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RE: **Association of Corporate Counsel Oral Testimony on proposed FRE 502:**
Hearings in New York City, March 16, 2007

Thank you for the opportunity to present comments to you today. I know that your time is very valuable and that you've likely heard a lot of similar themes repeated today given that scores of folks have already appeared before you. I'll try to add something new to the mix so as not to waste your time.

My name is Susan Hackett, and I am the Senior Vice President and General Counsel of the Association of Corporate Counsel or ACC. ACC is a bar association for in-house counsel, with over 21,000 members. While the predominance of our members work in the United States, we have members now in over 60 countries. ACC members work in over 9,000 different companies, small and large, domestic and multinational, public and private, and in every conceivable industry and practice specialty. ACC members are not only responsible for the execution of legal affairs and compliance within their client entities, but also for the management of the relationship those companies have with their outside counsel. If you'd like to know how attorney-client privilege issues are perceived by and impacting corporate practitioners and their clients, listen in.

ACC submitted written, formal testimony to the Committee dated January 9, 2007 (we also submitted comments in your previous round of hearings in June of 2006).[1] My testimony today is intended to compliment these submissions and not repeat them – but I certainly don't mean to suggest by not repeating them that they are superceded or that I don't wish you to consider them. In the short time I have with you here today, I had hoped to delve a little deeper into the practical impact and the human elements at play that can be harder to capture on paper, and that have led us to the position we've taken, for whatever that may be worth to your process.

As you probably know. ACC supports 502(a), (b), (d), and (e). We object to 502(c).

There are some at the table and many in the larger bar community who are surprised (and even perturbed) that the in-house bar association and the members it represents wouldn't be four-square behind the selective waiver protections offered by 502(c); they don't understand why we wouldn't want to guarantee our members and their clients the comfort of enforceable confidentiality agreements that would preclude further disclosure of company confidences in subsequent third party litigation. Indeed, I keep asking within my membership for perspectives from this allegedly large segment of the in-house bar I keep hearing about … somewhere they are supposedly large groups of in-house lawyers who want 502(c) to pass, but I've yet to find them. There are some corporate lawyers and a few law departments that support selective waiver for their own reasons, but while I respect their views, they do not constitute anything close to a critical mass of the in-house bar. There are also some white collar defense lawyers, albeit not a majority of them, who support the enforceability of

[1] ACC's comments online: http://www.acc.com/public/policy/attyclient/accfre502comments.pdf.

selective waivers because they've made the negotiation and papering of them their practice specialty.

So certainly there is a sentiment that enforceable confidentiality agreements are preferable to unenforceable ones, but not at the price of overarching concerns about the unabated erosion of the company's ability to protect its attorney-client confidences from government disclosure. So let me try to explain the position we've taken and why our members and leaders have repeatedly confirmed the perspective we've adopted and conveyed to you in our written comments.

ACC was founded in 1982, and I've been at the association since 1989. We've been focused on corporate compliance and preventive law issues, and on improving and protecting in-house practice since our inception; for us, the focus on and interest in corporate counsel's gatekeeping responsibilities and the goal of improving corporate responsibility and ethical conduct is not a new fashion, a passing vogue, or an unfamiliar concept that we're trying to get our hands around. Our members may not always be able to control or prevent problems from arising, but I can't even begin to tell you how much worse the corporate compliance landscape and record would be if not for the legions of in-house lawyers who have labored with singular vision to ensure companies' legal health and stronger internal compliance cultures.

As someone who's been around thousands of corporate counsel and their public and private conversations about the ins and outs of their daily practices for approaching two decades, I can certify to you that: **first**, corporate counsel have always known that their client is the entity and not the company's executives. But **second**, they're also faced with the practical reality that in order to act, the company operates through

boards, executives, managers and employees who embody the entity; so long as all of these folks are behaving properly and following authorized and legal directions, the counseling relationship lawyers have with the entity is properly personified by those employees who are acting as the client. And therefore, **third**, that without the trust and cooperation of corporate leaders who pro-actively call upon and integrate lawyers into the daily function of the company, without the faith of the line employee who calls the in-house counsel because he's seen something that just doesn't smell right happening in his division and wants to report it to someone he trusts, in-house counsel could not do their jobs and the company as an entity would not be well served.

