

**Minutes of the November 15, 2005  
United States Sentencing Commission  
Public Meeting**

Chair Hinojosa called the meeting to order at 3:00 p.m. in the Federal Judicial Conference Meeting Room.

The following Commissioners and staff participated in the meeting:

Judge Ricardo H. Hinojosa, Chair  
Judge Ruben Castillo, Vice Chair  
Judge William K. Sessions, III, Vice Chair  
John R. Steer, Vice Chair  
Michael E. Horowitz, Commissioner  
Beryl Howell, Commissioner  
Edward F. Reilly, Jr., Ex Officio  
Michael Elston, Ex Officio  
Judith Sheon, Interim Staff Director

Chair Hinojosa opened the meeting by asking for the approval of the August 24, 2005, public meeting minutes. There being no additions or corrections, Vice Chair Sessions moved that they be approved, the motion was seconded by Vice Chair Steer, and were unanimously approved.

The Chair reported that the Commission has prepared a new data set, containing approximately 48,000 cases, which will be posted on the Commission's website. The newest dataset yielded the following sentencing statistics.\*

Sentences within the guideline ranges:	61.7%
Government-sponsored departures:	24.2%
Sentences below the guideline ranges:	12.8%
Sentences above the guideline ranges:	1.4%

Of the 12.8% below the guideline range sentences, 9.5% cited *Booker* or other 18 U.S.C. § 3553(a) factors, or the Commission cannot determine the basis for the downward departure. The remaining 3.3% cited sentencing guidelines as the basis for the departures. Of the 1.4% above the guideline range sentences, 1.1% cited *Booker* or other 18 U.S.C. § 3553(a) factors, or the Commission cannot determine the basis for the upward departure. The remaining 0.3% cited the sentencing guidelines as the basis for the upward departures.

The Chair noted that the percentage of sentences within the guideline ranges in the new dataset is consistent with the Commission's prior, post-*Booker*, datasets. He also observed that this figure was generally consistent with past fiscal year datasets. For FY2002, the percentage of sentences within the guideline ranges was 64-65%. For FY2003, the year the Protect Act came in to force, the percentage was 69%. He further observed that the combination of sentences

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\* Total may not equal 100% due to rounding.

within the guideline ranges and sentences resulting from government-sponsored departures accounted for 85.9% of the total post-*Booker* sentences.

The Chair then called on the Interim Staff Director for her report. Ms. Sheon reported that the compilation of the FY2004 data will be completed soon with the preliminary results reported to the Commissioners as early as the first week in December. She thanked the Sentencing Commission's Offices of Monitoring and Policy Analysis for their efforts in collecting and preparing the data. Ms. Sheon also informed the Commissioners that the Commission's data automation project is proceeding according to plan. Forty-three of the 97 federal court districts are submitting records to the Commission electronically, with another 14 districts scheduled to join soon. The Interim Staff Director also advised that the new sentencing guideline manual, incorporating amendments effective October 1, 2005, and November 1, 2005, will be distributed shortly.

Referring to the Commission's priority list, the Chair noted that one of the items before the Commission is the review and possible amendment of the commentary in the Chapter Eight Organizations Guidelines regarding the waiver of attorney-client privilege and work product protections. In furtherance of this priority, the Commission invited a number of individuals to discuss their concerns with the Commission. The Chair welcomed the panelists and introduced them to the audience. They were in order of speaking:

- Richard Thornburgh, former Attorney General of the United States
- Stan Anderson, on behalf of the U.S. Chamber of Commerce
- Donald C. Klawiter, on behalf of the American Bar Association
- Tina S. Van Dam, on behalf of the American Chemistry Council, the Association of Corporate Counsel, and the National Association of Manufacturers
- Henry W. Asbill, on behalf of the National Association of Criminal Defense Lawyers

Summaries of the panelists' statements are attached. After all panelists concluded their opening remarks, a question and answer session followed.

Vice Chair Steer thanked the panelists for participating in the Commission's public meeting. He prefaced his question by noting that the legal landscape has changed considerably since the Section 8C2.5 commentary was amended. He noted that when the language came before the Commission's Advisory Group, the language was not greeted with the same negative response as the panelists are now voicing. The Commissioner read a statement from the Advisory Group's report stating that it was the defense bar's opinion that the Commission should explicitly clarify the role of waivers in the guideline commentary. Acting on this advice, the Commission amended the guideline commentary, which has sparked what Vice Chair Steer, quoting others, described as a "firestorm of controversy." With this as a backdrop, he asked the panel what would be the harm if the Commission simply repealed the relevant commentary language and left it to the parties involved in individual cases to deal with the DOJ over its policies, or to Congress if it so chose, or leave it up to a well-qualified federal judge to determine any question about a waiver.

Mr. Thornburgh responded that the DOJ, perhaps viewing the Commission's action as a mandate, has established policies based on the guideline commentary. Just undoing the language, he added, would not necessarily cause the DOJ to undo its policy of requesting waivers. With respect to the Advisory Group report the Vice Chair quoted, he agreed that it appeared contradictory for the defense bar to first ask the Commission to clarify the role of waivers under the guidelines and then, after the Commission took action to ask it to repeal that very same language.

Vice Chair Castillo thanked the panelists for attending the meeting and specifically thanked Mr. Thornburgh for appointing him an Assistant United States Attorney during his tenure with the DOJ. He expressed his personal view that like any good judge, a U.S. Sentencing Commissioner is always willing to evaluate any position based on sound evidence and that this is what the Commission is looking for in this matter. The Commission is looking for specific evidence, he continued, that links the changes in the Chapter Eight Commentary to the alleged erosion of the attorney-client privilege. He expressed the opinion that Mr. Thornburgh's comments came closest to making this connection. He noted that the language under examination was a compromise. At the time, the DOJ did not want any changes made to the commentary, or, if any changes were to be made, reluctantly agreed to the proposed language with the proviso that the DOJ would decide if the corporation's cooperation met the requirements for a sentencing reduction. He further noted that the commentary calls for waivers on a limited basis and opined that perhaps this limiting language should be included in the guideline itself. In Vice Chair Castillo view, the language in Chapter Eight is not the real issue, rather, it's the panelists' battle with the DOJ and that perhaps they are pursuing this battle through the Commission. The Vice Chair asked if perhaps some language should be included in the guidelines calling for waivers to be requested only on a limited basis.

Mr. Thornburgh responded by stating that this issue has been overtaken by subsequent events. He acknowledged that the sub-theme of the panel's argument is the quarrel with the actions of federal prosecutors pursuant to the Holder and Thompson memoranda. However, in Mr. Thornburgh's opinion, the DOJ's position has been strengthened by the Commission's actions in amending the Chapter Eight commentary. He also is of the opinion that adoption of the panel's proposed guideline language is one of the steps necessary before confronting the DOJ directly.

Mr. Thornburgh expressed his amazement that the discussions over the attorney-client privilege had reached the current point. He observed that one of the first things learned in law school was the inviolability of the attorney-client privilege. But now, he continued, that privilege seems to be "in play," as a negotiable item. He lamented this as a deplorable development. He noted that the only gain is for prosecutors to satisfy their appetite for every last bit of information they can get from a corporation. While there are other protections, specifically citing the 5<sup>th</sup> and 6<sup>th</sup> Amendments, Mr. Thornburgh believes that the attorney client privilege is the protection most revered by legal professionals. This is because the attorney is face-to-face with the client and must engender a confidence on the part of the client that making a full and complete disclosure to the attorney will not work to their disadvantage. He concluded by expressing his opinion that the criminal justice system is on the wrong path with regards to

the attorney-client waiver as it seeks to secure a balance between individual liberties and the desire for law enforcement.

Vice Chair Castillo followed up with a question concerning the McCallum memo. The Commissioner asked if Mr. Thornburgh was dissatisfied with the memo as it does not establish uniform standards for attorney-client waivers requests made by the DOJ's field offices.

Mr. Thornburgh responded that in his opinion it was somewhat curious for the Department of Justice to leave this policy decision in the hands of the individual field office as it appears to run contrary to his experience as head of the DOJ's Criminal Division. While well intended, he concluded that the memo accomplishes nothing in terms of solving the problem and may create a problem by failing to create a predictable rule governing this sensitive situation.

Mr. Anderson also addressed Vice Chair Castillo's questions. He stated that he and his organization understood where the root of the problem rested, the conflict with the DOJ and its policies, but that resolving the problem was a process and addressing the language in Chapter Eight was a step in that process. One of the reasons the Chamber of Commerce was holding a conference the following day was to help shed more light on this issue for the people at the DOJ, SEC, and Congress. This is one of a series of steps the coalition is taking in order to have an impact on all of the parties involved in the discussion. Addressing Vice Chair Castillo's question about the McCallum memo, Mr. Anderson suggested that it created a problem by possibly encouraging forum shopping by allowing each U.S. Attorney to create his own policy on waivers, causing parties to bring litigation in a jurisdiction with rules favorable to their position.

Mr. Klawiter suggested that the Commission should take a neutral approach in the guidelines commentary. By having the language in the guidelines, it suggests a seal of approval for prosecutors and regulators to request waivers. By going back and just removing the language, he stated, and failing to add further clarification, the message is still out there and will result in further waiver requests. The language the ABA and others have proposed, Mr. Klawiter continued, makes clear that waivers will not be a factor, and as a result, will not act as an encouragement to seek waivers. He recognized that the Commission tried to strike a balance when it amended the Chapter Eight commentary. Unfortunately, in his opinion, this attempt to balance the concerns resulted in some individuals reading the language and concluding that, because they were mentioned, it is okay to request a waiver. Just cutting the language out of the commentary will not result in the neutrality the panel is asking for, he concluded.

The Chair asked Mr. Klawiter if the Commission would be acting in a neutral fashion if it adopted the panel's suggested language, instructing the court not to consider a factor when making its determinations. The Chair added that simply removing the language might no longer be viewed as neutral by the DOJ.

Mr. Klawiter responded that by taking the language out it would eliminate the waiver issue, but still leave the cooperation issue. Waiver requests and cooperation are two different issues, he posited. Prosecutors will continue to evaluate the level and scope of cooperation and

how it will be used as a factor at sentencing. This is different, he believed, than having a waiver as an operative event.

