March 28, 2006

VIA ELECTRONIC FILING

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

Re: Comments on "Chapter Eight – Privilege Waiver"

Dear Sir/Madam:

The Coalition to Preserve the Attorney-Client Privilege, which is composed of the undersigned organizations,[1] is pleased to provide these comments on the Commission's Notice of Proposed Amendments, Request for Public Comment, and Notice of Public Hearings for the amendment cycle ending May 1, 2006.[2] These comments exclusively address Final Priority (6): "review, and possible amendment," of the language regarding waiver of attorney-client privilege and work product protections contained in the Commentary to Section 8C2.5 of the Federal Sentencing Guidelines. For the reasons explained below, we urge the Commission to amend that language to clarify that waiver of attorney-client privilege and work product protections should not be a factor in determining whether a sentencing reduction for cooperation with the government is warranted.

Background

On April 30, 2004, the Commission submitted to Congress a number of amendments to Chapter 8 of the Guidelines relating to organizations. Included in these amendments, all of which became effective on November 1, 2004, was the addition of the following new language to the Commentary for Section 8C2.5of 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.

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[1]The Coalition to Preserve the Attorney-Client Privilege includes the following organizations: American Chemistry Council, Association of Corporate Counsel, Business Civil Liberties, Inc., Business Roundtable, the Financial Services Roundtable, Frontiers of Freedom, National Association of Criminal Defense Lawyers, National Association of Manufacturers, National Defense Industrial Association, Retail Industry Leaders Association, the U.S. Chamber of Commerce, and Washington Legal Foundation. The American Civil Liberties Union (ACLU) is a part of the coalition as well but was not able to secure approval to co-sign this comment letter prior to today's deadline. The ACLU did sign the coalition's August 15, 2005 comment letter to the Commission, referenced in footnote 5, *infra,* which makes many of the same substantive points outlined in this comment letter. Although the American Bar Association is prevented by internal policies from formally joining coalitions, it is working in close cooperation with the Coalition to Preserve the Attorney-Client Privilege on the privilege waiver issue and will be filing separate comments with the Commission today on the issue of "Chapter Eight – Privilege Waiver."

[2] 71 Fed. Reg. 4782-4804 (January 27, 2006)

Before the adoption of the privilege waiver amendment, the Commentary was silent on privilege and contained no suggestion that such a waiver would ever be a factor in charging or sentencing decisions. The issue of waiver emerged during deliberations of the Commission's Ad Hoc Advisory Group on the Organizational Guidelines. The Advisory Group was concerned about the effect on effective corporate compliance programs of the Justice Department's privilege waiver policies, as spelled out in the Holder and Thompson Memoranda.[3] After considering the views of the Department of Justice, various bar associations, and regulated entities—and weighing the concerns raised by numerous representatives of the business community and various legal groups—the Advisory Group recommended privilege waiver language somewhat similar to, though more general than, the language quoted above. The Commission revised that language and incorporated it into the 2004 amendments to the Guidelines.

After the 2004 privilege waiver amendment to the Guidelines was adopted, a broader cross-section of business, legal, and public policy organizations, including many of the undersigned entities and the American Bar Association (ABA), began to evaluate the substantive and practical impact of the waiver provision on their operations—and on the legal and business communities in general—and communicated their concerns to the Commission. On March 3, 2005, the coalition sent a letter to the Commission expressing its concerns over the privilege waiver amendment. The ABA expressed similar concerns in its separate letter to the Commission dated May 17, 2005.

In June 2005, the Sentencing Commission issued its "Notice of Proposed Priorities and Request for Public Comment" for the amendment cycle ending May 1, 2006, in which it stated its tentative plans to reconsider the 2004 privilege waiver amendment to the Federal Sentencing Guidelines during its 2005-2006 amendment cycle. In response, the coalition submitted a comment letter to the Commission on August 15, 2005, urging it to reverse the privilege waiver amendment and add language to the Guidelines stating that waiver should not be a factor in determining cooperation. Similar comment letters opposing the November 2004 privilege waiver amendment were also filed by a prominent group of nine former senior Justice Department officials—including three former Attorneys General—and by the ABA.

