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Revised DOJ Guidelines Alter Legal Landscape for Companies Under Investigation

The Department of Justice has issued new guidelines for federal prosecutors considering whether to prosecute business organizations. These guidelines, along with a recent Second Circuit decision, have significantly changed the rules surrounding corporate government investigations, particularly with respect to the attorney-client privilege and the payment of employee attorneys' fees.

Guidelines Enhance Privilege Protection

The revised "[Principles of Federal Prosecution of Business Organizations](#)" replace the so-called "McNulty Memo." In a significant departure from the prior memo, the guidelines now prohibit federal prosecutors from requesting that corporations waive the attorney-client privilege in the context of criminal investigations. They also protect the right of corporations to advance or reimburse the attorneys' fees of officers, directors, and employees who are the subject of an investigation.

This is second time that the Department of Justice has altered the 2003 "Thompson Memo," issued by then-Deputy Attorney General Larry D. Thompson in the wake of the Enron scandal. That memo encouraged a policy of requiring corporations to waive the attorney-client privilege and work product protections in order to get credit for cooperation with a government investigation.

The revised guidelines recognize the coercive effect of such waiver requests, noting that a *de facto* requirement that

corporations waive the attorney-client privilege and work product protections "has promoted an environment in which those protections are being unfairly eroded to the detriment of all."

The new guidelines also provide that federal prosecutors may not take into account whether the corporation is advancing or reimbursing the attorneys' fees of its employees, officers, or directors as an additional measure of cooperation.

The Second Circuit's Rebuke to Prosecutors

On the same day that the new guidelines were issued, the U.S. Court of Appeals for the Second Circuit, in [United States v. Stein](#), dismissed criminal fraud charges against 13 former KPMG employees on the grounds that prosecutors interfered with the employees' Sixth Amendment right to counsel.

The defendants' employer had advanced attorneys' fees to the employees during a government investigation. Prosecutors told the company that the payment of such fees would undermine the company's ability to receive credit for cooperation with the investigation. That action led the employer, KPMG, to place restrictions on the payment of the fees and, ultimately, to cut off entirely the payment of attorneys' fees for several of the employees.

Finding that prosecutors had "unjustifiably interfered with defendants' relationship with counsel and their ability to mount a defense, in violation of the Sixth

Amendment,” the court rejected the government’s argument that KPMG’s actions were voluntary. “The government’s threat of indictment was easily sufficient to convert its adversary into its agent. KPMG was not in a position to consider coolly the risk of indictment, weigh the potential significance of the other enumerated factors in the Thompson Memorandum, and decide for itself how to proceed.”

Will Congress Act to Further Protect the Attorney-Client Relationship?

Many observers believe that the government’s new guidelines still do not provide sufficient protection for the attorney-client privilege, work product protection, or employees’ Sixth Amendment rights. Legislation is pending in Congress to further protect these rights and legal privileges.

H.R. 3013, the Attorney-Client Privilege Protection Act, has been passed by the House, and the Senate version, S. 3217 is before the Senate Judiciary Committee.

These bills would provide protection beyond the actions of DOJ to cover agencies that have aggressively sought waivers of privilege, including the Environmental Protection Agency, the

Securities and Exchange Commission, and others whose actions are not covered by the DOJ guidelines.

Strategic Considerations

In light of these developments, the following considerations may be of use to counsel facing government investigations, or when conducting internal investigations or compliance assessments.

First, the new guidelines seek to move the government’s focus in assessing cooperation away from waiver and toward the disclosure of relevant facts. Because it is often a prudent practice to retain outside counsel to conduct internal investigations, the issue of waiver remains when companies are deciding whether or how to disclose facts learned during counsel’s inquiry. The government’s suggested solution is to use non-attorneys to interview employees and collect records. The results of such an effort, however, would not be privileged from disclosure to third parties or government subpoenas. Thus, counsel conducting investigations should be mindful of the need to structure their inquiry in a way that allows for the possible communication of relevant factual information to the government while at

the same time maintaining attorney-client and work product protection.

Second, the new guidelines are clear that prosecutors may not consider the advancement of attorneys’ fees for an employee as grounds for rendering the company ineligible for cooperation credit. Prosecutors are also prohibited from considering a company’s participation in a joint defense agreement, by itself, as a lack of cooperation. Prosecutors may, however, take into account a company’s refusal to produce documents to the government, even where such production is explicitly prohibited by a joint defense agreement. For that reason, entry into, and communication during, joint defense agreements must be considered and handled to allow for appropriate flexibility.

Finally, the guidelines explicitly recognize that non-prosecution and deferred prosecution agreements are suitable options for a prosecutor to consider in resolving matters concerning corporations. Many prosecutors’ offices have declined to consider these settlement approaches in recent years. The guidelines now provide counsel with greater support for their consideration.

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