



# Department of Justice

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**STATEMENT**

**OF**

**BARRY M. SABIN  
DEPUTY ASSISTANT ATTORNEY GENERAL  
CRIMINAL DIVISION  
DEPARTMENT OF JUSTICE**

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

**CONCERNING  
THE RIGHT TO COUNSEL IN CORPORATE INVESTIGATIONS**

**PRESENTED ON  
MARCH 8, 2007**

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Barry M. Sabin  
Deputy Assistant Attorney General  
Criminal Division  
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Committee on the Judiciary  
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**Concerning  
The Right to Counsel in Corporate Investigations**

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Thank you for the opportunity to be here today to discuss with you the Department of Justice's corporate criminal charging policies and its respect for the attorney-client privilege. These policies have been articulated in a memorandum issued by Deputy Attorney General Paul McNulty on December 12, 2006 (referred to as the "McNulty Memorandum"). In connection with my testimony today regarding the *McNulty Memorandum*, I would like to underscore five key points that are fundamental to the Department's corporate criminal charging policies: (1) the tone of the *McNulty Memorandum* and its respect for the importance of the attorney-client privilege; (2) developing concrete data to uniformly consider and implement the *McNulty Memorandum*; (3) establishing a legitimate need for requesting a waiver of the attorney-client privilege; (4) instituting a meaningful consultation and approval process to ensure consistent application of Department practices; and (5) an incremental approach to seeking information – first factual information and then legal opinions – from the corporate entity, if appropriate.

**The Department Shares a Common Goal With Responsible Corporate Leaders and Recognizes the Importance of the Attorney-Client Privilege**

The tone of the *McNulty Memorandum* is critical to an understanding of the Department's approach to corporate criminal charging policies. It is a tone of respect for the importance and long-standing nature of the attorney-client privilege. The Department helps protect investors and ensure public confidence in business entities and the markets in which those entities participate. The Department shares this common goal with the vast majority of corporate leaders who believe in and work hard to maintain integrity and honesty in corporate governance.

The Department has long recognized that the attorney-client and work product protections serve an extremely important function in the U.S. legal system and can help responsible corporations in their efforts to comply with applicable law. We acknowledge that the purpose of these privileges "is to encourage full and frank communications between attorneys and their clients and thereby promote broader public interests in the observance of law and administration of justice." *Upjohn v. United States*, 449 U.S. 383, 389 (1976). At the same time,

waiver of the privilege may advance important law enforcement interests. As articulated in the McNulty Memorandum, “[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.”

### The Department’s Corporate Criminal Charging Policy

Many positive benefits flow from criminal enforcement against corporations, including increased compliance and restoring the confidence of the investing public in the capital markets. At the same time, due to the nature of a corporation, certain additional considerations are present. For this reason, and to ensure consistency in corporate charging decisions, the Department of Justice initially memorialized the principles governing the Federal Prosecution of Business Organizations in the *Holder Memorandum* issued in 1999. That document, as well as the various iterations that followed – the *Thompson Memorandum* and *McNulty Memorandum* – established a nine-factor test that prosecutors consider in determining whether to charge a corporation or other business entity. A prosecutor must consider and weigh all of the relevant factors in order “to ensure that the general purposes of the criminal law – assurance of warranted punishment, deterrence of further criminal conduct, protection of the public from dangerous and fraudulent conduct, rehabilitations of offenders, and restitution for victims and affected communities – are adequately met, taking into account the special nature of the [corporation].” The nine factors are:

- (1) the nature and seriousness of the offense, including the risk of harm to the public, and applicable policies and priorities, if any, governing the prosecution of corporations for particular categories of crime;
- (2) the pervasiveness of wrongdoing within the corporation, including the complicity in, or condoning of, the wrongdoing by corporate management;
- (3) the corporation's history of similar conduct, including prior criminal, civil, and regulatory enforcement actions against it;
- (4) the corporation's timely and voluntary disclosure of wrongdoing and its willingness to cooperate in the investigation of its agents;
- (5) the existence and adequacy of the corporation's pre-existing compliance program;
- (6) the corporation’s remedial actions, including any efforts to implement an effective corporate compliance program or to improve an existing one, to replace responsible management, to discipline or terminate wrongdoers, to pay restitution, and to cooperate with the relevant government agencies;
- (7) collateral consequences, including disproportionate harm to shareholders, pension holders and employees not proven personally culpable and impact on the public arising from the prosecution;
- (8) the adequacy of the prosecution of individuals responsible for the corporation's malfeasance; and
- (9) the adequacy of remedies such as civil or regulatory enforcement actions.

A corporation's cooperation is just one of the nine factors a prosecutor must consider in determining whether to charge a corporation, and a company's willingness to waive the attorney-client privilege is just one sub-factor in gauging cooperation. To make it clear that waiver of the attorney-client privilege is never mandatory, the *McNulty Memorandum* expressly provides that waiver of the privilege is not a pre-requisite to a finding that a company has cooperated. Moreover, a company that has not cooperated may still not be charged criminally, depending on the other factors enumerated above.

