



TOP NEWS December 13, 2006, 12:01AM EST

## Justice Softens Investigation Guidelines

New rules may make it harder for U.S. attorneys to demand confidential data in fraud probes, or to punish companies if they refuse to comply

by [Lorraine Woellert](#)

The Justice Dept. has promised to ease up on its tactics for investigating corporate fraud, raising the bar for prosecutors who want to obtain privileged information from companies. Deputy Attorney General Paul McNulty announced the policy change Dec. 12 at a New York meeting of corporate and defense lawyers, laying out details in a 19-page memorandum to U.S. attorneys.

The [McNulty Memorandum](#) updates the 2003 Thompson Memorandum, a series of corporate prosecution guidelines issued by then-Deputy Attorney General Larry Thompson.

Under the new guidelines, prosecutors must seek written permission from McNulty before asking a corporation to turn over confidential communications to its attorneys. Companies that refuse requests to turn over such information can't be considered uncooperative by investigators. In addition, prosecutors may not label a company uncooperative because it advances attorneys' fees to employees who are charged with a crime.

"The revisions in our guidelines make sense, while still preserving the department's right to obtain needed privileged information where appropriate," McNulty said in a speech to a gathering of Lawyers for Civil Justice, a business-backed group that promotes legal reform. "They encourage the company's compliance efforts; that is, companies now know that the department is not going to request this information out of convenience. Prosecutors will only ask when there is a legitimate need."

### TIME FOR A CHANGE?

Business advocates reacted cautiously to the announcement. "After his speech, Paul turned to me and said, 'Don't overreact, let's take some time to see this work,'" said Stanton D. Anderson, a law partner at McDermott, Will & Emery and consultant to the U.S. Chamber of Commerce, who attended Tuesday's meeting. "I have some sympathy for that. One of our options might be to look at it for six months."

But other reaction was swift—and negative. The [Washington Legal Foundation](#), the American Bar Assn., and others immediately condemned the policy as too little, too late and called on Congress to pass a legislative fix. The revised guidelines "are but a modest improvement," said Karen Mathis, president of the ABA. The McNulty Memorandum "continues to allow prosecutors to force companies to take punitive action against employees in return for cooperation credit, long before any guilt is established," Mathis said.

The McNulty Memorandum updates nine factors that federal prosecutors are to use when deciding whether to bring criminal charges against a company. The Thompson Memorandum had come under fire from business, civil liberties advocates, the American Bar Assn., and the courts, which have attacked it as unconstitutional and fundamentally unfair. A diverse coalition, which includes the National Association of Manufacturers, criminal defense lawyers, and the American Civil Liberties Union, has been pressuring Justice to abandon the policy for more than a year.

The group reports receiving a lukewarm reception from Justice officials, but it has rallied the support of several leading lawmakers, including incoming Senate Judiciary Committee Chairman Patrick Leahy (D-Vt.) and ranking minority member Arlen Specter (R-Pa.), as well as Barney Frank (D-Mass.), incoming chairman of the House Financial Services Committee.

### **COMMUNICATIONS DISCONNECT**

Specter introduced legislation to rewrite Justice's policy last week, a bill that had Leahy's backing. McNulty's announcement was timed in part to forestall legislation in the upcoming Congress that would force a policy change on the agency. But neither Leahy nor Specter have said yet whether they will reintroduce legislation.

Thompson recently added his own voice to the chorus of critics assailing the Justice Dept.'s tactics. Defending the overall policy, he said prosecutors might be applying it too aggressively to pressure business into turning over confidential communications to investigators. "There seems to be a sort of a disconnect," Thompson said in a Nov. 30 speech at the Heritage Foundation, a conservative Washington (D.C.) think tank.

Business has declared the Thompson Memorandum a disaster that has harmed corporate compliance with the law rather than helping it. Fearing that any communication with a company's lawyers might one day be fodder for Justice Dept. investigators—not to mention plaintiff lawyers seeking civil damages—corporate higher-ups reportedly have refused to cooperate with company lawyers in internal investigations, making it harder for businesses to get to the roots of fraud.

### **"CULTURE OF WAIVER"**

And in June, Judge Lewis Kaplan of the Southern District of New York found that federal prosecutors "held the proverbial gun" to the head of accounting firm KPMG to keep it from advancing legal fees to employees under investigation in connection with abusive tax shelters.

The move was meant to satisfy prosecutors who suggested that if the company paid its employees' legal fees, it might be considered "uncooperative" and could face criminal charges. Although the threat was implicit, it amounted to a constitutional violation of workers' Fifth and Sixth Amendment rights to due process and legal representation. Justice has appealed that ruling.

Justice officials say business groups have exaggerated the frequency of privilege-waiver requests in particular, but business says that Justice has discounted what has become a widespread, implicit expectation by prosecutors. In a March survey by the National Association of Criminal Defense Lawyers, nearly 75% of in-house and outside corporate lawyers surveyed agreed that a "culture of waiver" has evolved in which government agencies, including the Justice Dept., consider it "reasonable" to expect a company under investigation to turn over confidential attorney-client communications.

[Woellert](#) is a correspondent in BusinessWeek's Washington bureau.