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DOJ Releases New Guidance on Prosecution of Business Organizations

On January 20, 2003, Deputy Attorney General Larry Thompson issued revised guidelines for the federal prosecution of business entities. The changes to the guidelines extend the Department of Justice's effort to "deputize" corporate counsel as adjuncts to the government. As one Assistant United States Attorney recently said at a securities fraud seminar, "It's better for us to have defense counsel do the work. They often have greater resources than the government and do not have the same Fifth Amendment problems we run into in interviewing employees." Because prosecutors across the country will rely on these guidelines in exercising their discretion whether and how to charge a business entity, they are a must-read for any attorney who represents corporate clients in government investigations.

While Mr. Thompson's new policy statement mainly restates guidelines issued in 1999 by then-Deputy Attorney General Eric Holder (commonly referred to as the "Holder Memo"), it differs in several crucial respects. As Mr. Thompson explained in his cover letter regarding the guidelines:

> The main focus of the revisions is increased emphasis on and security of the authenticity of a corporation's cooperation. Too often business organizations, while purporting to cooperate with a Department investigation, in fact take steps to impede the quick and effective exposure of the complete scope of wrongdoing under investigation. The revisions make clear that such conduct should weigh in favor of corporate prosecution. The revisions also address the efficacy of the corporate governance mechanisms in place within a corporation, to ensure that these measures are truly effective rather than mere paper programs

As part of the focus on corporate cooperation, prosecutors are specifically instructed to consider conduct, short of obstruction, that "impedes the investigation." The examples of such conduct listed in the guidelines are cause for concern. For example, the guidelines warn against "overly broad" assertions of corporate representation of employees or former employees. Similary, joint defense agreements between a corporation and its key employees will be viewed with suspicion and could lead the Department to question the genuineness of the corporation's cooperation.

Like the Holder memo before it, the Thompson memo (as it will certainly come to be called) continues to emphasize a corporation's willingness to waive

attorney-client and work product privileges. This factor, combined with the government's attitude toward joint defense agreements, may lead to less cooperation between a corporation and its employees and ultimately impede a corporation's ability to learn and then provide meaningful information to the government.

In addition, corporations are also faced with the difficult choice of waiving privilege in the hope of avoiding prosecution at the risk of handing over damaging information to class-action plaintiffs' attorneys. While both the DOJ and SEC have indicated their willingness to enter into confidentiality agreements to protect disclosure of materials provided by a cooperating corporation, recent court decisions have cast great doubt on the viability of these agreements. Even if work product protection might be salvaged, as courts generally agree it can be selectively waived, courts generally treat waiver of attorney client privilege to one as waiver to all.

While the Holder memo already required a prosecutor to take into account the existence of a corporate compliance program, under Thompson's second significant revision to the guidelines, prosecutors are tasked to look beyond the mere existence of a compliance program. Currently, prosecutors should determine whether the program is designed to "effectively detect and prevent misconduct."

Further, prosecutors should also look at the general governance structure of the corporation. There is great emphasis on independence:

> For example, do the corporation's directors exercise independent review over proposed corporate actions rather than unquestionably ratifying officer's recommendations; are the directors provided with information sufficient to enable the exercise of independent judgment; are internal audit functions conducted at a level sufficient to ensure their independence and accuracy and have the directors established an information and reporting system . . . reasonably designed to provide management and the board of directors timely and accurate information sufficient to allow them to reach an informed decision regarding the organization's compliance with the law.

Finally, the Thompson memo effects two other, somewhat less significant, changes. First, it expressly provides that the "nature and seriousness" of an offense may be sufficient, in and of itself, to warrant prosecution, "regardless of other factors." Second, in the only ray of hope for the defense bar in the document, the guidelines specifically suggest that pretrial diversion may be an appropriate result for a cooperating corporation in the event that amnesty or immunity are not available options.