Vice Chair Castillo suggested that when the Commission added the commentary language it actually sought to assist the defense bar by making sure corporations received credit for their cooperation, rather than leaving the determination solely in the hands of the Department of Justice. He advised the panel that the Sentencing Commissioners held the attorney-client privilege and work product protections sacrosanct. Now, he noted, the same groups the Commission sought to help are criticizing the Commission and the suggestions being made will again leave the matter of waivers and cooperation largely in the hands of the Department of Justice.

Vice Chair Sessions again asked why taking the waiver language out of the commentary is not sufficient to settle this matter. He suggested that if the DOJ based its requests for waivers on the Commission's actions in amending the guidelines, why is simply removing the language not enough to indicate to the DOJ that it misinterpreted the Commission's intention as it relates to waivers. By eliminating the language, the Commission will not appear to take a position one way or the other on the issue, thus achieving the neutral stance advocated by the panel.

Commissioner Howell observed that the panel and the DOJ were now in the same position of not wanting the commentary language simply repealed.

Mr. Klawiter agreed that repealing the language was a positive move, but that the panelists want to address the issue of cooperation without the waiver issue.

Vice Chair Sessions noted that in the year since the commentary was amended, both the DOJ and the entities represented by the panel appear to have hardened their positions. He asked whether if the Commission makes a determination to change the language, rather than just eliminating it, that it is likely a political battle would ensue?

Mr. Thornburgh acknowledged that the entities involved, the DOJ and parties that do not share its views, are adversaries, suggesting that disagreement on this issue is inevitable. He stated further that if the language is simply removed, strong advocates in the DOJ will view it simply as the Commission abandoning its stance and not as a restraint on the DOJ's policy on waivers. Mr. Thornburgh stated that there must be a clear statement made by the Commission that waivers should not to be used as a factor when considering cooperation.

Commissioner Horowitz asked if the panelists could provide the Commission with specific examples of the waiver request abuses they allege. He noted that companies are often hesitant to make this information available, but it would be very helpful to the Commission to have specific evidence for its deliberations. He also asked the panel for evidence of other agencies using the sentencing guidelines as support when requesting attorney-client waivers.

Mr. Anderson acknowledged the lack of hard evidence and indicated that the members of the panel will ask its various constituents for specific examples of the alleged abuse. He added that some of the groups have discussed this matter with members of Congress and perhaps

Congress is in the best position to gather this information. He concluded by saying that the panelists were not in a position to ask the DOJ for this information.

Mr. Thornburgh added that the McCallum memo did not assist with the collection of this information. The DOJ is sometimes called upon to report on its policies to Congress, but the policy espoused in the McCallum memo, decentralizing how the policy is implemented, does not assist it in collecting information on when waivers are requested.

The Chair noted that of the 70,000 cases decided each year in the federal system, only about 150 go through the Chapter Eight (Organization) guidelines. The guidelines make no other mention of attorney-client waivers. If, as suggested, specific language is placed in the Chapter Eight guidelines, the Chair asked if it would send any message with respect to the other cases in the federal system. In the case of individual defendants, attorney-client waivers arise in the course of plea agreements. He asked if making the suggested changes for a small group of cases have an effect on the larger number of other cases.

Ms. Van Dam responded that it was important to prevent situations from becoming part of the statistics the Commission reports. She observed that the ethics and compliance programs that companies implement are meant to prevent issues from rising to a level where they become part of the Commission's statistics and that the requests for waivers are affecting those programs. In response to the earlier question of Commissioner Horowitz on evidence of specific incidents where a waiver was requested, she cited a case where an attorney retained as outside counsel by a company under investigation in New York was asked to appear before a grand jury in an effort to collect more information. The attorney declined, citing ethics and confidentiality issues, and the issue was dropped.

Mr. Asbill, referring to the statistics cited by the Chair, noted that in the case of an individual client, waivers may be given in regards to 5<sup>th</sup> Amendment protections, but he stated that he has never represented a client that waived his attorney-client privilege.

The Chair noted that 5<sup>th</sup> and 6<sup>th</sup> Amendment protections and attorney-client and work product privileges often overlap, but his point was meant to highlight that if no statement is made concerning the attorney-client privilege in the guidelines, than the corporate defendant is in no different position than any other defendant.

Mr. Asbill noted that the U.S. Attorney's Manual contains detailed rules regarding subpoenaing attorneys, while there are no guidelines regarding waiver requests. He suggested a parallel between subpoenaing attorneys and requesting attorney-client privilege waivers and a lack of guidance from the DOJ on the latter.

Commissioner Horowitz interjected that rules in the U.S. Attorney's Manual must be approved by the DOJ's Criminal Division, to which Mr. Asbill agreed.

Commissioner Howell followed up on what she called the "statistical conundrum." From the DOJ, the Commission hears that waivers are not routinely requested and, if so, only requested on a limited basis, while from others the Commission hears that waivers are routinely

requested. This makes it difficult for the Commission to get a clear picture on what is actually happening. She called the panel's attention to page 10 of the NACDL survey where respondents reported that the attorney-client waiver is often offered to investigators before it is requested, and that Mr. Asbill also reported this as well. This could be, she concluded, part of the disconnect in the statistics: Companies are often offering the waivers before they are requested. Commissioner Howell asked if the panelists had any other specific data to help explain the statement in the survey?

Mr. Asbill responded that he had no other statistical data to further explain this point. He theorized that any one representing a company will read the Holder memo, look at its enumerated factors and as the parties negotiate, the attorney will raise those factors as needed on behalf of the client. It is, he said, the expectation for the request that is at issue.

Vice Chair Castillo advised the panel that the survey information provided was not very helpful. He suggested the general nature of the questions asked in the surveys, the subjective nature of what is an "erosion," and the lack of specificity in tying the requests for waivers to the DOJ as opposed to auditors or other third-parties as reasons why the survey was not helpful. He suggested that it would be useful to collect any hard evidence regarding the DOJ request for waivers in the last year and stated that this could be done without divulging any company names or details. Commissioner Howell added that the information Vice Chair Castillo suggested should focus on actual requests and not offers to waive as included in the NACDL survey.

Ex officio Commissioner Elston thanked the panelists for their comments. As a member of the Department of Justice, he welcomed comments from those outside the organization. He stated for the record that when amendments to the Chapter Eight commentary were being debated in 2003, it was the DOJ's position that there be no changes. When it became clear that the Commission would be changing the language, the DOJ worked with the Commission to help formulate the language. He also noted the McCallum memo, while not creating a centralization policy, did not establish a de-centralized policy as characterized by the panel members. Before the memo, individual prosecutors were allowed to ask for waivers from corporations, so de-centralization, in his opinion, is not the right characterization. In the same manner, he continued, the term "compelled waiver" is not the proper term. Rather, the Thompson memo makes clear it is a "request" for waiver. Commissioner Elston agreed with Vice Chair Castillo regarding the way the questions were asked in the surveys submitted to the Commission. He suggested that it would be helpful if a survey would ask the questions, "How many times have Department of Justice prosecutors requested the waiver? How many times has it been granted? How many times has it been denied?" He then asked Ms. Van Dam if she had any specific information regarding her earlier statement that DOJ prosecutors had been abusive and coercive when asking for waivers. He reported that he was unaware of any complaints of this nature being made to the DOJ's Office of Professional Responsibility and that it was not the Department of Justice's policy to be abusive when requesting waivers from any party.

Ms. Van Dam answered that she will gather further information and answer the Commissioner's question at a later date. She noted that the general environment surrounding waiver requests generated a coercive atmosphere.

Commissioner Horowitz reiterated his earlier request for specific instances of waiver requests and asked that the panelists include not only DOJ requests, but also requests from regulators and other third parties.

Ms. Van Dam responded that the groups she represents would try to get the requested information for the Commission.

Vice Chair Steer observed that as he has attended corporate forums around the country, he has heard a consistent message from DOJ representatives that waivers should not be routinely asked for by the field offices. He expressed his belief that it was the Commission's actions in amending the guideline commentary that resulted in this position by senior DOJ personnel and that it would not have happened without the Commission's actions.

Commissioner Horowitz raised the issue of limited-waivers, a policy where waivers are granted in a criminal matter, but the resulting information gathered may not be provided or used in a civil matter. Legislation has been put forward by the SEC, the Commissioner said, and asked if the panel members had any thoughts on this issue.

Mr. Klawiter answered that the groups he represented did not support limited-waivers.

The Chair asked the panel if they had any further statements they would like to make.

Mr. Thornburgh responded that he was heartened by the Chair and other Commissioner's responses and felt that the Commissioners shared the panel's concern that the attorney-client and work product privileges must be protected.

The Chair thanked the panelists and expressed the Commission's appreciation for their appearances. The Commission welcomes comments from the field, the Chair continued, on this and any other issue regarding the guidelines. The Commission is enlightened when someone takes the time to express their opinions. He added that the Commission is a bipartisan agency, and in the Chair's opinion, works well and hearing from others helps the Commissioners to do their job better.

The meeting was adjourned at 4:45 p.m.



**Testimony of Mr. Richard Thornburgh**

Reading from his prepared remarks, Mr. Thornburgh stated:

Good afternoon Chairman Hinojosa and members of the Commission, and thank you for the opportunity to appear before you today to discuss the commentary in Chapter Eight regarding waiver of attorney-client privilege and work product protection and its role in determining cooperation. I commend the Commission for reexamining this issue barely one year after that commentary took effect. I know how much time and effort the Commission has invested in its review of Chapter Eight, and I can imagine you may feel some frustration in being implored to reconsider this aspect of those changes. Let me assure you that this is a vitally important question and that you are doing the right thing by asking again what the best answer is.

As you know, I was one of nine former Attorneys General, Deputy Attorneys General and Solicitors General, from both Republican and Democratic administrations, who signed a letter to you this summer urging you to undertake this review. It is never a simple matter to enlist endorsements like this, particularly in the summer, on short notice. And yet it was not difficult at all to secure those nine signatures, because we all feel so strongly about the fundamental role the attorney-client privilege and work product protections play in our system of justice. We feel just as strongly that the recent change in Chapter Eight regarding waiver of those protections threatens to seriously undermine them. Simply put, there is a significant question about whether the attorney-client privilege still exists for organizations. I won't repeat here what we said in our letter about the adverse consequences flowing from that fact. But I will explain why I think the new Commentary exacerbates an already dismal situation, and what the Commission can do to begin turning things around.

