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BEFORE THE COMMITTEE ON THE JUDICIARY
UNITED STATES HOUSE OF REPRESENTATIVES
SUBCOMMITTEE ON CRIME, TERRORISM, AND HOMELAND SECURITY

"The McNulty Memorandum's Effect on the Right to Counsel in Corporate Investigations"

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Introduction

Good morning Chairman Scott, Ranking Member Forbes and subcommittee members and staff. Thank you for your invitation to address recent developments concerning the Department of Justice's policies and practices of seeking attorney-client privilege and work-product waivers from corporations, and in particular the McNulty Memorandum's Effect on the Right to Counsel in Corporate Investigations.

I am currently a partner at the law firm of Winston & Strawn, LLP where I specialize in white-collar criminal defense and corporate internal investigations. From 1991-2001, I served as an Assistant United States Attorney for the District of Columbia. In these capacities, I have been involved in virtually all facets of white-collar investigations and corporate defense: I have overseen both criminal investigations and internal corporate investigations, and I have represented both corporations and individuals in internal investigations, and before federal enforcement authorities and regulators, as well as in class action, derivative, and ERISA litigation. Since 2001, I have represented many companies, as well as officers and directors, in high profile, high stakes criminal investigations. My perspective on corporate cooperation and the waiver of attorney-client and attorney work product privileges has therefore been forged by my experiences on both sides of the criminal justice system.

One year ago yesterday, this Subcommittee held hearings on this very issue, and which stimulated an important dialogue. I was privileged to testify then. In response to concerns raised by this and other congressional, commercial and judicial bodies, last December, Deputy Attorney General Paul McNulty released revised Department of Justice guidelines regarding the federal prosecution of business organizations. The reconfigured policies, which are embodied in an internal Department of Justice memorandum (the "McNulty Memorandum"), supersede and replace earlier guidelines issued in 2003 by then-Deputy Attorney General Larry Thompson.

While the McNulty Memorandum is a commendable effort to regulate and perhaps restrict government waiver requests, it remains to be seen whether it constitutes a real departure from existing practice. I am gravely concerned that the Memorandum's non-binding guidelines may only serve to entrench and expand an internal deliberative process pre-disposed to request attorney-client privileged information and attorney work product. I urge the members of this subcommittee to consider how these policies have given government prosecutors unnecessary, unconstitutional and unfair advantages when pursuing corporate entities, and to perhaps craft an enforceable legislative response to not only restore balance, but to continue to foster an environment in which corporations can properly rely on counsel in order to follow the rule of law.

A. A Review of The Problem

The traditional protections for business organizations afforded by the attorney-client privilege and attorney work product doctrine are further eroding as prosecutors and regulators continue to demand participation in internal investigations and the submission of detailed reports in exchange for the mere prospect of leniency. In my experience, waiver requests are made even before I have completed my client's internal investigation, and thus even before I have

determined waiver is in my client's best interest. Prosecutors' requests for information in a factual "road map" form could encompass a broad subject matter waiver, leading to possible disclosure of privileged information beyond the scope of the investigation, to not only law enforcement officials, but also to all future third parties, including other government agencies or opportunistic plaintiffs' attorneys.

The corporate clients with whom I work unequivocally desire to identify and eliminate suspected criminal activities occurring within their ranks. They come to me, their lawyer, seeking advice and guidance in abiding with internal corporate governance policies and external laws and regulations. In such discussions, I may be compelled to determine the existence, nature, and extent of potential criminal activity. My obligation to the client is to make the best choice based upon an informed understanding of the law and facts. The presumption of innocence should never be forgotten or ignored, and counsel's first responsibility should be to inquire as to whether misconduct in fact took place, and if so, whether there might exist a credible defense.

Naturally, clients are fearful of sharing all pertinent information when they believe that the details of these conversations may be turned over to the Department of Justice as a part of a current or future investigation into these activities. In the worst cases, the current policies of the Department only serve to dampen the aggressive repression of criminal activity within companies because they serve to inhibit the implementation of remediation efforts by responsible corporate citizens and their counsel.

In addressing the practice of conditioning leniency for disclosure of otherwise privileged reports, I believe that a balance must be struck between the legitimate interests of law enforcement in pursuing and punishing illegal conduct, the benefits to be obtained by

corporations which determine to assist in this process and to take remedial action, and the rights of individual employees. It is imperative that we do not sacrifice accuracy and fundamental fairness for expediency and convenience. An equilibrium must be achieved between the aforementioned competing concerns, and the McNulty Memorandum fails to accomplish this goal.

