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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

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/ctf/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. Flack, *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 officials⁸—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.

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_formerdojofficialstletter8-15-05.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.uscc.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,

A handwritten signature in black ink that reads "Robert D. Evans". The signature is written in a cursive style with a large, stylized initial "R".

Robert D. Evans

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