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Answers and More Questions on the DOJ'S New Policy on Prosecution of Corporations

In response to the continued outcry of the defense bar, Congress, and other interested organizations and individuals, the Department of Justice has, for the third time since 2003, issued guidance on departmental policy regarding the prosecution of corporations. The most recent iteration, issued on August 28, 2008, by the office of Deputy Attorney General Mark Filip as amendments to the U.S. Attorneys Manual (the "USAM Amendments"), replaces the two-year-old "McNulty Memorandum," which in turn replaced the "Thompson Memorandum" of 2003. As the latest USAM Amendments show, the Department's positions regarding the prosecution of corporations—including the role of the attorney-client privilege and work-product protection in measuring a corporation's cooperation with a government investigation, and the use of deferred-prosecution agreements and nonprosecution agreements—continues to evolve. While our prior update summarized those changes, we address here in detail what has been resolved and what concerns remain.

I. ATTORNEY-CLIENT PRIVILEGE AND WORK-PRODUCT PROTECTION

The Department continues to stress the value of cooperation in determining whether to indict a corporation. The Department further asserts that "waiving the attorney-client and work product protections has never been a prerequisite under the Department's prosecution guidelines for a corporation to be viewed as cooperative." *See* USAM Amendments § 9-28.710. This rather defensive assertion no doubt is in response to the many critics of the Department's prior policy statements charging that, in practice, the Department's policies put undue pressure on corporations to waive privilege or risk losing credit for cooperating with a government investigation. Whether founded or not, those concerns have been one of the primary driving forces behind the bar's and Congress' continued pressing of the Department for further changes to its policies. The USAM Amendments offer the following response:

1. While waiver of privilege can no longer be considered in measuring a corporation's cooperation, "relevant facts" are not typically protected by the attorney-client privilege or work product protection, however uncovered. As we noted in our previous summary, the USAM Amendments state that cooperation credit is not to be measured by the waiver of privileges, but by the "disclosure of the relevant *facts*" concerning alleged misconduct. USAM Amendments § 9-28.720 (emphasis in original). The Amendments also describe what the Department considers to be "relevant facts": "how and when" the misconduct occurred, who "promoted or approved it," and who was "responsible for committing it." USAM Amendments § 9-28.720. While this is a step in the right direction—precluding consideration of whether a corporation has waived attorney-client and work-product protections—it also raises further questions which themselves could serve to undermine the progress achieved.

First, the USAM Amendments arguably accomplish the prohibition on considering whether privileges have been waived by defining away traditionally protected information as not privileged in the first instance. That is, the USAM Amendments suggest that the Department does not consider "relevant facts" to be covered by any special protections at all (thus obviating the need to request any waivers), regardless of how a corporation comes into possession of "relevant facts." This is an important shift from the McNulty Memorandum which, by requiring U.S. Attorney and Assistant Attorney General approval for requests that a corporation disclose "purely factual" information, McNulty Memo. at 9, inherently recognized that even such "purely factual" information may be covered by the attorney-client privilege or work-product protection. As described in our previous summary, it remains to be seen how the Department will apply this change, especially

given that such facts are generally only known as the result of an investigation by counsel. Counsel will need to be extra vigilant in setting forth and communicating to interviewed subjects the scope of any privilege governing the communication and the risk that while privileged exchanges need not be revealed to the government, the underlying facts gleaned from those communications may.

Second, the USAM Amendments shift the focus on what is a "relevant fact." That is, while the Amendments look to the broader ideas of "who," "how," and "when," the McNulty Memorandum defined "purely factual" information by the *type* of information at issue, including "key documents, witness statements, or purely factual interview memoranda regarding the underlying misconduct, organization charts created by company counsel, factual chronologies, factual summaries, or reports (or portions thereof) containing investigative facts documented by counsel." McNulty Memo. at 9. This shift is likely an effort to broaden the scope of allowable inquiry by the government into the underlying "facts" uncovered by internal investigations—whatever their form—while at the same time allowing the corporation to avoid subject-matter waiver for purposes of collateral proceedings.

