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Is the DOJ's New Policy on Prosecuting Corporations Real Reform or Business as Usual?

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For the third time in seven years, the U.S. Justice Department has issued a new policy for investigating and charging corporations.

Now, what will be called the McNulty Memorandum (named for Deputy Attorney General Paul McNulty, who announced it) will be added to the Thompson and Holder Memoranda (also named for the deputy attorneys general who announced them) in the ever-evolving attempt by the DOJ to get it right.

Putting aside whether the whole idea of prosecuting corporations (versus the people within a company who commit the alleged wrongdoing) makes any sense at all (many countries have no process for charging companies), the question is whether the newest policy has changed anything.

Particularly after the Justice Department implement-

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ed the earlier Thompson Memorandum's policy on charging companies, there was vocal criticism from the defense bar that government tactics -- such as encouraging companies to fire suspected employees, requiring waiver of the company's attorney-client privileges and cutting off attorney fees for targeted employees -- were strong-arm measures that violated constitutional rights.



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The DOJ had this awesome power because the threat to companies of the stigma of prosecution (e.g., KPMG) or of winning the battle only to lose the war (e.g., Arthur Andersen) was grave. To avoid such dire consequences, companies all too readily opened their confidential files and, in effect, did the prosecutors' job by investigating themselves and giving the government the results. Despite the presumption of innocence, companies then fired any employee suspected or named by the prosecutors and cut off their defense fees to avoid a corporate death sentence that could result merely from being charged. These actions often led the employees caught in the crossfire to enter plea bargains, not because they truly felt they had violated the law but because they could not fight both the prosecutors and their employers.

It was not until a federal judge in New York in the

KPMG case said the government "let its zeal get in the way of its judgment" and that its actions "held the proverbial gun to [defendants'] heads" that prosecutors' actions became more widely reviewed. For example, Sen. Arlen Specter introduced legislation to stop what he called abusive prosecutorial tactics. Only in the face of forced change did the DOJ issue a new policy in an attempt to police itself. But, the proposed self-restraint may be a bit too little and a bit too late.

The way the government asserted the power it had over companies was to evaluate whether to charge a company (and likely put it out of business) based on that company's "cooperation." And, this cooperation often was measured by how broad the company's waiver of privileges was, how quickly it fired those involved and how many benefits, like attorney fees, it would take from those former employees. Too many companies were all too willing to do all that was asked (and more) to survive and avoid prosecution.

The McNulty Memorandum addresses two of the most frequent charges of abuse that have been leveled against the department -- the requirement of privilege waiver and denial of attorney fees. The new memorandum states that neither tactic should be employed by prosecutors as a general matter in the evaluation of whether a company has cooperated or should be charged. Yet, the "change" is in degree and not to the tactics themselves. The department is not disclaiming its ability to use either form of pressure but is simply declaring that it will do so more sparingly. The department's message to the business and legal community is "trust us." But when such a message is delivered by the same people who betrayed such trust by engaging in egregious conduct in the first place, the department will have to demonstrate that the McNulty Memorandum works in practice before its words will inspire much confidence.

The most significant problem with the McNulty Memorandum is that it speaks only to what the prosecu-

tor can demand, but it does not place any meaningful limit on what the prosecutor can suggest. As we all know, a prosecutor's request or suggestion of what companies might do to be deemed cooperative can be heard by a company as what it has to do. While the new policy may rein in the rogue or overzealous prosecutor by requiring approval by a senior DOJ official before demanding a privilege waiver or fee cutoff, the policy does nothing to restrain Assistant U.S. Attorneys from making these requests more subtly. The pressure on corporations to accede to a prosecutor's "request" to waive privilege or to make life difficult for suspected employees is still too great so long as the practical reality of failing to do what the government wants is corporate suicide. Without an actual ban of these tactics, prosecutors can wink and nod, and companies will feel that the best way to avoid indictment is to do that which the government used to demand directly. There will be no way for this now sub rosa pressure to be exposed. Exchanges between prosecutors and corporations will now say all the right words, and it will be harder for well-intentioned DOJ supervisors and judges to scrutinize the pressure on corporations that was once overt but is now implicit.

While the department should be commended for recognizing a need for a shift in policy, the problems it seeks to redress may not be solved by the precatory approach the McNulty Memorandum has adopted. If the DOJ is not ready to actually ban strong-arm tactics that violate constitutional rights, then it will have to go a long way in supervising prosecutors to show that a real change has occurred. Otherwise, the new policy will be a press conference and fanfare without any real substance or reform, and it will be back to business as usual.

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