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**The Corporation and The Criminal Law:
Developments In The Law of Corporate Waiver of The
Attorney-Client Privilege**

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I. Introduction

It has been said that our system of justice is, “at its core, an adversarial system” where each side” has, through the Constitution, statutes, rules of procedure and case law, certain powers and rights that allow it to implement and promote its advocacy interests for the fair administration of justice.”¹ For corporations enmeshed in regulatory or criminal investigations, this right enables the company, and its management to fully investigate, and review with legal counsel any and all matters of potential legal consequences – without fear that the government and other potential parties will require disclosure of this confidential information as a price of resolving disputes.

Since 1989, and continuing even to the present, through numerous intentions, the Executive Branch has issued pronouncements that interfere with the core legal principles of corporate client confidentiality. By requiring the corporation to waive attorney-client and work product privileges in order to avoid criminal prosecution, often for alleged wrongdoing of miscreant or former employees, the government has deprived the corporation – and its employees – of the fundamental right of attorney advice before conclusions are reached. This practice, known as the Privilege Waiver, has recently come under judicial and legislative scrutiny, which, it is hoped, will lead to its demise as a prosecution tool. This presentation will trace the origin, and the anticipated demise, of the “voluntary” privilege waiver in American jurisprudence.

II. Historical Overview of “Voluntary” Privilege Waiver

A. The “Thornburgh Memo”

- 1) **Contents of Memo:** In 1989, then-Attorney General Richard Thornburgh issued a controversial memorandum that became known simply as the “Thornburgh Memo.”² The Thornburgh Memo was the first in a long line of DOJ memoranda to deal with the topic of corporate investigations. Essentially the memorandum said that DOJ attorneys were exempt from state ethical rules regarding *ex parte* communications with potential targets of criminal

¹ Earl J. Silbert & Demme D. Joannou, *Under Pressure to Catch the Crooks: The Impact of Corporate Privilege Waivers on the Adversarial System*, 43 Am. Crim. L. Rev. 1225, ____ (2006). The focus of this document is the DOJ policy of encouraging “voluntary” privilege waiver. Other agencies such as the Securities and Exchange Commission, Department of Housing and Urban Development and Commodity Futures Trading Commission have followed the DOJ’s lead and adopted similar privilege waiver policies. See ABA Fact Sheet, *Key Points Regarding S. 186, the “Attorney-Client Privilege Protection Act of 2007”* (Feb. 2007) (“ABA Fact Sheet”).

² Matthew F. Heffron, *Federalism and the Ethics Fights of the ‘90s*, NEB. LAW., Sept. 1998, at 7.

investigations.³ The memo contained a section specifically dealing with corporations:

Where one lawyer claims to represent the interests of all the employees, an employee who seeks to communicate with the investigators or with Department attorneys is willing to advise the lawyer that he does not want representation In such a case, communication with the unrepresented individual cannot conceivably be contrary to any local rule.⁴

The memo ignited a debate, with the federal and state benches and the organized bar on one side and the DOJ on the other, that culminated in 1998 with the enactment of Section 530B of the McDade Act, which effectively eviscerated the memorandum and held that “An attorney for the Government shall be subject to State laws and rules, and local Federal court rules, governing attorneys in each State where such attorney engages in that attorney's duties, to the same extent and in the same manner as other attorneys in that State.”⁵

- 2) **Legacy:** Although the Thornburgh Memo did not deal exclusively with corporate prosecutions and did not reference privilege waivers it set the stage for subsequent DOJ memos dealing with the investigation and prosecution of corporate crime.

B. The “Holder Memo”

- 1) **Content of Memo:** The so-called “Holder Memo” was named after former Deputy Attorney General Eric Holder.⁶ Entitled “Federal Prosecution of Corporations,” the Holder Memo was adopted on June 16, 1999 as the DOJ’s first set of guidelines regarding corporate crime.⁷ The stated purpose of the memo was to provide a set of factors for prosecutors to consider when

³ *Id.*

⁴ Thornburgh Memo, *reprinted in In re Doe*, 801 F. Supp. 478, 492 (D.N.M. 1992).

⁵ Allen Samelson & Robert Maxwell, *State Ethics Rules Now Apply to Federal Prosecutors*, available at <http://www.rjo.com/publish22.html>

⁶ Memorandum from Eric Holder, Deputy Attorney General, U.S. Dept. of Justice, to All Component Heads and U.S. Attorneys, on Bringing Criminal Charges Against Corporations (June 16, 1999) (“Holder Memo”).