The attorney-client privilege is key to producing a relationship of trust and comfort between corporate lawyers and the board, management and company employees they counsel on a daily basis: it reinforces individual and team decisions to call upon counselors who they know aren't agents of the government, but who can and should be asked to join meetings to give straight-up confidential guidance so that even the most sensitive topics can be discussed in an open fashion, without recrimination, and so that good decisions can be made accordingly.

In-house lawyers are uniquely positioned, and we want them to be functionally responsible, for providing the guidance that only those responsible for the company's compliance and maintenance of the company's reputational standing can offer. Employees don't wish to worry that hard questions asked and entrepreneurial ideas discussed will become future evidence that the company is corrupt for even considering a project or for discussion its ramifications. Executives don't wish to worry that advice solicited about compliance programs they're looking into will later

become a blueprint of evidence of the company's insufficiencies if failures occur – some of which in large organizations are unfortunately inevitable when thousands of people are responsible for getting it right every day.

But times have changed. In the post-Enron world, the in-house counsel's job hasn't changed, nor has the responsibility she carries. But many people inside companies, including in-house counsel themselves, now question the wisdom of placing lawyers in a fully integrated fashion in the company's daily functions. Why? These questions are a direct result of the increasing scrutiny applied to assessing and leveraging corporate lawyers' roles and responsibilities as gatekeepers within their company and demanding access to the privileged information and conversations to which they've been privy.

All interesting you say, but what does this have to do with our 502 hearing? What I'm struggling to convey is that if this were 1982 when ACC was founded, or even 2002 shortly after outrageous frauds were uncovered at some of America's most visible companies, I'd likely be before this group begging you to pass 502(c) more quickly.

The last five years have been catastrophic for the privileges the profession – including prosecutors and courts – have respected for hundreds of years without question. ACC members and their clients now work in an environment not only colored by the difficulties of assuring against unreasonable reputational risks and avoiding illegalities, but also in one marred by a very new and different prosecutorial culture that didn't exist prior to 2002.

When the DOJ was asked to respond to the administration's correct decision to crack down on corporate crime in the wake of major failures at companies such as Enron, WorldCom and others, they took the right goal and set about to accomplish it with the wrong means. They took the DOJ's 1999 Holder Memo – which ACC and a few others commented upon when it was penned, but which was a largely discretionary policy guideline at that time -- and re-fashioned it into a mandatory checklist that prosecutors in the field were instructed to use to assess corporate cooperation. Some prosecutors took the 2003 issuance of the Thompson Memo, considered its many factors, and in applying them, didn't feel any need to corrupt any of underlying principles supporting a fair and impartial playing field; others reading the Thompson Memo decided that it gave US Attorneys license to change the way the field offices conducted their business, allowing prosecutors (and not the company or an impartial court) to decide when and how a company might exert its guaranteed rights under long-established and respected court doctrines protecting client confidences and lawyer thought processes.

If you've read our written submissions and followed the work of our coalition of business, bar, and civil rights organizations to address this practical problem, you know the rest of my story: That the result of the Thompson Memo, followed by the SEC's Seaboard Report, is the sanctioning of an environment of coercive enforcement and prosecutorial conduct that now sets the tone and practice in many regional offices of the DOJ and amongst many SEC enforcement officials. And that the work of ACC and its coalition partners is to stand up to such abusive practices and demand they stop.

So when my members read about 502(c) and when they consider how it might work in a world where it's assumed that participating companies "voluntarily" waive to the government, they get pretty mad. For in their day-to-day world for the last five years, "voluntary waiver" is not a concept in play; there's nothing voluntary about a process in which a loaded gun is placed to the company's head, held by a prosecutor or enforcement officials whose satisfaction with the company's "cooperation" will be determined by their satisfaction with the company's willingness to disclose everything it's got, regardless of what is actually needed in order to go after wrongdoers.

