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Aggressive Corporate Crime Approach Offers Little Protection

With McNulty memorandum, sufficient protection for privileges is lacking

In a previous article, we discussed charging business entities under the memorandum promulgated by the then Deputy Attorney General Paul J. McNulty ("McNulty Memorandum"), (Memorandum from Deputy Attorney General Paul J. McNulty entitled Principles of Federal Prosecution of Business Organizations (December 12, 2006), http://justice.gov/dag/speech/2006/McNulty-memo.pdf.), (Ernest Badway, "Is the McNulty Memorandum Fool's Gold?" 191 N.J.L.J. 755). This article discusses the McNulty Memorandum and the criticism of the Department of Justice's ("DOJ") reliance upon corporate cooperation, including its requests to business entities to waive their corporate attorney-client and work-product privileges and provide DOJ investigators with information that otherwise would have been protected.

Much ink has been spilled in discussing the DOJ's very aggressive approach towards corporate crime. However, the DOJ is not alone among government regulators in this fight and the waiver debate. For example, the United States Securities and Exchange Commission ("SEC") has relied upon its *Seaboard* guidelines (Report of Investigation Pursuant to Section 21(a) of the Securities Exchange Act of 1934 and Commission Statement on the Relationship of Cooperation to Agency Enforcement Decisions, Exchange Act Release No. 44969 (October 23, 2001)) and others have promulgated standards to consider cooperation when making their charging decisions. (Douglas I. Koff and Jason Jurgens, "CFTC Yields More Conflicting Advice on Privilege Waiver," *New York Law Journal*, April 13, 2007.)

Additionally, the McNulty Memorandum was not the DOJ's first attempt to enunciate standards in this area. It previously issued, among others, the Thompson and Holder Memorandums, all seeking to outline standards for federal prosecutors when making these charging decisions. Despite all of this effort and the innocuous language used in describing these policies, these regulators effectively required business entities under investigation to disclose confidential information to obtain lenient treatment.

Some chose to challenge these policies. In particular, the Thompson Memorandum was challenged in *United States v. Stein*, before United States District Judge Lewis A. Kaplan. 435 F. Supp. 2d 390 (S.D.N.Y. 2006). Judge Kaplan questioned the constitutionality of the Thompson Memorandum, and found that federal prosecutors had violated the Fifth and Sixth Amendment Constitutional rights of the defendants with their practice of causing a corporation to stop the paying legal fees of those under investigation or prosecution.

In December 2006, the DOJ responded to the attacks on the Thompson Memorandum and outlined a new procedure for requesting privileged material from business entities in exchange for leniency in the context of the DOJ's consideration of a corporation's alleged misconduct. The result was contained in

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the McNulty Memorandum. The McNulty Memorandum is not a law, but simply government policy. Although the McNulty Memorandum provides guidance to federal prosecutors on numerous issues, the discussion on its position for the production of documents and information covered by the attorney-client and work-product privileges has gained the most press.

The McNulty Memorandum addresses when federal prosecutors may seek privileged material from business entities in exchange for leniency in charging and sentencing. The McNulty Memorandum carefully provides assurances that the DOJ respects the attorney-client and work-product privileges, but clearly places limits on this largesse. For example, the McNulty Memorandum states that the: "[w]aiver of attorney-client and work-product protections is not a prerequisite to a finding that a company has cooperated in a government investigation. However, a company's disclosure of privileged information may permit the government to expedite its investigation. In addition, the disclosure of privileged information may be critical in enabling the government to evaluate the accuracy and completeness of the company's voluntary disclosure."

Although an attempt to provide comfort, the McNulty Memorandum only reinforces the DOJ's ultimate desire to obtain confidential information, but in a more refined and procedurally oriented approach. (N. Richard Javis, "The McNulty Memorandum, Much Ado About Nothing," *Washington Lawyer* (February 2007)).

The McNulty Memorandum establishes that "[p]rosecutors may only request a waiver of attorney-client or work-product privileges from a business entity when there is a legitimate need for the privileged information to fulfill their law enforcement obligations." This new procedure suggests that the information sought is a legitimate need "if it is not established by concluding it merely desirable or convenient to obtain privileged information." As a result (and from an apparent desire to afford some protection from overzealous federal prosecutors), the McNulty Memorandum establishes a balancing test for determining legitimate need.