⁷ Craig D. Margolis & Amy L. Riella, *McNulty Memo: Cure for the Thompson Blues?*, Member Briefing (Am. Health Law. Ass’n, Corp. Governance Task Force), April 2007, at 3 (“Margolis & Riella”).

deciding whether to charge a corporation.⁸ The Holder Memo was intended to be “precatory” and to merely provide non-binding guidance to prosecutors.⁹

(a) Applicable Introductory Paragraph of Holder Memo:

The attached document, *Federal Prosecution of Corporations*, provides guidance as to what factors should generally inform a prosecutor in making the decision whether to charge a corporation in a particular case. I believe these factors provide a useful framework in which prosecutors can analyze their cases and provide a common vocabulary for them to discuss their decision with fellow prosecutors, supervisors, and defense counsel. These factors are, however, not outcome-determinative and are only guidelines. Federal prosecutors are not required to reference these factors in a particular case, nor are they required to document the weight they accorded specific factors in reaching their decision.¹⁰

- 2) **Waiver of Privilege and Refusal to Pay Employee Attorney’s Fees:** The Holder Memo referenced a corporation’s “willingness to cooperate” as a relevant factor when deciding whether or not to charge a corporation.¹¹ The voluntary waiver of attorney-client privilege and the funding of employee attorney’s fees were listed as considerations to gauge a company’s level of cooperation.¹² In doing so, the Holder memo was the first DOJ memo to reference privilege waiver and payment of attorney fees as “leverage points” to use against companies under criminal investigation.¹³

(a) Applicable Memo Text:

General Principle: In determining whether to charge a corporation, that corporation's timely and voluntary disclosure of wrongdoing and its willingness to cooperate with the government's investigation may be relevant factors. In gauging the extent of the corporation's cooperation, the prosecutor may consider the corporation's willingness to identify the culprits within the corporation, including senior executives, to make witnesses available, to

⁸ *Id.* at 4; Holder Memo at Intro.

⁹ Margolis & Riella, *supra* note 7, at 4.

¹⁰ Holder Memo at Intro.

¹¹ *Id.* at VI. A.

¹² *Id.* at VI. A, B.

¹³ Margolis & Riella, *supra* note 7, at 4.

disclose the complete results of its internal investigation, and to waive the attorney-client and work product privileges.¹⁴

C. The “Thompson Memo”

- 1) **Content of Memo:** On January 20, 2003 the Holder Memo was replaced by a different memorandum, “Principles of Federal Prosecution of Business Organizations” written by former Deputy Attorney General Larry D. Thompson (the “Thompson Memo”).¹⁵ Issued in response to a series of high profile corporate scandals (e.g., Enron, WorldCom, HealthSouth) the Thompson Memo was part of the DOJ’s “crack down” on corporate crime.¹⁶ Like the Holder Memo, the Thompson Memo outlined the factors that prosecutors should consider when deciding whether to criminally charge a business organization, with one important difference—unlike the Holder Memo—the Thompson Memo’s precepts were mandatory.¹⁷
- 2) **Waiver of Privilege and Refusal to Pay Employee Attorney’s Fees Mandatory:** The “main focus” of the Thompson Memo revisions was an “increased emphasis on and scrutiny of the authenticity of a corporation’s cooperation.”¹⁸ Two controversial aspects of this “increased emphasis” on cooperation was a corporation’s willingness to waive attorney-client privilege and refusal to protect “culpable” employees and agents by advancing attorney’s fees.¹⁹ The result of these changes was that corporations were effectively forced to: 1) waive attorney-client and work product privilege, and 2) refuse to advance attorneys fees to employees in order to avoid prosecution.²⁰
 - (a) **Waiver of Privilege:** The Thompson Memo’s mandatory approach to privilege waiver created a maelstrom of criticism and was condemned by many different organizations, including the American Bar

¹⁴ Holder Memo at VI.A.

¹⁵ Memorandum from Larry D. Thompson, Deputy Attorney General, U.S. Dep’t of Justice, to Heads of Dep’t Components, U.S. Attorneys, on Principles of Federal Prosecution of Business Organizations (Jan. 20, 2003) (the “Thompson Memo”), *available at* www.usdoj.gov/dag/cftf/corporate-guidelines.htm.

¹⁶ Margolis & Riella, *supra* note 7, at 4-5.

¹⁷ U.S. Dep’t of Justice, Criminal Resource Manual § 163 (2005).

¹⁸ Thompson Memo at Intro.

¹⁹ Margolis & Riella at 6; Thompson Memo at VI.

