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May 2, 2006

The Honorable Alberto Gonzales
Attorney General
Department of Justice
950 Pennsylvania Avenue, N.W.
Washington, D.C. 20530-0001

Re: Proposal for Revising Department of Justice Attorney-Client Privilege and Work Product Doctrine Waiver Policy

Dear Mr. Attorney General:

On behalf of the American Bar Association and its more than 400,000 members, I write to enlist your help and support in preserving the attorney-client privilege and work product doctrine and protecting them from Departmental policy and practices that seriously threaten to erode these fundamental rights. Towards that end, we urge you to consider modifying the Justice Department's internal waiver policy to stop the increasingly common practice of federal prosecutors requiring organizations to waive their attorney-client and work product protections as a condition for receiving cooperation credit during investigations. Enclosed is specific proposed language that we believe would accomplish this goal without impairing the Department's ability to gather the information it needs to enforce federal laws.

As you know, the attorney-client privilege enables both individual and organizational clients to communicate with their lawyers in confidence, and it encourages clients to seek out and obtain guidance in how to conform their conduct to the law. The privilege facilitates self-investigation into past conduct to identify shortcomings and remedy problems, to the benefit of corporate institutions, the investing community and society-at-large. The work product doctrine underpins our adversarial justice system and allows attorneys to prepare for litigation without fear that their work product and mental impressions will be revealed to adversaries.

The ABA strongly supports the preservation of the attorney-client privilege and work product doctrine and opposes governmental policies, practices and procedures that have the effect of eroding the privilege or doctrine. Unfortunately, the Department of Justice has adopted—and is now following—a policy that has led many of its prosecutors to routinely pressure organizations to waive the protections of the attorney-client privilege and/or work product doctrine as a condition for receiving cooperation credit during investigations. While this policy was formally established by the Department's 1999 "Holder Memorandum" and 2003 "Thompson Memorandum," the incidence of coerced waiver was exacerbated in 2004 when the U.S. Sentencing Commission added language to Section 8C2.5 of the Federal Sentencing Guidelines that authorizes and encourages the government to seek waiver as a condition for cooperation.

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In an attempt to address the growing concern being expressed about government-coerced waiver, then-Acting Deputy Attorney General Robert McCallum sent a memorandum to all U.S. Attorneys and Department Component Heads last October instructing each of them to adopt “a written waiver review process for your district or component,” and it is our understanding that U.S. Attorneys are now in the process of implementing this directive. Though well-intentioned, the McCallum Memorandum likely will 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. More importantly, it fails to acknowledge and address the many problems arising from the specter of forced waiver.

According to a recent survey of over 1,200 in-house and outside corporate counsel, which is available at <http://www.acca.com/Surveys/attyclient2.pdf>, almost 75% of the respondents believe that 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. Corporate counsel also indicated that when prosecutors give a reason for requesting privilege waiver, the Holder/Thompson/McCallum Memoranda and the amendment to the Sentencing Guidelines were among the reasons most frequently cited.

The ABA is concerned that government waiver policies weaken the attorney-client privilege and work product doctrine and undermine companies’ internal compliance programs. Unfortunately, the government’s waiver policies discourage entities both from consulting with their lawyers—thereby impeding the lawyers’ ability to effectively counsel compliance with the law—and conducting internal investigations designed to quickly detect and remedy misconduct. The ABA believes that prosecutors can obtain the information they most frequently seek and need from a cooperating organization without resorting to requests for waiver of the privilege or doctrine.

The ABA and a broad and diverse coalition of business and legal groups—ranging from the U.S. Chamber of Commerce to the American Civil Liberties Union—previously expressed these and other similar concerns to Congress and the Sentencing Commission. In addition, a prominent group of nine former senior Justice Department officials—including three former Attorneys General from both parties—submitted similar comments to the Sentencing Commission last August. These statements and other useful resources on the topic of privilege waiver are available at <http://www.abanet.org/poladv/acprivilege.htm> and on the website of the ABA Task Force on Attorney-Client Privilege at <http://www.abanet.org/buslaw/attorneyclient/>.