### The Department Has Engaged in a Dialogue With Critics of its Policy and Has Taken Reasonable and Measured Steps to Address the Criticism

The Department published the principles of charging corporations – which are the factors that prosecutors have long informally considered – to ensure consistency and transparency. We at the Department are aware that, despite the Department's successes, some in the business community and criminal defense bar had expressed dissatisfaction arising out of a perception that federal prosecutors were “coercing” corporations to provide privileged materials in criminal investigations. However, no concrete information was provided to the Department to support these types of allegations and it was inconsistent with the findings of the Deputy Attorney General's office.

Nevertheless, the Department took reasoned and measured steps to address the perceived problems. Department officials, led by the Deputy Attorney General, undertook an extensive and thorough review of our corporate charging policy. The Deputy Attorney General's office sought input from members of the business community, bar associations, associations of corporate counsel, and our own prosecutors. The *McNulty Memorandum* was the result of this dialogue. The revisions that the Department made to the *McNulty Memorandum* preserve that transparency while addressing and dispelling the perceptions of our critics in very significant ways.

### The *McNulty Memorandum* Establishes an Exacting Procedure for Requesting a Waiver of the Attorney-Client Privilege

For instance, the most often-heard criticism was that prosecutors routinely sought waivers of privilege in corporate criminal investigations and that a “culture of waiver” had developed. The Department has never instructed prosecutors to seek routine requests for waiver of privilege. However, in order to address the perception that routine waivers were being sought, the new policy now makes clear that legal advice, mental impressions and conclusions and legal determinations by counsel are protected and should only be sought in rare circumstances. Any request for such materials must be in writing and “seek the least intrusive waiver necessary to conduct a complete and thorough investigation.” If such materials are requested, approval to make such a request must come from the second highest ranking official in the Department, the Deputy Attorney General. This requirement demonstrates the importance that we have placed in making certain that requests for attorney-client communications are tightly controlled and reviewed at the highest levels.

But the Department did more than just establish an approval requirement. Before prosecutors can even make a request of the Deputy Attorney General, prosecutors must establish a legitimate need for the information. "A legitimate need for the information is not established by concluding that it is merely desirable or convenient to obtain privileged information." To meet the legitimate need test, prosecutors must show: (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) collateral consequences to a corporation of a waiver.

This test ensures that evaluating the need for waiver is a thoughtful process and that prosecutors are not requesting it without examining the quantum of evidence already in their possession and determining whether there is a real need to request privileged information. Prosecutors cannot even undertake this test until they take preliminary investigative steps to determine whether a corporation and its employees have engaged in criminal activity before seeking waiver, thereby ensuring that prosecutors cannot seek waiver at the outset of the investigation.

The privilege is protected to such an extent in this approval process, that even if the prosecutors have established a legitimate need and the Deputy Attorney General approves the request for the waiver, if the request is made and the corporation declines to give the information, the Department will not hold it against the corporation or view it negatively in making a charging decision. This is to ensure that where a valid privilege is asserted for legal advice or strategy, that the corporation and its lawyers are not penalized for deciding that they want to preserve the confidentiality of their communications.

If the corporation decides to give us the information, we will consider it favorably. The government wants to encourage cooperation and the production of information where requested, and certainly a corporation would want to receive a benefit for production if the decision is made to waive the privilege. It would not make sense for the corporation to voluntarily provide information to the government and not receive some credit for it. There would be no incentive to cooperate if that were the case, and cooperation of corporate entities is often a crucial part in early identification of a corporate fraud.

There is another category of information, facts obtained and documented by corporate counsel, that is subject to a different approval requirement. A prosecutor's request for facts most often comes up in the context of an internal investigation by the corporation. Corporate lawyers or outside counsel will interview witnesses and gather together key documents to determine whether wrongdoing has occurred. This may happen before or during the government's criminal investigation. When the corporation comes in explicitly seeking to cooperate, the government needs to have a full factual understanding of the nature and scope of the facts involved in order to make informed decisions. Attorneys may assert privilege relating to this information. If there is a legitimate need, and subject to the process discussed below, the government may ask for a waiver of the privilege to obtain the facts they collected. Asking for this type of information is

much less intrusive to the privilege than asking for legal advice. Most experienced corporate counsel recognize that if the corporation wants the benefits of cooperation, it would be prudent to produce the facts that it has learned during the course of its own investigation. In fact, in our discussions with corporate counsel, they have acknowledged the benefits of proceeding quickly. Rather than facing additional delay while the government duplicates its efforts, the company will often offer the results of its internal investigation so that the government's investigation can move faster. This allows the government to make a charging decision within months, rather than years, which saves the company money and employee time and protects the value of its stock.