In August 2005, the Sentencing Commission issued its "Notice of Final Priorities" for the amendment cycle ending May 1, 2006, in which it stated its intent to formally reconsider the 2004 privilege waiver amendment to the Federal Sentencing Guidelines. Subsequently, several organizations from the coalition, former Attorney General Dick Thornburgh, and the ABA, testified before the Commission on November 15, 2005, on the subject of privilege waiver. During the November 15 hearing, the coalition presented the results of its April 2005 surveys of in-house and

[3] The Justice Department's privilege waiver policy originated with the adoption of a 1999 memorandum by then-Deputy Attorney General Eric Holder, also known as the "Holder Memorandum," that encouraged federal prosecutors to request that companies waive their privileges as a condition for receiving cooperation credit during investigations. The Department's waiver policy was expanded in a January 2003 memorandum written by then-Deputy Attorney General Larry Thompson, also known as the "Thompson Memorandum." Subsequently, then-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," although the directive—also known as the "McCallum Memorandum"—does not establish any minimum standards for, or require national uniformity regarding, privilege waiver demands by prosecutors. The Thompson and McCallum Memoranda are available online at http://www.usdoj.gov/dag/cftf/business_organizations.pdf and http://www.abanet.org/poladv/mccallummemo212005.pdf, respectively.

outside counsel, both of which confirmed the importance of the privilege to corporate counsel and the growing trend of government-coerced privilege waiver.[4] At that hearing, the Commission asked coalition members to help to gather additional information and data regarding the frequency with which governmental entities have been requesting that businesses waive their privileges as a condition for cooperation credit, as well as the effects of these waiver requests.

After considering the comments and testimony presented by the coalition, the ABA, and others,[5] the Commission issued its Notice of Proposed Amendments, Request for Public Comment, and Notice of Public Hearings on January 27, 2006. One of the issues on which the Commission sought public comment was the issue of "Chapter Eight – Privilege Waiver." In particular, the Commission sought additional comment on the following specific issues:

> (1) whether this commentary language [in Application Note 12 of Section 8C2.5 of the Guidelines] is having unintended consequences; (2) if so, how specifically has it adversely affected the application of the sentencing guidelines and the administration of justice; (3) whether this commentary language should be deleted or amended; and (4) if it should be amended, in what manner.[6]

In response to the Commission's November 15, 2005, request for additional information and data on the frequency of government demands for privilege waiver and their effects, the coalition undertook a second, more detailed survey of in-house and outside corporate counsel. The results of the new survey were presented to the Commission in early March 2006.[7] Subsequently, on March 15, 2006, two representatives of the coalition—Susan Hackett of the Association of Corporate Counsel (ACC) and Kent Wicker of the National Association of Criminal Defense Lawyers (NACDL)—testified before the Commission regarding the results of the new survey.

Unintended Consequences of the 2004 Privilege Waiver Amendment to the Guidelines

The coalition continues to believe that the 2004 changes to the Section 8C2.5 Commentary of the Sentencing Guidelines, though well-intentioned, have helped cause a number of profoundly negative unintended consequences. The results of our new survey provide substantial and compelling evidence supporting the validity of these concerns. In our view, the 2004 privilege waiver amendment to the Guidelines, combined with the existing Justice Department privilege waiver policy as expressed in the Holder and Thompson Memoranda, has led to the following negative consequences:

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[4] Executive summaries of these April 2005 surveys are available online at www.acca.com/Surveys/attyclient.pdf and www.nacdl.org/public.nsf/Legislation/Overcriminalization002/$FILE/AC_Survey.pdf, respectively.

[5] Links to all of the comment letters, written testimony, and other statements that the coalition, the ABA, and the former senior Justice Department officials previously presented to the Sentencing Commission and Congress are available at http://www.abanet.org/poladv/acprivilege.htm. In addition, other useful materials regarding privilege waiver are available on the ABA Task Force on Attorney-Client Privilege website at http://www.abanet.org/buslaw/attorneyclient/.

