

White Collar Crime and  
Business Regulation

**ALERT**

## U.S. Department of Justice Revises Corporate Prosecution Policy

The McNulty Memo creates new procedural requirements for federal prosecutors seeking waiver of attorney-client privilege or work product protection, limits prosecutors' consideration of certain waiver decisions in making charging decisions, and generally bars the government from considering a corporation's advancement of employees' attorneys' fees in deciding whether to charge the company.

On December 12, 2006, United States Deputy Attorney General Paul McNulty issued new guidelines governing when the Department of Justice (DOJ) will charge business organizations criminally (the "McNulty Memo").<sup>1</sup> The McNulty Memo supersedes and revises the Thompson Memo, the DOJ's heavily criticized prior policy statement.<sup>2</sup> The McNulty Memo creates new procedural requirements for federal prosecutors seeking waiver of attorney-client privilege or work product protection, limits prosecutors' consideration of certain waiver decisions in making charging determinations, and generally bars the government from considering a corporation's advancement of employees' attorneys' fees in deciding whether to charge the company.<sup>3</sup> However, the McNulty Memo stops well short of enacting the more sweeping changes proposed in recently introduced legislation, leaving some uncertainty as to what rules will govern prosecutorial tactics in federal criminal investigations in the long term.

### The Former Policy Under the Thompson Memo

The Thompson Memo lists nine factors prosecutors were required to take into account when deciding whether to indict a corporation. The most controversial of those factors was the corporation's "timely and voluntary disclosure of wrongdoing and its willingness to cooperate with the government's investigation." Specifically, under the Thompson Memo, the prosecutor was to consider the corporation's willingness to "disclose the complete results of its internal investigation" and to "waive attorney-client and work product protection." Moreover, prosecutors were to weigh "whether the corporation appears to be protecting its culpable employees and agents." The Thompson Memo explained that "depending on the circumstances," "a corporation's promise of support to culpable employees and agents . . . through the advancing of attorney's fees" or "providing information to the employees about the government's investigation pursuant to a joint defense agreement" could be "considered by the prosecutor in weighing the extent and value of a corporation's cooperation."

Over the past several years, these aspects of the Thompson Memo's definition of "cooperation" came under widespread attack from a diverse coalition of business and legal organizations, as well as from courts and commentators.

<sup>1</sup> "Principles of Federal Prosecution of Business Organizations" ("McNulty Memo"), December 12, 2006, available at [http://www.usdoj.gov/dag/speech/2006/mcnulty\\_memo.pdf](http://www.usdoj.gov/dag/speech/2006/mcnulty_memo.pdf).

<sup>2</sup> "Principles of Federal Prosecution of Business Organizations" ("Thompson Memo"), January 20, 2003.

<sup>3</sup> Like the previous policy, the revised policy "appl[ies] to the consideration of the prosecution of all types of business organizations, including partnerships, sole proprietorships, government entities, and unincorporated associations."

**ALERT****The McNulty Memo Policy Revisions**

The McNulty Memo retains nearly all of the principles laid out in the Thompson Memo, many of them verbatim. However, the McNulty Memo includes the following noteworthy new provisions:

- (1) new procedural requirements which prosecutors must meet before requesting waiver of attorney-client privilege or work product protection;
- (2) limited restrictions on prosecutors' consideration of such waivers in evaluating corporate cooperation and making charging decisions; and,
- (3) a provision prohibiting prosecutors from considering the advancement of employees' attorneys' fees in making charging decisions except in "extremely rare cases."

**New Procedures Governing Federal Prosecutors' Requests for Waiver**

The McNulty Memo provides generally that "prosecutors may only request waiver of attorney-client or work product protections when there is a legitimate need for the privileged information to fulfill their law enforcement obligations." The Memo divides such privileged information into two categories, and imposes different procedural obligations on prosecutors seeking production of each category.

**Category I** is characterized as "purely factual information . . . relating to the underlying misconduct." Examples of Category I information include copies of key documents, witness statements, "purely factual interview memoranda regarding the underlying misconduct," organization charts, factual chronologies or summaries, and "reports (or portions thereof) containing investigative facts documented by counsel." Legal advice is also treated as Category I information where (1) it was contemporaneous to the misconduct under investigation and the company or its employee is relying upon an advice-of-counsel defense or (2) it was given in furtherance of a crime or fraud, in the prosecutor's judgment.

**Category II** is defined as attorney-client communications or non-factual attorney work product, including legal advice given to the corporation before, during, and after the underlying misconduct under investigation. Examples of Category II information include attorney notes, memoranda or reports containing counsel's mental impressions and conclusions, legal determinations reached as a result of an internal investigation, or legal advice given to the corporation. The McNulty Memo cautions prosecutors that "Category II information should only be sought in rare circumstances," and limits such requests to circumstances in which production of purely factual information has proven insufficient to permit a thorough investigation.

Before requesting production of either Category I or Category II information, a prosecutor must submit an application within DOJ showing a "legitimate need" for the material. A request for a waiver regarding Category I factual information must be authorized in writing by the head of the prosecutor's office (either the United States Attorney or the Assistant Attorney General in charge of the prosecutor's division), after consultation with the Assistant Attorney General for

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