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WHITE COLLAR ENFORCEMENT: ATTORNEY-CLIENT PRIVILEGE AND CORPORATE WAIVERS

HEARING

BEFORE THE

SUBCOMMITTEE ON CRIME, TERRORISM, AND HOMELAND SECURITY

OF THE

COMMITTEE ON THE JUDICIARY
HOUSE OF REPRESENTATIVES

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WHITE COLLAR ENFORCEMENT: ATTORNEY-CLIENT PRIVILEGE AND CORPORATE WAIVERS

TUESDAY, MARCH 7, 2006

HOUSE OF REPRESENTATIVES,
SUBCOMMITTEE ON CRIME, TERRORISM,
AND HOMELAND SECURITY
COMMITTEE ON THE JUDICIARY,
Washington, DC.

The Subcommittee met, pursuant to notice, at 12 p.m., in Room 2141, Rayburn House Office Building, the Honorable Howard Coble (Chairman of the Subcommittee) presiding.

Mr. COBLE. Good afternoon, ladies and gentlemen. We welcome you to this important oversight hearing on white-collar crime and the issue of the attorney-client privilege and waivers by corporations in criminal investigations.

At first blush, some may say that this topic is an arcane legal issue with little relevance to the general public. In fact, the attorney-client privilege is deeply rooted in our values and the legal profession. It encourages openness and honesty between clients and their attorneys so that clients hopefully can receive effective advice and counsel.

But this privilege is not inviolate. When it comes to corporate crime, there is and probably always will be an institutional tension between preserving corporate attorney-client and work product privileges and a prosecutor's quest to unearth the truth about criminal acts.

I know that one of the most important engines in our criminal justice system is cooperation. By encouraging and rewarding cooperation, prosecutors are able to unearth sophisticated fraud schemes which cause devastating harm to investors and employees and undermine our faith in the markets.

But the possible benefits of cooperation cannot be used to support a prosecutor's laundry list of demands for a cooperating corporation. Prosecutors must be zealous and vigorous in their efforts to bring corporate actors to justice. However, zeal does not in my opinion equate with coercion in fair enforcement of these laws.

To me, the important question is whether prosecutors seeking to investigate corporate crimes can gain access to the information without requiring a waiver of the attorney-client privilege. There is no excuse for prosecutors to require privilege waivers as a routine matter, it seems to me.

The Subcommittee will examine the important issue with a keen eye to determine whether Federal prosecutors are routinely requiring cooperating corporations to waive such privilege. Then-Acting Deputy Attorney General McCallum issued a memorandum on October 21, 2005 which mandated a change in Justice Department policy to try to establish a more uniform review procedure for any such requirement imposed by a prosecutor.

This is a welcome development, and the Subcommittee is interested in determining how that policy has been implemented. I am also aware of the fact that the Sentencing Commission is examining its current policy of encouraging such waivers when determining the nature and extent of cooperation.

While the guidelines do not explicitly mandate a waiver of privileges for the full benefit of cooperation, in practical terms we have to make sure that they do not operate to impose such a requirement. Our Subcommittee needs to examine this issue, work closely with the Sentencing Commission, the defense bar, and the Justice Department to make sure that a fair balance is struck.

I look forward to hearing from our distinguished panel of witnesses today, and I am now pleased to recognize the distinguished gentleman from Virginia, the Ranking Member of the Subcommittee, Mr. Bobby Scott.

Mr. SCOTT. Thank you, Mr. Chairman. And I want to thank you for holding this hearing on attorney-client privilege and corporate waivers of that privilege.

Attorney-client privilege is more usually associated with the context of protecting an individual from having to disclose communications with his or her lawyer for the purpose of criminal or civil prosecution, corporations or persons, for the sake of legal processes that are also entitled to attorney-client privilege.

As noted by the United States Supreme Court in *Upjohn vs. U.S.*, the attorney-client privilege is the oldest of privileges for confidential communications known to common law. Its purpose is to encourage full and frank communications between attorneys and their clients so that sound legal advice and advocacy can be given by counsel. Such advice or activity depends upon the lawyer being fully informed by the client.

As noted in other cases, the lawyer-client privilege rests on the need for the advocate and counselor to know all that relates to the client's reasons for seeking representation if the professional mission is to be carried out. This purpose can only be effectively carried out when the client is free from consequences or apprehensions regarding the possibility of disclosure of the information.

Exceptions to protections of the attorney—excuse me. Exceptions to the protections of the privilege do exist, but they have generally been limited to the crime-fraud exception, which holds that the privilege does not apply to an attorney-client communication in furtherance of a crime, or other cases where the client has already waived the privilege through disclosure to a non-privileged third party.

Now it appears that the Department of Justice has determined that there may be another exception, that is, when it wishes the corporation to waive the privilege in the context of a criminal investigation. For some time now I have been concerned about re-

ports that the Department of Justice is coercing corporations to waive their attorney-client privilege during criminal investigations of the corporation and its employees by making waiver a prerequisite for consideration by the Department and its recommendation for not challenging leniency should criminal conduct be established.

Now, this is particularly significant because under mandatory minimums and sentencing guidelines, prosecutorial motions for leniency may be the only way to get a sentence under the mandatory minimum. So in this case, a prosecutor often has more control over sentencing than the judge.

While the attorney-client privilege doctrine does apply to corporations, complications arise when the client is a corporation since the corporate privilege has to be asserted by persons who may themselves be the target of a criminal investigation or subject to criminal charges based on the disclosed attorney-client information. Disclosed information can be used either in criminal prosecutions or civil prosecutions. Whatever fiduciary duty an official may have to the corporation and its shareholders, it is probably superseded by the official's own self-interest in the criminal investigation.

And there is no protection for employees of the corporation against waivers of the attorney-client privilege by officials who may have their own self-interest at heart. This includes information provided by employees to corporate counsel to assist internal investigations by the corporation, even if the information was under threat of an employee being fired and even if the information constituted self-incrimination by the employee.

It is one thing for officials of a corporation to break the attorney-client privilege in their own self-interest by their own volition. It is another thing for the Department to require or coerce it by making leniency considerations contingent upon it, even when it is merely on a fishing expedition on the part of the Department. Complaints have indicated that the practice of requiring a waiver of the corporate attorney-client privilege has become routine. And, of course, why wouldn't it be the case? What is the advantage to the Department of not requiring a waiver in the corporate investigation?

Now, because of the exclusionary rule, when a confession is coerced or a search is conducted illegally, anything that is found of that becomes fruit of a poisonous tree and can't be used in a criminal prosecution. So police and prosecutors who jeopardize the case by such tainted evidence are generally disparaged by their colleagues, and thus there is a disincentive for them to pursue and collect such evidence in the first place. There is no incentive to collect evidence if it is going to ruin the case.

Although coerced confessions and illegal searches are always improper, before the exclusionary rule there was an incentive for police to coerce confessions and illegally obtain information because they could make a case based on it, and there was no penalty.

Here we have the same incentives with respect to the waiver of corporate privilege. So, not surprisingly, reports are the demand for waivers are rising, not only by the Department but by other entities as well, such as auditors as a prerequisite of issuing a clean audit.

Now, coercing corporate attorney-client privileges has not been—has not long been the practice in the Department. It has really been the last two Administrations that have practiced this, and it has been growing by leaps and bounds. Corporate attorney-client privilege has not always been the prerequisite for leniency. Providing non-privileged documents and information and providing broad access to corporate premises and employees have been traditional ways to receive benefits of corporate cooperation.

Some nine U.S. Attorneys General, Deputy Attorneys General, and Solicitors General have expressed their concerns about the current Departmental waiver policy. We will hear from witnesses today who have prosecuted corporate cases without requiring such waiver. And so, Mr. Chairman, we look forward to the testimony by the witnesses and to working with you to address the concerns regarding the Department's corporate attorney-client waiver policy.

[The prepared statement of Mr. Scott follows in the Appendix]

Mr. COBLE. Thank you, Mr. Scott. And gentlemen, we have been joined by the distinguished gentleman from California, Mr. Lungren, the distinguished gentleman from Florida, Mr. Feeney, and the distinguished gentleman from Massachusetts, Mr. Delahunt.

Gentlemen, what I am about to do I am very awkward in doing it. It is customary for the Subcommittee to administer the oath to the panelists. I know you all. I know you don't need to be sworn in to tell the truth. But if you don't mind, would each of you please stand and raise your hands.

[Witnesses sworn.]

Mr. COBLE. Let the record show each witness answered in the affirmative. And I have had the fear if I depart with you all, then the next panel is going to wonder why I don't depart from them. But you all, I am not worried about what you all say violating the truth in any way.

As I said before, we have four distinguished witnesses with us today. Our first witness is Mr. Robert McCallum, Jr., Associate Attorney General of the Department of Justice. In this capacity, Mr. McCallum advises and assists the Attorney General and the Deputy Attorney General in formulating policies pertaining to a broad range of civil justice, Federal and local law enforcement, and public safety matters. Prior to this appointment, he served as Assistant Attorney General for the Civil Division. Mr. McCallum received his undergraduate and law degrees from Yale University, and was a Rhodes Scholar at Oxford University.

Our second witness is returning to the Hill after some extended absence, the Honorable Dick Thornburgh of Kirkpatrick & Lockhart Nicholson Graham. Mr. Thornburgh's distinguished public career extends over a quarter of a century. He previously served as Governor of Pennsylvania, as Attorney General under Presidents Reagan and Bush, and as Undersecretary General of the United Nations.

Mr. Thornburgh has been awarded honorary degrees by 31 colleges and universities, and previously served as Director of the Institute of Politics at Harvard's John F. Kennedy School of Government. Mr. Thornburgh earned his undergraduate degree at Yale and his law degree at the University of Pittsburgh School of Law.

Our third witness is Mr. Thomas Donohue, President and CEO of the United States Chamber of Commerce. In his current capacity, Mr. Donohue has expanded the influence of the Chamber across the globe. He engaged the Chamber Institute for Legal Reform and revitalized the National Chamber Foundation. Previously, Mr. Donohue served for 13 years as President and CEO of the American Trucking Association, and was awarded his bachelors degree from St. Johns University and a masters degree from Adelphi University.

Our fourth and final witness today is Mr. William Sullivan, Jr., litigation partner at Winston & Strawn. In this capacity, Mr. Sullivan concentrates on corporate internal investigations, trial practice, white-collar criminal defense, and complex securities litigation.

Previously, he served for over 10 years as an Assistant United States Attorney for the District of Columbia, and has worked in private practice as a litigator. Additionally, Mr. Sullivan has addressed the World Trade Organization on Sarbanes-Oxley issues. He received his bachelors and masters degrees from Tufts University and his law degree from Cornell University.

Gentlemen, it is good to have you all with us. And as we have previously told you, without hamstringing you too severely, we try to apply the 5-minute rule here. And when you all see that amber light on your panel appear, that tells you that the ice on which you are skating is becoming thin. You have about a minute to go. And we're not going to keelhaul anybody for violating it, but if you can wrap up in as close to 5 minutes as you can.

Mr. McCallum, why don't you kick us off.

TESTIMONY OF ROBERT D. McCALLUM, JR., ASSOCIATE ATTORNEY GENERAL, U.S. DEPARTMENT OF JUSTICE

Mr. MCCALLUM. Thank you, Mr. Chairman, Ranking Member Scott, and Members of the Committee. We appreciate at the Department of Justice this opportunity to appear before you today.

Now, President Bush, this Congress, and the American people have all embraced a zero tolerance policy when it comes to corporate fraud. In passing the landmark Sarbanes-Oxley legislation in 2002, Congress gave the Department of Justice clear marching orders: prosecute fully those who would use their positions of power and influence in corporate America to enrich themselves unlawfully, and thereby restore confidence in our financial markets.

And we have done exactly that, Mr. Chairman. From July 2002 through December 2005, the Department has secured more than 900 corporate fraud convictions, including 85 presidents, 82 chief executive officers, 40 chief financial officers, 14 chief operating officers, 17 corporate counsel or attorneys, and 98 vice presidents, as well as millions of dollars in damages for victims of fraud.

Much of our success depends on our ability to secure cooperation. As Chairman Sensenbrenner noted recently, and I quote, "By encouraging and rewarding corporate cooperation, our laws serve the public interest in promoting corporate compliance, minimizing use of our enforcement resources, and leading to the prosecution and punishment of the most culpable actors."

The Department's approach to corporate fraud is set forth in the so-called Thompson Memorandum, issued by Larry D. Thompson as Deputy Attorney General. Pursuant to that memorandum, the degree to which a corporation cooperates with a criminal investigation may be a factor to be considered by prosecutors when determining whether or not to charge the corporation with criminal misconduct.

Cooperation in turn depends on—and here I quote the Thompson Memorandum—"the corporation's willingness to identify the culprits within the corporation, including senior executives; to make witnesses available; to disclose the complete results of its internal investigation; and to waive attorney-client and work product protections."

Some critics have suggested that the Department is contemptuous of legal privileges. Nothing could be further from the truth. We recognize the ability to communicate freely with counsel can serve legitimate and important functions and encourage responsible corporate stewardship and corporate governance.

But at the same time, we all must recognize that corporate fraud is often highly difficult to detect. Indeed, in recent years we have witnessed a series of highly complex corporate scandals which would have been difficult to prosecute in a timely and efficient manner without corporate cooperation, including in some instances the waiver of privileges.

The Thompson Memorandum carefully balances the legitimate interests furthered by the privilege, and the societal benefits of rigorous enforcement of the laws supporting ethical standards of conduct.

There is also a so-called McCallum Memorandum, issued during my tenure as Acting Deputy Attorney General last year, which adds to this balancing of the competing interests. The McCallum memorandum first ensures that no Federal prosecutor may request a waiver without supervisory review. And second, it requires each United States Office to institute a written waiver review policy governing such requests.

Mr. Chairman, I recognize that despite these limitations and restrictions, there are some critics of the Department's approach. While I look forward to addressing specific concerns of the Members of this Subcommittee that may occur during the questioning, let me make a few preliminary observations.

First, voluntary disclosure is but one factor in assessing cooperation, and cooperation in turn is but one factor among many considered in any charging decisions. Disclosure, thus, is not required to obtain credit for cooperation in all cases; cooperation may be had by corporations most readily without waiving anything, simply by identifying the employees best situated to provide the Government with relevant information.

Nor can the Government compel corporations to give waivers. Corporations are generally represented by sophisticated and accomplished counsel who are fully capable of calculating the benefits or harms of disclosure. Sometimes they agree; sometimes they do not agree. Whether to disclose information voluntarily always remains within the corporation's choice. And in fact, voluntary disclosure is

frequently initiated by the corporate counsel and not by the Government.

Second, under our process, waivers of privileges should not be routinely sought, and we believe are not routinely sought. Indeed, they should be sought based upon a need for three things: timely, complete, and accurate information. And they should be requested pursuant to the established guidelines, and only with supervisory approval.

Third, our approach does not diminish a corporation's willingness to undertake investigations, in our view. Wholly apart from the Government's criminal investigations, corporate management owes to its shareholders, not to itself or to its employees, but to its shareholders, a fiduciary duty to investigate potential wrongdoing and to take corrective action. To the extent that shareholders are best served by timely internal investigations, responsible management will always do so.

And finally, in some jurisdictions, voluntary disclosure to the Government waives privileges in civil litigation seeking monetary damages, thus, it is said, compounding the corporation's litigation risk. Addressing this concern, the Committee should be aware that the Evidence Committee of the Advisory Rules of the Judicial Conference is currently considering a rule that would limit use by others of privileged material voluntarily provided by a corporation in its cooperation with a Government investigation. We at the Department of Justice will be involved in the Federal Rules Advisory Committee on Evidence considering that, and we will watch that debate with interest.

In sum, Mr. Chairman, we believe that the Department has struck an appropriate balance between traditional privileges and the American people's legitimate law enforcement needs and the necessity of establishing standards.

Thank you for the opportunity to testify.

[The prepared statement of Mr. McCallum follows:]

PREPARED STATEMENT OF ROBERT D. MCCALLUM, JR.

Department of Justice

STATEMENT

OF

ROBERT D. MCCALLUM, JR.

ASSOCIATE ATTORNEY GENERAL

UNITED STATES DEPARTMENT OF JUSTICE

BEFORE THE

COMMITTEE ON THE JUDICIARY

SUBCOMMITTEE ON CRIME, TERRORISM, AND HOMELAND SECURITY

CONCERNING

OVERSIGHT HEARING ON "WHITE COLLAR ENFORCEMENT (PART I): ATTORNEY-CLIENT PRIVILEGE AND CORPORATE WAIVERS"

PRESENTED ON

MARCH 7, 2006

Mr. Chairman, Ranking Member Scott, and members of the subcommittee, thank you for the opportunity to appear before you today.

President Bush, this Congress, and the American people have all embraced a zero tolerance policy when it comes to corporate fraud. In passing the landmark Sarbanes-Oxley legislation in 2002, Congress gave the Department clear marching orders: prosecute fully those who would use their positions of power and influence in corporate America to enrich themselves unlawfully, restoring confidence in our financial markets.

We have done exactly that. Specifically, Mr. Chairman, from July 2002 through December 2005, the Department secured more than 900 corporate fraud convictions, including 85 presidents, 82 CEOs, 40 CFOs, 14 COOs, 17 corporate counsel or attorneys, and 98 vice-presidents, as well as millions of dollars in damages for victims of fraud.

Much of our success depends on our ability to secure cooperation. As Chairman Sensenbrenner noted recently - quote -

> By encouraging and rewarding corporate cooperation, our laws serve the public interest in promoting corporate compliance, minimizing use of our enforcement resources, and leading to the prosecution and punishment of the most culpable actors.

The Department's approach in corporate fraud cases is set forth in the so-called "Thompson Memo." Pursuant to that Memorandum, the degree to which a corporation cooperates with a criminal investigation may be considered by prosecutors as one factor when determining whether or not to charge the corporation with criminal misconduct.

Cooperation in turn depends on -- and here I quote -- "the corporation's willingness to identify the culprits within the corporation, including senior executives; to make witnesses available; to disclose the complete results of its internal investigation; and to waive attorney-client and work product protection."

Some critics have suggested that the Department is contemptuous of legal privileges. Nothing could be further from the truth. We recognize that the ability to communicate freely with counsel can serve legitimate and important functions and encourage responsible corporate stewardship.

At the same time, we all recognize that corporate fraud is often highly difficult to detect. Indeed, in recent years we have witnessed a series of highly complex corporate scandals, which would have been difficult to prosecute in a timely and efficient manner without corporate cooperation, including in some instances the waiver of privileges.

The Thompson memo carefully balances the legitimate interests furthered by the privilege, with the societal benefits of rigorous enforcement of the laws supporting ethical standards of conduct.

The so-called "McCallum Memo," issued during my tenure as Acting Deputy Attorney General last year, adds to this balance. The McCallum Memo first ensures that no federal prosecutor may request a waiver without supervisory review. Second, it requires each U.S. Attorney's Office to institute a written waiver review policy governing such requests.

Mr. Chairman, I recognize that despite these limitations there are some critics of the Department's approach. While I look forward to addressing specific concerns that Members of the Subcommittee may have about our policy during your questioning, let me make a few preliminary observations.

First, voluntary disclosure is but one factor in assessing cooperation, and cooperation in turn is but one factor among many considered in a charging decision. Disclosure thus is not required to obtain credit for cooperation in all cases; corporations may cooperate most readily without waiving anything simply by identifying the employees best situated to provide the government with relevant information. Nor can the government compel corporations to give waivers. Corporations are represented by sophisticated and accomplished counsel who are fully capable of calculating the benefit or harm of disclosure. Sometimes they agree; sometimes they do not. Whether to disclose information voluntarily always remains the corporation's choice. And in fact, voluntary disclosures are frequently initiated not by the government, but by corporate counsel.

Second, under our process, waivers of privileges should not be "routinely" sought. Indeed, they should be sought based upon a need for timely, complete, and accurate information, and requested pursuant to established guidelines, and only with supervisory approval.

Third, our approach should not diminish a corporation's willingness to undertake internal investigations. Wholly apart from the government's criminal investigations, corporate management owes shareholders a fiduciary duty to investigate potential wrongdoing and to take corrective action. To the extent that shareholders are best served by timely internal investigation, responsible management will always do so.

Finally, in some jurisdictions, voluntary disclosure to the government waives privileges as to civil litigation plaintiffs seeking money damages, thus compounding the corporation's litigation risk. Addressing this concern, the Evidence Committee is currently considering a rule that would limit use by others of privileged materials voluntarily provided by a corporation in cooperation with a governmental investigation. We will watch that debate with interest.

In summation, Mr. Chairman, we believe that we have struck an appropriate balance between traditional privileges and the American people's legitimate law enforcement needs.

Thank you again for the opportunity to testify, and I look forward to your questions.

Mr. COBLE. Thank you, Mr. McCallum.
Mr. Thornburgh.

TESTIMONY OF THE HONORABLE DICK THORNBURGH, KIRKPATRICK & LOCKHART NICHOLSON GRAHAM LLP

Mr. THORNBURGH. Chairman Coble, Ranking Member Scott, Members of the Subcommittee, I want to thank you for the invitation to speak to you today about the grave dangers posed to the attorney-client privilege and work product doctrine by current governmental policies and practices.

At the outset, let me commend you for being the first Congressional body to convene a hearing on this very worrisome situation. The attorney-client privilege, as we all know, is a fundamental element of the American system of justice, and I fear that we have all been too slow in recognizing how seriously the privilege has been undermined in the past several years by Government action. Your focus on this issue today is vitally needed and much appreciated.

The attorney-client privilege is the oldest of the evidentiary privileges originating in the common law of England in the 1500's. Although the privilege shields from disclosure evidence that might otherwise be admissible, courts have found that this potential loss of evidence is outweighed by the benefits to the immediate client, who receives better advice, and to society as a whole, which obtains the benefits of voluntary legal compliance.

These ideas have been embraced time and time again by our courts. In the words of the Supreme Court, the privilege encourages "full and frank communication between attorneys and their clients, and thereby promotes broader public interest in the observance of law and the administration of justice." The attorney-client privilege is thus a core element in a law-abiding society and a well-ordered commercial world.

And yet the previously solid protection that attorney-client communications have enjoyed has been profoundly shaken by a trend in law enforcement for the Government to, in effect, demand a waiver of a corporation's privilege as a precondition for granting the benefits of cooperation that might prevent indictment or diminish punishment. These pressures emanate chiefly from the Department of Justice and the Securities and Exchange Commission.

Beginning with the 1999 Holder Memorandum, and as more forcefully stated in the 2003 Thompson Memorandum, the Department of Justice has made clear its policy that waiver of the attorney-client and work product protections is an important element in determining whether a corporation may get favorable treatment for cooperation. The SEC, in a public report issued at the conclusion of an investigation, outlined a similar policy.

Finally, the U.S. Sentencing Commission in 2004 amended the commentary to its sentencing guidelines so that waiver of privilege becomes a significant factor in determining whether an organization has engaged in timely and thorough cooperation necessary for obtaining leniency. Following the Federal lead, State law enforcement officials are beginning to demand broad privilege waivers, as are self-regulatory organizations and the auditing profession.

While the tone of these documents may be moderate, and officials representing these entities stress their intent to implement them in reasonable ways, it has now become abundantly clear that in actual practice, these policies pose overwhelming temptations to prosecutors seeking to save time and resources and to target organizations desperate to save their very existence. And each waiver has a ripple effect that creates more demands for greater disclosures, both in individual cases and as a matter of practice. Once a corporation discloses a certain amount of information, then the bar is raised for the next situation, and each subsequent corporation will need to provide more information to be deemed cooperative.

The result is documented in a survey released just this week to which over 1400 in-house and outside counsel responded, in which almost 75 percent of both groups agreed—almost 40 percent agreeing strongly—that a culture of waiver has evolved in which Government agencies believe it is reasonable and appropriate for them to expect a company under investigation to broadly waive attorney-client privilege or work product protections.

I practice law at a major firm with a significant white-collar criminal defense practice. My partners generally report that they now encounter waiver requests in virtually every organizational criminal investigation in which they are involved. In their experience, waiver has become a standard expectation of Federal prosecutors. Others with whom I have spoken in the white-collar defense bar tell me the same thing.

I am prepared to concede that the significance of these developments took some time to penetrate beyond the Beltway and the relatively small community of white-collar defense lawyers. It is clear, however, that as the legal profession has become aware of the problem, it has resulted in a strong and impassioned defense of the attorney-client privilege and the work product protection.

This issue was the hottest topic at last summer's annual meeting of the American Bar Association, and at its conclusion, the ABA House of Delegates unanimously passed a resolution that strongly supports the preservation of the attorney-client privilege and opposes policies, practices, and procedures of Government bodies that have the effect of eroding the attorney-client privilege.

I was one of those nine former Department of Justice officials from both Republican and Democratic Administrations who, as the Chairman noted, signed a letter to the Sentencing Commission last summer urging it to reconsider its recent amendment regarding waiver.

It is never a simple matter to enlist such endorsements, particularly in the summertime and on short notice. And yet it was not difficult at all to secure those nine signatures because all feel so strongly about the fundamental role the attorney-client privilege and work product protections play in our system of justice.

We feel just as strongly that the other governmental policies and practices outlined above seriously undermine those protections. As you know, I served as a Federal prosecutor for many years, and I supervised other Federal prosecutors in my capacities as U.S. Attorney, Assistant Attorney General in charge of the Criminal Division, and Attorney General of the United States. Throughout those years, requests to organizations we were investigating to hand over

privileged information never came to my attention. One wonders what has changed in the past decade to warrant such a dramatic encroachment on the attorney-client privilege.

Clearly, in order to be deemed cooperative, an organization under investigation must provide to the Government all relevant factual information and documents in its possession, and it should assist the Government by explaining the relevant facts and identifying individuals with knowledge of them. But in doing so, it should not have to reveal privileged communications or attorney work product.

That limitation is necessary to maintain the primacy of those protections in our system of justice. It is a fair limitation on prosecutors, who have extraordinary powers to gather information for themselves. This balance is one I found workable in my years of Federal service, and it should be restored.

I was pleased to see the Sentencing Commission earlier this year request comment on whether it should delete or amend the commentary sentence regarding waiver. In testimony last fall, I urged it to provide affirmatively that waiver should not be a factor in assessing cooperation. I understand that the American Bar Association will shortly approach the Department of Justice with a request that the Thompson Memorandum be revised in similar fashion. These are promising developments.

Mr. Chairman, I thank you again for beginning a much-needed process of Congressional oversight of the privilege waiver crisis. This is not an issue that Washington lobby groups have orchestrated, but it is one that likely will take Congressional attention to resolve.

Thank you. I look forward to your questions.

[The prepared statement of Mr. Thornburgh follows:]

PREPARED STATEMENT OF DICK THORNBURGH

Good morning, Chairman Coble and members of the Subcommittee, and thank you for the invitation to speak to you today about the grave dangers posed to the attorney-client privilege and work product doctrine by current governmental policies and practices. At the outset, let me commend you for being the first Congressional body to convene a hearing on this very worrisome situation. The attorney-client privilege is a fundamental element of the American system of justice, and I fear that we have all been too slow in recognizing how seriously the privilege has been undermined in the past several years by government actions. Your focus on this issue today is vitally needed and much appreciated.

The attorney-client privilege is the oldest of the "evidentiary privileges," originating in the common law of England in the 1500s.[1] Although the privilege shields from disclosure evidence that might otherwise be admissible, courts have found that this potential loss of evidence is outweighed by the benefits to the immediate client, who receives better advice, and society as a whole, which obtains the benefits of voluntary legal compliance. These ideas have been embraced time and time again by the courts—in the words of the Supreme Court, the privilege encourages "full and frank communication between attorneys and their clients and thereby promote[s] broader public interest in the observance of law and administration of justice."[2] The attorney-client privilege is thus a core element in a law-abiding society and a well-ordered commercial world.

And yet the previously solid protection that attorney-client communications have enjoyed has been profoundly shaken by a trend in law enforcement for the government to demand a waiver of a corporation's privilege as a precondition for granting the benefits of "cooperation" that might prevent indictment, or diminish punishment. These pressures emanate chiefly from the Department of Justice ("DOJ") and

[1] *See Berd v. Lovelace,* 21 Eng. Rep. 33 (Ch. 1577); *Dennis v. Codrington,* 21 Eng. Rep. 53 (Ch. 1580) (finding "A counselor not to be examined of any matter, wherein he hath been of counsel").