²⁰ Margolis & Riella, *supra* note 7, at 6.

Association.²¹ Pursuant to the memo prosecutors were using a company's willingness to waive the attorney-client and work product privilege as a "key factor" to evaluate whether the company was cooperating with a DOJ investigation.²² Although waiver was supposedly not an "absolute requirement" of cooperation, the commentary of the memo arguably encouraged prosecutors to use privilege waivers as a substitute to conducting a thorough investigation:

[W]aivers permit the government to obtain statements of possible witnesses, subjects, and targets, without having to negotiate individual cooperation or immunity agreements. In addition, they are often critical in enabling the government to evaluate the completeness of a corporation's voluntary disclosure and cooperation. Prosecutors may, therefore, request a waiver in appropriate circumstances.²³

- (i) **ACC Privilege Waiver Surveys:** In March 2005 the Association of Corporate Counsel ("ACC") conducted a survey regarding the Thompson Memo and privilege waiver. The survey revealed that at least one-third of respondents had personal knowledge of an effort by the government to breach privilege and that companies that refused waiver suffered adverse consequences.²⁴ The ACC conducted a follow-up survey in November 2005 at the request of the United States Sentencing Commission, which confirmed the finding of the earlier survey.²⁵ Of 1200 survey respondents nearly 75% said that a "culture of waiver" had evolved in which governmental agencies believe that it is "reasonable and appropriate" to expect a company under investigation to "broadly waive attorney-client privilege or work product protections."²⁶ Moreover, survey respondents said that roughly half of all

²¹ Margolis & Riella at 8.

²² *Id.* at 7.

²³ Thompson Memo at VI. B.

²⁴ Margolis & Riella at 7; Executive Summary, "Is the Attorney-Client Privilege Under Attack?" (Ass'n of Corporate Counsel Apr. 6, 2005, at 2, available at www.acca.com/surveys/attyclient.pdf).

²⁵ Margolis & Riella, *supra*, note 7, at 8; Ass. of Corporate Counsel et al., *The Decline of the Attorney-Client Privilege in the Corporate Context: Survey Results Presented to the United States Congress and the United States Sentencing Commission*, at 2-4, available at www.acca.com/surveys/attyclient2.pdf ("ACC Survey").

²⁶ ACC Survey at 3.

investigations or other inquires that they experienced resulted in privilege waivers.²⁷

- (ii) **Third Party Litigation and Selective Waiver Doctrine:** One criticism of the Thompson Memo is that its policy of advocating privilege waivers encourages private litigation because once privileged information is provided to the government the privilege is waived and becomes accessible to third parties.²⁸ In fact, the ACC Survey found that 15% of companies that experienced a government investigation within the past five years said that the investigation generated a related third party civil suit.²⁹ The selective waiver doctrine, which provides that a company does not waive privilege to a third party when it provides privileged information to the government, would seem a natural fit with the type of “voluntary” waiver that was advocated in the Thompson Memo.³⁰ But the vast majority of circuits have rejected the selective waiver doctrine and unless resuscitated by Federal Rule of Evidence 502 (described *infra*) the doctrine does not protect companies that elect to waive privilege pursuant to a DOJ request.³¹
- (iii) **Discourages Frank Attorney-Client Discussion:** One common criticism of the Thompson Memo is that its policy of advocating privilege waivers creates a disincentive for corporate employees to have frank and open discussions with corporate counsel.³² Because employees are less likely to bring a legal question to counsel if they are afraid that the discussion will later be discoverable, an unfortunate effect of privilege waiver is that it undermines corporate internal compliance programs.³³

²⁷ *Id.*

²⁸ Margolis & Riella at 9, & n. 41; ACC Survey at 4.

²⁹ ACC Survey at 4.

³⁰ *See, e.g., Diversified Indus., Inc. v. Meredith*, 572 F.2d 596, 611 (8th Cir. 1977); Margolis & Riella, *supra* note 7, at 9.

³¹ *Id.* at 9.

³² *Id.* at 8.

³³ *Id.* at 8.

- 3) **Advancement of Employee Attorney Fees:** The payment of employee legal fees is a standard benefit that most corporations offer to attract quality employees and officers.³⁴ Employee legal fees are generally advanced with the condition that they repay the fees if it is later determined that the employee was not entitled to indemnification (i.e., the employee did not act in good faith and/or did not act within the bounds of the law).³⁵ The Thompson Memo changed the rules when it said that a prosecutor could consider a corporation’s advancement of legal fees when it evaluated “the extent and value of a corporation’s cooperation.”³⁶ Pursuant to the memo, payment of employee legal fees was synonymous with supporting “culpable employees” and was evidence of an absence of “true corporate cooperation.”³⁷ If a company wanted to be seen as cooperating with a government investigation it could not pay the legal fees of employees or directors that were the targets of the investigation.

