Submission to the U.S. House of Representatives
Judiciary Subcommittee on Crime, Terrorism and Homeland Security

The Honorable Howard Coble, Chairman

Regarding the Subcommittee's Hearings on "White Collar Enforcement (Part 1): Attorney-Client Privilege and Corporate Waivers"

Tuesday, March 7, 2006

Submitted by the Coalition to Preserve the Attorney-Client Privilege:
American Chemistry Council
American Civil Liberties Union
Association of Corporate Counsel
Business Civil Liberties, Inc.
Business Roundtable
National Association of Criminal Defense Lawyers
National Association of Manufacturers
U.S. Chamber of Commerce

Chairman Coble, members of the House Judiciary Subcommittee on Crime, Terrorism and Homeland Security, we appreciate the opportunity to submit the following statement for the record of today's hearing to examine the erosion of the attorney-client privilege in the corporate context.

It is our firm belief that the attorney-client privilege in the corporate context has been significantly weakened in recent years due largely to current Justice Department investigative policies and practices and recent amendments to the U.S. Sentencing Guidelines that put companies in the position of having to waive their attorney-client privilege during federal investigations in order to receive credit, during charging and sentencing decisions, for having fully cooperated with the authorities. This statement explains our concerns, and provides the Subcommittee with historical context for the importance of the attorney-client privilege.

Background and Importance of the Attorney-Client Privilege

Attorney-client confidentiality is the foundation of the relationship between a lawyer and client. The attorney-client privilege is essentially an evidentiary or procedural right recognized by the courts when one party to litigation or other adversarial matter wishes to exclude documents or communications from the other party's requested production of the first party's files, when those files include attorney-client confidences. But increasingly, demands to waive the attorney-client privilege are being made outside the authority and oversight of the courts; increasingly, privilege waiver demands are unilaterally made by prosecutors, enforcement officials, and third-party plaintiffs. Those demanding such waivers of the privilege believe they are entitled to everything and anything that may assist them in investigating potential misconduct at the company, even if the information is privileged. Even corporate auditors are demanding to see privileged information as the price of a "clean" audit letter.

While lawyers are generally bound by rules of professional ethics [1] to preserve their clients' confidences, it is the attorney-client privilege that allows a client to assert the right to the confidentiality of its conversations with counsel. While the workings of the privilege are more familiar in the context of an individual who, confronted with a threat of prosecution or suit, consults a lawyer and expects that the content of their conversations will be confidential, the U.S. Supreme Court confirmed that corporations are similarly entitled to the protections of the privilege in the landmark case of *Upjohn Co. v. United States.*[2]

The main general exceptions to the clients' rights to maintain the privileged status of conversations with their attorneys are:

• the crime-fraud exception (the privilege cannot apply to conversations in which the lawyer's advice or services will be used in furtherance of a crime or fraud); and

• the exception for discovery of communications that the client previously waived through disclosure to any non-privileged party; such a disclosure can invalidate the client's right to invoke the privilege's protections against other third parties who demand production of the communications in the future.[3]

Privilege In The Post Sarbanes-Oxley Environment

While nothing has technically changed in the laws governing the application of the privilege in the corporate context in recent years, past corporate accounting scandals have raised concerns about the need for corporations to operate in a more transparent and accountable fashion. However, we believe that weakening the attorney-client privilege is counterproductive to the ultimate twin goals of promoting corporate compliance and rewarding corporate self-reporting.

Since lawyers employed or retained by a corporation represent the entity (rather than individual employees, officers or directors), they are particularly aware of the need to protect the privilege. Corporate counsel find that privilege is essential to successfully counseling those officers and employees on compliance and ethics in the daily conduct of business. In order to perform their functions optimally, corporate lawyers must be *included in* executive corporate decision-making. Success requires that they encourage clients to take a moment, and seek legal advice in an increasingly fast paced, competitive, complex and regulated business environment.

The privilege allows corporate counsel to advise against poor choices and help clients understand the adverse legal implications of suggested activities without fear that their sensitive conversations will be made public in the future. Furthermore, it provides an important incentive to those with relevant information or concerns about possible wrongdoing to share what they know with their counsel, who can then advise them and the company to pursue remedial actions and proactively prevent similar problems in the future.

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[1] See, for example, Model Rule of Professional Conduct 1.6, and its counterpart rule in every state's code of professional responsibility.

[2] *Upjohn Co. v. U.S.*, 449 U.S. 383 (1981).

[3] We have provided a more detailed explanation of the privilege and its application as Attachment A.

If employees believe that the attorney-client privilege will not protect the confidentiality of those conversations, conversations that are in the company's best interests and continued legal health will likely not occur. As the Supreme Court declared in the *Upjohn* case – "An uncertain privilege . . . is little better than no privilege at all.[4]

Privilege Waiver Requests Are on the Rise

Demands for waiver of privilege fall into four main categories:

1. the prosecutorial context (involving the Department of Justice, U.S. attorneys or state attorneys general);
2. the regulatory context (most commonly with the SEC);
3. the adversarial civil litigation context (in which the other side is demanding access to privileged or work-product material as a matter of right); and
4. the corporate audits context (as the company's external auditors seek to comply with the Public Company Accounting Oversight Board's excessive interpretation of Sarbanes-Oxley internal controls requirements).

Unfortunately, waiver of privilege to any one of these groups opens these same files to the potential future discovery demands of any third party seeking the same or even related information stemming from the same matter for most any other purpose. Attempts to craft a limited waiver agreement (through the execution of a confidentiality agreement) with government investigators or prosecutors would not be enforceable in most jurisdictions when subsequent document production demands were made.

The Government is Contributing to Privilege Erosion

In recent years[5], particularly on the federal level, criminal law enforcement and regulatory authorities have adopted policies and employed practices and procedures that suggest that if corporations disclose documents and information that are protected by the corporate attorney-client privilege and work-product doctrine, they will receive credit for "cooperation." While this sounds like an option that a company can choose to exercise or not, the reality is that corporations have no practical choice but to comply with this waiver demand. In federal criminal cases against companies, prosecutors' ability to assert a need for waiver is reinforced by both the Justice Department's internal policies on charging decisions (the Thompson Memorandum[6]), as well as a provision of the Federal Sentencing Guidelines

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[4] Upjohn, supra note 2,449 U.S. at 393.

[5] Former leaders of the Department of Justice have testified in alignment with our coalition that the aggressive waiver policies in play today were not the norm during their tenures, and are not only unnecessary to accomplishing the Department's goals, but deplorable and inappropriate. *See, e.g.*, the testimony of former Attorney General Dick Thornburgh before the US Sentencing Commission at http://www.ussc.gov/corp/11_15_05/Thornburgh.pdf; and the submitted statement of nine former senior DOJ officials, including former Attorneys General, Deputy Attorneys General and Solicitors General, attached to this filing because the Commission did not post it to its website.

[6] Deputy Attorney General Larry Thompson issued a 2003 memorandum that addressed the principles of federal prosecution of business organizations. (Memorandum from Deputy Attorney General Larry Thompson to Heads of Department Components and U.S. Attorneys, "Principles of Federal Prosecution of Business Organizations" (Jan. 20, 2003) (available at http://www.usdoj.gov/dag/cftf/corporate_guidelines.htm). The Thompson Memorandum (which updates the "Holder Memorandum," originated by one of his predecessors,

which suggests that prosecutors can demand waiver of privilege if they feel that it is important to making their case.[7] In the case of the SEC, the precedent of the "Seaboard Report" and the SEC's Enforcement Division's focus on lawyers as needed "gatekeepers" are emphasized.[8] Furthermore, the SEC's strategies are being imitated by other agencies, such as the IRS, the DOL, the EPA, the FEC and others.

Even prosecutors who traditionally recognized that criminal charges ought to be rarely applied against corporate entities now often employ the threat of criminal prosecution of the entity to secure the company's assistance in their criminal investigations and prosecutions of individuals who are actually responsible for malfeasance and the target of the government's probe. Because recent cases of corporate failures are complex, the size and sophistication of the government's investigations into complex frauds has increased correspondingly. This build-up has placed tremendous public pressure on prosecutors to obtain convictions of bad actors, which has lead many prosecutors to look for ways to coerce the "assistance" of companies under investigation.

Formerly, a company could show cooperation by providing access to both relevant documents and information and to the company's workplace and employees. The definition of a company's "cooperation" did not entail production of legally privileged communications and attorneys' litigation work product. Under current practices, in order to convince the prosecutor or regulator that the company is cooperating with the investigation, and indeed to avoid being accused of engaging in obstructionist behavior, companies are told directly or indirectly to waive their privileges.

Eric Holder) lists nine factors that federal prosecutors should consider when charging companies. One of the nine factors is the corporation's "timely and voluntary disclosure of wrongdoing and its willingness to cooperate in the investigation of its agents, including, if necessary, the waiver of corporate attorney-client and work product protections." This provision in practice is interpreted to require that companies routinely identify and hand over damaging documents, disclose the results of internal investigations, furnish the text and results of interviews with company officers and employees, and agree to waive attorney-client and work product protections in the course of their cooperation.