Obviously, you all heard – well, all but Commissioner Howell – conflicting testimony two years ago about how commonly waiver requests are now being made by federal prosecutors. It is admittedly difficult to say with confidence how much more common such requests have become in the last year, as prosecutors are not required to report such requests to the Commission. Indeed, I'm not sure that such reporting would be feasible, given the informality and ambiguity associated with most waiver requests. I know you will hear from another speaker this afternoon about a survey conducted earlier this year of both in-house and outside counsel that is fairly eye-opening in its indication of how far the utility of the privilege has fallen in their view.

But I can provide some perspective from my colleagues at a major law firm, one with a significant white collar criminal defense practice. My partners generally report that they now encounter waiver requests in virtually every organizational criminal case in which they are involved. In their experience, waiver has become a standard expectation of federal prosecutors. Others with whom I've spoken in the white collar defense bar tell me the same thing.

## Attachment-1

I can offer several reasons why it is reasonable to attribute this state of affairs, at least in part, to the recent change in the Organizational Guidelines. The first is based on the language of the new commentary itself. That language provides that waiver “is not a prerequisite . . . unless such waiver is necessary in order to provide timely and thorough disclosure of all pertinent information known to the organization.”<sup>1</sup> Clearly, any time a lawyer conducts any sort of investigation of a potential crime, that lawyer is bound to acquire some amount of “pertinent” information, almost by definition. And the government is now entitled to have “all” of it. Under these circumstances, a prosecutor may well be disinclined to rest on the assurances of an organization that it had provided him or her with the pertinent facts, unless and until the organization provided “all” such information. The prosecutor may want to make that judgment him or herself, and may insist on getting all pertinent attorney work to ensure that he or she had received “all” pertinent information.

Another reason was expressed succinctly by United States Attorney Mary Beth Buchanan, from my hometown of Pittsburgh, Pennsylvania, in her Wake Forest Law Review article last year, in which she asserted that “the Department’s consideration of waiver is based squarely on the definition of cooperation set forth in the Organizational Sentencing Guidelines.”<sup>2</sup> Now that federal prosecutors’ attitudes and practices regarding waiver have in effect been codified by the Guidelines, prosecutors no doubt feel authorized to maintain them without misgiving, and to pay little heed to protestations from their targets that waiver should not be necessary in a given case.

A third reason is what has quickly become known as the “McCallum memo.” In his memorandum of October 21, the Acting Deputy Attorney General confirmed the vitality of the Thompson memo and endorsed the practice of seeking waivers as part of “the prosecutorial discretion necessary . . . to seek timely, complete, and accurate information from business organizations.”<sup>3</sup> Importantly, while this memorandum requires Assistant Attorneys General and U.S. Attorneys to establish written waiver review processes, it does not require any sort of consistency among them. These processes can, it seems, say whatever they like. Given that this memo is clearly a response to the ABA’s resolution from this past August expressing opposition to routine waiver requests, the memo strikes a rather defiant tone that can only embolden prosecutors.

As you know, I served as a federal prosecutor for many years, and I supervised other federal prosecutors in my capacities as U.S. Attorney, Assistant Attorney General in charge of the Criminal Division and Attorney General. Throughout those years, requests to organizations we were investigating to hand over privileged information never came to my attention. Clearly,

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<sup>1</sup>§ 8C2.5, comment 12.

<sup>2</sup> Mary Beth Buchanan, “Organizational Sentencing: Federal Guidelines and the Benefits of Programs to Prevent and Detect Violations of Law,” 39 WAKE FOREST L. REV. 587, 589 (Fall 2004).

<sup>3</sup> “Waiver of Corporate Attorney-Client and Work Product Protection,” memorandum from Robert D. McCallum, Jr. to Heads of Department Components and U.S. Attorneys (Oct. 21, 2005).

## Attachment-1

in order to be deemed cooperative, an organization under investigation must provide the government with all relevant factual information in its possession. But in doing so, it should not have to reveal privileged communications or attorney work product. That limitation is necessary to maintain the primacy of these protections in our system of justice. It is a fair limitation on prosecutors, who have extraordinary powers to gather information for themselves. This balance is one I found workable in my years of federal service, and it should be restored.

Accordingly, I would urge the Commission to revise the commentary sentence regarding waiver to provide affirmatively that waiver is not a factor to be considered in assessing cooperation.

A final observation before I conclude. As I noted at the outset, the Commission proceeded very deliberately and thoroughly in reviewing Chapter Eight, creating an Advisory Group, holding lengthy public meetings, and seeking comment at multiple junctures. And yet the waiver portion of the amendments has generated a relative firestorm of controversy. With all due respect, I think what this demonstrates is that, even with the degree of outreach you conducted, the significance of this provision – indeed, even the fact of its consideration – simply did not penetrate beyond the Beltway and the relatively small community of white collar defense lawyers. It is clear, however, that as the American bar has become aware of this provision, they have risen up, spontaneously, in strong and impassioned defense of the attorney-client privilege and work product protection. This is not something that Washington lobby groups have orchestrated. While it is unfortunate that the message did not travel farther at the time, I hope that you will appreciate this broad and sincere expression of concern for what it is, and will give it due consideration.

Thank you again, and I look forward to your questions.

### Testimony of Mr. Stan Anderson

Mr. Anderson read from his prepared statement:

Thank you for inviting me to speak today on behalf of the three million businesses that are members of the U.S. Chamber of Commerce. The attorney-client privilege is threatened as never before – and not because of a change in the common law or because of a new statute enacted by Congress. The threat comes from unprecedented burdens on the privilege, imposed unilaterally by prosecutors, that are chilling attorney-client interaction in companies throughout the nation.

This Commission is to be applauded for being the first disinterested governmental decision-maker to consider the issue. We regret that we did not participate actively in your proceedings regarding this issue last year, and we very much appreciate your willingness to hold this hearing to supplement the record on this extremely important topic.

No one supports the detection and punishment of corporate wrongdoing more than honest businesspeople. Bad actors tarnish the entire business community in the eyes of the public, and often inflict as much or more economic harm on other companies as they do on consumers or investors. I am not here to protect wrongdoers – they should be punished to the full extent of the law. I am here because the attacks on the attorney-client privilege hurt legitimate businesses.

I want to make two basic points today. First, no one should believe a company's decision to waive the attorney-client privilege in the current environment is voluntary. The practical effect of current policies is to force companies to waive the privilege any time that prosecutors request it. We are dealing here with government-compelled waivers of one of our legal system's most fundamental protections.

Second, this policy of compelled waivers does not enhance compliance with the law. By making officers and employees reluctant to involve lawyers in ongoing business activities, it increases the risk that those officers and employees will inadvertently violate the law. The policy also hobbles internal corporate investigations, preventing companies from detecting and correcting illegal activity. Finally, because the courts have held that a privilege waiver in favor of the government also exposes attorney-client communications to private plaintiffs, the policy can impose huge financial burdens on innocent shareholders by forcing companies to pay exorbitant settlements in private litigation.

The starting point for this issue was the Department of Justice's 1999 "Holder Memo" which states that "[i]n gauging the extent of the corporation's cooperation, the prosecutor may consider the corporation's willingness . . . to waive the attorney-client and work product privileges." Although the memo does not expressly require a waiver, its inevitable practical effect is to compel one.

## Attachment-2

Similarly, I recognize that the language that you added last year to the commentary to Section 8C2.5 does not explicitly *require* companies to surrender the privilege and in fact it was meant to limit compelled waiver. But any time that a company's attorneys have gathered information regarding a potential violation, and prosecutors do not have the very same information, prosecutors may be able to assert that a privilege waiver would lead to "timely and thorough disclosure."

In today's environment, companies will suffer tremendous harm – to their brand; to their banking, supplier, and customer relationships; to the value of shareholders' investments; and to their very ability to survive – if they are described as "not cooperating" with a government investigation. For the same reasons, ending investigations as quickly as possible is a business imperative. Declining the government's waiver requests therefore simply is not an option for the vast majority of American businesses today. The real-world effect of the DoJ policies and the language in your commentary is to force companies to waive the privilege.

I know that representatives of the Justice Department argue that they are not requesting privilege waivers on a large scale; they say that in most cases the companies volunteer a waiver. But these companies are only volunteering because they know that doing so gets cooperation points under the Department's policy, and cooperation is essential to their survival.

Waivers are not needed to give prosecutors access to attorney-client discussions where the attorney aided the client in committing a crime. The crime-fraud exception eliminates the privilege in those circumstances. By definition, therefore, the waivers are being used to obtain access to legitimate attorney-client conversations. That intrusion on the privilege imposes a very high price on honest businesses and on our entire legal system.

- First, for the truth to emerge and justice to be served, adversaries must meet on equal footing. This new system creates tremendous inequality. The government decides what companies to investigate. It decides that the company cannot keep its discussions privileged. And it decides what charges to bring. The practical business realities that I've already discussed often prevent the company from going to trial or otherwise challenging the government's decisions. That is not a system that most Americans would recognize as anything close to fair and just.
- Second, compelled waivers actually diminish compliance with the law. The statutes and regulations governing corporate activities are complicated; business people need legal advice to comply with the law. As the Supreme Court observed in upholding the privilege in the *Upjohn* case, "the attorney and the client must be able to predict with some degree of certainty whether particular discussions will be protected. An uncertain privilege . . . is little better than no privilege at all." 449 U.S. at 393. Because privilege waivers are becoming commonplace, company employees no can longer "predict with some degree of certainty" that the conversations will be protected – as a result, they do not consult lawyers as frequently as they did in the past. The practical effect of this

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process is to defeat the key law enforcement goal of *encouraging* compliance with the law.

- Third, compelled waivers also make it more difficult for company lawyers to conduct effective internal investigations. When employees suspect that anything they say can and will be used against them, they won't say anything at all. That means neither the company nor the government will be able to find out what went wrong, punish the wrongdoers, and correct the company's compliance systems.
- Finally, the coerced waiver policy also can have a serious effect on companies' bottom lines. Plaintiffs' lawyers closely monitor the companies the government is investigating. When those companies waive their privilege, the plaintiffs' lawyers demand access to the same materials, use them against the company in tort suits, and obtain massive settlements. After all, lawyers' notes taken out of context can be extremely useful in prejudicing a jury. Companies that waive privilege in hopes of staving off the massive blow of a criminal indictment might find themselves equally hobbled by private lawsuits.