B. The McNulty Memorandum Improperly Undermines A Corporations' Right to Counsel

In most respects, the revised charging guidelines in the McNulty Memorandum follow prior Department of Justice policies regarding corporate criminal prosecutions. Under the McNulty Memorandum, the Department of Justice, despite acknowledging a corporation's artificial nature and inability as an entity to form criminal intent, and while proclaiming the goal of protecting innocent investors, continues to insist on treating corporations as culpable individual defendants.

Notably, the McNulty Memorandum refines the Thompson Memorandum and earlier Department policies in only two substantive respects. First, the McNulty Memorandum sets forth internal procedures for seeking corporate waivers of attorney-client privilege and attorney work product protection. Second, it bars prosecutors, except in exceptional circumstances, from considering corporate payment or advancement of attorney fees in evaluating corporate cooperation. While these two changes are a step in the right direction towards protecting corporations' legal rights, they do not go far enough and in fact may perpetuate the problems underlying the prior guidelines.

1. Waiver of Attorney-Client Privilege and Attorney Work Product Protections

Under the McNulty Memorandum, the Department's practice of requesting and evaluating corporate waivers of attorney-client privilege and attorney work product will continue. Rather than eliminating waiver requests, the McNulty Memorandum provides a multi-tiered procedure for requesting business entities to disclose protected materials. Pursuant to this new approach, requests for protected materials will only be made where there is a "legitimate need" for privileged information, to be determined by: (i) the likelihood and degree to which the privileged information will benefit the government's investigation; (ii) whether the information can be obtained in a timely and complete fashion by using alternative means that do not require waiver; (iii) the completeness of a voluntary disclosure already provided; and (iv) the collateral consequences to a corporation resulting from a waiver.

These factors, however, provide little guidance (or clear, affirmative limits) on what will and will not constitute a "legitimate need" for purposes of requesting otherwise privileged and protected materials. Moreover, this "legitimate need" determination will be made by prosecutors in their sole discretion without any third party review or appeal process.

Once prosecutors themselves determine that a "legitimate need" exists, they are instructed to seek privileged information as divided into two categories. Category I information consists of factual information relating to the alleged misconduct and materials including witness statements, factual interview memoranda and factual materials (for example chronologies and organization charts) prepared by or at the request of counsel. Prosecutors are instructed to first request purely factual information, which may or may not be privileged, relating to the underlying misconduct. Before requesting waiver of attorney-client or work product protections for Category I information, prosecutors must obtain written authorization from the United States

Attorney ("USA") who, prior to authorizing the request, must provide a copy of the request to, and consult with, the Assistant Attorney General for the Criminal Division ("AAG-CD"). If authorized, the USA must communicate the request in writing to the corporation. It is unclear what it means for the AAG-CD to *consult* with the USA. It is not even clear whether the AAG-CD can overrule the USA's decision.

A corporation's response to the government's request for waiver of privilege and work product protection for Category I information may still be considered in evaluating its cooperation and in making charging determinations. While the Memorandum says that a corporation cannot be *required* to waive protections, because any corporation knows that refusal to waive may be adversely considered and result in charges being brought, the pressure to waive is undeniable. In effect, the Department of Justice controls the waiver process, rather than the corporation, whose privilege alone it is to waive in the first instance. This dynamic is the absolute reverse of what the practice should be. It may make sense for a corporation to waive in extreme circumstances when faced with strongly incriminating and pervasive facts. But it should be the corporation which volunteers and thereby deserves credit for the waiver; the government should be precluded from making the request, or in most cases, the demand, in the first instance.

In the "rare circumstances" where Category I information is viewed by prosecutors as providing an incomplete basis to conduct a thorough investigation, they are authorized to seek access to Category II information. Category II information is defined as attorney-client communications and opinion attorney work product. The McNulty Memorandum explicitly states that Category II information includes "legal advice given to the corporation before, during, and after the underlying misconduct occurred" as well as "attorney notes memoranda or reports containing counsel's mental impressions and conclusions, legal determinations reached as a

result of an internal investigation, or legal advice." Such information implicates at the very heart of the privilege, and the McNulty Memorandum fails to explain why this type of attorney advice and communication is necessary. In fact, the two types of attorney communications that seem most relevant to a criminal investigation (i.e., advice in furtherance of a crime, or advice put in issue by raising it as a defense) are specifically exempted.

2. Indemnification and Advancement of Attorneys Fee's

In a clear shift from earlier Department policy, the McNulty Memorandum instructs prosecutors that, as a general matter they cannot consider a business organization's indemnification or advancement of attorneys fee's to individual employees when evaluating corporation cooperation. The memorandum provides an exception to this rule such that in the "extremely rare" cases where "the totality of circumstances show that (indemnification or the advancement of attorney's fees is) intended to impede a criminal investigation" these matters may be considered. In such cases, the fee arrangement will be considered as a factor in making a determination that the corporation is acting improperly. Where prosecutors determine such circumstances do exist, approval must be obtained from the Deputy Attorney General before prosecutors may consider this factor for charging purposes.

