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PROSECUTING CORPORATIONS:

APPLYING THE NEW DEPARTMENT OF JUSTICE GUIDELINES

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In June 1999, after considerable internal discussion, the Criminal Division of the United States Department of Justice (DOJ) announced that it had formulated a set of Principles of Federal Prosecution of Corporations (Principles).[1] The Principles set out guidelines for federal prosecutors to use in deciding whether to charge corporations with crimes.

The memorandum that announced the Principles to the various DOJ components advised that they are not meant to be "outcome-determinative" but rather aim at providing for prosecutors a "useful framework" with which to analyze cases and a "common vocabulary" with which to discuss decisions with other prosecutors, supervisors and defense counsel.[2]

To this end, the Principles list eight broad factors that should be considered by prosecutors as they exercise their considerable charging discretion. The factors include those already used in weighing decisions to charge individuals, as well as additional factors targeted specifically at the corporate "person."

- the nature and seriousness of the offense in question;
- the pervasiveness of wrongdoing within the corporation, including the involvement of management;
- the corporation's history of similar conduct;
- the corporation's "timely and voluntary disclosure of wrongdoing" and its willingness to cooperate, including waiver of the corporate attorney-client and work product privileges;
- the existence and adequacy of the corporation's compliance program;
- remedial actions, including efforts to implement compliance programs, to replace faulty management, to discipline or terminate guilty parties, to pay restitution, and to cooperate with government agencies;
- collateral consequences, including disproportionate harm to non-guilty shareholders and employees;
- adequacy of non-criminal remedies.[3]

As pointed out in these pages in an earlier piece by Audrey Strauss,[4] the Principles are written from a prosecutor's perspective: They note the policy arguments in favor of corporate prosecution, and appear to fix a "default setting" in favor of corporate prosecution. Thus, the Principles tell prosecutors to consider indicting corporations "[i]n all cases involving wrongdoing by corporate agents," and even when an employee commits crimes that do not profit the corporation at all, but were intended to line the employee's own pockets. As the Principles observe, all that the law requires is some intent to benefit the entity.[5]

More significantly, the Principles address the question of corporate prosecution from the vantage point of a prosecutor who already has determined that a corporate crime has been committed. That is, the starting assumption is that someone within the company has done something wrong, and the Principles are meant to help the prosecutor decide whether to exercise his or her discretion to charge the entity.

From a prosecutor's perspective, this assumption is neither surprising nor upsetting. After all, there is no occasion for the exercise of prosecutorial discretion unless there has been a crime. Even in this aggressive day and age, the first question that a prosecutor must answer is: Did the corporation commit a crime? Unless the answer is "yes," the nature and extent of a corporation's cooperation matters not at all. Thus, the Principles assume ab initio that the investigation will yield sufficient evidence of a crime to support a prosecution.

A defense attorney, however, is not free to assume away his or her client's guilt. From the defense perspective, the lawyer must also consider how to handle a situation in which the investigation may not conclusively establish the client's commission of a crime, particularly in deciding whether to waive privileges or to do other things that will prejudice the company's ability to defend itself if one day it may have to resist what it believes to be unfounded charges.

Thus, the Principles may be used very differently by prosecutors and defense lawyers. For prosecutors, they help answer the question: "Should we charge this guilty corporation?" For the defense attorneys, they help answer the question: "How should we represent our corporate clients, some of whom may have obvious exposure and some of whom may have done nothing wrong?"

Despite their prosecutorial bent, and their operating premise that the corporation in question has committed a crime, however, the Principles have considerable value for defense counsel.

Apart from articulating the factors that will shape the charging decision, they can be helpful in dealing with prosecutors who may be unfamiliar with DOJ policy or who misconstrue or overstate it. This is particularly true with regard to that "bête noire" of modern white collar defense practice, the government's request for the production of internal memos of counsel along with a waiver of the attorney client and work product privileges that apply to them.

The request for a privilege waiver has become the rule rather than the exception. The opening gambit from the government in a corporate investigation now often runs something

like this: "Hello, nice to meet you. Gimme your documents, and waiver the privilege. Now."

The DOJ Principles offer at least some ammunition for a reply. First, they emphasize that the waiver of privileges is not a litmus test or an "absolute requirement," but rather "only one factor" in evaluating corporation cooperation: "[T]he prosecutor *may* consider the corporation's willingness to identify the culprits within the corporation, ... to make witnesses available, to disclose the complete results of its internal investigation, and to waive the attorney-client work product privileges.[6] In particular, footnote 2 explains that the waiver generally should be limited to "the factual internal investigation and any contemporaneous advice" given to the corporation concerning the conduct at issue.[7]

Further, except in "unusual circumstances," prosecutors should not seek a waiver with respect to "communications and work product related to advice concerning the government's criminal investigation."[8] While not defined, "unusual circumstances" presumably refer to ongoing crime, a threat to public safety, or fear of witness tampering or spoilation of evidence. Absent those kinds of circumstances, the Principles indicate that sweeping and automatic requests for blanket privilege waivers are not in keeping with Justice Department policy.