2. To obtain cooperation credit, a corporation *must* disclose "relevant *facts*" of which it has knowledge. *See* USAM Amendments § 9-28.720. The McNulty Memorandum was less stringent and instructed that a corporation's refusal to provide "purely factual information" "*may* be considered in determining whether a corporation has cooperated in the government's investigation." McNulty Memo. at 9. In practice, even under the McNulty Memorandum, failure to disclose "purely factual information" likely precluded a corporation from getting cooperation credit; the USAM Amendments now make that directive explicit.

3. The government cannot request, and a corporation need not provide, waiver of privilege or protections that apply to communications seeking or dispensing legal advice, as a condition for earning credit for corporate cooperation. USAM Amendments § 9-28.720. Despite arguably lowering the bar for requesting the disclosure factual information, the USAM Amendments effect a substantial change from the McNulty Memorandum in how far the government may go in seeking disclosure of clearly protected legal advice. In short, while the McNulty Memorandum allowed a prosecutor to ask a corporation to waive protections applying to the dispensing or seeking of legal advice, albeit only in "rare circumstances," McNulty Memo. at 10, the USAM Amendments categorically prohibit the practice—except when the corporation or an individual defendant asserts an advice-of-counsel defense, or when the allegations involve the crime-fraud exception to the attorney-client privilege doctrine.

4. Certain failures to cooperate are no longer *explicitly* considered a valid ground for an assertion that a corporation is obstructing the government's investigation. Under the McNulty Memorandum, the government could consider whether the corporation was trying to "impede the [government's] investigation," by such tactics as, *inter alia*, directing employees or their counsel "not to cooperate openly and fully with the investigation including, for example, the direction to decline to be interviewed," and the "failure to promptly disclose illegal conduct known to the corporation." McNulty Memo. at 12. Both of those considerations were conspicuously dropped from the USAM Amendments. Nevertheless, it is unlikely the government would look favorably upon such tactics when determining whether to credit cooperation, especially given that the USAM Amendments still consider generally giving "inappropriate directions to employees or their counsel" sufficient grounds for finding obstruction. USAM Amendments § 9-28.730.

5. Participation in a joint defense agreement with employees "does not render the corporation ineligible to receive cooperation credit." The McNulty Memorandum did not specifically withhold cooperation credit when a corporation participated in a joint defense agreement with its employees, but did caution that cooperation could be measured by whether a corporation shares information learned about the government's investigation with its culpable employees through such an agreement. McNulty Memo. at 11. Similarly, the USAM Amendments state that such agreements *per se* do not preclude a corporation from being deemed fully cooperative. USAM Amendments § 9-28.730. Caution is still warranted, however. The Amendments also make clear that a "corporation may wish to avoid putting itself in the position of being disabled, by virtue of a particular joint defense or similar agreement, from providing some relevant facts to the government and thereby limiting its ability to seek such cooperation credit." In other words, JDAs are permitted, but the corporation must structure them very

carefully if it still wants to receive full credit for cooperating. As the exchange of relevant factual information is often at the heart of a JDA, it remains to be seen how effective such agreements can actually be while still enabling the corporation to secure cooperation credit. In any event, it appears clear that the Department will look with disfavor upon any agreements that result in the shielding of information already in the corporation's possession. The USAM Amendments provide no further guidance, and it may take Department scrutiny of several JDAs before a pattern emerges as to what kinds of JDAs the Department views as acceptable.

6. Prosecutors may no longer request a corporation refrain from advancing attorneys' fees to or providing counsel for its employees. Like the McNulty Memorandum before them, *see* McNulty Memo. at 11, the USAM Amendments say that "prosecutors should not take into account" the advancement of fees to employees in determining whether a corporation is sufficiently cooperating. Following the Southern District of New York's and the Second Circuit's strong rebukes of the government's tactics in its prosecution of former KPMG partners in *United States v. Stein*, however, the Amendments go further and explicitly prohibit prosecutors from requesting the corporation decline to advance such fees. This is a significant change, and one that should alleviate a major source of concern both by the corporation and its employees under investigation.