[6] *See* Notice of Proposed Amendments, Request for Public Comment, and Notice of Public Hearings, 71 Fed. Reg. 4782-4804 (January 27, 2006).

[7] The detailed results of the new March 2006 surveys of in-house and outside corporate counsel are available online at http://www.acca.com/Surveys/attyclient2.pdf.

•The privilege waiver amendment and related Justice Department policies and practices have forced companies to waive their attorney-client and work product protections in most cases. The problem of coerced waiver that began with the 1999 Holder Memorandum and the 2003 Thompson Memorandum was exacerbated when the Commission added the new privilege waiver language to the Section 8C2.5 Commentary in 2004. While the new 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.

Now that this amendment has become effective, it is the experience of our members that 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, it is our perception that the Justice Department, as well as other enforcement agencies, view 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 indict them for being "uncooperative" presents an unacceptable prospect of diminished or destroyed public image, stock price, and standing in the marketplace.

The concerns previously expressed by the coalition that government-coerced waiver had become routine—and that the 2004 privilege waiver amendment was a significant factor contributing to that trend—were confirmed by the results of the new coalition survey. In particular, the survey revealed the following trends:

> *A Government "Culture of Waiver" Exists.* Almost 75% of both inside and outside corporate counsel respondents believe (almost 40% believe strongly) that a "'culture of waiver' has evolved in which governmental agencies believe it is reasonable and appropriate for them to expect a company under investigation to broadly waive attorney-client privilege or work product protections." (Only 1% of inside counsel and 2.5 % of outside counsel disagreed with the statement.)
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> *Waiver is a Condition of Cooperation.* Fifty-two percent of in-house respondents and 59% of outside respondents confirmed that they believe that there has been a marked increase in waiver requests as a condition of cooperation. Consistent with that finding, roughly half of all investigations or other inquiries experienced by survey respondents resulted in privilege waivers.
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> *A "Government Expectation"[8] of Waiver of Attorney-Client Privilege Confirmed.* Of the respondents who confirmed that they or their clients had been subject to investigation in the last five years, approximately 30% of in-house respondents and 51% of outside respondents said that the government expected waiver in order for a company to engage in bargaining or to be eligible to receive more favorable treatment.

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

Prosecutors Typically Request Privilege Waiver – It Is Rarely "Inferred" by Counsel. Of those who have been investigated, 55% of outside counsel responded that waiver of the attorney-client privilege was requested by enforcement officials either directly or indirectly. Twenty-seven percent of in-house counsel confirmed this to be true.[9] Only 8% percent of outside counsel and 3% of in-house counsel said that they "inferred it was expected."

Sentencing Guidelines Rank Second Only to Justice Department Policies Among the Reasons Given For Waiver Demands. Outside counsel indicated that while the Justice Department's waiver policies (i.e., the Thompson/Holder/McCallum Memoranda) are cited most frequently when a reason for waiver is provided by an enforcement official, the Sentencing Guidelines are cited second. In-house counsel placed the Guidelines third, behind "a quick and efficient resolution of the matter," and Justice Department policies, respectively.

Based on this survey data, and the voluminous anecdotal evidence provided by the in-house and outside corporate counsel in the essay portions of our survey, it is clear that government demands for privilege waiver have become routine and that the 2004 privilege waiver amendment to the Guidelines have been a significant contributing factor to this growing trend.

•The 2004 privilege waiver amendment has helped to weaken the confidentiality of communications between companies and their lawyers. Lawyers for companies and other organizations play a key role in helping these entities and their officials comply with the law and act in the entity's best interests. To fulfill this role, lawyers must enjoy the trust and confidence of managers, boards, and other key personnel of the entity and must be provided with all relevant information necessary to properly represent that entity. By authorizing and encouraging routine government demands for waiver of attorney-client and work product protections, the privilege waiver amendment discourages personnel within companies and other organizations from consulting with their lawyers. This, in turn, seriously impedes the lawyers' ability to effectively counsel compliance with the law.