[7] Amendments made to the US Sentencing Guidelines, which became effective in November of 2004, state that in order to qualify for a reduction in sentence for providing assistance to a government investigation, a corporation is required to waive confidentiality protections if "such waiver is necessary in order to provide timely and thorough disclosure of all pertinent information known to the organization." (U.S. Sentencing Guidelines Manual § 8C2.5 (2004) (emphasis added) (available at http://www.ussc.gov/2004guid/8c2_5.htm.)

[8] Federal regulators, and particularly the SEC, have begun to adopt policies and practices mirroring those of the Department of Justice, which while discussing "cooperation credit," mention disclosures of protected confidential information. See, e.g., the Seaboard Report, ["Report of Investigation Pursuant to Section 21(a) of the Securities Exchange Act of 1934 and Commission Statement on the Relationship of Cooperation to Agency Enforcement Decisions," Exch. Act Rel. No. 44969 (Oct. 23, 2001)]; in the Seaboard Report, the SEC outlined some of the criteria that it considers when assessing the extent to which a company's self-policing and cooperation efforts will influence its decision to bring an enforcement action against a company for federal securities law violations. The concern that waiver of the attorney-client privilege and work-product protections are now viewed as necessary elements evidencing a company's cooperation is bolstered by public remarks made by former SEC enforcement chief Stephen Cutler, in his remarks made during a program discussing the changing role of lawyers in remedying corporate wrongdoing during a presentation at UCLA's Law School in the Fall of 2004 ("The Themes of Sarbanes-Oxley as reflected in the Commission's Enforcement Program," (September 20, 2004) (transcript available at http://www.sec.gov/news/speech/spch092004smc.htm.)

While the DOJ repeatedly states that cooperation and waiver of the privilege is only one of the nine criteria they examine under the Thompson Memorandum, and is rarely determinative, our surveys suggest otherwise. Furthermore, we do not believe the DOJ has done enough to promote reliable and enforceable internal guidelines interpreting the purpose of this policy, when it is to be applied, and what safeguards should be in place to prevent abuse. Coalition constituents tell us that privilege waiver is inevitably the pivotal consideration that determines whether a company will be able survive prosecution in a manner that will allow it to return to its business at the conclusion of the investigation, even if the government finds that no further prosecution is warranted.

Waiver of the Privilege has had a Negative Impact

The Department of Justice has maintained that the privilege is not in danger, primarily because DOJ very rarely seeks waivers.[9] Confident that this contention is incorrect, the Coalition to Preserve the Attorney-Client Privilege, which includes organizations that have signed this statement, decided to collect empirical data on the prevalence of waiver requests, as well as other indicators of the current health of the attorney-client privilege.

To accomplish our goal, we conducted several surveys to collect information about privilege erosion in 2005. In the first survey, over 700 corporate lawyers gave their perspectives on the privilege and its application in the corporate context. Over 350 responses came from corporate counsel, many of them general counsel and the remainder came from outside counsel who specialize primarily in white collar criminal defense. We were struck by the strong response rate, and the unanimity of the message sent by respondents from different disciplines. The following are the results from our survey:[10]

- **Reliance on privilege:** In-house lawyers confirmed that their clients are aware of and rely on privilege when consulting them (93% affirmed this statement for senior-level employees; 68% for mid and lower-tier employees).

- **Absent privilege, clients will be less candid:** If the privilege does not offer protection, in-house lawyers believe there will be a "chill" in the flow or candor of information from clients (95%); indeed, in-house respondents stated that clients are far more sensitive as to whether the privilege and its protections apply when the issue is highly sensitive (236 of 363), and when the issue might impact the employee personally (189 of 363).

- **Privilege facilitates delivery of legal services:** 96% of in-house counsel respondents said that the privilege and work-product doctrines serve an important purpose in facilitating their work as company counsel.

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[9] *See, e.g.*, Mary Beth Buchanan, "Effective Cooperation by Business Organizations and the Impact of Privilege Waivers," 39 Wake Forest L. Rev. 587, 598 (2004).

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

- **Privilege enhances the likelihood that clients will proactively seek advice:** 94% of in-house counsel 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:** 97% of 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.

Struck by the responses to our survey, the United States Sentencing Commission, which is reviewing its 2004 decision to include new privilege waiver language in its organizational sentencing guidelines, asked us to conduct further research in several areas of particular interest. We offer you today the results of this new survey, which are being unveiled for these hearings; they are attached and at the end of this document.

In brief, this second survey[11], found:

- **A Government Culture of Waiver Exists:** Almost 75% of both inside and outside counsel who responded to this question expressed agreement (almost 40% agreeing strongly) with a statement 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.**)
- **'Government Expectation'[12] 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 to engage in bargaining or to be eligible to receive more favorable treatment.
- **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 (60% of in-house counsel responded that they were not directly involved with waiver requests). Only 8% percent of outside counsel and 3% of in-house counsel said that they "inferred it was expected."
- **DOJ Policies Rank First, Sentencing Guidelines Second Among Reasons Given For Waiver Demands:** Outside counsel indicated that the Thompson/Holder/McCallum Memoranda are cited most frequently when a reason for waiver is provided by an enforcement official, and the Sentencing Guidelines are

[11] The second survey's results are online at http://www.acca.com/Surveys/attyclient2.pdf.

[12] 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.

cited second. In-house counsel placed the Guidelines third, behind "a quick and efficient resolution of the matter" (1) and DOJ policies (2).

- **Third Party Civil Suits Among Top Consequences of Government Investigations:** Fifteen percent of companies that experienced a governmental investigation within the past 5 years indicated that the investigation generated related third-party civil suits (such as private antitrust suits or derivative securities law suits). Of the eight response options that asked respondents to list the ultimate consequences of their clients' investigations, related third-party civil suits rated third for in-house lawyers. The first and second most common outcomes for in-house counsel were that the government decided not to pursue the matter further (24%), or that the company engaged in a civil settlement with the government to avoid further prosecution (18%). For outside counsel, the most cited outcome was criminal charges against individual leaders/employees of the company (18%), and a decision by the government not to prosecute (14%). "Related third party civil litigation" finished fifth (for outside counsel respondents) with 12%.

Faced with this evidence of privilege erosion and increasingly successful (coerced) unilateral government waiver demands, we conclude that the government believes it has a right to determine when clients can and cannot exert their Constitutional privilege rights.

Privilege erosions are almost inevitable in situations where prosecutors have immense leverage and companies very little; a company's failure to "cooperate" could have severe impact on its reputation, its financial well-being and even its very existence. While companies have a good reason to complain about forced or coerced waiver of their privileges, lawyers who advise their clients to take a stand and fight against privilege erosions are potentially subjecting the company to a long, costly, and hostile prosecution, at the end of which the client will have paid dearly even if it is ultimately acquitted.

Faced with such situations, many corporations will conclude that the protection of their privileged communications and files is not worth risking the negative publicity that could follow the company's stark refusal to divulge its "secret" conversations with its lawyers in asserting privilege.[13] Though a difficult decision, companies must consider the affect of asserting privilege in these situations on the company's shareholders or investors, customers and suppliers, and its standing in the marketplace.

The Role of Congress in Protecting the Attorney-Client Privilege

In the Subcommittee's continued oversight, we ask you to join us in sending a message to the Department of Justice that the Thompson Memorandum is inconsistent with the foundational role of the attorney-client privilege in our system of justice, and that the prosecutorial powers regarding privilege exercised thereunder are inappropriate. The attorney-client privilege is a client's right under our legal system, and its application serves the purposes of corporate compliance, self-reporting, and corporate responsibility. Privilege waiver should not be coerced or even considered when assessing whether a corporation is

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[13] Unfortunately, a decision to waive for the short-term gain of "getting along" with a current prosecution could also be later questioned if the results of waiver are even more devastating further down the road in an unrelated third party action. Boards and executives know that civil suits ensuing after the "successful" completion of a settlement with the government can have more damaging effects on the company's long-term viability than the instant matter.

cooperating in an investigation or can qualify for leniency. We believe that Congress should send a clear message to the federal prosecutors at the Department of Justice and other regulatory agencies that companies and their employees should not be punished for preserving their rights to exercise their attorney-client privileges. Further, we believe Congress should hold further hearings to request that the Department of Justice provide more meaningful information on privilege waiver requests by prosecutors and its progress in policing the practices of US attorneys in the field.

Similarly, we urge Congress to request similar changes to similar procedural enforcement powers exercised at the SEC. We agree that aggressive enforcement of wrongdoing and harsh penalties for wrongdoers is appropriate, but stripping clients of their privilege rights – especially when it is clear that even when provided under a confidentiality agreement, privilege waiver may be irreversible in many jurisdictions – is not a necessary or appropriate tactic for an agency to employ in the course of an investigation, even before any finding of entity complicity or culpability for a failure is made.

Finally, we urge the Subcommittee to communicate these concerns to the United States Sentencing Commission as it engages in its current process of reconsidering the 2004 amendment to the Guidelines' commentary language, which the Justice Department views as codifying its policy of requesting privilege waiver routinely as an emblem of cooperation. The waiver of the right to effective and meaningful legal counsel is not an appropriate demand to make of a defendant, and should not be the standard by which the courts determine whether an entity has properly facilitated the government's investigation of charges against individuals or the entity.

