MAYER BROWN ROWE & MAW

Litigation Update

Waiving Attorney-Client Privilege:

The Changing Landscape in Corporate Internal Investigations

February 21, 2007

In the wake of the scandals of the last few years that engulfed corporate America, and the ongoing ubiquitous stock options investigations facing hundreds of American corporations, prosecutors and regulators from the Department of Justice ("DOJ"), the Securities and Exchange Commission (the "Commission" or the "SEC"), the Commodity Futures Trading Commission, the National Association of Securities Dealers, and the New York Stock Exchange now routinely demand that corporations, as part of their efforts to cooperate fully with government investigations, waive attorney-client privilege and work product protection by, among other things, producing privileged documents, notes of employee interviews conducted by lawyers, and, where available, reports of internal investigations.[1]

In the last year, however, this culture of waiver, along with the government's insistence that corporations under investigation decline to pay legal fees or enter into joint defense agreements with current or former employees implicated in corporate wrongdoing, has raised significant concerns about the erosion of constitutionally guaranteed rights and protections and, more broadly, the undermining of a cornerstone of the American legal system: the attorney-client relationship. Criticism of this culture of waiver has come loud and clear from certain members of Congress, at least three former United States Attorneys General, three former Deputy Attorneys General, four former Solicitors General, several former United States Attorneys and scores of former prosecutors, civil libertarians, law professors and practitioners.[2] This groundswell of opposition has led to four recent developments that are beginning to stem the tide of routine demands for waiver by prosecutors and regulators.

First, recognizing the Hobson's choice faced by corporations caught in the crosshairs of government investigations, in April 2006, the Advisory Committee on Evidence Rules approved proposed Rule 502 and recommended its release for public comment. Proposed Rule 502(c) provides that disclosure of protected information to federal agencies "does not operate as a waiver of the privilege or protection in favor of non-governmental persons or entities."

Second, effective October 13, 2006, Congress passed the Financial Services Regulatory Relief Act of 2006, which states, among other things, that an insured depository institution or credit union does not waive its attorney-client privilege by providing privileged materials to a federal, state or foreign banking authority in the course of that authority's supervisory or regulatory process.

Third, on January 4, 2007, Senator Arlen Specter reintroduced legislation targeted at three of the most controversial provisions of the Thompson Memorandum. Senator Specter's proposed legislation, unchanged since its original introduction to the 109th Congress in December 2006, would bar prosecutors from demanding that corporations waive attorney-client privilege and work product protection. The bill further bars prosecutors and enforcement agencies from taking into account a corporation's valid assertion of privilege, advancement of legal fees, or a valid joint defense

agreement when deciding whether to charge a corporation or when determining whether a corporation has fully cooperated with the government's investigation.

Fourth, on December 12, 2006, reacting to severe criticisms from Congress and the bar at large, Deputy Attorney General Paul J. McNulty released the DOJ's revised principles for the prosecution of business organizations, known as the "McNulty Memorandum," that purports to revise the Thompson Memorandum by limiting the circumstances under which prosecutors may seek corporate waivers.

We outline these recent developments in more detail below and discuss how corporations should take them into consideration when faced with a request for privileged information from prosecutors and regulators.

The Four Recent Developments

1. Financial Services Regulatory Relief Act

Amending Section 18 of the Federal Deposit Insurance Act (12 U.S.C. § 1828) and Section 205 of the Federal Credit Union Act (12 U.S.C. § 1785), the Financial Services Regulatory Relief Act of 2006 provides that an insured depository institution or credit union does not waive its privileges in connection with a disclosure made in the course of a supervisory or regulatory process before any federal, state, or foreign banking authority. With respect to depository institutions, the statute states, in pertinent part:

> The submission by any person of any information to any [f]ederal banking agency, [s]tate bank supervisor, or foreign banking authority for any purpose in the course of any supervisory or regulatory process of such agency, supervisor, or authority shall not be construed as waiving, destroying, or otherwise affecting any privilege such person may claim with respect to such information under [f]ederal or [s]tate law as to any person or entity other than such agency, supervisor, or authority.[3]

The Financial Services Regulatory Relief Act is an effort by Congress to address the problems faced by corporations that are coerced to waive attorney-client privilege and work product protection during government investigations. Because most circuit courts have declined to recognize the concept of selective or limited waiver, a company that waives its attorney-client privilege or work product protection in order to earn credit for cooperating with a government investigation thus waives the privilege as to all.[4] At least as it relates to depository institutions and credit unions, beginning October 13, 2006, these new provisions should provide some protection in shielding privileged information from private third-party litigants who typically seek to use privileged information to shore up their private lawsuits. It remains to be seen how courts will respond to this new tool in the arsenal of depository institutions and credit unions.