After considering the concerns raised by the ABA, the coalition, former Justice Department officials, and others, as well as the results of the new survey of corporate counsel that documented the severe negative consequences of the 2004 privilege waiver amendment to the Sentencing Guidelines, the Commission voted unanimously on April 5, 2006 to remove the privilege waiver language from the Guidelines. Unless Congress affirmatively takes action to modify or disapprove of the Commission’s proposal, it will become effective on November 1, 2006. While we are extremely gratified by the Commission’s action, the Justice Department’s waiver policy continues to be problematic and needs to be addressed.

The ABA Task Force on Attorney-Client Privilege and the coalition have prepared suggested revisions to the Holder/Thompson/McCallum Memoranda that would remedy the problem of government-coerced waiver while preserving the ability of prosecutors to obtain the important factual information

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that they need to effectively enforce the law. The revised memorandum enclosed herewith would accomplish these objectives by (1) preventing prosecutors from seeking privilege waiver during investigations, (2) specifying the types of factual, non-privileged information that prosecutors may request from companies as a sign of cooperation, and (3) clarifying that any voluntary waiver of privilege shall not be considered when assessing whether the entity provided effective cooperation. We believe that this proposal, if adopted by the Department, would strike the proper balance between effective law enforcement and the preservation of essential attorney-client and work product protections, and we urge you to consider it.

If you or your staff have any questions or need additional information about this vital issue, please ask your staff to contact Bill Ide, the Chair of the ABA Task Force on Attorney-Client Privilege, at (404) 527-4650 or Larson Frisby of the ABA Governmental Affairs Office at (202) 662-1098.

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

Sincerely,

A handwritten signature in cursive script that reads "Michael S. Greco". The signature is written in dark ink and is positioned below the word "Sincerely,".

Michael S. Greco

enclosure

**SUGGESTED REVISIONS TO DEPARTMENT OF JUSTICE POLICY CONCERNING
WAIVER OF CORPORATE ATTORNEY-CLIENT AND WORK PRODUCT
PROTECTIONS**

**PREPARED BY THE AMERICAN BAR ASSOCIATION TASK FORCE ON
ATTORNEY-CLIENT PRIVILEGE**

FEBRUARY 10, 2006

MEMORANDUM

TO: Heads of Department Components
United States Attorneys

FROM:

DATE:

RE: Guidelines for Determining “Timely and Voluntary Disclosure of Wrongdoing
and Willingness to Cooperate”

This Memorandum amends and supplements the October 21, 2005 memorandum issued by Acting Deputy Attorney General Robert D. McCallum, Jr. (“*McCallum Memorandum*”) concerning Waiver of the Corporate Attorney-Client and Work Product Protections. In general, the *McCallum Memorandum* requires establishment of a review process for federal prosecutors to follow before seeking waivers of these protections. The *McCallum Memorandum* also notes the Department of Justice that “places significant emphasis on prosecution of corporate crimes.”

This Memorandum also amends and supplements the Department’s policy on charging business organizations set forth in the memorandum issued by Deputy Attorney General Larry D. Thompson to Heads of Department Components and United States Attorneys, *Re: Principles of Federal Prosecution of Business Organizations* (Jan. 20, 2003) (hereinafter “*Thompson Memorandum*”), reprinted in *United States Attorneys’ Manual*, tit. 9, Crim. Resource Manual, §§ 161-62. As noted in the *McCallum Memorandum*, one of the nine (9) factors that was identified for federal prosecutors to consider under the *Thompson Memorandum* (§ II.A.4.) 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 protection.”

In particular, this Memorandum amends the *Thompson Memorandum* by striking the following portion of § II.A.4.: “...including, if necessary, the waiver of corporate attorney-client and work product protection.” As amended, § II.A.4. directs that federal prosecutors consider “...the corporation’s timely and voluntary disclosure of wrongdoing and its willingness to cooperate in the investigation of its agents.”

This Memorandum also amends § VI.A. of the *Thompson Memorandum* by striking the last clause: "...and to waive attorney-client and work product protection;" and by striking the word "complete" from the third clause preceding "results of its internal investigation." As amended, that sentence of § VI.A. states: "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; and to disclose the results of its internal investigation."