This Commission cannot fix all of these problems. But you can have a very important impact on this debate. As I said at the beginning of my testimony, you are the first unbiased decision-maker to address the issue. Please continue to exercise that independence and decline to join with those who are placing unfair burdens on the privilege, especially in the absence of any congressional or judicial authority for that approach. We request that you strengthen the language that you added to the commentary last year by prohibiting any consideration of privilege waivers in the sentencing process. That will leave intact the crime-fraud exception and the long-standing proffer process which allow access to privileged information when necessary for law enforcement purposes, and prevent the significant harm that is now occurring as a result of today's compelled privilege waivers.

Thank you.

### **Testimony of Mr. Donald C. Klawiter**

Mr. Klawiter's comments closely followed his written statement, which is given below. He also elaborated on a couple of the key points included in his written statement. He referred to his experience as a prosecutor when emphasizing that the government's need for information will always meet the requirements of Section 8C2.5's attorney-client waiver commentary to be "necessary," "timely," and "thorough." He suggested that investigators are asking for information before conducting their own investigations. Instead, he asserted that investigators should first attempt to obtain information in ways that lay outside the scope of the attorney-client privilege. Mr. Klawiter pointed to the Antitrust Division of the DOJ as a model for this approach. He reported that the Antitrust Division has a very effective leniency policy that will give a "free-pass" to a corporation reporting evidence of wrongdoing and presents all the evidence to the Division. He stressed that never in the history of the Antitrust Division's policy has any corporation been asked for an attorney-client privilege waiver. He stated that the success of the Antitrust Division's policy suggests that the attorney-client waiver requests by other DOJ investigators are simply a matter of convenience, adding that by having the attorney-client waiver language now in the guidelines serves as a "seal of approval" that encourages investigators to ask for a waiver rather than conducting their own investigation.

Mr. Klawiter observed that clients engage lawyers to help them with legal problems and seek advice on how to resolve their problems. With the possibility that investigators may ask for an attorney-client waiver, he concluded, clients may be hesitant to engage lawyers to solve their legal problems. He added that clients are already asking attorneys not to commit anything to paper and not to speak to anyone about the client's issues for fear of the information being given to prosecutors as a result of a waiver request.

Statement of Mr. Klawiter, appearing on behalf of the American Bar Association:

Mr. Chairman and Members of the Commission:

My name is Donald C. Klawiter. I have been asked by Michael S. Greco, President of the American Bar Association (ABA), to present the ABA's views concerning recent changes to the Federal Sentencing Guidelines that we believe weaken both the attorney-client privilege and the work product doctrine. In particular, I have been asked to express the ABA's support for the Commission's decision to make it a policy priority this year to review, and possibly amend, the Commentary in Chapter Eight (Organizations) of the Guidelines regarding waiver of the attorney-client privilege and work product protections.<sup>1</sup> The ABA has suggested several specific changes to the Commentary that are set out at the end of my statement.

It is my privilege to serve as the Chair of the Antitrust Law Section of the American Bar Association, a section consisting of approximately 10,000 antitrust lawyers, professors and other professionals throughout the country. In that capacity, I have been authorized to express the

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<sup>1</sup> See the United States Sentencing Commission's Notice of Final Priorities for the 2005-2006 amendment cycle, policy priority number (6), 70 Fed. Reg. 51398 (August 30, 2005).

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position of the American Bar Association, and its more than 400,000 members, on the important issue of privilege waiver. We welcome the opportunity to work with you and your staff to improve the law and serve the interests of the public.

On August 15, 2005, the ABA filed a formal comment letter<sup>2</sup> with the Commission in response to its Notice of Proposed Priorities for the amendment cycle ending May 1, 2006.<sup>3</sup> In that comment letter, the ABA urged the Commission to retain its tentative policy priority number (5), described in the Notice as a “review, and possible amendment, of commentary in Chapter Eight (Organizations) regarding waiver of the attorney-client privilege and work product protections.” The ABA also urged the Commission, at the end of its review, to amend the applicable language in the Commentary to clarify that waiver of attorney-client privilege and work product protections should not be a factor in determining whether a sentencing reduction is warranted for cooperation with the government. The ABA is very pleased that the Commission has decided to retain the privilege waiver issue on its final list of priorities for the upcoming amendment cycle, and we continue to urge the Commission to adopt our suggested amendment.

The ABA has long supported the use of the Sentencing Guidelines as an important part of our criminal justice system. In particular, our established ABA policy, which is reflected in the Criminal Justice Standards on Sentencing (3d ed.), supports an individualized sentencing system that guides, yet encourages, judicial discretion while advancing the goals of parity, certainty and proportionality in sentencing. Such a system need not, and should not, inhibit judges’ ability to exercise their informed discretion in particular cases to ensure satisfaction of these goals.

In February 2005, the ABA House of Delegates met and reexamined the overall Sentencing Guidelines system in light of the recent Supreme Court decision in *United States v. Booker* and *United States v. Fanfan*. At the conclusion of that process, the ABA adopted a new policy recommending that Congress take no immediate legislative action regarding the overall Sentencing Guidelines system, and that it not rush to any judgments regarding the new advisory system until it is able to ascertain that broad legislation is both necessary and likely to be beneficial.

Although the ABA opposes broad changes to the Federal Sentencing Guidelines at the present time, we have serious concerns regarding several specific amendments to the Sentencing Guidelines that took effect on November 1, 2004. These amendments, which the Commission submitted to Congress on April 30, 2004, apply to that section of the Sentencing Guidelines relating to “organizations”—a broad term that includes corporations, partnerships, unions, non-profit organizations, governments, and other entities. While the ABA has serious concerns regarding several of these recent amendments<sup>4</sup>, our greatest concern involves a change in the

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<sup>2</sup> The ABA’s August 15 comment letter to the Commission is available at: <http://www.abanet.org/buslaw/attorneyclient/materials/049/049.pdf>.

<sup>3</sup> 70 Fed. Reg. 37145 (June 28, 2005).

<sup>4</sup> In August 2004, the ABA House of Delegates adopted a resolution supporting five specific changes to the then-proposed amendments to the Federal Sentencing Guidelines for Organizations, including amending the Commentary to Section 8C2.5 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.” Subsequently, on August 9, 2005, the ABA adopted a resolution, sponsored by the ABA Task Force on Attorney-Client Privilege, supporting the preservation of the attorney-client privilege and work product doctrine, opposing



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Commentary to Section 8C2.5 that authorizes and encourages the government to require entities to waive their attorney-client and work product protections in order to show “thorough” cooperation with the government and thereby qualify for a reduction in the culpability score—and a more lenient sentence—under the Sentencing Guidelines (the “privilege waiver amendment”). Prior to the change, the Commentary was silent on the issue and contained no suggestion that such a waiver would ever be required.

Since the adoption of the privilege waiver amendment to the Sentencing Guidelines, the ABA—working with a large and diverse group of business and legal organizations from across the political spectrum—has evaluated the substantive and practical impact that ever-increasing demands for privilege waiver have had on the business and legal communities. For example, the National Association of Criminal Defense Lawyers and the Association of Corporate Counsel each recently conducted surveys<sup>5</sup> of in-house and outside counsel to determine the extent to which attorney-client and work product protections have been eroded in the corporate context. In addition, the American Bar Association’s Task Force on Attorney-Client Privilege is examining various issues involving erosion of attorney-client and work product protections, including the privilege waiver amendment, and has held several public hearings on these subjects.<sup>6</sup> As a result, the ABA has concluded that the new privilege waiver amendment, though undoubtedly well intentioned, will bring about a number of profoundly negative consequences.

First, the ABA believes that as a result of the privilege waiver amendment, companies and other organizations will be required to waive their attorney-client and work product protections on a routine basis. The Commentary to Section 8C2.5 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.” But the exception is likely to swallow the rule. Prosecutors will make routine requests for waivers, and organizations will be forced routinely to grant them, because, among other things, there is no obvious mechanism for challenging the government’s assertion that waiver is “necessary.”

The Justice Department has followed a general policy of requiring companies to waive privileges in many cases as a sign of cooperation since the 1999 “Holder Memorandum” and the 2003 “Thompson Memorandum.” Anecdotal evidence abounds where companies have been asked to turn over internal investigation reports and waive both attorney-client privilege and work product protection in cooperating with the government, even though “on the record” examples, by the very nature of the process, are hard to come by. Companies are reluctant to

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governmental actions that erode these protections, and opposing the routine practice by government officials of seeking the waiver of these protections through the granting or denial of any benefit or advantage. Both ABA resolutions, and the related background reports, are available at <http://www.abanet.org/poladv/acprivilege.htm>.

<sup>5</sup> Executive summaries of these surveys are available online at [www.nacdl.org/public.nsf/Legislation/Overcriminalization002/\\$FILE/AC\\_Survey.pdf](http://www.nacdl.org/public.nsf/Legislation/Overcriminalization002/$FILE/AC_Survey.pdf) and [www.acca.com/Surveys/attyclient.pdf](http://www.acca.com/Surveys/attyclient.pdf), respectively.

<sup>6</sup> Materials relating to the work of the ABA Task Force on Attorney-Client Privilege are available on its website at [www.abanet.org/buslaw/attorneyclient/](http://www.abanet.org/buslaw/attorneyclient/).

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speaking publicly about their experiences for good reason. They deal with the agencies that regulate them on a routine basis, and it is generally in a company's best interest to stay on good terms with those agencies. Companies also guard their public image and are reticent to reveal unnecessarily the existence or details of governmental investigations into their conduct. Where companies *can* come forward with their experiences, the routine nature of the government's practice is clear. For example, we recently learned that some fifty general counsel met with Paul McNulty of the Justice Department regarding abuses of the privilege. The former General Counsel of a now defunct steel company was one of them, and his story follows.