[2] *Upjohn Co. v. United States,* 449 U.S. 383, 389 (1981).

the Securities and Exchange Commission ("SEC"). Beginning with the 1999 "Holder Memorandum," and as more forcefully stated in the 2003 "Thompson Memorandum," DOJ has made clear its policy that waiver of the attorney-client (and work product) protections is an important element in determining whether a corporation may get favorable treatment for cooperation.[3] The SEC, in a public "report" issued at the conclusion of an investigation, outlined a similar policy.[4] Finally, the U.S. Sentencing Commission in 2004 amended the commentary to its Sentencing Guidelines so that waiver of privilege became a significant factor in determining whether an organization has engaged in the timely and thorough "cooperation" necessary for obtaining leniency.[5] Following the federal lead, state law enforcement officials are beginning to demand broad privilege waivers, as are self-regulatory organizations and the auditing profession.[6]

While the tone of these documents may be moderate, and officials representing these entities stress their intent to implement them in reasonable ways, it has by now become abundantly clear that, in actual practice, these policies pose overwhelming temptations to prosecutors seeking to save time and resources and to target organizations desperate to save their very existence. And each waiver has a "ripple effect" that creates more demands for greater disclosures, both in individual cases, and as a matter of practice. Once a corporation discloses a certain amount of information, then the bar is raised for the next situation, and each subsequent corporation will need to provide more information to be deemed cooperative.

The result is documented in a survey released just this week to which over 1,400 in-house and outside counsel responded, in which almost 75% of both groups agreed—almost 40% agreeing strongly—that a "'culture of waiver' has evolved in which governmental agencies believe it is reasonable and appropriate for them to expect a company under investigation to broadly waive attorney-client privilege or work product protections." I practice law at a major firm with a significant white collar criminal defense practice. My partners generally report that they now encounter waiver requests in virtually every organizational criminal investigation in which they are involved. In their experience, waiver has become a standard expectation of federal prosecutors. Others with whom I've spoken in the white collar defense bar tell me the same thing.

I am prepared to concede that the significance of these developments took some time to penetrate beyond the Beltway and the relatively small community of white collar defense lawyers. It is clear, however, that as the legal profession has become aware of the problem, it has resulted in a strong and impassioned defense of the attorney-client privilege and work product protection. This issue was the hottest topic of last summer's Annual Meeting of the American Bar Association ("ABA"), and at its conclusion, the ABA House of Delegates unanimously passed a resolution that "strongly supports the preservation of the attorney-client privilege" and "opposes policies, practices and procedures of government bodies that have the effect of eroding the attorney-client privilege. . . ."[7]

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[3] *See* Memorandum from Deputy Attorney General Larry D. Thompson to Heads of Department Components and United States Attorneys, *Re: Principles of Federal Prosecution of Business Organizations* (January 20, 2003); available at *www.usdoj.gov/dag/cftf/business—organizations.pdf.* The DOJ recently re-affirmed that the Thompson Memorandum remains the Department's official policy. *See* Memorandum from Acting Deputy Attorney Robert D. McCallum, Jr. to Heads of Department Components and United States Attorneys, *Re: Waiver of Corporate Attorney-Client and Work Product Protection* (October 21, 2005) (the "McCallum Memorandum"); available at *http://www.usdoj.gov/usao/eousa/foia—reading—room/usam/title9/crm00163.htm.*

[4] *See Report of Investigation Pursuant to Section 21(a) of the Securities Exchange Act of 1934 and Commission Statement on the Relationship of Cooperation to Agency Enforcement Decisions,* SEC Release Nos. 34–44969 and AAER-1470 (Oct. 23, 2001) (the "Seaboard Report"); available at http://www.sec.gov/litigation/investreport/34-44969.htm.

[5] United States Sentencing Commission, *Guidelines Manual,* § 8C2.5(g), comment 12 (Nov. 2004).

[6] For example, in late 2005 the New York Stock Exchange issued a memorandum detailing the degree of "required" or "extraordinary" cooperation Members and Member Firms could and should engage in with the Exchange. *See* NYSE Information Memorandum No. 05–65, *Cooperation,* dated September 14, 2005. Exchange Members engaging in "extraordinary" cooperation, including waiver of the attorney-client privilege, are able to reduce prospective fines and penalties levied by the Exchange. *See, e.g.,* NYSE News Release, *NYSE Regulation Announces Settlements with 20 Firms for Systemic Operational Failures and Supervisory Violations* (January 31, 2006) (noting that Goldman, Sachs & Co. had been credited with "extraordinary" cooperation by self-reporting violations, and indicating it received the lowest of three possible fine amounts), available at *http://www.nyse.com/Frameset.html?displayPage=/press/1138361407523.html.*

[7] This resolution was initially drafted by an ABA Task Force on the Attorney-Client Privilege, which held public hearings on the issues raised by recent government practices. A report detail-

Continued

I was one of nine former Attorneys General, Deputy Attorneys General and Solicitors General, from both Republican and Democratic administrations, who signed a letter to the Sentencing Commission last summer urging it to reconsider its recent amendment regarding waiver. It is never a simple matter to enlist such endorsements, particularly in the summer and on short notice. And yet it was not difficult at all to secure those nine signatures, because we all feel so strongly about the fundamental role the attorney-client privilege and work product protections play in our system of justice.

We feel just as strongly that the other governmental policies and practices outlined above seriously undermine those protections. As you know, I served as a federal prosecutor for many years, and I supervised other federal prosecutors in my capacities as U.S. Attorney, Assistant Attorney General in charge of the Criminal Division and Attorney General. Throughout those years, requests to organizations we were investigating to hand over privileged information never came to my attention. Clearly, in order to be deemed cooperative, an organization under investigation must provide the government with all relevant factual information and documents in its possession, and it should assist the government by explaining the relevant facts and identifying individuals with knowledge of them. But in doing so, it should not have to reveal privileged communications or attorney work product. That limitation is necessary to maintain the primacy of these protections in our system of justice. It is a fair limitation on prosecutors, who have extraordinary powers to gather information for themselves. This balance is one I found workable in my years of federal service, and it should be restored.

I was pleased to see the Sentencing Commission earlier this year request comment on whether it should delete or amend the commentary sentence regarding waiver. In testimony last fall I urged it to provide affirmatively that waiver should not a factor in assessing cooperation. I understand that the ABA will shortly approach DOJ with a request that the Thompson memorandum be revised in similar fashion. These are promising developments.

Mr. Chairman, I thank you again for beginning the much-needed process of Congressional oversight of the privilege waiver crisis. This is not an issue that Washington lobby groups have orchestrated, but it is one that likely will take Congressional attention to resolve.

Thank you, and I look forward to your questions.

Mr. COBLE. Thank you, Mr. Thornburgh.

And Mr. Donohue, in a sense of equity and fairness, since I permitted Mr. McCallum and Mr. Thornburgh to exceed the red light, I will not crack the hammer on you once that red light illuminates.

You are now recognized.

TESTIMONY OF THOMAS J. DONOHUE, PRESIDENT AND CEO, U.S. CHAMBER OF COMMERCE

Mr. DONOHUE. Thank you, Mr. Chairman, Mr. Scott, Members of the Committee.

I am here today representing the Chamber and on behalf of a coalition to preserve the attorney-client privilege, which includes many of the major legal and business associations in our country, including the American Chemistry Council, the American Civil Liberties Union, the Association of Corporate Counsel, the Business Civil Liberties, Inc., the Business Roundtable, the Financial Services Roundtable, Frontiers of Freedom, the National Association of Criminal Defense Lawyers, the National Association of Manufacturers, the National Defense Industrial Association, the Retail Industry Leaders Association, and the Washington Legal Foundation.

I should add that the coalition is working closely with the American Bar Association, which has separately submitted written testi-

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ing the Task Force's work is available at *http://www.abanet.org/buslaw/attorneyclient/materials/hod/report.pdf.* ABA members also heard extensive discussion of the issues at these well attended presentations. *See* Conference Report, ABA Annual Meeting, Vol. 21, No. 16 (August 10, 2005).

mony here today detailing its concerns about the erosion of the attorney-client privilege. ABA policy prevents the organization from being listed as a member of broader coalitions.

The privilege to consult with an attorney freely, candidly, and confidentially is a fundamental constitutional right that in our opinion is under attack. Recent policy changes at the Department of Justice and, very importantly, at the SEC have permitted and encouraged the Government to demand or expect companies to waive their attorney-client privilege or work product protections during an investigation.

A company is required to waive its privilege in order to be seen as cooperating with Federal investigators. A company that refuses to waive its privilege risks being labeled as uncooperative, which all but guarantees that it will not get a chance to come to a settlement or receive, if it needs to, leniency in sentencing or fines.

But it goes far beyond that, Mr. Chairman. The uncooperative label can severely damage a company's brand, its shareholder value, their relationship with suppliers and customers, and their very ability to survive.

The enforcement agencies argue that waiver of attorney-client privilege is necessary for improving compliance and conducting effective and thorough investigation. The opposite, in my opinion, is true. An uncertain and unprotected attorney-client privilege actually diminishes compliance with the law.

If company employees responsible for compliance with complicated statutes and regulations know that their conversations with attorneys are not protected, they will simply choose not to seek appropriate legal guidance. The result is that companies may fall out of compliance, often not intentionally, but because of a lack of communication and trust between a company's employees and its attorneys.

Similarly, during an investigation, if employees suspect that anything they say to their attorneys can be used against them, they won't say anything at all. That means that both the company and the Government will be unable to find out what went wrong, to punish wrongdoers, and to correct the company's compliance system.

And there is one other major consequence. Once the privilege is waived, third party private plaintiffs' lawyers can gain access to attorney-client conversations and use them to sue the company or other massive settlements. By the way, right now there are some arguments in the court about partial protection in waiving, and the question has been raised that perhaps the Government cannot even guarantee that.

How pervasive has this waiving of the attorney-client privilege become? Well, last November we presented findings to the U.S. Sentencing Commission showing that approximately a third of inside counsel respondents, and as many as 48 percent of outside counsel respondents, say they had personally experienced erosion of attorney-client privilege or work product protections.

After that presentation, the Sentencing Commission asked us for even more information about the frequency of waivers and their impact. So our coalition commissioned a second, more detailed survey and got an even greater response rate from the members of our

coalition partners. We publicly released the results of this second survey just this morning. They have been provided to the Committee, along with more detailed coalition written statements on the subject.

Here are a couple of highlights, and I am going to skip them because General Thornburgh mentioned them, but 75 percent of both inside and outside counsel agreed with the statement that a culture of waiver has evolved to the point the Government agencies believe it is responsible and appropriate to expect a company under investigation to broadly waive attorney-client privilege or waiver protections. Of those who have been investigated, 55 percent of outside counsel say that that is the experience that they had.

Now, our coalition is aggressively seeking to reverse this erosion of confidence in the attorney-client provision and the conversations covered there. We are pleased that the U.S. Sentencing Commission has decided to revisit recently amended commentary to the guidelines that allow the waiver to be a cooperation factor in sentencing, and we have submitted more detailed materials to them.

We would encourage this Committee to weigh in with its support of the attorney-client privilege to the Sentencing Commission as it reconsiders its guidelines. It is important to note that the Department of Justice and other regulatory agencies have created this erosion of the privilege without seeking input, oversight, or approval from the Congress or the judiciary. And the plan, Mr. Chairman, that is on the table now, would allow all 92 jurisdictions of the Department of Justice across the country to have their own plan, their own determination, of what is covered and what is protected. That is going to be a circus.

We seek your input and strongly urge you to exercise your oversight of the Department of Justice and the SEC to ensure the protection of attorney-client privilege. Now, let me be very clear as I close: Our efforts are not about trying to protect corrupt companies or businesspeople. Nobody wants corporate wrongdoers caught and punished more than I do and the legitimate and honest businesspeople that I represent. Rather, this is about protecting a well-established and vital constitutional right.

Mr. Chairman, I thank you and the Members of the Committee, and I look forward to your questions.

[The prepared statement of Mr. Donohue follows:]

PREPARED STATEMENT OF THOMAS J. DONOHUE

House Judiciary Committee
Subcommittee on Crime, Terrorism, and Homeland Security
Oral testimony on Attorney-Client privilege
By Thomas J. Donohue
President & CEO, U.S. Chamber of Commerce

Rayburn House Office Building
March 7, 2006

- Good afternoon, Mr. Chairman and members of the committee. My name is Tom Donohue. I am president and CEO of the U.S. Chamber of Commerce, the world's largest business federation, representing some 3 million businesses.

- I am also here today on behalf of the Coalition to Preserve the Attorney Client Privilege, which includes most of the major legal and business associations in the country, including:

    - The American Chemistry Council
    - The American Civil Liberties Union
    - The Association of Corporate Counsel
    - Business Civil Liberties, Inc.
    - The Business Roundtable
    - The Financial Services Roundtable
    - Frontiers of Freedom
    - The National Association of Criminal Defense Lawyers

- The National Association of Manufacturers
- The National Defense Industrial Association
- Retail Industry Leaders Association
- The U.S. Chamber of Commerce; and
- The Washington Legal Foundation

- I should add that the coalition is working closely with the American Bar Association, which has separately submitted written testimony here today detailing its concerns about the erosion of attorney-client privilege. ABA policy prevents the organization from being listed as a member of broader coalitions.

- The privilege to consult with an attorney freely, candidly, and confidentially is a fundamental Constitutional right that is under attack.

- Recent policy changes at the Department of Justice and the SEC have permitted and encouraged the government to demand or expect companies to waive their attorney-client privilege or work-product protections during an investigation.

- A company is required to waive its privilege in order to be seen as cooperating with federal investigators.

- A company that refuses to waive its privilege risks being labeled as uncooperative, which all but guarantees that it will not get a settlement or receive leniency in their sentencing or fine.

- But it goes far beyond that. The "uncooperative" label can severely damage a company's brand, shareholder value, their relationships with suppliers and customers, and their very ability to survive.

- The enforcement agencies argue that waiver of attorney-client privilege is necessary for improving compliance and conducting effective and thorough investigations.

- The opposite is true. An uncertain or unprotected attorney-client privilege actually diminishes compliance with the law.

- If company employees responsible for compliance with complicated statutes and regulations know that their conversations with attorneys are not protected, they will simply choose not to seek legal guidance.

- The result is that the company may fall out of compliance – not intentionally – but because of a lack of communication and trust between the company's employees and its attorneys.

- Similarly, during an investigation, if employees suspect that anything they say to their attorneys can be used against them, they won't say anything at all.

- That means that both the company and the government will be unable to find out what went wrong, punish the wrongdoers, and correct the company's compliance system.

- And there's one other major consequence – once the privilege is waived, third party private plaintiffs' lawyers can gain access to attorney-client conversations and use them to sue the company or obtain massive settlements.

- How pervasive has the waiving of attorney-client privilege become?

- Last November, we presented findings to the U.S. Sentencing Commission showing that approximately one-third of inside counsel respondents – and as much as 48% of outside counsel respondents – said they had personally experienced erosion of attorney-client privilege or work-product protections.

- This was according to a survey by the Association of Corporate Counsel and the National Association of Criminal Defense Lawyers.

- After that presentation, the Sentencing Commission asked us for even more information about the frequency of waivers and their impact.

- So our coalition commissioned a second, more detailed survey and got an even greater response rate from the members of our coalition partners.

- We publicly released the results of this second survey just yesterday. They have been provided to the Committee, along with a more detailed coalition written statement. Here are a few highlights:

    - Almost 75% of both inside and outside counsel agree with the statement that a "culture of waiver" has evolved to the point that governmental agencies believe it is reasonable and appropriate to expect a company under investigation to broadly waive attorney-client privilege or waiver protections.

    - Of the respondents who confirmed that they or their clients had been subject to investigation in the last five years, approximately 30% of in-house respondents and 51% of outside respondents said that the government expected wavier in order to engage in bargaining or to be eligible to receive more favorable treatment.

- Of those who have been investigated, 55% of outside counsel responded that waiver of the attorney-client privilege was requested by enforcement officials either directly or indirectly. Twenty-seven percent of in-house counsel confirmed this to be true – 60% responded that they were not directly involved with waiver requests. Only 8% percent of outside counsel and 3% of in-house counsel said that they "inferred waiver was expected."

- Our coalition is aggressively seeking to reverse this erosion of confidential attorney-client conversations.

- We are pleased that the U.S. Sentencing Commission has decided to revisit recently amended commentary to the guidelines that allows waiver to be a cooperation factor in sentencing formulas, and we have submitted detailed comments on the ramifications of this policy.

- We would encourage the Committee to weigh in with its support of the attorney-client privilege to the United States Sentencing Commission as it reconsiders the 2004 amendments to the Guidelines' commentary language.

- It is important to note that the Department of Justice and other regulatory agencies have created this erosion of the privilege without seeking input, oversight, or approval from Congress or the judiciary.

- We seek your input and strongly urge you to exercise your oversight of DOJ and the SEC to ensure protection of the attorney-client privilege.

- Let me be very clear: our efforts are not about trying to protect corrupt companies or businesspeople. Nobody wants corporate wrongdoers caught and punished more than legitimate and honest businesspeople.

- Rather, this is about protecting a well established and vital Constitutional right. Thank you very much. I look forward to your questions.

Mr. COBLE. Thank you, Mr. Donohue.
Mr. Sullivan.

TESTIMONY OF WILLIAM M. SULLIVAN, JR., LITIGATION PARTNER, WINSTON & STRAWN, LLP

Mr. SULLIVAN. Thank you. Good afternoon, Chairman Coble, Ranking Member Scott, and Members of the Subcommittee. Thank you for your kind invitation to address you today concerning the Department of Justice policies and practices with regard to seeking attorney-client privilege and work product protection waivers from corporations, and whether the waiver of such privilege and protection should be relevant to assessing the corporations' cooperation efforts within the meaning of the organizational guidelines.

I am currently a partner at the law firm of Winston & Strawn, where I specialize in white-collar criminal defense and corporate internal investigations. For 10 years, from 1991 to 2001, I served as an assistant U.S. Attorney for the District of Columbia. In these capacities, I have been involved in virtually all aspects of white-collar investigations and corporate defense.

I have overseen both criminal investigations as a prosecutor and internal corporate investigations as a defense attorney. And I have represented both corporations and individuals in internal investigations and before Federal law enforcement authorities and regulators as well as in class action, derivative, and ERISA litigation.

My perspective on corporate cooperation and the waiver of attorney-client and attorney work product privileges has therefore been forged not only by my experiences on both sides of the criminal justice system, but by my participation in the civil arena as well. This afternoon, I am eager to give you a view from the arena.

The real issue is not the waiver but what is being waived and how it was assembled. For business organizations today, the traditional protections afforded by the attorney-client privilege and the work product doctrine are under siege. The privilege reflects the public priority of facilitating the observance of law through candor with counsel.

Prosecutors and regulators now routinely demand that in return for the mere prospect of leniency, corporations engage in intensive internal investigations of alleged wrongdoing and submit detailed written reports documenting both the depth and breadth of their inquiry as well as the basis for their conclusions. Attorney impressions, opinions, and evaluations are necessarily included.

When pressed on this practice, many prosecutors and regulators will publicly insist that they are only seeking a roadmap—the identity of the individuals involved, the crucial acts, and the supporting documentation. However, this has not been my personal experience.

Just last week I was asked by a Government regulator in our very first meeting to broadly waive attorney-client privilege and work product protection and to provide copies of interview notes, even before I had completed my client's internal investigation myself, and accordingly, even before I had determined as corporate counsel that cooperation would be in my client's best interest.

Incredibly, I was further asked whether or not I was appearing as an advocate for my client, the corporation, or whether I was an

independent third party. Presumably, the regulators had hoped that I would undertake their investigation for them, despite the fact that I would be paid by my client to do so.

Most importantly, however, such roadmap requests fail to relieve the valid concerns of corporations related to privilege and work product waivers. A less than carefully drawn roadmap risks a broad subject matter waiver of attorney-client privilege and attorney work product protection under current authority applicable in just about every jurisdiction.

The waiver of attorney-client communications arriving in connection with a factual roadmap subsequently disclosed to law enforcement extends beyond the disclosure itself and encompasses all communications on that subject matter. The consequences of this result can be extreme, in that even a rudimentary roadmap is the product of information obtained through thousands of hours of legal work spent conducting interviews, parsing statements from hundreds of pages of interview notes, and analyzing thousands and perhaps millions of pages of both privileged and nonprivileged corporate documents.

Furthermore, the waiver would be applicable not only to the law enforcement officials receiving the information, but would also embrace future third parties, including other Government agencies and opportunistic plaintiffs' counsel seeking fodder for class action and derivative strike suits.

In addressing the practice of conditioning leniency for disclosure of otherwise privileged reports, I believe that a balance must be struck between the legitimate interests of law enforcement in pursuing and punishing illegal conduct, the benefits to be retained by corporations which assist this process and determine to take remedial action, and the rights of individual employees.

It is imperative that we do not sacrifice accuracy and fundamental fairness for expedience and convenience now routinely requested by the Government. An equilibrium must be achieved between the aforementioned competing concerns.

The issues being addressed today in this Committee meeting are not simply part of an academic debate. Across the country, there are dozens of corporations scrutinized in internal investigations at any one time, with real consequences for real people. These investigations directly impact the lives of thousands of workers and millions of shareholders.

In conditioning leniency upon the disclosure of otherwise privileged information, we need to accommodate the competing interests of effective law enforcement, the benefits down to deserving corporations, the corporation's own interests and its ability to observe law through consultation with counsel, and the fundamental rights of individual employees.

Reaching a consensus on the information sought by the Government, limiting that information to non-opinion factual work product or perhaps the adoption of a selective waiver for cooperating corporations, and lucid, comprehensive standards to guide internal investigations, are each important first steps.

Thank you, and I look forward to your questions.

[The prepared statement of Mr. Sullivan follows:]

PREPARED STATEMENT OF WILLIAM M. SULLIVAN, JR.

TESTIMONY OF WILLIAM M. SULLIVAN, JR. ESQ.
PARTNER, WINSTON & STRAWN, LLP
BEFORE THE COMMITTEE ON THE JUDICIARY
UNITED STATES HOUSE OF REPRESENTATIVES
SUBCOMMITTEE ON CRIME, TERRORISM, AND HOMELAND SECURITY
MARCH 7, 2006

Introduction

Good Morning Chairman Coble and members of the Subcomittee. Thank you for your kind invitation to address you today concerning the Department of Justices' policies and practices with regard to seeking attorney-client privilege and work product protection waivers from corporations, and whether the waiver of such privilege and protection should be relevant to assessing the corporation's "cooperation" within the meaning of the Organizational Guidelines.

I am currently a partner at the law firm of Winston & Strawn, LLP where I specialize in white-collar criminal defense and corporate internal investigations. From 1991-2001, I served as an Assistant United States Attorney for the District of Columbia. In these capacities, I have been involved in virtually all facets of white-collar investigations and corporate defense: I have overseen both criminal investigations and internal corporate investigations, and I have represented both corporations and individuals in internal investigations, and before federal law enforcement authorities and regulators, as well as in class action, derivative, and ERISA litigation. My perspective on corporate cooperation and the waiver of attorney-client and attorney work product privileges has therefore been forged not only by my experiences on both sides of the criminal justice system, but by my participation in the civil arena as well.

The Real Issue Is Not The Waiver, But What Is Being Waived, And How It Was Assembled

For business organizations today, the traditional protections afforded by the attorney-client privilege and the attorney work-product doctrine are under siege. Prosecutors and regulators now routinely demand that, in return for the mere prospect of leniency, corporations engage in intensive internal investigations of alleged wrongdoing and submit detailed written reports documenting both the depth and breadth of their inquiry, as well as the basis for their conclusions.

When pressed on this practice, many prosecutors and regulators will publicly insist that they are only seeking a "road map"—the identity of the individuals involved, the crucial acts, and the supporting documentation. However, this has not been my experience. Just last week, I was asked by a government regulator in our very first meeting to broadly waive attorney-client privilege and work product protection and to provide copies of interview notes, even before I had completed my client's internal investigation, and accordingly even before I determined as corporate counsel that cooperation would be in my client's best interest.

Most importantly, however, such "road map" requests fail to relieve the valid concerns of corporations related to privilege and work product waivers. A less than carefully drawn road map risks a broad subject-matter waiver of attorney-client privilege and attorney work-product protection. Under current authority applicable in most jurisdictions, the waiver of attorney-client communications arising in connection with a factual road map subsequently disclosed to law enforcement would extend beyond the disclosure itself and encompass all communications on that subject matter. The consequences of this result can be extreme in that even a rudimentary road map is the product of information obtained through thousands of hours legal work spent conducting interviews, parsing statements from hundreds of pages of interview notes, and

analyzing thousands (perhaps millions) of pages of both privileged and non-privileged corporate documents. Furthermore, the waiver would be applicable not only to the law enforcement officials receiving the information, but would include all future third-parties, including other government agencies and opportunistic plaintiffs' attorneys seeking fodder for class action and derivative strike suits.

In addressing the practice of conditioning leniency for disclosure of otherwise privileged reports, I believe that a balance must be struck between the legitimate interests of law enforcement in pursuing and punishing illegal conduct, the benefits to be obtained by corporations which determine to assist in this process and to take remedial action, and the rights of individual employees. It is imperative that we do not sacrifice accuracy, fundamental fairness and due process for expediency and convenience. An equilibrium must be achieved between the aforementioned competing concerns, and I am prepared today to share my views regarding how that might be accomplished.

An Old Debate
Revitalized By A Harsh New Reality

The discussion regarding the attorney-client privilege in the corporate context is not a novel phenomenon. Commentators have long discussed and disputed the scope of the privilege and its application to corporations and other legal entities. The dialogue has largely revolved around efforts to adapt the attorney-client privilege to the practical realities of business entities: corporations act only through employees (with whom they share limited legal privity) and the conduct of those employees—at all levels of the company—have legal consequences for the entity.[1] Consequently, corporate privilege serves an important purpose in protecting

[1] Indeed, the harsh consequences of cooperation with law enforcement and the waiver of attorney-client privilege, have also been recognized for several decades. The decision in Diversified Industries v. Meredith, the only circuit court decision recognizing selective waiver of attorney-client privilege, was rendered in 1978.

communications between attorneys and their corporate clients so as to facilitate the candid exchange of ideas and information to enable the enterprise to comply with applicable law and regulation. But while the organization itself is recognized as the client, it is incapable of communicating with counsel. This anomaly has been crystallized in the "*Upjohn* Warning," which is premised upon on a 1981 Supreme Court decision and is routinely given to corporate employees by company counsel. This warning seeks to explain that discussions with corporate counsel are privileged, but that the privilege belongs solely to the company and may be waived at any time by the company. Ironically, this explanation inevitably undercuts the privilege's effectiveness by chilling communications. Employees are left with the accurate understanding that anything they say may be disclosed to third parties, including law enforcement, government regulators, and plaintiffs' counsel.

Today, what is driving the renewed concern regarding the waiver of attorney-client privilege is the premium being placed by law enforcement on internal investigative reports and related work product. In the wake of the Holder and Thompson Memoranda, and the Seaboard Report, the corporate defense bar has witnessed an unprecedented surge in government demands for access to privileged communications and work product. It is often said that perception is reality, and on this issue the two easily merge. Whether or not admitted by prosecutors and regulators, cooperation has become synonymous with waiver.

Regardless of this perceived equivalence, corporate counsel must always understand at the outset that choices exist, and that counsel's obligation to the client is to make the best choice based upon an informed understanding of the law and facts. The presumption of innocence should never be forgotten or ignored, and counsel's first responsibility should be to inquire as to whether misconduct in fact took place, and if so, whether there might exist a credible defense.

Common but misunderstood industry practices, newly revised and complex regulatory frameworks, and well-intentioned but ineffectual internal controls are all examples of factors which might negate criminal intent, and all should be fully explored and developed. Nevertheless, in other instances, counsel might be confronted with strong evidence of impropriety, and the best interests of the corporation are only served through cooperation with the government. Having made such a determination in today's environment, however, corporations can sometimes pursue compliance with the waiver demands of law enforcement, only to find themselves rewarded with an indictment. Moreover, because such waivers cannot be recalled or even truly limited under current legal doctrine, the compliant corporation has thereby also imperiled itself to parallel and intractable civil litigation, consuming vast amounts of corporate financial resources and posing a constant distraction to management. In such situations, the only real winners are the lawyers.

