

# HEALTH LAW

## *Update*

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## DOJ Revises Guidelines on Seeking Waiver of Attorney-Client Privilege

January 31, 2007

The Department of Justice (DOJ) recently issued revised guidelines to federal prosecutors for determining whether to charge corporate entities with crimes. Released on December 12, 2006, by Deputy Attorney General Paul McNulty, the “McNulty Memo” supersedes the “Thompson Memo” authored almost four years earlier by then-Deputy Attorney General Larry Thompson. The Thompson Memo, which was issued in the wake of corporate scandals such as Enron, advised prosecutors that a corporation should not be given credit for cooperating with the government if it refused to waive its attorney-client privilege or if it advanced legal fees to employees facing investigation.

Over the years, the Thompson Memo had come under mounting criticism for creating an environment where federal prosecutors sought privilege waivers as a matter of course in conducting investigations and pressured corporations to turn over information disclosed to their counsel or else risk indictment. Critics argued that these actions fostered a culture of waiver that dissuaded clients from being forthcoming with their counsel and inhibited corporate compliance efforts.

The effect of the backlash against the Thompson Memo was seen in April 2006, when the U.S. Sentencing Commission voted to eliminate language from the federal sentencing guidelines requiring corporations to waive the attorney-client privilege and work product protections to earn credit for cooperation. On December 7, 2006, Senator Arlen Specter, then-Chairman of the Judiciary Committee, introduced the Attorney-Client Privilege Protection Act of 2006, which would forbid federal prosecutors from considering waiver of attorney-client protections, advancement of legal fees to employees, or entry into joint defense agreements in assessing a corporation’s cooperation. Perhaps hastened by Senator Specter’s proposed legislation, less than a week later, Deputy Attorney General McNulty issued revised charging guidelines for federal prosecutors, noting: “[m]any of those associated with the corporate legal community have expressed concern that our practices may be discouraging to full and candid communications between corporate employees and counsel.”

The Thompson Memo had outlined several factors for federal prosecutors to consider in determining whether to charge a corporation, such as the nature and seriousness of the offense, the pervasiveness of wrongdoing within the corporation, the corporation's history of similar conduct, and the corporation's level of cooperation with the governmental investigation. With respect to cooperation, the Thompson Memo provided that when assessing the adequacy of a corporation's cooperation, a prosecutor could weigh the corporation's waiver of the attorney-client privilege and work product protections and whether the corporation had indemnified for attorney's fees advanced to targeted employees. The Thompson Memo further provided that prosecutors could request that corporations waive the privilege "in appropriate circumstances."

The McNulty Memo preserves the framework of factors to consider in charging corporations but substantially revises the considerations for assessing whether a corporation has cooperated. Under the new guidelines, prosecutors may request waiver of the attorney-client privilege or work product protections only when there is a "legitimate need" for the privileged information, which requires an assessment of four factors:

- (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) the collateral consequences to a corporation of a waiver.

If a prosecutor determines that a "legitimate need" exists, the prosecutor may seek a waiver of the privilege only upon prior approval. The approval required depends upon the scope of the waiver sought by the prosecutor. For "Category I" information, the prosecutor must obtain written authorization from the United States Attorney, who, in turn, must consult with the Assistant Attorney General for the Criminal Division. Category I information includes fact work product, such as copies of key documents, witness statements, interview memoranda, chronologies, summaries, or reports (or portions thereof) containing investigative facts documented by counsel.

For "Category II" information, the United States Attorney must obtain written authorization from the Deputy Attorney General. Category II information includes attorney-client communications and opinion work product, such as attorney notes, memoranda, reports containing counsel's mental impressions, legal determinations reached as a result of an internal investigation, or legal advice given to the corporation before, during, and after the underlying conduct occurred. Prosecutors are directed to limit requests to Category I information and to seek Category II information only in "rare circumstances" where purely factual information provides an "incomplete basis to conduct a thorough investigation."

The McNulty Memo also revises how prosecutors may take into account a corporation's decision to waive the privilege. Prosecutors may consider a corporation's refusal to waive the privilege for Category I information in assessing cooperation, but a corporation's decision not to provide a

waiver for Category II information cannot be considered against the corporation in making a charging decision. However, prosecutors can consider favorably a corporation's decision to comply with a Category II waiver request.

The McNulty Memo instructs that prosecutors' charging decisions generally should not take into account whether a corporation is advancing attorneys' fees to employees under investigation or indictment. However, a footnote provides that in "extremely rare circumstances," and upon approval by the Deputy Attorney General, advancement of attorneys' fees may be taken into account if the circumstances show that it was intended to impede a criminal investigation.

The McNulty Memo represents a retreat from aggressive pursuit of privilege waivers as a prerequisite for corporate cooperation. The actual extent of the retreat will depend on how the DOJ's internal approval process is administered in practice. Whether the DOJ will simply rubber stamp prosecutors' claims of "legitimate need" for seeking waivers remains to be seen. At a minimum, the burden of obtaining approval presumably will make prosecutors more hesitant to seek waivers. Additionally, formalizing the process for seeking a waiver should improve consistency among the federal districts regarding the circumstances in which waivers should be sought.