D. Sentencing Commission Change

- 1) In April 2006 the United States Sentencing Commission voted to remove language from the Sentencing Guidelines commentary that could be interpreted to provide cooperation “credit” to companies that waived the attorney-client or work product privilege.³⁸ This change was the result of pressure from the legal community and was the first hint that the precepts of the Thompson Memo may not hold up intact for much longer.³⁹ Although, this change did not change DOJ policy—whether a company would be charged in the first place—it was a harbinger of things to come.

E. *United States v. Stein*

- 1) **Landmark holding:** Just three months after the change in the Sentencing Guidelines Judge Kaplan of the Southern District of New York dealt a more direct blow to the Thompson Memo. In the landmark case *United States v. Stein*, Judge Kaplan held that the DOJ policy of discouraging the advancement

³⁴ *Id.* at 9-10.

³⁵ *Id.* at 10.

³⁶ Thompson Memo at VI, Margolis & Riella, *supra* note 7, at 10.

³⁷ Margolis & Riella, *supra* note 7, at 10

³⁸ Margolis & Riella, *supra* note 7, at 11.

³⁹ *Id.*

of employee legal fees—pursuant to the Thompson Memo—was a violation of the Fifth and Sixth Amendments.⁴⁰

- 2) **Summary of case:** In *Stein*, employees of the accounting firm KPMG challenged their indictment for accounting fraud because of pressure that the government applied on KPMG to cut off reimbursement of attorney’s fees.⁴¹ After holding an evidentiary hearing Judge Kaplan found that government lawyers had specifically referenced the Thompson Memo policy of not advancing legal fees during their very first meeting with KPMG counsel.⁴² After that meeting, out of fear of being judged non-cooperative by the government, KPMG counsel elected to break from its standard practice of advancing attorneys fees to employees by setting various limitations on the fees it would pay, including refusing to pay the fees for employees that were charged with a criminal offense.⁴³ True to their word, once employees were indicted, KPMG ceased paying their fees.⁴⁴ Applying strict scrutiny, Judge Kaplan held that the pressure that the government put on KPMG to refuse payment of legal fees violated the employees’ rights under the Fifth and Sixth Amendments.⁴⁵ The court found that because the DOJ applied its policy as a punishment to employees prior to a conviction and against employees who had refused to cooperate with the government—whether or not the refusal was justified—neither the Thompson Memo nor its application by the prosecutors was narrowly tailored to achieve a compelling government interest.⁴⁶ Judge Kaplan also held that the Thompson Memo interfered with the Sixth Amendment right to counsel by discouraging, and in some cases preventing, companies from providing employees “with the financial means to exercise their constitutional right to defend themselves.”⁴⁷
- 3) **Repercussions:** The *Stein* decision is currently under appeal with the 2nd Circuit, but however it is resolved it has led to important changes—both potential and realized—to DOJ policy. The two most notable of these changes is legislation that was introduced by Senator Arlen Specter that would

⁴⁰ *United States v. Stein*, 435 F. Supp. 2d 330, 356-360 (S.D.N.Y. 2006); Margolis & Riella at 12.

⁴¹ *Stein*, 435 F. Supp. 2d at 341-43.

⁴² *Stein*, 435 F. Supp. 2d at 352-53; Margolis & Riella, *supra* note 7, at 12.

⁴³ *Stein*, 435 F. Supp. 2d at 348-49; Margolis & Riella, *supra* note 7, at 13.

⁴⁴ *Stein*, 435 F. Supp. 2d at 349; Margolis & Riella, *supra* note 7, at 13.

⁴⁵ *Stein*, 435 F. Supp. 2d at 356-66; Margolis & Riella, *supra* note 7, at 14.

⁴⁶ *Stein*, 435 F. Supp. 2d at 363-64; Margolis & Riella, *supra* note 7, at 14.