When Bethlehem Steel was still in existence, a disgruntled former employee told authorities that the company was burying toxic waste at one of its sites in Texas. Fifty federal agents arrived at the company with a search warrant and backhoes and started digging up the yard. No buried drums were ever found, but, in the course of the search, the investigators found evidence of garden variety environmental violations that, in most circumstances, likely would have been pursued as civil violations. Perhaps understandably, the Justice Department did not want to drop the matter altogether, and decided to pursue a criminal investigation.

At their very first meeting with the General Counsel, the Justice Department demanded the privileged internal report prepared by outside counsel and sought cooperation from the company in pursuing charges against individual employees. No middle ground alternative was entertained. Firmly believing that no knowing or intentional violation had occurred, the General Counsel declined the request, and the company prepared its defenses. In the end, the Justice Department did not charge a single individual; the company negotiated a plea and paid a fine.

The Bethlehem Steel example demonstrates that the Justice Department prosecutors—operating under an increasingly expansive interpretation of the Holder and Thompson Memoranda—will seek internal investigation reports and privilege waivers even in cases that arguably never should have been prosecuted. Now that the privilege waiver amendment to the Sentencing Guidelines has become effective, there may be no limit on the Justice Department's ability to put pressure on companies to waive their privileges in almost all cases. Our concern is that the Justice Department, as well as other enforcement agencies, will contend that this change in the Commentary to the Guidelines provides Commission and Congressional ratification of the Department's policy of routinely requiring privilege waivers. From a practical standpoint, companies will have no choice but to waive these privileges whenever the government demands it, because the government's threat to label them as "uncooperative" in combating corporate crime would profoundly threaten their public image, stock price, and credit worthiness.

Second, the ABA believes that the privilege waiver amendment seriously weakens the attorney-client privilege between companies and their lawyers, resulting in great harm both to companies and the investing public. Lawyers for companies and other organizations play a key role in helping these entities and their officials to comply with the law and to act in the entity's best interests. To fulfill this role, lawyers must enjoy the trust and confidence of managers, boards and other key personnel of the entity and must be provided with all relevant information necessary to properly represent the entity. By encouraging routine government demands for waiver of attorney-client and work product protections, the amendment discourages personnel within companies and other organizations from consulting—or being completely candid—with

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their lawyers. This, in turn, seriously impedes the lawyers' ability to counsel compliance with the law effectively.

Third, while the privilege waiver amendment was intended in good faith to aid government prosecution of corporate criminals, the ABA believes that its actual effect is to 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, are one of the most effective and efficient tools for detecting and flushing out improper conduct. Indeed, Congress recognized the value of these compliance tools when it enacted the Sarbanes-Oxley Act. Because the effectiveness of these internal investigations depends in large part on the ability of the individuals with knowledge to speak candidly and confidentially with the lawyer conducting the investigation, any uncertainty as to whether attorney-client and work product privileges will be honored makes it more difficult for companies to detect and remedy wrongdoing early or even stop improper conduct before it takes place. Therefore, rather than promoting good compliance practices, the privilege waiver amendment undermines this laudable goal.

Fourth, the ABA believes that the privilege waiver amendment unfairly harms employees. The amendment places the employees of a company or other organization in a very difficult position when their employers ask them to cooperate in an investigation. They can cooperate and run the risk that statements made to the company's or organization's lawyers will be turned over to the government by the entity, or they can decline to cooperate and risk their employment. In the ABA's view, it is fundamentally unfair to force employees to choose between keeping their jobs and preserving their legal rights.

In recent months, many other organizations have expressed similar concerns regarding the privilege waiver amendment to the Sentencing Guidelines. These concerns were formally brought to the Commission's attention on March 3, 2005—and again on August 15, 2005—when an informal coalition of numerous prominent business, legal and public policy organizations<sup>7</sup> submitted joint comment letters urging the Commission to reverse or modify the privilege waiver amendment. The remarkable political and philosophical diversity of that coalition, with members ranging from the U.S. Chamber of Commerce and the National Association of Manufacturers to the American Civil Liberties Union and the National Association of Criminal Defense Lawyers, shows just how widespread these concerns have become in the business, legal and public policy communities.

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The signatories to the March 3, 2005 letter to the Commission were the American Chemistry Council, American Civil Liberties Union, Association of Corporate Counsel, Business Civil Liberties, Inc., Business Roundtable, Frontiers of Freedom, National Association of Manufacturers, U.S. Chamber of Commerce, and Washington Legal Foundation. The ABA also expressed similar concerns to the Commission in its separate letter dated May 17, 2005. The coalition's August 15, 2005 comment letter was signed by the same groups that signed the March 3 letter, as well as the Financial Services Roundtable, National Association of Criminal Defense Lawyers, National Defense Industrial Association and Retail Industry Leaders Association. The coalition's August 15, 2005 comment letter is available online at: <http://www.abanet.org/buslaw/attorneyclient/materials/047/047.pdf>.

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The ABA shares these concerns and believes that the privilege waiver amendment is counterproductive and undermines, rather than enhances, compliance with the law as well as the many other societal benefits that are advanced by the confidential attorney-client relationship. Because of the serious and immediate nature of this harm, we urge the Commission during its 2005-2006 amendment cycle to modify the applicable language in the Commentary to clarify that the waiver of attorney-client privilege and work product protections should not be a factor in determining whether a sentencing reduction under the Guidelines is warranted for cooperation with the government.

To accomplish this, we recommend that the Commission (1) add language to the Commentary clarifying that cooperation only requires the disclosure of “all pertinent non-privileged information known to the organization”, (2) delete the existing Commentary language “unless such waiver is necessary in order to provide timely and thorough disclosure of all pertinent information known to the organization”, and (3) make the other minor wording changes in the Commentary outlined below. If the ABA’s recommendations were adopted, the relevant portion of the Commentary would read as follows<sup>8</sup>:

“12. To qualify for a reduction under subsection (g)(1) or (g)(2), cooperation must be both timely and thorough. To be timely, the cooperation must begin essentially at the same time as the organization is officially notified of a criminal investigation. To be thorough, the cooperation should include the disclosure of all pertinent non-privileged information known by the organization. A prime test of whether the organization has disclosed all pertinent non-privileged information is whether the information is sufficient for law enforcement personnel to identify the nature and extent of the offense and the individual(s) responsible for the criminal conduct. However, the cooperation to be measured is the cooperation of the organization itself, not the cooperation of individuals within the organization. If, because of the lack of cooperation of particular individual(s), neither the organization nor law enforcement personnel are able to identify the culpable individual(s) within the organization despite the organization’s efforts to cooperate fully, the organization may still be given credit for full cooperation. *Waiver of attorney-client privilege and of work product protections is not a factor in determining whether a prerequisite to a reduction in culpability score under subdivisions (1) and (2) of subsection (g) is warranted unless such waiver is necessary in order to provide timely and thorough disclosure of all pertinent information known to the organization.*”

We appreciate the opportunity to appear before the Commission and present our views on the important issue of privilege waiver, and we look forward to working with you and your staff on this matter throughout the current amendment cycle.

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<sup>8</sup> Note: The Commission’s November 1, 2004 amendments on the privilege waiver issue are shown in italics. Our suggested additions are underscored and our suggested deletions are noted by strikethroughs.

**Testimony of Ms. Tina S. Van Dam**

Ms. Van Dam read from her prepared statement:

Thank you for this opportunity to appear before you today on behalf of the memberships of three organizations: the American Chemistry Council, the Association of Corporate Counsel, and the National Association of Manufacturers.

My name is Tina S. Van Dam and I am Senior Counsel for Corporate Governance and Finance for the National Association of Manufacturers. Previously, I served as Corporate Secretary and an officer of a large multinational company, and as a senior member of an in-house legal department with management responsibility for various compliance matters. I wish to advise that I am not here as a representative of any single company or individual member of the groups.

I have been asked to share with you our experience with the impact of the waiver commentary on our organizations' ability to manage compliance and risk assessment. As I'll explain, the commentary has greatly complicated in-house counsel's already difficult job of counseling our clients as to ethics, compliance, governance and litigation in a highly complex and increasingly regulated multi-jurisdictional environment.

You have heard eloquent and well-reasoned statements from my colleagues at the table, both in their testimony here today, and in the letters and previous testimony they and others have offered the Commission on this issue in the past few months and years. I do not seek to replicate remarks you have already heard from us – not because they aren't important and worthy of repetition, but because our time is limited. Moreover, I understand that you have invited us here today to address aspects of this significant and far-reaching issue not already highlighted in past submissions.

In this regard, I would like to focus my comments on the following:

- It has now been a year since the commentary to Section 8C2.5 was amended. So, first, I'll address our organizations' experiences with waiver requests during that time, and how this codification of the Justice Department's waiver policy has facilitated inappropriate or even abusive prosecutorial behavior.

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- Second, I'll talk about how other federal agencies, and even state prosecutors are now starting to request waiver almost routinely. Thus, this provision of the Federal Sentencing Guidelines currently influences charging and settlement decisions in a wide variety of civil and criminal enforcement actions, in a manner far beyond the original intent of assuring consistency of sentencing in federal courts.
- Third, I'll explain how the goals of effective compliance and risk assessment in the Guidelines are hindered by the chilling effect of potential future waivers of attorney-client privilege.
- Finally, for these and other reasons, I will respectfully request the Commission to amend the waiver provisions of Section 8C2.5's commentary, consistent with the requests of the various organizations and individuals before you today, to provide that waiver should not be taken into consideration in assessing cooperation.

In the recent discussions of privilege waivers, we have heard a refrain from the Department of Justice, as well as other governmental enforcement personnel, that our concerns were somewhat overblown and lacked quantified supportive data. DOJ has insisted that privilege waivers were not being sought on a regular or frequent basis, and indeed, were used so sparingly that only a handful of such requests were identified by the 35 U.S. Attorneys who responded to the Ad Hoc Advisory Group's survey in 2002, before the Thompson Memorandum or amendments to the Sentencing Guidelines were in effect.

Therefore, the Association of Corporate Counsel felt it useful to poll its members in an effort to determine whether privilege waivers were in fact becoming more common. For a three-week period this spring, about six months after the new waiver commentary became effective, we surveyed about 3,000 randomly selected senior in-house counsel on this issue. Responses were received from 363 corporate counsel.

