

*The McNulty Memo -
Update on DOJ and SEC
Cooperation Standards*



Thomas O. Gorman, Esq.
Porter, Wright, Morris & Arthur LLP
Washington, D.C.
www.secactions.com

January 2007



Introduction

- December 12, 2006, McNulty Memo responds to critics of prior DOJ corporate charging policies
 - Similar critics of SEC’s Seaboard Release
 - Critics: “Culture of Waiver”
 - Redrafts DOJ policies re: waiver of attorney-client privilege



McNulty Memo

- Significant Changes:
 - Tone
 - Privilege
 - Limits on Waiver Requests
 - Indemnification



Tone

- Government and Business have common cause
- Waiver is not required
- Acknowledges importance of attorney-client privilege



Limits on Waiver Requests

- Multi-factor test for need:
 - (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 from alternative means;
 - (3) the completeness of the voluntary disclosures provided; and
 - (4) the collateral consequences of a waiver to the company.



Limits on Waiver Requests

- Category I Information
 - Factual
 - Can request
 - Authorization US Attorney/Asst. AG Criminal Div.
 - Can influence charging
- Category II Information
 - Non-factual work product
 - Can request in “rare” circumstances
 - Authorization US Attorney/Deputy AG
 - Cannot influence charging



Indemnification

- Generally cannot be considered
- Matter of state law
- Prosecutors may inquire



Analysis – McNulty v. Thompson

- **Tone**
 - McNulty: invokes an aura of cooperation between corporations and the government.
 - Thompson: directed prosecutors to be skeptical and view offers of corporate cooperation with a jaundiced eye.
- **Privilege**
 - McNulty: acknowledges the importance; waiver is not required to be cooperative.
 - Thompson: did not address importance of privilege.



Analysis – McNulty v. Thompson

- **Voluntary waiver**
 - McNulty: prosecutors can consider voluntary waiver in assessing cooperation as part of the charging decision.
 - Thompson: provides that waiver may sometimes be necessary.
- **Waiver**
 - McNulty: waiver request is restricted based on type of information sought and can only be a negative factor in a charging decision when a company refuses to provide Category I information.
 - Thompson: waiver request is not restricted and a company's decision to waive or not can be a factor in any charging decision.



Analysis – McNulty v. Thompson

- Indemnification
 - McNulty: generally cannot consider payments in charging process; however, can ask questions about payments.
 - Thompson: may consider as evidence of lack of cooperation.
- Termination of employees
 - McNulty: can consider if culpable employees terminated.
 - Thompson: can consider if culpable employees terminated.



Analysis – McNulty v. Thompson

- Common interest agreements
 - McNulty: not mentioned.
 - Thompson: may consider as evidence of lack of cooperation.



Issues Not Resolved by McNulty

- Failure to provide bright line cooperation standards
- Indemnification – does not respond to US v. Stein
- Employee termination
- Common interest agreements



Conclusion

- Important step
- May not go far enough
- Future will tell