag-757.html](http://www.usdoj.gov/opa/pr/2008/August/08-odag-757.html).

<sup>2</sup> *United States v. Stein*, United States Court of Appeals for the Second Circuit, August 28, 2008, Docket No. 07-3042cr.

charge, and prosecute corporate crimes. The revisions announced on August 28 were long-awaited, given that they address in large part controversial issues associated with cooperation credit (i.e., whether credit is dependent upon waiver of the attorney–client or work product privilege). The Filip Memorandum also incorporates substantial yet subtle (and in most instances corresponding) changes to long-standing DOJ guidelines with respect to credit received for an effective corporate compliance plan.<sup>3</sup>

### *Overview of Revisions*

The revised guidelines announced by Deputy Attorney General Filip will guide federal prosecutors in assessing whether companies have cooperated in corporate criminal investigations. These changes follow increasing bipartisan threats from Congress to override (by legislation) the Department’s prior policies, outlined in the previous iteration of the Guidelines (the so-called McNulty Memorandum, released in 2006 and referencing then-Deputy Attorney General Paul J. McNulty).<sup>4</sup> Congress, the private bar, and the judiciary had criticized several provisions in the McNulty Memorandum, including one that allowed federal prosecutors to demand waivers of the attorney–client and work-product privileges in exchange for cooperation credit. Among other things, these provisions were viewed as having a chilling effect on a company’s fundamental right to obtain effective legal counsel.

Effective on August 28, the DOJ (through the Filip Memorandum) has changed its policy as to corporate cooperation in the following respects:

- **Cooperation will be measured by the extent to which a corporation discloses relevant facts and evidence, not its waiver of privileges.** The government’s key measure of cooperation will be the same for a corporation as an individual: 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 the attorney–client privilege or work product protection in making its disclosures.

---

<sup>3</sup> See, e.g., Principles of Federal Prosecution of Business Organization, Sec. 9-28.800.

<sup>4</sup> U.S. Department of Justice Memorandum, Principles of Federal Prosecution of Business Organization, December 12, 2006. [www.usdoj.gov/dag/speech/2—6/mcnulty\\_memo.pdf](http://www.usdoj.gov/dag/speech/2—6/mcnulty_memo.pdf) (the “McNulty Memorandum”).

- **Federal prosecutors will not demand the disclosure of “Category II” information as a condition for cooperation credit.** To be eligible for cooperation credit, a corporation need not disclose, and the government may not demand, what the McNulty Memo defines as “Category II” information—nonfactual attorney-work product and core attorney–client privileged communications.
- **Federal prosecutors will not consider whether the corporation has advanced attorneys’ fees to its employees in evaluating cooperation.** The advancement of attorneys’ fees or provision of counsel by a corporation to its employees will not be taken into account for the purpose of evaluating cooperation.
- **Federal prosecutions will not consider whether the corporation has entered into a joint defense agreement in evaluating cooperation.** The mere participation in a joint defense, common interest, or similar agreement by a corporation will not be taken into account for the purpose of evaluating cooperation.
- **Federal prosecutors will not consider whether the corporation has retained or sanctioned employees in evaluating cooperation.** How and whether a corporation disciplines culpable employees may bear on the quality of its remedial measures or its compliance program; it will not be taken into account for the purpose of evaluating cooperation.

#### *Impact on Healthcare Providers*

While it is tempting for some healthcare organizations to dismiss criminal charging policy as irrelevant or not worthy of priority attention, the Filip Memorandum relates directly to the board’s compliance plan oversight obligations as articulated by the *Caremark*<sup>5</sup> and *Stone*<sup>6</sup> decisions. It should be understood that United States Attorneys and Office of Inspector General (OIG) counsel use the guidelines, as well as other

---

<sup>5</sup> *In re Caremark, Inc.*, Derivative Litigation, 698 A.2d. 959 (Del. Ch. 1996).

<sup>6</sup> *Stone v. Ritter*, 2006 Del. LEXIS 597, Nov. 6, 2006.

related tools, when determining the nature and extent of civil and administrative sanctions that could flow from the full range of enforcement and compliance issues.

### *Impact on Compliance Plans*

In particular, healthcare providers and their corporate leadership should recognize that the Filip Memorandum confirms the DOJ's historical enforcement perspective on the importance of effective corporate compliance. Carried over in large part from the McNulty Memorandum is a highly significant discussion of how an "effective and pre-existing compliance plan" will be considered by DOJ in reaching a decision as to the proper treatment of a corporate target. This discussion is separate and distinct from compliance guidance issued by the Department of Health and Human Services (HHS) OIG, and other healthcare regulatory agencies, and is very practical in terms of its scope.<sup>7</sup>

The Filip Memorandum's discussion of the role of compliance programs to the prosecution decision differs from the discussion contained in the McNulty Memorandum, in two principal respects:

**First**, the Filip Memorandum discussion contains a series of subtle revisions intended to achieve consistency with the overall theme of the changes to the corporate charging policies. For example, the Filip Memorandum deletes prior references providing that (a) the commission of a crime in the face of a compliance program may suggest that corporate management is not adequately enforcing the program and (b) the extent of the corporation's cooperation in the government's investigation is a factor to be considered by prosecutors.