The National Association of Criminal Defense Lawyers at the same time queried their membership of outside counsel members from the white collar bar with similar questions and published results from 365 responding members. The results of both surveys were remarkably similar and varied dramatically from DOJ's reported results. Here are the major findings from the two surveys:<sup>1</sup>

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<sup>1</sup> Complete Executive Summaries of both surveys are online at <http://www.acca.com/Surveys/attyclient.pdf> and [http://www.acca.com/Surveys/attyclient\\_nacdl.pdf](http://www.acca.com/Surveys/attyclient_nacdl.pdf).

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- **Erosion of privilege:** Approximately one-third of the in-house counsel respondents reported that they had personally experienced an erosion in the corporate client's privilege, indicating a growing problem for corporate clients who wish to exercise their right to confidential legal counsel. Correspondingly, erosion in the protections offered by privilege and work product doctrines was experienced by approximately 40% of outside counsel respondents in the companion survey.
- **Reliance on privilege:** Lawyers believe that their clients are aware of and rely upon privilege in discussions with counsel (93% for senior-level employees; 68% for mid- and lower-tier employees).
- **Absent privilege, clients will be less candid:** If privilege did not offer protections, lawyers believe there will be a "chill" in the flow or candor of information from clients (95%).
- **Privilege facilitates delivery of legal services:** Lawyers believe that the privilege and work-product doctrines serve an important purpose in facilitating their work as company counsel (96%).
- **Privilege enhances the likelihood that clients will proactively seek advice:** Lawyers believe that the existence of the attorney-client privilege enhances the likelihood that company employees will come forward to discuss sensitive or difficult issues regarding the company's ongoing compliance with law (94%).
- **Privilege improves the lawyer's ability to guarantee effective compliance initiatives:** Existence of the privilege improves the lawyer's ability to monitor, enforce, and/or improve company compliance initiatives (97%).

You've received comments from our organizations previously that link our concerns about privilege erosion to our experience that corporate compliance programs are being adversely affected, as noted by survey respondents in a number of the key findings I just listed. Focusing on the first of those findings, the results are that 30% of in-house lawyers and 40% of the outside counsel surveyed had personally experienced an erosion in their clients' privilege rights in the recent past. Thus, reported statements by many corporate law attorneys that the privilege appears to be jeopardized are in fact based on and supported by actual personal experience and are not merely urban legends or other anecdotal.

Respondents expressing such concerns said this is a considerable shift from prior experience. They noted a marked increase in the fear that waiver would be sought or demanded

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in such a manner that the client company would believe it had no choice other than to comply – to do otherwise would only reinforce the perceived lack of appropriately thorough cooperation. The adverse consequences and fallout from the prosecutor, the press and the securities markets would simply be too great. For many companies, this is a coercive situation with no reasonable alternative courses of action.

In analyzing this finding, the Association of Corporate Counsel tried to determine the reasons that prosecutors were now apparently more willing to abrogate privilege than in the last few years. Even though governmental authorities may be prosecuting more companies than they did pre-Enron, this does not by itself explain the reported change of prosecutorial practices. Rather, the data indicate that a primary driver for the tremendous increase in government's waiver demands is a belief that waiver "requests" are not only allowable (since no one seems able to succeed in resisting them), but are in fact legitimized by the commentary to Section 8C2.5. Further, from a prosecutor's standpoint, waiver of privilege by a target company, while not required, can obviously significantly reduce the prosecutor's investigatory workload.

Mary Beth Buchanan, known and respected for her work with this Commission and as one of DOJ's senior policy lawyers, authored a law review article in which she asserts that the DOJ's Thompson Memorandum is correct in advancing privilege waiver as an appropriate request by prosecutors of companies that wish to be considered "cooperative." Dismissing many of the concerns over privilege waiver, she declares that the Thompson Memo's waiver tactics are not only consistent with, but "based squarely on" the new commentary on Section 8C2.5.<sup>2</sup> In fact, she goes on to say that anyone challenging the Thompson Memo is also challenging the Sentencing Guidelines themselves:

It is important to note that those who argue that the Department's approach discourages cooperation also disagree with the very approach and theoretical underpinnings of the Organizational Sentencing Guidelines. Originally promulgated in 1991, the Guidelines seek to create incentives, through a stratification of lesser and greater punishments for corporations to ferret out the facts. Simply put, the Justice Department's policy is entirely consistent with the "carrot and stick" approach taken by the Sentencing Commission. ... The incentives created by this approach, as with the Organizational Sentencing Guidelines themselves, are for the corporation to be proactive in detecting crime within its ranks, *cooperating with the Department's investigation*, and taking steps to prevent future criminal conduct. (*emphasis added*)

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<sup>2</sup> Mary Beth Buchanan, "Organizational Sentencing: Federal Guidelines and the Benefits of Programs to Prevent and Detect Violations of Law," 39 WAKE FOREST L. REV. 587 (Fall 2004).



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Clearly, we disagree, as we feel that the Thompson Memorandum and the new waiver commentary, undermine the effective corporate compliance programs that the Guidelines – and this Commission – wisely seek to encourage.

The Securities and Exchange Commission has also been influenced by the Guidelines' language on waiver requests. In a December 2004 speech Stephen M. Cutler, then Director of the SEC's Division of Enforcement, notes the similarity of approach between the SEC in its Seaboard Report requirements, the DOJ in the Thompson Memorandum, and the Sentencing Commission in its recently amended Organizational Guidelines.<sup>3</sup>

Moreover, in defending his office's movement toward more aggressive privilege waiver requests, New York State Attorney General Eliot Spitzer told the Association of Corporate Counsel's Board of Directors at their January meeting, that since the Sentencing Guidelines Commentary proposals validated federal prosecutors' waiver practices, he would be in effect be foolish not to ask for waiver in any major corporate case his office prosecutes. He said his approach is that if waivers are appropriate for the DOJ to demand in making charging and sentencing decisions, why shouldn't his staff take full advantage of the approach?

While the Sentencing Guidelines commentary may not be solely responsible for the large increase in privilege waiver requests, it has become the equivalent of a "Good Housekeeping Seal of Approval" for regulators and prosecutors who might previously have been hesitant to ask companies to waive their long-standing rights to confidential counsel.

Chairman Hinojosa and members of the Commission, at the heart of the issues we are discussing today is the desire by all of us for corporations to ensure effective and comprehensive ethics and compliance programs. Essential to that goal is the need for effective risk assessment, anonymous whistle-blower processes with guarantees that retaliation will not occur, oversight by independent boards of directors, and good internal investigatory techniques. The most common comment I have received from fellow attorneys is the critical role of attorney-client privilege for each of those elements.

Candid dialogue with employees depends upon the ability to rely upon the privilege if necessary. We have directly experienced the result that, without the predictability that privilege will be maintained, both in-house and outside counsel do not provide written reports for management and directors with the same candor and advice. Management's risk assessments – which, by their very nature speculate on areas of relative weakness from a control perspective – are not nearly as robust where there is apprehension that if something later goes wrong the documents may be produced to government investigators and private plaintiffs.

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<sup>3</sup> Stephen Cutler, Speech given in December of 2004 and available on the SEC's website at <http://www.sec.gov/news/speech/spch120304smc.htm>).

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For the majority of companies whose legal compliance policy is zero tolerance of violations, the day-to-day work of running a compliance program depends upon fostering trust in the ranks of employees. One cannot underestimate the importance of privileged and confidential communications in those endeavors.

In summary, members of the American Chemistry Council, the Association of Corporate Counsel and the National Association of Manufacturers believe that the Sentencing Guidelines' Commentary language on waiver has had an immediate, significant and negative impact on the ability of our corporate clients to reasonably expect that the privilege of otherwise protected attorney-client communications will be maintained if there is an investigation of alleged wrongdoing. While I am sure this was not the Commission's intent, the Commentary to Section 8C2.5 has become the official endorsement of the concept that the client's right to privilege is in the hands of the prosecutor, who has the authority to demand its waiver.

Accordingly, and consistent with the testimony of our fellow coalition members, we request that the Commission revise the Commentary to Section 8C2.5 to state affirmatively that waiver is not to be taken into account in determining extent of cooperation. This step will help restore the privilege to its time-honored and rightful position of respect – respect which is embodied in the long tradition of our courts' rules of civil procedure. Exceptions should only be granted by impartial judges who are able to hear both sides of the argument and then make a decision based on the law and the desire for justice within an adversarial legal system.

Thank you for your time and attention today.

### **Testimony of Mr. Henry W. Asbill**

In addition to submitting a written statement, which is given below, Mr. Asbill expanded on several points given in his written submission.

Mr. Asbill thanked the Chair and voiced his agreement with the statements made by his co-panelists. To help illustrate his concerns of the effects the attorney-client waiver has on the individuals he represents, Mr. Asbill referred to his personal involvement in a case where the attorney-client privilege was at issue. (The citation for the case is given at Footnote 9 of Mr. Asbill's written statement.)

The case involved two business partners, both corporations, one a major corporation, where a controversy occurred after one of the partner's stock declined in value, he explained. The major corporation launched an internal investigation to determine its liability and to identify the potential risk of adverse shareholder actions. As an aside, but critical for the Commissioners to understand, Mr. Asbill noted that most internal corporate investigations are conducted on an emergence basis. In the current case, he continued, the major corporation hired outside counsel of an especially sophisticated type. This was atypical, he explained, as most corporations do not have the resources to hire counsel experienced in criminal law matters.

At the outset of the investigation, corporate and outside counsel identified and met with employees who were the most knowledgeable with the corporation's dealings with the business partner. In light of having sophisticated counsel, Mr. Asbill suggested that the investigation should have included the corporate Miranda warnings elaborated on in the *Upjohn* case. But, this was not the case, he stated, adding that no individual client he has represented has ever received such a warning. Instead, his client was informed by the lawyers that they "represent the company" and that they "can represent you, too," but if a "conflict later arises, we will tell you," in order that the individual could hire his own attorney. Mr. Asbill added that the attorneys informed his client that the "corporation holds the privilege," noting that the later statement lacked further elaboration, and that the discussions between the individual and the attorneys was "confidential." Agreeing with these statements, Mr. Asbill stated that at the time his client was under the impression that the corporate attorneys were also his attorneys.