2. Proposed Amendment To The Federal Rules of Evidence: Rule 502

In an effort to address the culture of waiver occasioned primarily by the Thompson Memorandum and the SEC's Seaboard Report, the Advisory Committee on Evidence Rules released for public comment Federal Rule of Evidence 502. If passed by Congress, proposed Rule 502(c), like the Financial Services Regulatory Relief Act of 2006, will permit corporations to produce protected information to federal government agencies without rendering otherwise privileged documents, information, and advice discoverable by future civil litigants.[5] The proposed rule, as currently drafted, states:

> Selective waiver. – In a federal or state proceeding, a disclosure of a communication or information covered by the attorney-client privilege or work product protection – when made to a federal public office or agency in the exercise of its regulatory, investigative, or enforcement authority – does not operate as a waiver of the [attorney-client] privilege or [work product] protection in favor of non-governmental persons or entities. The effect of disclosure to a state or local government agency, with respect to non-governmental persons or entities, is governed by applicable state law. Nothing in this rule limits or expands the authority of a government agency to disclose communications or information to other government agencies or as otherwise authorized or required by law.[6]

Public hearings on Rule 502 were held in Phoenix and New York in January 2007, and the public comment deadline was February 15, 2007.[7]

3. Attorney-Client Privilege Protection Act of 2007

On September 15, 2006, the Senate Judiciary Committee held hearings on the Thompson Memorandum's effect on the right to counsel in corporate investigations. The public hearing provided critics a platform to further outline their opposition to the Thompson Memorandum.[8] Although participants at the hearing expressed many criticisms of the Thompson Memorandum, two are particularly noteworthy.

First, participants observed that the Thompson Memorandum policies contribute to a coercive "culture of waiver," in which "governmental agencies believe it is reasonable and appropriate for them to expect a company under investigation to broadly waive [its] attorney client privilege."[9] The fear of indictment has doubtless exacerbated corporations' concern with being labeled uncooperative. As one observer noted, "[i]n the current climate few, if any, public companies can afford the risk of possible indictment and the myriad of collateral consequences, not the least of which is the diminution of shareholder value."[10]

Second, the emphasis placed on waiver of the attorney-client privilege and work product protection threatens to create a counterproductive climate of distrust between corporations and their employees, and would work to undermine corporations' internal compliance programs and procedures. As noted by Karen J. Mathis, president of the American Bar Association, "[b]ecause the effectiveness of these internal mechanisms depends in large part on the ability of the individuals with knowledge to speak candidly and confidentially with lawyers, any attempt to require routine waiver of attorney-client [privilege] and work product protection will seriously undermine systems that are crucial to compliance and have worked well."[11]

Further exacerbating the Thompson Memorandum's culture of waiver is the receptiveness of courts to the notion of selective or limited waiver. Corporations providing information covered by the attorney-client privilege or work product protection to prosecutors and regulators have argued that such selective or limited waivers should not be construed as complete waivers such that protected information produced to government agencies can be freely obtained by private civil litigants. With the exception of the Eighth Circuit in *Diversified Industries, Inc. v. Meredith*, 572 F.2d 596, 611 (8th Cir. 1977) (*en banc*), every circuit court that has considered the question of selective or limited waiver of the attorney-client privilege has declined to adopt such a rule.[12] With respect to the work product protection, only the Fourth Circuit has adopted the notion of selective or limited waiver.[13] The First, Third, Sixth, Eighth, and Tenth Circuits have all rejected a selective or limited waiver rule with respect to work product protected information.[14] Some circuits have left open the possibility of recognizing the selective or limited waiver rule for work product protected information in limited circumstances.[15] While in some jurisdictions a confidentiality agreement might go some way towards protecting privileged information,[16] at least three circuits have held that the disclosure of privileged information operates as a waiver notwithstanding the existence of a confidentiality agreement.[17]