Further, there is widespread concern that government demands for waiver in this context blur traditional criminal procedure constraints. Employees interviewed are often compelled to provide statements and to potentially waive their Fifth Amendment right against self-incrimination under threat of losing their employment. Ironically, the Supreme Court in Garrity v. New Jersey[2] held almost thirty years ago that evidence obtained through such coercive pressure was inadmissible against government employees, yet the government currently demands that corporations routinely deploy such duress against their own. Moreover, through corporate counsel, the government can gain direct access to witness statements without negotiating a proffer, immunity or cooperation agreement with counsel for individuals, and without having to specify whether the person interviewed is a witness, subject, or target of its investigation. Of

[2] Garrity v. New Jersey, 385 U.S. 493 (1967).

course, all such information gathered by corporate counsel is obtained free from constitutional protections, especially that of the Fifth Amendment, and can immediately serve as the basis for charging decisions against either the corporation itself or individual employees.

By necessity, therefore, corporate counsel is often placed in a precarious position, one which the Fourth Circuit has described as a "minefield." In re Grand Jury Subpoena Under Seal, 415 F.3d. 333 (4th Cir. 2005). Accordingly, the careful and thoughtful corporate counsel understands and fulfills the obligations imposed by the Rules of Professional Conduct applicable to internal investigations, specifically the responsibility to explain client identity, disclose conflicts of interest, deal fairly with unrepresented persons, and to never employ methods of obtaining evidence that would violate a client's interest or operate in disregard of the rights of third persons.

Nevertheless, we have seen some internal inquiries proceed in a pre-determined way, commissioned by those who have an interest in absolution. In such instances, employees (especially mid-level and lower-level employees) were neither afforded counsel, nor apprised of their right to have counsel present during the interviews at their own expense. In addition, employees were not provided any opportunity to review documents or refresh their memories before or during interviews, even when the events at issue occurred years earlier and were largely indistinguishable from the employee's routine activities. Moreover, even in a well intentioned investigation there are often no assurances that the team of investigators employed to ferret out the truth is thoroughly knowledgeable about the corporation's business and the subject matter under investigation. This is especially true in cases involving complex financial transactions and accounting issues, which are often beyond the expertise of most investigating attorneys. In such circumstances, there is a heightened risk that inaccuracies and misperceptions

will be held by investigators, which in turn can lead to incorrect findings, misplaced blame, and, in some cases, the frustration of the search for truth.

Such observations should never be understood to be a denunciation of the internal investigation process, but rather a call for its continued refinement as an indispensable corporate compliance and governance tool. Today, there are many fine lawyers who are diligently conducting thorough, accurate investigations and, as is their professional responsibility, maintaining fidelity to individual rights, and in particular the rights of unrepresented persons. Nor do I wish to suggest that there should be a single, inflexible approach to conducting an internal investigation. Every scenario is different, and the endless variety of business enterprise precludes drawing conclusions as to a single "correct" way to perform an internal investigation. Yet, as we review the policies related to the waiver of attorney-client privilege and the disclosure of the products of internal investigations, we must be cognizant of the weaknesses of the process and the risks of inaccuracy and injustice, particularly in instances where the fundamental fairness obligations of counsel have gone unrecognized. Once an investigation has been concluded and the attorney-client privilege and work product protection waived, investigative conclusions and findings invariably shape the contours of all the actions that follow—law enforcement and regulatory actions, civil litigation, and public reports and perceptions. The findings become, in essence, the law of the case, and while individual aspects of the report or findings may be questioned or discredited, it is almost impossible to undo the damage of a wholly inaccurate, incomplete or biased report.

Striking The Proper Balance

The attorney-client and work product privileges reflect the public priorities of facilitating the observance of law through the uninhibited communication with counsel and the resultant

effective assistance of counsel. The recent efforts of law enforcement to condition cooperation on the disclosure of detailed written reports and underlying attorney work product implicate society's interest in identifying and punishing crime, the corporation's interest in identifying misconduct and adopting remedial measures, as well as protecting itself from exasperating civil litigation, and the rights of individuals. There is obviously friction in seeking to satisfy all these objectives, but there are a number of possible measures which, if developed, would maximize the benefit to society, while protecting the rights of employees as well.

(i) Consensus on the Type of Information the Government Expects

There is a lack of consensus regarding what the government is actually seeking from corporations. At least some prosecutors have publicly stated that they are merely desirous a "road map" of internal investigations -- the identities of the individuals, the key events, and the supporting documents. In practice, however, many law enforcement authorities require far more, including detailed written reports, interview notes, attorney opinion work product, and other sensitive materials. Discussions of waiver need to be informed by a consensus of what the government will and should accept from corporate cooperators, in exchange for leniency. As developed above, conditioning credit for cooperation on the waiver of privilege and the disclosure of detailed reports and work product chills candor within the corporation and implicates individual rights otherwise left intact by other forms of cooperation. In my view, offering to provide the factual findings of an internal investigation conducted in a manner consistent with the precepts of fundamental fairness should satisfy government representatives while simultaneously preserving privileged communications and work product. Indeed, once in receipt of a factual proffer, the government should be encouraged, and should itself insist, that it perform its own legal analysis.

(ii) Selective Waiver

To the extent law enforcement authorities and regulators continue to insist on the disclosure of internal investigative reports and attorney work product, I believe we must consider implementing a limited version of selective waiver, restricted to specifically negotiated materials, which would permit corporations to make disclosures to the government without sacrificing the privilege with respect to all other third-parties and without effectuating a broad subject-matter waiver. To date, most of the Circuit Courts of Appeals have refused to recognize the idea of selective waiver on the basis that such a practice is fundamentally inconsistent with the traditional application of the waiver and could encourage the use of the waiver as both a "sword and a shield." As a result, a corporation faces a veritable Hobson's choice. The corporation can waive its privilege and thereby receive consideration and credit from the government for its cooperation, but then must face the prospect of enormously expensive civil litigation brought by plaintiffs' counsel seeking to exploit the corporation's own repentant efforts. Alternatively, the corporation may refuse to waive the privilege, but then runs the risk of being perceived by the government as uncooperative, and therefore undeserving of consideration or leniency. Selective waiver cuts through this Gordian Knot by recognizing the benefit to society of the corporation's full and complete cooperation, while at the same time preserving corporate defenses and the interests of innocent shareholders and employees from vexatious litigation.

Far from denigrating the attorney-client privilege as a mere tactical tool as some critics have alleged, the doctrine of selective waiver restores the delicate balance of protecting confidential legal communications from outside parties while still allowing those adverse parties access to the underlying factual material. Perhaps most importantly, however, selective waiver allows the government access to relevant information, without the broadcasting of untested

conclusions about the corporation or its employees to the public in a manner in which no meaningful response is possible, and without unnecessarily encouraging burdensome litigation.

(iii) Standards to Guide Internal Investigations

Under the *status quo*, the most vulnerable group is that of individual employees. Through internal investigations, employees are routinely compelled to participate in interviews under the threat of losing their jobs. These interviews are not necessarily subject to basic notions of fairness and due process. Nevertheless, they can have profound implications for the individual employee, including loss of livelihood, diminution of reputation, compelled waiver of the Fifth Amendment right against self-incrimination, and, ultimately, civil sanctions and/or criminal prosecution. The significance placed on these interviews, and the potential for adverse consequences for the individual, increases dramatically if otherwise privileged records of the interviews are demanded by law enforcement as the price of corporate cooperation.

Should this trend continue, corporate counsel and the legal profession as a whole need to establish compelling guidelines for interacting with individual employees during internal investigations. While the Rules of Professional Responsibility governing the legal profession apply to how internal investigations should be conducted, greater clarity is needed. For, example American Bar Association Model Rule 4.4 provides that "[i]n representing a client, a lawyer shall not . . . use methods of obtaining evidence that violate the legal rights of [third persons]." Such general pronouncements, however, do little to articulate when individuals should be apprised of their right to have individual counsel, what access (if any) the employee should have to corporate records and documents, and whether the employee should be given an opportunity to review and correct interview notes. Not only do such fundamental questions remain

unanswered, but there currently exists no effective mechanism for redressing even clear violations of professional responsibility on the part of corporate investigators.

The call for uniform standards for internal investigations is not merely a prescription for the corporate bar. I believe that law enforcement authorities have an affirmative obligation to be sophisticated consumers of internal investigative reports and to ensure that the search for truth is conducted in a fair and impartial manner consistent with the rules of professional conduct and traditional understandings of fundamental fairness. This proposed procedural review would assist in insuring that conflicting interests within a corporation do not result in an unreliable report and would further refocus internal investigations on what they have always purported to be about -- helping the corporation as an entity to resolve internal problems, and not what they have too frequently become -- an exercise in protecting one constituency of the corporation at the expense of another.

Conclusion

The issues being addressed today in this committee meeting are not simply a part of an academic debate. Across the country there are dozens of corporations scrutinized in internal investigations at any one time, with real consequences for real people. These investigations directly impact the lives of thousands of workers, and millions of shareholders. In conditioning leniency upon the disclosure of otherwise privileged information, we need to accommodate the competing interests of effective law enforcement, the benefits to redound to deserving corporations, and the fundamental rights of individual employees. Reaching a consensus on the information sought by the government, the adoption of a selective waiver for cooperating

corporations, and lucid, comprehensive standards to guide internal investigations, are each important first steps.

Thank you. I look forward to your questions.

Mr. COBLE. Thank you, Mr. Sullivan.

Mr. McCallum, I think—by the way, we apply the 5-minute rule to ourselves as well, so we will try to move along here.

Mr. McCallum, I think Mr. Donohue may have touched on this. And where I am coming from is: Does the policy require uniform review? That is to say, a United States Attorney in the Middle District of North Carolina, would it be likely or unlikely that he or she would be operating under a policy that would be identical to the Eastern District of Virginia?

Your mike is not on, Mr. McCallum.

Mr. MCCALLUM. Mr. Chairman, in response to that question, the memorandum that I issued does allow for the different United States Attorneys to institute a review policy in accordance with the peculiar circumstance of their particular district.

For instance, the Southern District of New York may be very different than the District of Montana in terms of the number of sophisticated corporate cases that involve allegations of corporate fraud, and therefore the number of people that are in the Southern District of New York, the number of Assistant United States Attorneys that are available for the review process, may be very different than the number of attorneys that are in a different district.

So it is not identical, but it affords the type of prosecutorial discretion to the United States Attorney to determine what it will be, and that is coordinated through the Executive Office of United States Attorneys in the Department of Justice as well.

Mr. COBLE. I thank you, sir. Now, you indicated, Mr. McCallum, that in some instances, the corporate defendant may well be the one to initiate the waiver. Do you have any figures as to, comparatively speaking, Government initiated or defendant initiated?

Mr. MCCALLUM. Mr. Chairman, we do not have statistical figures like that. And most of the surveys, including, we believe, the survey that we have not yet seen that the Chamber of Commerce just issued this morning, are based more on perception and anecdotal evidence than they are on very, very specific identification of particular cases.

We have been involved in a dialogue with various business representatives, including the task force of the American Bar Association that is dealing with this issue, with its chairman. And we invited him and Jamie Conrad, who is here today, to come out and talk with the United States Attorneys last year at their annual conference to make sure that the United States Attorneys were aware of exactly the concerns and the issues that the business community was seeing in this.

And we were told at that time that a very detailed study of particular cases would be prepared and would be provided to us. And just last week, Mr. Ide, the ABA chairman, indicated to me that that was forthcoming. That will allow us to dig down into the specifics because each case is really unique, Mr. Chairman. And it is that sort of detailed analysis that will be necessary to determine or refute the "routineness" with which these waivers are requested. We do not believe that they are "routinely" requested.

Mr. COBLE. I thank you, Mr. McCallum.

Mr. Thornburgh, during your many years of public service, were you ever aware of any criminal case in which the Justice Depart-

ment sought or required an attorney-client privilege waiver from a cooperating corporation, A, and if so, what was and is your position on that issue?

Mr. THORNBURGH. I am not aware of any such request, Mr. Chairman, although I can't absolutely verify that such a request was not made at any time during the 25 years that I have been affiliated one way or another with the Department of Justice. It is a development of the last decade or so.

I would just like to add a footnote to Mr. McCallum's response. It seems to me that the Department is giving up too much by permitting each United States Attorney to frame his own set of policies on this kind of question. Uniformity and internal Department of Justice review has been adopted in any number of areas that are sensitive, such as issuing a subpoena to an attorney or to a reporter, or using undercover sting operations. Those are not within the discretion of the U.S. Attorney. And when we are dealing with such a sensitive and venerable privilege as the attorney-client privilege, it seems to me that ought to be the kind of rule that is applied.

Secondly, I think that there is a controversy, at least, with regard to statistics about whether or not frequent use is made of this waiver request. And the easiest way to do that is to promulgate a review process within the Department so that you have readily available at your fingertips the absolute number of times it has been carried out.

If, as the Department claims, these are limited and infrequent, it would not impose any undue burden. If, on the other hand, they are as the perceptions indicate from this report, it would provide a solid base for evaluating whether or not this process is going forward in the right manner.

Mr. COBLE. I thank you, Mr. Thornburgh. I see my time has expired. Gentlemen, we probably will have a second round of questioning because I have questions for Mr. Sullivan and Mr. Donohue. This is significant enough, I think, to do that.

The gentleman from Virginia.

Mr. SCOTT. Thank you, Mr. Chairman.

Mr. Chairman, we have a public policy on the attorney-client privilege which we are trying to protect. There are other kinds of public policies that can't be—where you can't use certain things as evidence when you are trying to investigate and fix a problem. You can't—the fact that you fixed a product subsequently can't be used to show negligence of the former product because that would obviously discourage fixing. Evidence that you tried to settle a case can't be used as an admission because that would discourage settlements.

Is there a public policy that we want to protect in trying to protect, to the extent possible, the attorney-client privilege, Mr. McCallum?

Mr. MCCALLUM. Ranking Member Scott, there is unquestionably recognized within the Department of Justice the societal benefits that attend to the attorney-client privilege and work product privilege and various other privileges. And it is certainly something that the United States Attorneys are—and the other Federal prosecutors are mindful of.

And I think that one of the things that you are alluding to is something that all three of my distinguished panelists have touched on, and that is the providing of information to the Government, whether to a regulator or to a prosecutor, and the consequences of that disclosure in the civil litigation area.

Now, that, I mentioned previously, is an area that the Federal Rules Advisory Committee on Evidence is looking at. It is also an area that there have been bills introduced for the Congress to address that issue. So I think that there is certainly recognition.

Mr. SCOTT. Well, I think Mr. Donohue kind of alluded to civil litigation because if somebody blurts something out in a criminal investigation totally unrelated to what may be said affecting civil litigation, you could open yourself up to all kinds of problems including massive punitive damages if all that information got out. Is that right?

Mr. MCCALLUM. There is a consequence of a waiver of attorney-client privilege, and one context being a waiver in other contexts. That is correct, Mr. Scott.

Mr. SCOTT. Okay. Well, have you ever asked for waivers in individual cases?

Mr. MCCALLUM. I am sure that, like former Attorney General Thornburgh, I can't tell you that that has never happened. I am—it has never happened in any case that I am involved in. And I think there is one issue that needs to be focused on here, is that there is an issue of attorney-client waivers, privilege waivers, by the corporation. That is, the lawyers who represent the corporation. In my opening statement, I made the point that they do not represent the management. They do not represent employees.

And I am sure that Mr. Sullivan, every time he does an internal investigation and interviews a witness, he explains to them exactly who he represents, i.e., that it is the corporation, and that that individual who is being interviewed is not his client and there is no attorney-client privilege between him and that individual.

Mr. SCOTT. Well, I mean, in an individual criminal case where an individual is the defendant, have you ever asked for a waiver of attorney-client privilege?

Mr. MCCALLUM. I never have, Mr. Scott. But my experience over my 35-year career has been predominately in the civil litigation area. So I would not be someone who would be able to respond to that effectively.

Mr. SCOTT. Have you ever had cases that the defendant, the corporate defendant, got leniency for cooperation when they had not waived attorney-client privilege?

Mr. MCCALLUM. I cannot personally testify to that. I can tell you that within the Department, I am informed by those that have extensive experience in the criminal area that that is indeed the case, that cooperation is but one factor in the Thompson Memorandum in determining whether to indict someone. And it is a factor, of course, in the Sentencing Commission current matters.

Mr. SCOTT. Can you get the cooperation benefit without waiving attorney-client privilege?

Mr. MCCALLUM. There are—there are any number of instances, I am informed, in which that is indeed the case, yes, and that the circumstances of a corporation providing information may not re-

quire the waiver of attorney-client privileged information of work product information.

Mr. SCOTT. Let me ask one further question. Mr. Sullivan, you represent corporations, many of whom have multi-jurisdictional activities. Would there be a problem in having 92 different processes in terms of what the attorney-client privilege may be?

Mr. SULLIVAN. Ranking Member Scott, yes. I think that would be a very difficult road to navigate. It is difficult enough working with prosecutors and regulators who are insistent that you do their work for them. And in fact, if I am in a situation where I am evaluating a cooperative mode for purposes of obtaining favorable treatment by the Government in exchange for a new compliance program, ferreting out wrongdoing—which would be my obligation in any event—to the extent that I would have to, in a multi-district context, deal with a variety of competing considerations along the same lines would make my job much more difficult and would also cause intractable problems on the part of the corporation in terms of negotiating a resolution.

Let me also add that I know the context here is cooperation, but I don't think the presumption of innocence should be forgotten. And when I addressed the Committee a few minutes ago and mentioned that at the very first meeting I was asked to waive the privilege, I also mentioned that I had not even conducted an internal investigation and therefore had not made up my mind as to whether I have defensible conduct or not. So I think that also illuminates the mindset that corporate counsel are dealing with today.

Mr. COBLE. I thank the gentleman.

We have been joined by the distinguished gentleman from Ohio, Mr. Chabot.

And in order of appearance, the Chair recognizes the distinguished gentleman from Florida, Mr. Feeney.

Mr. FEENEY. Thank you, Mr. Chairman. And I am grateful for the testimony from all our distinguished panel.

You know, I had an observation I thought perhaps you could talk a little bit about because I think you have gone into some details about the importance historically of the attorney-client privilege.

By the way, I would point out that most of us who, you know, practiced law at one point think of this more in the context of criminal—of violent crime as opposed to corporate crime, exactly for the reasons that former Attorney General Thornburgh laid out. This really hasn't been used until the last 8 or 10 years, this waiver requirement.

But the average violent criminal doesn't have deep pockets. And other than the fact that if he fails to comply and waive privilege, for example, there is very little incentive. He is not subject to fines because he has got the empty pocket defense. He is not worried about civil litigants. But for a lot of the reasons that Mr. Donohue laid out, the pressure on corporate clients and business clients is immense to find favor as they cooperate, and there is an enormous pressure on them.

I do understand the necessity at times to try in a corporate context, especially with respect to fraud, to find out what everybody knew, and that would include corporate counsel. What I am worried about, and I guess I want to put it in this respect—Mr. Sul-

livan might be the best person to answer this—we live in a very new climate on Wall Street. I mean, investors appropriately expect a lot more transparency. We had things like Enron and WorldCom.

But in some ways, we may have overreacted. Post-Sarbanes-Oxley, directors have some real problems. Number one, we don't have a standard set of accounting principles, so that a major international corporate firm may be responsible, and the directors individually liable, to know where every box of pencils or paper clips are. And we don't have standards to protect people based on *de minimis* standards.

When directors or executives with corporations go and they hire an independent auditor nowadays, they are not allowed to seek the guidance of their auditor. They can't get help from one of the top four accounting firms that they have to pay. That firm is not allowed to tell them how to comply with Sarbanes-Oxley.

Now we are in a position where if we are going to have what amounts to blanket waivers or, in some jurisdictions, anyway, what amounts to blanket waivers, where corporate executives and corporate directors, who are going to be held personally responsible even if they didn't necessarily know about mis-actions that somebody else in the corporation took over, can't be candid with their lawyer and cannot count on candid advice back.

That type of chilling effect makes it almost impossible for anybody with any sense to agree to be a member of the board of directors today, and I thought maybe Mr. Sullivan and Mr. Donohue could talk about this in the totality of the circumstances today in corporate law. I mean, this is just one more burden that makes it almost impossible to try to do your job in an honest way as a member of a board or an executive at a major corporation.

Mr. Sullivan, go ahead.

Mr. SULLIVAN. Thank you, Mr. Feeney. Well, in fact, you are absolutely correct. Corporations have noticed a dearth of willing applicants in terms of individuals who are willing to serve on boards. What is attempted these days is to maintain a level of independence, both with outside counsel as well as special audit committees, special litigation committees, and as you mentioned, even accountants.

But it also goes right back to what Mr. McCallum said, and he is absolutely correct. I am well aware of the Upjohn warnings, and when I am pursuing an internal investigation, I am obligated and I do advise the individuals whom I am interviewing that I do not represent them.

But in fact, if we move forward and they are led to believe that not only do I not represent them but I am also going to turn over everything they say to the Government at a moment's notice, upon caprice or whim because I am interested in maintaining the best possible position of the corporation, we are in a situation where, as Mr. Donohue mentioned, I won't get any information at all.

The corporate entity is an artificial entity, true. It has legal responsibilities, true. But it also is run and managed by people. The acts of the employees are imputed to the corporation. So you must deal with the people because they are the ones who bind the corporation.

And for my—from my perspective as well as the perspective of independent directors or board members or auditors or management, we need to be able to access facts. We need to be able to do it freely, without any concerns about where those facts may ultimately go. And we need to be able to manage the information we have so that we can evaluate properly how to respond to Government inquiries.

As I mentioned before, all too often the first mode that a corporation will pursue is cooperation. They will find or seek to find the responsible employees and throw them under the bus. That is not necessarily the best policy. In a free-flowing exchange of information environment where the lawyer can carefully evaluate the information he has, he can make the best decision for that corporation in how to deal with regulators and ultimately save everybody a lot of money, shareholders and individual investors.

Mr. SCOTT. Mr. Donohue?

Mr. DONOHUE. I serve on three public company boards of directors. And I will say in response to your inquiry that, first of all, it is getting harder and harder to attract competent directors, not only because of the fear of liability, which is getting greater, but because of the extraordinary amount of time and process that has to be followed following the Sarbanes-Oxley rules and their implementation.

What directors most worry about, other than running the company, leading the company and having good management that operates in an honorable way, are two things, and that is dealing with regulators of every type and shape and dealing with the Justice Department. And by the way, when you get people like Mr. McCallum here, if he were to come out and deal with the issues that individual companies have to deal with, we would do fine.

But they have the greatest collection of young, soon-to-make-it, want-to-be-famous kinds of lawyers all around the country who, by the way, don't have the same amount of judgment and experience, and many have little or no idea what corporations do and how they are supposed to work.

So when 92 different groups—by the way, and when there is an approval, it will be approval by the U.S. Attorney for one of his underlings—they are going to have 92 different approaches to do this, it is going to get a little more complicated for most of the companies on whose boards I serve.

And I am not—we are not talking about huge criminal issues; there are always questions with the SEC and others. And it gets very, very complicated when everybody has got a different rule. Everybody has got a different way of approaching it. And standing behind them like vultures on a fence are the class action and the mass action lawyers that are sucking the vitality out of American industry. And they are doing it, maybe unintended, but they are doing it with the help of our Government, who is putting us in that kind of a position that it shouldn't happen.

Mr. COBLE. The gentleman's time has expired.

The distinguished gentleman from Massachusetts, Mr. Delahunt, recognized for 5 minutes.

Mr. DELAHUNT. I would think, Mr. Sullivan, that you must find yourself in a position where not only do you have to inform the em-

ployee that you are not his lawyer, but there is going to be a likelihood that what he tells you will become—you will at some point in time be compelled to reveal to the Government exactly what he says.

Have you run into that situation?

Mr. SULLIVAN. Yes, Mr. Delahunt. As part of the Upjohn warnings, I am required to advise the employee that I represent the company, that the privilege resides with the company, and that the privilege can be waived by the company at any time——

Mr. DELAHUNT. And that——

Mr. SULLIVAN [continuing]. And in any manner.

Mr. DELAHUNT [continuing]. In a significant number of cases, the privilege is waived.

You know what I can't understand, Mr. McCallum, is what happened in the past 10 years? You know, for 20 years of my own professional life, I was a—I was a prosecutor. Did a number of sophisticated white-collar crime investigations. And, I mean, there are grand juries. There is the use of informants. You know, we knew how to squeeze people without sacrificing or eroding the attorney-client privilege.

You know, I just have this very uneasy feeling that it is the easy way to do it, you know. There is a certain level of, you know, why should I—why should I have to really exercise myself to secure the truth?

You know, from what I understand, there has been no review in terms of the frequency of the waiver. There is no data. There is nothing empirical. But, you know, Mr. Thornburgh and Mr. Sullivan, you know, I am sure they have had extensive practices. At least anecdotally, you know, they are here. They are concerned.

Is there something that I am missing that the traditional law enforcement investigatory techniques were insufficient?

Mr. MCCALLUM. Mr. Delahunt——

Mr. DELAHUNT. I got to tell you something. I am a little annoyed with the Sentencing Commission, too, making this a factor. You know, where did that come from? Go ahead.

Mr. MCCALLUM. I believe it came from the defense bar, who wanted to pin down for certain that if there was a waiver—to answer the second question first——

Mr. DELAHUNT. Sure. Thanks.

Mr. MCCALLUM [continuing]. If there was a waiver, that it would necessarily be deemed cooperation for purposes of a downward departure. But let me——

Mr. DELAHUNT. Well, I would just dwell on that for a minute because we will get a second round.

Mr. MCCALLUM. Okay.

Mr. DELAHUNT. I would want to—I would want to hear that coming from, you know, some criminal defense lawyer, saying that that is the import of it. Because that tells me that if they are looking for that kind of certainty, that this is being used frequently. This is—this is becoming the rule rather than the exception. But go ahead and take a shot at my——

Mr. MCCALLUM. Let me respond to the first question, Mr. Delahunt, and that is what has happened recently over the years? I think we only have to look back to the 1997 through 2006 era to

see a spate of very complicated, very complex, very arcane, very difficult to determine corporate frauds of immense proportions in terms of the dollar amounts involved which also——

Mr. DELAHUNT. With all due respect, Mr. McCallum, I got to tell you something. That just doesn't—that doesn't hold water. You know, I am sure immense complex fraud has been being perpetrated, you know, since the days of the robber barons. If we don't have the resources in the Department of Justice to conduct the necessary investigations to deal with it, then let's assess it on a resource basis. Let's not do it the easy way that erodes, I believe, a fundamental principal of American jurisprudence.

I mean, if that is what you are telling me, I won't accept it because of my own experience. You know, fraud is nothing new. Uncovering it maybe is, but, I mean, there is—you have—you know, you can use immunity. There are informants. There are grand juries. There are all kinds of ways to do it.

And I am sure Mr. Thornburgh, being a former Attorney General and a former, I think, Attorney General in a State, I am sure he supervised or conducted a series of heavy investigations that are as complex as anything that, you know, occurred from 1997 to date, and did it in a way that didn't erode significant legal principles that are embedded in our jurisprudence.

I will be back, and you can think about the question.

Mr. MCCALLUM. Thank you.

Mr. COBLE. The gentleman's time has expired.

The distinguished gentleman from California.

Mr. LUNGREN. Mr. Chairman, it is always fun being with my friend from Massachusetts. I was trying to figure out what he said when he said "partay," and then I thought he was talking about getting a drink and going out someplace. [Laughter.]

Mr. DELAHUNT. I can't understand what you are talking about.

Mr. LUNGREN. But I understand. You weren't talking about a party, you were talking about a part A. I got that. Okay.

And Mr. Sullivan, I have been informed by counsel here that the two of you used to work together, so that you used to be one of those fellows that resembled the remarks of Mr. Donohue. [Laughter.]

But now you have made it.

Mr. SULLIVAN. Mr. Volkov was a fine mentor.

Mr. LUNGREN. And I wondered if you had to deal with 92 different jurisdictions. It would certainly improve your billables. [Laughter.]

Mr. SULLIVAN. I try to get involved in——

Mr. LUNGREN. But those Italian suits could be kept up, as it was.

Just to put it on the record, I submitted a letter last August to the Sentencing Commission regarding my concerns about the Sentencing Commission's commentary with respect to the rule. It looks to me like that amendment authorizes and encourages the Government to require entities to waive the attorney-client privilege and work product protections as a condition of showing cooperation. And that is the huge concern I have here.