The results of the original, April 2005 surveys of in-house and outside corporate counsel conducted by the ACC and the NACDL confirmed the important purpose that privilege and work product doctrines serve in facilitating the lawyer's work, with over 95% of respondents expressing agreement with this principle. (*See* April 2005 ACC and NACDL surveys at pgs. 4 and 5, respectively) In addition, over 90% of respondents in both surveys believed that the privilege enhances the likelihood that company employees will discuss sensitive/difficult issues regarding legal compliance. (*Id.* at pgs. 4 and 6, respectively) The April 2005 surveys also confirmed the chilling effect that privilege waiver would have on the confidential attorney-client relationship. According to those surveys, approximately 95% of both in-house and outside corporate counsel agreed that there would be "a 'chill' in the flow/candor of information provided to counsel if the privilege did not offer protection to client communications or your attorney work-product." (*Id.* at p. 3)

In addition, in response to the open-ended text questions offered at the end of the new March 2006

[9] Sixty percent of in-house counsel who had experience with a waiver request responded "N/A" (not applicable) to this question, suggesting they had not been present when privilege waivers were discussed.

survey, numerous in-house and outside corporate counsel confirmed that government-coerced waiver policies have had a severe chilling effect on the attorney-client relationship and on the ability of corporate attorneys to counsel their clients to comply with the law. The following quotations are typical of the many narrative responses to the survey's open-ended questions:

> "The fear of privilege waiver has curtailed my ability to frankly and strongly direct my colleagues in areas of risk. I can no longer send memos that say: 'under no circumstances may you do this,' or the like, for fear of reprisal [in the future]. My inability to speak forthrightly forces my advice to be sugar-coated in ways that I believe lessen my power and effectiveness to force others to do the right thing…When things appear as if they will be highly sensitive, I carefully retain outside counsel, often in matters I could handle better internally, thereby wasting significant not-for-profit dollars because of the government's inappropriate intrusion in this formerly sacrosanct land." (*See* March 2006 survey results at p. 15)

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

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

> "In my experience, it is remarkably difficult for corporations and their employees to get legal advice in today's environment. There is a clear expectation -- sometimes unspoken, often spoken -- that any communication, privileged or not, will be shared with the government. There is no balancing of the advantages of waiver against the risks, including the company's ability to defend itself in ongoing civil litigation. This puts company counsel in a completely untenable position, unable to give or seek advice freely. The important purposes behind the privilege are simply being ignored." (*Id.* at p. 16)

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

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

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

The sheer number of these and the many other unequivocal responses to the new survey demonstrate that prosecutors' routine demands for waiver—further exacerbated by the 2004 amendment to the Guidelines—have seriously weakened the confidential attorney-client relationship between many companies and their lawyers and made it more difficult for the lawyers to counsel compliance with the law.

•**The privilege waiver amendment helps to undermine internal compliance programs.** The net effect of the privilege waiver amendment and other government policies encouraging routine waiver is to make the detection of corporate misconduct more difficult by undermining companies' internal compliance programs and procedures. As the Commission itself has repeatedly emphasized, effective corporate compliance 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. The April 2005 surveys confirmed the important contribution that the attorney-client privilege makes to internal compliance programs, with over 94% of corporate counsel respondents agreeing that the privilege improves the lawyer's ability to monitor, enforce, and improve compliance initiatives. (*See* April 2005 ACC and NACDL surveys at pgs. 4 and 6, respectively.) Unfortunately, because the effectiveness of these internal investigations depends on the ability of the individuals with knowledge to speak candidly and confidentially with the lawyer conducting the investigation, any uncertainty as to whether attorney-client and work product privileges will be honored makes it more difficult for companies to detect and remedy wrongdoing early. Therefore, by further encouraging prosecutors to seek waiver on a routine basis, the privilege waiver amendment undermines, rather than promotes, good compliance practices.

