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DOJ Releases McNulty Memo Revising Policies for Prosecutions of Organizations

Amid mounting criticism about perceived unfairness in the Department of Justice's ("DOJ") treatment of businesses in criminal investigations, on December 12, 2006, Deputy Attorney General Paul McNulty issued a memorandum entitled "Principles of Federal Prosecution of Business Organizations" ("McNulty Memo"). The McNulty Memo modifies certain DOJ internal policies and standards for determining whether business organizations have cooperated in federal criminal investigations. The McNulty Memo supersedes policies contained in the often-reviled "Thompson Memorandum," a set of 2003 guidelines authored by then-Deputy Attorney General Larry Thompson for deciding whether to bring a criminal prosecution against a business entity.[1] The McNulty Memo purports to alter DOJ policy in two key areas: (1) prosecution requests for privileged corporate information, and (2) government interference with companies' advancement of attorney's fees for employees.

Government Requests for Privilege Waiver

Under the Thompson Memo, prosecutors were instructed to consider a corporation's waiver of attorney-client and work-product protections as a factor in making criminal charging decisions. In light of this policy, the Thompson Memo was widely condemned for essentially encouraging federal prosecutors to insist upon corporate waivers of these privileges as a condition to receiving "credit" for cooperating with the government. The perceived unfairness and the chilling effects that this policy brought to bear on business organizations in seeking prompt and sound legal advice created a firestorm of opposition from critics across the political spectrum who argued that companies should not be put to such a Hobson's choice.

"Legitimate Need" & "Least Intrusive" Manner

In an effort to quell this public outcry, the McNulty Memo specifies that "[w]aiver of attorney-client and work product protections is not a prerequisite to a finding that a company has cooperated in the government's investigation." Under this new regime, government prosecutors may not request a waiver of attorney-client or work-product privileges unless there is a "legitimate need" and even then, they are directed to do so in the "least intrusive" manner. The McNulty Memo emphasizes that "[a] legitimate need for the information is not established by concluding it is merely desirable or convenient to obtain privileged information." In determining whether there is a "legitimate need" for requesting a waiver, prosecutors must consider the following factors: (1) the likelihood that privileged information will benefit the government's investigation; (2) whether the information sought can be obtained from alternative means; (3) the completeness of the voluntary disclosures provided by the company; and (4) the collateral consequences of a waiver to the corporation.

"Category I" Privileged Information

If a "legitimate need" exists, the McNulty Memo delineates procedural steps that must be followed in requesting production of privileged materials. Prosecutors "should first request purely factual information" – such as copies of documents, witness statements, factual interview memoranda, and factual summaries prepared by counsel – relating to the underlying misconduct, which the McNulty Memo refers to as "Category I" materials. Category I materials also include both legal advice contemporaneous to the underlying misconduct when the corporation or one of its employees has asserted a reliance on advice-of-

[1] Memorandum from Larry D. Thompson, Deputy Attorney General, to Heads of Department Components and United States Attorneys, *Principles of Federal Prosecution of Business Organizations* (Jan. 20, 2003), available at http://www.usdoj.gov/dag/cftf/corporate_guidelines.htm ("Thompson Memo").

counsel defense, and legal advice or communications that fall within the crime-fraud exception to the attorney-client privilege.

Before asking for a corporate waiver for Category I information, the McNulty Memo requires prosecutors to obtain written authorization from the U.S. Attorney who thereafter must provide a copy of the request to, and consult with, the Assistant Attorney General for the Criminal Division before granting or denying the request. A prosecutor's request for permission to seek a Category I waiver must describe the "legitimate need" for the information and identify the scope of the waiver sought. The McNulty Memo further requires that a copy of a waiver request and written authorization for Category I information must be kept in the U.S. Attorney's files. If the request is authorized, the McNulty Memo directs the U.S. Attorney to communicate the request in writing to the corporation.

The McNulty Memo does not, however, eliminate the danger that a company's refusal to turn over Category I information could be held against the company by prosecutors in deciding whether to bring an indictment. Indeed, the McNulty Memo specifically states that "[a] corporation's response to the government's request for waiver of privilege of Category I information may be considered in determining whether a corporation has cooperated in the government's investigation."

"Category II" Privileged Information

If prosecutors conclude that Category I privileged information is insufficient to conduct a thorough investigation, the McNulty Memo permits prosecutors to request from a corporation more sensitive attorney-client communications and non-factual attorney work-product, which is described as "Category II" information. According to the McNulty Memo, this category includes legal advice given to the corporation contemporaneous to the underlying misconduct as well as later investigative materials such as memoranda containing counsel's mental impressions, legal determinations, and advice. The McNulty Memo cautions, however, that this information should be sought only in "rare" circumstances.

Before requesting a waiver for Category II information, the McNulty Memo requires that the U.S. Attorney must obtain written authorization from the Deputy Attorney General. As is the case with respect to seeking permission to ask for Category I materials, a request for authorization for Category II materials must set forth the "legitimate need" for the information and identify the scope of the waiver requested. A copy of each waiver request and authorization to ask for production of Category II information must be kept in the files of the Deputy Attorney General. If authorization is granted, the McNulty Memo requires the U.S. Attorney to communicate the request in writing to the corporation.

