



Management Alert

Revised U.S. Department of Justice Guidelines for Prosecution of Business Organizations

Recently, Mark Filip, Deputy Attorney General, announced that the U.S. Department of Justice (DOJ) had adopted certain important changes to the DOJ's guidelines setting forth the factors that federal prosecutors must consider when determining whether to bring criminal charges against a business organization.¹ The guidelines, titled "Principles of Federal Prosecution of Business Organizations," set forth nine factors that prosecutors must consider: (1) the nature and seriousness of the offense; (2) the pervasiveness of wrongdoing within the corporation; (3) the corporation's history of similar misconduct; (4) the corporation's timely and voluntary disclosure of wrongdoing and its willingness to cooperate in the investigation; (5) the existence and effectiveness of the corporation's pre-existing compliance program; (6) the corporation's remedial actions; (7) collateral consequences of a conviction; (8) the adequacy of the prosecution of individuals responsible for the corporation's malfeasance; and (9) the adequacy of alternative remedies such as civil or regulatory enforcement actions.

Assessment of a Company's Cooperation

The most recent changes modify the framework for assessing a company's cooperation in the investigation. Most significantly, credit for cooperation will no longer be dependent on a company's waiver of the attorney-client or work product privilege. In addition, prosecutors will no longer be permitted to consider the company's advancement of legal fees to employees under investigation, or the company's entry into a joint defense agreement, in assessing the extent of a company's cooperation.

Previously, federal prosecutors were permitted to request, under certain conditions, the disclosure of attorney-client privileged communications and work product materials. The new guidelines forbid prosecutors from asking for such communications or work product, except where either (i) the company is asserting an advice-of-counsel defense to criminal charges, or (ii) the communications between the company and its counsel were in furtherance of a crime.

Under the new policy, corporations that timely disclose relevant facts may receive credit for cooperation, regardless of whether they waive the attorney-client privilege or work product protection in the process. However, although prosecutors can no longer explicitly request a waiver of the attorney-client or work product privilege, they can still request relevant factual information that may be contained only in privileged materials, such as attorney interview memoranda. Such requests will still put the company in the difficult position of determining how to provide the requested "factual information" without the

¹ The new DOJ guidelines ([available here](#)) will be reflected in the United States Attorneys' Manual and supersede and replace guidance contained in the December 12, 2006 memorandum from Paul J. McNulty, Deputy Attorney General, (the "McNulty Memo").

disclosure constituting a waiver of the attorney-client or work product privileges. Although the DOJ suggests conducting interviews by non-attorneys, this is often impractical and/or ill-advised for a number of reasons. Thus, it remains to be seen how the government will negotiate the transfer of relevant factual information contained only in such privileged documents without forcing a privilege waiver.

The new policy also instructs prosecutors not to consider whether a corporation has advanced attorneys' fees to its employees, officers, or directors when evaluating a company's cooperation. Under the previous guidance, the DOJ reserved the right to consider such payments in assessing the extent of a corporation's cooperation. Now, a corporation's payment of or advancement of attorneys' fees to its employees will be relevant only in the rare situation where it rises to the level of obstruction of justice, such as where the fee advancement is conditioned upon testifying to an unfounded sets of facts.

Under the new policy, federal prosecutors may not consider whether the corporation has entered into a joint defense agreement in evaluating whether to give the corporation credit for cooperation. The government also reserves the right to ask that a corporation not disclose to third parties information about the investigation that the government provided to the corporation. However, the new guidelines provide that if a joint defense agreement prevents a company from disclosing relevant facts, the failure to disclose the facts will weigh against the corporation receiving cooperation credit. Accordingly, corporations should still carefully weigh whether it is in their best interest to enter into a joint defense agreement with employees and other parties and ensure that any such agreements do not preclude them from disclosing relevant information to the government.

Previously, prosecutors were allowed to consider whether a corporation retained culpable employees and the severity of any employee discipline when evaluating cooperation. Prosecutors may no longer take employee discipline into account when assessing a company's cooperation. However, prosecutors may still consider whether a corporation has sufficiently terminated or punished culpable employees when evaluating the corporation's remedial measures or compliance program. Thus, a corporation's treatment of culpable employees will still be closely scrutinized by the government when deciding whether to charge a company.

Many legal commentators and white collar practitioners have criticized the revisions as not going far enough to protect attorney-client and work product privileges. For example, the guidelines are limited in application to the DOJ and will not stem the pressure to waive attorney-client and work product privileges by the U.S. Securities and Exchange Commission and other regulatory bodies who often conduct parallel investigations. In addition, the guidelines do not "create any rights, substantive or procedural, enforceable at law by any party in any matter civil or criminal." Thus, corporations or individuals can not seek enforcement in court if DOJ attorneys fail to follow their own guidelines. Moreover, the guidelines are subject to revision at any time and can be withdrawn or modified in the future.²

What Does This Mean for Companies?

The initial encounters between government investigators and company employees are often the source of the company's greatest legal difficulties. Confusing, incomplete, incorrect or untruthful responses by employees to government inquiries

² Thus, many feel that enactment of the Attorney-Client Privilege Protection Act of 2008, introduced by Senator Arlen Specter, and which would mandate DOJ's compliance with these and other restrictions on its conduct of investigations, is still advisable.

outside the presence of counsel often cause more legal difficulties for companies than the underlying conduct being investigated. It is critically important that employees be fully educated on how to respond to government inquiries. It is also important that companies engage white collar practitioners or other experienced counsel at the earliest stages of an investigation to develop a strategy that ensures a good faith response to government inquiries, while still fully protecting the company's legal interests.

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