It is against this backdrop that, on December 8, 2006, Senator Arlen Specter introduced the Attorney-Client Privilege Protection Act of 2006, which he designed to bar three DOJ policies under the Thompson Memorandum.[18] First, federal enforcement agents and attorneys would be barred from demanding, requesting, or conditioning treatment on "the disclosure by an organization, or person affiliated with that organization, of any communication protected by the attorney-client privilege or any attorney work product."[19] Second, federal enforcement agents and attorneys would not be permitted to condition valid assertions of attorney-client privilege or work product protection, an organization's advancement of employee legal fees, or the valid entry into a joint defense agreement on an organizational charging decision.[20] Third, the proposed legislation would prohibit federal enforcement agents and attorneys from using claims of attorney-client privilege or work product protection, the advancement of attorneys' fees, or entry into joint defense agreements as factors in determining whether the organization is cooperating with the government.[21] Under the proposed legislation, a corporation is not prohibited from making, or a federal enforcement agent or attorney is not precluded from accepting, a voluntary and unsolicited offer to share the internal investigation materials of such an organization.

Senator Specter's proposed legislation was not fully considered before the 109th Congress recessed. Notwithstanding the Department of Justice's release of the McNulty Memorandum (discussed below) on December 12, 2006 to address the very issues raised by Senator Specter's proposed legisla-

tion, Senator Specter has reintroduced the legislation, without any changes, as the Attorney-Client Privilege Protection Act of 2007 – thereby sending a clear message that Senator Specter was unimpressed by the McNulty Memorandum's efforts to address his concerns.[22] Currently, Senator Specter's legislation is before the Senate Committee on the Judiciary.[23] Although promising, it is too early to tell whether Senator Specter's proposed legislation will ever become law.[24]

4. The McNulty Memorandum

On December 12, 2006, Deputy Attorney General Paul McNulty bowed to pressure to revise the Thompson Memorandum, and released the McNulty Memorandum.[25] However, the McNulty Memorandum did not go as far as critics had hoped. Instead, rather than putting a complete stop to the culture of waiver that the Thompson Memorandum fostered, as critics had demanded, the McNulty Memorandum set forth a balancing test by which prosecutors are to determine whether they have a "legitimate need" for materials protected by the attorney-client privilege or the work product protection.[26] If a "legitimate need" exists for privileged information, the McNulty Memorandum counsels prosecutors to "seek the least intrusive waiver necessary to conduct a complete and thorough investigation."[27] To do this, the McNulty Memorandum provides for a tiered approach for seeking waivers.

The McNulty Memorandum counsels that federal prosecutors must obtain authorization from their respective United States Attorney before demanding that a corporation waive privilege and provide Category I information to federal prosecutors. Category I information is information that is "purely factual information, which may or may not be privileged, relating to the underlying misconduct."[28] Once the United States Attorney permits the federal prosecutor to seek Category I information, a prosecutor is thereafter permitted to consider a corporation's response "in determining whether [the] corporation has cooperated [with] the government's investigation."[29] Obviously, a corporation that declines to provide Category I information runs the risk of being viewed as uncooperative, with all the associated risks, including the possibility of indictment.

If Category I information provides "an incomplete basis to conduct a thorough investigation," federal prosecutors are allowed to seek "Category II" information.[30] "Category II" information is defined as "attorney-client communications or non-factual attorney work product," including legal advice given to the corporation before, during and after the underlying misconduct occurred, 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 given to the corporation.[31] The McNulty Memorandum, however, cautions that "only in rare circumstances" should Category II information be sought.[32]

In those rare circumstances when it is necessary to seek Category II information, the United States Attorney must first obtain written permission from the Deputy Attorney General. The United States Attorney's request for authorization to seek Category II information must "set forth [the] law enforcement's legitimate need for information and identify the scope of the waiver sought."[33] Unlike Category I information, a federal prosecutor must not consider a corporation's refusal to produce Category II information in making a charging decision.[34] Nevertheless, "[p]rosecutors may always favorably consider a corporation's acquiescence to the government's waiver request [for Category II information] in determining whether a corporation has cooperated in the government's investigation."[35]