Unlike a refusal to provide Category I information, the McNulty Memo mandates that a corporation's refusal to waive privilege of Category II materials may not be held against the corporation in deciding whether to prosecute it. On the other hand, the McNulty Memo is quick to point out that prosecutors nonetheless may accord favorable consideration to a corporation's acquiescence to a government request to produce Category II information in deciding whether to prosecute the company. Whether this curiously-crafted policy will prove successful in tempering coercive government pressure to relinquish the privilege, or whether it merely will preserve the status quo by allowing prosecutors to strong-arm corporate waivers by threatening to withhold cooperation credit that companies otherwise would receive by surrendering Category II materials, remains to be seen.

Finally, the McNulty Memo provides that federal prosecutors are not required to obtain authorization to accept productions of privileged materials if a company voluntarily offers the privileged information without a request by the government. Absent meaningful oversight and good-faith implementation, there is a danger that this provision could be misused as an end-run around the McNulty Memo's procedural regime by prosecutors who wish to avoid the cumbersome requirements for making a formal request for privileged information. In reality, prosecutors often do not have to even ask for waivers directly; merely posing generic questions about the nature and extent of potentially helpful privileged information that a company may have in its possession can convey a tacit message that by providing such information to the government, the company can spare itself from a fatal indictment. For companies desperate to avoid criminal prosecution, such subtle tactics may be as compelling as a formal request for waiver in pressuring them to set aside their legal rights.

Payment of Employee Legal Fees

The McNulty Memo also addresses a practice condoned by the Thompson Memo pursuant to which prosecutors could consider a corporation's payment of an employee's legal fees and other litigation expenses as an indication of the company's lack of cooperation with criminal authorities. In June 2006, Judge Lewis A. Kaplan of the U.S. District Court for the Southern District of New York reviewed this policy in connection with the Government's criminal prosecution of certain current and former employees of KPMG in United States v. Stein, No. S1 05 Crim. 0888 (S.D.N.Y. June 26, 2006). In Stein, Judge Kaplan held that the government's application of pressure on KPMG to cut off its employees' legal fees and other defense costs - in the hopes of obtaining a deferred prosecution agreement that it later received in August 2004 - violated the employees' Fifth and Sixth Amendment rights. Judge Kaplan thus determined that the portion of the Thompson Memo governing this practice was unconstitutional. In rebuking the government's coercive tactics, Judge Kaplan found that although KPMG had made

it a practice to pay the fees of its employees, it refused to do so in Stein "because the government held the proverbial gun to its head."

In an obvious response to the Stein ruling, the McNulty Memo revises DOJ policy to reflect that "[p]rosecutors generally should not take into account whether a corporation is advancing attorneys' fees to employees or agents under investigation and indictment." It appears, however, that this new policy may be limited to situations in which advancement of attorneys' fees is required by state corporation law. Indeed, the McNulty Memo points out that "[m]any state indemnification statutes grant corporations the power to advance legal fees of officers," and consequently, "many corporations enter into contractual obligations to advance attorneys' fees through provisions contained in their corporate charters, bylaws or employment agreements." In such circumstances, the McNulty Memo explains that "a corporation's compliance with governing state law and its contractual obligations cannot be considered a failure to cooperate." Unfortunately, the McNulty Memo says nothing about whether a corporation's decision voluntarily to advance legal expenses as a matter of company practice – *i.e.*, in the absence of any state law or contractual obligation to do so, as was the case in Stein – may be deemed indicia of non-cooperation.

The McNulty Memo also carves out a vaguely-worded exception – to be invoked only in "extremely rare" cases – pursuant to which advancement of legal fees can be taken into account when the "totality of the circumstances" reveals that it was intended to impede a criminal investigation. The McNulty Memo requires, however, that prosecutors must obtain approval from the Deputy Attorney General before they may consider this factor in their charging decisions.

Finally, the McNulty Memo makes clear that prosecutors may continue to ask questions about an attorney's representation of a corporation or its employees, including how and by whom attorney's fees are paid.

Impact of the McNulty Memo

The release of the McNulty Memo comes on the heels of proposed legislation recently introduced by Senator Arlen Specter, Chairman of the Senate Judiciary Committee. Senator Specter's bill, entitled the "Attorney-Client Privilege Protection Act of 2006" ("ACPPA"), would categorically prohibit the government from demanding, requesting or conditioning treatment on the disclosure by an organization of privileged information, and would forbid consideration of a company's valid assertion of the attorney-client or work-product privileges as a factor in determining whether the company is cooperating with the government. The McNulty Memo may be DOJ's attempt to avoid enactment of these and other sweeping restrictions proposed by the ACPPA by offering a compromise on DOJ's own terms. Whether the McNulty Memo will be successful in this regard is an open question.

It also is unclear how, if at all, the McNulty Memo will change the way in which federal prosecutors treat business organizations in the future. Only time will tell whether the McNulty Memo will have any meaningful impact in neutralizing the prevailing atmosphere of coercion in criminal investigations that has compelled many companies to surrender their legal rights.

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