1025 Connecticut Avenue, NW, Suite 200
Washington, DC 20036-5425

tel 202.293.4103
fax 202.293.4701

www.ACCA.COM

STATEMENT OF

RICHARD T. WHITE

CHAIRMAN OF THE BOARD OF DIRECTORS OF THE ASSOCIATION OF CORPORATE COUNSEL (ACC)

before the

SUBCOMMITTEE ON CRIME, TERRORISM, AND HOMELND SECURITY

of the

COMMITTEE ON JUDICIARY

of the

UNITED STATES HOUSE OR REPRESENTATIVES

concerning

"THE McNULTY MEMORANDUM'S EFFECT ON THE RIGHT TO COUNSEL IN CORPORATE INVESTIGATIONS"

MARCH 8, 2007

This document is available online at http://www.acc.com/public/policy/attyclient/richardwhitemcnultytestimony.pdf
More info on ACC's privilege protection work is online at: http://www.acc.com/php/cms/index.php?id=84

Mr. Chairman, Ranking Member Forbes, and Members of the Subcommittee:

Thank you for the opportunity to testify before you today regarding "The McNulty Memorandum's Effect on the Right to Counsel in Corporate Investigations." My name is Richard White, and I am the general counsel of the Auto Club Group in Dearborn, Michigan. More importantly for purposes of this hearing, I am the 2007 Chairman of the Board of the Association of Corporate Counsel, the bar association for lawyers who work as in-house counsel in all kinds of corporate entities.

Today I am here to bring you the perspectives and concerns of the more than 20,000 members of ACC, who collectively represent more than 9,000 companies, in the United States and abroad, including public and private companies, both large and small, as well as various not-for-profit organizations. Obviously, this testimony also reflects my own views, and the concerns I have as General Counsel of a non-profit membership organization, part of the AAA family; like most companies, we're focused on doing a great job for our members every day, and wish to be a good corporate citizen in the communities in which we work. The issue we are here to address is one that is of concern to corporate lawyers like me nationwide, who work in every size of company in every industry you can imagine. My point is that the ramifications of this issue affect the entire business community, not just the handful of largest corporations or those companies which are under investigation for some kind of failure or wrong-doing.

I. Overview of Testimony

The in-house legal community has strong and very clearly articulated positions on the current debate about government policies that erode the attorney client privilege, work product protections, and individual rights in the corporate context. As noted by ACC President Frederick J. Krebs, "the attorney-client privilege is fundamental to the fair operation of our system of justice." It is a doctrine older than the Constitution, and it supports rather than frustrates the best practices of companies engaged in promoting compliance and responsible behavior. This fight is not about protecting guilty company executives: those who fight to protect the privilege are not motivated by some perverse desire to protect them from the rightful consequences of their actions. Rather, our focus is on preventing the government from furthering the damage to innocent companies, employees, shareholders, and other stakeholders who've already been harmed enough by rogue executives who may be targeted by the government for prosecution.

In particular, I want to address two key points:

- The McNulty Memorandum does not substantively change DOJ's policies. Although DOJ suggests that changes it made to the Thompson Memorandum are a total fix to the problems of waiver we're here to address, the McNulty Memorandum offers only some surface, procedural changes and does nothing to address our larger concerns or abusive prosecutorial practices.

  DOJ's focus on standardizing formal, on-the-record waiver demands misses the point. My corporate colleagues know from experience that many federal enforcement officials rely almost exclusively on informal demands to coerce corporations to waive their attorney client and work product protections. No formal demand is necessary given the culture of waiver that DOJ and other agencies have fostered in the past few years. Further, establishing a clearer policy on how privilege waivers should be sought by prosecutors requires one to buy into the basic premise that the DOJ, as opposed to the Courts, have a right to determine

when a corporate client's privilege rights deserve protection and when they don't. The privilege belongs to the client, not the prosecutor who believes it might be convenient if it were waived.

Limited changes regarding reimbursement of attorneys' fees don't offer enough protection of employees' rights. Prosecutors are still permitted to trample on employees' rights by forcing corporations to terminate individual employees, to deny employees information shared with prosecutors and critical to their defense, and to refuse to enter into any joint defense arrangements with employees. Moreover, even the general rule in the McNulty Memorandum barring prosecutors from requiring companies to refuse to pay employees' legal fees can be circumvented by an exception that swallows the rule.