7. Approval within the Department is no longer required for requests of a purely factual nature. Under the McNulty Memorandum, a prosecutor was required to get the approval of the U.S. Attorney, who in turn was required to consult with the Assistant Attorney General for the Criminal Division, before asking a corporation to provide relevant factual information. *See* McNulty Memo. at 9. That requirement is dropped from the USAM Amendments, leaving local assistant U.S. attorneys free to make demands without an apparent hierarchy in place to make sure government attorneys are not over-stepping their authority under the USAM Amendments.

8. The Department pledges more oversight. Nevertheless, despite the fact that no apparent direct approval is required before an AUSA may demand disclosure at least of factual information, and likely in response to concerns that individual U.S. Attorneys or Department prosecutors have put or may put undue pressure on corporations to waive attorney-client or work-product protections, the USAM Amendments set forth a procedure for raising concerns regarding those matters directly with the offending prosecutor's supervisors. *See* USAM Amendments § 9-28.760.

II. DEFERRED-PROSECUTION AND NONPROSECUTION AGREEMENTS

An equally important change not directly addressed by the Department in its press release regarding the USAM Amendments is the rising use of deferred-prosecution and nonprosecution agreements ("DPAs" and "NPAs") as alternatives to indictment. The Amendments add explicit language in that regard from the outset: "In certain instances, it may be appropriate . . . to resolve a corporate criminal case by means other than indictment. Non-prosecution and deferred prosecution agreements, for example, occupy an important middle ground between declining prosecution and obtaining the conviction of a corporation." USAM Amendments § 9-28.200(B). This new emphasis helpfully manifests itself in several areas of the USAM Amendments:

1. The emphasis on DPAs and NPAs is particularly noteworthy given recent congressional resistance. On July 15, 2008, Congressman Bill Pascrell introduced the Accountability in Deferred Prosecution Act of 2008. The Act was largely in response to a series of exchanges between the Department and members of the House Judiciary Committee, wherein Congress sought more information on the rising use of DPAs and NPAs as alternative means of resolving corporate prosecutions. Congress appeared to be concerned both with the perceived non-public manner in which DPAs and NPAs are entered, and with potential conflicts of interest arising from the appointment of corporate monitors to ensure compliance with the DPAs or NPAs. Thus, the Act would require (i) the Department to issue specific guidance on the appointment and retention of corporate monitors, and the standard terms and conditions to be used in DPAs and NPAs; (ii) the Department to file each DPA with the appropriate U.S. District Court; (iii) the District Court to pass on and monitor compliance with any DPA; and (iv) the Department to publicly post all DPAs on its website, subject to court-approved exceptions for good cause shown. Passage of this Act would put significant burdens on the Department and the courts, and could discourage early resolution of government investigations. Despite the proposed oversight by Congress, the USAM Amendments seek to encourage the use of

DPAs and NPAs where appropriate.

2. DPAs and NPAs are encouraged especially where the collateral consequences of indicting a corporation are significant. Declaring DPAs and NPAs as a "third option" between indictment and declination of prosecution, the USAM Amendments advocate use of the agreements "where the collateral consequences of a corporate conviction for innocent third parties would be significant," and where the agreement is structured to "promote compliance with applicable law and to prevent recidivism." *See* USAM Amendments § 9-28.1000. In particular, the Amendments stress that DPAs and NPAs "can help restore the integrity of a company's operations and preserve the financial viability of a corporation that has engaged in criminal conduct, while preserving the government's ability to prosecute a recalcitrant corporation that materially breaches the agreement." DPAs and NPAs also "achieve other important objectives as well, like prompt restitution for victims." *Id.*

