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EPSTEIN BECKER & GREEN, P.C.

Resurgens Plaza
945 East Paces Ferry Road
Suite 2700
Atlanta, Georgia 30326-1380
404.923.9000

150 North Michigan Avenue
35th Floor
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26th Floor
San Francisco, California 94111-5427
415.398.3500

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Stamford, Connecticut 06901-2681
203.348.3737

1227 25th Street, N.W.
Suite 700
Washington, DC 20037-1175
202.861.0900

WWW.EBGLAW.COM

U.S. ATTORNEY GENERAL ROLLS BACK MEMO ON WAIVER OF ATTORNEY-CLIENT PRIVILEGE

In a move that has received extensive media coverage, U.S. Deputy Attorney General Paul J. McNulty on Tuesday, Dec. 12, announced a significant rollback of the so-called Thompson Memorandum, which had led to routine demands by Assistant United States Attorneys that corporations waive attorney-client privilege in order to get credit toward a governmental decision not to prosecute.

Under the authority of the Thompson Memorandum, federal prosecutors also had frequently attempted to block companies from indemnifying their executives and other employees for attorneys' fees occasioned while defending themselves in cases of alleged corporate misconduct.

McNulty's announcement followed an extraordinary campaign conducted by former Justice Department leaders, the American Bar Association, the American Civil Liberties Union and a host of other organizations ranging across the political spectrum—all, however, recognizing that confidentiality is an essential element of effective representation and a necessary concomitant of effective internal corporate investigations and compliance.

The Thompson Memorandum was issued in 2003 by former Deputy Attorney General Larry Thompson, in the wake of the scandals involving Enron Corp. and other companies and immediately provoked controversy. The memorandum details the factors that federal prosecutors could consider when bringing criminal charges, such as whether a company has waived attorney-client privilege or paid an executive's criminal defense fees. Critics argued that the memorandum placed undue pressure on corporations to waive the attorney-client privilege.

Under the revised DOJ policy, waiver of attorney-client privilege will be sought from corporations only rarely, and only when "legitimate need" has been demonstrated by the prosecutor. Moreover, approval can be obtained only by written request of the line attorney communicated to the United States Attorney for the respective district and then, ultimately, to the Deputy Attorney General, who must issue any decision in writing.

Even if legitimate need has been shown to the satisfaction of the Deputy Attorney General, and the subject company refuses to waive privilege, the DOJ may not hold this decision against the company in making its charging decision. This element tracks the decision that our coalition of former DOJ officials was able to procure from the Federal Sentencing Commission to exclude waiver from the decision to afford cooperation credit under the Organizational Sentencing Guidelines. That decision was confirmed through congressional inaction several weeks ago.

The Deputy Attorney General's new guidance also generally will prohibit AUSAs from considering as part of the charging decision whether a corporation is advancing attorneys' fees to its employees or agents who are under investigation or indictment, thus bowing to an objection stated by, among others, a federal court judge in litigation against accounting firm KPMG.

Also noteworthy is that legislation recently introduced by outgoing Senate Judiciary Committee Chairman Arlen Specter, R-Pa., which would codify the waiver protection in the charging process, will likely will not go forward, pending analysis of how the DOJ acts with respect to corporate investigations in the months to come. Notwithstanding the more lenient policy now in effect, prosecutors will still seek cooperation, and some companies will continue voluntarily to disclose otherwise-confidential investigative matters. However, the waiver decision will at least rest more securely in the hands of the party that owns the privilege.

Another matter that Congress may consider is enactment of a limited-waiver provision that might allow a company voluntarily to disclose privileged information to government agencies such as the DOJ and U.S. Securities and Exchange Commission, in order to get them to decline proceeding but to prevent third parties such as potential securities suit plaintiffs from having access to such information.

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A copy of the new Department of Justice policy is attached. For further information, please contact **Stuart Gerson** in the **Washington, DC,** office of Epstein Becker & Green, P.C., at 202/861-0900 or **sgerson@ebglaw.com.** Mr. Gerson is a member of the Firm, and heads the Firm's National Litigation practice in Washington, DC. He is a former Assistant Attorney General, and served as Acting Attorney General of the United States during the Clinton Administration.