The McNulty Memorandum requires federal prosecutors to balance the competing interests between the attorney-client and work-product privileges with law enforcement requirements for government investigations. Thus, when determining if a legitimate need exists, the McNulty Memorandum provides that federal prosecutors consider four 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 a waiver."

If the federal prosecutor makes a determination that a legitimate need is present, the McNulty Memorandum outlines a standard process for senior DOJ management to approve such a request to obtain the privileged information from the business entity.

Initially, federal prosecutors must use the least intrusive means to obtain the information by seeking factual information relating to the underlying alleged corporate misconduct. The McNulty Memorandum characterizes this information as "Category I" information. Category I Information from a business entity includes, among other things, documents, witness statements and other factual items that may have been uncovered by or created by corporate counsel.

To obtain Category I Information from a business entity, federal prosecutors must first obtain written authorization from the United States Attorney in their district, who must consult with the Assistant Attorney General for the DOJ's Criminal Division, before granting or denying the request. Of course, if a corporation provides Category I Information to federal prosecutors, the McNulty Memorandum permits the production to be considered cooperation in the context of the government's investigation.

Federal prosecutors may also seek other privileged information categorized as "Category II Information." Category II Information includes privileged attorney-client communications or nonfactual attorney work-product describing legal advice provided to the corporation "before, during, and after the underlying [alleged] misconduct. . . ." Some of the privileged information sought may include, among other things, attorney notes, memoranda or reports regarding mental impressions and conclusions, as well as legal advice.

The McNulty Memorandum does caution federal prosecutors to only seek Category II Information in the rarest of circumstances, and requires the prior approval of the Deputy Attorney General for a request of this type of information to a business entity.

The McNulty Memorandum does not, however, apply to Category II information where the legal advice sought is part of the corporation's "reliance upon counsel" defense or where the advice was sought in furtherance of a crime or fraud covered by the crime/fraud exception to the attorney-client privilege. This information is not considered privileged, and is open to disclosure.

Nonetheless, these "protections" do not apply to "voluntary" offers of waiver by a corporation. This aspect of the McNulty Memorandum leaves a hole that a virtual tractor trailer truck would be able to navigate with ease.

The DOJ, essentially, with a "wink and nod," announces that corporations have these procedural protections, but "voluntary" offers would provide great benefits to a

business entity. One wonders if the DOJ truly believes this "voluntary" avenue will be ignored when a corporation faces potential significant liability. Such a provision almost assumes that any corporation (who hires any white collar criminal defense lawyer that breathes) will recognize "voluntary" offers of waiver will bring about greater benefits than a "request" for such information from an assistant United States Attorney.

Accordingly, such an exception renders the alleged "moderation" effort of the McNulty Memorandum to be meaningless.

In response to the DOJ's attacks on these privileges and despite the McNulty Memorandum, Congress and the organized legal bar, such as the American Bar Association, entered the fray, and supported additional attempts to reform the DOJ's practices. (Statement of the American Bar Association to the Committee on Judiciary of the United States Senate, "Examining approaches to Corporate Fraud Prosecutions and the Attorney-Client Privilege under the McNulty Memorandum" (September 18, 2007).)

Bills were introduced in both the Senate and the House of Representatives under the title of the Attorney-Client Privilege Protection Act of 2007. Senator Arlen Spector (R.-Pa.), a former prosecutor, has sheparded his legislation through Congress. This legislation, if enacted, would preclude the DOJ from requesting attorney-client or work-product information as well as prohibiting its use as a condition or factor relating to charging or cooperation with a person or organization.

Further, this legislation would not allow the DOJ or other government agencies to use the payment of attorney's fees, joint defense agreements or the failure to terminate employees, among other things, as evidence of a failure to cooperate by a business entity or individual.

In November 2007, the House of Representatives passed this legislation, and it now awaits Senate approval.

In sum, the McNulty Memorandum does not provide sufficient protection for the attorney-client or work-product privileges. Waivers of such privileges should not be the province of the DOJ. Congress needs to complete its work in this area to cease the erosion of these privileges, and restore the balance between proper law enforcement techniques and a business entity's right to seek, obtain and utilize effective assistance of counsel. ■