Internal DOJ authorization of waiver demands do not constitute meaningful safeguards. On the rare occasion a prosecutor ever makes a formal waiver demand, merely requiring authorization from another prosecutor in the same department does not constitute a meaningful protection of the attorney client and work product protections. Our surveys show that when prosecutors abuse their powers and coerce waiver of the privilege, it's happening in the field, and not at DOJ Main. Those prosecutors and offices that were unlikely to make privilege waiver a centerpiece in the determination of a company's cooperation, are still unlikely to demand waiver now; but those prosecutors who were inclined to require privilege waiver as a routine practice before, are still just as likely to require it now, post-McNulty. Yet DOJ Main continues to focus on self-policing in the field offices as a remedy.

- In the face of DOJ's repeated refusal to fix the problem, legislation is warranted. Despite the desire and efforts of ACC's members to grant the DOJ time and discretion to consider how it can fix these problems, the department repeatedly has refused to address (or even acknowledge) these problems until issuing the McNulty Memorandum (after the introduction of S. 186 to correct this problem through legislation). ACC issued its first letter requesting that DOJ reverse what was then known as the Holder Memorandum in 1999, when the policy was first introduced. We tried repeatedly to address privileges problems that got worse when the Holder Memorandum was replaced by the Thompson Memorandum: the Thompson Memorandum was designed to give greater teeth (not counter abusive practices) to policies employed by DOJ prosecutors in the charging process

  The McNulty Memorandum, which is DOJ's effort to finally address our concerns, completely misses the point. Indeed, while DOJ has announced that they're not getting many – if any – waiver requests rising up the ladder due to their new policy (and thus they claim that the problems of abusive waiver demands, if there ever were any, are "fixed"), reports from in-house and outside counsel in the months since the issuance of the McNulty Memorandum suggest that prosecutors who were likely to request or demand privilege waivers under Thompson, continue to make these demands under McNulty. Their conduct has not changed. Given DOJ's intransigence, and the fact that the McNulty Memo does not address our concern with their belief that they have any right to unilaterally require waivers of the attorney-client privilege of their potential targets, ACC must conclude that legislation is necessary.

  Our goal is to restore the important doctrines of attorney client privilege, work product protections, and individual rights in the corporate context to the place they existed before these federal policies and prosecutor practices created the current culture of waiver. Corporate crimes were successfully prosecuted before the Holder/Thompson/McNulty Memoranda, and the DOJ cannot explain what is stopping them from being successful in "getting the bad guys" with all of the tools that the legal system has always afforded them, *without privilege waiver involved*.

II. Background

A. Promoting corporate compliance

Any in-house lawyer will tell you that attorney-client privilege, attorney work product protections, and individual rights in the corporate context are essential to successfully counseling officers, directors, and employees on legal compliance issues that arise in the daily conduct of business and that require corporate employees to fully integrate lawyers into their daily work. The success of corporate counsel's efforts requires that they gain the trust of employees and are able to encourage these employees in their role as agents of the entity to seek and follow legal advice in an increasingly fast-paced, competitive, complex and highly-regulated business environment. Corporate counsel know that many of the employees they work with believe their jobs would be easier if they didn't have to take time out to consult a lawyer who might say no in the first place; if the confidentiality of corporate communications with the lawyer is attacked and the very communications an employee has with the company's counsel are likely to become the centerpiece of scrutiny by those looking for fodder to support allegations that a failure is the fault of some employee or another, a relationship that is important to encourage candid communications is further chilled, and the lawyer's pro-active role as a gatekeeper in the company is difficult to fulfill.

The DOJ repeatedly asserts that their waiver requests, when made, are requested as a part of their focus on "getting the bad guys." They suggest that companies asserting their privileges must be trying to protect guilty execs, since companies "volunteer" to waive their privileges to the government "all the time" because companies that have nothing to hide have nothing to lose. Such statements are facetious. While it is true that no one is more motivated than the company itself to get the investigation over and done, privilege waiver that is gained by brandishing the business end of the prosecutorial gun is not voluntary. Further, while companies wish to identify, ostracize, and punish rogue employees who do intentional great harm to the company and its reputation, it is equally true that privilege does not just protect "the bad guys" or the guilty. And it serves as a brake on the tendency to look for some employee to throw under the bus to take the fall and get the focus of the DOJ's wrath off the entity.