Separately, in a tacit effort to address a pair of decisions handed down in June and July of 2006 by Judge Lewis Kaplan in the KPMG tax shelter cases, the McNulty Memorandum now counsels prosecutors not to "take into account whether a corporation is advancing attorneys' fees to employees or agents under investigation and indictment."[36] In *United States v. Stein*, No. S1 05 Crim. 0888 (LAK), 2006 WL 1735260 (S.D.N.Y. June 26, 2006) (Stein I), Judge Kaplan ruled that the Thompson Memorandum's guideline on the advancement of legal fees by corporate employers, both alone and coupled with the action of the United States Attorney's Office, violated the Fifth and Sixth Amendment rights of the individual KPMG defendants. In *United States v. Stein*, No. S1 05 Crim. 0888 (LAK), 2006 WL 2060430 (S.D.N.Y. June 26, 2006) (Stein II), Judge Kaplan suppressed statements by two defendants because the statements had been "deliberately" coerced by the government. Judge Kaplan found that KPMG, under pressure from the government to cooperate, hard-pressed its employees to

grant government requests for pre-indictment interviews and threatened to stop payment of legal fees should the employees refuse to cooperate.

The revision to the Thompson Memorandum in this regard should give corporations more comfort to advance legal fees to current or former employees without wondering whether the government will view advancement of legal fees as a failure to cooperate. Corporations should, however, be mindful that in "extremely rare cases, the advancement of legal fees may be taken into account when the totality of the circumstances show that it was intended to impede a criminal investigation."[37]

It is difficult to see how the new waiver framework addresses the fundamental concerns that prompted revisions to the Thompson Memorandum.[38] Nor does the McNulty Memorandum do anything to address the issue of selective or limited waiver. The bottom line is that prosecutors can still lean on corporations to produce Category I and II privileged information, while dangling cooperation credit as an incentive. It remains to be seen how stringently the United States Attorneys across the country will apply the "legitimate need" and "an incomplete basis to conduct a thorough investigation" tests. It is also unclear how these new directives will affect Senator Specter's determination to push through his proposed Attorney-Client Privilege Protection Act of 2007.

Conclusion

Depository institutions covered by the Federal Deposit Insurance Act and credit unions covered by the Federal Credit Union Act may now provide privileged information to any federal banking agency, state bank supervisor or foreign banking authority without waiving or otherwise destroying the privileged nature of the information. While proposed Federal Rule of Evidence 502 and Senator Specter's Attorney-Client Privilege Protection Act make their way through Congress, the new directives of the McNulty Memorandum are likely to slowly begin to turn the tide against routine demand for waivers, and corporations may now pay the attorneys' fees of their employees without staring down the barrel of a federal indictment.

We hope you have found this Client Alert helpful. If you have any questions or comments, please feel free to contact the Mayer, Brown, Rowe & Maw LLP attorneys with whom you regularly work, or any of the following attorneys. If you would prefer to receive distributions electronically and are not receiving them that way now, please send your e-mail address to mnoonan@mayerbrownrowe.com.

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[1] *See generally* Larry D. Thompson, Deputy Attorney General, Principles of Federal Prosecution of Business Organizations (Jan. 20, 2003), *available at* http://www.usdoj.gov/dag/cftf/corporate_guidelines.htm [hereinafter Thompson Memorandum]; *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*, Rel. No. 34-44969 (Oct. 23, 2001), *available at* 2001 WL 1301408 [hereinafter Seaboard Report]; NASD, *Principle Considerations in Determining Sanctions* (2006), *available at* http://www.nasd.com/RegulatoryEnforcement/NASDEnforcementMarketRegulation/NASDSanctionGuidelines/PrincipalConsiderationsinDeterminingSanctions/index.htm; Memorandum from Susan Merrill, Exec. V.P., NYSE's Div. of Enforcement, to All Members, Member Orgs. and COOs, NYSE Information Memo No. 05-65 (Sept. 14, 2005), [hereinafter Cooperation Memo], *available at* http://apps.nyse.com/commdata/PubInfoMemos.nsf/AllPublishedInfoMemosNyseCom/85256FCB005E19E88525707C004C6DE0/$FILE/Microsoft%20Word%20-%20Document%20in%2005-65.pdf; Memorandum from Susan Merrill, Exec. V.P., NYSE Div. of Enforcement, to All Members, Member Orgs. and COOs, NYSE Information Memo 05-77 (Oct. 7, 2005) [hereinafter Sanctions Memo], *available at* http://apps.nyse.com/commdata/PubInfoMemos.nsf/AllPublishedInfoMemosNyseCom/85256FCB005E19E8852570920068314A/$FILE/Microsoft%20Word%20-%20Document%20in%2005-77.pdf; Commodity Futures Trading Commission, Enforcement Advisory: Cooperation Factors in Enforcement Division Sanction Recommendations, Comm. Fut. L. Rep. (CCH) 29,819 (CFTC 2004).

