

*White Collar Practice Alert*

December 15, 2006

*DOJ Replaces Thompson Memorandum with McNulty Memorandum**by Andrew Weissmann, Robert R. Stauffer and Ana R. Bagan*

The Department of Justice (DOJ) has announced significant revisions to its guidelines for determining whether to seek to charge a corporation with a crime. The revisions, announced on Tuesday by Deputy Attorney General Paul McNulty, came in response to mounting criticism that the DOJ's guidelines as expressed in the Thompson Memorandum were eroding the attorney-client privilege. They also follow on opinions by Judge Lewis Kaplan in *United States v. Stein* that were sharply critical of prosecutors' pressure on KPMG to discontinue payment of its employees' legal fees.[1]

**The Attorney-Client Privilege**

The Thompson Memorandum called for prosecutors to consider, as one of the factors in deciding to seek to indict a company, whether or not the company had cooperated with the government's investigation by waiving the attorney-client and work product protections. As McNulty acknowledged in announcing the new policy, the Thompson Memorandum had the unintended result of "discouraging full and candid communications between corporate employees and legal counsel."

In an effort to safeguard the attorney-client privilege, the new McNulty Memorandum [2], which replaces the Thompson Memorandum, institutes a series of procedures a federal prosecutor must follow before she can approach a company about waiving its privilege. It also requires that, depending on the type of information requested, either the Deputy Attorney General or the United States Attorney in consultation with the Assistant Attorney General for the Criminal Division approve in advance every request for a waiver.

The threshold requirement is that prosecutors should only seek waiver if there is a "legitimate need" for the protected information. To determine whether a legitimate need exists, prosecutors must weigh the following factors: (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 a corporation of waiver.

If the legitimate need test is met, the prosecutor must follow certain steps before requesting the information from the corporation. Prosecutors are instructed to "seek the least intrusive waiver necessary." A prosecutor must first seek to obtain "purely factual information...relating to the underlying misconduct," so-called "Category I" information. Listed examples of Category I information include "purely factual" interview memoranda, chronologies, and reports detailing investigative facts documented by counsel, among others. Before attempting to obtain the waiver, the prosecutor must submit a "waiver request" to the United States Attorney. In the request, the prosecutor must explain the legitimate need for the information and identify the scope of the waiver sought. The United States Attorney will then either grant or deny the request in writing, after consultation with the Assistant Attorney General for the Criminal Division. If the request is authorized, the United States Attorney must communicate the waiver request in writing to the company.

If the purely factual information provided by the company pursuant to the waiver of Category I information “provides an incomplete basis to conduct a thorough investigation,” prosecutors are authorized to pursue “Category II” information – attorney-client communications and “non-factual attorney work product.” The McNulty Memorandum admonishes that Category II information “should only be sought in rare circumstances.” To seek a waiver of Category II information, the United States Attorney must request written authorization from the Deputy Attorney General. As with Category I information, the request must explain the legitimate need for the information and the scope of the waiver sought, and, if the request is authorized, the United States Attorney must communicate the request in writing to the company.

These procedures do not apply, however, with respect to two kinds of Category II materials. If the company or one of its employees is relying on an advice-of-counsel defense, a prosecutor need not obtain the Deputy Attorney General’s approval to seek materials concerning legal advice contemporaneous to the misconduct being investigated. Category II approval is also not required in the case of legal advice or communications that would fall within the crime-fraud exception to the attorney-client privilege.

## **Commentary**

The McNulty Memorandum is likely to have certain salutary effects. For example, the revisions to the charging guidelines hold the promise of curbing the “culture of waiver” – the tendency of some prosecutors to seek blanket waivers at the very outset of an investigation or simply for convenience’s sake, even though the information could be obtained by the government through non-privileged channels. This differs significantly from the Thompson Memorandum, which allowed waiver requests simply to expedite an investigation. For instance, a prosecutor was previously permitted to seek fact memoranda of employee interviews, even though the employees were available for the prosecutor to interview herself. The McNulty Memorandum strongly suggests that such a practice will not be appropriate under the “legitimate

need” test. The new policies and procedures also increase the prospect of greater uniformity across the 93 United States Attorneys Offices concerning when it is appropriate to seek a waiver.

But while the McNulty Memorandum attempts to ensure greater uniformity for waiver requests, the same cannot be said of charging decisions. That determination, and how a refusal to waive the privilege will weigh in the balance, remains with individual prosecutors. Given the potentially devastating consequences of a corporate indictment, the decision to indict a company should receive at least the same review as the decision whether to seek Category II materials – namely, approval by the Deputy Attorney General.