Privilege serves important public policy purposes: it encourages employees to speak candidly when problems arise, and report them through the company's formal or informal hotline or reporting processes. It also greases the important processes by which difficult and sometimes sensitive questions are asked as daily business is conducted: "How do I interpret this regulation?" " Can we try doing this if we can't do that?" "If this product is not outright outlawed, but may push the edge of the envelope, should we produce it, or is the risk too high?" In today's complex, multi-jurisdicitonal, and fast-paced business environment, it's worth remembering that regulatory or other guidance does not always offer clear-cut answers.

We want lawyers present and actively counseling in all of these situations and more, but if employees think that their corporate lawyers are thinly disguised agents of the government, they will simply shut their company's lawyers out of the process entirely, and proceed without legal help.

Indeed, the Supreme Court openly recognizes that without predictable and enforceable confidentiality in lawyer-client communications, employees of a company will be unwilling to put corporate concerns ahead of their own personal interests in staying out of the spotlight when trouble might be brewing inside the company. *Upjohn Co. v. United States*, 449 U.S. 383, 389 (1981) (protecting the confidentiality of attorney-client communications "promote[s] . . . the observance of law and administration of justice"). In *Upjohn*, the Court endorsed the concept of rewarding – not

penalizing – employees for consulting a lawyer about a complex, sensitive, or troubling matter; to do so encourages well-informed and responsible corporate actions.

These conclusions are not just theoretical or off-the-cuff presumptions, as evidenced by the empirical results of the first of two surveys conducted by ACC of its members, one in 2005 and the other in 2006; our initial survey in 2005 found that:[1]

- *Clients rely on privilege*: In-house lawyers confirmed that their clients are aware of and rely on privilege when consulting them.
- *Absent privilege, clients will be less candid*: If the privilege does not offer protection, in-house lawyers document a "chill" in the flow or candor of information from clients.
- *Privilege facilitates delivery of legal services*: 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*: 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*: 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.

Given this reality, government policies that erode attorney-client privilege, attorney work product protections, and individual rights in the corporate context ultimately are self-defeating as law enforcement tools: executives and directors who would like to consult with corporate counsel about the most sensitive issues are confused about whether the corporate attorney-client privilege will apply to their conversations with counsel; lawyers investigating allegations of wrongdoing are worried about how their honest attempts to unearth and correct serious problems may be used against the company's interests in the future; and line employees who lack the sophistication or means to protect themselves can be deprived of their Constitutional rights and left without the protections we guarantee to any other person whose actions are under scrutiny as a result of a government investigation.

In sum, preservation of these fundamental protections and rights should be nonnegotiable because their erosion undermines corporate compliance programs by creating uncertainty that dissuades employees from participating. As the Supreme Court declared in the *Upjohn* case, "[a]n uncertain privilege . . . is little better than no privilege at all." *Upjohn*, 449 U.S. at 393.

B. Recent Government Policies Have Given Rise to a Culture of Waiver

Unfortunately, in the current environment my colleagues and I have seen just this type of erosion occurring. In their prosecutorial zeal, federal enforcement agencies have inappropriately claimed that it is within a government official's purview to decide when a corporate target's privilege should be waived. By unilaterally treating privilege as a bargaining chip to be played in the investigation and charging process (certainly well before any determination of guilt or even confirmation of wrongdoing), the government has created a "culture of waiver" that is dismissive of clients' rights to counsel and a balanced playing field for litigants in the adversarial process. In today's highly-charged legal compliance environment, some prosecutors routinely coerce corporations that wish to survive an investigation (let alone a prosecution) to abandon the fundamental protections previously

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

guaranteed to every party participating in our justice system. The resulting "culture of waiver" has put the continuing vitality of attorney-client privilege, attorney work product protections, and individual rights in the corporate context in serious jeopardy.