[2] *See, e.g., Memo to Gonzales*, WALL ST. J., Sept. 8, 2006, at A14 (reporting on memorandum critical of the Thompson Memo sent by former top Justice Department officials from five different administrations – including Griffin Bell, Dick Thornburgh, Jamie Gorelick, Theodore Olson, Kenneth Starr, and Seth Waxman – to Attorney General Roberto Gonzales).

[3] Financial Services Regulatory Relief Act of 2006, Pub. L. No. 109-351, Sec. 607, 120 Stat. 1966 (2006), codified at 12 U.S.C. § 1828(x) (depository institutions) and 12 U.S.C. § 1785(j) (credit unions).

[4] *See, e.g.*, *In re Qwest Commc'ns Int'l, Inc.*, 450 F.3d 1179, 1192, 1201 (10th Cir. 2006), *cert. denied*, 127 S. Ct. 584 (2006) (holding that because Qwest had waived privileges when it disclosed otherwise privileged materials to the SEC and DOJ in an effort to cooperate with government investigations, district court did not abuse its discretion in ordering Qwest to produce materials to private third-party civil litigants). *See also* discussion of federal courts' reluctance toward selective waiver, *infra* & notes 12-17.

[5] *See* Report of the Advisory Committee on Evidence Rules, Proposed Amendment to the Federal Rules of Evidence, FED. R. EVID. 502(c), at 12, *available at* www.uscourts.gov/rules/Excerpt_EV_Report_Pub.pdf (revised June 30, 2006) [hereinafter Report of the Advisory Committee on Evidence Rules Amendment to the Federal Rules of Evidence, FED. R. EVID. 502(c)]. Proposed Fed. R. Evid. 502(c) must be enacted directly by Congress, because it is a rule affecting privileges that seeks to bind state courts. *See id*. at 9; 28 U.S.C. § 2074(b).

[6] Report of the Advisory Committee on Evidence Rules, Proposed Amendment to the Federal Rules of Evidence, FED. R. EVID. 502(c), *supra* note 5, at 5.

[7] Committee on Rules of Practice and Procedure of the Judicial Conference of the United States, Memorandum to the Bench, Bar, and Public on Proposed Amendments to the Federal Rules (Aug. 10, 2006), *available at* http://www.uscourts.gov/rules/Memo_Bench_Bar_and_Public_2006.pdf.

[8] *See, e.g., The Thompson Memorandum's Effect on the Right to Counsel in Corporate Investigations: Hearing Before the United States Senate Committee on the Judiciary*, 109th Cong. (Sept. 12, 2006) [hereinafter Senate Hearings], *available at* http://judiciary.senate.gov/hearing.cfm?id=2054 (testimony of Mark B. Sheppard, Esquire, Partner, Sprague & Sprague; Andrew Weissmann, Partner, Jenner & Block LLP; Edwin Meese III, Ronald Reagan Distinguished Fellow in Public Policy and Chairman, Center for Legal and Judicial Studies, The Heritage Foundation; Thomas J. Donohue, President & CEO, U.S. Chamber of Commerce; Senator Patrick Leahy, Ranking Member, Senate Judiciary Committee; Senator Russ Feingold, Member, Senate Judiciary Committee; and Karen J. Mathis, President of the American Bar Association); *Memo to Gonzales*, WALL ST. J., Sept. 8, 2006, at A14; John Hasnas, *Department of Coercion*, WALL ST. J., Mar. 11, 2006; *White Collar Enforcement (Part I): Attorney-Client Privilege and Corporate Waivers: Hearing Before the Subcommittee on Crime, Terrorism & Homeland Security of the H. Comm. On the Judiciary*, 109th Cong. Mar. 7, 2006) [hereinafter *House Hearings*], *available at* http://judiciary.house.gov/oversight.aspx?ID=222 (testimony of Dick Thornburgh, former Attorney General; and William M. Sullivan, Jr., Esq., Partner, Winston & Strawn, LLP).

