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U.S. DEPARTMENT OF JUSTICE ASKED TO SUPPORT ATTORNEY-CLIENT PRIVILEGE

The Washington Legal Foundation (WLF) last week filed a petition asking the United States Department of Justice (DOJ) not to consider a corporation's willingness (or unwillingness) to waive its attorney-client and attorney work product privileges when determining whether a corporation has been sufficiently cooperative to avoid indictment or otherwise to receive lenient treatment.

A DOJ guidance document entitled "Federal Prosecution of Corporations" lays out factors intended to "generally inform a prosecutor in making the decision whether to charge a corporation in a particular case." Two factors invite prosecutors to regard the waiver of a corporation's evidentiary privileges as a reason not to indict and, by negative implication, the exercise of such privileges as a reason to indict. Principle II, "Charging Corporations— Factors to Be Considered," directs prosecutors to take into account "[t]he corporation's timely and voluntary disclosure of wrongdoing and its willingness to cooperate in the investigation of its agents, *including, if necessary, the waiver of the corporate attorney-client and work product privileges.*" Principle VI, "Charging the Corporation: Cooperation and Voluntary Disclosure," instructs prosecutors, "In gauging the extent of the corporation's cooperation, the prosecutor may consider the corporation's willingness . . . to *waive the attorney-client and work product privileges.*"

The DOJ explained that such a waiver should extend broadly to encompass "its internal investigation and with respect to communications between specific officers, directors, and employees and counsel." The government justified the demand for evidentiary waivers, stating that "[s]uch waivers permit the government to obtain statements of possible witnesses, subjects, and targets, without having to negotiate individual cooperation or immunity agreements." It also maintained that waivers serve the purpose of verifying the "completeness of a corporation's voluntary disclosure and cooperation."

In a petition filed with the DOJ, WLF argued that compelling reasons count against equating disclosure with cooperation. First, corporations will be less likely to consult with lawyers, much less consult with them candidly, if such

communications are likely to become available to government investigators on pain of federal prosecution. Because this loss of trust will presumably not be selective, corporations will be frustrated in their efforts to comply with the law and to correct inadvertent noncompliance. Discouraging corporations from complying with the law hardly serves the public interest. Second, equating disclosure with cooperation may simply be inaccurate. Especially given the realistic probability that disclosure will lead to civil litigation, a prudent corporation could wish to fully cooperate with the government's investigation while at the same time insisting on preserving its evidentiary privileges. Third, forcing a corporation to choose between waiver and adverse prosecutorial decisions may operate unfairly when the corporation is wholly innocent of wrongdoing. Ultimately, WLF argued, such serious consequences are hardly defensible on the slender grounds that voluntary disclosure makes prosecution easier.

"Corporations should not be prosecuted merely because they decide to preserve the confidentiality of their communications with attorneys," WLF Senior Counsel for Litigation Affairs Shawn Gunnarson said after filing WLF's petition. "Neither individual corporations nor the public in general is well served when the government requires a corporation to sacrifice its evidentiary privileges, just to be considered fully cooperative with a federal investigation. The government should not encourage, even indirectly, such an erosion of business civil liberties."

The Washington Legal Foundation is a public interest law and policy center with supporters in all 50 states. It devotes a significant portion of its resources to defending and promoting the principles of free enterprise and individual rights.

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