We've heard DOJ repeatedly assert that they are only interested in getting to the facts. Well, if that were the case, there would be no need for a hearing today. What the DOJ calls facts are items that fall squarely within the protections of the privilege and work product doctrines, including lawyer notes from witness interviews, internal investigation reports, and documents that clearly disclose the company's legal assessments of issues and offer insight into their defense strategies as well as case weaknesses and strengths. The privilege does not protect facts, but corporate counsel ACC has talked to report that providing an internal investigation report that does not contain privilege documents, but whose contents contain all of the facts necessary for the prosecutor to "make' their case, are deemed insufficient. Indeed, if you look to the McNulty Memorandum and the executive summaries issued by DOJ to explain it, you'll see that the DOJ is unable to articulate when anything less than privileged materials by anyone else's definitions are required in order for disclosure to be deemed sufficient.

One must question, how did prosecutors do their work prior to 1999 and the issuance of these memos? According to a high-level group of former senior DOJ officials, the answer is "very well, thank you!" See the attached letter from these officials, which was prepared in anticipation of the September 2006 hearings in the Senate Judiciary Committee which lead to the introduction of what is now numbered as S. 186, the Attorney-Client Privilege Protection Act of 2007. These former prosecutors suggest that DOJ's current policies are not only unnecessary, but damaging to the integrity of our legal system and the DOJ's reputation as an agency that upholds the principles it seeks to enforce.

The mounting alarm and frustration in response to DOJ's coercion of clients' rights is clear to those of us connected to the in-house pipeline, but I thought it would be instructive to share with the Subcommittee the heightened concern voiced by members of the in-house legal community in their own words:

- "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."
- "The government now expects a waiver as their inherent right."
- "It seems the government has taken the stand that because they are the government the rules do not apply to them and [they] can by force and intimidation take whatever they want."
- "[W]ithin a matter of a few years, these [government policies] have utterly eviscerated the attorney client privilege and undermined the most important aspect of the attorney client relationship."
- "We are forced to practice in a world where we cannot expect that any privilege will be respected by government investigators."
- "[T]he 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."
- "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."

- "For all intents and purposes, there is no such thing as an attorney-client privilege or work product protection in a public company."

Coalition to Preserve the Attorney-Client Privilege, *The Decline of the Attorney-Client Privilege in the Corporate Context: Survey Results* at 14-22 (2006).[2]

The in-house legal community is not a monolith, but despite our diversity of backgrounds and points of view we have certain common experiences. One of them, unfortunately, is that we have seen the adverse effects of the "culture of waiver" that exists in the context of corporate prosecutions as a result of policies enacted within the past few years at DOJ and other federal agencies.

III. The McNulty Memorandum Does Not Substantively Change DOJ Policies

Clearly, DOJ has repackaged its policy in the McNulty Memorandum and made some superficial changes. Upon review, however, these changes have no substantive impact on the culture of waiver that has eroded attorney client privilege, work product protections, and individual rights in the corporate context.

A. Focus on formal, on-the-record waiver demands misses the point

The McNulty Memorandum addresses only *formal* waiver demands, but in the real world prosecutors' demands are more often informal and subtle. The in-house legal community knows from extensive experience that some prosecutors often couch a their demand for waiver as a "choice" that the company chooses to exercise or not (*as in.*, "it's your choice: you can waive or we'll indict"). Other prosecutors may toss a copy of the DOJ policy on the table with the privilege waiver section highlighted as a factor in determining corporate cooperation, and make a statement such as "you'd like to qualify for the benefits of cooperation in this investigation, correct?" While not formal "demands," the company and its lawyers get the message loud and clear.

As a technical matter, such informal prosecutorial "requests" or presentations of "choices" are not formal waiver demands – and therefore not covered by the McNulty Memorandum – but my colleagues and I know they are functional equivalents of a demand to the company facing possible indictment and a shutdown of the entity. By failing to address this pattern and practice of prosecutors requesting waiver only informally, the McNulty Memorandum does not – and cannot – have any substantive impact on reality faced by companies and their lawyers.

B. Limited changes regarding reimbursement of attorneys fees doesn't protect employees

The potential for DOJ's policies to abridge employees' individual rights was underscored by a decision in the Southern District of New York last summer regarding the cases of individual partners embroiled in the KPMG tax shelter cases. In *U.S. vs. Jeffrey Stein, et al.*,[3] Judge Kaplan held that prosecutors' tactics deployed under the authority of the Thompson Memorandum violated the Fifth and Sixth Amendment rights of the defendants in the case. The court found that prosecutors coerced KPMG to cut off defendants' legal fees provided under KPMG's partnership policies; the government stated that if KPMG wished to be deemed cooperative and avoid indictment as an entity, it must sever all ties with the targeted partners.

