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Hon. Patrick J. Leahy, Chairman
Senate Committee on the Judiciary
433 Russell Senate Office Building
Washington, D.C. 20510-4502

Hon. Arlen Specter, Ranking Member
Senate Committee on the Judiciary
711 Hart Senate Office Building
Washington, D.C. 20510-3802

Re: Proposed Attorney-Client Privilege Protection Act of 2007

Dear Senators Leahy & Specter:

The Association of the Bar of the City of New York¹ (the "Association"), respectfully submits this letter, prepared by its Committee on Criminal Law ("the Committee"), in support of the "Attorney-Client Privilege Protection Act of 2007," introduced by Senator Arlen Specter (R-PA). Although the recent Justice Department policy changes are a step in the right direction, they cannot undo the damage that has occurred to our justice system. The Association's membership practices in districts in which the "culture of waiver" has become endemic, a situation that necessitates a legislative solution to the issue of compelled waivers of the privilege. As set forth further below, the Association supports S. 186, which attempts to strike a balance between the promotion of law enforcement and compliance efforts, on the one hand, and the preservation of essential legal protections on the other.

The attorney-client privilege is vital to our adversarial justice system; without frank disclosures to fully informed counsel, the system cannot function effectively. Yet, under the Thompson Memorandum, which set forth the Department of Justice's policies regarding charging decisions for corporate entities, and even under the newly implemented McNulty Memorandum, a company under governmental investigation faces pressure to forgo the protections of the attorney-client privilege, and thus, its employees have reason to suspect that its communications will not be kept confidential. As will be discussed below, the government continues to measure the extent of a company's cooperation with an investigation by how it treats individual employees that the government deems to be

¹ The Association is one of the oldest and largest local bar Associations in the United States, with a current membership of over 22,000 lawyers. The Association serves not only as a professional Association, but also as a leader and advocate through the work of over 160 committees. Among other activities, the Association's committees prepare comments for legislative bodies, regulatory agencies, and rule making committees on pending and existing laws, regulations, and rules that have broad legal, regulatory, practical, or policy implications. Further information regarding the Association can be found at its web site, www.nycbar.org.

subjects of its investigation. Under such circumstances, employees may rightly suspect that anything said to a company lawyer can and will be used against them, either by their employer, or potentially, a prosecutor. As a result, individual employees may refuse to say anything at all. In turn, internal corporate investigations, which aim at detecting possible wrongdoing and encourage employees to comply with the law, may be wholly unsuccessful.

Accordingly, S. 186 represents an important effort to end such threats to the confidential attorney-client relationship. The bill protects only valid assertions of attorney-client privilege and work product doctrine. It would not expand these protections and it would allow prosecutors and other law enforcement officials to seek information that they reasonably believe is not privileged or work product. The key provisions of this legislation would, however, 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.

A number of these issues were the focus of a pair of recent decisions in the so-called KPMG tax shelter case,² involving prosecutors in the Southern District of New York, the home District of many of the Committee's members. In that case, Judge Lewis Kaplan found that government lawyers coerced KPMG to cut off or fail to pay the defendants' legal fees provided under the accounting firm's partnership policies and stressed that if KPMG wished to be deemed cooperative and avoid indictment as an entity, it had to sever all ties with the targeted employees. Judge Kaplan held that such tactics, deployed under the authority of the Thompson Memorandum, were violations of the individual defendant employees' Fifth and Sixth Amendment rights.

Most likely in response to Judge Kaplan's findings, the Justice Department recently attempted to fix certain provisions of the Thompson Memorandum that encouraged prosecutors to make routine demands for waiver. The resulting McNulty Memorandum, issued in December 2006, generally prohibits prosecutors from considering a corporation's indemnification or advancement of attorneys' fees to individual employees when evaluating cooperation. It also made significant procedural changes to the DOJ's earlier guidelines and established a system of high-level DOJ review for all formal requests for

² *United States v. Stein*, 425 F. Supp. 2d 330 (S.D.N.Y. 2006); *United States v. Stein*, No. S1 05 Cr. 0888, 2006 WL 2060430 (S.D.N.Y. July 25, 2006).

waiver. These changes represent steps in the right direction, but do not ultimately obviate the need for a legislative solution to the problem of compelled waivers for several reasons.

