

CLIENT ALERT

Department of Justice Supersedes Thompson Memorandum

December 13, 2006

U.S. Deputy Attorney General Paul J. McNulty announced yesterday that the Department of Justice has superseded the recently embattled “Thompson Memo” setting forth “Principles of Federal Prosecution of Business Organizations.” The new guidelines, embodied in a document already branded the “McNulty Memo” depart from the Thompson Memo in two important areas: (i) waivers of attorney-client privilege and work-product protections; and (ii) advancement of legal fees to employees under investigation and indictment.

The McNulty Memo requires prosecutors to seek pre-approval before requesting waivers for attorney-client communications and attorney work-product. For privileged information reflecting legal advice or mental impressions or conclusions of counsel, approval is necessary at the Deputy Attorney General level. For “purely factual information” over which the company may assert a privilege or work-product protection, approval is required at the United States Attorney level with concurrence by the Assistant Attorney General in charge of the Criminal Division. When applying for approval to request either type of waiver, prosecutors must demonstrate a valid need for the information sought by describing: (i) how the privileged information will benefit the government's investigation; (ii) whether it is available using alternative means that do not require waiver; (iii) the completeness of the voluntary disclosure already provided by the company under investigation; and (iv) the collateral consequences to that company of a waiver. Notably, while the McNulty Memo mandates that prosecutors “must not” consider a decision by a company not to waive privilege when making charging decisions, prosecutors can still credit companies that do waive the privilege. Thus, the real impact of this new policy on charging decisions is opaque at best.

The McNulty Memo also addresses the controversial issue of government inquiries concerning a company's decision to advance attorneys' fees to employees under investigation. As with privilege waivers, prosecutors now “generally should not take into account” whether a company is advancing legal fees to its employees under investigation or indictment. However, prosecutors are not prohibited from “asking questions” about an attorney's representation of a corporation or its employees, “including how and by whom attorneys' fees are paid,” in order to address “other issues” including conflicts of interest.

Regardless of whether it was designed to respond to a groundswell of criticism from corporate America or stave off even more restrictive legislation proposed recently in Congress, the McNulty Memo is a step forward for the Department of Justice. However, whether these modifications have a substantial effect on the day-to-day decisions and tactics of federal prosecutors investigating companies remains to be seen.

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