⁴⁷ *Stein*, 435 F. Supp. 2d at 364; Margolis & Riella, *supra* note 7, at 14.

prevent the government from asking for privilege waivers and from considering payment of employee legal fees when evaluating corporate cooperation (see discussion *infra*) and the recent revisions that former Deputy Attorney General Paul McNulty made to the Thompson Memo.⁴⁸

F. The “McNulty Memo”

- 1) **Content of Memo:** As a response to criticism of the Thompson Memo, on December 12, 2006, former United States Deputy Attorney General Paul J. McNulty⁴⁹ published a new memorandum that softened some of the more controversial aspects of the Thompson Memo.⁵⁰ Also titled “Principles of Federal Prosecution of Business Organizations,” the McNulty Memo superseded the Thompson Memo and effectively re-wrote the provisions of the Thompson Memo dealing with privilege waiver and advancement of attorney fees.⁵¹

(a) **Applicable Memo Text from the Introduction:**

We have heard from responsible corporate officials recently about the challenges they face in discharging their duties to the corporation while responding in a meaningful way to a government investigation. Many of those associated with the corporate legal community have expressed concern that our practices may be discouraging full and candid communications between corporate employees and legal counsel. To the extent this is happening, it was never the intention of the Department for our corporate charging principles to cause such a result.

Therefore, I have decided to adjust certain aspects of our policy in ways that will further promote public confidence in the Department, encourage

⁴⁸ Margolis & Riella, *supra* note 7, at 2; there is also a proposed Federal Rule of Evidence that would “federalize” the selective waiver doctrine (discussed *infra*) and an effort by the ABA Task Force on Attorney-Client Privilege to draft a new Model Rule of Professional Conduct (Rule 3.4(g)) to prevent government attorneys from requesting privileged information. See Memorandum from M. Peter Moser to ABA Task Force on Attorney-Client Privilege, Liaisons and Staff on Comments received regarding Rule 3.4(g). (Feb. 6, 2007).

⁴⁹ McNulty recently announced his resignation on May 14, 2007.

⁵⁰ See Memorandum from Paul J. McNulty, Deputy Attorney General, U.S. Dep’t of Justice, to Head of Dep’t Components and U.S. Attorneys, on Principles of Federal Prosecution of Business Organizations (Dec. 12, 2006) (“McNulty Memo”); Margolis & Riella, *supra* note 7, at 17-18.

⁵¹ McNulty Memo at Intro.; Margolis & Riella, *supra* note 7, at 17-18.

corporate fraud prevention efforts, and clarify our goals without sacrificing our ability to prosecute these important cases effectively. The new language expands upon the Department’s long-standing policies concerning how we evaluate the authenticity of a corporation’s cooperation with a government investigations.⁵²

2) **Limitations Set on Privilege Waiver Requests and Payment of Employee Attorney’s Fees:** The McNulty Memo requires a “rigorous” review and approval process before a prosecutor can request a privilege waiver and limits prosecutors, in all but “extremely rare cases,” from taking into account the advancement of attorneys fees to potentially culpable employees.⁵³

(a) **Privilege Waiver:** The McNulty Memo says that privilege waiver is not a “prerequisite” to a finding that a company has “cooperated” with a government investigation.⁵⁴ According to the memo, the government can only request a waiver upon a showing of “legitimate need.”⁵⁵ Whether a legitimate need exists depends upon four factors: (1) the likelihood and degree that the privileged information will benefit the investigation; (2) whether the information sought can be obtained in a timely and complete manner that does not require a waiver; (3) the completeness of the information that has already been voluntarily provided; and (4) the collateral consequences that waiver will cause the corporation.⁵⁶ The memo dictates that if a “legitimate need” exists a prosecutor should seek the “least intrusive waiver necessary to conduct a complete and thorough investigation.”⁵⁷ The McNulty Memo also creates two tiers of privileged information, each having separate standards of approval.⁵⁸ The first tier (“Category I”) is purely factual information (i.e., witness statements, factual summaries, etc.). The second tier (“Category II”) is non-factual attorney-client communications (i.e., legal advice, attorney mental impressions, etc.).⁵⁹ To request a waiver of Category I information a prosecutor

⁵² McNulty Memo at Intro.

⁵³ McNulty Memo at VII.B.3 n.3; Margolis & Riella, *supra* note 7, at 18.

⁵⁴ McNulty Memo at VII.B.2; Margolis & Riella, *supra* note 7, at 18.

⁵⁵ McNulty Memo at VII.B.2; Margolis & Riella, *supra* note 7, at 18.

⁵⁶ McNulty Memo at VII.B.2; Margolis & Riella, *supra* note 7, at 18.

⁵⁷ McNulty Memo at VII.B.2.

⁵⁸ Margolis & Riella, *supra* note 7, at 18-19; McNulty Memo at VII.B.2.