[9] *Senate Hearings, supra* note 8 (testimony of Edwin Meese III).

[10] *Senate Hearings, supra* note 8 (testimony of Mark B. Sheppard).

[11] *Senate Hearings, supra* note 8 (testimony of Karen J. Mathis).

[12] *Qwest, supra* note 4, 450 F.3d at 1200; *In re Columbia/HCA Healthcare Corp. Billing Practices Litig.*, 293 F.3d 289, 302 (6th Cir. 2002); *United States v. Massachusetts Inst. of Tech*., 129 F.3d 681, 686 (1st Cir. 1997); *Westinghouse Elec. Corp. v. Republic of the Phil.*, 951 F.2d 1414, 1425 (3d Cir. 1991); *In re Martin Marietta Corp.*, 856 F.2d 619, 623-24 (4th Cir. 1988); *In re John Doe Corp.*, 675 F.2d 482, 489 (2d Cir. 1982); *Permian Corp. v. United States*, 665 F.2d 1214, 1219-20 (D.C. Cir. 1981).

[13] *See Martin Marietta, supra* note 12, 856 F.2d at 623, 626 (adopting selective waiver for opinion work product but declining to apply selective waiver to protect non-opinion work product).

[14] *See Qwest, supra* note 4, 450 F.3d at 1192 (concluding that selective waiver did not apply to work product disclosed to the government under the circumstances); *In re Chrysler Motors Corp. Overnight Evaluation Program Litig.*, 860 F.2d 844, 846-47 (8th Cir. 1988) (rejecting selective waiver for non-opinion work product); *Massachusetts Inst. of Tech., supra* note 12, 129 F.3d at 687 (rejecting selective waiver for non-opinion work product); *Westinghouse*, *supra* note 12, 951 F.2d at 1429 (rejecting selective waiver of work product where disclosures were inconsistent with the objectives of the work product doctrine); *Columbia/HCA Healthcare, supra* note 12, 293 F.3d at 306-307 (concluding that many of the reasons for disallowing selective waiver of attorney-client privilege also applied to the work product doctrine).

[15] *See, e.g., In re Subpoenas Duces Tecum*, 738 F.2d 1367, 1372-75 (D.C. Cir. 1984) (disclosure of work product to SEC constituted a waiver rested on three factors, including (1) the party claiming privilege sought to use it in a way inconsistent with the purpose of the privilege; (2) "appellants had no reasonable basis for believing that the disclosed materials would be kept confidential by the SEC"; and (3) no public policy behind the work product privilege demanded an exception to the waiver rule under the circumstances); *In re Steinhardt Partners*, 9 F.3d 230, 236 (2d Cir. 1993) (declining to adopt a *per se* rule that all voluntary disclosures to the government waive work product protection on the basis that such a rigid rule "would fail to anticipate situations in which the disclosing party and the government may share a common interest in developing legal theories and analyzing information, or situations in which the SEC and the disclosing party have entered into an explicit agreement that the SEC will maintain the confidentiality of the disclosed materials").

[16] *See, e.g., Steinhardt Partners, supra* note 15, 9 F.3d at 236 (citing existence of confidentiality agreement as one way in which to avoid a complete waiver of materials provided to the government); *Lawrence E. Jaffe Pension Plan v. Household Int'l, Inc.*, No. 02 C 5893, 2006 WL 3524016, at *20-*22 (N.D. Ill. Dec. 6, 2006) (noting that Seventh Circuit has not yet decided position on selective waiver and that selective waiver has been disfavored by district courts within Seventh Circuit, but holding that under the circumstances, defendant had not waived privilege with respect to documents produced to the SEC because it had entered into confidentiality agreement with SEC); *In re Natural Gas Commodity Litig.*, No. 03 Civ. 6186VMAJP, 2005 WL 1457666, at *9 (S.D.N.Y. June 21, 2005) (holding that under *Steinhardt Partners*, defendants had not waived work product privilege because they had explicit confidentiality agreements with the government agencies who had received the protected materials, and because the plaintiffs had not shown a substantial need for the work product because they had received the underlying documents on which the analyses were based).

