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TROUTMAN SANDERS
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e-Alert

Special Investigations

THE JUSTICE DEPARTMENT'S NEW MCNULTY MEMORANDUM - DOES IT CHANGE ANYTHING?

WHY THIS ALERT:
E-Alerts are brought to you by Troutman Sanders LLP to keep you informed of any recent changes in the law, upcoming regulatory deadlines or significant judicial opinions that could impact your business.

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THE RETREAT FROM THE THOMPSON MEMORANDUM

In January 2003, then-Deputy Attorney General Larry Thompson authorized federal prosecutors to consider penalizing corporations and other businesses that refuse requests to waive attorney-client privileges and work product protection. After four years of wide-spread business objections, severe judicial criticism and Congressional proposals to overrule the Thompson Memorandum, Paul McNulty, the new Deputy Attorney General, has issued a superseding memorandum. While most critics assert that the new McNulty rules do not retreat far enough from the Thompson Memorandum, McNulty's new rules do provide some opportunity for protection against the dilemma of early waiver requests.

THE EARLY WAIVER DILEMMA

Under the Thompson Memorandum – even as modified by the October 2005 McCallum Memorandum establishing a written procedure within each U.S. Attorneys Office – there was no prohibition against a prosecutor's requesting a waiver at the outset of contact with a subject or target. Indeed, there was every incentive to make such a request, as it would give the government an early lawyer's inside perspective on the matter. For maximum pressure, the prosecutor would typically request a counsel-privilege waiver as a condition of delaying actions that could irreparably harm a subject company and its stakeholders. The company's officers and directors were then faced with the Hobson's Choice of either agreeing to a waiver that would give access to the privileged material, not only to the government, but to all others, or refusing the request and explaining later why it invited the adverse enforcement action when, as it believed and later confirmed, it did nothing wrong.

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While not addressing this dilemma, the McNulty Memorandum tacitly acknowledges that its practice of routinely requesting waivers may have had the effect of interfering with the truth and completeness of a subject's internal investigation, as interviewees may withhold full information knowing that what they say may be shared with prosecutors. Equally important, McNulty was surely aware of a significant political threat to his control of the criminal investigation and charging process.

AN OPPORTUNITY

The McNulty Memorandum was issued after three years of widespread criticism of the Thompson Memorandum and just a week after Senator Specter introduced legislation intended to eliminate government requests for waiver as a matter of law. The new Democratic Chairman of the Senate Judiciary Committee has said that he will introduce similar legislation in the new Congress. The U.S. Sentencing Commission had already tacitly indicated a retreat from the significance of privilege waiver in determining cooperation by removing a reference to it in its Guidelines.

Evidently aware that the provisions of his Memorandum would not avert congressional limitations unless the Justice Department's practice actually changed, McNulty has included four notable provisions: (1) a request for waiver will be approved only after prosecutors have reviewed the subject's cooperation, analyzed evidence from alternative sources and can demonstrate a need for privileged material; (2) the Assistant Attorney General or the Deputy Attorney General in Washington must review and issue any approvals; (3) the process will be documented, and, thus, accessible for congressional review; and (4) the subject will be advised in writing if a waiver request is approved. This voluntary submission to a specific procedure in a fishbowl provides a significant opportunity for subjects to resist any early request for privilege waiver.

Having issued his new rules with assertions that they will avert the erosion of counsel privileges attributed to the Thompson Memorandum, McNulty would risk an immediate congressional over-ride of his authority over privilege waivers if he or his Assistant Attorney General should approve a request for waiver in any but the most compelling circumstances. Indeed, McNulty can expect to testify in the new Congress that the new rules are working so well that congressional action is unnecessary. And since, by his own direction, such approval will be documented internally and by notice to the subject of the request, any wink-and-a-nod circumvention of the stated approval process would be very difficult, particularly where the subject's counsel is aware of the opportunity to insist on compliance with McNulty's new directions. There is an opportunity, then, to withhold counsel-privileged materials until

the client and counsel can make an informed judgment whether it serves the client's interest to offer to produce them. Attention to this opportunity at the outset is critical to realizing its potential.

WHAT ABOUT REGULATORY ENFORCEMENT?

The McNulty Memorandum says nothing about the regulatory enforcement agencies, many of which have demonstrated the same inclination as federal prosecutors to request early counsel-privilege waivers. While those agencies may say they are not bound by the new McNulty policy, they are subject to the same congressional and business scrutiny as the Justice Department. Indeed, Senator Specter's bill would apply, not only to criminal investigations, but also to all federal civil or criminal enforcement matters. Thus, for the same reasons that the McNulty Memorandum offers an opportunity to move toward a more level playing field when federal prosecutors are actively involved, its purpose and context indicate the same opportunities – albeit informal – for strategic judgments on waiver in an investigation by a federal regulatory enforcement agency.

SOME THINGS WILL NOT CHANGE

While the McNulty Memorandum signals opportunities to begin to reshift the balance in protecting counsel privileges, only the coercion of a request for waiver issue will be removed. Unless Congress imposes a stricter rule than McNulty, the benefits of a truly voluntary waiver will still be a component of any strategy in dealing with a government enforcement investigation.

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