



**Prepared Remarks of Deputy Attorney General Paul J. McNulty at the Lawyers for Civil Justice Membership Conference
Regarding
the Department's Charging Guidelines in Corporate Fraud Prosecutions**

New York

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Good morning. Thank you for that introduction.

It is a pleasure to be here with you today to discuss ways in which we can improve the administration of justice and promote compliance with the law. Serving as Deputy Attorney General is an extraordinary privilege because I have a front row seat to watch highly talented and professional people accomplish great things every day. The devoted men and women I work with serve a vital mission, including the war on terrorism and the struggle against violent crime, gangs, drug trafficking and child exploitation. We remain vigorously engaged in the protection of civil rights. And we have taken on the critical fight against corruption, both in the halls of government and the offices of corporate America.

It is extremely satisfying to know that these efforts have made a real difference in people's lives, whether it's the liberation of a neighborhood besieged by a violent gang or the prevention of another catastrophic terrorist attack.

Those who investigate and prosecute corporate fraud should share in this sense of satisfaction. When we look back to the corporate scandals of 2000 and 2001, we remember that it was a time of great concern for the American investor and all those whose hopes and dreams were connected to investments. Public trust in our financial markets and corporate America was at an all-time low with the large-scale bankruptcies of companies like Worldcom and Enron. We saw the wild excesses of corporate executives, Dennis Kozlowski and Bernie Ebbers, spending millions of dollars in corporate compensation, throwing lavish parties, charging enormous personal expenses to their companies. All of these excesses occurred while their own shareholders and the investing public remained blissfully ignorant of their frauds.

Then the bottom fell out. The most telling story of this national crisis had to be Enron. Enron was a story about a company - a group of people - who were bright, motivated and considered themselves to be the "smartest guys in the room" -- widely viewed to be professionals at the top of their field. But at some point, the corporate culture of that company went completely off-track. At Enron, it became all about whether they could "close the deal," or whether managers could book enough earnings to meet the increasingly relentless upward targets established by the company.

That's when the fraud began -- the shifting of liabilities off the books, the creation of partnership entities with no economic value, the booking of earnings that did not exist. And all sorts of people inside and outside the company -- employees, lawyers and accountants -- either sat back and said nothing or saw their concerns swept aside. No one stood up publicly to say "no" when the deals crossed the line.

When these stories were splashed across the front pages of the newspaper, those of us in the law enforcement community met the challenges of this crisis aggressively. The investing public was counting on us to ensure that our capital markets were honest places of enterprise, places where they could invest their hard-earned dollars and know that they had a real chance at a fair return. Employees needed to know that when they worked for a company for twenty or thirty years, the pension plan would be available for them in retirement. The law enforcement community, criminal prosecutors and civil regulators were obligated to take action.

Our response to this outcry reflected the duty we owe to the American public. As prosecutors, we are committed to the fair administration of justice and equal treatment under the law. Our duty is to enforce the law -- duties not all that different from the duties of a corporate officer or director. Or at least they should not be. Directors and officers owe a fiduciary duty to a corporation's shareholders, the corporation's true owners, and they owe duties of honest dealing to the investing public when releasing regulatory filings and making public statements.

The faithful execution of these duties by corporate leadership serves the same values in promoting public trust and confidence that our criminal prosecutions are designed to serve.

In fact, the best corporate prosecution is the one that never occurs. Through successful corporate compliance efforts, investor harm can be avoided. Corporate officials must be encouraged to seek legal advice if they are in doubt about the requirements of the law.

There must also be integrity in what the company does when investigating misconduct. In internal investigations of corporate wrongdoing, corporate counsels play a quasi-public role, not because they are an arm of the prosecutor, but because they are acting on behalf of their investors and must vindicate the good name of the company. To do the job right, corporate attorneys have told me that they need full and frank communication between attorney and employee if they are expected to steer conduct away from law-breaking or uncover criminal wrongdoing.

