

WHITE-COLLAR CRIME

The McNulty Memorandum

By Andrew Weissmann
and Ana R. Bugan

On the heels of mounting criticism, the U.S. Department of Justice (DOJ) recently instituted significant revisions to its corporate charging guidelines. The “Thompson Memorandum”—as the now superseded guidelines were informally known—had come under fire from several sectors, including the business and legal communities, a federal judge and Congress. Critics complained that the Thompson memo was eroding the attorney-client privilege and infringing on the Fifth and Sixth Amendment rights of employees who refused to cooperate with the government’s investigation. Indeed, the din from such criticism led to the question of whether the Thompson memo would survive. It has not. The question now becomes whether the new memorandum, named after the current deputy attorney general, Paul McNulty, will suffer the same fate, offering too little, too late by way of necessary reforms. McNulty Memorandum, www.usdoj.gov/dag/speech/2006/mcnulty_memo.pdf.

The McNulty Memorandum includes several revisions

The Thompson memo required prosecutors to consider several factors in



determining whether to indict a company. The most controversial one was whether the company had cooperated with the government’s investigation by agreeing to waive the attorney-client and work-product protections when asked by the government. In response to the criticism, the McNulty memo institutes procedures a prosecutor must follow before asking a company for a privilege waiver. First, the prosecutor must establish a “legitimate need” for the protected materials.

Part of the legitimate-need calculation is whether the information is available from other, nonprivileged sources and the degree to which the information will benefit the government’s investigation. Moreover, if the waiver is sought for attorney-client protected information and nonfactual work product, the deputy attorney general must personally approve such waiver request in advance. And, in a critical new provision, even if the request is approved, a company’s refusal to waive the attorney-client privilege in the latter circumstance may not count against it in a charging decision.

The McNulty memo also virtually eliminates from a prosecutor’s consideration another controversial Thompson factor: whether a company is paying the

legal fees of employees who are under investigation or have been indicted. Judge Lewis Kaplan, in a ruling in the KPMG tax-shelter fraud case, held that this provision of the Thompson memo infringes upon the Fifth Amendment due process clause and the Sixth Amendment. *U.S. v. Stein*, 435 F. Supp. 2d 330 (S.D.N.Y. 2006).

The McNulty memo’s rationale for the elimination, namely that many corporations are contractually obligated to advance legal fees, differs significantly from Kaplan’s. Regardless of the stated rationale, however, the McNulty memo takes this controversial factor off the table, with one small exception. The payment of legal fees can be considered against a company if the “totality of the circumstances” indicates that the advancement of fees is part of an effort to impede the government’s investigation. Even then, the new guidelines require a prosecutor to obtain approval from the deputy attorney general before he or she can weigh the payment in a charging decision.

The McNulty memo is promising in several important respects. The revisions will likely go far in curbing the “culture of waiver”—the tendency of certain prosecutors to demand 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 nonprivileged channels. For instance, a prosecutor previously was permitted to seek memoranda of employee interviews, even though the employees were available for the prosecutor to interview herself. The McNulty memo states that “[a] legitimate need for the information is not established by concluding it is merely desirable or

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convenient to obtain privileged information.” Also, the requirement that prosecutors justify the need for a waiver to their boss (or their boss’s boss) is likely to make them reluctant to seek waivers in borderline cases.

The revised policy also increases the prospect of greater uniformity across the 93 U.S. attorneys’ offices. A significant problem under the Thompson memo was that it gave prosecutors a green light to seek waivers, but offered no guidance about when it was appropriate to do so or under what circumstances a company’s failure to waive should be taken as noncooperation. The considerable variances in interpretation that resulted subjected companies, many of which are national or international in scope, to the vagaries and unreviewed decisions of an individual prosecutor. The new memo, which establishes two senior officials at Main Justice—the deputy attorney general and the assistant attorney general—as gatekeepers, holds out the prospect of a consistent, national policy for waiver requests.

Despite these salutary provisions, the McNulty memo is vulnerable to valid criticism that it does not go far enough. For instance, it is probable that companies will continue to feel pressure to waive the privilege because the McNulty memo still gives “credit” to those companies that waive. While a refusal to disclose legal advice and attorney-client communications may not count against a company, the same does not hold true for information the government deems “purely factual.” Such information “may or may not be privileged” and includes “purely factual interview memoranda...factual chronologies, factual summaries, or reports...containing investigative facts documented by counsel.” A prosecutor must first show a legitimate need for the materials and obtain permission prior to requesting the waiver. But if the company refuses to waive, the prosecutor may ultimately consider that refusal against it in making a charging decision.

The McNulty memo falls short of the recommendations of Thompson memo critics, such as the American Bar Association, the Heritage Foundation and even former senior DOJ officials, who called for the complete elimination of waiver as a

consideration in corporate charging decisions. Nor does it go as far as would legislation first proposed by Senator Arlen Specter, R-Pa., in December 2006 and reintroduced in January. Unlike the revised guidelines, the Attorney-Client Privilege Protection Act would categorically prohibit prosecutors from conditioning a charging decision on any valid assertion of the attorney-client privilege or work-product protection, regardless of

Memo disappoints Thompson memo critics, who called for total elimination of waiver as a consideration in charging decisions.

whether DOJ deems the requested materials “purely factual.” Some have suspected that the timing of the McNulty memo, just five days after Specter introduced his bill, is DOJ’s attempt to pre-empt this more far-reaching legislation, which would remove regulation of the waiver issue from DOJ’s hands.

McNulty safeguards do not apply to voluntary waivers

Under the McNulty memo, companies are likely to continue to experience pressure to waive privilege for another reason. The safeguards it lays out do not apply when a company voluntarily waives the privilege 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 request. As long as waiver weighs favorably in the balance, coercive pressures will remain, as will the

negative impact on the ability of employees to have full and candid discussions with counsel. Companies may at first blush consider this a positive step. In reality, it serves to encourage waivers with little or no concomitant benefit. A company’s voluntary privilege waiver will rarely be determinative of the charging decision. This factor is overwhelmed by myriad others, such as the nature, severity and scope of the criminal conduct, and a history of recidivism. The McNulty memo also fails to address another criticism of the Thompson memo. Specter’s bill would bar conditioning a charging decision on a company’s failure to fire an employee who refuses to cooperate with the investigation. The McNulty memo leaves the Thompson language unchanged.

Perhaps the McNulty memo’s greatest shortcoming is that it does not require DOJ approval of the most critical decision—whether to prosecute a company. That determination remains in the hands of individual prosecutors. In the post-Enron world it is not too much of a stretch to say, as did Kaplan in the KPMG case, that an indictment could be a corporate death sentence. Given these dire potential consequences, the decision to prosecute a company should receive at least the same review as the decision to seek privileged materials—namely, approval by the deputy attorney general.

The greatest potential threat to the McNulty memo’s longevity comes from Specter’s bill. Calling the DOJ’s changes “insufficient” and the new protections for the privilege “inadequate,” the senator reintroduced his bill in January. The bill has been referred to the Senate Judiciary Committee, but its members may well wait and see how the revised guidelines play out in practice. If the memo succeeds in dampening congressional resolve, DOJ’s limited concessions will have staved off much-needed reforms. **NLJ**

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