**Second**, the Filip Memorandum adds a new "good faith" factor to the evaluation criteria. Specifically, it adds to the list of fundamental (compliance-related) questions a prosecutor should ask whether the "program is being applied earnestly and in good faith." While no definition of "good faith" is provided, it

---

<sup>7</sup> See, e.g., OIG Compliance Program for Hospitals, 63 Fed. Reg. 8987 (Feb. 23, 1998), OIG Supplemental Compliance Program Guidance for Hospitals, 70 Fed. Reg. 4958 (Jan. 31, 2005).

would seem to implicate core *Caremark* and Sentencing Guidelines oversight expectations of corporate leadership.

See summary of the DOJ's compliance plan effectiveness criteria attached to this executive summary.

Considering the threat of governmental enforcement and qui tam/whistleblower claims against healthcare organizations of all types, the Filip Memorandum should be used to guide efforts to upgrade compliance policies and procedures, operate the program using focused testing, and further educate the board of directors and senior executives responsible for protecting the organization from enhanced penalties and other sanctions.

Organizations should thus revisit the adequacy and focus of their existing compliance programs and related efforts using the DOJ's continuing emphasis on effective corporate compliance, as well as leading industry settlements imposing compliance reforms as a guide. Concerned organizations should also consider incorporating focused compliance effectiveness assessments and ensure that there has been appropriate consideration given to relevant guidance, including incorporation of compliance practices and other reforms either influenced or driven by notable settlements and judgments in the industry.

### ***U.S. v. Stein***

Also on August 28, the Second Circuit issued a significant ruling, affirming the dismissal of the indictments returned against thirteen former KPMG employees for their alleged participation in tax shelter-related fraud. The decision in *U.S. v. Stein* relates to the issues addressed in the Filip Memorandum and the DOJ corporate charging policies generally, to the extent it reflects upon the forces prompting DOJ reconsideration of certain investigation and charging decisions. From a collateral perspective, it underscores the importance of effective and reasonable director/officer indemnification arrangements (particularly to the extent they provide reimbursement of defense costs).

### *Case Background*

In *Stein*, KPMG and its employees had come under investigation for their roles in creating allegedly unlawful tax shelters. The investigation prompted KPMG to seek a resolution of the case without corporate prosecution, to avoid the risk of failure that had ensued in the criminal case brought by DOJ against Arthur Andersen. KPMG had initially followed its traditional practice of extending advances of defense fees and costs to its employees who had come under investigation and later indictment. This typical practice became the source of friction in KPMG's negotiations with the government and resulted, under "overwhelming influence" by the federal prosecutors, in a decision by KPMG to end the advances of defense fees for the thirteen employees.

At the trial court level, the district court judge determined that the government's pressure on KPMG had resulted in a constitutional deprivation of the assistance of counsel to the company's indicted employees. Unable to craft another remedy, the court took the drastic action of dismissing the indictments against the KPMG employees in their entirety. That decision was appealed and resulted in the decision handed down on August 28. In affirming the dismissal of the indictments, the appeals court found that federal prosecutors had "unjustifiably interfered with the defendants' relationship with counsel and their ability to mount a defense, in violation of the Sixth Amendment." This was a serious condemnation of the investigation and charging practices that have now been modified by the latest policy and guidance set forth in the Filip Memorandum.

### *Impact on Healthcare Compliance*

It is obvious that threat of legislation, the *Stein* decision, and related criticism of DOJ have prompted the government to end its earlier practice of insisting on waivers of attorney-client privilege and pressuring corporate organizations to withhold typical support offered to employees involved in investigations. The impact of both *Stein* and the new Filip Memorandum should be a restoration of the ability of corporations to engage in the traditional defense activities that follow from an enforcement investigation and risk of prosecution.

Against this backdrop, it remains critical to posture healthcare organizations as favorably as possible to defend these types of inquiries, and the new policy and guidance continues to reaffirm the important role that good compliance and governance can play in mitigating risk of exposure. The *Stein* decision also highlights the importance of insurance and indemnification protections available pursuant to state law by corporations to their officers and directors—and should prompt organizational re-evaluation of the sufficiency and fairness of their scope. This is particularly important regarding whether the coverage includes the cost of defense and liability and, if so, whether there are any limits.

### **Recommended Action Items**

Corporate counsel can play an important role in assisting the board and executive leadership of healthcare clients in appreciating the implications—and opportunities—arising from the release of the Filip Memorandum and the *Stein* decision.

Part of this will involve, to a certain extent, clarifying for the client why it should pay attention to these important new developments. As significant as they may be, both Filip and *Stein* may initially be greeted with a shrug by many healthcare board and executive leaders—who may understandably perceive their organization as unlikely to ever be in a situation in which waiver of the privilege or indemnification of defense costs are substantive concerns, at least in terms of a criminal proceeding.