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[2] The summary of this survey, reflecting responses from over 1,200 in-house and outside corporate counsel, is available online at http://www.acca.com/Surveys/attyclient2.pdf.

[3] The KPMG case was decided by Judge Lewis Kaplan on June 28, 2006, [S1 05 Crim. 0888 (LAK)], opinion available online at http://www.acca.com/public/attyclientpriv/kpmg_decision.pdf.

As a direct result of Judge Kaplan's scathing opinion finding their practices unconstitutional, the McNulty Memorandum makes one small change regarding DOJ's coercion of individual rights in the corporate cooperation determination process, but this limited policy adjustment fails to protect employees to the extent that they have always been protected under established theories for decades. Specifically, the McNulty Memorandum includes a general rule barring prosecutors from requiring companies to stop reimbursing employees' attorneys fees if they wish to avoid indictment of the entity. Notably, however, there is an explicit exception allowing prosecutors to ignore this general guidance in special circumstances (which are determined by the DOJ).

Moreover, and more troubling, the McNulty Memorandum continues to permit other prosecutorial tactics that trample on employees' rights – they simply haven't addressed these issues at all. For example, prosecutors are still permitted to require companies who wish to be deemed cooperative to (i) terminate individual employees, (ii) deny employees information critical to their defense (which was often required to be offered to prosecutors), and (iii) refuse to enter into any joint defense or common interest agreement with employees. Any of these three tactics alone can result in the same level of coercion over individual employees as the denial of reimbursement for attorneys fees. As such, notwithstanding the McNulty Memorandum, employees who are concerned about protecting their individual rights will perceive a DIS-incentive stepping forward and alerting in-house counsel to potentially illegal conduct occurring within the company, all of which further undermines corporate compliance programs.

<u>C. Internal DOJ authorization procedures do not constitute meaningful safeguards</u>

Finally, the McNulty Memorandum's reliance on new authorization procedures from fellow prosecutors for formal waiver demands does not constitute a substantive change to the current culture of waiver that DOJ has created. As a threshold matter, these new procedures would not even apply except when there is a formal waiver request which, as noted above, is rare. Further, like the proverbial fox guarding the hen house, it is unrealistic to expect prosecutors' colleagues to be able to effectively police requests made by other lawyers in the same office with their assurances that waiver is necessary to ensure a successful prosecution. This is not intended to suggest any ethical infirmities at DOJ, but rather a recognition of human nature – colleagues within the same organization are poor candidates to be objective decision-makers about the validity of their peers' shared working practices.

I would also note that DOJ previously assured ACC and its coalition partners (in offline meetings at the time of the issuance of the McCallum Memorandum) that most U.S. attorneys were required to get permission from a supervising prosecutor before they demand privilege waivers even *prior to* the issuance of the McNulty Memorandum. If so, this suggests that the post-McNulty procedures represent even less of a policy change than has been suggested. It also suggests, further, that prosecutors who were likely to ignore these requirements before, will likely continue to find ways around them now.

For all of these reasons, the McNulty's Memorandum's reliance on internal DOJ authorization procedures also will not have a substantive impact on the culture of waiver that has eroded attorney client privilege, work product protections, and individual rights in the corporate context.

IV. Legislation is Required Because DOJ Refuses to Fix the Problem

As a general matter, ACC members are hesitant to endorse legislation regarding issues such as attorney-client privilege, the work product doctrine, or individual rights in the corporate context. For that reason, ACC and our coalition partners have attempted to actively engage DOJ since 1999

in a discussion of how to address the culture of waiver it has created. DOJ, however, was not receptive to either our concerns or our proposed solutions. Moreover, during the same period DOJ was equally unresponsive to extensive congressional oversight on this issue. Because the adverse ramifications of this culture of waiver continue to grow and the new McNulty Memorandum further demonstrates that DOJ will not fix the problem itself, ACC concludes that a legislative solution is necessary.