[17] *See Qwest, supra* note 4, 450 F.3d at 1194 (dismissing notion that confidentiality agreements with enforcement agencies warranted selective waiver rule under the circumstances); *Columbia/HCA Healthcare Corp., supra* note 12, 293 F.3d at 307 (rejecting notion of selective waiver under circumstances, notwithstanding confidentiality agreement); *Chrysler Motors Corp., supra* note 14, 860 F.2d at 847 (holding that agreement with adversary not to disclose work product materials to a third party could not protect the materials from waiver).

[18] Attorney-Client Privilege Protection Act of 2006, S. 30, 109th Cong. 2d Sess. (2006); *see also* Jason McLure, *Specter Prods Justice to Stop Encouraging Privilege Waivers: Bill Demands Revisions to Thompson Memo*, N.Y.L.J., Dec. 8, 2006, at 1; Carrie Johnson, *Shift in Corporate Prosecution Ahead: Government to Stiffen Rules on Indicting Corporations*, WASH. POST, Nov. 30, 2006, at D1.

[19] Attorney-Client Privilege Protection Act of 2006, *supra* note 18, § 3(a).

[20] *Id.*

[21] *Id.*

[22] *See* Attorney-Client Privilege Protection Act of 2007, S. 186, 110th Cong. 1st Sess. (2007). *See also* 153 Cong. Rec. S42-01, at S181-183 (Jan. 4. 2007) (statement of Sen. Specter). When reintroducing this legislation to the 110th Congress, Specter observed that "[t]here is no need to wait to see how the McNulty memorandum will operate in practice. The flaws in that memorandum are already apparent." *Id*.

[23] *See* Attorney-Client Privilege Protection Act of 2007, *supra* note 22, status *available at* http://thomas.loc.gov/cgi-bin/bdquery/z?d110:SN00186:@@@L&summ2=m&.

[24] *See Sen. Specter Continues Efforts to Force DOJ to Stop Seeking Corporate Waiver of Privilege*, BNA WHITE COLLAR CRIME REPORT, Vol. 1, No. 26, at 827 (Jan. 19, 2007) (noting that Sen. Patrick Leahy "plans to give DOJ a chance to implement the new policy before deciding whether to move ahead with the legislation"); Richard Ben-Veniste & Raj De, *The "McNulty Memo": A Missed Opportunity to Reverse Erosion of Attorney-Client Privilege*, LEGAL BACKGROUNDER, Washington Legal Foundation, Vol. 22, No. 3 (Jan. 19, 2007) ("Speculation now centers on whether the McNulty Memo will forestall, or at least delay, legislative action on the expected DOJ argument that until the impact of this new policy guidance can be gauged, it would be premature for Congress to act.").

[25] *See* Paul J. McNulty, Deputy Attorney General, Principles of Federal Prosecution of Business Organizations (Dec. 12, 2006), *available at* http://www.usdoj.gov/dag/speech/2006/mcnulty_memo.pdf [hereinafter McNulty Memorandum].

[26] Whether a federal prosecutor has a "legitimate need" for Category I documents depends upon (i) the likelihood and degree to which the privileged information will benefit the government's investigation; (ii) whether the information sought can be obtained in a timely and complete fashion by using alternative means that do not require waiver; (iii) the completeness, if any, of the voluntary disclosure already provided; and (iv) the collateral consequences to a corporation of a waiver. McNulty Memorandum, *supra* note 25, § VII.B.2. At first blush, it appears that it is the rare investigation in which a federal prosecutor will not be able to meet the "legitimate need" test. For example, a prosecutor faced with an accounting fraud investigation spanning multiple subsidiaries or business lines of a multinational issuer should have little, if any, trouble showing that having access to Category I documents will benefit the government's investigation, save time and resources.

[27] *Id.*

[28] *Id.* Category I information includes material such as "copies of key documents, witness statements, or purely factual interview memoranda regarding the underlying misconduct, organization charts created by company counsel, factual chronologies, factual summaries, or reports . . . containing investigative facts documented by counsel." *Id*.

[29] *Id.*

[30] McNulty Memorandum, *supra* note 25, § VII.B.2.

[31] *Id.*

[32] *Id.*

[33] *Id*.

[34] McNulty Memorandum, *supra* note 25, § VII.B.2.

[35] *Id.*

[36] *Id.* § VII.B.3.

[37] *Id.* § VII.B.3 n.3.

[38] For an additional discussion of the limited impact of the McNulty Memorandum, see generally Ben-Veniste and De, *supra* note 24.