ATTACHMENT A

The Attorney-Client Privilege and its Operation in the Corporate Legal Setting

Following is a working definition of the attorney-client privilege and how it applies in the corporate context. Before the privilege can attach to a client's communication with its attorney, the following requirements must be satisfied:

- The entity that wishes to hold the privilege must be the lawyer's client.
- The person to whom the client's communication is made must be a member of the bar of a court or a subordinate of such a person.
- The lawyer to whom the communication is made must be acting as a lawyer (and not, for instance, as a business person).
- The communication must be made without non-client and non-essential third parties present (it could be made, for instance, at a crowded restaurant, but not at a table with other non-client folks around to overhear; it could be conducted as an email exchange, but not if non-client, "unnecessary" parties are cc'ed or are forwarded the email later).
- The communication must be made for the purpose of securing legal services or assistance, and not for the purpose of committing a crime or fraud.
- The client must claim and not waive the privilege.[14]

While the privilege will attach to almost all communications that satisfy these requirements, what it protects is actually very narrow in scope. The privilege does not protect the client from the discovery through other means and sources of any relevant facts. It just protects the "consult." Indeed, one of the best arguments in favor of privilege protection is precisely that it *doesn't* prevent anyone from discovering all the facts necessary to make their case, whatever that may be: it simply requires the government or a civil litigant to do their own work to prove their case, so as not to deprive the client's ability to communicate openly with its attorney.

If the application of the privilege to a conversation, documents or a written communication between lawyer and client is challenged, the party claiming the benefit of the privilege has the burden of proving its applicability.[15]

The related "work product doctrine" offers qualified protection for materials prepared by or for an attorney when litigation is anticipated (even if the litigation never arises or ends up taking on a different form). Attorney work product material can enjoy the same level of protection as attorney-client privileged materials, but if the work product does not disclose

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[14] These criteria were laid down by the court in United States v. United States Mach. Corp., 89 F. Supp. 357, 358-59 (D. Mass. 1950), and have set the standard for privilege qualification ever since.

[15] Federal Trade Commission v. Lukens Steel Co., 444 F.Supp. 803 (D.D.C. 1977).

the mental impressions of the attorney, a court may order its production if good cause for the documents' production is established (such as it would be unreasonable or impossible for the other side to replicate the work on their own).

One of the most contentious and difficult issues for companies concerned about privilege issues is the production of the internal investigation notes of the company's lawyers (and their agents). Many companies self-investigate and self-report problems and the number of self-reports are increasing as a result of Sarbanes-Oxley and related legislation and regulation at the federal, state and agency levels. But self-reporting a problem, by its very nature, confirms to an adversary or prosecutor that the ideal place to begin their evaluation of the company's problems would be a thorough review of the company's internal investigation and any communications made between lawyers and the company regarding the failure. Producing these investigation summaries and reports entails the disgorgement of the attorney's work product and attorney-client confidences, and the U.S. Supreme Court set forth the standard for protecting such work from discovery in Hickman v. Taylor.[16]

The attorney work product doctrine suggests that it is unfair for the other side to have access to another party's attorney's thought process, her impressions and thoughts, and even her strategies in unlocking and mapping her potential case by the selection of which employees to interview (and which to skip); which files she reviews, and so on.

[16] *Hickman v. Taylor,* 329 U.S. 495 (1947).

The Decline Of the Attorney-Client Privilege in the Corporate Context[1]

Survey Results

Presented to the United States Congress and the United States Sentencing Commission by 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
U.S. Chamber of Commerce
Washington Legal Foundation

BACKGROUND

The coalition of organizations listed above[2] believes that the attorney-client privilege and work product doctrine as applied in the corporate context are vital protections that serve society's interests and protect clients' Constitutional rights to counsel. The attorney-client privilege is fundamental to fairness and balance in our justice system and essential to corporate compliance regimes. Without reliable privilege protections, executives and other employees will be discouraged from asking difficult questions or seeking guidance regarding the most sensitive situations. Without meaningful privilege protections, lawyers are more likely to be excluded from operating in a preventive (rather than reactive) manner. In today's complex business environment, it is increasingly important to encourage business executives and even line managers to regularly – and without any hesitation – engage their lawyers in open discussions about anything that concerns them in furtherance of assuring the corporation's legal health. It is our belief that attorney-client communications, and the confidentiality that fosters those communications, are more important than ever, and laudably serve society's and our legal system's public policy goals.

Our coalition has been very active in protecting the attorney-client privilege in the corporate context from governmental policies and practices whose daily applications, we believe, erode the privilege. Our work has

[1] This survey is also available online at http://www.acca.com/Surveys/attyclient2.pdf
[2] The American Bar Association has also expressed similar views to Congress and the U.S. Sentencing Commission regarding the importance of preserving the attorney-client privilege and work product doctrine and protecting them from federal governmental policies and practices that now seriously threaten to erode these fundamental rights. The ABA has also worked in close cooperation with the coalition in the preparation and distribution of the surveys referenced in this document.

been advanced through educational programs, study groups and task forces, and various filings, communications, meetings, and testimony before authoritative bodies examining privilege erosions.[3]

In March of 2005, in response to increasing concerns expressed by in-house counsel and outside criminal defense counsel regarding their experiences with the policies and practices just noted, coalition members asked their respective constituencies to complete an online survey titled: "*Is the Attorney-Client Privilege Under Attack?*"[4] According to the survey, approximately one-third of the survey respondents had personally experienced some kind of privilege erosion. This powerful finding offered some of the first empirical evidence documenting the difficulty – indeed, the Hobson's Choice – that corporate clients confront when the government begins an investigation into an allegation of wrongdoing and presumes that confidentiality should be waived, or when company auditors demand access to confidential information in order to certify the company's books. The 2005 survey also found that: 1) clients may be increasingly unwilling to rely on the long-established protections of the confidentiality of their lawyer's counsel (affirming the logic of the US Supreme Court's insight that "an uncertain privilege is no privilege at all"[5]); 2) companies that refuse to waive their privileges suffer consequences (being labeled uncooperative or obstructionist, even if they fully cooperated with every other legitimate request of the investigator); and 3) contrary to the claims of many prosecutors and other regulators, privilege waiver demands are neither uncommon nor rarely exercised.

On November 15, 2005, the results of this survey were presented to the United States Sentencing Commission, which had begun to re-examine the commentary language regarding privilege that the Commission had inserted into Chapter 8 of the guidelines in the 2004 amendment process.[6] 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 attorney-client and work product protections as a condition for cooperation credit, as well as the effects of these waiver requests. In response to that and similar requests for more detailed information about the erosion of the privilege, our coalition undertook a second, more detailed survey, and obtained an even greater response rate (more than 1,200) from our constituents. We are pleased to present the findings of this second survey, which was designed to capture more detailed information about government and auditor requests and implicit expectations for privilege and work product waivers.[7]

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[3] Representatives from all of the organizations listed here have participated in previous testimony before the US Sentencing Commission on this issue, some both prior and subsequent to the Commission's 2004 adoption of new commentary language on privilege in Chapter 8, which our organizations find offensive (see, most recently, http://www.ussc.gov/AGENDAS/agd11_05.htm). Please visit each organization's website or contact their staff for more information on educational programs, resources, and additional advocacy (including communication with Congressional leaders and their staffs, the Department of Justice, Securities & Exchange Commission, Public Company Accounting and Oversight Board, and others), which our organizations have engaged in to seek better protection of the attorney-client privilege.

[4] An Executive Summary of the March 2005 survey may be accessed via the following links: for the in-house version: http://www.acca.com/Surveys/attyclient.pdf, and for the outside counsel version: http://www.acca.com/Surveys/attyclient_nacdl.pdf. Based on feedback from those who read the previous survey results, this document provides in one place the combined 2006 results of both the in-house and outside counsel surveys.

[5] *Upjohn Co. v. United States*, 449 U.S. 383 (1981).

[6] The USSC Commentary to Section 8C2.5 (adopted in November of 2004) states that "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." It is our position that the exception listed in the latter part of that sentence swallows the rule. Under this exception, prosecutors are free to make routine requests for waivers, and organizations will be forced routinely to grant them, because there is no obvious method by which the corporation can challenge the government's assertion that waiver is "necessary."

[7] In January 2006, the Association of Corporate Counsel directly contacted approximately 4,700 members, whose titles included the words either "general counsel" or "chief legal officer," requesting them to complete this web-based survey. The web link to the survey was also made available to the coalition partners offering this summary and the ABA Task Force on Attorney-Client Privilege, which in turn publicized it to the many groups participating in the Task Force's endeavors. The survey was "open" for approximately 2 weeks. Five hundred sixty-six of the 676 responses to the in-house version of the survey were received from the

Survey Results

We prepared two surveys with virtually identical questions except for some minor wording changes that reflected that one survey was for in-house counsel and one was for outside counsel.[8] Section I summarizes key themes emerging from the survey. Section II shows information on respondent demographics. Section III summarizes results shared by companies who have experienced government expectations to waive attorney-client privilege or work product protections and/or expectations regarding other employee actions. Section IV summarizes themes that emerged from the open-ended questions on situational experiences regarding privilege waiver and additional commentary on privilege erosion. Quotes from survey respondents are also interspersed throughout the text as illustrations of the points made.

I. KEY THEMES *(additional discussion follows)*

- **A Government Culture of Waiver Exists:** Almost 75% of both inside and outside counsel who responded to this question expressed agreement (almost 40% agreeing strongly) with a statement 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.)**
- **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.
- **'Government Expectation'[9] 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 to engage in bargaining or to be eligible to receive more favorable treatment.

