

## **Department of Justice Announces Key Changes to the Principles of Federal Prosecution of Business Organizations**

**July 15, 2008**

In a July 9 letter to the U.S. Congress, Deputy Attorney General Mark Filip outlined significant upcoming changes to the Department of Justice's (the Department's) controversial Principles of Federal Prosecution of Business Organizations. These revisions will further limit the ability of federal prosecutors to obtain attorney-client privileged information from companies, and will also significantly affect the way in which the Department evaluates cooperation by a company seeking to avoid federal criminal charges. By making the proposed changes, the Department hopes to fend off proposed legislation containing many similar provisions.

The letter indicates that the Department will reverse several of its prior guiding principles for measuring the adequacy of a corporation's "cooperation" in a federal criminal investigation, as follows:

- Federal prosecutors no longer may seek as a condition of cooperation "credit" any nonfactual attorney work product or, except in rare cases involving the crime-fraud exception or an advice of counsel defense, the substance of core attorney-client privileged communications. This represents a further retreat from prior policies in which Department requests for privilege waivers as a condition of cooperation "credit" were permissible. Now, cooperation will be measured by the extent to which a corporation discloses relevant facts and evidence, not its waiver of privileges.
- Prosecutors may not consider whether the corporation has advanced attorneys' fees to its employees in evaluating cooperation. Previously, federal prosecutors could consider a company's voluntary advancement of fees to culpable employees in evaluating corporate cooperation.
- Prosecutors may not consider whether a company has entered into a joint defense, common interest, or similar information-sharing agreement in evaluating cooperation. However, companies still may be asked not to disclose to others sensitive, confidential investigative information that the government provides, and the government may consider whether the company has abided by such a request in evaluating its cooperation.
- Prosecutors may no longer deem a company uncooperative simply because it has retained or failed to sanction culpable employees. However, how and whether a company disciplines culpable employees still may bear on the quality of its remedial measures or compliance

program, both of which are important factors in deciding whether to bring a prosecution. Thus, this particular policy change likely will not in any material way alter the government's expectation that a company will terminate or at least discipline employees involved in criminal wrongdoing.

Assuming that the announced changes are implemented, they likely will have a significant effect on the manner in which corporations interact with both the Department and their own employees. However, the revised policies make clear that the Department continues to expect corporate cooperation in government investigations, and that adequate cooperation must include complete and candid factual disclosure. (Read Deputy Attorney General Filip's letter in its entirety at [http://morganlewis.com/documents/Letter\\_PrinciplesOfFederalProsecution\\_7.9.08.pdf](http://morganlewis.com/documents/Letter_PrinciplesOfFederalProsecution_7.9.08.pdf).)

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