The attorney-client privilege is an important part of the legal framework supporting this compliance and accountability. The privilege promotes thorough and complete disclosure from a corporate employee to his attorney and candid advice from legal counsel. It is one of the oldest and most sacrosanct privileges in American law. In a government investigation, the corporation and its employees must have the ability to retain and communicate with a lawyer. If that relationship is interfered with, if those communications are unfairly breached, it makes it harder for companies to detect and remedy wrongdoing. And the reality is that the use and preservation of the attorney-client privilege is often not an issue.

Many have argued that the Department's corporate charging guidance, also known as the Thompson Memorandum, has discouraged seeking legal advice and full and candid communication between lawyer and client. Counsel have complained that we are demanding blanket waivers and making waivers a prerequisite for cooperation. This perception, well founded – or not, is said to be discouraging corporate compliance by chilling attorney-client communications.

Today, I'm announcing revisions to the Thompson Memorandum. The previous guidance is superseded, and a new memorandum, under my signature, will provide revised guidance to corporate fraud prosecutors across the country.

The memorandum clarifies the intent of the Thompson Memorandum in connection with how prosecutors evaluate a company's cooperation in making their charging decisions.

As an initial matter, let me point out that the Thompson Memorandum was not intended to encourage practices that chill attorney-client communications, as is currently perceived by some. The revised guidance now addresses that concern. The attorney-client waiver policy found in the Thompson Memo was first articulated in the Holder Memo adopted during the previous administration. My memorandum now amplifies the limited circumstances under which prosecutors may ask for waivers of privilege.

First, my policy now makes clear that attorney-client communications should only be sought in rare cases; that is, that legal advice, mental impressions and conclusions and legal determinations by counsel are protected. Before they are requested, the United States Attorney must seek approval directly from me. I must personally approve each waiver request for attorney-client communications. Both the request for approval and my authorization will be in writing.

Second, to support the request, prosecutors must show a "legitimate need" for the information. If they cannot meet that test, I will not authorize their seeking privileged information. To meet this test, prosecutors must show:

- (1) the likelihood and degree to which the privileged information will benefit the government's investigation;
- (2) whether the information sought can be obtained in a timely and complete fashion by using alternative means that do not require waiver;
- (3) the completeness of the voluntary disclosure already provided; and
- (4) the collateral consequences to the corporation in requesting a waiver.

This is a substantial test and it addresses the criticism that prosecutors are merely asking for blanket waivers in every circumstance. I do not agree that blanket waivers were routinely sought in the past, but establishing this test ensures that requesting waiver is a thoughtful, considered process and that prosecutors are not requesting waiver from corporations without examining their real need for the information.

The privilege is protected to such an extent, that even if the prosecutors have established a legitimate need and I approve the request for the waiver, the Department will not hold it against the corporation if it declines to give the information. That is, prosecutors will not view it negatively in making a charging decision.

Now this is not to say that if the corporation decides to give us the information, we will not consider it favorably. The government wants to encourage cooperation and the production of information where requested. Certainly a corporation would want to receive credit for its production of privileged materials if the decision is made to waive the privilege.

There is another category of information that the guidance identifies, a category that is much less intrusive on the attorney-client privilege because it does not require the disclosure of legal advice. Prosecutors may also seek investigative facts obtained by

corporate counsel in their own internal investigation of corporate wrongdoing. Where the government is seeking investigative facts, there now is a different approval requirement.

In my experience, corporations have a strong incentive to turn over factual information to government investigators. The alternative may be a prolonged criminal investigation, employee grand jury appearances, search warrants and the production of millions of pages of documents. This takes a toll on a company - stock prices plummet, employees leave because of the disruption in business operations or job insecurity, a customer base shrinks, and the company is now perceived as a credit risk. Public confidence in the company erodes.

That's why corporate counsel turns over facts - it wants a fast and thorough criminal investigation so that the company can get itself, and its business operations, back on track.

And yet, even with a relatively non-controversial request for factual information, the request cannot be made informally. Prosecutors still have to establish a legitimate need and submit a written request for approval to the United States Attorney. The United States Attorney considers that request in consultation with the Assistant Attorney General of the Criminal Division. Ultimately, if the request is approved, the United States Attorney must communicate the request in writing to the company.

And if, after receipt of fact information, the prosecutors still believe that they need more intrusive information which may implicate attorney-client communications such as legal advice, then they can come to me as I previously outlined to obtain approval to request that information.