Let me ask you this, Mr. McCallum: Should we in the Congress believe that any time the Administration refuses to waive executive

privilege, that the Administration is not cooperating with the Congress?

Mr. MCCALLUM. Absolutely not, Mr. Lungren. I would—I would hesitate to make that argument. There are benefits, and I think that in my opening statement I described that there are definitely benefits, societal benefits, from attorney-client privilege.

Mr. LUNGREN. But, see, that—I understand. See, that is my problem. If we in the Congress were to every time the President says that there is a reason to protect executive privilege, not only for his administration but for future administrations, that every time he did that he was violating the sense of cooperation that should prevail between two equal branches of Government, I think we would be wrong.

And I see the Justice Department taking a position that if a corporate defendant or potential defendant refuses to waive that privilege, that is a priori evidence of the fact that they are not cooperating. And that is the problem I really have here.

See, the President makes the arguments—and I think that you should—and the Department makes the arguments that there is a reason for those privileges that the executive branch has. And the reason is part institutional, but part to have that ability to speak within yourselves, that is, that institution of the administration, which is more than the President but is personified by the President. He can talk to his advisors without believing that we are going to hear everything he says.

And here you have a situation where you want a corporation to follow the law, I presume. And you would want the corporation to listen to good counsel, I would think. And here we have got a rule that seems to me to work in the opposite direction.

And I think that that weighs heavy on me and other Members here on this panel. And so I would ask, don't you see the creeping intrusion here? I mean, first you have the first memorandum. Now we have the second memorandum, which is a little tighter and a little tougher. And then, following that, you have the Sentencing Commission saying, well, that is a bad idea. As a matter of fact, we are going to have that as evidence of cooperation, and the lack of it as evidence of lack of cooperation.

What is a corporate counsel to do under those circumstances?

Mr. MCCALLUM. Well, there are a series of questions there, Mr. Lungren. Number one, with respect to the Sentencing Commission, the Department's position has been we would be comfortable with the Sentencing Commission going back to where it was before that amendment.

Mr. LUNGREN. Well, is that your position? Is that the Administration's position?

Mr. MCCALLUM. I believe that that is the Department of Justice's review——

Mr. LUNGREN. That is what I mean.

Mr. MCCALLUM [continuing]. Underway at this particular time. I do not know whether that has been absolutely finalized. But my review of that is that there would not necessarily be an objection to going back to the way it was before, where it was not addressed.

Number two, let me talk about the issue of cooperation. Attorney-client privilege waivers are only one factor with respect to co-

operation. There are many other ways for a corporation under the Thompson Memorandum to indicate and to provide a degree of cooperation that will impact both the decisions on the charging of the corporation and on the determination of recommendations to be made to any sentencing commission about—or to any sentencing body about a downward deviation. So I don't—I don't think that it is accurate to assert that privilege waivers are the sine qua non or the absolute requirement in order to achieve a status of cooperation with prosecutors.

With respect to the diversity of jurisdictions, the 92 different districts, as I indicated previously, this is not a situation in which one size fits all. And what the McCallum Memorandum really did was to recognize a best practices that was, in my view, attendant to United States Attorneys across the United States in which privilege waiver requests, formal ones from the Government, as opposed to privilege waiver offers voluntarily from corporations, would go through some sort of supervisory review that would preserve for the peculiar circumstances of that particular district and the United States Attorney there a degree of flexibility.

But all of that would be done in coordination through the Executive Office of United States Attorneys. So I don't think it is an accurate picture to paint, 92 different definitions of what is attorney-client privileged and what is not attorney-client privileged. It is a second set of eyes to reassure that there is a deliberate and considered process before attorney-client privilege waivers are requested by the Department of Justice.

Mr. LUNGREN. Thank you.

Mr. COBLE. The gentleman's time is expired.

The distinguished gentleman from Ohio, Mr. Chabot.

Mr. CHABOT. Thank you, Mr. Chairman.

Mr. Donohue, if I could begin with you. Can you give the Subcommittee any examples from your members of instances where a request for a Department of Justice—for an attorney-client waiver resulted in unnecessary consequences for the corporation, perhaps a third party suit, for example, and arguably the information could have been gathered without a waiver?

Mr. DONOHUE. Well, sir, you have just put your finger on why this is a very difficult matter to challenge, either here in the Congress or in the courts, because most companies that have been painted into this box are not going to come forward and give you an example. I know many examples. I would suggest it is probably in our mutual best interests not to lay out the names of a bunch of companies.

I could tell you a couple of interesting points. In one matter that I am aware of, the prosecutor in a jurisdiction gave a public speech and said, in our jurisdiction, anybody failing to waive the privilege will be considered guilty. I passed that material on to the Justice Department; I don't know how it was used.

But if you were to go—and by the way, it is very, very important to understand that the SEC and the Justice Department have hundreds and thousands of investigations going on. And the great amount of these have nothing to do with fraud. They have arguments about proper accounting and all kinds of other issues.

Where there is fraud, there should be a vigorous investigation. But, you know, I was trying to think of a good example that I might use. You know, the Inquisition supposedly had the blessing of the Church, but their means weren't very appropriate. And when Mr. McCallum began today, he laid out a rationale of why they should be able to do these things because of the assignment they were given to respond to Sarbanes-Oxley.

My understanding is that the privilege is a constitutional protection, and that the end does not justify the means, and that the serious nature of this—and I think the point made about resources did not—should not put the companies in the position of conducting investigations, which I am aware of many, to supplement the work and actually do the work of the prosecutors.

And I ended my statement by saying if people maliciously, directly, and intentionally go out and violate the law and they are in the American business community, lock them up. But you try and go out, as Mr. Sullivan indicated, and deal with these prosecutors—and you have got two sets of them; you got the SEC and you got the Justice Department, and they are playing off each other, and they are sitting in the same rooms, you know, when you have a civil issue and you have a criminal issue. And I would just say, you know, if you and I want to walk down a hall one day, I will give you four or five examples. But with the Chairman's permission and protection, I am not going to do that here. [Laughter.]

Mr. CHABOT. Thank you very much.

Mr. Sullivan, if I could ask you the next question. What alternative techniques are available to prosecutors to obtain the needed information from a corporation without requiring a waiver of the attorney-client privilege?

Mr. SULLIVAN. Mr. Delahunt alluded to many, drawing upon his years as a prosecutor. There are all types of investigative techniques. There is cooperation undertaken by individuals within the corporation. There is the grand jury process, with subpoenas. There are wires.

What also is available, and which I suggested, for purposes of a corporation who is—which is interested in cooperating, is the factual recitation, which is actually quite common: a factual review of what the outside counsel's investigation has yielded, with a view toward working in concert with the Government, ferreting out the criminal activity as it is perhaps determined to be a rogue element or an independent group working without knowledge of management. We see that in export control cases, for example, where shipments are made abroad by individuals who have an incentive for sales commissions without the knowledge of management or at least without management understanding that ineffective internal controls were in place.

All of this suggests that the corporate entity itself and outside counsel, certainly responsible management, as Mr. Donohue has mentioned, has an interest in abiding by the law. And to the extent that it becomes aware of problems with the law, either through its own inquiry or through an external source, a subpoena or whatnot, outside counsel working with in-house counsel wants to ferret that out and find it out.

And we will assist the Government to the extent that it is in our best interests to provide them with the roadmap, with the factual outline, who you should talk to, what this document means. But we shouldn't have to and we don't want to provide them with our mental impressions, our specific interview notes, our opinion work product, and our sensitive discussions with employees because we want to preserve the ability to talk to them again about another problem so that we can continue to observe the law.

And the factual recitation is not something that is ultimately going to be a problem. Factual recitations are found in indictments every day in a very public context. If you want to learn what happened in a particular case, what went wrong, read the Government's indictment. And we will help you with that factual outline to preserve our ability to interact with you and to get credit for cooperation. But you should be encouraged, Mr. Prosecutor, and you should insist on doing your own legal analysis.

Mr. CHABOT. Thank you.

Mr. COBLE. The gentleman's time is expired. I thank the gentleman.

Gentlemen, as I said earlier, I think this issue warrants a second round, so we will commence that now.

Mr. Donohue, I may be repetitive, but I want to be sure this is in the record. In your testimony, you mentioned that erosion of the attorney-client privilege will frustrate corporate efforts to comply with regulations and statutes. Elaborate a little bit more in detail about that.

Mr. DONOHUE. Mr. Chairman, what happens in a company is when issues of significance—it happens with me every day—come up that we are dealing with some Federal regulation, some political regulation, whatever it is, the first thing we do is call the general counsel. When we are sued, as people are on a regular basis, the first thing we do is call the general counsel. And these are all civil matters.

But I want to have a feeling that when I sit down and talk to Steve Bokat, who is the general counsel of the United States Chamber of Commerce, that what I am talking about is going to stay there. And if I had a feeling that in matters where there may be differences with the Government, there may be differences with regulars, if I talk to him, if anybody wanted to bring an action against us, he is going to be up sitting—talking about what we discussed, I am not too sure I am going to talk to him. Nor am I going to go and get my regulatory counsel, nor am I going to go down and get my outside counsel.

At least—you know, the term "counsel" is used up here a great deal. And if you look to your right, you have your counsel, and you sure want to make sure that what you are talking to him about is not blabbed all over this place.

Mr. COBLE. Yes. Well, that is what I thought you——

Mr. DONOHUE. And I think we have a constitutional right to do that.

Mr. COBLE. Thank you, Mr. Donohue.

Mr. Sullivan, in your testimony, you noted that you represented a client before a regulator who requested a waiver prior to your client's declining to cooperate or deciding to cooperate.

What impact would such a waiver have on your ability to represent a client corporation, given—under those facts?

Mr. SULLIVAN. Thank you, Mr. Chairman. Of course, I declined that request immediately. And in fact, as Mr. Donohue so perceptively referenced only upon hearing my anecdote, there was more than one law enforcement agency representative in there. There was the tag team, as he referenced a few moments ago.

As I said before, this was a very early meeting, a meet and greet, if you will, where I was attempting to outline to them what my preliminary view of the evidence I had gathered after only a couple weeks would suggest, as a function of how to address their concerns.

I had not made up my mind as to what I would do in terms of seeking cooperation or defending. As I said before, we should never forget about the presumption of innocence as a corporate representative, as a corporate lawyer, and we should always ferret out the facts and then have a good understanding of the law and those facts to understand whether or not there was a crime committed and whether or not there was a credible defense.

But to go directly to answer your question, if I had undertaken to waive the privilege, how would I walk into that company's office the following day? We had not determined that a crime had been committed or that there were regulatory problems. I needed to find out what went on, and in the best way possible, so that I could represent that client in an informed way.

Who would speak to me, Mr. Chairman? What type of evidence would I be able to gain? I would be nothing more than an arm of the Government. I would in fact have been deputized. My role would be completely eliminated. It makes no sense, particularly when, if I found there was wrongdoing and I needed to work with the Government, I would be most pleased to do so by rendering factual, non-opinion work product.

Mr. COBLE. I thank the gentleman.

The gentleman from Virginia. The distinguished gentleman from Virginia. [Laughter.]

Mr. SCOTT. Thank you, Mr. Chairman.

Mr. Sullivan, why would a corporation do an in-depth investigation of suspected employee misconduct if the report of that investigation has to be turned over to the prosecutors?

Mr. SULLIVAN. Well, frequently reports are turned over to prosecutors. In fact, we see public reports very frequently. We just saw a very public Fannie Mae report. Shell has got a report. Baker Botts has got Freddie Mac's report on its website.

The difference is, again, reports outlining factual undertakings and understandings as opposed to attorney work product and attorney-client communications. And——

Mr. SCOTT. Well, let me ask it another way. If you are writing such a report, would you be writing it to be read by the president of the corporation or by the prosecutor? I mean, you know, you would say things differently depending on who the audience is.

Mr. SULLIVAN. Sure. And it depends who I represent and what my charge might be. The individuals who, for example, are writing the Fannie Mae report may have been reporting to an independent board, an independent accounting board or an independent board

of directors, coming in after the fact to outline what facts happened. I think they would be very cautious in outlining any opinion work product in that report.

And to be fair to the Justice Department, I have not seen requests for waiver of attorney-client communications. It is all work product. And I am not saying that in any way to suggest that it is any less nefarious. It is the opinion attorney work product, which is perhaps the most dangerous.

But to the extent that I would undertake to write a report, a report for the general counsel or for the board of directors, I would insist that it be a privileged document, that it would include my mental impressions and opinions, thereby covering it as work product, perhaps made in anticipation of litigation as well. It would certainly be an attorney-client communication because I would be proffering it to the general counsel. But I would never want that to go elsewhere. A parsed, very narrowly drawn factual recitation I might be persuaded to part company with.

One thing I would like to also mention, Ranking Member Scott. You earlier in the hearing talked about public policies regarding inadmissible information and material. I think that was a very important point. I would like to bring out that I have represented Federal prosecutors in internal DOJ investigations—OPR investigations, Office of Professional Responsibility.

There is no compelled waiver of the fifth amendment. There is no compelled self-incrimination under pain of losing your job in the Justice Department. There is a Supreme Court case on that, *Garrity*. Nevertheless, I am literally asked by Justice Department officials to bring my employees in and to tell them they either tell me everything or they walk.

And I have no problem doing that because there is no specific type of due process in a corporation. But the next step is, and by the way, once you get something from that employee and if it is an incriminatory fifth amendment waiver, I did it, I want it, Mr. Sullivan. And that is where I draw the line.

They don't extract from their own employees. Why should they ask that kind of duress of mine, or of my clients?

Mr. SCOTT. Thank you. Exactly who can waive the privilege?

Mr. SULLIVAN. The corporation, to the extent that the corporation has the privilege when we are dealing with corporations and employees.

Mr. SCOTT. Who? Who? The CEO?

Mr. SULLIVAN. We would have to get that consent of representative management, whoever is running the program, the board, in consultation with counsel.

Mr. SCOTT. Can the CEO waive the privilege?

Mr. SULLIVAN. Not as an individual. He has got to only do it on behalf of the corporation as a function of his role as a corporate representative.

Mr. SCOTT. Is that right, Mr. Donohue?

Mr. DONOHUE. I believe procedurally the CEO could move, with probably advice of his lawyer, to waive the privilege. But in these kinds of instances, this would be so sensitive that it would already be up to the board, and the board would be informed of that change in circumstance.

Mr. SULLIVAN. And that is what I meant by——

Mr. DONOHUE. That probably wouldn't have been done four or 5 years ago, but it would sure be done today.

Mr. SCOTT. Are you aware of—the Department indicated that they don't—you can get full cooperation without a waiver. Are you aware of cases where full cooperation credit on sentencing was given without a waiver of attorney-client privilege?

Mr. DONOHUE. Mr. Scott, I am sure it has. I cannot give you a definitive case. The more difficult the case, the more visible the Justice Department and the SEC has been in announcing the case and how they are going to be successful and all these terrible things that have happened before they have had their full investigation, the more aggressive the SEC and Justice Department lawyers are going to be to try and make sure that they are successful.

And when they are having problems in finding what they thought they were going to find, then they want the company to investigate it for them, and they want people to break the privilege. We are not trying to protect criminals. We are trying to protect a constitutional protection that is given to individuals and corporate individuals, and we believe it is being eroded.

Mr. SCOTT. Mr. Chairman, could I ask one other question?

In terms of corporate organization, which attorney—do all attorneys in the corporation have the privilege, or is it just corporate counsel we are talking about? And let me follow up on that by saying, I mean, there is some—if you are trying to discuss certain activities, trying to come up with a process that may be kind of borderline legal, would you help yourself by having the person in that position you are talking to be an attorney where you wouldn't get that privilege if it was not an attorney? And do you find people hiring lawyers in kind of non-lawyer positions to try to get a privilege?

Mr. DONOHUE. Mr. Scott, I am going to respond and then ask Mr. Sullivan if he would make sure I am correct. But I am not sending him a fee. [Laughter.]

You know, generally, when one is dealing with broad corporate matters, the general counsel of the corporation, who is an officer of the court by his own professional standing, would be the person that would have this role with the CEO or other executives.

There are, however, issues, for example, on SEC questions or environmental questions or other matters where there are senior lawyers within the institution, probably but not necessarily working for the general counsel, who on those matters would be seen as the more senior person with whom discussions and therefore protected discussions could have been held.

Mr. Sullivan, you have had a minute to think about that.

Mr. SULLIVAN. You are absolutely right. My experience has been working with the general counsel and other lawyers in the company who hold particular expertise in various areas as questions may arise. But no privilege determinations are made without the assent and consent of the board or a special committee who is operating in a joint way—a special committee on accounting, a special litigation committee—so that there is usually a board approval at the highest levels for such——

Mr. SCOTT. Board approval to determine who has a privilege and who doesn't?

Mr. SULLIVAN. Well, board approval relating to waiver of the privilege.

Mr. SCOTT. Well, I mean, if you have in a certain department—for example, sometimes a person may be hired as a lawyer; sometimes they may have expertise and are not a lawyer. Would the lawyer have—would there be a privilege when the person happens to be a lawyer and a privilege when the person does not happen to be a lawyer, and would there be an advantage in hiring somebody for that position who is a lawyer?

Mr. SULLIVAN. The privilege is held by the corporation. And to the extent that, for example, outside counsel is acting at the behest of the corporation for purposes of pursing an internal investigation, individual employees who are interviewed by that counsel do not hold a privilege relationship with that investigating counsel. The privilege is held by the corporate entity, and it can be waived only through the exercise of a determination by management in consultation with the board.

Mr. DONOHUE. But Mr. Scott——

Mr. SCOTT. That is if you have a lawyer. If you have a non-lawyer in that position, he wouldn't have a privilege. Is that right?

Mr. DONOHUE. Yes. But even the lawyer—for example, as you can imagine in this town, the Chamber is full of lawyers. So if we looked at it as if it were a public company and I walked in the door and talked to any of the lot of lawyers, there is no implied privilege there.

The privilege is when you seek legal guidance from those people who are in a corporate position to give it and protect it. And so walking down to the cafeteria with any number of the lawyers that work for us in some other—and I think Mr. Sullivan—again, I am not paying him a fee—I think he would suggest that there would be no implied privilege there.

Mr. SULLIVAN. I would agree.

Mr. COBLE. The gentleman's time is expired.

The distinguished gentleman from Florida.

Mr. FEENEY. Thank you.

General Thornburgh, you said you don't recall using this required waiver in prosecutions during your tenure as AG. You can think of, you know, briefly a hypothetical where it would be appropriate in order for a corporation to have considered to have cooperated where the attorney-client privilege would be waived, can you not?

Mr. THORNBURGH. I think there are certainly going to be situations where the corporation itself may take the initiative to waive the privilege in order to make available to the Government——

Mr. FEENEY. But off the top of your head, you can't think of where it would be appropriate for the Justice Department to waive—to require a waiver in order for the corporation to have considered cooperating?

Mr. THORNBURGH. I can't, but I wouldn't want to rule it out. I mean, there might be——

Mr. FEENEY. Okay. I think that is very telling.

And with that, you know, Mr. McCallum, I have to tell you, I am, you know, typically a huge supporter of giving the Justice Department the tools that it needs because these are very dangerous

times, and we want to clean up Wall Street, Enron, and WorldCom. We're a disaster for investors.

But I would ask you: Have there been any successful prosecutions that you know of of major Wall Street fraud that would not have been successful in the absence of a required waiver?

Mr. MCCALLUM. I can't speak to that because I was not personally involved to a degree to be able to assess the strength or weaknesses of any of those cases.

I would, in response to the previous question, indicate to you, Mr. Feeney, that with respect to circumstances in which it would be clear that a waiver of attorney-client privilege might be necessary would be when the investigation implicates or creates suspicion regarding the general counsel's activity and whether that person is complicit within the fraud. That would be one, you know, prime example that is obvious.

But I can't talk to you with regard to the second question. I can't address the issue of would the prosecution of X have succeeded without a——

Mr. FEENEY. If you would be willing to give us a list, I think I would like to know that, Mr. Chairman, with unanimous consent of the Committee, if you would be willing to go back and get us that information.

General Thornburgh?

Mr. THORNBURGH. Yeah. I want to amplify a bit my response. Under the crime-fraud exception, there is no privilege. So it's not a waiver of a privilege; it is that the privilege doesn't arise in the first place.

I want to say one thing, if I might. Having been one of those young, zealous prosecutors that Tom Donohue so eloquently described earlier on, I want to come to their defense. We want our prosecutors to use every single tool that is legally available to them. On the other hand, I don't want to castigate those prosecutors for the faults that we are speaking about today.

This, unfortunately, is a matter of Department policy. And they are empowered to pursue these waivers by the policy of the Department of Justice. And it is that level upon which this requires some redress.

Mr. FEENEY. I thank you, General Thornburgh. And on that one, I wanted to go back to Mr. McCallum.

Mr. McCallum, as I said, I tend to be a huge supporter of the tools the Justice Department needs. But I am not persuaded by the position of the Justice Department in this case—in this case yet. I mean, you start out your remarks by talking about the number of prosecutions.

My goal would be investor confidence and investor security. Prosecuting successfully lots of directors, CFOs, CEOs, and COOs is not necessarily the type of successful, clean Wall Street that I want to see.

And toward that end, you know, Mr. Donohue suggested that a lot of directors nowadays and top level management are spending a good portion, if not the majority of their time, not only building a better, cheaper, quality mousetrap, but on compliance with regulatory burdens and legal burdens. It doesn't seem like that helps

investors, and it doesn't seem like that helps a solid corporate governance strategy.

You know, one of the concerns that I have is that if I am a director—let's assume hypothetically I am a director trying to do the right thing, which is to make profits for the shareholders and succeed in business. And let's assume for purposes of my hypothetical that even though I am a Congressman, I am an ethical guy. And let's assume, since it is my hypothetical, that I am trying to do the right thing.

If I have an accounting question, I want to go to my independent auditor. I am not allowed to do that under Sarbanes-Oxley. If there is a close call on a legal or ethical issue, I want to go to the corporation's general counsel. I am terrified to do that for the same reason that if I were a Catholic and there was no protection for things I said to my priest, I would be afraid to confess some of my sins and I would not be able to get the absolution that I were seeking.

So can you see that some of the things that we want to accomplish with solid corporate governance, with people focused on doing the right thing but making a profit for their shareholders, providing a better widget for the marketplace, can you see how some of these concerns—I am not worried about the Enron fraud case. I am worried about the guy trying to do the right thing and how he is afraid to talk to, in the one case, his accountants, and in this case, his lawyers.

Mr. MCCALLUM. Mr. Feeney, we certainly hear the arguments that are made by the business community on that side relating to the chilling effect. I would submit to you that our view of the compliance environment is indeed that corporations are spending more time on compliance. There is more regulatory supervision and oversight that has been imposed as a result of the corporate frauds. And I think that corporate governance is better off for it.

Rather than being deterred from seeking counsel from the general counsel, we believe that management is—in fact has been encouraged to seek advice and counsel, and there are any number of institutional investors who assess the legal risks and who try to determine whether there are compliance programs in place that are vigorously followed and that are effective. That has become part of the investment decision that institutional investors make these days because of the frauds that—corporate frauds that have been experienced in the financial community over the—over the past 6, 7, 8 years.

Mr. FEENEY. Well, just one brief follow-up. If that is part of the investor decision-making process, does that account for the enormous flight into international investments and the fact that since Sarbanes-Oxley, for example, at that time 90 percent of foreign firms that went public raised 90 percent of their capital in the U.S. Today it's the reverse. Foreign corporations, not just because of Sarbanes-Oxley but because of the legal burden, are fleeing, and capital markets are moving overseas where there is no requirement for some of these things and these burdens.

Mr. MCCALLUM. Well, I think that doesn't speak to the issue of the improvements in corporate governance, corporate standards, and corporate citizenship within the United States. And there has

been, I would submit, a restoration of confidence in the American corporate culture and in the American financial markets as a result of many of the regulatory oversight matters that have been instituted by the Congress and enforced by the Department of Justice.

Mr. COBLE. The gentleman's time is expired.

The distinguished gentleman from Massachusetts.

Mr. DELAHUNT. Mr. McCallum, let me give you a chance to respond to part A. You know, what happened in the past decade since I left, you know, my previous career as a prosecutor? You know, what information do you receive now from waiver of the attorney-client privilege that absolutely cannot be developed from other mechanisms, other tools that have existed, you know, for the past 30, 40 years?

Mr. MCCALLUM. Well, Mr. Delahunt, there are three standards that are articulated in the Thompson Memorandum.

Mr. DELAHUNT. I am not interested in the standards. What I am interested in, you know, is in the course of an investigation, there are—there is a litany of investigative methods, mechanisms, and tools—we could repeat them—that are insufficient that have increased the reliance on the waiver.

Mr. MCCALLUM. All right. There are issues regarding the timeliness of the information and whether or not a particular criminal activity and the consequences of it can be addressed regardless of the investment of significant resources in an adequately—in a timely manner to respond to both the public need, the financial market needs.

Number two, the completeness of the information. I would submit to you that even in the investigations that you diligently pursued, you were not always confident that despite all of the efforts that you had used and all of the tools that you had used, that the information that you found was, in fact, complete. the whole story, all the facts, with all of the documents. And then——

Mr. DELAHUNT. I—go ahead. I am.

Mr. MCCALLUM. Excuse me. And then thirdly is the accuracy of that information. That is, there are subjective judgments that are necessarily made regarding the credibility of witnesses, the credibility of documentation, and all of that is——

Mr. DELAHUNT. Right. But documentation and witness credibility, they can all be tested via grand jury testimony. I mean, everything that you say I can envision occurring without the need to secure the waiver.

What I am concerned about, even—I think that, you know, there has been a restoration of confidence. I think that that in fact has happened as a result of legislative policy. I think it has happened probably because of aggressive enforcement. And I think that is good for our financial markets, and over time, I think it would attract capital as opposed to encourage its flight.

But I am concerned about the attorney-client privilege because I can see slippage in that privilege. You know, today it's, you know, the corporation. You know, tomorrow it's that priest, you know, that I might have gone to confession to. All right? I mean, it makes me very, very uncomfortable, and I really do think that this is a shortcut method to secure evidence that can be developed by alternative means.

You know, I thought Mr. Thornburgh made a good suggestion in terms of the review that alluded to. I would like to see you, the Department on its own, conduct a review. Get us some information. You know, get us some data. I mean, who is doing this and who is initiating it? Because it is a concern.

And, you know, I think that you can probably sense by the questions that have been posed, as well as observations by individual Members, that there is a real concern here. And you don't want someone like Lungren from California, you know a far right conservative Republican, and Delahunt, this Northeast liberal, filing legislation on this because I think that is the order of magnitude that is being expressed here.

So respectfully, that is a message that I think you can bring back to Justice, is that there is concern about the Thompson/McCallum Memorandum. Okay?

Mr. MCCALLUM. I will certainly take that message back, Mr. Delahunt.

Mr. COBLE. And for the record, let me say that far left-winger and that far right-winger are both pretty good guys.

Gentlemen, before I forget it, I want to introduce into the record, without objection, coalition letters to preserve the attorney-client privilege.

[The coalition letters follow in the Appendix]

Mr. COBLE. Gentleman, we thank you all very much for being here. In order to ensure a full record and adequate consideration of this issue, the record will be left open for additional submissions for 7 days. Any written questions that a Member of the Subcommittee wants to submit should also be submitted within the same 7-day period.

This concludes the Oversight Hearing on White-Collar Enforcement, Part 1, Attorney-Client Privilege and Corporate Waivers. Thank you again, gentlemen. And the Subcommittee stands adjourned.

[Whereupon, at 1:50 p.m., the Subcommittee was adjourned.]

APPENDIX

MATERIAL SUBMITTED FOR THE HEARING RECORD

THE HONORABLE ROBERT C. SCOTT, A REPRESENTATIVE IN CONGRESS FROM THE STATE OF VIRGINIA, AND RANKING MEMBER, SUBCOMMITTEE ON CRIME, TERRORISM, AND HOMELAND SECURITY

Mr. Chairman, I want to thank you for holding this hearing on the attorney/client privilege and corporate waivers of the privilege. While attorney/client privilege is more usually associated with the context of protecting an individual from having to disclose communications with his or her lawyer for the purpose of criminal or civil prosecution, corporations are "persons" for the sake of legal processes and are also entitled to the attorney/client privilege.