This Memorandum also amends § VI.B. by striking the fourth paragraph and adding language in its place that recognizes the importance of the attorney-client and work product protections and the adverse consequences that may occur when attorneys within the Department of Justice seek the waiver of these protections. As amended, the fourth paragraph of § VI.B. states:

"The Department of Justice recognizes that the attorney-client privilege and the work-product doctrine are fundamental to the American legal system and the administration of justice. These rights are no less important for an organizational entity than for an individual. The Department further recognizes that an attorney may be an effective advocate for a client, and best promote the client's compliance with the law, only when the client is confident that its communications with counsel are protected from unwanted disclosure and when the attorney can prepare for litigation knowing that materials prepared in anticipation of litigation will be protected from disclosure to the client's adversaries. *See Upjohn Co. v. United States*, 449 U.S. 383, 392-393 (1981). The Department further recognizes that seeking waiver of the attorney-client privilege or work-product doctrine in the context of an ongoing Department investigation may have adverse consequences for the organizational entity. A waiver might impede communications between the entity's counsel and its employees and unfairly prejudice the entity in private civil litigation or parallel administrative or regulatory proceedings and thereby bring unwarranted harm to its innocent public shareholders and employees. *See also* § IX (Collateral Consequences). Attorneys within the Department shall not take any action or assert any position that directly or indirectly demands, requests or encourages an organizational entity or its attorneys to waive its attorney-client privilege or the protections of the work product doctrine. Also, in assessing an entity's cooperation, attorneys within the Department shall not draw any inference from the entity's preservation of its attorney-client privilege and the protections of the work product doctrine. At the same time, the voluntary decision by an organizational entity to waive the attorney-client privilege and the work product doctrine shall not be considered when assessing whether the entity provided effective cooperation."¹

¹ Notwithstanding the general rule set forth herein, attorneys within the Department may, after obtaining in advance the approval of the Assistant Attorney General of the Criminal Division or his designee, seek materials otherwise
(footnote continued on next page)

Section VI. of the *Thompson Memorandum* is further amended and supplemented by adding new subpart C. that states:

“C. In assessing whether an organizational entity has been cooperative under § II.A.4. and § VI.B., attorneys within the Department should take into account the following factors:

“1. Whether the entity has identified for and provided to attorneys within the Department all relevant data and documents created during and bearing upon the events under investigation other than those entitled to protection under the attorney-client privilege or work product doctrine.

“2. Whether the entity has in good faith assisted attorneys within the Department in gaining an understanding of the data, documents and facts relating to, arising from and bearing upon the matter under investigation, in a manner that does not require disclosure of materials protected by the attorney-client privilege or work product doctrine.

“3. Whether the entity has identified for attorneys within the Department the individuals with knowledge bearing on the events under investigation.

“4. Whether the entity has used its best efforts to make such individuals available to attorneys within the Department for interview or other appropriate investigative steps.²

“5. Whether the entity has conducted a thorough internal investigation of the matter, as appropriate to the circumstances, reported on the investigation to the Board of Directors or appropriate committee of the Board, or to the appropriate governing body within the entity, and has made the results of the investigation available to attorneys within the Department in a manner that does not result in a waiver of the attorney-client privilege or work product doctrine.

(footnote continued from previous page)

protected from disclosure by the attorney-client privilege or the work product doctrine if the organization asserts, or indicates that it will assert an advice of counsel defense with respect to the matters under investigation. Moreover, attorneys within the Department also may seek materials respecting which there is a final judicial determination that the privilege or doctrine does not apply for any reason, such as the crime/fraud exception or a waiver. In circumstances described in this paragraph, the attorneys within the Department shall limit their requests for disclosure only to those otherwise protected materials reasonably necessary and which are within the scope of the particular exception.

² Actions by an entity recognizing the rights of such individuals are not inconsistent with this factor.

“6. Whether the entity has taken appropriate steps to terminate any improper conduct of which it has knowledge; to discipline or terminate culpable employees; to remediate the effects of any improper conduct; and to ensure that the organization has safeguards in place to prevent and detect a recurrence of the events giving rise to the investigation.”