After divulging the information he had to the corporate investigators, the individual was subpoenaed by the SEC. At the deposition with the SEC, the individual was asked to again divulge the information he provided to the corporate counsel. The individual declined to do so, invoking client-attorney privilege, which was concurred with by both corporate counsel and external counsel, who were present at the deposition. Later during the investigation, the DOJ became involved. In an effort to gain a declination of prosecution or a deferment of prosecution,

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the corporation sought to enter into an agreement with the DOJ, Mr. Asbill informed the Commission. In pursuit of this agreement, the corporation waived its attorney-client privilege. This resulted in the employee being subpoenaed by the DOJ. Mr. Asbill sought to quash the subpoena in the context of the attorney-client waiver, which, he added, resulted in a year and a half of litigation at the district court level and a subsequent appeal to the Fourth Circuit.

Mr. Asbill observed that the important point of this matter is not the actual request, but rather the expectation that the request for a waiver will be made by the DOJ. Corporate and external counsel's conduct is dictated by this expectation, he stressed. Mr. Asbill also emphasized his belief that individual employees of the corporation were in an especially disadvantaged position, as they are not aware of the possibility that a waiver may be sought and granted by the corporation. He emphasized that corporate Miranda warnings are never given to employees, stressing that employees are never warned by corporate layers that their statements may be used against them. In this case, the 4<sup>th</sup> Circuit Court of Appeals determined that the phrase "can represent you" did not create a contractual obligation to represent an individual employee. The court went on to say that the phrase "can represent you as long as no conflict appears" was different from the phrase "we do represent you." As a result of what Mr. Asbill characterized as "language parsing," the court concluded that the privilege remained with the corporation and not with the employee. Reading excerpts from the opinion, Mr. Asbill noted that the court warned corporate lawyers that if they did enter into a contractual obligation with an employee, when a conflict arose, the corporate lawyers would have to withdraw representation from both the employee and the corporation and maintain all confidences. The court went on to say that in such an event, the investigating counsel would have been unable to pursue a robust investigation with the necessary candor.

Mr. Asbill concluded his statement by respectfully asked the Commission not to encourage corporate waivers as they lead to a panoply of adverse consequences as described by his fellow panelists. He reminded the Commissioners that the privilege existed in the first place to encourage people with legal problems to seek and get legal advice. Good legal advice cannot be given, he stressed, when the client will not tell the attorney the truth. Unless a client is confident that their remarks will be kept confidential, they may not be truthful. Only the client themselves should be allowed to decide themselves to waive the privileged, he urged. The privilege is especially important in the context of government investigators and regulators who have the resources to do their jobs instead of requiring the client's attorney to provide them with the information, effectively doing the investigators job. Mr. Asbill closed by thanking the Commissioner's for their attention.

The following is Mr. Asbill's written statement to the Sentencing Commission:

Good afternoon. My name is Hank Asbill, and I am a partner in the law firm of Cozen O'Connor. I have practiced criminal defense law for 31 years, and I am currently the co-chair of

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Cozen O'Connor's White Collar Defense and Complex Criminal Defense Practice Group. I have been asked to provide you with the views of the National Association of Criminal Defense Lawyers, a nearly 50-year-old organization of more than 13,000 criminal defense lawyers throughout the country.

I am very pleased to have the opportunity today to address the issue of whether waiver of the attorney-client privilege should be relevant to determining "cooperation" within the meaning of the Organizational Guidelines. As you know, on August 15, 2005, NACDL joined in the written comments of several other business and bar associations that all support the Commission's proposal to re-examine its new "waiver" amendment to the Guidelines. In my comments to you today, I will review some of the reasons that we think that this amendment is extremely harmful to the attorney-client relationship and should be altered or repealed. NACDL also believes, however, that it is worthwhile at this juncture also to review the reasons that we are back here today, in front of the Commission, a scant year after the amendment in question became effective.

First, many of us here today did submit testimony to the Commission during the 2004 amendment cycle; some of us—among us, the business groups who represent the biggest stakeholders in the corporate attorney-client privilege—did not. We believe that this amendment, which strikes at the heart of how highly we value the attorney-client privilege in our adversarial system, must be afforded every opportunity for analysis and debate.

Second, as the Ad Hoc Committee and the Commissioners noted during the 2004 amendment cycle, the very decision to include the waiver of the attorney-client privilege in the Guidelines itself implicates extremely important policy issues. It is NACDL's belief that some of these issues may not have received the attention that they deserved at the time of the original amendment because the Committee and the Commissioners were also considering a large and novel package of Guidelines amendments in response to Sarbanes-Oxley. Just some of the issues that NACDL urges the Commission to consider anew are: that allowing for *any* waiver in meting out sentences will diminish the value of the attorney-client privilege in general; the impact that "codifying" a broad allowance for waiver in the Guidelines has on the current policy of the Department of Justice and the Securities and Exchange Commission<sup>1</sup>; the affect that such

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<sup>1</sup> See Memorandum from Larry D. Thompson, Deputy Attorney General, to Heads of Department Components and United States Attorneys, Principles of Federal Prosecution of Business Organizations (Jan. 20, 2003), *available at* [http://www.usdoj.gov/dag/cftf/corporate\\_guidelines.htm](http://www.usdoj.gov/dag/cftf/corporate_guidelines.htm) (last visited Jun. 6, 2005). This memorandum revised the earlier "Holder Memorandum," although the changes were relatively minor. Memorandum from Eric Holder to All Component Heads and United States Attorneys, Bringing Criminal Charges Against Corporations (Jun. 16, 1999), *available at* <http://www.usdoj.gov/criminal/fraud/policy/Chargingcorps.html> (last visited Jun. 6, 2005).

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a policy has on business organizations' compliance programs; and the affect that such a policy has on individual corporate employees.

Third, more complete data has become available that indicates how aggressively the federal government is now pursuing the waiver of the corporate attorney-client privilege. We are aware that at the time of the 2004 amendment cycle, the Department of Justice had conducted its own study indicating that waiver requests were rarely made—and that, for instance, the office of the United States Attorney for the Southern District of New York had only requested that a corporation waive its attorney-client privilege four times in a 12-month period. Without commenting on whether this was an accurate result at the time, it is the experience of our members that this result would not reflect today's reality. This year, NACDL and the Association of Corporate Counsel conducted a survey of 800 inside and outside counsel.<sup>2</sup> Eighty-five percent of respondents who are outside counsel for corporations and corporate employees said that waiver had been suggested, pushed for, or demanded in a recent case. More than 96 percent of outside corporate counsel reported that an unpredictable and inconsistent corporate privilege would have a chilling affect on the flow and candor of information to corporate counsel. Similarly, more than 96 percent of outside counsel agreed that a weakened privilege hinders a company's ability to enforce and improve its internal compliance systems.

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<sup>2</sup> In March 2005, NACDL emailed this survey (on two separate occasions) to all of its 12,000 members, not all of whom are white-collar defense practitioners. The survey was open for approximately three weeks and 365 outside counsel responded. Results were tabulated as of April 8, 2005.

The survey had two parts: the first part included 21 questions primarily seeking responses in multiple choice or yes/no question format; the second part consisted of 10 open-ended questions seeking text responses to inquiries about investigations, audits, and generally, circumstances in which waiver is requested or demanded. Respondents were given the option of completing both parts or submitting their responses following completion of Part 1. Of the 365 responses received, approximately 13 percent of respondents chose to complete the "essay" questions in Part 2.

At the same time, the Association of Corporate Counsel—who deserve the credit for initiating this survey and authoring the template for it—offered the same survey reworded for a different audience—in-house counsel. Those results can be found at <http://www.acca.com/feature.php?fid=670>.

These surveys involved the largest number of respondents of any survey on attorney-client privilege, including the Department of Justice's survey. However, NACDL would welcome the opportunity to partner with any organization or government entity to obtain more scientific results. In the meantime, NACDL believes that its survey results are the most accurate to date, since data reflects requests for waiver that are formally presented and reported.

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When NACDL’s respondents were asked to provide text answers to questions about waiver, the following information surfaced: An overwhelming number of respondents—approximately 85 percent—reported that DOJ and the SEC frequently require “discussions” of waiver as part of “settlement” negotiations—in other words, in deciding whether to charge a company, accept a plea, or settle civilly. Lawyers reported: (1) that the results of internal investigations are routinely demanded; (2) that individuals are less forthcoming as a result; (3) that indemnification for legal bills and joint defense agreements are a thing of the past; and (4) that the climate is such that waiver is often offered before it is requested—at the cost of individual employees.

Only a uniform, predictable, non-discretionary federal policy that reflects the centuries-old understanding of the role of the attorney-client privilege can reverse these harmful collateral consequences. Currently, the Commentary to Section 8C2.5 of the Guidelines 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 a waiver is necessary in order to provide timely and thorough disclosure of all pertinent information known to the organization” (emphasis added). NACDL agrees with the ABA’s position that this exception swallows the rule. “Prosecutors will make routine requests for waivers, and organizations will be forced routinely to grant them, because, among other things, there is no obvious mechanism for challenging the government’s assertion that waiver is ‘necessary.’”<sup>3</sup> As the Supreme Court observed unequivocally in *United States v. Upjohn*, 449 U.S. 383, 393 (1981), “if the purpose of the attorney-client privilege is to be served, the attorney and client must be able to predict with some degree of certainty whether particular discussions will be protected. An uncertain privilege, or one which purports to be certain but results in widely varying applications by the courts, is little better than no privilege at all.”

More instrumentally, as one respondent to the NACDL survey stated eloquently:

In today’s world, most non-employment issues trigger at least the consideration of outside counsel. . . . [In the course of an investigation], employees need some basic protection in order to feel comfortable and for the corporation to have a right to expect cooperation by the employee. Today’s world [in which the attorney-client privilege is under attack] leaves these employees twisting in the wind. Ultimately, corporations and corporate America will be harmed by this uncertainty and the unnecessary risks being imposed on corporate management. The nation’s best and brightest will eventually stay out of public companies if this trend isn’t halted or even reversed.

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<sup>3</sup> Statement of the American Bar Association Concerning the Proposed Amendment of Commentary in Section 8C2.5 of the Federal Sentencing Guidelines Regarding Waiver of Attorney-Client Privilege, November 15, 2005, at 4.