As noted by the U.S. Supreme Court in *Upjohn Co. v. U.S,* the attorney-client privilege is the oldest of the privileges for confidential communications known to the common law. Its purpose is to encourage full and frank communication between attorneys and their clients so that sound legal advice and advocacy can be given by counsel. Such advice or advocacy depends upon the lawyer being fully informed by the client. And as the Court noted in *Trammel v. United States,* 445 U.S. 40, 51 (1980): "The lawyer-client privilege rests on the need for the advocate and counselor to know all that relates to the client's reasons for seeking representation if the professional mission is to be carried out." This purpose can only be effectively carried out when the client is free from consequences or apprehensions regarding the possibility of disclosure of the information.

Exceptions to protections of the privilege do exist, but they have generally been limited to the crime/fraud exception, which holds that the privilege does not apply to attorney/client communications in furtherance of a crime or fraud, and where the client has already waived the privileged information through disclosure of it to a non-privileged third party. Now, it appears that the Department of Justice has determined that there is another exception - when it wishes the corporation to waive the privilege in the context of a criminal investigation. For sometime, now, I have been concerned about reports that the Department of Justice is coercing corporations to waive the attorney client privilege during criminal investigations of the corporation and its employees, by making waiver a prerequisite to consideration by the Department of it recommending or not challenging leniency should criminal conduct be established. This is particularly significant because under mandatory minimums and sentencing guidelines, prosecutorial motions for leniency may be the only way to have a sentence reduced below the mandatory minimum, since the prosecution often has more control over sentencing than the judge.

While the attorney/client privilege doctrine does apply to corporations, complications arise when the client is a corporation, since the corporate privilege has to be asserted by persons who may, themselves, be the target of a criminal investigation, or subject to criminal charges based on disclosed attorney/client information. Disclosed information can be used in either criminal or civil prosecutions. Whatever fiduciary duty an official may have to the corporation and its shareholders, it is superseded by the official's own self-interest in a criminal investigation. And there is no protection for employees of the corporation against waivers of attorney/client privileges by officials in their own self interest. This includes information provided by employees to corporate counsel to assist internal investigations by a corporation, even if the information was under threat of the employee being fired , and even if the information constituted self-incrimination by the employee.

It is one thing for officials of a corporation to break the attorney/client privilege in their self interest of their own volition; it's another thing for the Department to require or coerce it by making leniency consideration contingent upon it, even when it is merely a fishing expedition on the part of the Department. Complaints have indicated that the practice of requiring waiver of corporate attorney client/privilege

has become routine Department procedure. Why wouldn't this be the case? What is the advantage to the Department of NOT requiring waiver in a corporate investigation? Because of the "Exclusionary Rule," when a confession is coerced, or a search is conducted illegally, it becomes "fruit of a poisonous tree" and cannot be used in a criminal prosecution. Police and prosecutors who jeopardize a case by such tainted evidence are booed by their colleagues and become laughing stocks in their professions. Thus, there is a disincentive for them to pursue and collect such evidence in the first place. Although coerced confessions and illegal searches were always improper, before the Exclusionary Rule, there was every incentive for police to coerce confessions and illegally obtain information, because they could make cases on it, and there was no penalty if they didn't. Here we have the same incentives with respect to waiver of the corporate privilege, so not surprisingly, reports are that demand for waivers are rising, not only by the Department, but by other entities, as well, such as auditors as a prerequisite to issuing a clean audit.

Coercing waivers of corporate attorney/client privilege has not long been a practice withing the Department. It has apparently crept forward as a result of a series of Department policy memos, starting with one by former Deputy Attorney General Eric Holder and followed by one from Former Deputy Attorney General Larry Thompson. Then, there was a proposed Sentencing Commission guideline recognizing and guiding the practice and, recently, another memo by Acting Deputy Attorney General Robert McCallum, whom we will hear from today.

Waiver of attorney/client privilege has not always been a prerequisite to leniency. Providing non-privileged documents and information, and providing broad access to corporate premises and employees, have been traditional ways to receive the benefits of corporate cooperation. Some 9 former U.S. Attorneys General, Deputy Attorneys General, and Solictors General have express their concerns about the current Department waiver policy. And we will hear from witnesses today who prosecuted corporate cases without requiring such waivers. So, Mr. Chairman, I look forward to the testimony of our witnesses and to working with you to address the concerns regarding the Department's corporate attorney/client waiver policy. Thank you.

SUBMISSION TO THE SUBCOMMITTEE ON CRIME, TERRORISM, AND HOMELAND SECURITY FROM THE COALITION TO PRESERVE THE ATTORNEY-CLIENT PRIVILEGE, COMPRISED OF THE FOLLOWING ORGANIZATIONS: 1. AMERICAN CHEMISTRY COUNCIL; 2. AMERICAN CIVIL LIBERTIES UNION; 3. ASSOCIATION OF CORPORATE COUNSEL; 4. BUSINESS CIVIL LIBERTIES, INC.; 5. BUSINESS ROUNDTABLE; 6. NATIONAL ASSOCIATION OF CRIMINAL DEFENSE LAWYERS; 7. NATIONAL ASSOCIATION OF MANUFACTURERS; AND, 8. U.S. CHAMBER OF COMMERCE

Chairman Coble, members of the House Judiciary Subcommittee on Crime, Terrorism and Homeland Security, we appreciate the opportunity to submit the following statement for the record of today's hearing to examine the erosion of the attorney-client privilege in the corporate context.

It is our firm belief that the attorney-client privilege in the corporate context has been significantly weakened in recent years due largely to current Justice Department investigative policies and practices and recent amendments to the U.S. Sentencing Guidelines that put companies in the position of having to waive their attorney-client privilege during federal investigations in order to receive credit, during charging and sentencing decisions, for having fully cooperated with the authorities. This statement explains our concerns, and provides the Subcommittee with historical context for the importance of the attorney-client privilege.

Background and Importance of the Attorney-Client Privilege

Attorney-client confidentiality is the foundation of the relationship between a lawyer and client. The attorney-client privilege is essentially an evidentiary or procedural right recognized by the courts when one party to litigation or other adversarial matter wishes to exclude documents or communications from the other party's requested production of the first party's files, when those files include attorney-client confidences. But increasingly, demands to waive the attorney-client privilege are being made outside the authority and oversight of the courts; increasingly, privilege waiver demands are unilaterally made by prosecutors, enforcement officials, and third-party plaintiffs. Those demanding such waivers of the privilege believe they are entitled to everything and anything that may assist them in investigating potential misconduct at the company, even if the information is privileged. Even corporate auditors are demanding to see privileged information as the price of a "clean" audit letter.

While lawyers are generally bound by rules of professional ethics[1] to preserve their clients' confidences, it is the attorney-client privilege that allows a client to assert the right to the confidentiality of its conversations with counsel. While the workings of the privilege are more familiar in the context of an individual who, confronted with a threat of prosecution or suit, consults a lawyer and expects that the content of their conversations will be confidential, the U.S. Supreme Court confirmed that corporations are similarly entitled to the protections of the privilege in the landmark case of *Upjohn Co. v. United States*.[2]

The main general exceptions to the clients' rights to maintain the privileged status of conversations with their attorneys are:

- the crime-fraud exception (the privilege cannot apply to conversations in which the lawyer's advice or services will be used in furtherance of a crime or fraud); and
- the exception for discovery of communications that the client previously waived through disclosure to any non-privileged party; such a disclosure can invalidate the client's right to invoke the privilege's protections against other third parties who demand production of the communications in the future.[3]

Privilege In The Post Sarbanes-Oxley Environment

While nothing has technically changed in the laws governing the application of the privilege in the corporate context in recent years, past corporate accounting scandals have raised concerns about the need for corporations to operate in a more transparent and accountable fashion. However, we believe that weakening the attorney-client privilege is counterproductive to the ultimate twin goals of promoting corporate compliance and rewarding corporate self-reporting.

Since lawyers employed or retained by a corporation represent the entity (rather than individual employees, officers or directors), they are particularly aware of the need to protect the privilege. Corporate counsel find that privilege is essential to successfully counseling those officers and employees on compliance and ethics in the daily conduct of business. In order to perform their functions optimally, corporate lawyers must be *included in* executive corporate decision-making. Success requires that they encourage clients to take a moment, and seek legal advice in an increasingly fast paced, competitive, complex and regulated business environment.

The privilege allows corporate counsel to advise against poor choices and help clients understand the adverse legal implications of suggested activities without fear that their sensitive conversations will be made public in the future. Furthermore, it provides an important incentive to those with relevant information or concerns about possible wrongdoing to share what they know with their counsel, who can then advise them and the company to pursue remedial actions and proactively prevent similar problems in the future. If employees believe that the attorney-client privilege will not protect the confidentiality of those conversations, conversations that are in the company's best interests and continued legal health will likely not occur. As the Supreme Court declared in the *Upjohn* case - "An uncertain privilege. . .is little better than no privilege at all.[4]

Privilege Waiver Requests Are on the Rise

Demands for waiver of privilege fall into four main categories:

1. the prosecutorial context (involving the Department of Justice, U.S. attorneys or state attorneys general);
2. the regulatory context (most commonly with the SEC);
3. the adversarial civil litigation context (in which the other side is demanding access to privileged or work-product material as a matter of right); and
4. the corporate audits context (as the company's external auditors seek to comply with the Public Company Accounting Oversight Board's excessive interpretation of Sarbanes-Oxley internal controls requirements).

Unfortunately, waiver of privilege to any one of these groups opens these same files to the potential future discovery demands of any third party seeking the same or even related information stemming from the same matter for most any other purpose. Attempts to craft a limited waiver agreement (through the execution of a con-

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[1] See, for example, Model Rule of Professional Conduct 1.6, and its counterpart rule in every state's code of professional responsibility.

[2] *Upjohn Co. v. U.S.*, 449 U.S. 383 (1981).

[3] We have provided a more detailed explanation of the privilege and its application as Attachment A.

[4] Upjohn, supra note 2,449 U.S. at 393.

fidentiality agreement) with government investigators or prosecutors would not be enforceable in most jurisdictions when subsequent document production demands were made.

The Government is Contributing to Privilege Erosion

In recent years[5], particularly on the federal level, criminal law enforcement and regulatory authorities have adopted policies and employed practices and procedures that suggest that if corporations disclose documents and information that are protected by the corporate attorney-client privilege and work-product doctrine, they will receive credit for "cooperation." While this sounds like an option that a company can choose to exercise or not, the reality is that corporations have no practical choice but to comply with this waiver demand. In federal criminal cases against companies, prosecutors' ability to assert a need for waiver is reinforced by both the Justice Department's internal policies on charging decisions (the Thompson Memorandum)[6], as well as a provision of the Federal Sentencing Guidelines which suggests that prosecutors can demand waiver of privilege if they feel that it is important to making their case.[7] In the case of the SEC, the precedent of the "Seaboard Report" and the SEC's Enforcement Division's focus on lawyers as needed "gatekeepers" are emphasized.[8] Furthermore, the SEC's strategies are being imitated by other agencies, such as the IRS, the DOL, the EPA, the FEC and others.

Even prosecutors who traditionally recognized that criminal charges ought to be rarely applied against corporate entities now often employ the threat of criminal prosecution of the entity to secure the company's assistance in their criminal investigations and prosecutions of individuals who are actually responsible for malfeasance and the target of the government's probe. Because recent cases of corporate failures are complex, the size and sophistication of the government's investigations into complex frauds has increased correspondingly. This build-up has placed tremendous public pressure on prosecutors to obtain convictions of bad actors, which has

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[5] Former leaders of the Department of Justice have testified in alignment with our coalition that the aggressive waiver policies in play today were not the norm during their tenures, and are not only unnecessary to accomplishing the Department's goals, but deplorable and inappropriate. *See, e.g.*, the testimony of former Attorney General Dick Thornburgh before the US Sentencing Commission at http://www.ussc.gov/corp/11—15—05/Thornburgh.pdf; and the submitted statement of nine former senior DOJ officials, including former Attorneys General, Deputy Attorneys General and Solicitors General, attached to this filing because the Commission did not post it to its website.

[6] Deputy Attorney General Larry Thompson issued a 2003 memorandum that addressed the principles of federal prosecution of business organizations. (Memorandum from Deputy Attorney General Larry Thompson to Heads of Department Components and U.S. Attorneys, "Principles of Federal Prosecution of Business Organizations" (Jan. 20, 2003) (available at http://www.usdoj.gov/dag/cftf/corporate—guidelines.htm). The Thompson Memorandum (which updates the "Holder Memorandum," originated by one of his predecessors, Eric Holder) lists nine factors that federal prosecutors should consider when charging companies. One of the nine factors is the corporation's "timely and voluntary disclosure of wrongdoing and its willingness to cooperate in the investigation of its agents, including, if necessary, the waiver of corporate attorney-client and work product protections." This provision in practice is interpreted to require that companies routinely identify and hand over damaging documents, disclose the results of internal investigations, furnish the text and results of interviews with company officers and employees, and agree to waive attorney-client and work product protections in the course of their cooperation.

[7] Amendments made to the US Sentencing Guidelines, which became effective in November of 2004, state that in order to qualify for a reduction in sentence for providing assistance to a government investigation, a corporation is required to waive confidentiality protections if "such waiver is necessary in order to provide timely and thorough disclosure of all pertinent information known to the organization." (U.S. Sentencing Guidelines Manual § 8C2.5 (2004) (emphasis added) (available at http://www.ussc.gov/2004guid/8c2—5.htm.)

[8] Federal regulators, and particularly the SEC, have begun to adopt policies and practices mirroring those of the Department of Justice, which while discussing "cooperation credit," mention disclosures of protected confidential information. See, e.g., the Seaboard Report, ["Report of Investigation Pursuant to Section 21(a) of the Securities Exchange Act of 1934 and Commission Statement on the Relationship of Cooperation to Agency Enforcement Decisions," Exch. Act Rel. No. 44969 (Oct. 23, 2001)]; in the Seaboard Report, the SEC outlined some of the criteria that it considers when assessing the extent to which a company's self-policing and cooperation efforts will influence its decision to bring an enforcement action against a company for federal securities law violations. The concern that waiver of the attorney-client privilege and work-product protections are now viewed as necessary elements evidencing a company's cooperation is bolstered by public remarks made by former SEC enforcement chief Stephen Cutler, in his remarks made during a program discussing the changing role of lawyers in remedying corporate wrongdoing during a presentation at UCLA's Law School in the Fall of 2004 ("The Themes of Sarbanes-Oxley as reflected in the Commission's Enforcement Program," (September 20, 2004) (transcript available at http://www.sec.gov/news/speech/spch092004smc.htm.)

lead many prosecutors to look for ways to coerce the "assistance" of companies under investigation.

Formerly, a company could show cooperation by providing access to both relevant documents and information and to the company's workplace and employees. The definition of a company's "cooperation" did not entail production of legally privileged communications and attorneys' litigation work product. Under current practices, in order to convince the prosecutor or regulator that the company is cooperating with the investigation, and indeed to avoid being accused of engaging in obstructionist behavior, companies are told directly or indirectly to waive their privileges.

While the DOJ repeatedly states that cooperation and waiver of the privilege is only one of the nine criteria they examine under the Thompson Memorandum, and is rarely determinative, our surveys suggest otherwise. Furthermore, we do not believe the DOJ has done enough to promote reliable and enforceable internal guidelines interpreting the purpose of this policy, when it is to be applied, and what safeguards should be in place to prevent abuse. Coalition constituents tell us that privilege waiver is inevitably the pivotal consideration that determines whether a company will be able survive prosecution in a manner that will allow it to return to its business at the conclusion of the investigation, even if the government finds that no further prosecution is warranted.

Waiver of the Privilege has had a Negative Impact

The Department of Justice has maintained that the privilege is not in danger, primarily because DOJ very rarely seeks waivers.[9] Confident that this contention is incorrect, the Coalition to Preserve the Attorney-Client Privilege, which includes organizations that have signed this statement, decided to collect empirical data on the prevalence of waiver requests, as well as other indicators of the current health of the attorney-client privilege.

To accomplish our goal, we conducted several surveys to collect information about privilege erosion in 2005. In the first survey, over 700 corporate lawyers gave their perspectives on the privilege and its application in the corporate context. Over 350 responses came from corporate counsel, many of them general counsel and the remainder came from outside counsel who specialize primarily in white collar criminal defense. We were struck by the strong response rate, and the unanimity of the message sent by respondents from different disciplines. The following are the results from our survey:[10]

- Reliance on privilege: In-house lawyers confirmed that their clients are aware of and rely on privilege when consulting them (93% affirmed this statement for senior-level employees; 68% for mid and lower-tier employees).
- Absent privilege, clients will be less candid: If the privilege does not offer protection, in-house lawyers believe there will be a "chill" in the flow or candor of information from clients (95%); indeed, in-house respondents stated that clients are far more sensitive as to whether the privilege and its protections apply when the issue is highly sensitive (236 of 363), and when the issue might impact the employee personally (189 of 363).
- Privilege facilitates delivery of legal services: 96% of in-house counsel respondents said that the privilege and work-product doctrines serve an important purpose in facilitating their work as company counsel.
- Privilege enhances the likelihood that clients will proactively seek advice: 94% of in-house counsel respondents believe that the existence of the attorney-client privilege enhances the likelihood that company employees will come forward to discuss sensitive/difficult issues regarding the company's compliance with law.
- Privilege improves the lawyer's ability to guarantee effective compliance initiatives: 97% of corporate counsel surveyed believe that the mere existence of the privilege improves the lawyer's ability to monitor, enforce, and/or improve company compliance initiatives.

Struck by the responses to our survey, the United States Sentencing Commission, which is reviewing its 2004 decision to include new privilege waiver language in its organizational sentencing guidelines, asked us to conduct further research in several areas of particular interest. We offer you today the results of this new survey, which

[9] *See, e.g.*, Mary Beth Buchanan, "Effective Cooperation by Business Organizations and the Impact of Privilege Waivers," 39 Wake Forest L. Rev. 587, 598 (2004).

[10] An executive summary of this survey and its results is online at http://www.acca.com/Surveys/attyclient.pdf.

are being unveiled for these hearings; they are attached and at the end of this document.

In brief, this second survey[11], found:

- A Government Culture of Waiver Exists: Almost 75% of both inside and outside counsel who responded to this question expressed agreement (almost 40% agreeing strongly) with a statement that a "'culture of waiver' has evolved in which governmental agencies believe it is reasonable and appropriate for them to expect a company under investigation to broadly waive attorney-client privilege or work product protections." (Only 1% of inside counsel and 2.5 % of outside counsel disagreed with the statement.)
- 'Government Expectation'[12] of Waiver of Attorney-Client Privilege Confirmed: Of the respondents who confirmed that they or their clients had been subject to investigation in the last five years, approximately 30% of in-house respondents and 51% of outside respondents said that the government expected waiver in order to engage in bargaining or to be eligible to receive more favorable treatment.
- Prosecutors Typically Request Privilege Waiver - It Is Rarely "Inferred" by Counsel: Of those who have been investigated, 55% of outside counsel responded that waiver of the attorney-client privilege was requested by enforcement officials either directly or indirectly. Twenty-seven percent of in-house counsel confirmed this to be true (60% of in-house counsel responded that they were not directly involved with waiver requests). Only 8% percent of outside counsel and 3% of in-house counsel said that they "inferred it was expected."
- DOJ Policies Rank First, Sentencing Guidelines Second Among Reasons Given For Waiver Demands: Outside counsel indicated that the Thompson/Holder/McCallum Memoranda are cited most frequently when a reason for waiver is provided by an enforcement official, and the Sentencing Guidelines are cited second. In-house counsel placed the Guidelines third, behind "a quick and efficient resolution of the matter" (1) and DOJ policies (2).
- Third Party Civil Suits Among Top Consequences of Government Investigations: Fifteen percent of companies that experienced a governmental investigation within the past 5 years indicated that the investigation generated related third-party civil suits (such as private antitrust suits or derivative securities law suits). Of the eight response options that asked respondents to list the ultimate consequences of their clients' investigations, related third-party civil suits rated third for in-house lawyers. The first and second most common outcomes for in-house counsel were that the government decided not to pursue the matter further (24%), or that the company engaged in a civil settlement with the government to avoid further prosecution (18%). For outside counsel, the most cited outcome was criminal charges against individual leaders/employees of the company (18%), and a decision by the government not to prosecute (14%). "Related third party civil litigation" finished fifth (for outside counsel respondents) with 12%.

Faced with this evidence of privilege erosion and increasingly successful (coerced) unilateral government waiver demands, we conclude that the government believes it has a right to determine when clients can and cannot exert their Constitutional privilege rights.

Privilege erosions are almost inevitable in situations where prosecutors have immense leverage and companies very little; a company's failure to "cooperate" could have severe impact on its reputation, its financial well-being and even its very existence. While companies have a good reason to complain about forced or coerced waiver of their privileges, lawyers who advise their clients to take a stand and fight against privilege erosions are potentially subjecting the company to a long, costly, and hostile prosecution, at the end of which the client will have paid dearly even if it is ultimately acquitted.

Faced with such situations, many corporations will conclude that the protection of their privileged communications and files is not worth risking the negative publicity that could follow the company's stark refusal to divulge its "secret" conversa-

[11] The second survey's results are online at http://www.acca.com/Surveys/attyclient2.pdf.

[12] The survey defined 'government expectation' of waiver as a demand, suggestion, inquiry or other showing of expectation by the government that the company should waive the attorney-client privilege.

tions with its lawyers in asserting privilege.[13] Though a difficult decision, companies must consider the affect of asserting privilege in these situations on the company's shareholders or investors, customers and suppliers, and its standing in the marketplace.

The Role of Congress in Protecting the Attorney-Client Privilege

In the Subcommittee's continued oversight, we ask you to join us in sending a message to the Department of Justice that the Thompson Memorandum is inconsistent with the foundational role of the attorney-client privilege in our system of justice, and that the prosecutorial powers regarding privilege exercised thereunder are inappropriate. The attorney-client privilege is a client's right under our legal system, and its application serves the purposes of corporate compliance, self-reporting, and corporate responsibility. Privilege waiver should not be coerced or even considered when assessing whether a corporation is cooperating in an investigation or can qualify for leniency. We believe that Congress should send a clear message to the federal prosecutors at the Department of Justice and other regulatory agencies that companies and their employees should not be punished for preserving their rights to exercise their attorney-client privileges. Further, we believe Congress should hold further hearings to request that the Department of Justice provide more meaningful information on privilege waiver requests by prosecutors and its progress in policing the practices of US attorneys in the field.

Similarly, we urge Congress to request similar changes to similar procedural enforcement powers exercised at the SEC. We agree that aggressive enforcement of wrongdoing and harsh penalties for wrongdoers is appropriate, but stripping clients of their privilege rights - especially when it is clear that even when provided under a confidentiality agreement, privilege waiver may be irreversible in many jurisdictions - is not a necessary or appropriate tactic for an agency to employ in the course of an investigation, even before any finding of entity complicity or culpability for a failure is made.

Finally, we urge the Subcommittee to communicate these concerns to the United States Sentencing Commission as it engages in its current process of reconsidering the 2004 amendment to the Guidelines' commentary language, which the Justice Department views as codifying its policy of requesting privilege waiver routinely as an emblem of cooperation. The waiver of the right to effective and meaningful legal counsel is not an appropriate demand to make of a defendant, and should not be the standard by which the courts determine whether an entity has properly facilitated the government's investigation of charges against individuals or the entity.

ATTACHMENT A

The Attorney-Client Privilege and its Operation in the Corporate Legal Setting

Following is a working definition of the attorney-client privilege and how it applies in the corporate context. Before the privilege can attach to a client's communication with its attorney, the following requirements must be satisfied:

- The entity that wishes to hold the privilege must be the lawyer's client.
- The person to whom the client's communication is made must be a member of the bar of a court or a subordinate of such a person.
- The lawyer to whom the communication is made must be acting as a lawyer (and not, for instance, as a business person).
- The communication must be made without non-client and non-essential third parties present (it could be made, for instance, at a crowded restaurant, but not at a table with other non-client folks around to overhear; it could be conducted as an email exchange, but not if non-client, "unnecessary" parties are cc'ed or are forwarded the email later).
- The communication must be made for the purpose of securing legal services or assistance, and not for the purpose of committing a crime or fraud.

[13] Unfortunately, a decision to waive for the short-term gain of "getting along" with a current prosecution could also be later questioned if the results of waiver are even more devastating further down the road in an unrelated third party action. Boards and executives know that civil suits ensuing after the "successful" completion of a settlement with the government can have more damaging effects on the company's long-term viability than the instant matter.

- The client must claim and not waive the privilege.[14]

While the privilege will attach to almost all communications that satisfy these requirements, what it protects is actually very narrow in scope. The privilege does not protect the client from the discovery through other means and sources of any relevant facts. It just protects the "consult." Indeed, one of the best arguments in favor of privilege protection is precisely that it *doesn't* prevent anyone from discovering all the facts necessary to make their case, whatever that may be: it simply requires the government or a civil litigant to do their own work to prove their case, so as not to deprive the client's ability to communicate openly with its attorney.

If the application of the privilege to a conversation, documents or a written communication between lawyer and client is challenged, the party claiming the benefit of the privilege has the burden of proving its applicability.[15]

The related "work product doctrine" offers qualified protection for materials prepared by or for an attorney when litigation is anticipated (even if the litigation never arises or ends up taking on a different form). Attorney work product material can enjoy the same level of protection as attorney-client privileged materials, but if the work product does not disclose the mental impressions of the attorney, a court may order its production if good cause for the documents' production is established (such as it would be unreasonable or impossible for the other side to replicate the work on their own).

One of the most contentious and difficult issues for companies concerned about privilege issues is the production of the internal investigation notes of the company's lawyers (and their agents). Many companies self-investigate and self-report problems and the number of self-reports are increasing as a result of Sarbanes-Oxley and related legislation and regulation at the federal, state and agency levels. But self-reporting a problem, by its very nature, confirms to an adversary or prosecutor that the ideal place to begin their evaluation of the company's problems would be a thorough review of the company's internal investigation and any communications made between lawyers and the company regarding the failure. Producing these investigation summaries and reports entails the disgorgement of the attorney's work product and attorney-client confidences, and the U.S. Supreme Court set forth the standard for protecting such work from discovery in *Hickman v. Taylor.*[16]

The attorney work product doctrine suggests that it is unfair for the other side to have access to another party's attorney's thought process, her impressions and thoughts, and even her strategies in unlocking and mapping her potential case by the selection of which employees to interview (and which to skip); which files she reviews, and so on.

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[14] These criteria were laid down by the court in *United States v. United States Mach. Corp.,* 89 F. Supp. 357, 358–59 (D. Mass. 1950), and have set the standard for privilege qualification ever since.

[15] *Federal Trade Commission v. Lukens Steel Co.,* 444 F.Supp. 803 (D.D.C. 1977).

[16] *Hickman v. Taylor,* 329 U.S. 495 (1947).

SURVEY RESULTS, "THE DECLINE OF THE ATTORNEY-CLIENT PRIVLEGE IN CORPORATE CONTEXT," PRESENTED BY THE FOLLOWING ORGANIZATIONS: 1. AMERICAN CHEMISTRY COUNCIL; 2. ASSOCIATION OF CORPORATE COUNSEL; 3. BUSINESS CIVIL LIBERTIES, INC; 4. BUSINESS ROUNDTABLE; 5. THE FINANCIAL SERVICES ROUNDTABLE; 6. FRONTIERS OF FREEDOM; 7. NATIONAL ASSOCIATION OF CRIMINAL DEFENSE LAWYERS; 8. NATIONAL ASSOCIATION OF MANUFACTURERS; 9. NATIONAL DEFENSE INDUSTRIAL ASSOCIATION; 10. RETAIL INDUSTRY LEADERS ASSOCIATION; 11. U.S. CHAMBER OF COMMERCE; AND, 12. WASHINGTON LEGAL FOUNDATION

The Decline Of the Attorney-Client Privilege in the Corporate Context[1]

Survey Results

Presented to the United States Congress
and the United States Sentencing Commission
by the Following Organizations:

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

BACKGROUND

The coalition of organizations listed above[2] believes that the attorney-client privilege and work product doctrine as applied in the corporate context are vital protections that serve society's interests and protect clients' Constitutional rights to counsel. The attorney-client privilege is fundamental to fairness and balance in our justice system and essential to corporate compliance regimes. Without reliable privilege protections, executives and other employees will be discouraged from asking difficult questions or seeking guidance regarding the most sensitive situations. Without meaningful privilege protections, lawyers are more likely to be excluded from operating in a preventive (rather than reactive) manner. In today's complex business environment, it is increasingly important to encourage business executives and even line managers to regularly – and without any hesitation – engage their lawyers in open discussions about anything that concerns them in furtherance of assuring the corporation's legal health. It is our belief that attorney-client communications, and the confidentiality that fosters those communications, are more important than ever, and laudably serve society's and our legal system's public policy goals.

