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June 4, 2007

The Honorable Patrick J. Leahy
Chairman
Committee on the Judiciary
United States Senate
Washington, D.C. 20510

Re: S. 186, the “Attorney-Client Privilege Protection Act of 2007”

Dear Chairman Leahy:

On behalf of the American Bar Association (“ABA”) and its more than 415,000 members, I write to express our serious concerns regarding language in the Justice Department’s 2006 McNulty Memorandum—and other similar federal policies¹—that continue to erode the attorney-client privilege and the work product doctrine by pressuring companies and other organizations to waive these fundamental protections during investigations. The ABA also is concerned about separate provisions in these policies that erode employees’ constitutional and other legal rights, including the Sixth Amendment right to effective legal counsel and Fifth Amendment right against self-incrimination. Because of the serious and inherent problems with these policies, we urge you to support S. 186, introduced earlier this year by Senator Arlen Specter, which would protect the attorney-client privilege, the work product doctrine, and employee legal rights without impairing the ability of prosecutors to gather the information they need to enforce the law.

As you know, the Justice Department’s original privilege waiver and employee rights policies, set forth in the 1999 “Holder Memorandum” and the 2003 “Thompson Memorandum,”² instructed federal prosecutors to consider certain factors in determining whether corporations and other organizations should receive cooperation credit—and hence leniency—during government investigations. One of the key factors cited in the Holder and Thompson Memoranda—and other similar federal policies—was the organization’s willingness to waive attorney-client privilege and work product protections and

¹ In addition to the Justice Department, a number of other federal agencies have adopted similar privilege waiver policies as well, including the U.S. Sentencing Commission, the Securities and Exchange Commission (SEC), the Environmental Protection Agency (EPA), the Commodity Futures Trading Commission (CFTC), and the Department of Housing and Urban Development (HUD). While the Sentencing Commission and the CFTC reversed their waiver policies in April 2006 and March 2007, respectively, the other agencies have not done so. Copies of these federal policies are available at <http://www.abanet.org/poladv/priorities/privilegewaiver/acprivilege.html>

² See Memorandum from Eric Holder, Deputy Attorney General, Department of Justice, to Component Heads and United States Attorneys, Bringing Criminal Charges Against Corporations (June 16, 1999), available at http://www.abanet.org/poladv/priorities/privilegewaiver/1999jun16_privwaiv_dojholder.pdf. See also Memorandum from Larry D. Thompson, Deputy Attorney General, Department of Justice, to Heads of Department Components, U.S. Attorneys, Principles of Federal Prosecution of Business Organizations (January 20, 2003), at p. 7, http://www.abanet.org/poladv/priorities/privilegewaiver/2003jan20_privwaiv_dojthomp.pdf.

provide this confidential information to government investigators. Another key factor was the company's willingness to forgo paying its employees' legal fees during investigations, to fire the employees, or to take other punitive actions against them long before any guilt has been established.

In response to the widespread public outcry over the Justice Department's policies, the Senate Judiciary Committee held a hearing on September 12, 2006. After hearing the concerns expressed by the ABA, representatives of a broad coalition of business and legal groups ranging from the U.S. Chamber of Commerce to the ACLU, and Deputy Attorney General Paul McNulty, both you and Senator Specter expressed deep skepticism over the Department's policies and urged Mr. McNulty in the strongest terms to reverse those policies or face possible legislative action.³ Unfortunately, the Department has refused to reverse or fundamentally change its harmful policies.

Although the Justice Department reluctantly issued new cooperation standards on December 12, 2006, in the form 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.⁴ While the new policy requires prosecutors to obtain high-level Departmental approval before they can formally 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 generally bars prosecutors from requiring companies to forgo paying their employees' legal fees in return for cooperation credit, it still allows the practice in many cases and continues to pressure companies to take other punitive actions against their employees long before any guilt is established.

The ABA is concerned that the Justice Department's new privilege waiver and employee rights policies outlined in the McNulty Memorandum—like the previous Holder and Thompson Memoranda—will continue to cause a number of profoundly negative consequences.

First, the new McNulty Memorandum continues to lead to the routine compelled waiver of attorney-client privilege and work product protections. Instead of eliminating the improper practice of forcing companies and other entities to waive in return for cooperation credit, the McNulty Memorandum still allows prosecutors to demand waiver after receiving high level Department approval. In addition, like the Thompson Memorandum, it gives companies credit if they "voluntarily" waive without being asked.⁵ Whether direct or indirect, these waiver demands are unjustified, as prosecutors only need the relevant facts to enforce the law, not the opinions and mental impressions of corporate counsel.

³ The written statements of all witnesses appearing at the September 12, 2006 hearing are available online at http://www.abanet.org/poladv/letters/attyclient/060912testimony_hrgsjud.pdf

⁴ For a detailed analysis of the McNulty Memorandum and S. 186, please see the ABA's March 8, 2007 statement to the House Judiciary Subcommittee on Crime, Terrorism and Homeland Security, available online at http://www.abanet.org/poladv/letters/attyclient/2007mar08_privwaivh_t.pdf

⁵ According to a March 2006 survey of over 1,200 corporate counsels, almost 75% of the respondents believe that a "culture of waiver" has evolved in which agencies—including the Justice Department, the SEC, and others—believe that it is reasonable and appropriate for them to expect a company under investigation to broadly waive attorney-client privilege or work product protections. The detailed survey results are available at <http://www.acca.com/Surveys/attyclient2.pdf>. After the McNulty Memorandum was issued in December 2006, prosecutor demands for waiver have continued unabated, though most are now *informal*, so as not to trigger the procedural requirements of the new memorandum.

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Second, the McNulty Memorandum continues to seriously weaken the attorney-client privilege between companies and their lawyers and undermines companies' internal compliance programs. Lawyers play a key role in helping companies and their officials to 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 fundamental protections in order to receive maximum cooperation credit, the McNulty Memorandum discourages company personnel from consulting with the company 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 McNulty Memorandum also continues 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 memorandum continues to deny credit to companies that choose to assist their employees with their legal defenses or decline to fire them for exercising their Fifth Amendment rights against self-incrimination. By forcing companies to punish employees long before any guilt has been shown, the Department's policy weakens the presumption of innocence principle, overturns basic corporate governance principles, and violates the Constitution.

For all of these reasons, the ABA believes that the McNulty Memorandum and the other similar federal policies are fundamentally flawed and must be reversed. Therefore, the ABA strongly supports legislation like S. 186 that would bar the Justice Department and other federal agencies from pressuring companies to waive their privileges or take unfair punitive actions against their employees as conditions for receiving cooperation credit. We also support the bill's provisions that would preserve prosecutors' ability to obtain the non-privileged, factual material they need to punish wrongdoers. In our view, S. 186 would strike the proper balance between effective law enforcement and the preservation of essential attorney-client privilege, work product, and employee legal protections, and we urge you and other members of the Committee to pass the measure as soon as possible.

If you or your staff have any questions or need additional information about these issues, please ask your staff to contact Larson Frisby of the ABA Governmental Affairs Office at (202) 662-1098.

Thank you for considering the views of the American Bar Association on this subject, which is of such vital importance to our system of justice.

Sincerely,



Karen J. Mathis

cc: All members of the Senate Judiciary Committee