NACDL recommends that the Commission (1) add language to the Commentary clarifying that cooperation only requires the disclosure of “all pertinent *non-privileged* information known to the organization”; (2) delete the existing Commentary language “unless such waiver is necessary ...”; and (3) make the wording changes in the Commentary that are recommended by the American Bar Association.

Below, we emphasize some of the ways in which the current “waiver climate” jeopardizes employees, in particular.

I. **(The Hobson’s choice an employee must make in deciding whether to talk to lawyers dangerously erodes the adversarial system.** The ramifications for an employee who refuses to talk, on Fifth Amendment grounds or otherwise, to lawyers performing an internal investigation are extraordinarily severe. Increasingly, companies do not hesitate to fire individual employees who refuse to “cooperate.” (This is in keeping with the blunt statement that Timothy Coleman, Counsel to the Deputy Attorney General, made during a panel at the American Bar Association’s White Collar Institute in Henderson, Nevada on March 3, 2005: “Corporate employees have no right not to talk to internal investigators.”) This has been the case recently at both KPMG LLP and American International Group, Inc. (AIG).<sup>4</sup>

In addition, un-insured officers and employees are unlikely to have their defense costs paid if there is even a hint that they are potential targets of the investigation; at the same time many companies will categorically refuse to pay defense costs of employees who are seen as non-cooperating.<sup>5</sup> In fact, the Thompson Memo explicitly *discourages* corporations from advancing defense costs to employees in connection with an investigation and related proceedings.<sup>6</sup> In the view and experience of NACDL’s

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<sup>4</sup> See Laurie P. Cohen, “Prosecutors Tough new Tactics Turn Firms Against Employees,” *Wall Street Journal*, June 4, 2004, at A1; Theo Francis and Ian McDonald, “AIG Fires Two Top Executives As Probe Intensifies,” *Wall Street Journal*, March 22, 2005, at A1.

<sup>5</sup> According to an article in the *Wall Street Journal*, “KPMG ... is refusing to pay the legal costs [of 32 employees who were subjects of a grand jury investigation] unless the partners and employees talk to prosecutors. KPMG believes it is expected to impose such a condition to be regarded by investigators as fully cooperating ... . KPMG also is eschewing another traditional practice: joint defense agreements, in which a business under investigation shares information with employees who are also a focus. ... Going still further, KPMG has agreed to tell prosecutors which documents the employees and partners are requesting to use in their own defense, say lawyers for some of them. Indeed, KPMG is taking the position that it must give copies of these documents to prosecutors at the same time as it provides them to the individuals’ defense attorneys. This gives prosecutors a blueprint to the individuals’ defense strategies, many attorneys complain.” See Cohen, *supra* note 6.

<sup>6</sup> Thompson Memo at 8.



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members, the result is that employees feel compelled to talk, but are understandably terrified at the prospect of full disclosure. This is, in effect, compelled self-incrimination. As one defense lawyer recently wrote, “Essentially, they [employers and government officials] are demanding a waiver of the employee’s Fifth Amendment rights as a condition of continued employment. In an interesting contrast, the Supreme Court has found that the government itself cannot make such a demand on its own employees” (citing *Garrity v. New Jersey*, 385 U.S. 493 (1967)).<sup>7</sup>

In one recent case that may foreshadow a new frontier in criminal prosecution, employees of a company under criminal investigation were charged with fraud and causing false statements to be made *because of false material that they allegedly provided to lawyers conducting an internal investigation, and the privilege was later waived as to the entire investigation*.<sup>8</sup> In short, employees can be criminally sanctioned for refusing to talk to internal investigators when it is clear, in the current climate, that the fruits of such conversations will be turned over to the government, and yet they cannot assert their Fifth Amendment rights without risking termination or financial ruination. We respectfully submit that in such instances, the erosion of the attorney-client privilege has resulted in the emasculation of the adversary system for individual corporate employees.

In fact, a company’s own lawyers have now become so closely identified with the government that, when company lawyers interview employees about nearly any issue—big or small—they usually give what is sadly known as a “corporate Miranda warning.” The company’s lawyer has to tell the employee that the lawyer represents the company, not the employee, and that any statement made by the employee could be turned over to the government. For most regular people, this is extremely confusing, and likely to result in mistaken assumptions about the confidentiality of the conversation. Just this summer, the Fourth Circuit ruled that a lengthy corporate Miranda warning that contained the words “we, the company’s lawyers, *can* represent you,” as opposed to “we

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<sup>7</sup> N. Richard Janis, “Taking the Stand: Deputizing Corporate Counsel As Agents of the Federal Government,” *Washington Lawyer*, March 2005.

<sup>8</sup> See Department of Justice, Press Release, “Former Computer Associates Executives Indicted on Securities Fraud, Obstruction Charges,” Sept. 22, 2004 (In February 2002, Computer Associates retained a law firm to represent it in connection with the government investigations. Shortly after being retained, the company’s law firm met with [CA executives] ... During these meetings, the defendants and others allegedly failed to disclose, falsely denied and concealed the existence of [the allegedly fraudulent accounting practice]. The indictment alleges that [the CA executives] knew, and in fact intended, that the company’s law firm would present these false justifications to the U.S. Attorney’s Office, the SEC and the FBI in an attempt to [cover up the practice].”

do represent you,” was sufficiently clear that the employee should have known that the privilege was his employer’s, and not his own.<sup>9</sup>

**II. (Individuals cannot obtain documents that are necessary to their defense.** At the same time that corporations have been faced with a do-or-die choice regarding waiving their attorney-client privilege, federal enforcement officials have stated in words and in deeds that joint-defense agreements, and the common-interest privilege, are a thing of the past. The Thompson Memo explicitly discourages cooperation between a corporation and its employees.<sup>11</sup> In the experience of our members, this results in a one-way flow of documents and testimony: from the employees, to the corporation, and inevitably to the government.<sup>11</sup> This gives the government a blueprint of an individual’s strategy without allowing the individual the ability to obtain the documents he or she needs to prepare a defense.

**III. (Individuals cannot communicate candidly and effectively with in-house counsel in order to prevent compliance problems.** The results of the Association of Corporate Counsel’s survey of in-house lawyers confirm that senior and mid-level employees rely heavily on the attorney-client privilege in communicating with in-house counsel. Effective compliance systems promote rapid identification and reporting-up of events and circumstances that may give rise to legal liability. It is difficult to persuade officers and line employees alike to be forthcoming and frank about potential problems or misfeasance. The attorney-client privilege insures that all employees are able to provide all the relevant information about a potential problem, before it happens or escalates, to the company’s legal advisors. It prevents non-lawyer personnel from trying to “guess” what a lawyer would advise.<sup>11</sup>

In particular, the Thompson Memorandum places great emphasis on the need for voluntary cooperation by corporations wishing to avoid indictment. Rather than making the effectiveness of a corporation’s compliance program a critical factor in deciding whether to charge a company with a criminal violation, the Memo elevates “voluntary disclosure” as especially important. Regarding corporate compliance, the Memo warns, “The existence of a compliance program is not sufficient, in and of itself, to justify not

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<sup>9</sup> I was involved in this case. *In re Grand Jury Subpoena*, 415 F.3d 333 (4<sup>th</sup> Cir. 2005).

<sup>10</sup> Thompson Memo at 8.

<sup>11</sup> *See, e.g.*, Statement of Robert Morvillo, ABA White Collar Crime Institute, Henderson, Nevada, March 3, 2005 (explaining that even when he drafts joint defense agreements, they provide for document sharing from the employee to the corporation but not vice-versa).

<sup>12</sup> As the trial of former HealthSouth CEO Richard Scrushy and former WorldCom CEO Bernard Ebbers have shown, it is extremely difficult to determine who reported what to whom regarding alleged contemporaneous wrongdoing. *See, e.g.*, Dan Morse, “Fifth Finance Chief Adds To Pressure on Scrushy,” *The Wall Street Journal*, March 22, 2005, at C4.

charging a corporation for criminal conduct undertaken by its officers, directors, employees or agents.”<sup>11</sup> By contrast, the Memo spells out a number of ways that the assertion of the privilege or work-product protection can be viewed as non-cooperation: for example, “overly broad assertions of corporate representation of employees or former employees”; “incomplete or delayed production of records”; failure to promptly disclose illegal conduct known to the corporation.”<sup>11</sup> This emphasis on transparency *at the expense of compliance* disserves the public interest in reducing the incidence of corporate crime.

The emphasis on “transparency” also redounds to the detriment of individual employees who are less likely to make disclosures to prevent violations, and therefore are more likely to face criminal charges in the future. Regardless of whether this is a rational decision in terms of risk, the testimony before this panel unanimously confirms that this is the case. Individuals are more afraid of the *certain* risks of disclosure than of the *uncertain* risks of non-disclosure; to wit, if they do not disclose, they might not get caught. If they do disclose, they will certainly pay for their decision.

- IV. **Employees cannot be candid with outside counsel conducting internal investigations:** NACDL members reported that they believe that 88 percent of senior-level employees rely on the privilege when they are interviewed in the course of an internal investigation—especially when potential criminal behavior is implicated; similarly, they answered that 61 percent of mid-and lower-level employees rely on the privilege. More than 95 percent agreed that the erosion of the privilege has diminished the flow and candor of information from the employees of their clients. One respondent answered bluntly: “Individuals are not willing to be forthcoming in internal investigations, even if they have nothing to hide for fear of waiver of privilege and revelation to the government.” The problem has become so acute that companies are often willing to put waiver on the table before it is requested: a respondent said, “In one instance, an executive demanded that the privilege be waived and the results of a privileged analysis be disclosed to the government even without the demand because he believed that the current climate requires such ‘openness’ in order to be taken seriously in any discussion with the government.”

### Conclusion

Only an attorney-client privilege that is consistently respected can serve all of the instrumental and prudential goals that are inherent in our adversarial system of criminal justice.

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<sup>13</sup> Thompson Memo at 9-10.

<sup>11</sup> *Id.* at 7-8.

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In addition, a privilege whose validity relies on case-by-case determinations of individual prosecutors undermines the very goals of good corporate governance that the Guidelines seek to protect. For all of the reasons set forth above, the Organizational Guidelines should be amended to reflect the fact that the privilege is not a luxury afforded by the government, but a critical protection that can only be breached in the most exigent of circumstances—circumstances that are determined by well-recognized, court-made exceptions, not prosecutors alone.