This limitation is likely to be very useful in resisting privilege waiver for the work of outside counsel, who typically interview important witnesses and create file memos at the very beginning of a criminal investigation. Further, the limitation expressed in the Principles provides a ready answer to an Assistant U.S. Attorney who not only demands a blanket waiver as a matter of routine, but who also requests that counsel not interview witnesses or complete an internal investigation. This request, which has cropped up recently in white collar investigations, is intended to give the prosecutor "first crack" at the important witnesses.

The Principles indirectly suggest that such a request usually should not be made, for the protection they give to the work product of outside counsel responding to an investigation would be meaningless if the government routinely demanded that counsel not engage in the interviews that generate protected work product. *Or*, put otherwise, by protecting the work product of counsel who is advising concerning the government's criminal investigation, the Principles reflect the Justice Department's recognition of the important role that defense counsel play in corporate investigations. That role is diminished to the vanishing point if counsel is precluded, on pain of having the client viewed as uncooperative, from witness interviewing and fact-gathering.

Unfortunate Distinction

It is unfortunate, however, that the Principles do not treat work product related to a "factual internal investigation" in the same category as work product "related to advice concerning the government's criminal investigation," While the latter should not be the subject of routine privilege waiver demands under the Principles, the former are treated in the same fashion as "contemporaneous advice concerning the conduct at issue."[9] That is, the Principles tell prosecutors that they may request a privilege waiver "in appropriate circumstances" as to material relating to an internal investigation, while such requests

ordinarily should not be made as to material generated in the course of advising a company about a criminal investigation.

This distinction makes little sense. In practice, the line between "factual internal investigation" and "advice concerning the government's criminal investigation" is often blurred. Absent supernatural intuition, counsel cannot advise about an investigation without knowing something about the facts, and this requires investigation, interviewing witnesses, evaluating documents, and all the rest.

Further, many internal investigations are conducted in response to an allegation of wrongdoing that already has triggered a government investigation, and almost all internal investigations are done with one eye looking toward the government, even if the government is not yet aware of the matter being reviewed internally. Both internal and external investigations are conducted after the alleged conduct has occurred, by lawyers who were not involved first-hand in the conduct and who are examining the same historical pool of facts.

To be sure, the government has a legitimate and important interest in asking about "contemporaneous advice given to the corporation concerning the conduct at issue."[10] If, as is common in corporate investigations, there were attorneys who looked at or were involved in the conduct at issue, a prosecutor should be able to ask what the attorneys knew and did at the time of the alleged wrongdoing because the answer may help to gauge the company's state of mind at the critical time. The attorney, in that circumstance, is a direct fact witness, whose firsthand knowledge happens to be protected by a privilege. Requesting a waiver in that circumstance is not offensive.

On the other hand, an attorney who looks at questionable conduct after the fact, whether in the context of an internal inquiry or as part of the response to a government investigation, is engaged in a reactive, ex post facto analysis of the operative facts. That analysis ought be of less compelling interest to the government. Unlike the advice given by the attorney at the time of the alleged conduct, the information gleaned by counsel in a post-hoc investigation is not part of the "corpus delicti."

Further, the government already has a powerful arsenal of fact-finding tools available to it, including grand jury subpoenas, armed agents, and the formidable ability to intimidate that comes with official status. The government usually has ample means to get to the truth without penalizing companies for refusing to waive the privilege that shields such facts (often meager by comparison) as counsel has managed to gather on his or her own.

Typically, the government can talk to the same witnesses as corporate or outside counsel. A privilege waiver is convenient, and allows busy prosecutors to lighten their investigatory workload, but this is not a compelling interest that warrants wholesale intrusion into the defense function or the implicit threat of retribution if the company has the temerity to stand on its privileges.[11]

Privilege waivers, of course, are one aspect of cooperation with law enforcement. To the extent that requests for privilege waivers have become routine, this mirrors the growing premium that has been placed on cooperation all through the federal system for the administration of criminal justice. As every federal defense attorney knows, the government

controls departures from the Federal Sentencing Guidelines on account of cooperation, and such departures are often the only "way out" for criminal defendants. Not surprisingly, the Principles make explicit and repeated reference to a company's cooperation with the investigation as an important factor in the charging decision.

Defining Cooperation

The Principles also articulate what the Justice Department means by "cooperation" in the corporate context. Apart from privilege waivers, the commentary makes reference to "identify[ing] culprits within the corporation" and making "timely and voluntary disclosure of wrongdoing." Conversely, the commentary makes it plain that the government will take a dim view of a company's "protecting its culpable employees," including advancing attorney's fees, or providing information to those employees "pursuant to a joint defense agreement."