A. Prosecutors' conduct does not appear to have not changed during the months since the issuance of the McNulty Memorandum

Unfortunately, the report from the front lines is that nothing has changed. In the months since the DOJ issued the McNulty Memorandum, ACC has heard from in-house and outside counsel that they have not noticed any substantive differences in the way prosecutors interact with corporations regarding these issues. Indeed, some reports suggest that some prosecutors have become even more abusive in their requests, threatening that companies that ask them to take a formal waiver request up the ladder will be more harshly treated than if they simply comply. One report recounts a conversation that suggested that "we can do this the easy way, or the hard way …. If you force us to go the hard way, rest assured that our privilege waiver request will be approved, you won't win, but options that are open to you now will be gone and you can expect our offices to treat your client as "uncooperative" for purposes of charging decisions."

Other reports suggest that the only difference between Thompson behaviors and current standards is that is that prosecutors now toss a copy of the McNulty Memorandum – rather than Thompson Memorandum that it replaced – on the table at the start of the informal conversation about a company's "choice" to waive privilege.

Other prosecutors have noted quite candidly that the McNulty Memorandum does represent any "real change" in policy: they suggest that while the request for waiver is now formalized, privilege waiver remains a valid and quite significant criteria in determining a company's cooperation.

In short, the McNulty Memorandum has not changed the current culture of waiver or slowed the erosion of attorney client privilege, work product protections, and individual rights in the corporate context.

B. Legislation should restore these important doctrines that existed before government policies recently created this culture of waiver

Attorney-client privilege is the oldest of the evidentiary privileges and is a cornerstone of the attorney-client relationship.[4] The scope and application of this doctrine, as well as of attorney work product protections and individual rights in the corporate context, were well-settled prior to the recent government policies creating this culture of waiver. ACC members simply want to return to this status quo ex ante.

Specifically, ACC believes the following are the key elements of legislation to restore the vitality and purpose of these important doctrines:

- Government officials are barred from requesting waiver of these protections. Legislation should prevent both formal and informal waiver requests. This would include

[4] The concept of confidentiality of counsel dates back to ancient Rome; the privilege as we know it originates from English common law in the 1500s. *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").

eliminating the practices of penalizing a company for refusing to waive and (the other side of the same coin) rewarding a company for waiving. With regard to individual rights, the legislation should prohibit government officials from making any request that a company refuse to pay an employee's legal fees, terminate an employee, refuse to share relevant information with an employee, or refuse to enter into a joint defense or common interest agreement with an employee.

- These limited protections do not shield facts. Legislation should reflect the limited nature of these protections. They never have prevented any prosecutor from investigating or examining the facts, and privilege protections should not be used to shield otherwise discoverable facts from review.
- Well-established exceptions to these protections remain intact. Legislation should protect only *valid* assertions of attorney-client privilege and work product doctrine. It should not expand these protections or alter any applicable exceptions to the privilege (*e.g.*, crime-fraud, advice of counsel).

V. Conclusion

Over the past few years, my in-house colleagues and I have seen how policies and practices of the government undercut the lawyer-client relationship in the corporate context. Forced privilege waivers undermine responsible corporate compliance efforts and ethical leadership by making it more likely that executives and other employees in fast-paced businesses will simply forego consultation with lawyers with whom no predictable presumption of confidential communications exists. Such a result adversely impacts not only companies, but also employees, the investing public, and our markets.

As discussed above, the McNulty Memorandum does not substantively change DOJ's policies that have created this culture of waiver. Accordingly, the in-house legal community has reluctantly reached the conclusion that legislation is now necessary to stop the harmful erosion of attorney client privilege, work product protections, and individual rights in the corporate context.

ATTACHMENT 1:
Why Congress Should Act to Protect The Attorney Client Privilege

Offered by the Coalition to Preserve the Attorney-Client Privilege[5]

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

- The Coalition to Preserve the Attorney-Client Privilege strongly supports S. 186, the "Attorney-Client Privilege Protection Act of 2007," introduced by Sen. Arlen Specter (R-PA) on January 4, 2007 and we anticipate that we will support similar legislation that a bipartisan group of members of the House Judiciary Committee is planning to introduce.