The new March 2006 survey confirmed the fact that when prosecutors request that a company waive its privileges, they often seek sensitive documents directly relating to companies' internal investigations, including (1) written reports of an internal investigation, (2) files and work papers that supported an internal investigation, (3) lawyers' interview notes or memos or transcripts of interviews with employees who were targets, (4) notes/oral recollections of privileged conversations with or reports to senior executives, board members, or board committees, and (5) lawyers' interview notes with employees who were not available for interviews by the government or memos/transcripts of the same. (*See* March 2006 survey at pgs. 8-10) Clearly, prosecutors are taking a very expansive view

regarding the types of sensitive internal materials that companies should be forced to turn over during investigations.

•The privilege waiver amendment unfairly harms employees by infringing on their individual rights. The privilege waiver amendment and the other governmental policies encouraging routine waiver 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 statements made to the company's or organization's lawyers will be turned over to the government by the entity, or they can decline to cooperate and risk losing their employment. It is fundamentally unfair to force employees to choose between keeping their jobs and preserving their legal rights.

In the new survey, many outside corporate counsel confirmed that government-coerced waiver has had substantial adverse effects on companies' employees in a number of specific ways. A majority of the outside counsel who responded to the survey cited instances in which prosecutors encouraged or required companies to take certain actions against employees, including (1) not advancing legal expenses to, or agreeing to reimburse, a targeted employee, (2) not entering into, or breaching, a joint defense agreement with a targeted employee, (3) refusing to share requested documents with a targeted employee, or (4) discharging an employee who would not consent to be interviewed by the government. (*See* March 2006 survey at p. 13.)

Moreover, many if not most corporate criminal investigations do not involve black-and-white types of potential criminality, such as embezzlement. Particularly in the environmental field, there can be substantial question whether the conduct that the government posits is even illegal. In such cases, companies are often being coerced to identify, and treat as possible criminals, employees whose conduct they regard as lawful. In such "gray" areas, the possibility that employees' conversations with company counsel may be turned over to the government can quickly and prematurely squelch such communications.

For all these reasons, we believe that the privilege waiver amendment is flawed and uniquely dangerous to our shared goal of protecting the policies that are advanced by the attorney-client relationship.

Congressional Concern Regarding Privilege Wavier

In addition to the coalition, the ABA, and the former senior Justice Department officials referenced above, many prominent Congressional leaders have also expressed serious concerns regarding both the 2004 privilege waiver amendment to the Sentencing Guidelines and the Justice Department's internal privilege waiver policy.

On March 7, 2006, the House Judiciary Subcommittee on Crime, Terrorism, and Homeland Security held a hearing on the subject of "White Collar Enforcement (Part 1): Attorney-Client Privilege and Corporate Waivers." Witnesses testifying at the hearing included Associate Attorney General Robert McCallum, former Attorney General Dick Thornburgh, U.S. Chamber of Commerce President Thomas Donohue, and William Sullivan, Jr. of the law firm of Winston & Strawn.[10]

[10] The written testimony of each of the witnesses who appeared at the March 7, 2006 hearing and the letter submitted by

During the hearing, the Chairman of the Subcommittee, Rep. Howard Coble (R-NC), expressed his strong support for the attorney-client privilege and his concerns regarding routine prosecutor demands for waiver during investigations. After noting the "institutional tension between preserving corporate attorney-client and work product privileges and a prosecutor's quest to unearth the truth about criminal acts," Chairman Coble made the following remarks:

> Prosecutors must be zealous and vigorous in their efforts to bring corporate actors to justice. However, zeal does not in my opinion equate with coercion in fair enforcement of these laws. To me, the important question is whether prosecutors seeking to investigate corporate crimes can gain access to the information without requiring a waiver of the attorney-client privilege. There is no excuse for prosecutors to require privilege waivers as a routine matter, it seems to me. This subcommittee will examine the important issue with a keen eye to determine whether Federal prosecutors are routinely requiring cooperating corporations to waive such privilege…[In addition to the McCallum Memorandum of October 21, 2005,] I am also aware of the fact that the Sentencing Commission is examining its current policy of encouraging such waivers when determining the nature and extent of cooperation. While the guidelines do not explicitly mandate a waiver of privileges for the full benefit of cooperation, in practical terms we have to make sure that they do not operate to impose a requirement…