The McNulty Memorandum also arguably does not go far enough in safeguarding the attorney-client privilege and work product protection. Once the legitimate need test is met, the consequences to a company of refusing to waive the privilege with respect to Category I information will likely be the same as it was under the Thompson Memorandum. The McNulty Memorandum admonishes that a company’s refusal to waive the privilege with respect to Category II information – attorney-client communications and non-factual work product – cannot count against a company when a prosecutor is deciding whether or not to seek an indictment. The same is not the case, however, if a company declines to waive the privilege with respect to Category I information, which the McNulty Memorandum characterizes as “purely factual.” As under the Thompson Memorandum, prosecutors are authorized to consider a company’s refusal to waive the privilege for these materials in making a charging decision.

Because Category I information is limited to “purely factual” materials, this category may be very narrow. Many of the documents that could potentially fall within it, such as interview memoranda, are likely to contain attorney impressions and legal strategy. And from this point forward, the preparation of such memoranda and similar documents will no doubt be informed by the McNulty Memorandum standards.

To a large degree, however, companies will continue to experience the same pressures to waive the privilege as they did under the Thompson regime. And this is true for an additional reason – companies that agree to waive the privilege will continue to “receive credit” in charging decisions. Additionally, the procedures discussed above do not apply where a company voluntarily waives the privilege by offering protected materials to the government in the absence of a formal waiver request. The pressure to make a voluntary waiver may arguably be even greater than it was before, as companies seek to obtain favor with the government by eliminating a prosecutor’s need to jump through the hoops of securing a formal waiver request. As long as waiver weighs positively in the balance – whether formally or informally – of a prosecutor’s charging decision, the pressures to waive will remain, as will the negative impact on the ability of employees to have full and candid discussions with counsel.

Moreover, although the McNulty Memorandum’s “legitimate need” test envisions that waiver requests – at least with respect to Category II information – will be appropriate only in “rare circumstances,” it remains to be seen how the test will play out in practice. The test permits the possibility that a waiver request will be deemed appropriate so long as the protected information would be likely to help the government’s investigation and is not readily obtainable through alternate channels.

#### **Advancement of Legal Fees**

The Thompson Memorandum provided that one factor prosecutors were to take into account in making a charging decision was whether a company elected to pay the legal fees of “culpable employees.” Although the McNulty Memorandum and accompanying press release do not mention the opinions in *United States v. Stein*, those opinions are clearly the impetus behind the McNulty Memorandum’s virtual elimination of this factor from the charging determination. The *Stein* court held that this factor violated the Sixth Amendment right to counsel and the due process clause of the Fifth Amendment. Under the McNulty

Memorandum, prosecutors “generally should not take into account whether a corporation is advancing attorneys’ fees to employees or agents under investigation or indictment.” The McNulty Memorandum’s seeming rationale, which is quite different from the *Stein* court’s, is that many corporations are contractually obligated, either by provisions of corporate charters, bylaws, or employment agreements, to advance legal fees.

Prosecutors now can consider the payment of employees’ legal fees only in those “extremely rare cases” where the company advances fees in an effort to hamper the government’s investigation. The “totality of the circumstances,” not just the payment of fees, must indicate that the company is trying to impede the investigation. In those cases, the McNulty Memorandum requires that a prosecutor first obtain approval from the Deputy Attorney General before being able to consider this factor in a charging decision.

#### **The Attorney-Client Privilege Protection Act of 2006**

The McNulty Memorandum follows closely on, but differs in significant respects from, legislation recently proposed by Senator Arlen Specter.[3] The Attorney-Client Privilege Protection Act of 2006 would proscribe prosecutors from conditioning a charging decision on any valid assertion of the attorney-client privilege or work product protection. The bill would also prohibit prosecutors from taking into account whether a company pays its employees’ legal fees or retains employees who refuse to cooperate with a government investigation by asserting the Fifth Amendment privilege. Notably, while the McNulty Memorandum does almost entirely eliminate the payment of attorneys’ fees as a factor for consideration, the Memorandum is silent with respect to the propriety of considering whether a company retains employees who refuse to cooperate with the government.

Senator Specter’s proposed legislation also goes significantly farther than the McNulty Memorandum in

safeguarding the attorney-client privilege. Unlike the revised charging guidelines, the bill would categorically disallow the practice of considering a refusal to waive privilege against a company – regardless of whether the government considers the requested materials “purely factual.”

Senator Specter was expected to introduce the bill in January. It remains to be seen what impact the issuance of the McNulty Memorandum will have on the progress of the proposed legislation.

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## Endnotes

- [1] The *Stein* decisions were the subject of past Client Alerts. See “District Court Rules the Government’s Use of the Threat of Corporate Indictment Was Unconstitutional” and “*United States v. Stein*.”
- [2] Like the Thompson Memorandum, the formal name of the McNulty Memorandum is “Principles of Federal Prosecution of Business Organizations.”
- [3] The Senate Judiciary Committee’s hearing on the Thompson Memorandum and its effects on the attorney-client privilege and on Fifth and Sixth Amendment rights was the subject of a previous Client Alert. See “Congressional Scrutiny of the Thompson Memo.”

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