These requirements address the concerns that were raised by corporate defense advocates in the past year. This guidance is very protective of the attorney-client privilege and work product doctrine and it should satisfy anyone who may be concerned about the perception of a "culture of waiver" in corporate investigations. I disagree that there is such a culture but to the extent that the perception exists, this new memorandum and the new practices it requires thoroughly address the issue.

Another part of the guidance which is now revised is the way in which prosecutors may consider the advancement of attorneys' fees by the corporation. In general, the Thompson Memorandum simply directed that a federal prosecutor, as part of assessing whether a corporation cooperated with a government investigation, may look at whether the company is paying the attorneys' fees of individuals alleged to have committed the fraud.

The new memorandum clarifies the intent of the Thompson Memorandum. Let me emphasize this -- the advancement of attorneys' fees has always been a rare consideration in our corporate prosecutions. Most states have indemnification statutes which empower corporations to indemnify or advance fees to their employees. Corporations often include indemnification provisions in their charters, bylaws or separate agreements to attract skilled employees. The prior guidance specifically stated that where there was a legal or contractual obligation to advance fees, prosecutors could not consider that factor. Because corporations often do have these provisions which have been construed by courts to provide advancement and indemnification, fee advancement could be, and was, considered rarely.

The new guidelines now generally prohibit prosecutors from considering whether a corporation is advancing attorneys' fees to employees or agents under investigation or indictment.

So the guidance generally prohibits consideration of fees, but in those extremely rare cases, fee advancement can be considered where the totality of the circumstances show that it was intended to impede a government investigation.

As a practical matter, this factor is never considered alone. It is always combined with other telling facts to show that the corporation is attempting to shield itself and its culpable employees. Corporations may use advancement, and other methods, to stop the flow of information from the company to the government so that we cannot investigate the conduct effectively. But as I said, this is very, very rare. When it happens, prosecutors must come to me for approval before they can consider this factor in charging decisions.

The revisions in our guidance make sense, while still preserving the Department's right to obtain needed privileged information where appropriate. And 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.

The Department respects a company's right to ferret out wrongdoing within its ranks -- to do its own self-policing. It respects the confidential communications between counsel and employees during an internal investigation and the corporation's right to assert privilege. This new guidance reflects that respect.

But along with this respect, we also have expectations. We expect corporate counsel to insist on compliance with the law. As you have told us, lawyers are indispensable in advising companies and their officers on what the law says and why a company's best interests require compliance with it. The Department expects corporate counsel to provide "good counsel," to advise corporate leadership that a particular, possibly illegal, course of action will harm not only the company's own shareholders, but the investing public as well. We expect that corporate counsel will stand up against those in corporate leadership who pillage corporate coffers to

benefit themselves rather than their shareholders. After all, the job of corporate counsel is to protect those shareholders and to ensure that corporate leadership is truthful with the investing public.

In my experience, corporate leaders recognize that they have common goals with the Department. They are honorable men and women who want to foster a culture of integrity at their companies. This is not only because they take pride in what they do and desire that culture, but also because they recognize that it is their duty, it is what their board of directors requires of them.

The revisions in the new memorandum are designed to affirm that kind of corporate leadership. The memorandum places great weight on the honor and integrity in the relationship between corporate leaders, shareholders and the investing public. Our guidance conveys the expectation that you, as counsel representing corporations, also recognize that fiduciary duty. After all, our jobs, public and private, serve the American investor - and the American investor justifiably demands that we do the right thing.

At long last, Kenneth Lay and Jeffrey Skilling were convicted, but the lingering effects of the Enron scandal are not really over. The dreams of those Enron employees were shattered when their retirement savings disappeared. Now, those employees, and their families, will be living with the hardship caused by fraud for the rest of their lives.

The American public cannot afford another round of corporate scandals. We rely on you to help us ensure it does not happen again. Sustaining the achievements of the past five years will require devotion to duty by prosecutors, defense lawyers and corporate counsel. If we are faithful to these duties, America's financial markets will continue to support the hopes and dreams of all its citizens.

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