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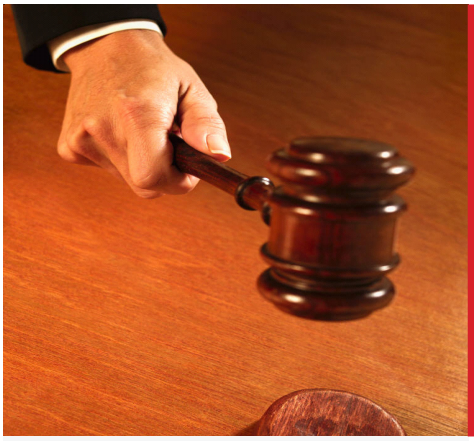

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Justice Department Changes Rules for Prosecutors Investigating and Prosecuting Business Organizations

Business organizations targeted by the Department of Justice who want to get credit if they cooperate with prosecutors have faced pressure from prosecutors to waive the attorney-client privilege and make other concessions in exchange for "cooperation credit" in charging and sentencing-recommendation decisions. These prosecutorial practices have been objected to by groups ranging from the American Civil Liberties Union to the Chamber of Commerce to the American Bar Association. Legislation has been introduced in Congress to curb such practices, and the House has already acted on curbing them.

To address these objections, Deputy Attorney General Mark Filip on August 28, 2008 announced revisions to federal charging guidelines called "Principles of Federal Prosecution of Business Organizations." The changes place restrictions on a federal prosecutor's ability to condition credit for cooperation on a business waiving attorney-client privilege and on other concessions by businesses. The new policies bind all federal prosecutors and apply to all forms of businesses, including sole proprietorships.

Here are the most important of these new policies.

1. Credit for cooperation by a business will not depend on whether the business has waived attorney-client privilege or work product protection or produced materials protected by them. Cooperation credit will depend on the disclosure of facts. Businesses will receive the same credit for disclosing facts that are contained in unprotected materials as they would for disclosing identical facts contained in protected materials.

2. Prosecutors are forbidden from asking businesses to produce non-factual attorney-client privileged communications and work product, such as legal advice, with two exceptions: where the business asserts that it relied on "advice of counsel" and where the prosecutor asserts that the attorney and the attorney materials are involved in the crime.

3. When evaluating cooperation by a business, prosecutors are not permitted to consider whether the business has advanced attorney fees to its employees, officers, or directors, unless such payments and other conduct amount to criminal obstruction of justice.

4. When evaluating cooperation by a business, prosecutors may not consider whether the business entered into a joint defense agreement with other businesses or individuals, although prosecutors may request that a cooperating busi-

ness not disclose information the government provides to it to other parties to a joint defense agreement.

5. Prosecutors may consider whether a business has disciplined or terminated employees that the business has identified as culpable only when evaluating a remedial program or compliance, not when evaluating cooperation.

The Department of Justice previously attempted to address critics' concerns in a 2006 memorandum from Deputy Attorney General Paul McNulty. The McNulty Memorandum drew a distinction between "Category I" material, which included documents containing factual information relating to the alleged misconduct, and "Category II" material, which included attorney-client communications conveying legal advice and non-factual work product such as attorney notes and memoranda containing counsel's mental impressions and legal conclusions. Under the McNulty Memorandum, a prosecutor could seek privilege waivers for both types of material with the approval of Department superiors, with waivers for Category II material reserved for "rare circumstances."

Under the revised policies, these categories are abolished, and a prosecutor cannot ask for material from the former Category II *at all*.

A shortcoming of the McNulty Memorandum was that it did not meaningfully bind prosecutors; parties under investigation had no means of enforcing the Memorandum's rules against prosecutors. That remains true despite the changes in policies, but now defense counsel are encouraged to raise concerns about policy violations to prosecutors' superiors, including the U.S. Attorney or Assistant Attorney General.

It is unclear how much these policy changes will actually provide additional protections to businesses. In order to be considered for cooperation credit, a business still must come forward with all relevant facts, and this often means disclosing materials from internal investigations, privileged or not. Deputy Attorney General Filip said in remarks upon announcing the revisions, "Corporations that do not disclose relevant facts typically may not receive such credit, just like any other defendant." Therefore, the result may be the same under the revised policies as under the McNulty Memorandum, even if prosecutors can no longer directly ask the business to waive privilege and for other concessions if they want credit for cooperation.

Whether the changes will curb abuses and calm concerns, and whether the Senate will follow through with legislation like that already passed by the House, remain to be seen.