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April 21, 2006

The Honorable Robert D. McCallum, Jr.
Associate Attorney General
U.S. Department of Justice
Robert F. Kennedy Building
950 Pennsylvania Avenue, N.W.
Washington, DC 20530

Re: April 13, 2006 meeting on waiver of attorney-client privilege and work product protections in the corporate legal context

Dear Associate Attorney General McCallum:

On behalf of the Association of Corporate Counsel (“ACC”) and the U.S. Chamber of Commerce (“Chamber”), thank you for taking the time and involving so many of your colleagues to discuss the issue of waiver of the attorney-client and work product protections in the corporate context. We greatly appreciate your personal interest in this issue that concerns us all.

As we mentioned in our meeting, ACC and the Chamber welcome the opportunity to work productively with the Department to seek a mutually beneficial resolution of this issue that promotes justice both by protecting companies’ fundamental legal rights and by providing U.S. attorneys the tools necessary to carry out the important work of prosecuting criminal activity. Current interest in the waiver of the attorney-client and work product protections by federal courts, the U.S. Sentencing Commission, and Congress underscores the importance of this issue as well as the need for government prosecutors and the business community to resolve their differences.

Because meetings like the one we had last week are so important to our future progress on this issue, I would like to memorialize a few key points from our discussions. First and foremost, the business community’s primary goal is to eliminate any consideration of waiver of attorney-client and work product protections as a condition or indicator of cooperation. These protections are crucial to fostering corporate compliance with the law and should not be eroded by a culture of waiver.

At the same time, however, ACC and the Chamber would be happy to work with the Department to explore what information a company that wishes to cooperate can and should provide to the government. We believe there are many ways that companies can help the government collect facts without effectively becoming ‘deputized agents’ of prosecutors.

The proposed edits to the Thompson Memorandum that ACC handed to you at our meeting are offered in this spirit of exploring potential common ground. The changes are limited, but address important aspects of this issue:

1. Delete the waiver requirement for corporate leniency. We believe that prosecutors should be barred from requesting any waiver of attorney-client or work product protections and from “consider[ing] whether a corporation has waived its attorney-client and work product protections in assessing that corporation’s cooperation for any purpose, including in the course of conducting an investigation, determining whether to bring charges, or negotiating plea agreements.” Consistent with this approach, we are suggesting that references to production of information subject to attorney-client or work product protections should be eliminated or limited to the production of information not subject to these protections. These proposed revisions directly address the policy issue of greatest concern to the business community.
2. Differentiate isolated cases from a broad pattern of misconduct. These proposed revisions acknowledge the reality that even law-abiding corporate citizens occasionally have rogue employees that engage in misconduct. Conclusions about the culture, compliance programs, or even supervision of employees should be based upon a company’s general patterns and practices, and should not be extrapolated from an isolated incident.
3. Identify practical limitations on corporate cooperation regarding individual employees. Although the Department’s expectation of assistance from a company in targeting culpable employees and agents is appropriate in general, there are practical limitations that companies want the DOJ to respect. These include any corporate commitments or obligations to pay the legal fees of certain employees until they have been proven guilty, and a variety of individual rights protecting employees that companies must take into account, as well.

As shared during our meeting, the specific wording of the edits is not as important as the general concepts. Both ACC and the Chamber remain open to alternative approaches (including the ABA’s) that would address the business community’s concerns.

We would value the opportunity to continue our important dialogue on this issue and provide feedback to you on any potential changes to the Department’s policy on waiver of attorney-client privilege and work product protections in the corporate context. Please let us know when and if you would like to meet again to discuss any appropriate next steps.

Sincerely,



Susan Hackett
Senior Vice President and General Counsel

cc: Fred Krebs, President, Association of Corporate Counsel
Stan Anderson and Pete Lawson, U.S. Chamber of Commerce
Steve Cannon and Todd Anderson, Constantine Cannon