During the March 7 hearing, the Subcommittee's Ranking Member, Rep. Robert Scott (D-VA), expressed similar concerns regarding erosion of the attorney-client privilege. After acknowledging the many policy reasons for preserving the privilege, Rep. Scott noted:

> For some time now I have been concerned about reports that the Department of Justice is coercing corporations to waive their attorney-client privilege during criminal investigations of the corporation and its employees by making waiver a prerequisite for consideration by the Department and its recommendation for not challenging leniency should criminal conduct be established…It is one thing for officials of a corporation to break the attorney-client privilege in their own self-interest by their own volition. It is another thing for the Department to require or coerce it by making leniency considerations contingent upon it, even when it is merely on a fishing expedition on the part of the Department. Complaints have indicated that the practice of requiring a waiver of the corporate attorney-client privilege has become routine. And of course, why wouldn't it be the case? What is the advantage to the Department of not requiring a waiver in the corporate investigation?...Now, coercing corporate attorney-client privileges has not been—has not long been the practice in the Department. It has really been the last two administrations that have practiced this, and it has been growing by leaps and bounds…

Similar concerns were also raised during the hearing by Reps. Dan Lungren (R-CA)—who previously served as California Attorney General—and William Delahunt (D-MA)—a long-time former prosecutor. During the question and answer period, Rep. Lungren reiterated his longstanding opposition to the 2004 privilege waiver amendment to the Sentencing Guidelines:

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the ABA to the Subcommittee regarding the hearing are available at http://www.abanet.org/poladv/testimony306.pdf.

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

During his questioning of Associate Attorney General McCallum, Rep. Lungren favorably compared companies' current efforts to preserve their attorney-client privilege with the Bush Administration's recent attempts to invoke and preserve executive privilege:

> If we in the Congress were to every time the President says that there is a reason to protect executive privilege, not only for his administration but for future administrations, that every time he did that he was violating the sense of cooperation that should prevail between two equal branches of government, I think we would be wrong. And I see the Justice Department taking a position that if a corporate defendant or potential defendant refuses to waive that privilege, that is a priori evidence of the fact that they are not cooperating. And that is the problem I really have here…And so I would ask, don't you see the creeping intrusion here? I mean, first you have the first [Holder] memorandum. Now we have the second [Thompson] memorandum, which is a little tighter and a little tougher. And then, following that, you have the Sentencing Commission…[adding privilege waiver language to the Guidelines], well, that is a bad idea…

Rep. Delahunt expressed similar concerns regarding the erosion of the privilege in recent years and questioned Associate Attorney General McCallum's assertion that government-coerced waiver may be necessary to effectively investigate complex corporate frauds. Rep. Delahunt stated:

> You know what I can't understand, Mr. McCallum, is what happened in the past 10 years?... For 20 years of my own professional life…I was a prosecutor. Did a number of sophisticated white collar crime investigations. And, I mean, there are grand juries. There is the use of informants…We knew how to squeeze people without sacrificing or eroding the attorney-client privilege…I just have this very uneasy feeling that it is the easy way to do it…There is a certain level of…why should I have to really exercise myself to secure the truth…I got to tell you something. I am a little annoyed with the Sentencing Commission, too, making this [e.g., privilege waiver] a factor…

At the conclusion of the hearing, Rep. Delahunt summed up the serious concerns that various Subcommittee members had previously expressed regarding governmental privilege waiver policies. In his final comments to Mr. McCallum, Rep. Delahunt explained:

> I think you can probably sense by the questions that have been posed, as well as observations by individual members, that there is a real concern here. And you don't want someone like [Rep.] Lungren from California, you know a far right conservative

> Republican, and [Rep.] Delahunt, this Northeast liberal, filing legislation on this because I think that is the order of magnitude that is being expressed here. So respectfully, that is a message that I think you can bring back to Justice, is that there is concern about the Thompson/McCallum Memorandum. Okay?