[1] This survey is also available online at http://www.acca.com/Surveys/attyclient2.pdf

[2] The American Bar Association has also expressed similar views to Congress and the U.S. Sentencing Commission regarding the importance of preserving the attorney-client privilege and work product doctrine and protecting them from federal governmental policies and practices that now seriously threaten to erode these fundamental rights. The ABA has also worked in close cooperation with the coalition in the preparation and distribution of the surveys referenced in this document.

Our coalition has been very active in protecting the attorney-client privilege in the corporate context from governmental policies and practices whose daily applications, we believe, erode the privilege. Our work has been advanced through educational programs, study groups and task forces, and various filings, communications, meetings, and testimony before authoritative bodies examining privilege erosions.[3]

In March of 2005, in response to increasing concerns expressed by in-house counsel and outside criminal defense counsel regarding their experiences with the policies and practices just noted, coalition members asked their respective constituencies to complete an online survey titled: "*Is the Attorney-Client Privilege Under Attack?*"[4] According to the survey, approximately one-third of the survey respondents had personally experienced some kind of privilege erosion. This powerful finding offered some of the first empirical evidence documenting the difficulty – indeed, the Hobson's Choice – that corporate clients confront when the government begins an investigation into an allegation of wrongdoing and presumes that confidentiality should be waived, or when company auditors demand access to confidential information in order to certify the company's books. The 2005 survey also found that: 1) clients may be increasingly unwilling to rely on the long-established protections of the confidentiality of their lawyer's counsel (affirming the logic of the US Supreme Court's insight that "an uncertain privilege is no privilege at all"[5]); 2) companies that refuse to waive their privileges suffer consequences (being labeled uncooperative or obstructionist, even if they fully cooperated with every other legitimate request of the investigator); and 3) contrary to the claims of many prosecutors and other regulators, privilege waiver demands are neither uncommon nor rarely exercised.

On November 15, 2005, the results of this survey were presented to the United States Sentencing Commission, which had begun to re-examine the commentary language regarding privilege that the Commission had inserted into Chapter 8 of the guidelines in the 2004 amendment process.[6] At that hearing, the Commission asked coalition members to help to gather additional information and data regarding the frequency with which governmental entities have been requesting that businesses waive their attorney-client and work product protections as a condition for cooperation credit, as well as the effects of these waiver requests. In response to that and similar requests for more detailed information

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[3] Representatives from all of the organizations listed here have participated in previous testimony before the US Sentencing Commission on this issue, some both prior and subsequent to the Commission's 2004 adoption of new commentary language on privilege in Chapter 8, which our organizations find offensive (see, most recently, http://www.ussc.gov/AGENDAS/agd11_05.htm). Please visit each organization's website or contact their staff for more information on educational programs, resources, and additional advocacy (including communication with Congressional leaders and their staffs, the Department of Justice, Securities & Exchange Commission, Public Company Accounting and Oversight Board, and others), which our organizations have engaged in to seek better protection of the attorney-client privilege.

[4] An Executive Summary of the March 2005 survey may be accessed via the following links: for the in-house version: http://www.acca.com/Surveys/attyclient.pdf, and for the outside counsel version: http://www.acca.com/Surveys/attyclient_nacdl.pdf. Based on feedback from those who read the previous survey results, this document provides in one place the combined 2006 results of both the in-house and outside counsel surveys.

[5] *Upjohn Co. v. United States*, 449 U.S. 383 (1981).

[6] The USSC Commentary to Section 8C2.5 (adopted in November of 2004) states that "waiver of attorney-client privilege and of work product protections is not a prerequisite to a reduction in culpability score [for cooperation with the government]...unless such waiver is necessary in order to provide timely and thorough disclosure of all pertinent information known to the organization." It is our position that the exception listed in the latter part of that sentence swallows the rule. Under this exception, prosecutors are free to make routine requests for waivers, and organizations will be forced routinely to grant them, because there is no obvious method by which the corporation can challenge the government's assertion that waiver is "necessary."

about the erosion of the privilege, our coalition undertook a second, more detailed survey, and obtained an even greater response rate (more than 1,200) from our constituents. We are pleased to present the findings of this second survey, which was designed to capture more detailed information about government and auditor requests and implicit expectations for privilege and work product waivers.[7]

Survey Results

We prepared two surveys with virtually identical questions except for some minor wording changes that reflected that one survey was for in-house counsel and one was for outside counsel.[8] Section I summarizes key themes emerging from the survey. Section II shows information on respondent demographics. Section III summarizes results shared by companies who have experienced government expectations to waive attorney-client privilege or work product protections and/or expectations regarding other employee actions. Section IV summarizes themes that emerged from the open-ended questions on situational experiences regarding privilege waiver and additional commentary on privilege erosion. Quotes from survey respondents are also interspersed throughout the text as illustrations of the points made.

I. KEY THEMES *(additional discussion follows)*

- **A Government Culture of Waiver Exists:** Almost 75% of both inside and outside counsel who responded to this question expressed agreement (almost 40% agreeing strongly) with a statement that a "'culture of waiver' has evolved in which governmental agencies believe it is reasonable and appropriate for them to expect a company under investigation to broadly waive attorney-

[7] In January 2006, the Association of Corporate Counsel directly contacted approximately 4,700 members, whose titles included the words either "general counsel" or "chief legal officer," requesting them to complete this web-based survey. The web link to the survey was also made available to the coalition partners offering this summary and the ABA Task Force on Attorney-Client Privilege, which in turn publicized it to the many groups participating in the Task Force's endeavors. The survey was "open" for approximately 2 weeks. Five hundred sixty-six of the 676 responses to the in-house version of the survey were received from the Association of Corporate Counsel emailing to 4,700 general counsel members; the remaining corporate counsel responses are from contacts initiated by the other groups. Also in January, the National Association of Criminal Defense Lawyers emailed the web link for the survey to its 13,000 members. NACDL also posted the web link for the survey on its listserv for white collar practitioners, which has approximately 1,200 subscribers. The survey was also made available to approximately 5,000 members of the Business Law and Criminal Justice sections of the American Bar Association. Five hundred thirty-eight outside counsel responded to this survey.

Both surveys included 23 questions primarily seeking specific responses to multiple choice or yes/no questions, with 4 open-ended questions at the end seeking text responses with additional detail on situational experiences. Since the open-ended questions were not mandatory and did not "apply" to those who said they'd had no occasion to run into a privilege erosion situation, the number of responses to those questions was not as robust.

This document offers the survey results in numbers and percentages that are approximated by rounding to the nearest whole integer. Summaries of broad themes and quotations drawn from the open-ended text responses are also included, but not all responses to those questions are included out a concern for confidentiality and to avoid unnecessary repetition. We believe the survey's response rate can be considered robust; but since we are not an independent surveying company or statisticians, we can make no proffer that the sampling is statistically significant or representative of the entire profession. We can note that statisticians have designated the Association of Corporate Counsel's membership as statistically representative of the entire in-house legal profession.

[8] The majority of differences between the two surveys were in the information requested in the respondent demographic information categories, and in general question phrasing such as "your company" for the in-house lawyers, and "your client(s)" for the outside lawyers. No "substantive" differences between the surveys' questions exists. If you would like a copy of the questions asked on these surveys, please contact Susan Hackett at hackett@acca.com.

client privilege or work product protections." **(Only 1% of inside counsel and 2.5 % of outside counsel disagreed with the statement.)**

- **Waiver is a Condition of Cooperation**: Fifty-two percent of in-house respondents and 59% of outside respondents confirmed that they believe that there has been a marked increase in waiver requests as a condition of cooperation. Consistent with that finding, roughly half of all investigations or other inquiries experienced by survey respondents resulted in privilege waivers.
- **'Government Expectation'[9] of Waiver of Attorney-Client Privilege Confirmed:** Of the respondents who confirmed that they or their clients had been subject to investigation in the last five years, approximately 30% of in-house respondents and 51% of outside respondents said that the government expected waiver in order to engage in bargaining or to be eligible to receive more favorable treatment.
- **Prosecutors Typically Request Privilege Waiver – It Is Rarely "Inferred" by Counsel:** Of those who have been investigated, 55% of outside counsel responded that waiver of the attorney-client privilege was requested by enforcement officials either directly or indirectly. Twenty-seven percent of in-house counsel confirmed this to be true.[10] Only 8% percent of outside counsel and 3% of in-house counsel said that they "inferred it was expected."
- **DOJ Policies Rank First, and Sentencing Guidelines Second, Among the Reasons Given For Waiver Demands:** Outside counsel indicated that the Thompson/Holder/McCallum Memoranda are cited most frequently when a reason for waiver is provided by an enforcement official, and the Sentencing Guidelines are cited second. In-house counsel placed the Guidelines third, behind "a quick and efficient resolution of the matter," and DOJ policies (Thompson/Holder/McCallum), respectively.
- **Third Party Civil Suits Among Top Consequences of Government Investigations:** Fifteen percent of companies that experienced a governmental investigation within the past 5 years indicated that the investigation generated related third-party civil suits (such as private antitrust suits or derivative securities law suits). Of the eight response options that asked respondents to list the ultimate consequences of their clients' investigations, related third-party civil suits rated third for in-house lawyers. The first and second most common outcomes for in-house counsel were that the government decided not to pursue the matter further (24%), or that the company engaged in a civil settlement with the government to avoid further prosecution (18%). For outside counsel, the most cited outcome was criminal charges against individual leaders/employees of the company (18%), and a decision by the government not to prosecute (14%). "Related third party civil litigation" finished fifth (for outside counsel respondents) with 12%.

II. RESPONDENT DEMOGRAPHICS

In-house: Almost 90% of the in-house counsel survey respondents were General Counsel. Approximately 40% indicated that the government (federal or state) had initiated some form of investigation into allegations of wrongdoing at their company during the past 5 years. Below is a summary of information on the in-house counsel respondent demographics.

- **Company Type:** Fifty-one percent of the respondents indicated their companies were privately-held/owned; 35% said their companies were publicly-traded but not in the Fortune 500; and 9%

[9] The survey defined 'government expectation' of waiver as a demand, suggestion, inquiry or other showing of expectation by the government that the company should waive the attorney-client privilege.
[10] Sixty percent of in-house counsel who'd had experience with a waiver request responded "N/A" (not applicable) to this question, suggesting they had not been present when privilege waivers were discussed.

of respondents worked for non-profits. Quasi-governmental entities and Fortune-ranked companies each represented 1% of the survey respondents, and less than 1% of the respondents said they worked for FTSE 200 companies.

- **Industry Group:** Respondents were asked to identify the primary industry that best describes their client company's main line of business and were given 22 response options. The top three industries selected were: Finance and Insurance (18%), Manufacturing (13%), and Information Technology (11%).
- **Size of Law Department:** Almost 90% of respondents had law departments of less than 20 lawyers: 33% were solo practitioners, 46% had offices of 2-7 lawyers, and 10% had offices of 8-19 lawyers. Of the remaining respondents, approximately 4% had law departments of over 100 lawyers, and less than 1% had law departments of over 500 lawyers.

These demographics are significant in that they show that even among a general population of company counsel, almost half have experienced some kind of privilege erosion. The vast majority of these respondents who experienced privilege erosions do not work for mega-corporations with extremely high visibility and the potential for "blockbuster" failures; they work for a wide variety of differently-sized businesses, representing the full spectrum of industries. While the companies participating in the survey are obviously large enough to afford full-time in-house counsel staff, only 1% of those responding worked for Fortune 1000 employer/clients, and three-quarters work in departments with fewer than 8 lawyers. We conclude that this sampling represents a breadth of experience from the "norm" of corporate America, and not just the perspective of the biggest companies, where the stakes and publicity attendant to the most prominent governance failures may attract disproportionate attention or be perceived as requiring "setting an example" responses.

Outside counsel: Seventy-one percent of those who answered the survey for outside counsel were partners in law firms, and 40% practiced criminal litigation as their primary area of concentration (26% indicated civil litigation and 20% indicated transactional work as their primary practice areas). Sixty-three percent represented companies that had been subject to a criminal or enforcement investigation in the last five years. Further demographics show:

- **Client Type:** Results were distributed in the following categories: Privately-held or -owned with revenues of less than $200 million annually (22%); individual officers or employees of organizations (20%); publicly traded companies with more than $1 billion in annual revenue (12%); publicly traded companies with between $500 million and $1 billion in annual revenue (11%).
- **Size of Law Practice:** Thirty-five percent of respondents worked for firms of between 2 and 20 lawyers. The rest of the responses were fairly evenly distributed among the following categories: solo (19%); 21-100 lawyers (17%); 101-500 lawyers (15%); more than 500 lawyers (14%).

As with the results of the survey of in-house counsel, these answers indicate that among a general population of outside counsel with a wide array of experience, both in terms of the types of law that they practice and the types of clients that they represent, 51% indicate that they experienced a demand, suggestion, inquiry, or other expectation of waiver by the government. A commanding 73% agree that a culture of waiver has evolved with respect to the corporate attorney-client privilege. The sizable plurality of lawyers who answered this survey represented either smaller, privately held companies or individuals—thus belying the conclusion that waiver requests, demands, and expectations are a problem only for large, publicly-traded companies who are at the center of "headline" scandals.

III. SUMMARY OF WAIVER EXPECTATIONS AND EXPERIENCES

> *"Whether to waive the privilege has not been subject to discussion; the only question is how far the waiver will go. And, thus far, there appears to be no limit."* (Response to in-house counsel survey)

> *"I think the forced waiver and related policies have become a problem of Constitutional proportions. There are many examples of government pressuring companies to waive privileges, stop advancing legal fees, and make statements against employees, under pain of corporate destruction. ... When I was a prosecutor, we recognized that big white collar cases are hard and that they should be. Now, the attitude seems to have changed, and if the corporation does not partner with the government to prosecute individuals, the government views it as obstruction. This view is becoming part of the culture, having begun with the Thompson, Holder, and USSG pronouncements. It's simply wrong ...."* (Response to outside counsel survey.)

A. Experiences relating to waiver

Almost 60% of respondents identified government expectations of waiver of **attorney-client privilege/communications** as relevant to their personal experience with their clients. Of those respondents, almost 30% confirmed that they experienced a government expectation that the company should waive the attorney-client privilege if it wanted to engage in any form of bargaining or receive more favorable treatment from the government's officials.

Almost 23% of respondents said that a question regarding government expectations for waiver of **work product protections** was applicable to their situations. Of those respondents, around 45% said their clients had experienced a governmental expectation of waiver of work product protections if the company wanted to engage in bargaining or receive more favorable treatment.

Responses regarding these experiences, including which agencies indicated an expectation of waiver, how these expectations were expressed, the type of requested material, justifications for waiver requests, and whether companies waived are summarized below.

1. AGENCIES REQUESTING WAIVER

For both in-house and outside counsel, the U.S. Attorneys' Offices were identified as the government agency that most often indicated an expectation of waiver. The survey asked respondents to identify which agencies indicated an expectation of waiver and were given a choice of seven enumerated agencies/categories of agencies, as well as the opportunity to state that the question did not apply or to write-in a response. (About one-third of the in-house respondents and one-fourth of outside counsel respondents indicated that this question was not applicable.) The top agencies/categories identified as most often expecting waiver (in descending order) were:

In-house counsel	Outside counsel
▪ U.S. Attorneys' Office	▪ U.S. Attorneys' Office
▪ SEC	▪ Department of Justice – 'Main' (e.g., Antritrust or Criminal Fraud)
▪ Department of Justice-'Main' (e.g., Antitrust or Criminal Fraud)	▪ SEC
▪ Other Federal Agencies (e.g., DOL, EPA, HHS, FEC, etc.)	▪ Other Federal Agencies (e.g., DOL, EPA, HHS, FEC, etc.)
▪ State Attorneys General Offices	▪ State Attorneys General Offices

> *"It is clear to me that this has become the 'rage' among prosecutors. ... In effect, prosecutors are overriding the [evidentiary precedent] that the attorney client privilege is to be maintained."* (Response to in-house counsel survey)

> *"[An AUSA told us] that he expected a full investigation and waiver of attorney-client privilege in order for my client to demonstrate that it was cooperating in an investigation into possible wrongdoing, including interviews of my client's outside counsel who provided advice contemporaneous to one of the events the AUSA wanted to investigate. He also expected that we would conduct interviews of foreign personnel not subject to U.S. jurisdiction and obtain documents that had only ever existed in foreign jurisdictions. He described a scorecard method he used ... he defined cooperation as the company conducting a full internal investigation, including interviewing outside counsel, submitting a written report of the investigation to him, and giving full waiver of the attorney-client privilege – and no joint defense agreements with any other person or entity. He said that otherwise he would issue grand jury subpoenas and conduct the full investigation with DOJ resources and it would be much worse for us if he had to do that. This was after he informed us that our company was NOT the target!"* (Response to in-house counsel survey)

2. HOW WAIVER EXPECTATIONS WERE EXPRESSED

Respondents were asked how prosecutors or enforcement officials conducting the investigation(s) have indicated that privilege waiver was expected.

Only 11 % of outside counsel who said that their clients had recently been involved in enforcement actions where there was an expectation that their clients would waive privilege said that prosecutors never mentioned waiver as an expectation. Nearly three-quarters (73%) of outside counsel said that the expectation was communicated and not inferred. Of these, 26% said that "waiver was requested in a

direct and specific statement, along with an indication that waiver was a condition precedent for the company if it wishes to be considered cooperative." Twenty-one percent indicated that waiver was "requested in an indirect statement that suggested (without explicit statements) that waiver was encouraged and in the company's interests." Only 13% said that waiver was requested directly but without any indication that positive or negative consequences would flow from the decision to waive.

Similarly, 66% of in-house respondents who indicated experience with this issue said that waiver expectations were communicated through direct and specific and/or indirect statements by prosecutors or enforcement officials. When waiver expectations were expressed, these in-house respondents said they were made using direct and specific statements more often than indirect statements. According to in-house counsel, direct statements with an indication that waiver was a condition precedent for the company to be considered cooperative occurred almost twice as often as direct statements indicating generally that positive or negative consequences would flow from the decision.

> *"The very nature of the self-reporting schema (at use in many federal and state regulatory contexts) is waiver of privileges."* (Response to in-house counsel survey)

> *"My company restated its earnings, after first notifying the SEC that we were about to do so. SEC's Corp Fin referred the matter to Enforcement. During our first meeting with Enforcement, we described the internal investigation we conducted that led to the decision to restate. Enforcement expressed the opinion that 'of course' we would waive privilege as to the investigation report, as a condition of being deemed 'cooperative.'"* (Response to in-house counsel survey)

> *"During an investigation by a state attorney general, we were told that we would be considered uncooperative and would not be able to settle with the agency unless we turned over lawyers' interview notes."* (Response to outside counsel survey)

3. KINDS OF MATERIALS REQUESTED IN WAIVER DEMANDS

On a 2:1 basis,[11] in-house counsel who experienced privilege waiver indicated that prosecutors or enforcement officials do not draw distinctions regarding attorney-client privilege and work-product protections and the kinds of materials these privileges protect. Outside counsel concurred with this observation by a margin of 4:3.[12] However, when a distinction is drawn in the course of a government

[11] 68% versus 31%.

[12] 56% versus 43%.

investigation, both in-house and outside counsel respondents indicated again on almost a 2:1 basis[13] that the distinctions were made at the initiative of defense or corporate counsel rather than by the prosecutor or enforcement official.

Respondents were asked about the types of privileged materials requested by the government in connection with **attorney-client privilege waiver requests** (as opposed to work product waiver requests). A choice of 11 types of possibly privileged materials was provided and respondents could check all that had been requested in their experiences. Respondents could also indicate that the question did not apply and/or include an additional text response.

About 46% of the responses of in-house counsel and 82% of the responses for outside counsel were for choices other than the "n/a" or the write-in category options. Around 90% of both in-house and outside counsel responses (other than the "n/a" group) identified specific types of material that enforcement officials had requested, with around 10% indicating that prosecutors or enforcement officials simply asked for complete waivers without articulating a specific material type.

Materials believed to be protected by attorney-client privilege and identified as most often requested by prosecutors or enforcement officials were (top 3, in descending order, for both categories of respondents):

- Written reports of an internal investigation (16% for outside counsel; 21% for in-house counsel)
- Files and work papers that supported an internal investigation (13% for outside counsel; 18% for in-house counsel)
- Lawyers' interview notes or memos or transcripts of interviews with employees who were targets (13% for outside counsel, a tie with "files and work papers"; 13% for in-house counsel)

For in-house respondents, numbers 4 and 5 were:

- Regular compliance performance reports and audits (11%)
- Notes/oral recollections of privileged conversations with or reports to senior executives, board members, or board committees (10%)

For outside counsel, numbers 4 and 5 were:

- Notes/oral recollections of privileged conversations with or reports to senior executives, board members, or board committees (10%)
- Lawyers' interview notes with employees who were not available for interviews by the government or memos/transcripts of the same (8%)

As part of this same question, respondents could also choose three categories of material related to advice of counsel: advice contemporaneous with the conduct being investigated absent the assertion of an advice of counsel defense; same as foregoing but requested after an advice of counsel defense was asserted; and advice relating to the investigation itself (rather than the underlying conduct being investigated). The responses selecting these three types of material comprised around 15% of requests experienced by in-house counsel and 20% of requests experienced by outside counsel. According to outside counsel, enforcement officials only asked for communications with counsel ***pursuant to*** the assertion of a company's advice of counsel defense 6% of the time, placing it eighth among nine types of requested material.

Likewise, respondents were asked about the types of protected materials requested by the government in connection with **work product waiver requests**. Six types of material protected by work-product were

[13] 66% versus 33 % for outside counsel; 65% versus 34% for in-house counsel.

listed and respondents could check all that applied. Respondents could also provide a text response. Of the six types, the three most often requested were:

In-house counsel:	Outside counsel:
▪ Results of written internal investigation reports (29%);	▪ Interview memos with witnesses (30%);
▪ Interview memos with witnesses (22%); and	▪ Results of written internal investigation reports (25%); and
▪ Results of reports prepared by non-lawyers or contractors hired to investigate a corporate matter (14%).	▪ Results of reports prepared by non-lawyers or contractors hired to investigate a corporate matter (16%).

> *"Usually the government does not justify its request. They want you to make their case for them."* (In-house counsel respondent.)

> *"In my experience, government enforcement officials simply have no respect for the attorney-client privilege and simply demand it be waived. In some cases, the demand seems to have been driven by sheer laziness and an expectation that we would do all the government's work for them ...."* (In-house counsel respondent.)

4. JUSTIFICATIONS PROFFERED FOR WAIVER REQUESTS

Sixty-two percent of in-house respondents and 48% of outside counsel who had been asked to waive indicated that government officials did not give a specific reason to justify their waiver requests. In a question asking for additional details on justifications when they were received, nine possible justifications were provided, as well as the opportunity to indicate that the respondent didn't remember or wished to submit a write-in response. The top "justification responses" follow (in descending order):

In-house counsel:	Outside counsel:
▪ The government said waiver was needed in order to facilitate a quick and efficient resolution of the matter/because it would ease their fact-finding process (19%)	▪ The government cited their internal policies sanctioning privilege waiver requests: The Holder, Thompson, or McCallum Memoranda (18%)
▪ The government cited their internal policies sanctioning privilege waiver requests: The Holder, Thompson, or McCallum Memoranda (13%)	▪ The government cited the negative impact of non-cooperation by corporations as articulated in the U.S. Sentencing Guidelines (17%)
▪ The government cited the negative impact of non-cooperation by corporations as articulated in the	▪ The government said waiver was needed in order to facilitate a quick and efficient resolution of the

U.S. Sentencing Guidelines (10%)	matter/because it would ease their fact-finding process (15%)[14]

"US Attorneys indicted my company despite complete cooperation and waivers of [attorney-client and work product] privileges, and despite the fact that only two lower-level employees were indicted." (In-house counsel respondent)

"The Holder/Thompson policy and the Guidelines themselves have created an unintended result. To claim certain material rightfully to be privileged is now a bad thing, only someone hiding something would hide behind it. Waiving is a good thing. The result has lead to such erosion of the concept behind a claim of privilege as to bring shame to whomever would make it." (Outside counsel respondent)

"[The Sentencing Guidelines] came up at the first meeting with the US Attorney or the second meeting." (Outside counsel respondent)

"[The Sentencing Guidelines] were mentioned in a not-so-subtle threatening manner." (Outside counsel respondent)

"Prosecutors casually refer to Thompson and the Sentencing Guidelines." (Outside counsel respondent)

"[The Sentencing Guidelines] were specifically discussed as a negotiating tool for a better or for any deal." (Outside counsel respondent)

"[The Sentencing Guidelines] were cited in pre-indictment settings re: possible penalties if no cooperation." (Outside counsel respondent)

"Waiver as an indictator of co-operation under the Guidelines was specifically mentioned." (Outside counsel respondent)

5. WAIVER AND TIMING

Asked whether their clients ever waived the attorney-client privilege, approximately 52% of in-house counsel but only 23% of outside counsel said that they never had occasion to consider the issue (either because they had not been subject to an investigation in the last five years or because waiver was not an issue in any particular representation). When clients did have occasion to consider waiver and decided to

[14] For outside counsel, the next most frequently cited justifications were: (4) privilege did not apply because of a crime-fraud exception (11%); (5) no reasons were offered—the demand was simply made (10%); (6) information protected by privilege was necessary to the investigation (8%). **Susan: complete.**

waive,[15] the top two of six reasons (for both in-house and outside counsel) that the client decided to do so were:

- Government officials' stated expectations that waiver would be required for the company to be treated as cooperative (37% for outside counsel, 30% for in-house counsel), and
- Government officials' unstated but perceived expectations that the company would not be treated as cooperative if waiver were withheld (27% for outside counsel, 28% for in-house counsel).

In addition, when clients waived, the most frequent point in the process for waiver was during the government's fact-finding process (36% for inside counsel and 27% for outside counsel): waivers were most likely provided at this point when the investigator raised concerns that the investigation could not be completed through gathering non-privileged information. For in-house counsel, the next most frequent point for waiver to occur was during the first meeting or communication with the government: around 26% of waivers at that stage were at the government's request or implicit suggestion, as opposed to 8% which were offered by the client without formal prompting or demand (on the presumption that privilege waivers were expected). For outside counsel, the second-most frequent point for waiver to occur was during the bargaining and charging decision (25.5%). Twenty percent of outside counsel said that the decision to waive was made during the first meeting or communication with the government at the government's suggestion, with and only 11% said waiver was offered without prompting or demand. According to all respondents, about 10% of the waiver decisions were made when the problem first surfaced – before any contact with enforcement officials. Approximately 8% of in-house respondents and 5% of outside counsel indicated that their clients do not assert the privilege.

> *"My experience ... is that government agencies routinely 'blackmail' companies with threats of indictment, fines, etc., in order to get them to waive privilege and take other actions (discharge of employees, and so forth). This was true in my dealings at the federal level with agencies (FTC, for example) as well as with federal and state prosecutors."* (In-house counsel respondent)

> *"Federal prosecutors in particular have begun to treat waiver as almost synonymous with cooperation."* (Outside counsel respondent)

> *"The decision by a client to waive the privilege is always agonizing. In part, it has to do with the unexpected ... the law on partial waiver is so unclear, does a decision to waive once ever stop? What will other agencies or third parties do if they get the material? How will an internal investigation ever be conducted in the future if employees feel the company has 'betrayed' them? It's the easy case when the company has identified a discrete problem. When the government seeks this material, however, the extent of the problem is usually not known."* (Outside counsel respondent)

[15] Eighteen percent of outside counsel and 6% of in-house counsel said that their clients did not waive the privilege but instead asserted their rights when faced with pressure to waive.