Again, this prohibition falls short. The issue addressed in *Stein*[1] concerned not only the limited issue of indemnification. Rather the court was concerned more broadly with the governments' use of economic coercion generally to force employees and former employees to provide statements to investigators which might be incriminating. As Judge Kaplan stated, "proper respect for the individual prevents the government from interfering with the manner in which the individual wishes to present a defense. The underlying theme is that the government

[1] United States v. Stein, 435 F. Supp. 2d 330 (S.D.N.Y. 2006); United States v. Stein, No. S1 05 Crim. 0888 LAK, 2006 WL 2060430 (S.D.N.Y. July 25, 2006).

may not both prosecute a defendant and then seek to influence the manner in which he or she defends the case."[2] Under the McNulty Memorandum, the government maintains the power to decide if the company "shielded ... employees," forcing the corporation to predict the government's charging decisions, and encouraging it to compromise employee rights to protect itself.

Finally, in addition to the specific concerns raised above, there are process-related concerns surrounding the McNulty Memorandum. The internal policy guidelines are non-binding and unenforceable at law. Thus, there is little incentive for a prosecutor to strictly adhere to the guidelines and there is no remedy for the corporate victim if a prosecutor fails to abide by the rules.

C. Rethinking Corporate Criminal Liability

While Department of Justice is to be commended for attempting to structure and refine its approach to compelled privilege waivers, what we are left with are non-binding internal guidelines that seem to merely entrench and even expand an internal deliberative process predisposed to request attorney-client privileged information and attorney work product.

Time will determine whether the requirements of high-level authorization and written requests will curb the frequency with which waivers are sought. It is alarming, however, that the Department is no longer restricting its waiver requests to merely factual information. The McNulty Memorandum formalizes procedures for penetrating the most sacrosanct of attorney-client communications and attorney opinion work product. In so doing, the Department is in fact inviting further erosion of the attorney-client privilege and attorney work product protections.

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[2] Stein, 435 F. Supp. 2d at 357.

Regrettably, the McNulty Memorandum represents a missed opportunity to conduct a broad re-assessment of the policies and procedures relating to the criminal prosecution of business organizations. Old, largely recycled rationales for corporate criminal liability no longer carry the same weight. The proliferation of emails and corporate controls means that, far more often than not, corporate misconduct leaves a well documented paper trail through which culpable individuals can be held directly responsible for their conduct. No public interest is served by holding an entire organization and its innocent shareholders responsible for the misconduct of identifiable individuals. Moreover, it is unclear what is gained by sanctioning business entities with steep criminal fines. In many cases, misconduct giving rise to criminal fines also compels substantial civil-administrative penalties and the prospect of civil class-action and derivative lawsuits.

We should not prosecute corporations simply because we can. The goal of a criminal prosecution should be to punish responsible individuals and not to hold an entire organization accountable, with the corresponding penalties that are inevitably suffered by innocent shareholders and employees, for the acts of a few. Consistent with this goal, criminal prosecution of business organizations should be an exceedingly rare undertaking and employed only in pursuit of vital, imperative social objectives. Moreover, the weighty and solemn decision to prosecute a business organization should only be made at the highest levels of the Justice Department, a protocol strikingly absent from the McNulty Memorandum.

Conclusion

Ultimately, while the McNulty Memorandum's limited revisions may have been designed to appease some critics and potentially forestall imminent judicial and congressional action, they

do not demonstrate an earnest re-evaluation of Department policies regarding corporate criminal enforcement, and fail to provide meaningful procedural change.

In fact, legislation such as the Attorney-Client Privilege Protection Act recently reintroduced by Sen. Arlen Specter may now be required. There is certainly something to be said for our elected representatives taking the laboring or to resolve difficult policy questions. Senator Specter's bill seeks to protect the attorney-client relationship by prohibiting *all* federal agents and attorneys in any civil or criminal case from demanding, requesting or in any way conditioning a company's treatment or charging decisions based upon a company's 1) valid invocation of a privilege assertion; 2) payment of employee legal fees; or 3) signing a joint defense agreement. While the idea encompassed by the bill is sound, it lacks an enforcement mechanism to ensure meaningful prosecutorial restraint, and I encourage the consideration of a sanctions provision to deter the willful government violator.

Ultimately, perhaps the time has come for us to expend the same amount of energy spent on this privilege dialogue in establishing the standards and the means with which to measure corporate compliance, governance and ethics programs, and their consistency with the objectives of the Federal Sentencing Guidelines, as factors for purposes of determining a corporation's cooperation, instead of a company's willingness to jeopardizes its future ability to conform to law through its renunciation of the attorney-client and work product privileges.

Thank you. I look forward to your questions.