U.S. Department of Justice

Office of Legislative Affairs

Office of the Assistant Attorney General

Washington, D.C. 20530

January 23, 2008

The Honorable Patrick J. Leahy
Chairman
Committee on the Judiciary
United States Senate
Washington, DC 20510

Dear Mr. Chairman:

Please find enclosed a response to questions arising from the appearance of United States Attorney Karin Immergut before the Committee on September 18, 2007, at a hearing entitled "Examining Approaches to Corporate Fraud Prosecutions and the Attorney-Client Privilege Under the McNulty Memorandum".

We hope that this information is of assistance to the Committee. Please do not hesitate to call upon us if we may be of additional assistance. The Office of Management and Budget has advised us that from the perspective of the Administration's program, there is no objection to submission of this letter.

Sincerely,

Brian A. Benczkowski
Principal Deputy Assistant Attorney General

Cc: The Honorable Arlen Specter
Ranking Member

"Examining Approaches to Corporate Fraud Prosecutions and the Attorney-Client Privilege Under the McNulty Memorandum"

September 18, 2007

Questions for the Hearing Record
for
Karin Immergut
United States Attorney
District of Oregon
United States Department of Justice
Chair
White Collar Subcommittee for the Attorney General's Advisory Committee
Portland, Oregon

QUESTION FROM SENATOR SESSIONS:

1. **Concerns have arisen regarding the Department's handling of corporate investigations. Specifically, there is a concern that prosecutors will simply seek waiver in order to expedite their investigation, as opposed to a request in the interest of justice. Under the McNulty Memorandum, then, if a waiver by a corporation will save the government a significant amount of investigation, may the government request a waiver on that basis alone?**

RESPONSE:

No. The McNulty Memorandum clearly states that a prosecutor may not seek a waiver merely because it is "desirable or convenient to obtain privileged information." Instead, prosecutors may only request a waiver when they can establish "a legitimate need for the privileged information to fulfill their law enforcement obligations." This test requires a careful balancing of important policy considerations underlying the attorney-client privilege and the work product doctrine and the law enforcement needs of the government's investigation. The McNulty Memorandum sets out four factors which must be considered in determining whether a legitimate need has been shown. Those factors are:

(1) The likelihood and degree to which the 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 the waiver.

The McNulty Memorandum also requires that prosecutors take the least intrusive approach necessary to request the information and to use a step-by-step approach. This is a substantial test which ensures that prosecutors must carefully evaluate the necessity for

requesting the information and the type and scope of the request. Moreover, the approval process requiring prosecutors to justify the need for the request prevents prosecutors from requesting privilege waiver solely to expedite an investigation.

2. **Communication between parties in litigation is a fundamental principle of our legal system. Supporters of S. 186 contend, however, that the McNulty Memorandum creates too great of incentives for corporate counsel to just provide all information to the prosecution in order to be viewed as cooperative. Explain what impact, if any, S. 186 would have on future communications between prosecutors and corporate counsel if passed.**

RESPONSE:

The Attorney-Client Privilege Protection Act of 2007 (S. 186) is likely to chill and impede routine communications between prosecutors and corporate representatives. Basic fact-finding with corporate counsel routinely assists the government in determining whether to open an investigation. Given the broad prohibitions of S. 186, however, prosecutors will hesitate to engage in such fact-finding because of the litigation risks that could occur in asking for that information. The potential inability to broach vital topics with counsel prevents the United States from making an assessment of whether opposing counsel's assertion of privilege is even valid. Furthermore, the prohibition on seeking privileged information lengthens the government's investigations, resulting in delayed justice for victims of corporate fraud or further dissipation of victim assets prior to recovery. This result would not occur with the McNulty Memorandum because prosecutors are able to make the request, as long as they seek approval from their supervisors and establish a legitimate need for the information before the request is made.

To illustrate, imagine a publicly held corporation has identified a fraud within the corporation committed by the Chief Financial Officer (CFO) affecting the accuracy of the company's financial statements. The public company has obligations to the Securities and Exchange Commission (SEC) and to the investing public to disclose that there is an inaccuracy. When questions must be answered with information obtained by counsel in the internal investigation about the matter, *i.e.,* protected by attorney-client privilege or work product, the legislation would prohibit asking these questions. If S. 186 is passed, the following simple questions by the SEC or the Department of Justice could be stymied if the corporation retained counsel to look into the matter: How did you learn of the fraud? What remedial actions did you take? Can you disclose what happened? What were the processes put in place to prevent this? What is the breadth of the fraud? What did the officers know about the fraud?

Subsection (c) of S. 186 entitled "Inapplicability" does not remedy this problem. That section provides that "Nothing in this Act shall prohibit an agent or attorney of the United States from requesting or seeking any communication or material that such agent or attorney reasonably believes is not entitled to protection under the attorney-client privilege or attorney work product doctrine." To invoke this provision, a federal prosecutor would have to hold a "reasonable belief" that the information is not privileged. In cases where a prosecutor can establish that the legal advice was communicated in furtherance of a crime or fraud ("the crime-fraud exception"), the prosecutor will be entitled to ask for that information. However, in most investigations, the

prosecutor will be hesitant to take advantage of this section because of the potential for adverse rulings from a court if the matter is later litigated and the court sets an unexpectedly high threshold for finding "reasonable belief" that the materials are not entitled to protection. Certainly, when the attorney is providing information directly from the internal investigation that he or she conducted, a federal prosecutor would be reluctant to argue that attorney-client and work product productions are not implicated. As a result, a prosecutor investigating corporate fraud may not be able to ask the most basic questions of corporate counsel.

