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WHAT THE MCNULTY MEMORANDUM MEANS FOR CORPORATIONS

Introduction

On December 12, 2006, U.S. Deputy Attorney General Paul J. McNulty released a memorandum entitled "Principles of Federal Prosecution of Business Organizations" that revised corporate charging guidelines for federal prosecutors. The memorandum, commonly known as the McNulty Memorandum, was designed to replace the Thompson Memorandum issued in January 2003 as a response to President Bush's directive to the Department of Justice to focus on corporate fraud. Many thought that the Thompson Memorandum had a chilling effect on the offering of legal advice because it granted prosecutors wide latitude to seek waivers of privileged information. The McNulty Memorandum strengthens the protections of the attorney-client privilege and the work product doctrine through curtailing what has been widely perceived as excessive government practices and policies. The McNulty Memorandum does this through creating new approval requirements with which prosecutors must comply before they can request corporations to waive privilege. Further, the McNulty Memorandum limits prosecutors' ability to consider a refusal to provide privileged information when making the decision whether to charge a corporation with criminal misconduct. The restraints placed on prosecutors by the McNulty Memorandum will allow for more open communication between corporations and their attorneys thereby improving corporate compliance.

Requests for Waiver of Attorney Client Privilege

The McNulty Memorandum sets forth new guidelines that prosecutors are required to follow when seeking privileged attorney-client communications, legal advice or non-fact attorney work product. When prosecutors now seek privileged information, their U.S. Attorney must obtain written approval from the Deputy Attorney General. The

request for approval must demonstrate a legitimate need for the privileged information and the scope of the waiver sought. Prosecutors must address the following to establish a legitimate need for privileged information:

- 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) collateral consequences to a corporation of a waiver.

These new guidelines prevent prosecutors from seeking waivers at will. Prosecutors are also cautioned that attorney-client communications should be sought only in rare circumstances and are now required to take investigative steps to determine whether a corporation has engaged in criminal misconduct.

The McNulty Memorandum also sets forth guidelines when prosecutors seek privileged factual information uncovered in a corporation's internal investigation of misconduct. Such privileged factual information includes key documents, witness statements or purely factual memoranda. Prosecutors must now seek approval from their U.S. Attorney who must consult with the Assistant Attorney General of the Criminal Division before approving such request.

In addition to these new guidelines, the McNulty Memorandum limits prosecutors' ability to consider a refusal to provide privileged information when making a decision whether to charge a corporation with criminal misconduct. The McNulty Memorandum directs prosecutors not to consider a corporation's declination to provide attorney-client communications as a factor against the corporation in charging decisions. Prosecutors may still consider favorably a corporation's decision to provide protected material, whether or not requested by the prosecutors and are not required to seek approval if a corporation voluntarily waives privilege.

Advancement of Attorneys' Fees

The McNulty Memorandum also instructs prosecutors that they cannot consider a corporation's advancement of attorneys' fees to employees when making a decision whether or not to charge a corporation with criminal misconduct. An exception is created in rare circumstances when the advancement of attorneys' fees, combined with other significant facts, shows that such advancement of attorneys' fees was intended to impede the government's investigation. In those limited circumstances, the advancement of attorneys' fees may be considered only if authorized by the Attorney General. When seeking such approval, prosecutors must follow the same authorization process established for seeking approval to request the waiver of attorney-client communications from the Deputy Attorney General.

Conclusion

The McNulty Memorandum strengthens attorney-client privilege through establishing clear approval requirements for requests of privileged information. Although this strengthening of attorney-client privilege has the effect of encouraging full and frank communication between a corporation and its attorneys, corporations should be advised that the guidelines set forth by the McNulty Memorandum are not enforceable at law. If a prosecutor fails to follow the guidelines, there is nothing that the accused can do in response. Consequently, corporations may remain reluctant to seek legal advice. To be truly effective, the Department of Justice must ensure that its prosecutors are in fact following the guidelines set forth by the McNulty Memorandum.

[Click here to view the McNulty Memorandum](#)
[Link opens a new page - PDF \(8.94 meg.\)](#)

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