- The Department of Justice has steadfastly refused to reverse its policy of pressuring companies and other organizations to waive the attorney-client privilege and work product doctrine—and take certain punitive actions against their employees—during investigations in return for cooperation credit. This policy was – until recently – embodied in its "Holder" and "Thompson" memoranda.

- The Department of Justice's new policy, outlined in the December 12, 2006 "McNulty Memorandum," is not a comprehensive solution. It falls far short of what is needed to prevent further erosion of fundamental attorney-client privilege, work product, and employee protections for the following reasons:

    - Instead of eliminating the improper Justice Department practice of requiring companies to waive their privileges in return for cooperation credit—the approach advocated by S.186—the McNulty Memorandum merely requires high level department approval before formal waiver requests can be made.

    - The McNulty Memo only applies to formal privilege waiver demands. According to our surveys of corporate lawyers, the most common method by which prosecutors convey their waiver expectations is less than formal: it takes the form of questions such as: "You're going to cooperate with this investigation, right?" This kind of request may not be reported as a waiver demand under the McNulty Memo's process, but since prosecutors can continue to encourage companies to "voluntarily" waive their attorney-client privilege and work product protections in return for cooperation credit and less harsh treatment, the new memorandum all but guarantees the continued erosion of these

[5] The American Bar Association is prohibited from joining coalitions, but works closely with this group in promoting privilege protections and also supports S.186 and the arguments advanced in this overview as to why it's still necessary.

protections. Companies will continue to feel inexorable pressure to waive in order to receive cooperation credits that are crucial to the entity's survival of the investigation and charging process.

- The McNulty Memorandum, like the previous Thompson Memorandum, will continue to seriously weaken the attorney-client privilege between companies and their lawyers and undermine companies' internal compliance programs. Lawyers play a key role in helping companies 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 company's officers, directors and employees, and must be provided with all relevant information necessary to properly represent the entity. By allowing prosecutors to continue to force companies to waive these fundamental protections, the new policy, like the old Thompson Memorandum, will discourage company personnel from consulting with the company's lawyers, thereby impeding the lawyers' ability to conduct thorough internal investigations and to effectively counsel compliance with the law. This harms not only companies, but the markets, employees, and the investing public as well.

- While the new policy bars prosecutors from requiring companies to forego paying their employees' attorney fees in most—but not all—cases in return for cooperation credit, it continues to allow prosecutors to force companies to take other punitive actions against their employees in return for such credit, long before any guilt is established. As such, the new policy fails to adequately protect employees' legal rights.

- Additionally, because other government agencies—including, for example, the Securities and Exchange Commission, Department of Housing and Urban Development, and Commodity Futures Trading Commission—have followed the Justice Department's lead by adopting similar privilege waiver policies, congressional action would be necessary even if the Department changed its policies and practices.

- In essence, the key provisions of S. 186 prohibit any agent or attorney of the United States from pressuring any company or other organization to:

    - Disclose confidential information protected by attorney-client privilege or work product doctrine,

    - Refuse to contribute to the legal defense of an employee,

    - Refuse to enter into a joint defense, information sharing, or common interest agreement with an employee,

    - Refuse to share relevant information with employees that they need to defend themselves, or

    - Terminate or discipline an employee for exercising his or her constitutional or other legal rights.

- S. 186 prevents both direct coercion (e.g., demanding or requesting one of these actions) and indirect coercion (e.g., measuring cooperation or otherwise conditioning treatment on such an action).

- S. 186 protects only *valid* assertions of attorney-client privilege and work product doctrine. It does not expand these protections—which are very limited under existing law and do not prevent any investigator from investigating or examining the facts—or alter any applicable exceptions to the privilege (e.g., crime-fraud, advice of counsel).

- The bill also preserves the ability of prosecutors and other law enforcement officials to seek information that they reasonably believe is not privileged or work product.

- Although the judicial branch generally should continue to govern lawyers' conduct, the current policies and practices of the Justice Department and other agencies have so undermined the confidential attorney-client relationship that corrective legislation is necessary. Clear precedent exists for Congress enacting legislation, like S. 186, that overrides inappropriate Justice Department directives to its prosecutors: the "McDade/Murtha" law, enacted in 1998, required federal prosecutors to abide by the same state laws and rules, and local federal court rules, as all other lawyers.

