
Recent Dialogue Between DOJ and Congress Suggests Changes to DOJ's McNulty Memo Are Coming

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At the July 9, 2008, oversight hearing of the Justice Department (DOJ) before the Senate Judiciary Committee, Attorney General Michael Mukasey indicated that the DOJ anticipates making several potentially significant changes to its policies contained in a DOJ memorandum governing federal investigations and prosecutions of companies (the McNulty Memo). The McNulty Memo (and predecessor memos) sets forth the DOJ's overall guidelines for making charging decisions in federal investigations of business organizations. The memo has been criticized for, among other things, encouraging the DOJ to take into account corporate privilege waivers, advancement of attorneys' fees, and the use of joint defense agreements when assessing whether a corporate defendant has cooperated in a government investigation. Senator Arlen Specter, Ranking Member of the Senate Judiciary Committee, proposed legislation in December 2006 to modify the McNulty Memo. See our [December 2006 alert](#), which discussed the McNulty Memorandum.

Attorney General Mukasey suggested in his testimony that guidelines in the McNulty Memo rewarding waiver of the attorney-client privilege in corporate fraud investigations may soon be replaced. "There's no such as thing as a memo that achieves perfection. . . . There are adjustments in the McNulty memo that can and will be made," Attorney General Mukasey said. "In particular, we will no longer measure cooperation by waiver of the attorney-client privilege." Attorney General Mukasey's statements came in response to a question from Senator Specter concerning the justification for coercing investigation targets to waive the attorney-client privilege.

In a letter dated July 9, 2008, Deputy Attorney General Mark Filip wrote to Senator Patrick Leahy, Chairman of the Judiciary Committee, and Senator Specter and outlined five revisions to the DOJ's policies that the DOJ "expect[s]" to make "in the next few weeks:"

- First, the measure of cooperation for corporations will be the extent to which the corporation makes timely disclosures of relevant facts. That, rather than whether the corporation waives the attorney-client privilege or work product protection, will be the "operative question."
- Second, federal prosecutors will not demand "non-factual" attorney work product or "core" attorney-client privileged communications as a condition for cooperation credit.
- Third, federal prosecutors will not consider payment of attorneys' fees on behalf of

employees when evaluating the corporation's cooperation.

- Fourth, federal prosecutors will not consider whether the corporation has entered into a joint defense agreement when evaluating the corporation's cooperation.
- Finally, federal prosecutors will not consider whether employees have been retained or sanctioned when evaluating the corporation's cooperation, although how and whether the corporation disciplines "culpable" employees may impact evaluation of the corporation's compliance program and remedial measures.

Deputy Attorney General Filip also urged Senators Leahy and Specter to give the DOJ a reasonable amount of time to implement and evaluate these proposed changes before pursuing legislation. Senator Specter replied to Deputy Attorney General Filip in a letter dated July 10, and expressed serious concerns over further delays in enacting legislation to address these issues. Citing previous promises by the DOJ to address them, subsequent delays in doing so, and the enormous costs imposed on individuals subjected to the policies contained in the McNulty Memo, Senator Specter wrote that it is "too much to ask for the legislative process to await a written revision of McNulty and then await a review of the implementation of a new memorandum for a 'reasonable amount of time' which could be very long."

In addition, Senator Specter complained that the revisions proposed in Deputy Attorney General Filip's letter remain "unsatisfactorily vague." He noted that, while the new principles state that cooperation will be measured by "disclosure of facts and evidence, not the waiver of privilege," those same facts and evidence may have been obtained with the expectation that they would be protected under the attorney-client privilege. Senator Specter also worried that exempting only the "non-factual attorney work product" ignores a large undefined area where factual and non-factual work product overlap. He also demanded further elaboration on the DOJ's past practices with respect to its evaluation of joint defense agreements and sanctions against employees when measuring cooperation.

Senator Specter's letter also noted that the proposed DOJ guidelines, unlike legislation, would not bind other federal agencies such as the SEC and IRS. Additionally, such guidelines would be subject to modification by future Attorneys General. Senator Specter concluded that his recommendation will be to proceed either through "some accommodation with the Administration on legislation or have Congress move ahead on its own." He asked for more explicit statements explaining the proposed new principles and for information regarding specific cases currently pending under the McNulty Memo guidelines (including the costs incurred by companies and individuals).

While the final outcome is still uncertain, it appears that there will be movement at the DOJ and/or through legislation to modify DOJ guidelines that have greatly concerned corporations and the lawyers who represent them. These changes likely will impact many of the strategic and tactical decisions made by companies and their counsel as they conduct internal investigations or respond to government subpoenas or other requests for information. We will update you as significant developments occur.

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