DEPARTMENT OF JUSTICE MAKES SIGNIFICANT CHANGES TO ITS CORPORATE CHARGING GUIDELINES

On August 28, 2008, the U.S. Department of Justice ("DOJ") announced revisions to its rules for assessing and crediting corporate voluntary cooperation in criminal cases. DOJ has faced mounting criticism for its corporate charging guidelines, which were widely perceived as fostering a "culture of waiver" -- empowering federal prosecutors to require corporations to waive attorney-client privilege or work product protection as a precondition to receiving full credit for cooperation in charging decisions. In direct response to this concern and others, DOJ has announced a revised policy after discussions with members of Congress, the criminal defense bar, civil liberties groups, and the business community. The changes to the policy, which became effective immediately, represent a substantial retrenchment from the policies embodied in the 2003 Thompson Memorandum and its successor, the 2006 McNulty Memorandum.

DOJ emphasized five major changes in announcing these revisions.

- First, credit for cooperation will no longer depend on whether a corporation waives the attorney-client privilege or work product protections. Instead, government prosecutors must give credit for the disclosure of relevant facts, regardless of whether the method by which the facts are disclosed involves a waiver of attorney-client or work product protections. The new guidelines regard the "operative question" as whether "the party timely disclosed the relevant facts about the putative misconduct," irrespective of whether the disclosure involved a waiver of applicable privileges or protections. While noting that corporations remain free to provide nonfactual or "core" attorney-client communications or work product, the guidelines also specifically state that "prosecutors should not ask for such waivers and are directed not to do so."

- Second, the new guidelines eliminate certain exceptions that formerly allowed prosecutors to request highly protected privileged communications or attorney work product, such as legal advice or mental impressions of counsel. Prior policy allowed prosecutors to seek this kind of information if purely factual disclosures did not provide the government with a sufficient basis to conduct a thorough investigation. Now, the only circumstances under which the government may seek such privileged or protected material are when a defendant asserts an advice-of-counsel defense or the legal advice or communication is in furtherance of a crime or fraud, both already well-rooted exceptions to the attorney-client privilege and work product doctrines.

- Third, prosecutors may not consider whether a corporation has advanced attorneys' fees to its employees, officers, or directors when evaluating cooperation. Past DOJ policy allowed prosecutors to count the advancement of legal fees to such individuals against the corporation in making a charging determination.

- Fourth, the government is no longer allowed to consider whether the corporation has entered into a joint defense agreement in determining whether to give the corporation credit for cooperation. DOJ's announcement specifically acknowledged that there are legitimate reasons for a corporation to choose to enter into a joint defense agreement that are not inconsistent with being fully cooperative in an investigation.

- Fifth, prosecutors may no longer consider whether a corporation has disciplined or terminated employees in assessing cooperation. However, prosecutors can still consider the degree to which a corporation has taken disciplinary actions against culpable employees in the context of evaluating the corporation's remedial actions or the effectiveness of its compliance program.

DOJ's revised policy represents a retreat from a nearly decade-long test of the boundaries of corporate attorney-client privilege and work product protections. With sensitivities to the issue heightened in the post-Enron era of corporate prosecutions, tensions over the policy have resulted in five revisions in ten years.

The issue of the advancement of legal fees to corporate employees came to a head in 2006 and 2007 in a criminal tax-shelter prosecution against certain former KPMG employees and others. The U.S. District Court presiding over that case found that government prosecutors had violated the defendants' Sixth Amendment right to counsel by pressuring KPMG to refuse to advance legal fees to these employees. *See United States v. Stein*, 435 F. Supp. 2d 330 (S.D.N.Y. 2006). After the government failed to show that it had cured this violation, the court dismissed the case against most of the individual defendants in its entirety. *See United States v. Stein*, 495 F. Supp. 2d 390 (S.D.N.Y. 2007). The U.S. Court of Appeals for the Second Circuit affirmed the District Court's dismissal and Sixth Amendment reasoning on the same day that DOJ announced its revised guidelines. *See United States v. Stein*, No. 07-3042-cr (2d Cir. Aug. 28, 2008).

Beyond the constitutional and policy debates, however, DOJ's new policy should have real and practical implications for corporations and individuals under investigation and their counsel. For instance, the revised guidelines expressly provide that a corporation need not provide -- and prosecutors may not seek -- notes and memos by counsel of employee interviews as a condition for receiving credit. Alternatively, though, prosecutors may seek and give credit for relevant information acquired through interviews. Thus, although wholesale waiver may be off the table and failure to waive cannot be used against corporations, corporations still must carefully navigate the process of investigation and disclosure of information. Moreover, other agencies with enforcement powers, such as the SEC, IRS and EPA, have not adopted revised policies akin to DOJ's new policy and, thus, may still demand the waiver of attorney-client privilege and work product protections in considering cooperation.

While DOJ's most recent policy revision is widely viewed as an attempt to stave off congressional action to strengthen protections of corporate attorney-client privilege and work product protection, it is not clear that it will succeed. The House of Representatives passed legislation on the issue in 2007 and a companion bill is now before the Senate. DOJ has

reportedly requested that the Senate bill's sponsor, Senator Arlen Specter (R-PA), refrain from moving the bill forward in order to give DOJ's new policy time to take effect and face evaluation. Senator Specter appears undeterred, however, stating in response to the new policy that the legislation will still be necessary, in part precisely because the aim of the DOJ policy would be undercut by compliance "with the waiver and disclosure programs of other agencies including the SEC and EPA." "Legislation," he added, "would bind all federal agencies and could not be changed except by an Act of Congress."

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