Statement of
The American Chemistry Council,
The Association of Corporate Counsel, and
The National Association of Manufacturers

Before the United States Sentencing Commission

November 15, 2005, Washington, DC

Regarding the Need to Amend the Commentary to Section 8C2.5
Regarding Waiver of the Attorney-Client Privilege and the Work Product Doctrine

Presented by Tina S. Van Dam

Honorable Commissioners and Staff:

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.

- 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:[1]

- **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).

[1] 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.

- **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 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.[2] 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)*

[2] 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).

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.[3]

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

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

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.

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 <u>not</u> 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.