Despite the modifications to the guidelines, the McNulty Memo still permits the waiver of the privilege to affect prosecutors' charging determinations under certain circumstances. Furthermore, by preserving the right to reward corporations for waiver of the privilege, the pressure to waive will remain a constant consideration for companies when performing internal compliance functions or conducting internal investigations. Especially in cases where companies uncover pervasive wrongdoing, companies must carefully weigh whether disclosing the results of an internal investigation outweighs the benefits of preserving the privilege. Because of the two-tiered approach adopted by the DOJ, counsel performing internal investigations should attempt to segregate, when possible, counsel's fact work product from opinion work product and not include counsel's legal analysis or mental impressions in documents summarizing factual events.

As of this date, no action has been taken with respect to Senator Specter's Attorney Client Privilege Protection Act, and it is uncertain what priority the bill will take with the new Senate leadership. Another development to monitor involves attempts to codify "selective waiver" through a new Federal Rule of Evidence. Most federal circuits, including the Sixth Circuit, hold that disclosure of privileged materials to a government agency constitutes a waiver for all purposes and to all parties, which can serve to discourage cooperation with the government for fear of waiving the privilege as to civil litigants. Proposed Federal Rule of Evidence 502(c) provides that disclosure of privileged information to a federal governmental agency does not waive the privilege with respect to private parties. The proposed rule has been published for public comment until February 15, 2007, and requires Congressional enactment to become effective.

If you have any questions about this *Health Law Update*, please contact one of the Bass, Berry & Sims attorneys listed at the end of this Update.

Bass, Berry & Sims Healthcare Attorneys

**H. Stanford Adams, Jr.**  
(615) 742-7775  
sadams@bassberry.com

**Michael L. Dagley**  
(615) 742-7729  
mdagley@bassberry.com

**Valere B. Fulwider**  
(615) 742-7742  
vfulwider@bassberry.com

**Anna Grizzle**  
(615) 742-7732  
agrizzle@bassberry.com

**Nancy S. Jones**  
(615) 742-6239  
njones@bassberry.com

**Leslie Maclellan**  
(615) 742-7818  
lmaclellan@bassberry.com

**Shannon Pinkston**  
(615) 742-7727  
spinkston@bassberry.com

**Scott B. Shanker**  
(901) 543-5932  
sshanker@bassberry.com

**Tara L. Swafford**  
(615) 742-7731  
tswafford@bassberry.com

**Elizabeth S. Warren**  
(615) 742-7719  
ewarren@bassberry.com

**H. Lee Barfield, II**  
(615) 742-6202  
lbarfield@bassberry.com

**Wallace W. Dietz**  
(615) 742-6276  
wdietz@bassberry.com

**Clevonne M. Gaillard**  
(615) 742-7769  
vgaillard@bassberry.com

**Angela Humphreys**  
(615) 742-7852  
ahumphreys@bassberry.com

**David King**  
(615) 742-7890  
dking@bassberry.com

**Claire F. Miley**  
(615) 742-7847  
cmiley@bassberry.com

**Cynthia Y. Reisz**  
(615) 742-6283  
creisz@bassberry.com

**Catherine J.B. Sloan**  
(615) 742-7789  
csloan@bassberry.com

**Krista Thornton**  
(615) 742-7734  
kthornton@bassberry.com

**Philip F. Berg**  
(615) 742-7908  
pberg@bassberry.com

**Renard François**  
(615) 742-7792  
rfrancois@bassberry.com

**Pooneh Ghiassi**  
(615) 742-7782  
pghiassi@bassberry.com

**J. James Jenkins, Jr.**  
(615) 742-6236  
jjenkins@bassberry.com

**Bryan E. Larson**  
(615) 742-6269  
bblarson@bassberry.com

**T. Scott Noonan, Co-Chair**  
(615) 742-6273  
snoonan@bassberry.com

**Brian D. Roark**  
(615) 742-7753  
broark@bassberry.com

**Danielle M. Sloane**  
(615) 742-7763  
dsloane@bassberry.com

**Leigh Walton, Chair**  
(615) 742-6201  
lwalton@bassberry.com

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**NASHVILLE Downtown**  
AmSouth Center  
315 Deaderick St. · Ste. 2700  
Nashville, TN 37238-3001  
(615) 742-6200

**KNOXVILLE**  
1700 Riverview Tower  
900 S. Gay St.  
Knoxville, TN 37902  
(865) 521-6200

**MEMPHIS**  
The Tower at Peabody Place  
100 Peabody Place · Ste. 900  
Memphis, TN 38103-3672  
(901) 543-5900

**NASHVILLE Music Row**  
29 Music Square East  
Nashville, TN 37203-4322  
(615) 255-6161