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White Collar Defense & Compliance Practice

## Department of Justice to Change Position on Corporate Privileges Waiver

In the face of mounting criticism from bi-partisan groups and pending legislation before the United States Senate, the Department of Justice (DOJ) has advised that it intends to modify its policy regarding the prosecution of corporations, currently embodied in the so-called "McNulty Memo." *See* Memorandum from Paul J. McNulty "Principles of Federal Prosecution of Business Organizations," (Dec. 12, 2006). In its current form, the McNulty Memo divides information into two categories: (1) Category I, which is purely factual information that may be privileged; and (2) Category II, which is attorney-client communications and non-factual attorney work product, including legal advice provided to the corporation by its counsel before, during, and after the conduct in question. Under the current DOJ policy, Assistant US Attorneys may request that a corporation waive any privilege as to Category I information—with little DOJ review—if the prosecutor concludes that there is a "legitimate need" for the information. The McNulty Memo also permits a prosecutor to request a waiver as to Category II information, but only if Category I information is insufficient to conduct a complete investigation, a "legitimate need" for the information still exists, and only after obtaining written approval from the Deputy Attorney General.

Current DOJ policy also allows a prosecutor to consider a corporation's willingness to waive privileges in determining whether that entity has cooperated with the government's investigation—a determination that impacts charging decisions, including whether to decline prosecution, grant immunity, agree to a deferred prosecution or pre-trial diversion, or, instead, to indict. Further, though a corporation's waiver of privileges no longer factors into the calculation of the offense level under the United States Sentencing Guidelines, a prosecutor can weigh the corporation's willingness to waive privileges in arguing before the court for the appropriate sentence within a given guideline range.

On June 26, 2008, Senator Arlen Specter reintroduced the Attorney-Client Privilege Protection Act of 2008, S. 3217, 110th Cong. (2008), legislation that would overrule DOJ policy as articulated in the McNulty Memo. The Senate bill would prohibit the DOJ from requesting that a corporation waive its privileges, from punishing an entity for refusing to waive, and from rewarding a company for acquiescing in a waiver request. Senator Specter had introduced similar legislation in 2007, and a sister bill had passed in the House of Representatives that same year. *See* H.R. 3013, 110th Cong. (2007).

On July 9, 2008, in an effort to forestall the revived legislation, Deputy Attorney General Mark Filip advised Senator Specter and Senate Judiciary Chairman Patrick Leahy that the DOJ intends to revise its policy regarding the charging of corporations. In a three-page letter, Filip touched on the "need for the Department to address any lingering perceptions" that DOJ's conduct in corporate criminal investigations was unfair. Filip informed the Senators that "in the next few weeks" the DOJ will revise its policy as follows:

1. The Department will no longer measure "cooperation" by the extent to which a corporation waives its privileges. Instead, it will focus on the extent to which the entity "timely disclosed the relevant

facts about the misconduct." In other words, the "government's key measure of cooperation will be the same for a corporation as for an individual."

2. Prosecutors may not demand the disclosure of "Category II" information as a condition for cooperation credit.

3. Prosecutors may not consider whether the corporation has advanced attorneys' fees to its employees in assessing that entity's cooperation.

4. The government will not take into account whether a corporation has entered into a joint defense agreement in determining its cooperation.

5. The Department will not consider whether a corporation has sanctioned or terminated its employees in measuring cooperation.

Senator Leahy indicated that he would "review thoroughly" the new policy when it is formally announced by the Department.

Filip's proposal would mark the Department's fourth revision since 1999 to its policy regarding what factors a prosecutor should consider in deciding whether to charge a corporation. It is not clear from Filip's outline the extent to which the Department will still expect potentially privileged "Category I" information to be included in an evaluation of whether a corporation has timely disclosed relevant facts. Nonetheless, it appears that the new policy will treat corporations more like individuals in applying the principles set forth in the United States Attorneys' Manual.

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