3. The USAM Amendments make small textual changes to coincide with the new encouragement to consider alternative resolutions. The Amendments, generally, are therefore rife with small tweaks in language to account for this new emphasis on DPAs and NPAs. For example, the Amendments now explicitly express concern over achieving "a fair and just outcome," not necessarily just a conviction. *Id.* § 9-28.300(B). Additionally, the Amendments refer not only to plea agreements, but to "plea or other" agreements. *Id.* § 9-28.300(A). Finally, the Amendments add language not only describing whether to bring criminal charges, but also "how best to resolve cases." *Id.* §§ 9-28.600(A); 9-28.700(A); 9-28.900(A); 9-28.1100 (A); *see also id.* § 9-28.900(B) (referring generally to "facts to consider as to appropriate disposition of a case"). In negotiating with the government, and in arguing for "how best to resolve" a case to reach "a fair and just outcome," company counsel should advocate for the use of a DPA or NPA, and emphasize that the Department, by including their consideration in its cooperation policy, recognizes the value of such arrangements in fairly resolving corporate criminal liability.

III. MISCELLANEOUS PROVISIONS

Finally, the USAM Amendments make several other minor changes worth noting:

1. Prosecutors are no longer explicitly authorized to consider a corporation's willingness to discipline its employees in deciding whether to bring charges. Under the McNulty Memorandum, the government was permitted to "consider" whether a corporation has undertaken "meaningful remedial measures," including "employee discipline and full restitution." McNulty Memo. at 15. Prosecutors were also authorized to "evaluate the willingness of the corporation to discipline culpable employees of all ranks and the adequacy of the discipline imposed." *Id.* Those two specific considerations were conspicuously dropped from the USAM Amendments. *See* USAM Amendments § 9-28.900(B). Importantly, however, while the Department's press release says explicitly that "prosecutors *may not consider* whether a corporation has sanctioned or retained culpable employees in evaluating whether to assign cooperation credit to the corporation," in fact, the USAM Amendments merely drop the permissive language; there is no explicit prohibitory language in the Amendments.

2. The USAM Amendments arguably hedge on whether the government should always seek to charge the maximum possible offense. The McNulty Memorandum directed that, once a decision to prosecute is made, the "prosecutor should charge . . . the most serious offense that is consistent with the nature of the defendants' conduct and that is likely to result in a sustainable conviction." McNulty Memo. at 17. The USAM Amendments insert some uncertainty to the strength of that assertion by stating that a prosecutor "*at least presumptively* should charge" the most serious offense. USAM Amendments § 9-28.1200(A). Similarly, under the USAM Amendments, "prosecutors should *generally* seek a plea to the most serious, readily provable offense charged," and "the corporation should *generally* be required to plead guilty to the most serious, readily provable offense charged." *Id.* & § 9-28.1200(B) (emphases added). The Amendments did not clarify what kinds of circumstances may warrant deviation from the "general" and "presumptive" rule, but company counsel should be prepared to make appropriate arguments for why a particular case may fall outside the norm.

3. The USAM Amendments now reflect current sentencing law,

requiring consideration of the Sentencing Guidelines and the factors set forth in 18 U.S.C. § 3553. Whereas the McNulty Memorandum emphasized the role the Sentencing Guidelines should play in a prosecutor's plea decisions, McNulty Memo. at 18, the USAM Amendments truncate that discussion and direct consideration of the Section 3553 factors as well, USAM Amendments § 9-28.1300(B). Those factors include, in addition to the range established by the Sentencing Guidelines, (i) the nature and circumstances of the offense and the history and characteristics of the defendant; (ii) the need for the sentence to fulfill certain prosecutorial goals; (iii) the kinds of sentences available; (iv) the need to avoid unwarranted sentencing disparities; and (v) the need to provide restitution to victims. The explicit addition of consideration of the Section 3553 factors will inject an opportunity for counsel to argue why the specific statutory factors warrant a particular plea, and will provide an extra degree of latitude by the prosecuting attorney to entertain and justify such arguments.

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As we described in our previous summary, the USAM Amendments are a significant step toward restoring the balance between the government's focus on corporate crime, and the normal protections available to any target of a criminal investigation and the special considerations warranted by investigation of a corporation. Despite this progress, however, it remains unclear exactly how the new guidance will change current practices. What is clear is that the Department's standards are evolving and, for the past several years, have been evolving toward more protections for the corporation under investigation.