This view of cooperation makes perfect sense if one starts — as the Principles do — from the presumption of guilt. And if the defense attorney knows early on in his or her representation that the company is "verifiably, undeniably, and certifiably" guilty, then full-fledged cooperation may make eminent good sense. The plainly guilty corporation often is well advised to blow the whistle on itself, root out its corrupt employees, and cut them off from financial support and information.

Consider, however, the difficulty this poses for an attorney whose corporate client is not patently guilty of a federal crime. The Principles do not address this circumstance. As noted above, they assume guilt, for unless the prosecutor is satisfied of the company's guilt, there is neither a need nor a basis to make a charging decision.

The defense attorney, though, has it tougher. He or she cannot wait until the end of the investigation and decide then whether the client is "guilty" and therefore ought to cooperate. Decisions need to be made sooner, and often they must be made on incomplete facts, before the lawyer knows how the proof will finally shake out. And this is not just the lawyer's dilemma. The corporate client, too, may be largely ignorant about its own exposure; the acts in question may have been committed by employees who have left the company, or those who remain may not tell the whole truth to the company's lawyers and investigators. And critical facts may lie outside the company, and beyond its ability to collect.

In this uncertain world, where the company's exposure is not known or even knowable, cooperation as the Principles envision it may be tactically unwise for the corporation and grossly unfair to the employees who were involved in the events under examination. Waiving the privilege and giving the government all of defense counsel's interview notes and memoranda, together with counsel's analysis of the facts, will certainly hurt the company's chances of defending itself if there is to be a charge and contested proceedings.

Worse yet, if the facts change as the investigation proceeds, the government may regard the company's sharing of facts as a cynical effort to distort the record, stripping the company of the benefits of cooperation and even exposing it to liability for obstruction of justice. And, unless and until the company can conclude firmly that there has been

wrongdoing, it may be tantamount to business and legal suicide to fire employees, refuse to pay their legal fees, and cut them off from the documents and information they need to defend themselves.

Is it possible, nevertheless, to "cooperate" within the meaning of the Principles if the company is uncertain about its ultimate exposure? Presumably, at least in theory, the answer should be "yes." Nothing in the Principles is set in stone. They are filled with caveats and "waffle words" that allow prosecutors sufficient latitude to view a corporation's response to an investigation in its full context. A fair-minded prosecutor should not hold against a corporation, for instance, its refusal to fire an employee before coming to a firm judgment about the propriety of that individual's conduct.

Nevertheless, in many cases, defense lawyers will have to do their best to "straddle the fence" and keep the prospect of full cooperation alive as the facts unfold. In practical terms, this means being extremely careful about factual presentations made early on to the government or to regulators. Even a small inaccuracy may be highly destructive, as the government (buoyed by the Principles) places a large premium on full and accurate corporate disclosure of wrongdoing.

Second, lawyers should be wary about waiving privileges too quickly or too readily at the early stage of a criminal investigation. Third, companies should try to preserve flexibility in their disciplinary decisions, and to avoid making irrevocable decisions before they gain full comfort with the facts.

Finally, it is worthwhile for defense attorneys to recall that law enforcement is a competitive business, and the Principles apply only to federal prosecutions. Sometimes — not always — corporations get to choose where to bring their dirty laundry. If federal prosecutors apply the Principles in a draconian or heavy-handed manner, there are other law enforcement authorities who will be glad to receive a company's dirty laundry with courteous, outstretched arms.

ENDNOTES

1. It has been reported that the Principles were not first to be released publicly, and that they were "leaked" to a legal publication. Recently, however, the Assistant Attorney General in charge of the Criminal Division disputed this, stating that he had announced the Principles soon after they were issued in a speech to the American Corporate Counsel Association, followed by other similar presentations. Letter from James K. Robinson, reported in the May 2000 edition of the *Business Crimes Bulletin*.

2. Justice Department Guidance on Prosecutions of Corporations. *Crim. L. Rep.* (Bureau of National Affairs, Inc., Washington, D.C.) Dec. 3, 1999, at 139 (Principles).

3. See id. at 190.

4. Audrey Strauss, "New Justice Department Factors on Corporate Prosecution," *New York Law Journal*, Mar. 2, 2000, at 5.

5. See Guidelines, supra note 1, at 189-90.

6. Id. at 191-92 (emphasis added).

7. Id. at 192 n.2.

8. Id.

9. Id.

10. Id.

11. Sometimes, prosecutors seek access to the privileged fruits of a company's internal investigation not in order to shortcut their fact finding, but to assess the company's bona fides and the sincerity of its reaction after learning of the behavior that is of concern to the government. Seeking a privilege waiver in this circumstance is more appropriate. It is akin to seeking a waiver as to contemporaneous legal advice, as the government in both cases is looking for first-hand information to help understand the company's bona fides.

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