⁵⁹ Margolis & Riella at 19; McNulty Memo at VII.B.2.

must seek approval of his or her U.S. Attorney, who must then consult with the Assistant Attorney General for the Criminal Division.⁶⁰ To request a waiver of Category II information a prosecutor must show that the Category I information already obtained is not sufficient to “conduct a thorough investigation” and must also receive the written approval of the Deputy Attorney General.⁶¹ A prosecutor can consider in the charging decision a companies refusal to comply with a Category I request but is not allowed to draw a negative inference from a refusal of a Category II request.⁶²

(b) **Advancement of Employee Attorney Fees:** The McNulty Memo also changes the conclusions that prosecutors are permitted to draw when a corporation advances legal fees to employees who are under investigation or indictment.⁶³ Prosecutors are “generally” instructed not to take into account advancement of fees when evaluating a company’s level of cooperation: “a corporation’s compliance with governing state law and its contractual obligations cannot be considered a failure to cooperate.”⁶⁴ However, the memo creates an exception to this rule in a footnote that says that the advancement of legal fees may be taken into account in “extremely rare cases” such as where the “totality of the circumstances” dictates that the fee advancement “was intended to impede a criminal investigation.”⁶⁵ But if a prosecutor wishes to consider fee advancement in their charging decision they must follow the same protocol that they need to follow to obtain Category II privileged information—receive written approval from the Deputy Attorney General.⁶⁶

3) **Impact of McNulty Memo:** It is still too early to tell the effect that the McNulty Memo will have on future government investigations. But it is clear that it did not fully address the concerns brought by critics of the Thompson

⁶⁰ Margolis & Riella at 19; McNulty Memo at VII.B.2.

⁶¹ Margolis & Riella at 19; McNulty Memo at VII.B.2.

⁶² McNulty Memo at VII.B.2. However, a “[p]rosecutor[] may always favorably consider a corporation’s acquiescence to the government’s waiver request in determining whether a corporation has cooperated in the government’s investigation.” *Id.*

⁶³ Margolis & Riella, *supra* note 7, at 19; McNulty Memo at VII.B.3.

⁶⁴ McNulty Memo at VII.B.3.

⁶⁵ *Id.* at VII.B.3 n.3.

⁶⁶ *Id.* See also Margolis & Riella, *supra* note 7, at 19-20.

Memo.⁶⁷ Despite McNulty’s attempt to satisfy the critics there are still many questions left unanswered: (1) the memo still permits the government to seek privilege waivers (albeit under a stricter standard); (2) it is hard to define the line between Category I and Category II information; (3) the McNulty rules do not apply to companies that choose to “voluntarily” waive privilege in response to informal signals from a prosecutor; (4) the line between a positive inference for a “voluntary” waiver and a refusal to waive that may not be viewed negatively is not clear (it still leaves room for “coercively inferred” waivers); (5) the “rare” occasion where a prosecutor may consider whether a company is paying employee legal fees is a subjective determination; and (6) the McNulty guidelines are not enforceable by law and do not provide a clear remedy if a prosecutor chooses to ignore them.⁶⁸

- (a) **Prepared Remarks at Panel Discussion re: Emerging Issues with Corporate Privilege Waivers:** On April 17, 2007, then Deputy Attorney General Paul McNulty appeared at a panel discussion sponsored by the D.C. Bar Criminal Law and Individual Rights Section and the Litigation Section entitled “Emerging Issues with Corporate Privilege Waivers.” In the course of his prepared remarks McNulty affirmed his belief that his Memo (which he jokingly referred to as Thompson II) should lay to rest any criticism of the Thompson Memo. As proof that prosecutors are no longer routinely asking corporations for privilege waivers—he also denied that it was *ever* routine—he said that since the McNulty memo was published in December 2006 there have only been five requests for Category I waivers and *not a single request* for a Category II waiver.⁶⁹ This could mean that the memo is having the desired effect and there is currently not a “culture of waiver” within the DOJ, or it could mean that companies are choosing to “voluntarily” waive privilege in the face of inferred threats by prosecutors. The panelists who spoke after McNulty were not convinced that the new memo went far enough and were unanimous in their belief that as long as privilege waivers are still evaluated in conjunction with cooperation with government

⁶⁷ Margolis & Riella, *supra* note 7, at 20-21.

⁶⁸ *Id.* at 21-23.

