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Client Alert

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Department of Justice to Revise Guidelines For Criminal Prosecution of Corporations

On July 10, 2008, the Department of Justice announced that it would revise its guidelines for prosecutors to consider when assessing whether to prosecute a corporation. This article reviews the current guidelines, the criticisms of those guidelines, and the announced revisions.

Background

Corporations and other business organizations, such as a physician's professional corporation or a hospital, are "legal persons," and, like individuals, can be prosecuted for criminal violations. A corporation found guilty of criminal acts, even if those acts are limited to a few employees whose actions are imputed to the corporation, faces the prospect of considerable fines, restitution, probation, and other sanctions. If the corporation conducts business with federal, state, or local governments, the corporation may face debarment from bidding for government contracts. Even the prospect of an indictment, without any determination of guilt, may signal the demise of a corporation.

In this environment, the pressures the federal government can, and often does, bring to bear on a corporation are substantial. For example, in the healthcare field, the prospect of a government investigation presents the risk of being excluded from participation in Medicare and Medicaid. In December 2006, the Department of Justice released revised guidelines for prosecutors to consider when determining whether to prosecute corporations, including factors to assess whether corporations are being cooperative. The new guidance was issued by then-Deputy Attorney General Paul J. McNulty and is commonly known as the "McNulty Memorandum" (hereafter "McNulty Memo"). The McNulty Memo is a revision of the Department of Justice's corporate prosecution guidelines issued in 2003 by then-Deputy Attorney General Larry D. Thompson ("Thompson Memo").

The McNulty Memorandum

The McNulty Memo was issued by the Department of Justice to direct and guide federal prosecutors investigating companies or other business organizations, including hospitals, doctor's practices, and other healthcare providers. It starts with the premise that corporations and other business organizations should not be treated more or less harshly than individuals but that, because

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corporations are artificial entities and must act through agents, prosecutors should separately consider whether an individual executive or officer, on the one hand, or the business entity, on the other, should be charged with a crime.

The McNulty Memo also sets forth a number of specific factors that prosecutors must assess when conducting a corporate criminal investigation. The factors are:

1. The nature and seriousness of the offense, including the risk of harm to the public.
2. The pervasiveness of wrongdoing within the corporation, including complicity by corporate management.
3. The corporation's history of similar conduct, including prior criminal, civil, or regulatory actions against it.
4. The corporation's timely and voluntary disclosure of wrongdoing and its willingness to cooperate in the investigation of its agents.
5. The existence and adequacy of the corporation's pre-existing compliance program.
6. The corporation's remedial actions, including efforts to improve its compliance program and discipline or terminate wrongdoers.
7. Collateral consequences arising from the prosecution.
8. The adequacy of the prosecution of individuals responsible for the corporation's malfeasance.
9. The adequacy of civil and regulatory remedies.

All of these factors may come into play during investigations of healthcare providers, perhaps especially so because almost all healthcare providers receive government funding.

The 2003 Thompson Memo and the subsequent McNulty Memo have been criticized for what some have viewed as the harshness of certain of the factors addressed in the memoranda. The McNulty Memo expresses the view that, under certain conditions, prosecutors can request that a corporation waive the attorney-client privilege to provide information to the government and that a company's response, including a refusal to waive the privilege, may be considered in determining whether a corporation is being cooperative in the government's investigation. Since the McNulty Memo also allows prosecutors to consider a company's voluntary waiver of the attorney-client privilege, some have argued that pressure on a company to waive remains, even absent a specific government request.

The McNulty Memo further states that prosecutors can consider whether a corporation appears to be protecting its culpable employees and agents, and that a failure to sanction the employee, a decision to pay the employee's attorney's fees or to enter into a joint defense agreement with the employee may also be considered by the prosecutor when weighing the extent and value of a corporation's cooperation. Under the Thompson Memo, the only stated justification a corporation had for paying attorneys' fees was compliance with governing law, such as state laws that may require corporations to pay legal fees of officers under investigation. With the McNulty Memo, prosecutors can still consider whether a company is paying for certain

individuals' attorneys' fees only "when the totality of circumstances show that it was intended to impede a criminal investigation."[1] The McNulty Memo states that would only be in "extremely rare cases,"[2] but this limitation are vague.

Revision of the McNulty Memorandum

For a variety of reasons, including criticisms of the McNulty Memo, Deputy Attorney General Mark Filip wrote to Senators Patrick J. Leahy and Arlen Specter, both former prosecutors, describing forthcoming changes to the McNulty Memo. In the letter, dated July 9, 2008, Deputy Attorney General Filip acknowledged criticisms that the Department of Justice may be using the threat of corporate criminal indictment and prosecution to coerce corporations to waive the attorney-client privilege and provide information that would be subject to the privilege and that the demand for privilege waivers has inhibited candid communications between corporate employees and legal counsel. Deputy Attorney General Filip also acknowledged concerns rose that the McNulty Memo improperly permits the government to limit or refuse cooperation credit to a corporation if the corporation has advanced attorneys' fees to its employees, has failed to sanction allegedly culpable employees, or has entered into joint defense agreements.

Deputy Attorney General Filip announced that the McNulty Memo will be revised shortly and will include the following changes:

1. Cooperation will be measured by the extent to which a corporation discloses relevant facts and evidence, not its waiver of privilege.
2. Federal prosecutors will not demand the disclosure of non-factual attorney work product and "core attorney-client communications" as a condition for cooperation credit.
3. Federal prosecutors will not consider whether the corporation has advanced attorneys' fees to its employees in evaluating cooperation.
4. Federal prosecutors will not consider whether the corporation has entered into a joint de fense agreement in evaluating cooperation.
5. Federal prosecutors will not consider whether the corporation has retained or sanctioned employees in evaluating cooperation.

The proposed revisions focus on whether the corporation is being cooperative with the government's investigation. They would tend to allow corporations greater flexibility in dealing with their employees and in protecting their attorney-client privilege while still receiving the benefit of cooperation with the government.

On July 10, 2008, Senator Specter responded to Deputy Attorney General Fillip's letter reiterating his previ-

1. Principles of Federal Prosecution of Business Organizations ("McNulty Memo"), n.3.
2 *Id.*

ously stated concerns over certain aspects of the McNulty Memo and his view of the immediate need for either revisions to the McNulty Memo or consideration of legislation to statutorily change the Department of Justice's policies regarding factors to consider when investigating corporations. Senator Specter observed that the proposed revisions set forth in Deputy Attorney General Fillip's letter were "unsatisfactorily vague." Senator Specter further noted that the Justice Department's revised principles of corporate prosecution would not bind any other federal agency,[3] suggesting that the prospect of legislation in this area remains significant.

In the near future there likely will be revised Justice Department guidelines for consideration in connection with investigations of corporations and other business organizations. Any changes, including those referenced by Deputy Attorney General Filip, will undoubtedly affect companies and their counsel as they make strategic and tactical decisions in responding to government subpoenas and investigations and in conducting their own internal investigations. Whether the revisions will go far enough to address concerns raised about the McNulty Memo, however, is yet to be seen.

For more information regarding the revised guidelines, please contact Aaron M. Danzig.

3. The SEC has a similar set of guidelines for assessing corporate investigations and prosecutions known as the Seaboard Report. The Seaboard Report is found in Exchange Act Release No. 44969 and is entitled, "Report of Investigation Pursuant to Section 21(a) of the Securities Exchange Act of 1934 and Commission Statement on the Relationship of Cooperation to Agency Enforcement Decisions."