

Corporate Defense Update

August 30, 2008

Justice Department Approves New Guidelines for Charging Corporations with Crimes

On August 28, 2008, the United States Justice Department approved new guidelines for federal prosecutors to use when deciding whether to charge business entities with crimes. These new guidelines replace those that have been in effect since December 12, 2006. Congress and defense attorneys heavily criticized the old guidelines because they arguably required companies to waive their attorney-client privilege and work-product protection for cooperation credit toward a non-prosecution or deferred-prosecution agreement. The Justice Department likely implemented the new rules to stave off stronger legislation currently underway in Congress.

Importantly, the Justice Department enshrined the new guidelines in the United States Attorneys' Manual. Although the Manual does not create any enforceable rights for corporate defendants, it embodies the Justice Department's official policy positions and federal prosecutors must adhere to those policies. As such, the new Manual provisions have more teeth than the successive memoranda issued on this topic over the past few years.

Deputy Attorney General Mark R. Filip, who announced the new Manual provisions, identified five primary changes to the way in which federal prosecutors determine whether a company deserves cooperation credit.

Federal prosecutors can no longer ask companies to disclose attorney-client communications or information covered by the work-product doctrine;

- They must judge a company's cooperation based upon its disclosure of relevant facts and evidence, not upon whether the company waived its attorney-client privilege or work-product protection;
- They cannot consider whether a company has entered into a joint-defense agreement with potentially culpable employees, officers, or directors;
- They cannot consider whether a company has disciplined culpable employees (although prosecutors can consider corporate discipline when evaluating the company's remedial measures or its compliance program, two other factors that play into the decision of whether to indict a company); and
- They cannot consider whether a company is covering its employees, officers, or directors' legal fees.

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As for the last policy change, the Deputy Attorney General's announcement came on the same day that the Second Circuit upheld a district court ruling that the Justice Department deprived 13 former KPMG employees of their Sixth Amendment right to counsel by "causing KPMG to place conditions on the advancement of [their] legal fees, to cap the[fees], and to ultimately end them." Many in the legal community attribute the Justice Department's policy shift to Judge Lewis Kaplan, the district judge who initially ruled that the old guidelines violated the Sixth Amendment. Indeed, the Deputy Attorney General noted that "[t]he changes that the Department announces are in keeping with the long-standing tradition of refining the Department's policy guidance in light of lessons learned from our prosecutions, as well as comments from others in the criminal justice system, the judiciary, and the broader legal community."

Companies should note, however, that these newly adopted guidelines apply only to federal prosecutors. Other agencies, including the Securities and Exchange Commission (SEC), operate under their own internal rules. While the Justice Department is now subject to more stringent guidelines, companies must be aware that other regulators may continue to operate under the old guidelines, at least for now. And that distinction is significant for some companies, especially publicly-traded companies subject to SEC regulations. Since virtually all courts reject the concept of selective waiver, courts will likely deem the privilege and protection waived as to the Justice Department and third-party civil litigants if a company waives its attorney-client privilege or work-product protection for a non-DOJ regulator.

For more information about the Justice Department's new Principles of Federal Prosecution of Business Organizations, please feel free to contact the authors, who are members of Butzel Long's Corporate Compliance, Internal Investigations, and Criminal Defense Group:

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