⁶⁹ During the course of his remarks McNulty also said that he was not in favor of the Specter Act (discussed *infra*) but that he supported the proposed FRE 502 (*id.*).

investigations there remained a “chilling effect” on employees having frank and open discussions with corporate counsel.⁷⁰

III. New and Proposed Legislation

A. Proposed FRE 502 – Federalization of the “Selective Waiver” Doctrine

- 1) **Amendment to FRE:** A recent proposed Amendment to the Federal Rules of Evidence seeks to soften the impact that waiver of the attorney-client and work product privileges has on companies that are under government investigation.⁷¹ Under proposed Federal Rule of Evidence 502 (“Rule 502”) the waiver of either privilege, “when made to a federal public office or agency in the exercise of its regulatory, investigative, or enforcement authority [will] not operate as a waiver of the privilege or protection in favor of non-governmental persons or entities.”⁷² Rule 502 would “effectively resuscitate” the selective waiver doctrine and protect companies that waive the privilege in response to government investigations from having to produce the same privileged information to private parties in related civil lawsuits.⁷³
- 2) **Effect of Rule 502:** While Rule 502 would seem to mitigate the effects of “voluntary” waiver pursuant to the McNulty Memo it could also cause more harm than good. On its face the rule protects corporations from the effects of privilege waivers; however, it does nothing to protect corporate *employees* from the effects of a waiver. Moreover, by eliminating a ground for refusing a government waiver request, Rule 502 would arguably *encourage* privilege waivers.⁷⁴ This could mean that confidential conversations between employees and corporate counsel would be even more likely to be discoverable by government investigators and would create a stronger disincentive against corporate employees having frank discussions with corporate counsel. Thus, Rule 502 would have the ironic effect of mitigating

⁷⁰ In addition to Deputy Attorney General Paul J. McNulty, the panel consisted of Susan Hackett, Senior Vice President and General Counsel, Association of Corporate Counsel, Washington, D.C., R. William Ide II, Partner, McKenna Long and Aldridge LLP, Chair, ABA Task Force on Attorney Client Privilege, Atlanta, GA; Stephanie Middleton, Chief Civil Counsel, Committee on the Judiciary, United States Senate, Washington D.C.; Richard Cullen, Partner, McGuire Woods, Richmond, VA; and Thomas Hanusik, Partner, Crowell and Moring, Washington, D.C.

⁷¹ Margolis & Riella, *supra* note 7, at 11.

⁷² Proposed Fed. R. Evid. 502(c) (2006).

⁷³ Margolis & Riella, *supra* note 7, at 11.

⁷⁴ *Id.*

the Thompson and McNulty Memos' stated purpose of corporate self-policing by making it more difficult for corporations to perform internal investigations and operate compliance programs.⁷⁵ Nonetheless, Rule 502 is likely to have the support of companies that are eager to appear to be cooperating with the DOJ yet do not want to risk waiving the applicable privilege to third parties.

B. Regulatory Relief Act of 2006

- 1) **Background:** On October 13, 2006, President Bush signed legislation establishing the selective waiver doctrine in the banking field. The legislation made disclosure of attorney-client privileged materials to banking authorities—U.S. or foreign—no longer act as waiver to third parties.
- 2) **The Act:** The Financial Services Regulatory Relief Act of 2006, adopts the doctrine of selective waiver for disclosures to authorities regulating banks and credit unions:

The submission by any person of any information to any Federal..., State..., or foreign banking authority for any purpose in the course of any supervisory or regulatory process of such agency ... shall not be construed as waiving, destroying, or otherwise affecting any privilege such person may claim with respect to such information under Federal or State law as to any person or entity other than such agency, supervisor, or authority.⁷⁶

- 3) **Effect of the Act:** Because the Act removes a large disincentive for companies to waive privilege it will undoubtedly lead to additional waivers. Consequently, the Act suffers from the same paradox as Rule 502; by discouraging frank discussion between employees and counsel it will make it harder for companies to operate effective internal investigations and compliance programs.

C. The “Attorney-Client Privilege Protection Act of 2006/2007”

- 1) **Background:** On September 12, 2006, the Senate Judiciary Committee held a hearing entitled “The Thompson Memorandum’s Effect on the Right to

⁷⁵ *See id.* at 8.

⁷⁶ Financial Services Regulatory Relief Act of 2006, Pub. L. No. 109-351, § 607(a) (to be codified at 12 U.S.C. § 1828). *See also* § 607(b) (to be codified at 12 U.S.C. § 1785) (credit unions).

