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# Government Investigations ADVISORY

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## U.S. Department of Justice Revises Charging Guidelines for Prosecuting Corporate Fraud

### Revisions Restore Ability of Companies to Maintain Attorney-Client Privilege

On August 28, 2008, Deputy Attorney General Mark R. Filip announced that the Justice Department is formally revising its corporate charging guidelines for federal prosecutors throughout the country. The revisions will bar prosecutors from pressuring companies and individuals under investigation to waive legal protections. On the same day, the Second Circuit Court of Appeals upheld a ruling by U.S. District Court Judge Lewis A. Kaplan, who had dismissed charges against 13 former partners and employees of KPMG LLP because prosecutors, who were considering charges against the firm, pressured the firm to cut off payment of the employees' legal fees as a condition of that company's "cooperation" with federal prosecutors.[1] The Filip revisions were undoubtedly drafted before the Court of Appeals' decision, signaling that the Justice Department had already "read the writing on the wall" — the new guidelines are intended to mitigate the vigorous criticism from judges, Congress, corporations and various bar associations alike that prosecutors have unfairly used the threat of criminal indictment against companies to pressure them to "cooperate" by, among other things, waiving the attorney-client privilege and refusing to pay employees' legal fees.

The Department of Justice's Principles of Federal Prosecution of Business Organizations were created in the wake of the Enron and MCI WorldCom scandals to guide federal prosecutors in making decisions whether to seek charges against a business organization. The Thompson Memorandum, issued in 2003 by then-Deputy Attorney General Larry D. Thompson, encouraged prosecutors to seek waivers by corporations of their attorney-client privilege, among other legal protections, in exchange for favorable treatment by the prosecutor in deciding whether to indict.[2] These policies came under fire when Sen. Arlen Specter (R-PA) introduced to Congress the Attorney-Client Privilege Act of 2006 (S. 3217), which was supported by various groups, including the ABA, the National Association of Criminal

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1 *United States v. Stein*, Dkt. No. 07-3042 (2d Cir. Aug. 28, 2008).

2 For a more detailed discussion on the Department's previous policies, see Alston & Bird's earlier publications: William H. Jordan and Spencer T. Pryor, "A Culture of Waiver: Compelled 'Voluntary' Waiver of the Attorney-Client and Work Product Privileges in Government Investigations," ***TRENDS in Litigation*** (Summer 2007); and William H. Jordan, "Cooperate… Or Else: Cooperation in Government Criminal Investigations," ***TRENDS in Litigation*** (Fall 2004).

Defense Lawyers (NACDL), the ACLU, Association of Corporate Counsel and the U.S. Chamber of Commerce as a direct response to the Justice Department's strong-arm policies. The legislation, which was passed out of committee, would have placed on each government agency clear limits designed to preserve the attorney-client privilege and work product protections available to an organization, as well as preserve the constitutional rights and other legal protections to employees of such an organization. In response to the Specter legislation, the Justice Department revised the Thompson Memorandum on several occasions.[3] Many commentators and attorneys, however, believed that the Specter legislation provided a better and more complete solution. Then, last week, in an effort to forestall the legislation, the Justice Department announced the following "significant revisions" for the investigation and prosecution of corporate crimes:

First, credit for cooperation will not depend on whether a corporation has waived the attorney-client privilege or work product protection, but rather on the disclosure of relevant facts. In other words, corporations that disclose relevant facts may receive due credit for cooperation, regardless of whether they waive attorney-client privilege or work product in the process.

Second, the new policies forbid prosecutors from requesting non-factual attorney-client privileged communications and work product, with two exceptions well established in existing law — the Crime Fraud Exception and the Advice of Counsel Defense.

Third, the new policies instruct prosecutors not to consider a corporation's advancement of attorneys' fees to employees when evaluating cooperativeness. This was the precise issue that resulted in the dismissal of the indictment against the former KPMG employees.

Fourth, the new policy makes clear that the mere participation in a joint defense agreement will not render a corporation ineligible for cooperation credit.

Fifth, under the new policy, prosecutors may not consider whether a corporation has sanctioned or retained culpable employees as factors for evaluating cooperation.

Finally, the new policy encourages corporations to develop compliance programs intended to detect wrongdoing, thereby providing an avenue for reporting criminal activity to the government. While the policy is clear that the mere presence of a compliance program is insufficient for freeing an organization from criminal liability, the policy directs federal prosecutors to evaluate whether the compliance program is effective in preventing and detecting criminal activity, and whether the corporate leaders are enforcing the program.

For the first time, these revisions and policy changes will not be set forth as a guidance memo, but instead committed to the United States Attorneys Manual, which is binding on all federal prosecutors within the Department of Justice. The revised Principles will be effective immediately.

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[3] See discussion of revisions in William H. Jordan and Spencer T. Pryor, "A Culture of Waiver: Compelled 'Voluntary' Waiver of the Attorney-Client and Work Product Privileges," *BNA's Corporate Counsel Weekly*, April 4, 2007.

What this means for the future of the defense community at this point is uncertain. While the new guidelines are binding on the Justice Department, they are not binding on other federal entities such as the Securities and Exchange Commission or the Department of Defense. Nonetheless, we can expect that, given the extraordinary criticism leveled in Congress against the Justice Department's policies, which has created what has been called a "culture of waiver" among prosecutors, other agencies with criminal enforcement authority will adopt similar guidelines. This is also not to say that a company facing a government investigation will not voluntarily decide to waive the privilege and reveal information to the government if it believes it is in the company's best interests to do so. Similarly, there are also ways to provide pertinent information to the government that may not waive the attorney-client privilege, such as proffering to the government what company counsel believes took place or suggesting pertinent witnesses to the government. Importantly for companies facing a government review — and for individuals subject to investigation for their actions in the course of their employment — the government can no longer demand the waiver of privilege or the rejection of an indemnification request as a condition of the company's "cooperation."

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