



Department of Justice

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U.S. Deputy Attorney General Paul J. McNulty Revises Charging Guidelines for Prosecuting Corporate Fraud

New Guidance Further Encourages Corporate Compliance

NEW YORK – U.S. Deputy Attorney General Paul J. McNulty announced today during a speech at a meeting of the Lawyers for Civil Justice in New York that the Department of Justice is revising its corporate charging guidelines for federal prosecutors throughout the country.

The new guidance revises the Thompson Memorandum, which was issued in January 2003 by then-Deputy Attorney General Larry D. Thompson and titled the “Principles of Federal Prosecution of Business Organizations.” The memo provides useful guidance to prosecutors in the field through nine factors to use when deciding whether to charge a corporation with criminal offenses.

The guidance continues to require consideration of the factors from the Thompson memo but adds new restrictions for prosecutors seeking privileged information from companies. Specifically, it creates new approval requirements that federal prosecutors must comply with before they can request waivers of attorney-client privilege and work product protections from corporations in criminal investigations.

“Our efforts to investigate and prosecute corporate fraud in the past five years through the President’s corporate initiative have been tremendously successful,” said Deputy Attorney General Paul J. McNulty. “With this new guidance, we want to encourage corporations to prevent corruption through self-policing and continue to punish wrongdoers through cooperation with law enforcement.”

The new guidance requires that prosecutors must first establish a legitimate need for privileged information, and that they must then seek approval before they can request it. When federal prosecutors seek privileged attorney-client communications or legal advice from a company, the U.S. Attorney must obtain written approval from the Deputy Attorney General. When prosecutors seek privileged factual information from a company, such as facts uncovered in a company’s internal investigation of corporate misconduct, prosecutors must seek the approval of their U.S. Attorney. The U.S. Attorney must then consult with the Assistant Attorney General of the Criminal Division before approving these requests.

The guidance cautions prosecutors that attorney-client communications should be sought only in rare circumstances. If a corporation chooses not to provide attorney-client communications after the government makes the request, prosecutors are directed not to consider that declination against the corporation in their charging decisions. Prosecutors are told to request factual information first and make sure they can establish a legitimate need to go further before requesting a waiver of privilege to obtain attorney-client communication or legal advice.

The new memorandum also instructs prosecutors that they cannot consider a corporation’s advancement of attorneys’ fees to employees when making a charging decision. A rare exception is created for those extraordinary instances where the advancement of fees, combined with other significant facts, shows that it was intended to impede the government’s investigation. In those limited circumstances, fee advancement may be considered only if it is authorized by the Deputy Attorney General.

The changes announced today by Deputy Attorney General McNulty were made after careful review and numerous meetings with those in the business and legal communities who raised concerns about the Department’s guidance.

“We will safeguard every tool prosecutors need to fight fraud and continue our aggressive efforts in rooting out corruption in our financial markets to protect the interests of the investing public,” said Deputy Attorney General McNulty. “The Department supports the sanctity of attorney-client privilege. We encourage full and frank communication between corporate employees and their lawyers. With this new guidance, I will personally approve all future requests for attorney-client communications.”

For more information about the McNulty Memorandum, or to obtain a copy, contact the U.S. Department of Justice Office of Public Affairs or visit .

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