

Executive Summary

On December 12, 2006, U.S. Deputy Attorney General Paul J. McNulty announced that he was releasing revised corporate charging guidelines for federal prosecutors throughout the country. The memorandum comes on the heels of a period in which federal prosecutors have enjoyed unprecedented success in combating corporate fraud, resulting in increased corporate self-policing and accountability.

The new guidance revises what is commonly known as the “Thompson Memorandum,” issued by then-Deputy Attorney General Larry D. Thompson in January 2003. The new memo, formally entitled “Principles of Federal Prosecution of Business Organizations,” creates new approval requirements that federal prosecutors must comply with before they can request corporations to waive attorney-client privilege and work product protections. It also limits prosecutors’ ability to consider a refusal to provide such material when making the decision whether to charge a corporation with criminal misconduct.

A. Requests for Waiver of Attorney Client Privilege

The new guidance adopts a tiered approach on when prosecutors may request that a corporation provide protected materials. When prosecutors wish to seek privileged attorney-client communications, legal advice or non-fact attorney work product – those materials generally considered to be the most sensitive of all protected materials – the United States Attorney must now obtain written approval directly from the Deputy Attorney General before making the request.

The request for approval must set forth law enforcement’s legitimate need for the information and identify the scope of the waiver sought. To establish a legitimate need for the information, federal prosecutors must address:

- (1) the likelihood and degree to which the privileged information will benefit the government’s investigation;
- (2) whether the information sought can be obtained in a timely and complete fashion by using alternative means that do not require waiver;
- (3) the completeness of the voluntary disclosure already provided; and
- (4) collateral consequences to a corporation of a waiver.

Such a requirement represents a substantial test. It addresses criticisms, which the Department has disputed, that prosecutors routinely ask companies to provide such information, thereby chilling the offering of legal advice. While the Department does not agree that blanket or unrestricted waivers were routinely sought in the past, this new approval requirements will insure that Department prosecutors only request a waiver of the most sensitive materials after such a request has received approval from the Justice Department’s second-highest ranking official. The

guidance cautions prosecutors that attorney-client communications should be sought only in rare circumstances. Because prosecutors are required to establish a legitimate need before seeking the information, they are expected take preliminary investigative steps to determine whether a corporation and its employees have engaged in criminal activity before seeking such materials.

The memorandum also provides new requirements when federal prosecutors are requesting a waiver of privilege to receive materials that disclose the facts a company has uncovered in a company's internal investigation of corporate misconduct. Before making a request for such materials, federal prosecutors must seek the approval of their United States Attorney, who must consult with the Assistant Attorney General of the Criminal Division before approving such a request. Examples of factual information of this type might include copies of key documents, witness statements, or purely factual interview memoranda regarding the underlying misconduct

The new approval requirements involving United States Attorney approval also apply to requests for (1) legal advice given contemporaneous to the misconduct being investigated, if the company is relying upon an advice-of-counsel defense to justify the conduct; and (2) legal advice or communications in furtherance of a crime or fraud, coming within the crime-fraud exception to the attorney-client privilege.

The memorandum indicates that federal prosecutors are not required to obtain authorization if the corporation voluntarily offers privileged documents without a request by the government.

In addition to the new approval requirements for making requests for materials, the new memorandum tightens a prosecutor's ability to consider the corporation's response to the request when the prosecutor makes a final decision whether to bring charges or not. A corporation's willingness to provide protected materials has, traditionally, been one aspect of how prosecutors assess whether a corporation has cooperated in the government's investigation. Under the new guidance, for the most sensitive information, which requires the Deputy Attorney General's approval before being requested, if a corporation chooses not to provide attorney-client communications after the government makes the request, prosecutors are directed not to consider that decision as a factor against the corporation in the charging decision. Prosecutors may consider a corporation's decision to refuse to provide factual information. In addition, prosecutors may always consider favorably a corporation's decision to provide protected materials, whether at the government's request or if provided voluntarily without a government request.

Finally, the new memorandum establishes various internal Department record-keeping requirements to document occasions when protected materials are sought.

B. Advancement of Attorneys' Fees

The new guidance also instructs prosecutors that they generally cannot consider a corporation's advancement of attorneys' fees to employees when making a decision whether to charge the corporation. A rare exception is created for those extraordinary instances where the advancement of fees, combined with other significant facts, shows that such a step was intended to impede the government's investigation. In those limited circumstances, fee advancement may be considered only if authorized by the Deputy Attorney General. When seeking this approval, federal prosecutors must follow the same authorization process established for seeking approval to request waiver of attorney-client communications from the Deputy Attorney General.

C. Conclusion

The revised guidance clarifies prior guidance and establishes new clear approval requirements for requests of sensitive, privileged information. The Department strongly supports the sanctity of the attorney-client privilege and work product protections. It wants to encourage full and frank communication between corporate counsel and its employees, as such communications can contribute to enhanced compliance with the law. At the same time, the Department must preserve its ability to prosecute complex corporate fraud cases successfully, and requests for waivers of privilege, where appropriate, continue to be an effective and essential tool in bringing corporate wrongdoers to justice. With this new guidance, the Department will continue its aggressive efforts to route out corruption in our financial markets and to protect the American investor, while allowing corporations to secure appropriate legal counsel.