Why Congress Should Act to Protect The Attorney Client Privilege

Offered by the Coalition to Preserve the Attorney-Client Privilege[1]

American Chemistry Council
American Civil Liberties Union
Association of Corporate Counsel
Business Civil Liberties, Inc.
Business Roundtable
The Financial Services Roundtable
National Association of Criminal Defense Lawyers
National Association of Manufacturers
Retail Industry Leaders Association
U.S. Chamber of Commerce

- The Coalition to Preserve the Attorney-Client Privilege strongly supports S. 186, the "Attorney-Client Privilege Protection Act of 2007," introduced by Sen. Arlen Specter (R-PA) on January 4, 2007 and we anticipate that we will support similar legislation that a bipartisan group of members of the House Judiciary Committee is planning to introduce.

- The Department of Justice has steadfastly refused to reverse its policy of pressuring companies and other organizations to waive the attorney-client privilege and work product doctrine—and take certain punitive actions against their employees—during investigations in return for cooperation credit. This policy was – until recently – embodied in its "Holder" and "Thompson" memoranda.

- The Department of Justice's new policy, outlined in the December 12, 2006 "McNulty Memorandum," is not a comprehensive solution. It falls far short of what is needed to prevent further erosion of fundamental attorney-client privilege, work product, and employee protections for the following reasons:

    - Instead of eliminating the improper Justice Department practice of requiring companies to waive their privileges in return for cooperation credit—the approach advocated by S.186—the McNulty Memorandum merely requires high level department approval before formal waiver requests can be made.

    - The McNulty Memo only applies to formal privilege waiver demands. According to our surveys of corporate lawyers, the most common method by which prosecutors convey their waiver expectations is less than formal: it takes the form of questions such as: "You're going to cooperate with this investigation, right?" This kind of request may not be reported as a waiver demand under the McNulty Memo's process, but since prosecutors can continue to encourage companies to "voluntarily" waive their attorney-

[1] The American Bar Association is prohibited from joining coalitions, but works closely with this group in promoting privilege protections and also supports S.186 and the arguments advanced in this overview as to why it's still necessary.

client privilege and work product protections in return for cooperation credit and less harsh treatment, the new memorandum all but guarantees the continued erosion of these protections. Companies will continue to feel inexorable pressure to waive in order to receive cooperation credits that are crucial to the entity's survival of the investigation and charging process.

- The McNulty Memorandum, like the previous Thompson Memorandum, 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 to comply with the law and to 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 allowing prosecutors to continue to force companies to waive these fundamental protections, the new policy, like the old Thompson Memorandum, will discourage company personnel from consulting with the company's lawyers, thereby impeding the lawyers' ability to conduct thorough internal investigations and to effectively counsel compliance with the law. This harms not only companies, but the markets, employees, and the investing public as well.

- While the new policy bars prosecutors from requiring companies to forego paying their employees' attorney fees in most—but not all—cases in return for cooperation credit, it continues to allow prosecutors to force companies to take other punitive actions against their employees in return for such credit, long before any guilt is established. As such, the new policy fails to adequately protect employees' legal rights.

- Additionally, because other government agencies—including, for example, the Securities and Exchange Commission, Department of Housing and Urban Development, and Commodity Futures Trading Commission—have followed the Justice Department's lead by adopting similar privilege waiver policies, congressional action would be necessary even if the Department changed its policies and practices.

- In essence, the key provisions of S. 186 prohibit any agent or attorney of the United States from pressuring any company or other organization to:

    - Disclose confidential information protected by attorney-client privilege or work product doctrine,

    - Refuse to contribute to the legal defense of an employee,

    - Refuse to enter into a joint defense, information sharing, or common interest agreement with an employee,

    - Refuse to share relevant information with employees that they need to defend themselves, or

    - Terminate or discipline an employee for exercising his or her constitutional or other legal rights.

- S. 186 prevents both direct coercion (e.g., demanding or requesting one of these actions) and indirect coercion (e.g., measuring cooperation or otherwise conditioning treatment on such an action).

- S. 186 protects only *valid* assertions of attorney-client privilege and work product doctrine. It does not expand these protections—which are very limited under existing law and do not prevent any investigator from investigating or examining the facts—or alter any applicable exceptions to the privilege (e.g., crime-fraud, advice of counsel).

- The bill also preserves the ability of prosecutors and other law enforcement officials to seek information that they reasonably believe is not privileged or work product.

- Although the judicial branch generally should continue to govern lawyers' conduct, the current policies and practices of the Justice Department and other agencies have so undermined the confidential attorney-client relationship that corrective legislation is necessary. Clear precedent exists for Congress enacting legislation, like S. 186, that overrides inappropriate Justice Department directives to its prosecutors: the "McDade/Murtha" law, enacted in 1998, required federal prosecutors to abide by the same state laws and rules, and local federal court rules, as all other lawyers.