In that regard, corporate counsel may wish to use this opportunity to remind their clients, in very simple terms, of the existence of DOJ's Guidelines for Prosecuting Corporate Fraud and that those guidelines apply across all corporate boundaries. Unlike the federal sentencing guidelines, the DOJ guidelines are applied going into an investigation, rather than at the point of sentencing—so their practical importance can be more significant.<sup>8</sup> This also is a useful opportunity to remind the board of its *Caremark/Stone* oversight obligations.

---

<sup>8</sup> 2006 Federal Sentencing Guidelines Manual, Chapter 8, § 8B2.1 “Effective Compliance and Ethics Program.” [www.ussc.gov/2006guid/8b2\\_1.html](http://www.ussc.gov/2006guid/8b2_1.html).

Another part of this may also involve reminding corporate leadership that the attorney–client and related privileges, when properly applied, remain valuable concepts. The Filip Memorandum provides a useful opportunity for organizational leadership to work with their corporate counsel to revisit proper attorney–client privilege practice (i.e., the bases for both applying—and losing—the privilege).

And another part of this should certainly serve as a reminder for board and executive compliance leadership to review those provisions of the Filip Memorandum devoted to the role of the corporate compliance plan (and its effectiveness) as it may relate to a decision to prosecute. It would be a very useful exercise for a provider to compare its own compliance practice against this latest version of DOJ’s expectations and make changes as needed.

\* \* \* \* \*

Thus, the August 28 release of both the Filip Memorandum and the *Stein* decision offer important opportunities for healthcare providers to enhance existing corporate compliance plans and indemnification arrangements.

***The “Filip Memorandum” and Stein: Relevance to Healthcare Providers*** © 2008 is published by the American Health Lawyers Association. All rights reserved. No part of this publication may be reproduced in any form except by prior written permission from the publisher. Printed in the United States of America.

Any views or advice offered in this publication are those of its authors and should not be construed as the position of the American Health Lawyers Association.

“This publication is designed to provide accurate and authoritative information in regard to the subject matter covered. It is provided with the understanding that the publisher is not engaged in rendering legal or other professional services. If legal advice or other expert assistance is required, the services of a competent professional person should be sought”—*from a declaration of the American Bar Association*

**Compliance Plan Effectiveness Criteria  
Department of Justice Guidelines  
Prosecution of Corporations**

**Compiled and Edited by Michael W. Peregrine, Esquire, McDermott Will & Emery LLP  
and Patrick S. Coffey, Esquire, Locke Lord Bissell & Liddell LLP**

<b>FUNDAMENTAL QUESTIONS:</b>	<ul style="list-style-type: none"> <li>▪ Is the corporation's compliance program well-designed?</li> <li>▪ Does the corporation's compliance program work?</li> <li>▪ Is the program being applied earnestly and in good faith?</li> </ul>
<b>CRITICAL FACTORS IN EVALUATION:</b>	<ul style="list-style-type: none"> <li>▪ Is the program adequately designed for maximum effectiveness in preventing and detecting wrongdoing by employees?</li> <li>▪ Is corporate management enforcing the program or is it tacitly encouraging or pressuring employees to engage in misconduct to achieve business objectives?</li> </ul>
<b>GOVERNANCE-RELATED EVALUATION CONSIDERATIONS</b>	<ul style="list-style-type: none"> <li>▪ Do corporate directors exercise independent judgment review over proposed corporate action rather than unquestioningly ratifying officers' recommendations?</li> <li>▪ Are internal audit functions conducted at a level sufficient to ensure their independence and accuracy?</li> <li>▪ Have the directors established an information and reporting system in the organization reasonably designed to provide management and the board with timely and accurate information sufficient to allow them to reach an informed decision regarding the organization's compliance with the law?</li> </ul>
<b>OTHER EVALUATION FACTORS:</b>	<ul style="list-style-type: none"> <li>▪ Has the corporation provided for a staff sufficient to audit, document, analyze, and utilize the results of the corporation's compliance efforts?</li> <li>▪ Are the corporation's employees adequately informed about the compliance program?</li> <li>▪ <b><i>Are the corporation's employees convinced of the corporation's commitment to the compliance program? [emphasis added]</i></b></li> <li>▪ Is it merely a "paper program" or is it designed, implemented, reviewed, and revised as appropriate?</li> </ul>
<b>SUPPLEMENTAL CONSIDERATIONS:</b>	<ul style="list-style-type: none"> <li>▪ Comprehensiveness of compliance program;</li> <li>▪ Extent and pervasiveness of criminal conduct;</li> <li>▪ Number and level of corporate employees involved;</li> <li>▪ Seriousness, duration, and frequency of the misconduct;</li> <li>▪ Remedial actions taken by the corporation (e.g., disciplinary action against past violators uncovered by the prior compliance program; revisions to corporate compliance program in light of lessons learned); and</li> <li>▪ Promptness of any disclosure of wrongdoing to the government.</li> </ul>

Source: U.S. Department of Justice, "Principles of Federal Prosecution of Business Organizations" (Section 9-28.800—"Corporate Compliance Programs"). [www.usdoj.gov](http://www.usdoj.gov).