ATTACHMENT 2
September 5, 2006

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

Re: Proposed Revisions to Department of Justice Policy Regarding
Waiver of the Attorney-Client Privilege and Work-Product Doctrine

Dear Mr. Attorney General:

We, the undersigned former senior Justice Department officials, write to enlist your support in preserving the attorney-client privilege and work-product doctrine. We believe that current Departmental policies and practices are seriously eroding these protections, and we urge you to take steps to change these policies and stop the practice of federal prosecutors requiring organizations to waive attorney-client privilege and work-product protections as a condition of receiving credit for cooperating during investigations.

As former Department officials, we appreciate and support your ongoing efforts to fight corporate crime. Unfortunately, we believe that the Department's current policy embodied in the 1999 "Holder Memorandum" and the 2003 "Thompson Memorandum," which encourages individual federal prosecutors to demand waiver of the attorney-client privilege and the work-product doctrine in return for cooperation credit, is undermining rather than strengthening compliance in a number of ways. In practice, companies who are all aware of the policies outlined in the Thompson Memorandum have no choice but to waive these protections. The threat of being labeled "uncooperative" simply poses too great a risk of indictment to do otherwise.

The Department's carrot-and-stick approach to waiving attorney-client privilege and work-product protections gravely weakens the attorney-client relationship 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 that they may represent the entity effectively and ensure that compliance is maintained (or that noncompliance is quickly remedied). By making waiver of privilege and work-product protections nearly assured, the Department's policies discourage personnel within companies and other organizations from consulting with their lawyers, thereby impeding the lawyers' ability effectively to counsel compliance with the law. This, in turn, harms not only the corporate client, but the investing public as well.

The Department's policies 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 to speak candidly and confidentially with the lawyer conducting the investigation, any uncertainty as to whether attorney-client privilege 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 Department's consideration of waiver as an element of cooperation undermines, rather than promotes, good compliance practices.

Finally, we believe that the Department's position with regard to privilege waiver encourages excessive "follow-on" civil litigation. In virtually all jurisdictions, waiver of attorney-client privilege or work-product protections for one party constitutes waiver to all parties, including subsequent civil litigants. Forcing companies and other entities routinely to waive their privileges during criminal investigations provides plaintiffs' 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 great financial risk – instead face the government's wrath.

We are not alone in voicing these concerns. According to a survey conducted earlier this year of over 1,200 in-house and outside corporate counsel, which is available at http://www.acca.com/Surveys/attyclient2.pdf, almost 75 percent of the respondents agreed with the statement 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 policy contained in the Holder/Thompson memoranda was most frequently cited.

We recognize that, in an attempt to address the growing concern being expressed about government-induced 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." 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 being established throughout the country, many of which may impose only token restraints on the ability of prosecutors to demand waiver. More importantly, it fails to acknowledge and address the many problems arising from the specter of forced waiver.

As you probably know, these views were expressed forcefully to Mr. McCallum on March 7 at a hearing of the House Judiciary Committee's Subcommittee on Crime, Terrorism and Homeland Security. The U.S. Sentencing Commission also validated these concerns when it voted on April 5, over the Department's objection, to rescind the "waiver as cooperation" amendment it had made only two years earlier to the commentary on its Organizational Sentencing Guidelines.

We agree with the position taken by the American Bar Association, as well as by the members of a broad coalition to preserve the attorney-client privilege representing virtually every business and legal organization in this country: Prosecutors can obtain needed information in ways that do not impinge upon the attorney-client relationship – for example, through corporate counsel identifying relevant data and documents and assisting prosecutors in understanding them, making available witnesses with knowledge of the events under investigation, and conveying the results of internal investigations in ways that do not implicate privileged material.

In sum, we believe that the Thompson Memorandum 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 Department to revise its policy to state affirmatively that waiver of attorney-client privilege and work-product protections should not be a factor in determining whether an organization has cooperated with the government in an investigation.

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

Sincerely,

Griffin B. Bell
Attorney General
(1977-1979)

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

Walter E. Dellinger III
Acting Solicitor General
(1996-1997)

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

Dick Thornburgh
Attorney General
(1988-1991)

Jamie Gorelick
Deputy Attorney General
(1994-1997)

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)