B. Experiences relating to employees

Respondents were asked whether the government had ever indicated certain expectations with regard to employees during the course of a governmental investigation. Around 60% of outside counsel indicated that this question applied to their own experiences. (Around 10% of in-house respondents to this question indicated that it applied.) Outside counsel who responded to this question said that they had experienced the following government expectations or demands with regard to employee actions:

- Not advance legal expenses (or agree to reimburse) to a targeted employee (26%);
- Not enter into, or breach, a joint defense agreement with a targeted employee (24%);
- Refuse to share requested documents with a targeted employee (21%)
- Discharge an employee who would not consent to be interviewed by the government (16%)

> *"The biggest issue is the pressure that the government puts on companies to terminate employees under investigation (long before any status determination is made) and then not to cover legal fees for loyal employees. A criminal investigation can bankrupt an individual quickly leaving them unemployed and destitute. The government does not want people to have adequate and competent counsel."* (Outside counsel respondent)

> *"[B]ecause of prosecutor demands for cooperation, corporate attorneys often decline to provide access to key documents critical to prepare a wholly legitimate defense based on actual facts. Government policies are interfering with the defense function, and will lead to increased charges against individuals who should not be charged."* (Outside counsel respondent)

> *"The culture of 'cooperate or be fired' has severely impacted the ability to represent executives in corporate investigations."* (Outside counsel respondent)

IV. SUMMARY OF WRITE-IN SITUATIONAL EXPERIENCES AND ADDITIONAL COMMENTARY

As noted above, some of the respondents completed open-ended text questions offered at the end of the survey, in which the survey requested them to provide examples of experiences they'd had with privilege erosion and to provide feedback on the general subject. Highlighted below are a few of the many illuminating responses to these questions.

<u>In-house counsel:</u>

……..

"In connection with a routine SEC investigation we were told that if we did not produce e-mail the matter would be referred to enforcement (i.e., the only wrongdoing would be failure to produce the e-mail – there was no other allegation of misconduct). When we produced our e-mail with a privilege log, we were told that the privilege log was insufficient because it did not describe the content of the e-mails not produced (which on advice of our outside securities counsel, a major law firm, we were advised could serve to waive the privilege). After a conference call in which SEC attorneys advised us that they did not recognize the work product doctrine and that internal compliance investigations were not privileged,' we ended up simply producing most of the e-mails without asserting privilege because 'we had nothing to hide'."

……..

"The company for which I work has commissioned an investigation of alleged accounting improprieties. The investigator is sharing its work with several outside regulators including the SEC and DOJ. All expect, and have received, a great deal of privileged material through this process. Whether to waive the privilege has not been subject to discussion; the only question is how far the waiver will go. And, thus far, there appears to be no limit. From speaking with my in-house counterparts, I know that my experience is not unique."

……..

"Gov[ernment] lawyers and investigators have asked -- demanded - that we produce attorney notes of interviews with employees as well as internal studies that constitute work product."

……..

"The government investigated our company starting about four years ago. At the request of the FBI agent, with her suggestion that it would help us to cooperate, we proffered several upper level employees for them to interview… About a year later, the government executed a warrant on our office. They seized an entire closet full of legal documents, most of which were not related to the investigation or appropriately seized under the warrant. They returned copies of all of the documents after numerous requests, but never returned the originals… . Over the next two years, requests were made to interview several employees and repeated requests for information were made. It was repeatedly outright said or implied that cooperation would make things easier for us... Prior to joining this company, I worked for the government. I feel that the government has behaved inappropriately and illegally with respect to this ongoing investigation. They have abused their authority and terrorized our employees…."

……..

"…The real concern goes [to how the] judiciary … react to and support such activities. Our matter focused on an alleged credit fraud charge that spread from the accused's business to his family and any attorney he had ever engaged. It was as if the government forgot how to spell privilege. They improperly sought and obtained warrants and subpoenas for everything, including protected matters. Eventually the matters were quashed, but only after significant effort."

……..

"We produced the documents because the privilege claim was not beyond doubt and because we wanted to be viewed as cooperative."

……..

"Our general practice is not to waive[] AC or work product protection. However, in circumstances in which a prior opinion of counsel was obtained and an 'advice of counsel' defense exists we will consider waiver of that opinion during the charging decision process."

……..

"We are forced to practice in a world where we cannot expect that any privilege will be respected by government investigators. In addition to a chilling effect on communications with between the client and the lawyer, waiver of privilege subjects companies to disclosure of these materials in litigation, potentially causing grievous harm to the company."

……..

"The assault on privilege seems to me deeply misguided from a long- or medium-term policy standpoint. Counsel serve a critical role in encouraging compliance and transparency. These current policies run a significant risk of chilling attorney client communications in the future which will heighten, rather than reduce, compliance risks. Simply, this is a terrible idea which is solving a problem which doesn't exist - … agencies can proceed with their investigations on the basis of evidence obtained through [other means]."

……..

"The fear of privilege waiver has curtailed my ability to frankly and strongly direct my colleagues in areas of risk. I can no longer send memos that say: "under no circumstances may you do this." or the like, for fear of reprisal [in the future]. My inability to speak forthrightly forces my advice to be sugar-coated in ways that I believe lessen my power and effectiveness to force others to do the right thing… . When things appear as if they will be highly sensitive, I carefully retain outside counsel, often in matters I could handle better internally, thereby wasting significant not-for-profit dollars because of the government's inappropriate intrusion in this formerly sacrosanct land."

……..

"Outside counsel urge their retention in part because they contend in-house counsel cannot assert the privilege as effectively as outside counsel."

……..

"The privilege was established so persons could seek competent legal advice and thereby understand their rights and obligations under the law. To treat corporations differently creates the specter that companies won't seek appropriate legal advice, as they have no ability to feel confident in the confidentiality of their communications."

……..

"Our corporate strategy is to have in-house counsel active and involved in business deals early and often. We have found that this significantly minimizes the risk that employees engage in questionable behavior. This 'prevention' strategy demands on open dialogue with employees. DOJ demands for waiver have a chilling effect on our employees seeking out in-house counsel to discuss potentially tricky legal situations. We depend on open lines of communication with employees and these are being strained by DOJ's policy and their push to alter the Sentencing Guidelines. We should have policies in place that encourage dialogue with employees. DOJ's waiver push is short sighted and counter productive."

……..

"It is my opinion that the concept of the government asking any person (either individual or corporate) to waive attorney-client privilege in order to facilitate their investigation is a travesty of justice. The attorney-client privilege is there as a means to have open discussions between the client and their attorney regarding all possibilities. To allow for this type of request will merely result in many corporations no longer including in-house counsel in important decision making processes which may in fact lead to even more wrongdoing."

……..

"In my experience, it is remarkably difficult for corporations and their employees to get legal advice in today's environment. There is a clear expectation -- sometimes unspoken, often spoken -- that any communication, privileged or not, will be shared with the government. There is no balancing of the advantages of waiver against the risks, including the company's ability to defend itself in ongoing civil litigation. This puts company counsel in a completely untenable position, unable to give or seek advice freely. The important purposes behind the privilege are simply being ignored."

……..

"I think the government's policy and position that companies should/must waive privilege and threatening criminal sanctions if they refuse to cooperate from the outset is frighteningly wrong, unconstitutional, over- reaching by the government, misguided, and is serving to undermine the efficacy of our system of jurisprudence and the assumption of innocent until proven guilty."

……..

"Reviewing the reports of waivers and requested waivers in the general press and in the legal periodicals has had a chilling effect on my function as general counsel. I warn our senior managers regularly that they should not count on having any privilege regarding their communications with me. We try hard to follow the law at this organization, so criminal prosecution is not a concern. What is a concern is that the continued erosion of privilege in prosecution by state and federal agencies will spill over into the civil arena. We are in a business sector in which litigation is common and the stakes are often very large. The self-censoring I feel compelled to do at this point hinders the company's ability to protect against or plan for anticipated claims."

……..

"While I have not experienced any problems, privilege erosion is a real fear that affects how we do business. A free and open dialogue between counsel (in house and outside) and management is critical to any business, and if the privilege becomes even more endangered, it will have a crippling effect on how we conduct our business."

……..

"As a result of our experiences, we now routinely advise our clients that there is not such thing as information protected by the attorney client privilege. Although I have no belief that the prosecutors requiring the waivers understand what they have done, within a matter of a few years, these attorneys have utterly eviscerated the attorney client privilege and undermined the most important aspect of the attorney client relationship. As a result, instead of advancing the interests of the public, government attorneys have now created a situation where clients are going to be less, not more, forthcoming; a result that will only lead to more corporate misdeeds."

……..

"At this stage, much of the damage is done--one has to conduct affairs, take (or not) notes, write communications and obtain information on the assumption that there will be no protection. In that environment, lawyers are already much less effective in discovering information and counseling compliant conduct."

……..

"That waiver may be just 'a factor' in the determination of cooperation as mitigation under the Guidelines is very little - in fact, no - comfort at all."

……..

"The government is out of control. The Bar and the Judiciary should stand up and recognize this is wrong. Individual companies cannot afford to do it on their own; the stakes are too high."

……..

"We are involved in several investigations/subpoenas/lawsuits in which AGs, DOLs, or other regulators have retained plaintiffs firms and are using their state powers to demand production to those firms of documents we would not produce in discovery. Some of those law firms are paid on contingency basis. They typically ask for investigation reports."

……..

"From discussions with other general counsel, top law firm partners, and reading case law, it appears that failure to "cooperate" with federal investigators will incur their wrath, whether it's obstruction of justice charges, increased fines/penalties, new charges, character assassinations, pressure on a company to terminate an employee, pressure to have a state bar "review" an attorney's conduct, etc. (translation of "cooperate" meaning, waive the privilege and work-product protection and give them everything they ask for; asserting one's rights is seen as trying to defy the federal government). This is frightening (the federal gov[ernment] becoming more like a police state), and just the threat of such action from the feds changes the way attorneys and their clients work together, and changes the defense strategies when handling such issues – all for the worse with regard to the Constitutional and legal rights of individuals and companies. The law becomes a weapon wielded by the feds against the "people," and the protections that people and corporations are entitled to become a meaningless facade."

……..

"It is clear to me that this has become the "rage" among prosecutors. Frankly, if this is to be the expectation of all prosecutors in corporate criminal investigations, then it will essentially eliminate the privilege as to corporations in all of those cases. Indeed the waiver has also become prevalent in grand jury work with individuals in which the prosecutor hints at avoiding target status if the individual will waive his attorney client (and reporter/source) materials. In effect, prosecutors are overriding the legislative decision that the attorney client privilege is to be maintained."

……..

"On more than one occasion in small group meetings with government lawyers, such as in discussions of the requirements and expectations under Sarbanes Oxley, government lawyers have stated in absolute terms that they expect complete, open and full cooperation and that any actions, including assertions of privilege, significantly affect their assessment of culpability, the level of fines or civil or criminal penalties that should apply."

……..

"The attorney/client privilege is critical for clients, because they need to be frank with their attorneys in order to obtain accurate advice. If the privilege is not there or is likely to be waived, the client may not inform its attorneys of all the relevant facts. The heavy-handed "requests" for waiver of the attorney/client privilege, with heavy penalties levied for failure to "cooperate," will undermine the administration of justice in the long run. These requests are not fair or appropriate."

……..

"The DOJ routinely ignores the role of corporate counsel in establishing the ground rules for communications with company employees and the rights of both the company employee and the company of having a company lawyer present during questioning."

……..

"Waiving privilege through coercion is bad policy. It prevents an in-house attorney from advising his/her client the company. It interferes with the company's and employees' rights … . If the government can't make a case without waiver, then perhaps the case isn't that strong. [They already] have a large club they

can use to access company records and interview employees, far beyond what is available in civil litigation."

……..

"The balance of power in America now weighs heavily in the hands of government prosecutors. Honest, good companies are scared to challenge government prosecution for fear of being labeled uncooperative and singled out for harsh treatment. See Arthur Andersen for details...oh yeah...they cease to exist."

……..

"Currently, during the course of annual audit by a big 4 public accounting firm, the firm has demanded that the company waive privilege by turning over a legal memorandum prepared by outside tax counsel. The [accountants have] taken the position that their review of the memorandum is "necessary" to complete their Sarbox internal control review. We have been informed that our failure to waive will result in the firm not issuing a clean opinion in connection with our 10K. The firm has cited litigation as support for its position."

……..

"Auditors are asking for privileged information in connection with reviewing the company's accrual of potential or contingent liabilities; opening the door even before investigations start. Need accountant client privilege in addition to attorney client privilege."

……..

"Where we see the most potential for privilege erosion is during our regular interactions with our external auditors who are asking for more and more information impinging on attorney/client privilege…"

……..

"Privilege should be maintained inviolate, and pressure brought to force waiver should be prevented. If a company chooses to waive the privilege it should be purely voluntary and not coerced."

……..

"I believe the issue of government supported waiver of attorney-client privilege and work-product is one of the most critical issues facing in-house companies, and, indeed, companies, today. Waivers will cause non-lawyers to avoid consulting with lawyers because to do so would expose the company to civil and/or criminal prosecution. The net result will be to reduce the effectiveness of counsel, particularly in-house counsel, and, ultimately, increased violations of regulations and rules."

Outside counsel:

Two responses in particular to the long-answer questions in the outside counsel survey are discursive and thoughtful, and merit reproduction in their entirety:

"My practice focuses exclusively on environmental crimes cases most always being conducted out of the Environmental Crimes Section at the DOJ, an office I used to head. For many years now, dating back to the end of the Bush I administration the Section has become increasingly aggressive in demanding a waiver of the privilege, most always excluding materials on strategy, direct advice to the client and mental impressions of the lawyers. Everything else must be turned over. Sometimes explicitly, more often subtly it is expressed that the waiver is a condition for even entering into plea negotiations. In no case have I ever felt that the client received any benefit for the waiver (or for that matter overall cooperation), rather it

had evolved over time to be an expectation that the client has to waive. More to the point, any claim of privilege or refusal to waive implies that something is being hidden from the government and that before a case can be concluded, the government must have that information even where it duplicates , for instance, information the government already has in its possession through the grand jury or otherwise. It has become so prevalent as to be casual. To fail to waive is to impede, it is said, often with the suggestion that a decision not to waive is to obstruct. I have been on many panels on this subject and I always hear the gov't representatives describe their request in sterile tones as if there were only infrequent demands for a waiver and then only when there was no other way for the government to obtain the evidence in counsel's possession. Something is missing in the discussion. The give and take with line prosecutors never sounds like the supervisor's view of how and when the demand for waiver takes place. What's more invidious in my view is how the concept of waiver/cooperation has made any suggestion or discussion of the concept of privilege a 'dirty word.' Prosecutors act as if a claim of privilege were an implement of the crime itself or a legal concept without any historical or important basis in our jurisprudential system. To claim a privilege is to force the government to work harder, they want a short cut. And yet, ironically, while I have never felt a client received any credit for waiving, I have also never felt that the material the government obtained from a waiver served any purpose. This has led me to conclude, it is not the actual material the government wants, it simply that the government wants to obtain waiver per se to be able to claim a thorough investigation."

…….

"I was a federal prosecutor for 16 years, in the EDNY (6 years), District of Arizona (2.5 years) and NDCA (7 years) (where I was the Chief of the Criminal Division and the US Attorney (interim appointment) for the last five of those years). I have been in private practice for the past 3 years.

Several US Attorneys' Offices were historically aggressive in demanding waivers, and that practice has become more prevalent, along with demands that companies fire employees who decline to talk to government investigators or who the government believes may have done wrong, even if those employees have not been indicted. The demands from some US Attorneys' Offices have sometimes required an immediate response, without giving the company time to evaluate the demand or distinguish among different documents. For example, one US Attorney's Office accused a client of failing to cooperate because it spent 2 weeks reviewing the documents that would be the subject of the waiver.

Even more troubling, however, is the lack of consideration that government prosecutors have provided to companies that waive privileges. Unlike the Antitrust Division, which has a history of granting amnesty to those companies that waive the privilege and otherwise cooperate, some US Attorneys' Offices demand waivers, demand that companies force executives and employees to be interviewed by the government on pain of termination, and suggest that the company should not pay the legal fees of those employees or officers (on pain of indictment of the company).

These tactics are intended to deprive employees of top legal representation and cause employees to resent the corporation for 'abandoning' them, both attempts by the government to convince those employees to provide damning information about others in the company. While truthful cooperation is in the government's interest, several US Attorneys' Offices have resorted to making false statements to counsel for individual employees and mischaracterizing companies' cooperation in an effort to extract guilty pleas from individuals and from companies.

In addition, some prosecutors, including prosecutors at Main Justice in Washington, D.C., have demanded that companies retain separate 'independent' counsel to conduct internal investigations and turn the results of those investigations over to the government. In my experience, our client declined that demand, recognizing the client might incur the wrath of the prosecutor, because it was unnecessary. Such demands

essentially require the companies to conduct the investigation for the government, turn over the results, and then agree to punitive measures for the company.

Finally, prosecutors recognize the difficult position that companies are in when they face criminal prosecution, because of negative public and shareholder reaction and because of possible government debarment. Some prosecutors exploit that fear to obtain information and then use it against the companies to extract unnecessary corporate guilty pleas or deferred prosecution agreements. Prosecutors' primary goal should be to indict individuals who commit crimes; in my experience, prosecutors have failed to give adequate weight to the factors identified in the Thompson memo and have disregarded mitigating factors when the companies do not accede to the prosecutors' version of events."

Other responses by outside counsel follow:

"Environmental enforcement case, handled by DOJ Environmental Crimes Section (ECS) and U.S.Atty. DOJ ECS lawyer made clear that favorable disposition (misdemeanor Water Act and diversion of felony hazardous waste charges) would not occur absent waiver. Produced approximately 80 typed interviews and notes. At other times in the litigation, was suggested that company terminate funding of counsel fees for employees (despite company bylaws authorizing). Demanded that company withdraw from all joint defense agreements in settlement agreement, despite pendency of continuing parallel civil litigation.

Environmental prosecution under Clean Water Act; U.S. Attorney and staff made clear that government decision to prosecute, despite company general cooperation and violation conduct caused by employee contrary to explicit company policy, hinged on company decision not to waive privilege. Govt immunized employee who committed violation then used him against company that had informed employee that pollution violations were contrary to company policy."

.....

"Typical situation: environmental crimes investigation in which the company is invariably expected to turn over its internal investigation. Although DOJ lawyers give lip service to the proposition that waiver is not required to get Thompson Memo cooperation credit, they invariably asked for the information (or the client knew they would invariably ask for the information) in such a manner as to make it plain they would not consider any company that did not waive to be a 'good corporate citizen' deserving of consideration for a charging decision less than 'the most serious readily provable offense.' In fact DOJ and USAO lawyers say the only way they are authorized under DOJ policy to charge less than the most serious readily provable offense is if the company shows it comes within the mitigating categories in the Thompson memo, and invariably waiver of work product and attorney client protections are discussed."

.....

"For all intents and purposes, there is no such thing as an attorney-client privilege or work product protection in a public company. This is true for inside counsel as well as outside counsel. In-house counsel should probably periodically issue a blanket warning to senior executives that they should expect that, in the event of a future governmental investigation, any conversations that would otherwise be viewed as privileged will likely be disclosed to the government. For outside counsel coming in to perform an investigation, we do so now in the expectation that our client will instruct us to turn over all of our materials to the government. We are, as a consequence, also fair game for testimony in class action and other civil cases brought by shareholders. Public companies currently have little choice in this matter and it is likely, at least in my opinion, that executives are beginning to realize that they cannot bring difficult

problems to their counsel and receive their advice for fear that advice will be disclosed and decisions will later be second-guessed by the government."

…….

"The AUSA wrote a letter to the company's counsel explicitly stating that whether the company receives any credit for cooperation would be determined by whether it had 'fully' met the factors set forth in the Thompson Memo, including the company's willingness to make a firm commitment to provide the government prompt access to all 'potentially relevant information, including information protected by the attorney-client privilege and work product privilege.'

Shortly thereafter, and even though the company waived privilege and work product with respect to the subject matter of the investigation, the prosecutor complained of a lack of cooperation, and demanded that the parent company's General Counsel, Audit Committee Chairman and CEO meet with him personally so that they could respond directly to his demands. Surprisingly, the company acceded to this request and there were one or more meetings at which the General Counsel (and, I believe) other top executives were lectured by the AUSA in a threatening manner.

As he realized that these pressure tactics were actually working, the AUSA continued to make escalating demands, including a series of demands for virtually unlimited waiver of the attorney-client privilege. When the company's outside counsel pointed out that the company had in fact complied with the Thompson Memo by providing, inter alia, the facts, the identity of witnesses, the documents, voluntary presentations on various issues and even limited waivers of attorney-client privilege, the AUSA apparently concluded that this attorney was an obstructionist and not cooperating."

…….

"When we assert privilege with regard to an independent counsel investigation report, records and recommendations, the government (in my case state attorneys general and state departments of insurance) tells us that we are being uncooperative and unreasonable and that we are the only person who has received such a subpoena that is withholding this kind of information. The state also requests information on the process our client followed to prepare its answers to other questions in the subpoena, including inquiries and analysis done by outside and inside counsel. We have also resisted that (on work product and other grounds) and received the same reply that we are the most unreasonable, uncooperative person in our industry, and that if we want to save the time and money of the government's investigation then we should cooperate."

…….

"The Department of Justice and the CFTC have extorted the energy industry into waiving privileges and paying huge unjustified settlements for "false reporting" trade data to the trade publications."

…….

"While guidelines for various agency voluntary disclosure programs may permit the assertion of privileges, in reality, agents who investigate apparent misconduct, those administering the disclosure programs and government lawyers who evaluate the issue that is the subject of the disclosure clearly expect waiver as a matter of course. Assertions of privilege, in such circumstances, are usually met with raised eyebrows and "tisk-tisks" rather than by direct threats or explicit statements of unfavorable treatment. Corporate clients, in particular, quickly get the message from the regulators and investigators and elect to waive the privilege in expectation favorable treatment in agency and prosecution decision making. The most common privileged material provided to government investigators and lawyers are interview memoranda prepared by counsel."

…….

"Government suspension and debarment and exclusion officials routinely demand that companies disclose internal investigations, including notes, in order to be deemed 'responsible' contractors and receive Federal contracts. Also, Congressional investigators routinely request such waivers. I have not had a serious issue with the Civil Division of the Justice Department. I routinely get this request from Assistant US Attorneys when they are conducting grand jury investigations."

…….

"The government now expects a waiver as their inherent right. In return, almost no credit is given."

…….

"In situations where the government is aware that an investigation has occurred, it has been indicated directly and indirectly that they need all of the gathered information to make a proper assessment elsewise they view any claims of cooperation or truthfulness unacceptable."

…….

"We generally advise clients to be prepared to waive certain privileges when the results of a preliminary investigation uncover a potential violation of law that, absent an affirmative disclosure, could subject the client to increased penalties or a potential qui tam action."

…….

"AUSA stated that asserting the attorney-client privilege was inconsistent with cooperation."

…….

"Corporate counsel are scared, and are the functional equivalent of AUSAs."

…….

"Seems like the guidelines have bred a culture of arrogance in our US attorney's office since the late 1980s. Prosecutors seemed more human and reasonable before."

…….

"The increase in pressure on companies to waive erodes the confidence some clients have in seeking advice from counsel who will then need to cooperate with the government."

…….

"It seems the government has taken the stand that because they are the government the rules do not apply to them and can by force and intimidation take whatever they want."

……

(For further information on this survey and results, please contact Susan Hackett at hackett@acca.com, or Stephanie Martz at stephanie@nacdl.org.)

LETTER FROM FORMER JUSTICE DEPARTMENT OFFICIALS TO THE HONORABLE RICARDO H. HINOJOSA, CHAIRMAN, U.S. SENTENCING COMMISSION

August 15, 2005

The Honorable Ricardo H. Hinojosa
Chairman
U.S. Sentencing Commission
One Columbus Circle, N.E.
Washington, D.C. 20002-8002

Re: Organizational Sentencing Guidelines Commentary Involving Waiver of Attorney-Client Privilege and Work Product Doctrine -- Comments on Notice of Proposed Priorities

Dear Judge Hinojosa:

We, the undersigned former Justice Department officials, are pleased that the Commission has included, on its list of tentative priorities for the upcoming amendment cycle, the recent amendment to the Commentary to the Organizational Guidelines involving waiver of attorney-client privilege and work product protection in the context of cooperation.[1] We believe that this new amendment is eroding and weakening the attorney-client and work product protections afforded by the American system of justice, and we urge the Commission to address and remedy this amendment as soon as possible.

As you know, on April 30, 2004, the Commission submitted to Congress a number of amendments to Chapter 8 of the Sentencing Guidelines relating to "organizations"—a broad term that includes corporations, partnerships, unions, non-profit organizations, governments, and other entities. Among these amendments—all of which became effective on November 1, 2004— was a change in the Commentary to Section 8C2.5 which authorizes and encourages the government to require entities to waive their attorney-client and work product protections in order to demonstrate cooperation with the government and thereby qualify for a more lenient sentence under the Guidelines.

Prior to the adoption of this privilege waiver amendment, the Sentencing Guidelines were silent on the privilege issue and contained no suggestion that such a waiver would ever be required. Although it is true that the Justice Department has followed a general policy of commonly requiring companies to waive privileges as a sign of cooperation since the 1999 "Holder Memorandum" and the 2003 "Thompson Memorandum," this was merely the Department's internal policy for its prosecutors. Now that the privilege waiver amendment has been incorporated into the official Commentary to the Sentencing Guidelines, the Justice Department, as well as other enforcement agencies, are contending that this amendment provides Congressional ratification of the Department's policy of routinely asking that privilege be waived.[2] In practice, companies are

[1] 70 Fed. Reg. 37145 (June 28, 2005).
[2] See, e.g., Mary Beth Buchanan, "Effective Cooperation by Business Organizations and the Impact of Privilege Waivers," 39 WAKE FOREST L. REV. 587, 589 (Fall 2004) ("This Article seeks to demonstrate that the [Justice] Department's consideration of waiver is based squarely on the definition of cooperation set forth in the Organizational Sentencing Guidelines.").

finding that they have no choice but to waive these privileges whenever the government demands it. The threat to label them as "uncooperative" in combating corporate crime simply poses too great a risk of indictment and further adverse consequences in the course of prosecution. Even if the charge is unfounded, the charge of "noncooperation" can have such a profound effect on a company's public image, stock price and credit worthiness that companies generally yield to waiver demands.

As former Justice Department officials, we appreciate and support the Commission's ongoing efforts to amend and strengthen the Sentencing Guidelines in order to reduce corporate crime. Unfortunately, however, we believe that the privilege waiver amendment, though well-intentioned, is undermining rather than strengthening compliance with the law in a number of ways.

In our view, the privilege waiver amendment seriously erodes and weakens the attorney-client privilege between companies and their lawyers by discouraging corporate personnel at all levels from consulting with counsel on close issues. Lawyers are indispensable in helping companies and their officials understand and comply with complex laws and act in the entity's best interests. In order to fulfill this important function, lawyers must enjoy the trust and confidence of the board, management and line operating personnel so they may represent the entity effectively and ensure that compliance is maintained (or that noncompliance is quickly remedied). By enabling routine demands for waiver of the attorney-client and work product protections, the amendment discourages personnel within companies and other organizations from consulting with their lawyers, thereby impeding the lawyers' ability to effectively counsel compliance with the law. This, in turn, will harm not only the corporate client, but the investing public and society as well.

The privilege waiver amendment will also make detection of corporate misconduct more difficult by undermining companies' internal compliance programs and procedures. These mechanisms, which often include internal investigations conducted by the company's in-house or outside lawyers, have become one of the most effective tools for detecting and flushing out malfeasance. Indeed, Congress recognized the value of these compliance tools when it enacted the Sarbanes-Oxley Act in 2002. Because the effectiveness of internal investigations depends on the ability of employees and other individuals with knowledge to speak candidly and confidentially with the lawyer conducting the investigation, any uncertainty as to whether attorney-client and work product protections will be honored makes it harder for companies to detect and remedy wrongdoing early. As a result, we believe that the privilege waiver amendment undermines rather than promotes good compliance practices.

Finally, we are concerned that the privilege waiver amendment will encourage excessive "follow-on" civil litigation. In virtually all jurisdictions, waiver of attorney-client or work product protections for one party constitutes waiver to all parties, including subsequent civil litigants. Forcing companies and other entities to routinely waive their privileges during criminal investigations provides plaintiff lawyers with a great deal of sensitive—and sometimes confidential—information that can be used against the entities in class action, derivative and similar suits, to the detriment of the entity's employees and shareholders. This risk of future litigation and

all its related costs unfairly penalizes organizations that choose to cooperate on the government's terms. Those who determine that they cannot do so—in order to preserve their defenses for subsequent actions that appear to involve a far greater financial risk—instead face the government's wrath.