Even with this non-controversial request for facts, prosecutors still have to demonstrate a legitimate need for the material and submit a written request for approval to the United States Attorney. The request must be narrowly tailored. The United States Attorney considers that request in consultation with the Assistant Attorney General of the Criminal Division. The request and approval must be in writing and those records must be maintained. If after receipt of this factual information, the prosecutors still believe that they need more information which may implicate attorney-client communications and legal advice, then they can request that the Deputy Attorney General approve their written request for that information. These process requirements address the concerns that have been raised by legal and business associations. They make sense, while still preserving the Department's right to obtain needed information quickly.

The divide is between legal advice and facts. To be clear, a prosecutor must take an incremental approach, first establishing a legitimate need and then submitting a narrowly-tailored written request. The United States Attorney, in consultation with the Assistant Attorney General of the Criminal Division approves a request for factual information; the Deputy Attorney General approves requests for legal advice, subject to two exceptions (when the company is asserting an advice of counsel defense or when the crime-fraud exception applies).

These process requirements only apply to requests from the government. Where the corporation makes a voluntary and unsolicited offer to give us documents which may be privileged, *e.g.*, its internal investigation, no approval to accept those documents is needed. But even in those instances, United States Attorneys must be notified that the prosecutor has accepted privileged documents and a record of those notifications must be kept at the United States Attorney's Office. This allows us to maintain data regarding the frequency of voluntary waivers and underscores the seriousness with which we take any production of privileged materials.

#### The McNulty Memorandum Provides that Prosecutors Generally Cannot Consider Whether a Corporation is Advancing Fees to Its Employees

Another part of the *McNulty Memorandum* revised the way in which prosecutors can consider the advancement of attorneys' fees by the corporation. In general, the *Thompson Memorandum* simply directed that a federal prosecutor, as part of assessing whether a corporation cooperated with a government investigation, may look at whether the company is paying the attorneys' fees of individuals alleged to have committed the fraud. The new guidance

generally prohibits prosecutors from considering whether a corporation is advancing attorneys' fees to employees or agents under investigation or indictment.

### The Department's Revised Policy Should Be Given Time to Work

In light of the substantial and thoughtful revisions contained in the *McNulty Memorandum*, the Department urges this Subcommittee, at a minimum, to allow the guidance a chance to work before considering any legislation. The guidance was recently issued and it is much too early to assess its effect.

There are preliminary indications that the policy is working. In the nearly three months since the *McNulty Memorandum* was issued, the Deputy Attorney General's office has not received a single request seeking a waiver of legal advice and strategy. Moreover, the Criminal Division has received only a few requests to seek purely factual information since the *Memorandum* was issued. In each of those instances, the Criminal Division, which must consult with the district requesting the waiver, has engaged in a meaningful dialogue regarding the request.

### The Battle Against Corporate Fraud Remains a Priority of the Department of Justice

In discussing the Department's corporate criminal charging policy in speeches and testimony, Department officials often underscore the corporate scandals of 2000-2002. Certainly, we should be mindful of these past occurrences. However, I want to conclude with a different focus – a focus not on Enron, but where we are today. Our recent cases confirm that corporate fraud is not a historical relic. Federal prosecutors continue to investigate inflated revenue schemes, market manipulation, self-dealing by corporate executives, insider trading, and stock option backdating. The Department of Justice continues to launch large-scale corporate investigations and to devote significant time and resources to protecting our financial markets and the American investor. We remain committed to investigating and prosecuting corporate matters, as evidenced in the recent trial of Enterasys executives in New Hampshire for fraudulently inflating earnings or the plea of guilty recently in New York of the former general counsel of Monster.com for fraudulent stock options backdating. The Department's efforts have not abated.

I believe that our past and current efforts to combat corporate fraud have helped to create a culture of compliance in the business community. Many corporations have implemented effective compliance programs and corporations are quicker to respond when they find fraud committed by the corporation. These are positive effects that should not be ignored or forgotten. It is this common ground – prosecutors committed to the fair administration of justice and responsible business leaders fulfilling their duties of honest dealing to corporate shareholders – that unites us in our determination that eliminating fraud is good for business.

## Conclusion

The Department remains hopeful that once Congress examines the revised guidance in detail and allows it to take root, it will recognize that the Department's policies and practices are sound. The charging factors in the *McNulty Memorandum* are prudent, necessary and time-tested. The revisions that address waiver are reasonable and will protect privileged materials. Taking away the Department's ability to request a waiver and our ability to make the right charging decisions by severely restricting what we can consider in determining whether a corporation is cooperating, not only hamstring federal prosecutors, it will ultimately discourage corporate self-policing. We respectfully suggest that this is not the message we should be sending to corporate leaders or the investing public.

We appreciate the opportunity to share our views with this Subcommittee. With your assistance, the Department will continue to prosecute corporate wrongdoers and protect the American investor, while maintaining its respect and protection of the attorney-client privilege.

Thank you.