



**For Immediate Release**

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## **DOJ REVISES CORPORATE PROSECUTION POLICY ON WAIVER OF ATTORNEY-CLIENT PRIVILEGE**

Deputy Attorney General Paul McNulty yesterday issued revised guidelines to U.S. Attorneys for investigating and prosecuting corporations. The guidelines included a provision making it more difficult for prosecutors to request that a corporation waive its attorney-client privilege during the course of a criminal investigation. Heretofore, prosecutors often sought the waiver at their discretion during their investigations; if a company refused to waive the privilege, it was deemed to be uncooperative and risked prosecution. The practical result was that companies were forced to waive the privilege to avoid indictment and prosecution. The McNulty Memorandum now specifies that requests for waiver of the privilege with respect to factual information requires approval of the local U.S. Attorney, and request for a full waiver requires written approval of the Deputy Attorney General.

The revised policy was issued after recent criticism from a wide variety of individuals and organizations, including WLF, regarding the abusive practice. It also came a week after Senator Arlen Specter introduced a bill in Congress forbidding prosecutors from requesting the waiver. "DOJ's revised policy is a welcome step in the right direction, but the change appears to be more cosmetic. Much remains to be done to rein in prosecutors and regulatory agencies that seek to criminalize legitimate business activities," said Paul Kamenar, WLF's Senior Executive Counsel. "Unfortunately, free enterprise is still a prime target for prosecution, with little regard to non-criminal enforcement remedies and the harm inflicted on innocent employees and shareholders," Kamenar said.

The 19-page McNulty Memorandum is the latest revision of DOJ's *Principles of Federal Prosecution of Business Organizations* issued to all federal prosecutors as guidance for investigating and prosecuting businesses. The Memorandum keeps intact the basic message to prosecutors: "First and foremost, prosecutors should be aware of the important public benefits that may flow from indicting a corporation in appropriate cases." The memorandum also singles out so-called "environmental crimes" as one of the categories deserving special prosecutorial attention. Past practice has shown that prosecutors have criminalized even minor regulatory infractions of confusing EPA rules that WLF has argued are better enforced with more reasonable non-criminal remedies.

In addition, the McNulty Memorandum urges prosecutors to seek indictments of businesses on charges that carry the maximum penalty as well as to seek the maximum punishment based on the U.S. Sentencing Guidelines, even though those Guidelines were struck down early last year by the Supreme Court as unconstitutional and are no longer mandatory.

The Supreme Court has recently decide to hear a pair of related cases regarding the weight that judges should give to the voluntary guidelines, *Claiborne v. U.S.* and *Rita v. U.S.*, in which WLF will be filing a brief next week.

In addition to modifying the procedures for seeking a waiver of attorney-client privilege and work product information, the McNulty Memorandum also addresses the issue of corporations defraying the legal expenses of employees who are under federal criminal investigation. Payment of legal fees are often contractually required, and in the past, prosecutors viewed these payments as evidence of being uncooperative and threatened prosecution of corporations for advancing fees. In a recent case, a federal judge in New York ruled that the constitutional rights of KPMG employees were violated when prosecutors pressured the company to stop paying for their legal fees.

Under the revised policy, corporations will be rewarded for waiving the privilege, whether voluntarily or in response to a special request, by considering the waiver as an indication of being cooperative. At the same time, a company's refusal to waive the privilege is not to be punished by prosecutors. Many critics of this aspect of the policy, which appears beneficial on its face, believe that as a practical matter, prosecutors will nevertheless regard the refusal negatively in their prosecutorial decisionmaking.

WLF has been in the forefront supporting business civil liberties and opposing criminalization of legitimate business activities and abusive prosecutorial practices, and has worked with the business community and other allies to urge DOJ to curtail unfair prosecutions. WLF's Legal Studies Division also has published numerous works on criminalization of corporate activities and the attorney-client privilege, including a major monograph on the subject by former Attorney General Richard Thornburgh who is Chairman of WLF's Legal Policy Advisory Board. Mr. Thornburgh, as well as other former Justice Department officials, have been vocal critics of DOJ's practices regarding the waiver of attorney-client privilege.

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