Association of Corporate Counsel emailing to 4,700 general counsel members; the remaining corporate counsel responses are from contacts initiated by the other groups. Also in January, the National Association of Criminal Defense Lawyers emailed the web link for the survey to its 13,000 members. NACDL also posted the web link for the survey on its listserv for white collar practitioners, which has approximately 1,200 subscribers. The survey was also made available to approximately 5,000 members of the Business Law and Criminal Justice sections of the American Bar Association. Five hundred thirty-eight outside counsel responded to this survey.

Both surveys included 23 questions primarily seeking specific responses to multiple choice or yes/no questions, with 4 open-ended questions at the end seeking text responses with additional detail on situational experiences. Since the open-ended questions were not mandatory and did not "apply" to those who said they'd had no occasion to run into a privilege erosion situation, the number of responses to those questions was not as robust.

This document offers the survey results in numbers and percentages that are approximated by rounding to the nearest whole integer. Summaries of broad themes and quotations drawn from the open-ended text responses are also included, but not all responses to those questions are included out a concern for confidentiality and to avoid unnecessary repetition. We believe the survey's response rate can be considered robust; but since we are not an independent surveying company or statisticians, we can make no proffer that the sampling is statistically significant or representative of the entire profession. We can note that statisticians have designated the Association of Corporate Counsel's membership as statistically representative of the entire in-house legal profession.

[8] The majority of differences between the two surveys were in the information requested in the respondent demographic information categories, and in general question phrasing such as "your company" for the in-house lawyers, and "your client(s)" for the outside lawyers. No "substantive" differences between the surveys' questions exists. If you would like a copy of the questions asked on these surveys, please contact Susan Hackett at hackett@acca.com.

[9] 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.[10] Only 8% percent of outside counsel and 3% of in-house counsel said that they "inferred it was expected."
- **DOJ Policies Rank First, and Sentencing Guidelines Second, Among the Reasons Given For Waiver Demands:** Outside counsel indicated that the Thompson/Holder/McCallum Memoranda are cited most frequently when a reason for waiver is provided by an enforcement official, and the Sentencing Guidelines are cited second. In-house counsel placed the Guidelines third, behind "a quick and efficient resolution of the matter," and DOJ policies (Thompson/Holder/McCallum), respectively.
- **Third Party Civil Suits Among Top Consequences of Government Investigations:** Fifteen percent of companies that experienced a governmental investigation within the past 5 years indicated that the investigation generated related third-party civil suits (such as private antitrust suits or derivative securities law suits). Of the eight response options that asked respondents to list the ultimate consequences of their clients' investigations, related third-party civil suits rated third for in-house lawyers. The first and second most common outcomes for in-house counsel were that the government decided not to pursue the matter further (24%), or that the company engaged in a civil settlement with the government to avoid further prosecution (18%). For outside counsel, the most cited outcome was criminal charges against individual leaders/employees of the company (18%), and a decision by the government not to prosecute (14%). "Related third party civil litigation" finished fifth (for outside counsel respondents) with 12%.

II. RESPONDENT DEMOGRAPHICS

In-house: Almost 90% of the in-house counsel survey respondents were General Counsel. Approximately 40% indicated that the government (federal or state) had initiated some form of investigation into allegations of wrongdoing at their company during the past 5 years. Below is a summary of information on the in-house counsel respondent demographics.

- **Company Type:** Fifty-one percent of the respondents indicated their companies were privately-held/owned; 35% said their companies were publicly-traded but not in the Fortune 500; and 9% of respondents worked for non-profits. Quasi-governmental entities and Fortune-ranked companies each represented 1% of the survey respondents, and less than 1% of the respondents said they worked for FTSE 200 companies.
- **Industry Group:** Respondents were asked to identify the primary industry that best describes their client company's main line of business and were given 22 response options. The top three industries selected were: Finance and Insurance (18%), Manufacturing (13%), and Information Technology (11%).
- **Size of Law Department:** Almost 90% of respondents had law departments of less than 20 lawyers: 33% were solo practitioners, 46% had offices of 2-7 lawyers, and 10% had offices of 8-19 lawyers. Of the remaining respondents, approximately 4% had law departments of over 100 lawyers, and less than 1% had law departments of over 500 lawyers.

These demographics are significant in that they show that even among a general population of company counsel, almost half have experienced some kind of privilege erosion. The vast majority of these respondents who experienced privilege erosions do not work for mega-corporations with extremely high visibility and the potential for "blockbuster" failures; they work for a wide variety of differently-sized businesses, representing the full spectrum of industries. While the companies participating in the survey are

[10] Sixty percent of in-house counsel who'd 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.

obviously large enough to afford full-time in-house counsel staff, only 1% of those responding worked for Fortune 1000 employer/clients, and three-quarters work in departments with fewer than 8 lawyers. We conclude that this sampling represents a breadth of experience from the "norm" of corporate America, and not just the perspective of the biggest companies, where the stakes and publicity attendant to the most prominent governance failures may attract disproportionate attention or be perceived as requiring "setting an example" responses.

Outside counsel: Seventy-one percent of those who answered the survey for outside counsel were partners in law firms, and 40% practiced criminal litigation as their primary area of concentration (26% indicated civil litigation and 20% indicated transactional work as their primary practice areas). Sixty-three percent represented companies that had been subject to a criminal or enforcement investigation in the last five years. Further demographics show:

- **Client Type:** Results were distributed in the following categories: Privately-held or -owned with revenues of less than $200 million annually (22%); individual officers or employees of organizations (20%); publicly traded companies with more than $1 billion in annual revenue (12%); publicly traded companies with between $500 million and $1 billion in annual revenue (11%).
- **Size of Law Practice:** Thirty-five percent of respondents worked for firms of between 2 and 20 lawyers. The rest of the responses were fairly evenly distributed among the following categories: solo (19%); 21-100 lawyers (17%); 101-500 lawyers (15%); more than 500 lawyers (14%).

As with the results of the survey of in-house counsel, these answers indicate that among a general population of outside counsel with a wide array of experience, both in terms of the types of law that they practice and the types of clients that they represent, 51% indicate that they experienced a demand, suggestion, inquiry, or other expectation of waiver by the government. A commanding 73% agree that a culture of waiver has evolved with respect to the corporate attorney-client privilege. The sizable plurality of lawyers who answered this survey represented either smaller, privately held companies or individuals—thus belying the conclusion that waiver requests, demands, and expectations are a problem only for large, publicly-traded companies who are at the center of "headline" scandals.

III. SUMMARY OF WAIVER EXPECTATIONS AND EXPERIENCES

> *"Whether to waive the privilege has not been subject to discussion; the only question is how far the waiver will go. And, thus far, there appears to be no limit."* (Response to in-house counsel survey)
>
> *"I think the forced waiver and related policies have become a problem of Constitutional proportions. There are many examples of government pressuring companies to waive privileges, stop advancing legal fees, and make statements against employees, under pain of corporate destruction. … When I was a prosecutor, we recognized that big white collar cases are hard and that they should be. Now, the attitude seems to have changed, and if the corporation does not partner with the government to prosecute individuals, the government views it as obstruction. This view is becoming part of the culture, having begun with the Thompson, Holder, and USSG pronouncements. It's simply wrong …."* (Response to outside counsel survey.)

A. Experiences relating to waiver

Almost 60% of respondents identified government expectations of waiver of **attorney-client privilege/communications** as relevant to their personal experience with their clients. Of those respondents, almost 30% confirmed that they experienced a government expectation that the company should waive the attorney-client privilege if it wanted to engage in any form of bargaining or receive more favorable treatment from the government's officials.

Almost 23% of respondents said that a question regarding government expectations for waiver of **work product protections** was applicable to their situations. Of those respondents, around 45% said their clients had experienced a governmental expectation of waiver of work product protections if the company wanted to engage in bargaining or receive more favorable treatment.

Responses regarding these experiences, including which agencies indicated an expectation of waiver, how these expectations were expressed, the type of requested material, justifications for waiver requests, and whether companies waived are summarized below.

1. AGENCIES REQUESTING WAIVER

For both in-house and outside counsel, the U.S. Attorneys' Offices were identified as the government agency that most often indicated an expectation of waiver. The survey asked respondents to identify which agencies indicated an expectation of waiver and were given a choice of seven enumerated agencies/categories of agencies, as well as the opportunity to state that the question did not apply or to write-in a response. (About one-third of the in-house respondents and one-fourth of outside counsel respondents indicated that this question was not applicable.) The top agencies/categories identified as most often expecting waiver (in descending order) were:

In-house counsel	**Outside counsel**
▪ U.S. Attorneys' Office	▪ U.S. Attorneys' Office
▪ SEC	▪ Department of Justice – 'Main' (e.g., Antitrust or Criminal Fraud)
▪ Department of Justice-'Main' (e.g., Antitrust or Criminal Fraud)	▪ SEC
▪ Other Federal Agencies (e.g., DOL, EPA, HHS, FEC, etc.)	▪ Other Federal Agencies (e.g., DOL, EPA, HHS, FEC, etc.)
▪ State Attorneys General Offices	▪ State Attorneys General Offices

"It is clear to me that this has become the 'rage' among prosecutors. … In effect, prosecutors are overriding the [evidentiary precedent] that the attorney client privilege is to be maintained." (Response to in-house counsel survey)

"[An AUSA told us] that he expected a full investigation and waiver of attorney-client privilege in order for my client to demonstrate that it was cooperating in an investigation into possible wrongdoing, including interviews of my client's outside counsel who provided advice contemporaneous to one of the events the AUSA wanted to investigate. He also expected that we would conduct interviews of foreign personnel not subject to U.S.

jurisdiction and obtain documents that had only ever existed in foreign jurisdictions. He described a scorecard method he used … he defined cooperation as the company conducting a full internal investigation, including interviewing outside counsel, submitting a written report of the investigation to him, and giving full waiver of the attorney-client privilege – and no joint defense agreements with any other person or entity. He said that otherwise he would issue grand jury subpoenas and conduct the full investigation with DOJ resources and it would be much worse for us if he had to do that. This was after he informed us that our company was NOT the target!" (Response to in-house counsel survey)

2. HOW WAIVER EXPECTATIONS WERE EXPRESSED

Respondents were asked how prosecutors or enforcement officials conducting the investigation(s) have indicated that privilege waiver was expected.