First, the policies outlined in the McNulty Memorandum are flawed. For instance, the McNulty Memorandum still allows prosecutors to demand privileged information when there is a “legitimate need” and to seek information that the head of the DOJ’s Criminal Division deems “purely factual,” such as attorney notes of witness statements or attorney-prepared chronologies or summaries of key events. In practice, the material that the McNulty Memorandum describes as “purely factual,” such as attorney notes of witness interviews, typically contains information that is properly protected by the attorney-client privilege and work product doctrine. In addition, the McNulty Memorandum does not fully protect employees’ legal rights. Although prosecutors are now prohibited from requiring companies to not pay their employees’ attorneys’ fees in most—but not all—cases in exchange for cooperation credit, the McNulty Memorandum still allows prosecutors to force companies to take other punitive actions against their employees in return for cooperation credit, including the potential demand that a company terminate individual employees.

Second, the McNulty Memorandum, even if perfectly conceived and executed, applies only to the DOJ. Other federal regulatory agencies, such as the SEC and the CFTC, have also sought waivers from companies seeking to cooperate. The Memorandum would not apply to those other agencies, thus setting up a system of inconsistent and potentially conflicting privilege waiver regimes.

Third, and most importantly, the McNulty Memorandum continues to encourage companies to “voluntarily” waive their attorney-client privilege and work product protections in return for cooperation credit and less harsh treatment. By doing so, the McNulty Memorandum does not actually relieve the enormous pressure companies now feel to waive the attorney-client privilege and work product protections, even when their waiver is not explicitly demanded. Thus, while prosecutors may not explicitly request waivers from companies at the same rates as they did previously, companies continue to be under pressure to waive “voluntarily” in order to obtain cooperation credit. In a recent public statement to a D.C. Bar panel on April 17, 2007, Deputy Attorney General Paul McNulty said that, “The [McNulty] memo is accomplishing its purpose” and that requests for waivers are now fewer than ever before.³ That statement misses the point. Indeed, our members are active in the Southern and Eastern Districts of New York, and their practices routinely involve discussions of presumptive waivers with prosecutors from those districts as well as with other federal agencies, like the SEC, and, as the practice has grown increasingly commonplace, with state authorities. The Committee fears that, after years of practice under policies that have institutionalized routine waivers of the attorney-client privilege, the McNulty Memorandum may be too little, too late. The McNulty Memorandum notwithstanding, waivers of the attorney-client privilege and work product protection may remain almost always implied, and frequently, directly discussed in off-the-record conversations with federal prosecutors and discussions with other state and federal agencies.

³ “McNulty Makes Rare Appearance to Tout Justice’s Fraud Policy,” *Legal Times*, Apr. 23, 2007, at 6 (noting that, “Since the McNulty memo was issued a little more than four months ago, Justice has received just six such requests and has approved five of them. For other types of privileged material, such as the advice from a company’s lawyers to its executives, prosecutors need the approval of McNulty himself. So far, the deputy attorney general says, he’s received no such requests for that type of waiver.”).

In spite of the McNulty Memorandum, current practices and policies of the DOJ and other agencies continue to damage the confidential attorney-client relationship. In light of that fact, S. 186 would make a change to current practice that the McNulty Memorandum does and could not: it would rightly take the issue of privilege waiver off the table entirely and would end government consideration of whether or not a corporation has advanced legal fees to its employees. This is a welcome and just result and we urge you to work for the enactment of S. 186.

We appreciate the opportunity to share the Committee's views and thank you for your consideration of this important matter.

Respectfully submitted,



Barry Kamins

cc: Senate Judiciary Committee