3. **The purpose of S. 186 is to protect a corporation's attorney-client and work product privilege. One thing that has not been discussed is the fact that there are various types of corporations. While large corporations involved in corporate fraud come to mind, Enron and WorldCom, as those that would claim protection under S. 186, there are numerous other shades of corporations that will also seek refuge under S. 186. Discuss what effect this legislation will have on these non-traditional corporations that do not seem to be the intended beneficiaries of S. 186.**

RESPONSE:

In today's increasingly sophisticated criminal environment, many criminals use corporate shells to insulate themselves from law enforcement scrutiny: drug dealers launder money through corporate entities; Ponzi schemes almost always employ corporate shells for fleecing investors; sham charities can be used for terrorist financing. The broad language of S. 186 will have the unintended consequence of imposing new rules on how prosecutors handle all these cases. The proposed statute applies to any inquiry by a prosecutor made either to a corporation or a person affiliated with a corporation which might implicate privileged information. Furthermore, S. 186 forbids the government from conditioning a charging decision regarding such a person on whether that person agrees to a waiver. S. 186 also prohibits using the disclosed information as a factor in determining whether the person is cooperating.

The literal terms of this statute thus would impede a prosecutor from seeking privilege waivers from a drug money launderer who happened to be using a corporate front, and also prevent the prosecutor from providing the normal incentives, *e.g.*, an offer to plead to reduced charges, that such cooperation could bring.

4. **In virtually every kind of a criminal prosecution, an individual is free to waive certain rights, including constitutional rights and waiver of the attorney client privilege. What effect, then, will S. 186 have on individual corporate employees who are personally involved in wrongdoing and subsequently wish to cooperate with the government?**

RESPONSE:

The broad language of S. 186 states that the government cannot "condition treatment" on the disclosure of protected information of a "person affiliated with that organization" or use [the disclosed information as a factor" in determining whether a "person affiliated with an organization" is cooperating with the government. If the plain language is read literally, the

legislation extends the shield to individual employees, agents or affiliates of the organization. Thus, S. 186 would effectively prohibit individuals from waiving their personal attorney-client privilege (as opposed to the corporation's privilege) and from receiving any benefit for this waiver. In the context of dealing with individuals who have retained counsel, such as whistleblowers or individuals who may be involved in criminal conduct, the legislation prohibits the United States from conferring any benefit on those individuals when they disclose wrongdoing inside the organization and waive their individual privilege. This practice would conflict with what occurs in nearly every other criminal prosecution. The United States is free to confer, and usually does confer, a benefit upon individuals who provide information, even when providing that information means waiving certain rights, including attorney-client privilege. Such benefits are extended every day in criminal cases across the United States. This exchange of benefits allows the criminal justice system to work more efficiently and rewards those individuals (and entities) who choose to cooperate with the government in solving crime.

5. **Critics of the McNulty Memorandum assert that some of the language is vague and arbitrary. Specifically, the language requiring that a United States Attorney consult with the Assistant Attorney General for the Criminal Division before seeking a waiver of Category I information. Should a dispute or disagreement arise as to a Category I waiver request, what happens? Whose decision prevails?**

RESPONSE:

The language of the McNulty Memorandum is neither vague nor arbitrary. Quite the contrary, the language is the end product of a process that began with the Holder memorandum in 1999 and continued with the Thompson Memorandum in 2003. With each iteration of the corporate charging policy, the Department has responded to concerns raised by the private sector and members of Congress. The resulting memorandum imposes clear guidelines and restrictions on the ability of prosecutors in the field to seek waivers. In addition, for the first time, the McNulty Memorandum established recordkeeping and consultation processes that would both memorialize requests for waivers and promote uniform application. First, a record must now be kept of every corporate privilege waiver, regardless whether it is entirely voluntary or requested by the government. When the government requests a waiver, that record will document how the "legitimate need" test has been met. This information base will assist the Department in responding to future questions about the actual implementation of corporate waiver practices. Second, the McNulty Memorandum requires that United States Attorneys consult with the Assistant Attorney General for the Criminal Division before permitting a prosecutor to seek a waiver. This provides the United States Attorneys with a single, centralized source for expertise in implementing the McNulty Memorandum, which will ensure that it is administered consistently and uniformly nationwide. Consultation requirements are common in the relationship between Main Justice and the United States Attorney's offices. They work effectively in numerous contexts, from money laundering to terrorism. Consultation with the Criminal Division before seeking a waiver of Category I information has proven to be a meaningful and rigorous process. The Criminal Division has provided significant input regarding the scope and substance of the request based on that Division's experience with waiver requests around the country.