Only 11 % of outside counsel who said that their clients had recently been involved in enforcement actions where there was an expectation that their clients would waive privilege said that prosecutors never mentioned waiver as an expectation. Nearly three-quarters (73%) of outside counsel said that the expectation was communicated and not inferred. Of these, 26% said that "waiver was requested in a direct and specific statement, along with an indication that waiver was a condition precedent for the company if it wishes to be considered cooperative." Twenty-one percent indicated that waiver was "requested in an indirect statement that suggested (without explicit statements) that waiver was encouraged and in the company's interests." Only 13% said that waiver was requested directly but without any indication that positive or negative consequences would flow from the decision to waive.

Similarly, 66% of in-house respondents who indicated experience with this issue said that waiver expectations were communicated through direct and specific and/or indirect statements by prosecutors or enforcement officials. When waiver expectations were expressed, these in-house respondents said they were made using direct and specific statements more often than indirect statements. According to in-house counsel, direct statements with an indication that waiver was a condition precedent for the company to be considered cooperative occurred almost twice as often as direct statements indicating generally that positive or negative consequences would flow from the decision.

"The very nature of the self-reporting schema (at use in many federal and state regulatory contexts) is waiver of privileges." (Response to in-house counsel survey)

"My company restated its earnings, after first notifying the SEC that we were about to do so. SEC's Corp Fin referred the matter to Enforcement. During our first meeting with Enforcement, we described the internal investigation we conducted that led to the decision to restate. Enforcement expressed the opinion that 'of course' we would waive privilege as to the investigation report, as a condition of being deemed 'cooperative.'" (Response to in-house counsel survey)

"During an investigation by a state attorney general, we were told that we would be considered uncooperative and would not be able to settle with the agency unless we turned over lawyers' interview notes." (Response to outside counsel survey)

3. KINDS OF MATERIALS REQUESTED IN WAIVER DEMANDS

On a 2:1 basis,[11] in-house counsel who experienced privilege waiver indicated that prosecutors or enforcement officials do not draw distinctions regarding attorney-client privilege and work-product protections and the kinds of materials these privileges protect. Outside counsel concurred with this observation by a margin of 4:3.[12] However, when a distinction is drawn in the course of a government investigation, both in-house and outside counsel respondents indicated again on almost a 2:1 basis[13] that the distinctions were made at the initiative of defense or corporate counsel rather than by the prosecutor or enforcement official.

Respondents were asked about the types of privileged materials requested by the government in connection with **attorney-client privilege waiver requests** (as opposed to work product waiver requests). A choice of 11 types of possibly privileged materials was provided and respondents could check all that had been requested in their experiences. Respondents could also indicate that the question did not apply and/or include an additional text response.

About 46% of the responses of in-house counsel and 82% of the responses for outside counsel were for choices other than the "n/a" or the write-in category options. Around 90% of both in-house and outside counsel responses (other than the "n/a" group) identified specific types of material that enforcement officials had requested, with around 10% indicating that prosecutors or enforcement officials simply asked for complete waivers without articulating a specific material type.

Materials believed to be protected by attorney-client privilege and identified as most often requested by prosecutors or enforcement officials were (top 3, in descending order, for both categories of respondents):

- Written reports of an internal investigation (16% for outside counsel; 21% for in-house counsel)
- Files and work papers that supported an internal investigation (13% for outside counsel; 18% for in-house counsel)
- Lawyers' interview notes or memos or transcripts of interviews with employees who were targets (13% for outside counsel, a tie with "files and work papers"; 13% for in-house counsel)

For in-house respondents, numbers 4 and 5 were:

- Regular compliance performance reports and audits (11%)
- Notes/oral recollections of privileged conversations with or reports to senior executives, board members, or board committees (10%)

For outside counsel, numbers 4 and 5 were:

- Notes/oral recollections of privileged conversations with or reports to senior executives, board members, or board committees (10%)

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[11] 68% versus 31%.

[12] 56% versus 43%.

[13] 66% versus 33 % for outside counsel; 65% versus 34% for in-house counsel.

- Lawyers' interview notes with employees who were not available for interviews by the government or memos/transcripts of the same (8%)

As part of this same question, respondents could also choose three categories of material related to advice of counsel: advice contemporaneous with the conduct being investigated absent the assertion of an advice of counsel defense; same as foregoing but requested after an advice of counsel defense was asserted; and advice relating to the investigation itself (rather than the underlying conduct being investigated). The responses selecting these three types of material comprised around 15% of requests experienced by in-house counsel and 20% of requests experienced by outside counsel. According to outside counsel, enforcement officials only asked for communications with counsel ***pursuant to*** the assertion of a company's advice of counsel defense 6% of the time, placing it eighth among nine types of requested material.

Likewise, respondents were asked about the types of protected materials requested by the government in connection with **work product waiver requests**. Six types of material protected by work-product were listed and respondents could check all that applied. Respondents could also provide a text response. Of the six types, the three most often requested were:

In-house counsel:	Outside counsel:
▪ Results of written internal investigation reports (29%);	▪ Interview memos with witnesses (30%);
▪ Interview memos with witnesses (22%); and	▪ Results of written internal investigation reports (25%); and
▪ Results of reports prepared by non-lawyers or contractors hired to investigate a corporate matter (14%).	▪ Results of reports prepared by non-lawyers or contractors hired to investigate a corporate matter (16%).

> *"Usually the government does not justify its request. They want you to make their case for them."* (In-house counsel respondent.)

> *"In my experience, government enforcement officials simply have no respect for the attorney-client privilege and simply demand it be waived. In some cases, the demand seems to have been driven by sheer laziness and an expectation that we would do all the government's work for them …."* (In-house counsel respondent.)

4. JUSTIFICATIONS PROFFERED FOR WAIVER REQUESTS

Sixty-two percent of in-house respondents and 48% of outside counsel who had been asked to waive indicated that government officials did not give a specific reason to justify their waiver requests. In a question asking for additional details on justifications when they were received, nine possible justifications were provided, as well as the opportunity to indicate that the respondent didn't remember or wished to submit a write-in response. The top "justification responses" follow (in descending order):

In-house counsel:	Outside counsel:
▪ The government said waiver was needed in order to facilitate a quick and efficient resolution of the matter/because it would ease their fact-finding process (19%)	▪ The government cited their internal policies sanctioning privilege waiver requests: The Holder, Thompson, or McCallum Memoranda (18%)

▪ The government cited their internal policies sanctioning privilege waiver requests: The Holder, Thompson, or McCallum Memoranda (13%)	▪ The government cited the negative impact of non-cooperation by corporations as articulated in the U.S. Sentencing Guidelines (17%)
▪ The government cited the negative impact of non-cooperation by corporations as articulated in the U.S. Sentencing Guidelines (10%)	▪ The government said waiver was needed in order to facilitate a quick and efficient resolution of the matter/because it would ease their fact-finding process (15%)[14]

> *"US Attorneys indicted my company despite complete cooperation and waivers of [attorney-client and work product] privileges, and despite the fact that only two lower-level employees were indicted."* (In-house counsel respondent)

> *"The Holder/Thompson policy and the Guidelines themselves have created an unintended result. To claim certain material rightfully to be privileged is now a bad thing, only someone hiding something would hide behind it. Waiving is a good thing. The result has lead to such erosion of the concept behind a claim of privilege as to bring shame to whomever would make it."* (Outside counsel respondent)

> *"[The Sentencing Guidelines] came up at the first meeting with the US Attorney or the second meeting."* (Outside counsel respondent)

> *"[The Sentencing Guidelines] were mentioned in a not-so-subtle threatening manner."* (Outside counsel respondent)

> *"Prosecutors casually refer to Thompson and the Sentencing Guidelines."* (Outside counsel respondent)

> *"[The Sentencing Guidelines] were specifically discussed as a negotiating tool for a better or for any deal."* (Outside counsel respondent)

> *"[The Sentencing Guidelines] were cited in pre-indictment settings re: possible penalties if no cooperation."* (Outside counsel respondent)

> *"Waiver as an indictator of co-operation under the Guidelines was specifically mentioned."* (Outside counsel respondent)

[14] For outside counsel, the next most frequently cited justifications were: (4) privilege did not apply because of a crime-fraud exception (11%); (5) no reasons were offered—the demand was simply made (10%); (6) information protected by privilege was necessary to the investigation (8%). **Susan: complete.**

5. WAIVER AND TIMING

Asked whether their clients ever waived the attorney-client privilege, approximately 52% of in-house counsel but only 23% of outside counsel said that they never had occasion to consider the issue (either because they had not been subject to an investigation in the last five years or because waiver was not an issue in any particular representation). When clients did have occasion to consider waiver and decided to waive,[15] the top two of six reasons (for both in-house and outside counsel) that the client decided to do so were:

- Government officials' stated expectations that waiver would be required for the company to be treated as cooperative (37% for outside counsel, 30% for in-house counsel), and
- Government officials' unstated but perceived expectations that the company would not be treated as cooperative if waiver were withheld (27% for outside counsel, 28% for in-house counsel).