Counsel in Corporate Investigations.”⁷⁷ At the hearing various prominent practitioners testified against the DOJ policy under the Thompson Memo—then in effect—of considering a companies willingness to waive privilege when evaluating cooperation.⁷⁸ Former Deputy Attorney General Paul McNulty testified at the hearing in support of the Thompson Memo; however, he also hinted that he may be willing to revise DOJ policy if he became convinced that revisions were “necessary and in the public interest.”⁷⁹ At the hearing Senator Arlen Specter chastised McNulty and communicated his willingness to introduce legislation if the DOJ refused to act to change the problems with the Thompson Memo.⁸⁰

- 2) **The Bill:** On December 7, 2006 Senator Specter introduced the Attorney-Client Privilege Protection Act of 2006 (the “Specter Bill”).⁸¹ The Specter Bill contained, among other things, provisions that would prevent prosecutors from requesting waivers of the attorney-client privilege or work-product protection or of conditioning a civil or criminal charging decision on an assertion of privilege or the contribution of legal fees to an employee.⁸² The 109th Congress came to a close without any action taken on the bill. Though the McNulty Memo was introduced on December 12, 2006, just five days after Specter first introduced the legislation, Senator Specter was apparently not impressed with the memo, because he promptly re-introduced the Specter Bill in the 110th Congress on January 4, 2007.⁸³
 - (a) **Support for the Bill:** The Specter Bill has the wide support of many groups including the American Bar Association, Association of Corporate Counsel, the National Association of Criminal Defense Lawyers, the American Civil Liberties Union, Business Roundtable, National Association of Manufacturers, American Chemistry Counsel,

⁷⁷ *The Thompson Memorandums Effect on the Right to Counsel in Corporate Investigations: Hearing Before the S. Comm. On the judiciary*, 109th Cong. (Sept. 12, 2006) (“Thompson Memo Hearing”); Margolis & Riella, *supra* note 7, at 16.

⁷⁸ Thompson Memo Hearing; Margolis & Riella at 16.

⁷⁹ Thompson Memo Hearing, Statement of Paul J. McNulty, Deputy Attorney General; Margolis & Riella, *supra* note 7, at 16.

⁸⁰ Kevin Drawbaugh, *Attorney-Client Right Waivers Concern Senators*, Nat’l Ass’n Crim. Defense Law., Sept. 12, 2006; Margolis & Riella at 16.

⁸¹ Margolis & Riella, *supra* note 7, at 16.

⁸² Attorney-Client Privilege Protection Act of 2006, S. 30, 109th Cong (2006).

⁸³ Attorney-Client Privilege Protection Act of 2007, S. 186, 110th Cong (2006); Margolis & Riella, *supra* note 7, at 17.

Financial Services Roundtable, Retail Industry Leaders Association, Frontiers of Freedom, Washington Legal Foundation and the U.S. Chamber of Commerce.⁸⁴ The American Bar Association released a Fact Sheet in February 2007 that describes why McNulty Memo falls short of fixing the problems with the Thompson Memo and explains why the ABA “strongly supports” the Specter Bill.⁸⁵

- 3) **Effect of the Bill:** The Specter Bill is currently pending in the Senate with an unknown future. Whatever its fate, one thing is clear. Because it does not suffer from the same limitations as the McNulty Memo or proposed Rule 502, the Specter Bill is the best solution for opponents of “voluntary” privilege waiver.⁸⁶

IV. Conclusion

The DOJ has proven, with the McNulty Memo, that it is willing to be flexible with its policies regarding corporate investigations. Nonetheless, as long as privilege waivers are used to evaluate corporate cooperation with government investigations critics will undoubtedly argue that employees will be less likely to utilize corporate counsel, which, in turn, will make it hard for companies to run internal investigations and corporate compliance programs. Because the DOJ appears disinclined to alter its policy again in the near future, if a change occurs, it will likely come in the form of the Specter Act or proposed Rule 502. Because Rule 502 does not limit—and may even encourage—waivers, the Specter Act is the only solution currently being considered that is likely to silence the critics of DOJ policy under the Thompson and McNulty Memos.

⁸⁴ ABA Fact Sheet, *supra* note 1; Margolis & Riella, *supra* note 7, at 16-17.

⁸⁵ ABA Fact Sheet, *supra* note 1. For example, the Fact Sheet argues that because the McNulty Memo continues to encourage waivers it interferes with employees consulting with corporate counsel, which impedes internal investigations and corporate compliance programs, which in turn, causes harm to companies and the investing public.

⁸⁶ The Specter Bill also applies to other government agencies with a policy of encouraging privilege waivers such as the Securities and Exchange Commission, Department of Housing and Urban Development and Commodity Futures Trading Commission.

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