The concerns that the members of the House Judiciary Subcommittee expressed during the March 7 hearing are consistent with those previously expressed on November 16, 2005 by Sen. Arlen Specter (R-PA), Chairman of the Senate Judiciary Committee, and Rep. James Sensenbrenner (R-WI), Chairman of the House Judiciary Committee.[11]

Proposed Changes to the 2004 Privilege Waiver Amendment to the Sentencing Guidelines

In order to stop and reverse the negative consequences resulting from the 2004 privilege waiver amendment to the Guidelines, we urge the Commission to amend the applicable language in the Commentary to Section 8C2.5 of the Guidelines to clarify that waiver of attorney-client privilege and work product protections should not be a factor in determining whether a sentencing reduction under the Guidelines is warranted for cooperation with the government.

To accomplish this, we recommend that the Commission (1) add language to the Commentary clarifying that cooperation only requires the disclosure of "all pertinent non-privileged information known by the organization", (2) delete the existing Commentary language "unless such waiver is necessary in order to provide timely and thorough disclosure of all pertinent information known to the organization", and (3) make the other minor wording changes in the Commentary outlined below.

If our recommendations were adopted, the relevant portion of the Commentary would read as follows[12]:

> "12. To qualify for a reduction under subsection (g)(1) or (g)(2), cooperation must be both timely and thorough. To be timely, the cooperation must begin essentially at the same time as the organization is officially notified of a criminal investigation. To be thorough, the cooperation should include the disclosure of all pertinent non-privileged information known by the organization. A prime test of whether the organization has disclosed all pertinent non-privileged information is whether the information is sufficient for law enforcement personnel to identify the nature and extent of the offense and the individual(s) responsible for the criminal conduct. However, the cooperation to be measured is the cooperation of the organization itself, not the cooperation of individuals within the organization. If, because of the lack of cooperation of particular individual(s), neither the organization nor law enforcement personnel are able to identify the culpable individual(s) within the organization

[11] On November 16, 2005, Sen. Specter and Rep. Sensenbrenner spoke at a conference dealing with the erosion of the attorney-client privilege that was sponsored by the U.S. Chamber of Commerce, the ABA, the ACC, the NACDL, and the American Civil Liberties Union. A transcript of Sen. Specter's comments and Rep. Sensenbrenner's prepared statement are available online at http://www.abanet.org/poladv/acpriv_transcriptofsenspecter11-16-05.pdf and http://www.abanet.org/poladv/acprivsensenbrenner11-16-05.pdf, respectively.

[12] Note: The Commission's November 1, 2004 amendments on the privilege waiver issue are shown in italics. Our suggested additions are underscored and our suggested deletions are noted by strikethroughs.

despite the organization's efforts to cooperate fully, the organization may still be given credit for full cooperation. *Waiver of attorney-client privilege and of work product protections is not* a factor in determining whether ~~*a prerequisite to*~~ *a reduction in culpability score under subdivisions (1) and (2) of subsection (g)* is warranted. ~~*unless such waiver is necessary in order to provide timely and thorough disclosure of all pertinent information known to the organization.*~~."

Thank you for the opportunity to present our views on this important matter.

Respectfully submitted,

AMERICAN CHEMISTRY COUNCIL

ASSOCIATION OF CORPORATE COUNSEL

BUSINESS CIVIL LIBERTIES, INC.

BUSINESS ROUNDTABLE

THE FINANCIAL SERVICES ROUNDTABLE

FRONTIERS OF FREEDOM

NATIONAL ASSOCIATION OF CRIMINAL DEFENSE LAWYERS

NATIONAL ASSOCIATION OF MANUFACTURERS

NATIONAL DEFENSE INDUSTRIAL ASSOCIATION

RETAIL INDUSTRY LEADERS ASSOCIATION

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