

# Client Alert

A report  
for clients  
and friends  
of the firm      September 2006

## Former DOJ Officials Call For An End to Compelled Waiver of Attorney-Client Privilege

Last week ten former high-ranking officials at the U.S. Department of Justice urged Attorney General Alberto Gonzalez to abandon DOJ policies that coerce companies to waive the attorney-client privilege and other legal protections during criminal investigations. In a letter delivered September 5, 2006, this bipartisan group called for an end to prosecutors insisting that companies must surrender legal privileges in order to receive credit for cooperating with investigators. Signatories to the letter include Richard L. Thornburgh, an attorney general under Presidents Reagan and George H. W. Bush; Griffin Bell, who served as an attorney general under President Carter; and Kenneth W. Starr, a former solicitor general.

At the center of the controversy is a 2003 memorandum authored by then-Deputy Attorney General Larry Thompson which established guidelines for federal prosecutors to follow in deciding whether to bring a criminal prosecution against a business organization. The so-called "Thompson Memorandum" has been criticized for encouraging prosecutors to insist upon corporate waivers of the attorney-client and attorney work-product protections as a condition to receiving "credit" for cooperating with the government. The letter sent this week to Attorney General Gonzalez claimed that this policy actually undermines compliance with federal law because, "by making waiver of privilege and work-product protections nearly assured, the Department's policies discourage personnel within companies and other organizations from consulting with their lawyers, thereby impeding the lawyers' ability effectively to counsel compliance with the law." The former DOJ officials further

argued that forcing corporations to relinquish the attorney-client privilege undermines corporate compliance programs and encourages excessive "follow-on" civil litigation.

The arguments contained in this letter echo recent criticism by the American Bar Association, a growing number of federal judges, and lawmakers who believe that the Thompson Memorandum's policies on waiver of the attorney-client privilege and other legal safeguards are harmful. For example, U.S. Congressmen Dan Lungren (R-CA) and William Delahunt (D-MA) wrote in a recent editorial in *The Hill* that "the Department of Justice, the Securities and Exchange Commission and other federal agencies should not consider any company or other entity to be 'non-cooperative' for protecting its right to consult confidentially with its attorneys." The Senate Judiciary Committee plans to hold a hearing on this issue next Tuesday, September 12, 2006. FBI Director Robert Mueller and former U.S. Attorney General Edwin Meese are scheduled to testify.

Issues surrounding the waiver of legal privileges surface nearly universally when an organization becomes the subject of a government investigation by the Department of Justice, Securities and Exchange Commission, or other federal and state law enforcement agencies. This topic has polarized the private bar and government attorneys, with government enforcement lawyers minimizing the perceived adverse consequences of a waiver while attorneys representing corporations observe the actual adverse consequences first-hand.

Legal guidance is necessary for an organization to garner the benefits of cooperating with the government while avoiding the potential significant adverse effects of relinquishing legal privileges. Members of Proskauer's Corporate Governance/Corporate Defense Group as well as the Criminal Defense & Corporate Investigations Group can assist your organization in responding to a government investigation in a thoughtful, effective and professional manner.

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