In addition, when clients waived, the most frequent point in the process for waiver was during the government's fact-finding process (36% for inside counsel and 27% for outside counsel): waivers were most likely provided at this point when the investigator raised concerns that the investigation could not be completed through gathering non-privileged information. For in-house counsel, the next most frequent point for waiver to occur was during the first meeting or communication with the government: around 26% of waivers at that stage were at the government's request or implicit suggestion, as opposed to 8% which were offered by the client without formal prompting or demand (on the presumption that privilege waivers were expected). For outside counsel, the second-most frequent point for waiver to occur was during the bargaining and charging decision (25.5%). Twenty percent of outside counsel said that the decision to waive was made during the first meeting or communication with the government at the government's suggestion, with and only 11% said waiver was offered without prompting or demand. According to all respondents, about 10% of the waiver decisions were made when the problem first surfaced – before any contact with enforcement officials. Approximately 8% of in-house respondents and 5% of outside counsel indicated that their clients do not assert the privilege.

> *"My experience … is that government agencies routinely 'blackmail' companies with threats of indictment, fines, etc., in order to get them to waive privilege and take other actions (discharge of employees, and so forth). This was true in my dealings at the federal level with agencies (FTC, for example) as well as with federal and state prosecutors."* (In-house counsel respondent)
>
> *"Federal prosecutors in particular have begun to treat waiver as almost synonymous with cooperation."* (Outside counsel respondent)
>
> *"The decision by a client to waive the privilege is always agonizing. In part, it has to do with the unexpected … the law on partial waiver is so unclear, does a decision to waive once ever stop? What will other agencies or third parties do if they get the material? How will an internal investigation ever be conducted in the future if employees feel the company has 'betrayed' them? It's the easy case when the company has identified a discrete problem. When the government seeks this material, however, the extent of the problem is usually not known."* (Outside counsel respondent)

[15] Eighteen percent of outside counsel and 6% of in-house counsel said that their clients did not waive the privilege but instead asserted their rights when faced with pressure to waive.

B. Experiences relating to employees

Respondents were asked whether the government had ever indicated certain expectations with regard to employees during the course of a governmental investigation. Around 60% of outside counsel indicated that this question applied to their own experiences. (Around 10% of in-house respondents to this question indicated that it applied.) Outside counsel who responded to this question said that they had experienced the following government expectations or demands with regard to employee actions:

- Not advance legal expenses (or agree to reimburse) to a targeted employee (26%);
- Not enter into, or breach, a joint defense agreement with a targeted employee (24%);
- Refuse to share requested documents with a targeted employee (21%)
- Discharge an employee who would not consent to be interviewed by the government (16%)

> *"The biggest issue is the pressure that the government puts on companies to terminate employees under investigation (long before any status determination is made) and then not to cover legal fees for loyal employees. A criminal investigation can bankrupt an individual quickly leaving them unemployed and destitute. The government does not want people to have adequate and competent counsel."* (Outside counsel respondent)

> *"[B]ecause of prosecutor demands for cooperation, corporate attorneys often decline to provide access to key documents critical to prepare a wholly legitimate defense based on actual facts. Government policies are interfering with the defense function, and will lead to increased charges against individuals who should not be charged."* (Outside counsel respondent)

> *"The culture of 'cooperate or be fired' has severely impacted the ability to represent executives in corporate investigations."* (Outside counsel respondent)

IV. SUMMARY OF WRITE-IN SITUATIONAL EXPERIENCES AND ADDITIONAL COMMENTARY

As noted above, some of the respondents completed open-ended text questions offered at the end of the survey, in which the survey requested them to provide examples of experiences they'd had with privilege erosion and to provide feedback on the general subject. Highlighted below are a few of the many illuminating responses to these questions.

In-house counsel:

…….

"In connection with a routine SEC investigation we were told that if we did not produce e-mail the matter would be referred to enforcement (i.e., the only wrongdoing would be failure to produce the e-mail – there was no other allegation of misconduct). When we produced our e-mail with a privilege log, we were told that the privilege log was insufficient because it did not describe the content of the e-mails not produced (which

on advice of our outside securities counsel, a major law firm, we were advised could serve to waive the privilege). After a conference call in which SEC attorneys advised us that they did not recognize the work product doctrine and that internal compliance investigations were not privileged,' we ended up simply producing most of the e-mails without asserting privilege because 'we had nothing to hide'."

……..

"The company for which I work has commissioned an investigation of alleged accounting improprieties. The investigator is sharing its work with several outside regulators including the SEC and DOJ. All expect, and have received, a great deal of privileged material through this process. Whether to waive the privilege has not been subject to discussion; the only question is how far the waiver will go. And, thus far, there appears to be no limit. From speaking with my in-house counterparts, I know that my experience is not unique."

……..

"Gov[ernment] lawyers and investigators have asked – demanded - that we produce attorney notes of interviews with employees as well as internal studies that constitute work product."

……..

"The government investigated our company starting about four years ago. At the request of the FBI agent, with her suggestion that it would help us to cooperate, we proffered several upper level employees for them to interview… About a year later, the government executed a warrant on our office. They seized an entire closet full of legal documents, most of which were not related to the investigation or appropriately seized under the warrant. They returned copies of all of the documents after numerous requests, but never returned the originals… . Over the next two years, requests were made to interview several employees and repeated requests for information were made. It was repeatedly outright said or implied that cooperation would make things easier for us... Prior to joining this company, I worked for the government. I feel that the government has behaved inappropriately and illegally with respect to this ongoing investigation. They have abused their authority and terrorized our employees…."

……..

"…The real concern goes [to how the] judiciary … react to and support such activities. Our matter focused on an alleged credit fraud charge that spread from the accused's business to his family and any attorney he had ever engaged. It was as if the government forgot how to spell privilege. They improperly sought and obtained warrants and subpoenas for everything, including protected matters. Eventually the matters were quashed, but only after significant effort."

……..

"We produced the documents because the privilege claim was not beyond doubt and because we wanted to be viewed as cooperative."

……..

"Our general practice is not to waive[] AC or work product protection. However, in circumstances in which a prior opinion of counsel was obtained and an 'advice of counsel' defense exists we will consider waiver of that opinion during the charging decision process."

……..

"We are forced to practice in a world where we cannot expect that any privilege will be respected by government investigators. In addition to a chilling effect on communications with between the client and the lawyer, waiver of privilege subjects companies to disclosure of these materials in litigation, potentially causing grievous harm to the company."

……..

"The assault on privilege seems to me deeply misguided from a long- or medium-term policy standpoint. Counsel serve a critical role in encouraging compliance and transparency. These current policies run a significant risk of chilling attorney client communications in the future which will heighten, rather than

reduce, compliance risks. Simply, this is a terrible idea which is solving a problem which doesn't exist - … agencies can proceed with their investigations on the basis of evidence obtained through [other means].”

……..

“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.”

……..

“Outside counsel urge their retention in part because they contend in-house counsel cannot assert the privilege as effectively as outside counsel.”

……..

“The privilege was established so persons could seek competent legal advice and thereby understand their rights and obligations under the law. To treat corporations differently creates the specter that companies won't seek appropriate legal advice, as they have no ability to feel confident in the confidentiality of their communications.”

……..

“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.”

……..

“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.”

……..

“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.”

……..

“I think the 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.”

……..

"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."

……..

"While I have not experienced any problems, privilege erosion is a real fear that affects how we do business. A free and open dialogue between counsel (in house and outside) and management is critical to any business, and if the privilege becomes even more endangered, it will have a crippling effect on how we conduct our business."

……..

"As a result of our experiences, we now routinely advise our clients that there is not 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."

……..

"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."

……..

"That waiver may be just 'a factor' in the determination of cooperation as mitigation under the Guidelines is very little - in fact, no - comfort at all."

……..

"The government is out of control. The Bar and the Judiciary should stand up and recognize this is wrong. Individual companies cannot afford to do it on their own; the stakes are too high."

……..

"We are involved in several investigations/subpoenas/lawsuits in which AGs, DOLs, or other regulators have retained plaintiffs firms and are using their state powers to demand production to those firms of documents we would not produce in discovery. Some of those law firms are paid on contingency basis. They typically ask for investigation reports."

……..

