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Protecting the Attorney-Client Privilege

ABA Urges Reversal of Federal Agency Waiver Policies

In recent years, a number of federal government agencies have adopted policies that erode the attorney-client privilege, the work product doctrine, and employee legal protections in the corporate context. Each of these policies—including the Justice Department's 2003 "Thompson Memorandum" and 2006 "McNulty Memorandum," the Securities and Exchange Commission's 2001 "Seaboard Report," and others—pressure companies and other organizations to waive their attorney-client privilege and work product protections as a condition for receiving cooperation credit during investigations. The policies also weaken employees' Sixth Amendment right to counsel, Fifth Amendment right against self-incrimination, and other fundamental rights by pressuring companies not to pay their employees' legal fees during investigations, to fire them for not waiving their rights, and to take other punitive actions against them before any guilt has been established.

Although the Justice Department issued revised cooperation standards in December 2006 as part of the "McNulty Memorandum," the revised policy continues to allow prosecutors to demand that companies waive their attorney-client privilege and work product protections—and take punitive actions against their employees—in many cases. As such, the McNulty Memorandum falls far short of what is needed to prevent further erosion of these fundamental rights. While the Department recently announced plans to introduce a new waiver policy to replace the McNulty Memorandum "very soon," the new policy will not solve the larger problem of government-coerced waiver, in part because it will not affect the similar waiver policies adopted by the SEC, HUD, EPA, and other agencies.

In July 2007, Rep. Bobby Scott (D-VA) introduced H.R. 3013, which would reverse all of these harmful federal agency policies, and the House approved the bill last November. A Senate companion measure, S. 3217 (formerly S.186), was introduced by Sen. Arlen Specter (R-PA) and is pending in the Senate Judiciary Committee. **The ABA urges Congress to pass this legislation—known as the "Attorney-Client Privilege Protection Act"—as soon as possible because:**

- **Unless the DOJ and other 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.

- **The federal agency waiver policies 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.

- **The agency policies 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 DOJ officials and U.S. Attorneys. Additional information is available at http://www.abanet.org/poladv/priorities/privilegewaiver/acprivilege.html.

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