NEW DOJ GUIDELINES ON CORPORATE PROSECUTIONS

The Department of Justice ("DOJ"), in the face of extensive recent criticism from judges, Congress, and business groups that it is being too heavy-handed in pressuring corporations about how to respond to criminal investigations, issued new guidelines for corporate prosecutions on December 12, 2006. The guidelines are contained in a memorandum to DOJ staff from Deputy Attorney General Paul J. McNulty entitled "Principles of Federal Prosecution of Business Organizations." The "McNulty Memorandum" supersedes earlier guidelines issued in January 2003 by then-Deputy Attorney General Larry D. Thompson.

At issue are the factors that the DOJ may take into consideration in deciding whether or not to file a criminal indictment against a business organization. As the Arthur Andersen case underscored, being indicted can put a substantial business entity out of business, even if the charges are ultimately determined to be without merit. Business entities anxious to avoid such a catastrophe are often prepared to do whatever the DOJ demands in order to avoid the filing of criminal charges, and the DOJ has been criticized for playing on this anxiety to pressure companies to refuse to pay the legal fees of employees under investigation or share information with them, to waive attorney-client privilege and provide the DOJ with the company's attorneys' findings about the matter under investigation, and to otherwise demonstrate cooperation.

How different are the new guidelines from the old ones? Not very, especially in the areas most likely to affect how a business organization responds to a DOJ criminal investigation.

To begin with, many of the key principles that guide DOJ decisions whether or not to file criminal charges against a business organization have not changed. Specifically, it remains the written policy of the DOJ that the government may consider, as reflecting adversely on a company's cooperation, any of the following:

- entering into a "joint defense" agreement with another party under investigation, including an employee, in order to facilitate the coordination of legal strategies;
- continuing to employ a person that the government has concluded engaged in wrongdoing, even if the company disagrees or believes the available information is inconclusive;
- refusing to provide the DOJ with the results of the company's own investigation of relevant facts when requested to do so, even if these investigation results are protected by privilege;
- engaging in conduct that, in the DOJ's view, is "intended to impede the investigation."

Although much remains the same, the McNulty Memorandum does offer some new protections to companies under investigation.

First, although refusal to provide investigation results when requested can be held against a company, before making such a request the investigating government attorney must now obtain prior written approval from the United States Attorney for the district, who in turn must consult with the Assistant Attorney General for the Criminal Division. While the approval is likely to be forthcoming in serious investigations, the approval process may make requests for company investigation results less routine in preliminary investigations.

Second, the McNulty Memorandum creates a second, more protected category of company information that goes beyond investigation results to include counsel's "mental impressions and conclusions, legal determinations reached as a result of an internal investigation, or legal advice given to the corporation." Such "Category II" information should "only be sought in rare circumstances." A request for Category II information requires advance written authorization from the Deputy Attorney General, and a company cannot be penalized for failing to agree to such a request. As a matter of practice, the DOJ did not often press in the past for what is now designated as "Category II" information, but the McNulty Memorandum provides formal guidelines for requesting such information that are generally protective of companies under investigation.

Finally, the McNulty Memorandum expressly provides that prosecutors "generally should not take into account whether a corporation is advancing attorneys' fees to employees or agents under investigation or indictment." In the KPMG tax shelter case, Judge Lewis A. Kaplan of the Southern District of New York held that the DOJ had violated the constitutional rights of former KPMG employees under criminal indictment by pressuring KPMG to discontinue advancing their attorneys' fees, and the attorneys' fees provision in the McNulty Memorandum appears intended to address Judge Kaplan's finding. It is not clear, however, how much practical impact the new guideline will have. In the past, the DOJ rarely questioned a company's advancement of legal fees where the company had a legal obligation to advance fees, and the new guideline is expressly tied to such legal obligation: "[A] corporation's compliance with governing state law and its contractual obligations [in the advancement of legal fees] cannot be considered a failure to cooperate." The McNulty Memorandum is less clear, however, on how the DOJ may view a company's payment of an employee's or agent's legal fees where the company has no obligation to make such payment.

In order to avoid indictment, a business organization must still be highly sensitive to the need to cooperate fully with a DOJ investigation. The McNulty Memorandum notwithstanding, the list of actions that the DOJ may consider as reflecting adversely on cooperation remains lengthy and largely unchanged.

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