"From discussions with other general counsel, top law firm partners, and reading case law, it appears that failure to "cooperate" with federal investigators will incur their wrath, whether it's obstruction of justice charges, increased fines/penalties, new charges, character assassinations, pressure on a company to terminate an employee, pressure to have a state bar "review" an attorney's conduct, etc. (translation of "cooperate" meaning, waive the privilege and work-product protection and give them everything they ask for; asserting one's rights is seen as trying to defy the federal government). This is frightening (the federal gov[ernment] becoming more like a police state), and just the threat of such action from the feds changes the way attorneys and their clients work together, and changes the defense strategies when handling such issues – all for the worse with regard to the Constitutional and legal rights of individuals and companies. The law becomes a

weapon wielded by the feds against the "people," and the protections that people and corporations are entitled to become a meaningless facade."

……..

"It is clear to me that this has become the "rage" among prosecutors. Frankly, if this is to be the expectation of all prosecutors in corporate criminal investigations, then it will essentially eliminate the privilege as to corporations in all of those cases. Indeed the waiver has also become prevalent in grand jury work with individuals in which the prosecutor hints at avoiding target status if the individual will waive his attorney client (and reporter/source) materials. In effect, prosecutors are overriding the legislative decision that the attorney client privilege is to be maintained."

……..

"On more than one occasion in small group meetings with government lawyers, such as in discussions of the requirements and expectations under Sarbanes Oxley, government lawyers have stated in absolute terms that they expect complete, open and full cooperation and that any actions, including assertions of privilege, significantly affect their assessment of culpability, the level of fines or civil or criminal penalties that should apply."

……..

"The attorney/client privilege is critical for clients, because they need to be frank with their attorneys in order to obtain accurate advice. If the privilege is not there or is likely to be waived, the client may not inform its attorneys of all the relevant facts. The heavy-handed "requests" for waiver of the attorney/client privilege, with heavy penalties levied for failure to "cooperate," will undermine the administration of justice in the long run. These requests are not fair or appropriate."

……..

"The DOJ routinely ignores the role of corporate counsel in establishing the ground rules for communications with company employees and the rights of both the company employee and the company of having a company lawyer present during questioning."

……..

"Waiving privilege through coercion is bad policy. It prevents an in-house attorney from advising his/her client the company. It interferes with the company's and employees' rights … . If the government can't make a case without waiver, then perhaps the case isn't that strong. [They already] have a large club they can use to access company records and interview employees, far beyond what is available in civil litigation."

……..

"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."

……..

"Currently, during the course of annual audit by a big 4 public accounting firm, the firm has demanded that the company waive privilege by turning over a legal memorandum prepared by outside tax counsel. The [accountants have] taken the position that their review of the memorandum is "necessary" to complete their Sarbox internal control review. We have been informed that our failure to waive will result in the firm not issuing a clean opinion in connection with our 10K. The firm has cited litigation as support for its position."

……..

"Auditors are asking for privileged information in connection with reviewing the company's accrual of potential or contingent liabilities; opening the door even before investigations start. Need accountant client privilege in addition to attorney client privilege."

……..

"Where we see the most potential for privilege erosion is during our regular interactions with our external auditors who are asking for more and more information impinging on attorney/client privilege…"

……..

"Privilege should be maintained inviolate, and pressure brought to force waiver should be prevented. If a company chooses to waive the privilege it should be purely voluntary and not coerced."

……..

"I believe the issue of government supported waiver of attorney-client privilege and work-product is one of the most critical issues facing in-house companies, and, indeed, companies, today. Waivers will cause non-lawyers to avoid consulting with lawyers because to do so would expose the company to civil and/or criminal prosecution. The net result will be to reduce the effectiveness of counsel, particularly in-house counsel, and, ultimately, increased violations of regulations and rules."

Outside counsel:

Two responses in particular to the long-answer questions in the outside counsel survey are discursive and thoughtful, and merit reproduction in their entirety:

"My practice focuses exclusively on environmental crimes cases most always being conducted out of the Environmental Crimes Section at the DOJ, an office I used to head. For many years now, dating back to the end of the Bush I administration the Section has become increasingly aggressive in demanding a waiver of the privilege, most always excluding materials on strategy, direct advice to the client and mental impressions of the lawyers. Everything else must be turned over. Sometimes explicitly, more often subtly it is expressed that the waiver is a condition for even entering into plea negotiations. In no case have I ever felt that the client received any benefit for the waiver (or for that matter overall cooperation), rather it had evolved over time to be an expectation that the client has to waive. More to the point, any claim of privilege or refusal to waive implies that something is being hidden from the government and that before a case can be concluded, the government must have that information even where it duplicates , for instance, information the government already has in its possession through the grand jury or otherwise. It has become so prevalent as to be casual. To fail to waive is to impede, it is said, often with the suggestion that a decision not to waive is to obstruct. I have been on many panels on this subject and I always hear the gov't representatives describe their request in sterile tones as if there were only infrequent demands for a waiver and then only when there was no other way for the government to obtain the evidence in counsel's possession. Something is missing in the discussion. The give and take with line prosecutors never sounds like the supervisor's view of how and when the demand for waiver takes place. What's more invidious in my view is how the concept of waiver/cooperation has made any suggestion or discussion of the concept of privilege a 'dirty word.' 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. To claim a privilege is to force the government to work harder, they want a short cut. And yet, ironically, while I have never felt a client received any credit for waiving, I have also never felt that the material the government obtained from a waiver served any purpose. This has led me to conclude, it is not the actual material the government wants, it simply that the government wants to obtain waiver per se to be able to claim a thorough investigation."

…….

"I was a federal prosecutor for 16 years, in the EDNY (6 years), District of Arizona (2.5 years) and NDCA (7 years) (where I was the Chief of the Criminal Division and the US Attorney (interim appointment) for the last five of those years). I have been in private practice for the past 3 years.

Several US Attorneys' Offices were historically aggressive in demanding waivers, and that practice has become more prevalent, along with demands that companies fire employees who decline to talk to government investigators or who the government believes may have done wrong, even if those employees have not been indicted. The demands from some US Attorneys' Offices have sometimes required an immediate response, without giving the company time to evaluate the demand or distinguish among different documents. For example, one US Attorney's Office accused a client of failing to cooperate because it spent 2 weeks reviewing the documents that would be the subject of the waiver.

Even more troubling, however, is the lack of consideration that government prosecutors have provided to companies that waive privileges. Unlike the Antitrust Division, which has a history of granting amnesty to those companies that waive the privilege and otherwise cooperate, some US Attorneys' Offices demand waivers, demand that companies force executives and employees to be interviewed by the government on pain of termination, and suggest that the company should not pay the legal fees of those employees or officers (on pain of indictment of the company).

These tactics are intended to deprive employees of top legal representation and cause employees to resent the corporation for 'abandoning' them, both attempts by the government to convince those employees to provide damning information about others in the company. While truthful cooperation is in the government's interest, several US Attorneys' Offices have resorted to making false statements to counsel for individual employees and mischaracterizing companies' cooperation in an effort to extract guilty pleas from individuals and from companies.

In addition, some prosecutors, including prosecutors at Main Justice in Washington, D.C., have demanded that companies retain separate 'independent' counsel to conduct internal investigations and turn the results of those investigations over to the government. In my experience, our client declined that demand, recognizing the client might incur the wrath of the prosecutor, because it was unnecessary. Such demands essentially require the companies to conduct the investigation for the government, turn over the results, and then agree to punitive measures for the company.

Finally, prosecutors recognize the difficult position that companies are in when they face criminal prosecution, because of negative public and shareholder reaction and because of possible government debarment. Some prosecutors exploit that fear to obtain information and then use it against the companies to extract unnecessary corporate guilty pleas or deferred prosecution agreements. Prosecutors' primary goal should be to indict individuals who commit crimes; in my experience, prosecutors have failed to give adequate weight to the factors identified in the Thompson memo and have disregarded mitigating factors when the companies do not accede to the prosecutors' version of events."

Other responses by outside counsel follow:

"Environmental enforcement case, handled by DOJ Environmental Crimes Section (ECS) and U.S.Atty. DOJ ECS lawyer made clear that favorable disposition (misdemeanor Water Act and diversion of felony hazardous waste charges) would not occur absent waiver. Produced approximately 80 typed interviews and notes. At other times in the litigation, was suggested that company terminate funding of counsel fees for employees (despite company bylaws authorizing). Demanded that company withdraw from all joint defense agreements in settlement agreement, despite pendency of continuing parallel civil litigation.

Environmental prosecution under Clean Water Act; U.S. Attorney and staff made clear that government

decision to prosecute, despite company general cooperation and violation conduct caused by employee contrary to explicit company policy, hinged on company decision not to waive privilege. Govt immunized employee who committed violation then used him against company that had informed employee that pollution violations were contrary to company policy."

…….

"Typical situation: environmental crimes investigation in which the company is invariably expected to turn over its internal investigation. Although DOJ lawyers give lip service to the proposition that waiver is not required to get Thompson Memo cooperation credit, they invariably asked for the information (or the client knew they would invariably ask for the information) in such a manner as to make it plain they would not consider any company that did not waive to be a 'good corporate citizen' deserving of consideration for a charging decision less than 'the most serious readily provable offense.' In fact DOJ and USAO lawyers say the only way they are authorized under DOJ policy to charge less than the most serious readily provable offense is if the company shows it comes within the mitigating categories in the Thompson memo, and invariably waiver of work product and attorney client protections are discussed."

…….

