

Press Release

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NEW DOJ GUIDELINES WILL EXPAND HARMFUL CRIMINALIZATION OF BUSINESS CONDUCT

The Department of Justice recently issued revised guidelines to federal prosecutors that could force companies to waive important attorney-client and work-product privileges or face prosecution. The DOJ Memorandum, entitled "Principles of Federal Prosecution of Business Organizations," was issued by Larry D. Thompson, the Deputy Attorney General, to all United States Attorneys and federal agency heads. Although dated January 20, 2003, it was not received by many U.S. Attorneys until last week. The cover memorandum by Mr. Thompson states that the revised guidelines were issued as a result of the work of the Corporate Fraud Task Force, and "in order to enhance [DOJ's] efforts against corporate fraud."

The guidelines revise the earlier so-called Holder Memorandum issued in 1999 by Eric H. Holder, then-Deputy Attorney General. The Holder Memorandum outlined seven factors that federal prosecutors should take into account when deciding whether to bring criminal charges against a corporation, including the willingness of the corporation to waive attorney-client and work-product privileges as part of the larger factor of voluntary disclosure and cooperation with the investigation.

While the Thompson Memorandum essentially reiterates much of the Holder Memorandum, "[t]he main focus of the revision is increased emphasis on and scrutiny of the authenticity of a corporation's cooperation," according to the cover memorandum. The key word is "authenticity," which suggests that the Justice Department will now almost always demand a waiver of attorney-client and work-product privileges. An unwillingness to provide such waivers, even if the corporation is otherwise cooperative in helping the government discover and root out the wrongdoers within its ranks, will weigh heavily against the company in the prosecutorial decision-making process.

"The Washington Legal Foundation is very disappointed by these revised guidelines," said Paul Kamenar, WLF's Senior Executive Counsel. "Unfortunately, waiver of the privilege undermines the frankness and quality of communications between employees and corporate counsel, and forces counsel to become a deputy to federal prosecutors. Waiver also exposes the company to ruinous civil liability by third parties. The result in many cases will be needless collateral damage to innocent employees and shareholders," Kamenar added. WLF has been urging the Department to be more selective in using criminal sanctions against businesses and employees, particularly for regulatory infractions where administrative and civil remedies would be more appropriate.

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