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Department of Justice Proposes Changes in Evaluation of Corporate Cooperation

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Last week, the Department of Justice announced planned revisions to its *Principles of Federal Prosecution of Business Organizations (Principles)* that signal changes to its policies regarding its evaluation of cooperation, including waivers of the attorney client privilege. The DOJ *Principles* govern the DOJ's process of investigating, charging and prosecuting corporate crimes. These Principles were last revised in December 2006 when U.S. Deputy Attorney General Paul J. McNulty issued what has been referred to as the "McNulty Memorandum." In particular, the Memorandum governs how DOJ measures a corporation's cooperativeness in a criminal investigation and how the DOJ determines whether the entity itself should be charged with a crime. On July 9, Deputy Attorney General Mark Filip, in a letter to Senator Patrick J. Leahy, Chairman of the Senate Judiciary Committee, outlined proposed changes to the McNulty Memorandum.

Under the proposed changes, DOJ will no longer Demand, Require or even Consider Waiver of the attorney-client privilege and attorney work product confidentiality in the context of corporate internal investigations. When a corporation suspects criminal activity in its ranks or the company is being investigated for possible criminal activity, the entity commonly retains outside counsel to conduct an internal investigation. Corporations use the results of these investigations to determine whether crimes have been committed and who within the corporation was negligently or intentionally at fault. Outside counsel advises the entity of corrective action that should be taken to prevent reoccurrence.

While corporate internal investigations are designed to discover facts, they are conducted in the context of a corporation's communicating freely with its counsel under the confidentiality assured by the attorney-client privilege. Conclusions arrived at during the investigation are confidential as attorney work product. Corporations ideally can cooperate with prosecutors by disclosing factual findings of the corporate investigation while holding on to the content of attorney-client privileged communications between corporate management and counsel.

Under the McNulty Memorandum, line prosecutors could request that the corporation waive the privilege and disclose these attorney-client communications if the line prosecutor demonstrated to his or her superiors at DOJ that there was a "legitimate need" to make this request of the corporation. If the prosecutor satisfied this showing of a "legitimate need" for the privileged material, and the prosecutor asked the corporation for the privileged information, under the express wording of the McNulty Memorandum, this could not be counted against the corporation in the Government's determination of whether the corporation was being cooperative. However, under the McNulty Memorandum, the corporation's waiver could be weighed positively in this regard: "Prosecutors may always favorably consider a corporation's acquiescence to the Government's waiver request in determining whether a corporation has cooperated in the Government's investigation."

The DOJ/Filip letter to Senator Leahy points out that, "in the eighteen months since [the McNulty Memorandum] the Department has approved no requests by prosecutors to obtain from corporations core attorney-client communications or non-factual attorney work product." Nevertheless, Filip's letter eliminates the positive weight of waivers. Under the revisions in the McNulty Memorandum, "cooperation will be measured by the extent to which a corporation discloses relevant facts and evidence, not its waiver of privileges." Moreover,

prosecutors will not "demand" the disclosure of privileged or work product information as a condition of cooperation credit.

Under the proposed changes, DOJ will no longer consider whether the corporation has advanced legal fees to its employees, as a measure of the corporation's cooperativeness in the Government's investigation. The McNulty Memorandum perpetuated a cloud of uncertainty as to whether a corporation would be viewed by DOJ as uncooperative with the Government's investigation or expose itself to greater risk of being charged with a crime if the entity fronted legal fees for employees deemed by the Government to be "culpable." McNulty excused the corporation for fronting these fees where the corporation was bound by statute or contract to do so. McNulty stated that, in "extremely rare cases," where "the totality of the circumstances" indicated that the advancement of fees was "intended to impede the investigation," the line prosecutor could seek the Deputy Attorney General's approval to consider this factor in the charging decision.

One of the problems with this criterion was that corporations and the Government often make very different determinations as to whether a particular employee is "culpable." Moreover, companies often, regardless of any statutory or contractual obligation to do so, consider it proper to assure a corporate employee is afforded competent legal counsel.

Deputy Attorney General Filip's letter to Senator Leahy eliminates fee advancement from the set of relevant factors in the Government's decision as to whether the corporation is being cooperative in the Government's investigation. Specifically, according to the letter, the McNulty Memorandum will be revised to state, "Federal prosecutors will not consider whether the corporation has advanced attorneys' fees to its employees in evaluating cooperation."

Under the proposed changes, DOJ will no longer consider whether a corporation has entered into a joint defense agreement with its employees. Companies in the midst of a Government investigation often enter into joint defense agreements with employees who are subjects or targets of the Government's investigation, in order to share information between company counsel and counsel for the employee under an expanded privileged arrangement. These agreements allow employees and their companies to share information and strategies as they commonly face the formidable resources of the federal Government during an investigation.

Under the McNulty Memorandum, a company's joint defense agreement with "culpable" employees "may be considered by the prosecutor in weighing the extent and value of a corporation's cooperation." This, of course, pressures the corporation to reach the same conclusions with respect to employee culpability as the Government reached and results in corporations avoiding joint defense agreements that might well otherwise facilitate the corporation's detection and deterrence of criminal wrongdoing.

The Filip letter eliminates this factor as well: "Federal prosecutors will not consider whether the corporation has entered into a joint defense agreement in evaluating cooperation." This revision to the McNulty Memorandum reserves the Government's right to provide certain information to the corporation in the midst of an investigation under the condition that the shared information not be passed along to employees under a joint defense agreement: "The Government may, of course, request that a corporation refrain from disclosing to others sensitive information about the investigation that the Government provides in confidence to the corporation, and may consider whether the corporation has abided by that request."

Under the proposed changes, DOJ will no longer consider the corporation's punishment of employees in the Government's measurement of the entity's cooperativeness in the Government's investigation. Under the McNulty Memorandum, prosecutors were instructed that they "must consider" the corporation's actions "to discipline or terminate wrongdoers" in the Government's decision of "the proper treatment of a

corporate target." McNulty regarded the company's action or inaction in "disciplining wrongdoers" as relevant to the Government's decision of whether the entity should be indicted. Like the McNulty Memorandum's provisions on attorney fees and joint defense agreements, this pressures the company to agree with the Government's categorization of employees as culpable or not.

Employee discipline is eliminated from the Government's charging decision according to Deputy Attorney General Filip's letter to Senator Leahy: "Federal prosecutors will not consider whether the corporation has retained or sanctioned employees in evaluating cooperation." Filip qualifies that this may be relevant to the quality of the company's remedial measures or its compliance program, but "will not be taken into account for the purpose of evaluating cooperation."

Conclusion. While the Filip letter suggests that DOJ policy is headed for significant changes, the scope of those changes is still uncertain because the McNulty Memorandum has not been amended yet. We only have the letter summarizing the proposed changes. Moreover, it remains to be seen whether Attorney General Michael Mukasey's offer of the Filip amendments to the McNulty Memorandum will satisfy concerns of Senator Arlen Specter, ranking Republican on the Judiciary Committee, who currently champions his own legislatively mandated limitations on corporate privilege waivers in Senate Bill 3217, last revised in late June. Senator Leahy regarded the Filip amendments as a "serious analysis of Department policy" and an "encouraging development."

In any event, Attorney General Mukasey's revisions to the McNulty Memorandum address the major threats to the preservation of a corporation's attorney-client privilege and work product confidentiality in the context of corporate internal investigations, while strengthening an employee's ability to prepare his or her own defense, with the benefit of counsel, whose fees are paid for by the company, as well as the sharing of information under the confidentiality of a joint defense agreement.