

In recent years, a number of federal governmental agencies have adopted policies that erode the attorney-client privilege, the work product doctrine, and employee legal protections in the corporate context. Although all of these policies raise concerns, the most troublesome are the Department of Justice's policy—set forth in the 2003 “Thompson Memorandum” and 2006 “McNulty Memorandum”—and the Securities and Exchange Commission's policy—set forth in the 2001 “Seaboard Report”—that pressure companies and other organizations to waive their privileges as a condition for receiving cooperation credit during investigations. The ABA also opposes separate provisions in each of these policies that erode employees' constitutional and other legal rights by pressuring companies to forgo paying their employees' legal fees during investigations or to take other punitive actions against them long before any guilt has been established.

Although the Justice Department issued new cooperation guidelines on December 12, 2006, as part of the “McNulty Memorandum,” the new policy falls far short of what is needed to prevent further erosion of fundamental attorney-client privilege, work product, and employee legal protections. While the new policy requires prosecutors to obtain high-level Departmental approval before they can demand waiver of a company's privileges, it fails to end the practice and continues to encourage routine waiver by rewarding companies for their “unsolicited” offers to waive these protections. Also, while the new DOJ policy bars prosecutors from requiring companies to forgo paying their employees' legal fees in many—but not all—cases in return for cooperation credit, it continues to pressure companies to take other punitive actions against employees in return for such credit, long before any guilt is established.

On January 4, 2007, Sen. Arlen Specter (R-PA) introduced S. 186, which would reverse all of these harmful federal agency policies. Rep. Bobby Scott (D-VA) also introduced an identical House bill, H.R. 3013, which the House Judiciary Committee approved on August 1. **The ABA urges Congress to pass this legislation as soon as possible because:**

- **Unless these federal agency waiver policies are reversed, they will continue to cause the routine compelled waiver of attorney-client privilege and work product protections.** Instead of eliminating the improper practice of forcing companies to waive their privileges in return for credit, the McNulty Memorandum still allows prosecutors to demand waiver after receiving high level Department approval and grants companies credit if they “voluntarily” waive without being asked. Whether direct or indirect, government demands for waiver are unjustified, as prosecutors only need the relevant facts to enforce the law, not the opinions or mental observations of corporate counsel.
- **These policies will continue to seriously weaken the attorney-client privilege between companies and their lawyers and undermine companies' internal compliance programs.** Lawyers play a key role in helping companies and their officials comply with the law and act in the entity's best interests. To fulfill this role, lawyers must enjoy the trust and confidence of the company's officers, directors, and employees, and must be provided with all relevant information necessary to properly represent the entity. By pressuring companies to waive these protections, the McNulty Memorandum, the Seaboard Report, and other similar policies discourage company personnel from consulting with the company's lawyers, thereby impeding the lawyers' ability to conduct thorough internal investigations and effectively counsel compliance with the law. This harms companies, employees and the investing public as well.
- **These policies will continue to erode employees' legal rights by pressuring companies to take unfair punitive action against them during investigations.** While the McNulty Memorandum bars prosecutors from requiring companies to forgo paying their employees' legal fees in many cases, it carves out a broad exception that could swallow the general rule. In addition, the new DOJ policy, the Seaboard Report, and other similar policies deny credit to companies that assist employees with their legal defenses or decline to fire them for exercising their Fifth Amendment rights. By forcing companies to punish employees long before any guilt has been shown, these policies weaken the presumption of innocence principle, overturn basic corporate governance principles, and violate the Constitution.
- **Legislation to reverse these harmful government policies enjoys widespread support.** In addition to the ABA, the legislation is strongly supported by a broad coalition of business and legal groups ranging from the U.S. Chamber of Commerce to the ACLU, state and local bar associations, and numerous former senior Justice Department officials. Additional information is available online at <http://www.abanet.org/poladv/priorities/privilegewaiver/acprivilege.html>.