"For all intents and purposes, there is no such thing as an attorney-client privilege or work product protection in a public company. This is true for inside counsel as well as outside counsel. In-house counsel should probably periodically issue a blanket warning to senior executives that they should expect that, in the event of a future governmental investigation, any conversations that would otherwise be viewed as privileged will likely be disclosed to the government. For outside counsel coming in to perform an investigation, we do so now in the expectation that our client will instruct us to turn over all of our materials to the government. We are, as a consequence, also fair game for testimony in class action and other civil cases brought by shareholders. Public companies currently have little choice in this matter and it is likely, at least in my opinion, that executives are beginning to realize that they cannot bring difficult problems to their counsel and receive their advice for fear that advice will be disclosed and decisions will later be second-guessed by the government."

…….

"The AUSA wrote a letter to the company's counsel explicitly stating that whether the company receives any credit for cooperation would be determined by whether it had 'fully' met the factors set forth in the Thompson Memo, including the company's willingness to make a firm commitment to provide the government prompt access to all 'potentially relevant information, including information protected by the attorney-client privilege and work product privilege.'

Shortly thereafter, and even though the company waived privilege and work product with respect to the subject matter of the investigation, the prosecutor complained of a lack of cooperation, and demanded that the parent company's General Counsel, Audit Committee Chairman and CEO meet with him personally so that they could respond directly to his demands. Surprisingly, the company acceded to this request and there were one or more meetings at which the General Counsel (and, I believe) other top executives were lectured by the AUSA in a threatening manner.

As he realized that these pressure tactics were actually working, the AUSA continued to make escalating demands, including a series of demands for virtually unlimited waiver of the attorney-client privilege. When the company's outside counsel pointed out that the company had in fact complied with the Thompson Memo by providing, inter alia, the facts, the identity of witnesses, the documents, voluntary presentations on various issues and even limited waivers of attorney-client privilege, the AUSA apparently concluded that this attorney was an obstructionist and not cooperating."

…….

“When we assert privilege with regard to an independent counsel investigation report, records and recommendations, the government (in my case state attorneys general and state departments of insurance) tells us that we are being uncooperative and unreasonable and that we are the only person who has received such a subpoena that is withholding this kind of information. The state also requests information on the process our client followed to prepare its answers to other questions in the subpoena, including inquiries and analysis done by outside and inside counsel. We have also resisted that (on work product and other grounds) and received the same reply that we are the most unreasonable, uncooperative person in our industry, and that if we want to save the time and money of the government's investigation then we should cooperate.”

…….

“The Department of Justice and the CFTC have extorted the energy industry into waiving privileges and paying huge unjustified settlements for "false reporting" trade data to the trade publications.”

…….

“While guidelines for various agency voluntary disclosure programs may permit the assertion of privileges, in reality, agents who investigate apparent misconduct, those administering the disclosure programs and government lawyers who evaluate the issue that is the subject of the disclosure clearly expect waiver as a matter of course. Assertions of privilege, in such circumstances, are usually met with raised eyebrows and "tisk-tisks" rather than by direct threats or explicit statements of unfavorable treatment. Corporate clients, in particular, quickly get the message from the regulators and investigators and elect to waive the privilege in expectation favorable treatment in agency and prosecution decision making. The most common privileged material provided to government investigators and lawyers are interview memoranda prepared by counsel.”

…….

“Government suspension and debarment and exclusion officials routinely demand that companies disclose internal investigations, including notes, in order to be deemed ‘responsible’ contractors and receive Federal contracts. Also, Congressional investigators routinely request such waivers. I have not had a serious issue with the Civil Division of the Justice Department. I routinely get this request from Assistant US Attorneys when they are conducting grand jury investigations.”

…….

“The government now expects a waiver as their inherent right. In return, almost no credit is given.”

…….

“In situations where the government is aware that an investigation has occurred, it has been indicated directly and indirectly that they need all of the gathered information to make a proper assessment elsewise they view any claims of cooperation or truthfulness unacceptable.”

…….

“We generally advise clients to be prepared to waive certain privileges when the results of a preliminary investigation uncover a potential violation of law that, absent an affirmative disclosure, could subject the client to increased penalties or a potential qui tam action.”

…….

“AUSA stated that asserting the attorney-client privilege was inconsistent with cooperation.”

…….

"Corporate counsel are scared, and are the functional equivalent of AUSAs."

…….

"Seems like the guidelines have bred a culture of arrogance in our US attorney's office since the late 1980s. Prosecutors seemed more human and reasonable before."

…….

"The increase in pressure on companies to waive erodes the confidence some clients have in seeking advice from counsel who will then need to cooperate with the government."

…….

"It seems the government has taken the stand that because they are the government the rules do not apply to them and can by force and intimidation take whatever they want."

……………………………………………………

(For further information on this survey and results, please contact Susan Hackett at hackett@acca.com, or Stephanie Martz at stephanie@nacdl.org.)

August 15, 2005

The Honorable Ricardo H. Hinojosa
Chairman
U.S. Sentencing Commission
One Columbus Circle, N.E.
Washington, D.C. 20002-8002

Re: Organizational Sentencing Guidelines Commentary Involving Waiver of Attorney-Client Privilege and Work Product Doctrine -- Comments on Notice of Proposed Priorities

Dear Judge Hinojosa:

We, the undersigned former Justice Department officials, are pleased that the Commission has included, on its list of tentative priorities for the upcoming amendment cycle, the recent amendment to the Commentary to the Organizational Guidelines involving waiver of attorney-client privilege and work product protection in the context of cooperation.[1] We believe that this new amendment is eroding and weakening the attorney-client and work product protections afforded by the American system of justice, and we urge the Commission to address and remedy this amendment as soon as possible.

As you know, on April 30, 2004, the Commission submitted to Congress a number of amendments to Chapter 8 of the Sentencing Guidelines relating to "organizations"—a broad term that includes corporations, partnerships, unions, non-profit organizations, governments, and other entities. Among these amendments—all of which became effective on November 1, 2004— was a change in the Commentary to Section 8C2.5 which authorizes and encourages the government to require entities to waive their attorney-client and work product protections in order to demonstrate cooperation with the government and thereby qualify for a more lenient sentence under the Guidelines.

Prior to the adoption of this privilege waiver amendment, the Sentencing Guidelines were silent on the privilege issue and contained no suggestion that such a waiver would ever be required. Although it is true that the Justice Department has followed a general policy of commonly requiring companies to waive privileges as a sign of cooperation since the 1999 "Holder Memorandum" and the 2003 "Thompson Memorandum," this was merely the Department's internal policy for its prosecutors. Now that the privilege waiver amendment has been incorporated into the official Commentary to the Sentencing Guidelines, the Justice Department, as well as other enforcement agencies, are contending that this amendment provides Congressional ratification of the Department's policy of routinely asking that privilege be waived.[2] In practice, companies are

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[1] 70 Fed. Reg. 37145 (June 28, 2005).
[2] See, e.g., Mary Beth Buchanan, "Effective Cooperation by Business Organizations and the Impact of Privilege Waivers," 39 WAKE FOREST L. REV. 587, 589 (Fall 2004) ("This Article seeks to demonstrate that the [Justice] Department's consideration of waiver is based squarely on the definition of cooperation set forth in the Organizational Sentencing Guidelines.").

finding that they have no choice but to waive these privileges whenever the government demands it. The threat to label them as "uncooperative" in combating corporate crime simply poses too great a risk of indictment and further adverse consequences in the course of prosecution. Even if the charge is unfounded, the charge of "noncooperation" can have such a profound effect on a company's public image, stock price and credit worthiness that companies generally yield to waiver demands.

As former Justice Department officials, we appreciate and support the Commission's ongoing efforts to amend and strengthen the Sentencing Guidelines in order to reduce corporate crime. Unfortunately, however, we believe that the privilege waiver amendment, though well-intentioned, is undermining rather than strengthening compliance with the law in a number of ways.

In our view, the privilege waiver amendment seriously erodes and weakens the attorney-client privilege 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 they may represent the entity effectively and ensure that compliance is maintained (or that noncompliance is quickly remedied). By enabling routine demands for waiver of the attorney-client and work product protections, the amendment discourages personnel within companies and other organizations from consulting with their lawyers, thereby impeding the lawyers' ability to effectively counsel compliance with the law. This, in turn, will harm not only the corporate client, but the investing public and society as well.

The privilege waiver amendment will 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 and other individuals with knowledge to speak candidly and confidentially with the lawyer conducting the investigation, any uncertainty as to whether attorney-client 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 privilege waiver amendment undermines rather than promotes good compliance practices.

Finally, we are concerned that the privilege waiver amendment will encourage excessive "follow-on" civil litigation. In virtually all jurisdictions, waiver of attorney-client or work product protections for one party constitutes waiver to all parties, including subsequent civil litigants. Forcing companies and other entities to routinely waive their privileges during criminal investigations provides plaintiff 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 a far greater financial risk—instead face the government's wrath.

In sum, we believe that the new privilege waiver amendment 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 Commission to retain this issue on its list of priorities for the upcoming amendment cycle, and to address and remedy the issue as soon as possible. In particular, we recommend that the Commission revise the amendment to state affirmatively that waiver of attorney-client and work product protections should not be a factor in determining whether a sentencing reduction is warranted for cooperation with the government during an investigation.

Respectfully submitted,

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cc: United States Sentencing Commission
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Attention: Public Affairs—Priorities Comment

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