In sum, we believe that the new privilege waiver amendment is seriously flawed and undermines, rather than enhances, compliance with the law and the many other societal benefits that arise from the confidential attorney-client relationship. Therefore, we urge the Commission to retain this issue on its list of priorities for the upcoming amendment cycle, and to address and remedy the issue as soon as possible. In particular, we recommend that the Commission revise the amendment to state affirmatively that waiver of attorney-client and work product protections should not be a factor in determining whether a sentencing reduction is warranted for cooperation with the government during an investigation.

Respectfully submitted,

Griffin B. Bell
Attorney General
(1977-1979)

Stuart M. Gerson
Acting Attorney General (1993)
Assistant Attorney General,
Civil Division (1989-1993)

Edwin Meese, III
Attorney General
(1985-1988)

Dick Thornburgh
Attorney General
(1988-1991)

Carol E. Dinkins
Deputy Attorney General
(1984-1985)

George J. Terwilliger III
Deputy Attorney General
(1991-1992)

Theodore B. Olson
Solicitor General
(2001-2004)

Kenneth W. Starr
Solicitor General
(1989-1993)

Seth P. Waxman
Solicitor General
(1997-2001)

cc: United States Sentencing Commission
One Columbus Circle, N.E.
Suite 2-500, South Lobby
Washington, D.C. 20002-8002
Attention: Public Affairs—Priorities Comment

Members of the U.S. Sentencing Commission
Charles R. Tetzlaff, General Counsel, U.S. Sentencing Commission
Paula Desio, Deputy General Counsel, U.S. Sentencing Commission
Amy L. Schreiber, Assistant General Counsel, U.S. Sentencing Commission

LETTER FROM THE AMERICAN BAR ASSOCIATION TO THE SUBCOMMITTEE ON CRIME, TERRORISM AND HOMELAND SECURITY

GOVERNMENTAL AFFAIRS OFFICE

DIRECTOR
Robert D. Evans
(202) 662-1765
rdevans@staff.abanet.org

SENIOR LEGISLATIVE COUNSEL
Denise A. Cardman
(202) 662-1761
cardmanda@staff.abanet.org

Kevin J. Driscoll
(202) 662-1766
driscollk@staff.abanet.org

Edward G. Gilbin
(202) 662-1768
gilbinea@staff.abanet.org

LEGISLATIVE COUNSEL
R. Larken Kady
(202) 662-1936
kadylr@staff.abanet.org

Kristi Gaines
(202) 662-1763
gainesk@staff.abanet.org

Kenneth J. Gudebski
(202) 662-1784
gudebskik@staff.abanet.org

Ellen McBarnett
(202) 662-1767
mcbarnee@staff.abanet.org

J. Bruce McDonald
(202) 662-1765
mcdonaldb@staff.abanet.org

DIRECTOR GRASSROOTS OPERATIONS & LEGISLATIVE COUNSEL
Julie M. Strauss-Riley
(202) 662-1761
strauss@staff.abanet.org

INTELLECTUAL PROPERTY LAW CONSULTANT
Pamela Gregory
(202) 662-1772
gregorpa@staff.abanet.org

STATE LEGISLATIVE COUNSEL
Rita C. Aguilar
(202) 662-1780
aguilarrc@staff.abanet.org

EXECUTIVE ASSISTANT
Julie Fitzgerald
(202) 662-1779
fitzgeraldjl@staff.abanet.org

STAFF DIRECTOR FOR INFORMATION SERVICES
Sharon Gilmore
(202) 662-1774
gilmorsh@staff.abanet.org

EDITOR, WASHINGTON LETTER
Ricardo J. Anderson
(202) 662-1017
andersonrj@staff.abanet.org

AMERICAN BAR ASSOCIATION

Governmental Affairs Office
740 Fifteenth Street, NW
Washington, DC 20005-1022
(202) 662-1765
FAX (202) 662-1762

March 3, 2006

The Honorable Howard Coble
Chairman
Subcommittee on Crime, Terrorism and Homeland Security
Committee on the Judiciary
U. S. House of Representatives
Washington, D.C. 20515

Re: Hearing on "White Collar Enforcement (Part 1): Attorney-Client Privilege and Corporate Waivers," Scheduled for March 7, 2006

Dear Mr. Chairman:

On behalf of the American Bar Association ("ABA") and its more than 400,000 members, I write to express our views concerning the subject of your Subcommittee's upcoming hearing, "White Collar Enforcement (Part 1): Attorney-Client Privilege and Corporate Waivers," which is scheduled for March 7, 2006. In particular, we would like to express our strong support for preserving the attorney-client privilege and work product doctrine and our concerns regarding several federal governmental policies and practices that have begun to seriously erode these fundamental rights. We ask that this letter be included in the official record of the Subcommittee's March 7, 2006 hearing.

The Importance of the Attorney-Client Privilege

The attorney-client privilege—which belongs not to the lawyer but to the client—historically has enabled both individual and corporate clients to communicate with their lawyer in confidence. As such, it is the bedrock of the client's rights to effective counsel and confidentiality in seeking legal advice. From a practical standpoint, the privilege also plays a key role in helping companies to act legally and properly by permitting corporate clients to seek out and obtain guidance in how to conform conduct to the law. In addition, both the attorney-client privilege and the work product doctrine help facilitate self-investigation into past conduct to identify shortcomings and remedy problems as soon as possible, to the benefit of corporate institutions, the investing community and society-at-large.

Federal Government Policies That Erode the Attorney-Client Privilege

The American Bar Association strongly supports the preservation of the attorney-client privilege and opposes governmental policies, practices and procedures that have the effect of eroding the privilege.[1] Although a number of federal governmental agencies have adopted policies in recent years that have weakened attorney-client and work product protections, the ABA is particularly concerned about policies recently adopted by the Department of Justice—and an amendment to the Federal Sentencing Guidelines adopted by the U.S. Sentencing Commission in 2004—that have led many federal prosecutors to routinely pressure companies and other organizations to waive their privileges as a condition of receiving credit for cooperation during investigations.

Justice Department Policies

The Justice Department's privilege waiver policy originated with the adoption of a 1999 memorandum by then-Deputy Attorney General Eric Holder entitled "Federal Prosecution of Corporations." The so-called "Holder Memorandum" encouraged federal prosecutors to request that companies waive their privileges as a condition for receiving cooperation credit. It states in pertinent part:

> In gauging the extent of the corporation's cooperation, the prosecutor may consider the corporation's willingness to identify the culprits within the corporation, including senior executives, to make witnesses available, to disclose the complete results of its internal investigation, and to waive attorney-client and work product privileges.

Although the Holder Memorandum stated that waiver was not an absolute requirement, it nevertheless made it clear that waiver was a factor for prosecutors to consider in evaluating the corporation's cooperation. It relied on the prosecutor's discretion to determine whether waiver was necessary in the particular case.

The Department's waiver policy was expanded in a January 2003 memorandum written by then-Deputy Attorney General Larry Thompson entitled "Principles of Federal Prosecution of Business Organizations." The so-called "Thompson Memorandum" stated that:

> One factor the prosecutor may weigh in assessing the adequacy of the corporation's cooperation is the completeness of its disclosure including, if necessary, a waiver of the attorney-client and work product protection, both with respect to its internal investigation and with respect to communications between specific officers, directors, and employees

[1] On August 9, 2005, the ABA adopted a resolution, sponsored by the ABA Task Force on Attorney-Client Privilege, supporting the preservation of the attorney-client privilege and work product doctrine, opposing governmental actions that erode these protections, and opposing the routine practice by government officials of seeking the waiver of these protections through the granting or denial of any benefit or advantage. Previously, in August 2004, the ABA adopted a resolution supporting five specific changes to the then-proposed amendments to the Federal Sentencing Guidelines for Organizations, including amending the Commentary to Section 8C2.5 to state affirmatively that waiver of attorney-client and work product protections "should not be a factor in determining whether a sentencing reduction is warranted for cooperation with the government." Both ABA resolutions, and detailed background reports discussing the history and importance of the attorney-client privilege and work product doctrine and recent governmental assaults on these protections, are available at http://www.abanet.org/poladv/acprivilege.htm.

> and counsel. Such waivers permit the government to obtain statements of possible witnesses, subjects and targets without having to negotiate individual cooperation or immunity agreements. In addition, they are often critical in enabling the government to evaluate the completeness of a corporation's voluntary disclosure and cooperation. Prosecutors may, therefore, request a waiver in appropriate circumstances. The Department does not, however, consider waiver of a corporation's attorney-client and work product protection an absolute requirement, and prosecutors should consider the willingness of a corporation to waive such protection when necessary to provide timely and complete information as one factor in evaluating the corporation's cooperation.[2]

Although both the Holder and Thompson Memoranda state that waiver is not mandatory and should not be required in every situation, the reality is that these policies have led many if not most federal prosecutors to routinely pressure companies and other organizations to waive their privileges as a condition for receiving cooperation credit during investigations. Moreover, prosecutors typically demand disclosure at the very beginning of the investigation, even before the government has sought to obtain information through techniques such as grand jury subpoenas, warrants, and in appropriate circumstances, compulsion of testimony.[3] In addition, the U.S. Attorney for the Southern District of New York "has publicly called for a complete waiver of the attorney-client privilege by all corporate targets wishing to obtain credit for their cooperation."[4]

In an attempt to address this growing problem of routine governmental demands for privilege waiver, Acting Deputy Attorney General Robert McCallum sent a memorandum to all U.S. Attorneys and Department Heads in October 2005 instructing each of them to adopt "a written waiver review process for your district or component," and many local U.S. Attorneys are now in the process of implementing this directive.[5] Unfortunately, the McCallum Memorandum does not establish any minimum standards for, or require national uniformity regarding, privilege waiver demands by prosecutors. As a result, it will likely result in numerous different waiver policies throughout the country, many of which may impose only token restraints on the ability of federal prosecutors to demand waiver.

The 2004 Privilege Waiver Amendment to the Federal Sentencing Guidelines

The problem of coerced waiver that began with the 1999 Holder Memorandum and the 2003 Thompson Memorandum was further exacerbated when the U.S. Sentencing Commission adopted certain amendments to the Federal Sentencing Guidelines that took effect on November 1, 2004. These amendments apply to that section of the Guidelines relating to "organizations"—a broad term that includes corporations, partnerships, unions, non-profit organizations, governments, and other entities. These organizational guidelines provide the standard by which the criminal

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[2] 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), available at http://www.usdoj.gov/dag/cftf/business_organizations.pdf.

[3] Public hearing held by the Ad Hoc Advisory Group on Organizational Sentencing Guidelines, Nov. 14, 2002, at 27.

[4] Judson W. Starr and Brian L. Hack, *Government's Insistence on a Waiver of Privilege*, WHITE COLLAR CRIME 2001 J-1, at J-4 (ABA 2001).

[5] A copy of the McCallum Memorandum of October 21, 2005 is available online at http://www.abanet.org/poladv/mccallummemo212005.pdf.

penalties for corporate wrongdoing are measured, and they ostensibly are designed to create incentives for good corporate behavior while increasing penalties for corporations that lack mechanisms for discouraging and detecting employee wrongdoing.

Although the ABA has serious concerns regarding several of these recent amendments, most alarming is the amendment that added the following new language to the Commentary for Section 8C2.5 of the Guidelines:

> Waiver of attorney-client privilege and of work product protections is not a prerequisite to a reduction in culpability score [for cooperation with the government]…unless such waiver is necessary in order to provide timely and thorough disclosure of all pertinent information known to the organization.

While this language begins by stating a general rule that a waiver is "not a prerequisite" for a reduction in the culpability score—and leniency—under the Guidelines, that statement is followed by a very broad and subjective exception for situations where prosecutors contend that waiver "is necessary in order to provide timely and thorough disclosure of all pertinent information known to the organization." Without some meaningful oversight over what waivers prosecutors may deem to be "necessary," this exception essentially swallows the rule. Prior to the change, the Commentary was silent on the issue and contained no suggestion that such a waiver would ever be required.

Unfortunately, neither the Holder nor Thompson Memoranda provide any meaningful oversight over what waivers prosecutors may deem "necessary" under the new language in the Sentencing Guidelines. Therefore, now that this amendment has become effective, the Justice Department is even more likely than it was before to require companies to waive their privileges in almost all cases. Adding to our concern is that the Justice Department, as well as other enforcement agencies, is viewing the lack of congressional disapproval of this amendment as congressional ratification of the Department's policy of routinely requiring privilege waiver. From a practical standpoint, companies increasingly have no choice but to waive these privileges whenever the government demands it, as the government's threat to label them as "uncooperative" in combating corporate crime will have a profound effect on their public image, stock price, and credit worthiness.

Unintended Consequences of Governmental Demands for Privilege Waiver

Substantial new evidence has demonstrated that the Justice Department's waiver policies, combined with the 2004 privilege waiver amendment to the Federal Sentencing Guidelines, have resulted in the routine compelled waiver of attorney-client privilege and work product protections. According to a new survey of over 1,400 in-house and outside corporate counsel that was completed by the Association of Corporate Counsel, the National Association of Criminal Defense Lawyers, and the ABA in March 2006,[6] almost 75% of corporate counsel respondents believe that

[6] The detailed Survey Results are available online at http://www.acca.com/Surveys/attyclient2.pdf.

a "culture of waiver" has evolved in which governmental agencies believe that it is reasonable and appropriate for them to expect a company under investigation to broadly waive attorney-client or work product protections. In addition, 52% of in-house respondents and 59% of outside respondents have indicated that there has been a marked increase in waiver requests as a condition of cooperation in recent years. Corporate counsel also indicated that when prosecutors give a reason for requesting privilege waiver, the Thompson/Holder/McCallum Memoranda and the amendment to the Sentencing Guidelines were among the reasons most frequently cited.

The American Bar Association is concerned that the Justice Department's waiver policies and the 2004 amendment to the Sentencing Guidelines—resulting in routine government requests for waiver of attorney-client and work product protections—will continue to unfairly harm companies, associations, unions and other entities in a number of ways. First and foremost, these governmental policies seriously weaken the confidential attorney-client relationship between companies and their lawyers, resulting in great harm both to companies and the investing public. Lawyers for companies and other organizations play a key role in helping these entities 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 managers and the board and must be provided with all relevant information necessary to properly represent the entity. By requiring routine waiver of an entity's attorney-client and work product protections, these governmental policies discourage entities from consulting with their lawyers, thereby impeding the lawyers' ability to effectively counsel compliance with the law. This harms not only companies, but the investing public as well.

Second, while the Justice Department's waiver policies and the 2004 privilege waiver amendment were intended to aid government prosecution of corporate criminals, they are likely to make detection of corporate misconduct more difficult by undermining companies' internal compliance programs and procedures. These mechanisms, which often include internal investigations conducted by the company's in-house or outside lawyers, are one of the most effective tools for detecting and flushing out malfeasance. Indeed, Congress recognized the value of these compliance tools when it enacted the Sarbanes-Oxley Act. Because the effectiveness of these internal mechanisms depends in large part on the ability of the individuals with knowledge to speak candidly and confidentially with lawyers, any attempt to require routine waiver of attorney-client and work product protections will seriously undermine systems that are crucial to compliance and have worked well.

Third, the Justice Department's policies and the privilege waiver amendment to the Sentencing Guidelines unfairly harm employees by infringing on their individual rights. By fostering a system of routine waiver, these policies place the employees of a company or other organization in a very difficult position when their employers ask them to cooperate in an investigation. They can cooperate and risk that their privileged statements will be turned over to the government by the organization or they can decline to cooperate and risk their employment. It is fundamentally unfair to force employees to choose between keeping their jobs and preserving their legal rights. For all these reasons, the ABA believes that the Justice Department's waiver policies and the 2004 privilege waiver amendment to the Guidelines are counterproductive and undermine, rather than enhance, compliance with the law as well as the many other societal benefits that are advanced by the confidential attorney-client relationship.

The ABA is working to convey these concerns to policymakers, and reverse the recent erosion of attorney-client and work product protections, in a number of ways. In 2004, we created the ABA Task Force on Attorney-Client Privilege to study and address the governmental policies and practices that have eroded attorney-client and work product protections. The ABA Task Force has held a series of public hearings on the privilege waiver issue and received testimony from numerous legal, business, and public policy groups. The Task Force also crafted new ABA policy—unanimously adopted by our House of Delegates last August—supporting the privilege and opposing government policies that erode the privilege.[7] The new ABA policy and other useful resources on this topic are available on our Task Force website at http://www.abanet.org/buslaw/attorneyclient/.

The ABA is also working in close cooperation with a broad and diverse coalition of legal and business groups—ranging from the U.S. Chamber of Commerce to the American Civil Liberties Union—in an effort to modify both the Justice Department's waiver policies and the 2004 privilege waiver amendment to the Sentencing Guidelines to clarify that waiver of attorney-client and work product protections should not be a factor in determining cooperation. The remarkable political and philosophical diversity of that coalition shows just how widespread these concerns have become in the business, legal, and public policy communities.

On August 15, 2005, the ABA, the informal coalition, and a prominent group of nine former senior Justice Department officials[8]—including three former Attorneys General—submitted separate comment letters to the Sentencing Commission urging it to reverse or modify the 2004 privilege waiver amendment.[9] Subsequently, the ABA, several organizations from the coalition, and former Attorney General Dick Thornburgh testified before the Sentencing Commission on November 15, 2005 in order to reiterate these views.[10] In addition, the ABA and various members of the coalition have met repeatedly with a number of senior Justice Department officials in order to express our joint concerns over the Department's internal privilege waiver policies.

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[7] See ABA resolution regarding privilege waiver approved in August 2005, discussed in footnote 1, *supra*.
[8] The August 15, 2005 comment letter signed by the nine former senior Justice Department officials—including three former Attorneys General, one former Acting Attorney General, two former Deputy Attorneys General, and three former Solicitors General—is available at http://www.abanet.org/poladv/acpriv_formerdojofficialsletter8-15-05.pdf.
[9] The signatories to the coalition's August 15, 2005 comment letter to the Commission were the American Chemistry Council, American Civil Liberties Union, Association of Corporate Counsel, Business Civil Liberties, Inc., Business Roundtable, the Financial Services Roundtable, Frontiers of Freedom, National Association of Criminal Defense Lawyers, National Association of Manufacturers, National Defense Industrial Association, Retail Industry Leaders Association, U.S. Chamber of Commerce, and Washington Legal Foundation. In addition, the ABA, which is not a formal member of the coalition but has worked in close cooperation with that entity, also submitted similar comments to the Commission on August 15, 2005. Links to the coalition and ABA August 15 comment letters and all other privilege waiver materials referenced in this letter are available at http://www.abanet.org/poladv/acprivilege.htm.
[10] The November 15, 2005 testimony of the American Bar Association, American Chemistry Council, American Civil Liberties Union, Association of Corporate Counsel, National Association of Criminal Defense Lawyers, National Association of Manufacturers, U.S. Chamber of Commerce, and former Attorney General Dick Thornburgh are available at http://www.ussc.gov/AGENDAS/agd11_05.htm.

Reforms Necessary To Remedy the Privilege Waiver Problem

In order to stop and reverse the erosion of the attorney-client privilege and work product doctrine in the corporate context—and start to undo the negative consequences that have resulted from this erosion—it will be necessary to modify both the 2004 privilege waiver amendment to the Sentencing Guidelines and the Justice Department's internal waiver policies.

After receiving extensive written comments and testimony from the ABA, the coalition, former senior Justice Department officials, and other organizations, the Sentencing Commission issued a request for public comment by March 28, 2006 on whether the privilege waiver language in the Guidelines should be deleted or amended. In addition, the Commission has scheduled a hearing on March 15, 2006 to consider proposed amendments to the Sentencing Guidelines on a number of issues—including privilege waiver. Several representatives of the coalition have been invited to testify at that March 15 hearing and explain the results of the new surveys of corporate counsel. In addition, the ABA and the coalition will file additional comments with the Commission on this issue prior to the March 28 deadline, urging the Commission to revise the Sentencing Guidelines by stating affirmatively that waiver of attorney-client and work product protections should not be a factor in determining cooperation.

Although we are encouraged by the Commission's willingness to reconsider the 2004 privilege waiver amendment during its current amendment cycle, it is not known what changes, if any, the Commission will make to the provision this year. Its final decision on this issue will not be known until it issues its final Proposed Rules in late April 2006. Therefore, we urge the Subcommittee to (1) express its concerns to the Commission regarding the privilege waiver issue as soon as possible and (2) encourage the Commission to amend the Guidelines—during the current amendment cycle—to state that waiver of attorney-client and work product protections should not be a factor in determining whether a corporation or other entity has fully cooperated with the government during an investigation.

Unlike the Sentencing Commission, the Justice Department is not yet formally taking steps to reexamine—and possibly remedy—its role in the growing problem of government-coerced privilege waiver. As a result of the 1999 Holder Memorandum and the 2003 Thompson Memorandum, most federal prosecutors now routinely demand that companies waive their privileges as a condition for receiving cooperation credit. In addition, in response to the 2005 McCallum Memorandum, many local U.S. Attorneys are now in the process of adopting local privilege waiver review procedures, which will likely result in numerous different waiver policies throughout the country.

For these reasons, the ABA urges the Subcommittee, as part of its oversight responsibilities, to hold additional hearings and encourage the Department to modify its internal policies on privilege waiver. Ideally, the Department's policies should be modified to (1) prohibit federal prosecutors from demanding, requesting, or encouraging, directly or indirectly, that companies waive their attorney-client or work product protections during investigations, (2) specify the types of factual, non-privileged information that prosecutors may request from companies during investigations as a sign of cooperation, and (3) clarify that any voluntary decision by a company to waive the

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attorney-client privilege and the work product doctrine shall not be considered when assessing whether the entity provided effective cooperation.

Thank you for considering the views of the ABA. If you would like more information regarding the ABA's positions on these issues, please contact our senior legislative counsel for business law issues, Larson Frisby, at (202) 662-1098.

Sincerely,

Robert D. Evans

Robert D. Evans

cc: All members of the Subcommittee on Crime, Terrorism and Homeland Security

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LETTER FROM THE HONORABLE DANIEL LUNGREN, A REPRESENTATIVE IN CONGRESS FROM THE STATE OF CALIFORNIA TO THE HONORABLE RICARDO H. HINOJOSA, CHAIRMAN, U.S. SENTENCING COMMISSION

August 15, 2005

The Honorable Ricardo H. Hinojosa
Chairman
U.S. Sentencing Commission
One Columbus Circle, N.E.
Washington, D.C. 20002-8002

Re: Sentencing Guidelines Commentary Involving Waiver of Attorney-Client Privilege and Work Product Doctrine—Comments on Notice of Proposed Priorities

Dear Judge Hinojosa:

As a member of the House Judiciary Committee and its Subcommittee on Crime, Terrorism and Homeland Security, I have been following with great interest the debate over the recent amendment to the Commentary to Section 8C2.5 of the Federal Sentencing Guidelines, which I believe threatens to erode the long-standing attorney-client and work product protections afforded under our system of justice. As one who played an active role in the adoption of the Sentencing Guidelines statute, this causes me great concern. Although I am pleased that the Commission has announced plans to reconsider this issue during its regular 2005–2006 amendment cycle-and urge the Commission to follow through on this process-I remain concerned that the amendment process does not provide a more timely remedy for the problem. Therefore, I would appreciate hearing your thoughts about possible ways to address this problem more urgently.

As you know, on April 30, 2004, the Commission submitted to Congress a number of amendments to Chapter 8 of the Sentencing Guidelines relating to "organizations"—a broad term that includes corporations, partnerships, unions, non-profit organizations, governments, and other entities—which became effective on November 1, 2004. One of these amendments involved a change in the Commentary to Section 8C2.5 that authorizes and encourages the government to require entities to waive their attorney-client and work product protections as a condition of showing cooperation with the government during investigations. Prior to the adoption of this privilege waiver amendment, the Sentencing Guidelines were silent on the privilege issue and contained no suggestion that such a waiver would ever be required.

Although the Justice Department has followed a general internal policy—with the adoption of the 1999 "Holder Memorandum" and the 2003 "Thompson Memorandum"—of requiring companies to waive privileges in certain cases as a sign of cooperation, I am concerned that the privilege waiver amendment might erroneously be seen as Congressional ratification of this policy, resulting in even more routine demands for waiver. I am informed that, in practice, companies are finding that they have no choice but to waive these privileges whenever the government demands it, as the threat to label them as "uncooperative" in combating corporate crime simply poses too great a risk of indictment and further adverse consequences in the course of prosecution. Such an unbalanced dynamic simply goes too far. Even if the charge is unfounded, an allegation of "noncooperation" can have such a profound effect on a company's public image, stock price and credit worthiness that companies generally yield to waiver demands.

As both a former California Attorney General and a current Member of Congress, I appreciate and support the Commission's ongoing efforts to amend and strengthen the Sentencing Guidelines in order to reduce corporate crime. Creating incentives to increase the practice of corporate ethics and legal compliance is imperative. Unfortunately, I believe the privilege waiver amendment is likely to undermine rather than strengthen compliance with the law in several ways.

First of all, the privilege waiver amendment seriously weakens the attorney-client privilege between companies and their lawyers and undermines their internal corporate compliance programs, resulting in great harm to the public. Lawyers can play a key role in helping companies and other organizations to understand and comply with complex laws, but to fulfill this role, lawyers must enjoy the trust and confidence of the entity's leaders and must be provided with all relevant information necessary to represent the entity effectively, ensure compliance with the law, and quickly remedy any violations. By authorizing the government to demand waiver of attorney-client and work product protections *on a routine basis,* the amendment discourages entities from consulting with their lawyers. This, in turn, impedes the lawyers' ability to effectively counsel compliance with the law and discourages them from conducting internal investigations designed to quickly detect and remedy misconduct. As a result, companies and the investing public will be harmed.

I am also concerned that the privilege waiver amendment will encourage excessive civil litigation. In California and most other jurisdictions in the nation, waiver of attorney-client or work product protections in one case waives the protections for all future cases, including subsequent civil litigation matters. Thus, forcing companies and other entities to routinely waive their privileges during criminal investigations results in the waiver of those privileges in subsequent civil litigation as well. As a result, companies are unfairly forced to choose between waiving their privileges, thereby placing their employees and shareholders at an increased risk of costly civil litigation, or retaining their privileges and then facing the wrath of government prosecutors.

For these reasons, I believe that the recent privilege waiver amendment to the Sentencing Guidelines is likely to undermine, rather than strengthen, compliance with the law. In addition, I believe that it will undermine the many other societal benefits that arise from the essential role that the confidential attorney-client relationship plays in our adversarial system of justice. My concerns are also shared by many former senior Justice Department officials—including former Attorneys General Ed Meese and Dick Thornburgh, former Deputy Attorneys General George Terwilliger and Carol Dinkins, former Solicitors General Ted Olson, Seth Waxman and Ken Starr, and many others—who I understand are preparing to submit their own joint letter to the Commission in the near future. Therefore, I urge the Commission to follow through on its initial plan to address and remedy the privilege waiver issue as part of the 2005–2006 amendment cycle. The new amendment should state affirmatively that waiver of attorney-client and work product protections should not be a mandatory factor for determining whether a sentencing reduction is warranted for cooperation with the government during investigations.

While I believe that such an amendment is appropriate and desirable, it is my understanding that changes made during the upcoming 2005–2006 amendment cycle will not become effective until November 1, 2006. Because the current privilege waiver language in the Commentary to the Guidelines will continue to cause the problems described above until it is removed, I would appreciate your thoughts regarding any additional remedies—legislative or otherwise—that could resolve this problem more promptly.

Thank you for your consideration, and I look forward to hearing from you at your earliest convenience.

Sincerely,

Daniel E. Lungren
Member of Congress
cc:
United States Sentencing Commission
One Columbus Circle, N.E.
Suite 2–500, South Lobby
Washington, D.C. 20002–8002
Attention: Public Affairs—Priorities Comment

Members of the U.S. Sentencing Commission

The Honorable F. James Sensenbrenner, Jr.
Chairman, House Judiciary Committee

The Honorable John Conyers, Jr.
Ranking Member, House Judiciary Committee

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