DOJ Alters Policy on Waiver of Corporate Attorney-Client Privilege and Advancement of Employee Legal Fees

New York
December 13, 2006

On December 12, 2006, Deputy Attorney General Paul J. McNulty issued revised guidelines for federal prosecutors to use in deciding whether to prosecute business organizations. These guidelines, entitled the Principles of Federal Prosecution of Business Organizations (the "McNulty Memorandum"), significantly alter the previous Department of Justice ("DOJ") memorandum of the same title issued in 2003 by then Deputy Attorney General Larry D. Thompson (the "Thompson Memorandum"), which addressed the waiver of privilege and consideration of the advancement of attorneys' fees in this context. The McNulty Memorandum improves upon the October 21, 2005 directive from the Acting Deputy Attorney General Robert D. McCallum, Jr. that required Heads of Department Components and United States Attorneys to establish "a written waiver review process" governing the evaluation and approval of requests by Assistant United States Attorneys for corporations to waive the attorney-client privilege and work product protections.

The revised guidelines create a bifurcated system under which waiver as to privileged documents containing only factual information can be requested when there is "legitimate need" for the request and the prosecutor has obtained written supervisory approval. A corporation's decision to decline such a request may still be considered in assessing whether it has cooperated. Waiver as to privileged documents containing legal advice and opinions, on the other hand, requires an even higher level of approval. A corporation's decision to decline such a request may not be considered in the charging decision, but its agreement to provide such privileged material may favorably factor into a determination as to the level of its cooperation. Lastly, the revised guidelines all but eliminate the ability of federal prosecutors to consider a corporation's advancement of legal fees to employees or agents as a factor in deciding whether to charge the corporation.

The Thompson Memorandum outlined nine factors that federal prosecutors should consider in assessing whether to charge a corporation with a crime committed by an employee. One of those factors to be considered was the "corporation's timely and voluntary disclosure of wrongdoing and its willingness to cooperate" in the government's investigation. In assessing cooperation, the Thompson Memorandum allowed prosecutors to consider the corporation's waiver of the corporate attorney-client privilege and work product protections, as well as whether the corporation was supporting potentially "culpable

employees", including by advancing attorneys' fees. The Thompson Memorandum, while recognizing that waiver was not an absolute requirement, did not offer prosecutors guidance regarding when a request for waiver was appropriate and whether such a request should be vetted with the prosecutor's superior.

The revised guidelines respond to substantial concerns raised by business, legal and political communities regarding the "culture of waiver" that developed from the implementation of the Thompson Memorandum. Critics of the Thompson Memorandum suggested that federal prosecutors in the post-Enron world routinely asked for waiver of the attorney-client privilege and work product protections at early stages of an investigation and did so without considering alternative courses of action, without consulting with supervisors, and without considering the serious consequences to a corporation that waived the privilege, including the ability of third parties to discover these otherwise protected documents.

The McNulty Memorandum not only provides some clarity about when a request for waiver may be sought, but also requires that such requests be approved and documented. Specifically, the McNulty Memorandum allows prosecutors to request a waiver of attorney-client privilege or work product protections when there is a legitimate need for the information measured by:

(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 a waiver.

If a prosecutor finds there is a legitimate need to seek a waiver, the McNulty Memorandum requires that waiver first be sought concerning privileged documents that contain purely factual information ("Category I" documents) before seeking privileged documents containing legal advice and opinions ("Category II" documents). It defines Category I documents to be limited to those that include key documents, witness statements, purely factual summaries, interviews and reports. Moreover, requests for Category I documents must be approved, in writing, by the United States Attorney, who must consult with the Assistant Attorney General for the Criminal Division. If the request is approved, it must be sent in writing to the corporation. A corporation's decision not to waive privilege concerning Category I documents may still be considered in determining whether a

corporation has cooperated in the government's investigation, and, ultimately, in whether the corporation should be indicted.

If a prosecutor finds that a thorough investigation is not possible with a waiver only as to Category I documents, a request for waiver as to Category II documents may be sought. The McNulty Memorandum makes clear that requests for Category II documents should be rare. Such a request must be approved by the United States Attorney and the Deputy Attorney General and, if approved, must be communicated in writing to the corporation. A corporation's decision to decline to waive privilege concerning Category II documents cannot be considered against it in the prosecutor's charging decision, but its decision to accede to the request may be favorably considered in determining whether the corporation has cooperated.

Corporations, of course, may still choose voluntarily to offer privileged documents to the government, and the prosecutors must document such waivers.

Lastly, in a turnabout from the Thompson Memorandum, the McNulty Memorandum requires prosecutors generally not to take into consideration a corporation's advancement of attorneys' fees to employees when assessing cooperation unless there is evidence that the advancement of attorneys' fees is being used to impede the government's investigation. This undoubtedly responds to the highly publicized litigation between the United States and former partners of KMPG LLP before U.S. District Court Judge Lewis A. Kaplan. In June of 2006, Judge Kaplan issued a watershed decision holding that federal prosecutors' invocation of the Thompson Memorandum to pressure KMPG LLP to cease its long-standing practice of advancing employees attorneys' fees in order to avoid indictment interfered with the Fifth and Sixth Amendment rights of the former partners.

In our view, the McNulty Memorandum is a step in the right direction in addressing the concerns various constituencies raised about the "culture of waiver" that has developed in post-Enron times. However, it remains to be seen what practical effect the revised guidelines will have. While the McNulty Memorandum would suggest that the frequency with which waivers are requested by prosecutors and agreed to by corporations may decrease, the results will largely depend upon how seriously the United States Attorneys and Assistant Attorneys General exercise their oversight functions and act as gatekeepers to winnow out unnecessary and improper waiver requests. Indeed, the McNulty Memorandum may not in practice decrease the number of cases in which the prosecutor seeks waiver as to Category I documents. It is also unclear whether the revised guidelines will result in pressure being explicitly or implicitly placed upon corporations to "voluntarily" waive privilege. The value of such "voluntary" waivers may increase as they would assist the prosecutors in avoiding the approval process set forth in the revised guidelines and may then afford corporations additional credit under the cooperation factor. Accordingly, the practical influence of the McNulty Memorandum will depend on whether

corporations assert their rights to preserve the privilege and decline waiver requests, thereby forcing prosecutors to seek alterative means of obtaining information, and testing whether there are any repercussions from such declinations. Nevertheless, the revised guidance should provide some assurance to corporations facing DOJ scrutiny that decisions with respect to waiver should be more consistent, well thought out and evenhanded.

The McNulty Memorandum highlights again the care that corporations must exercise in conducting internal investigations. The potential for waiver requests may influence many matters, including who conducts the investigation and how the investigation is documented. For example, in conducting investigations and responding to regulatory inquiries, corporations should be mindful of the new distinction between Category I and Category II documents. Corporations should be creative in offering, and federal prosecutors should be more open to accepting, alternative means of accessing information contained in privileged documents. Before acceding to a waiver request, corporations should take steps to ensure that all alternatives have been exhausted. If a corporation does decide to accede to a request for waiver, steps should be taken to ensure that the procedure outlined in the McNulty Memorandum has been followed, and that the federal prosecutor, and, of course, the corporation, have considered the collateral consequences of such a waiver, including the potential ability of third parties to discover privileged material disclosed to the government. Lastly, although federal prosecutors may still inquire as to whether a corporation is advancing attorneys' fees to its employees, corporations should be mindful of the significance and circumstances of such an inquiry.

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