The McNulty Memo is not going to change prosecutors' perception that the company must be "hiding" something behind the privilege if it hasn't provided the fullest disclosure possible. We've already started hearing from members and outside counsel that prosecutors post-McNulty continue to suggest to companies that anything less than privilege waiver is likely going to be insufficient, and that the company will be punished if it forces the prosecutor to go up the ladder to get a McNulty-required permission to request a formal privilege waiver. We have solid examples already of prosecutors telling companies with whom they're discussing the need for "voluntary wavier" that they have no intention of papering the waiver process and indeed, don't really need to.

So there we have it. Imagine how much worse the conversation gets for a company post-passage of 502(c): the company's provided the prosecutor with everything she needs to conduct her case, but wishes to except its attorney-client or work product protected documents. Now the prosecutor says, not only "so what is it that you have got that you need to hide?" but also, "if there's anything sensitive in there, no worries, the government's got you covered. Why, we'll help protect you with a fully

enforceable selective waiver confidentiality agreement. Everything you offer up will just be between us chickens. I can assure you there won't be any leaks. Whatever could you possibly wish to protect that doesn't fall under the crime-fraud exceptions to privilege, if we're willing to protect you from disclosure to the rest of the world?" The answer is there are lots of reasons why a company wouldn't want to offer up disclosure of attorney-client confidences to the government: from concerns about chilling employee communications, to issues of concerns about the presumably discoverable log of waived material that the government will now keep in conformance with the McNulty Memo, to concerns about subject matter waivers and discovery of material unrelated to the underlying investigation.

Bottom line: ACC members don't want to talk selective waiver until the DOJ, SEC and other federal agencies get out of the business of stacking the charging process in favor of supporting their coerced waiver of corporate attorney-client privileges. The attorney-client privilege is the company's right, not the prosecutor's tool to use as a bargaining chip. In the post-Enron era, when it is impossible for a company to make anything approaching a "voluntary" decision to waive or not to the government, 502(c) will not be capable of operating as I think you all intended it would: as a tool that a company could choose to "trigger" when it wished to help the government get to a faster and more efficient resolution of a corporate failure and needed to provide privileged information to facilitate that end that it wished to exempt from uses against the company by others in the future.

Corporate lawyers cannot competently advise their clients to protest privilege waiver coercion, especially now under the McNulty Memo, for fear of reprisal for challenging a prosecutor who holds the company's fate in his hands. They also can't afford to be

labeled as "uncooperative" because they know that charges filed against them, or even statements made to the media about their unwillingness to "come clean" during an investigation process, will halve the value of the company's stock in 20 minutes on the big boards. Their reputations cannot be so easily restored when they are quietly acquitted or an investigation closes with a decision not to prosecute that's reported 3 years later on page 13 of the business section. They can't afford to be involved in a protracted and ugly battle over their "lack of disclosure" or their "unwillingness to cooperate" because they know it will irreversibly and negatively impact their ongoing relationships with market analysts, institutional investors, financial backers, insurers, auditors, customers and employees.

I've heard hundreds and hundreds of in-house lawyers say it: their decision to waive, whether in response to a formal McNulty Memo papered demand, or the sardonic sideways look of the prosecutor at the first meeting to discuss charges, is anything but voluntary. It's mandatory. And this practice must be stopped. **Our problem with the passage of FRE 502(c) is NOT that it is not well-intentioned and NOT that is it not needed by many companies who've been painted into a corner by prosecutors; our problem is that 502(c) will not operate as a brake to stop abusive prosecutorial and enforcement practices; it will operate as a gas pedal to facilitate more of them.**

So what do we want? Corporate counsel and their clients want the ability to assert their rights to confidential counsel against everyone, including most especially the government, without repercussion for that assertion. They would like to return to a climate in which they can truly make a decision about waiving their privileges free of government coercion. They would be happy to have an impartial arbiter of the facts decide if for some reason DOJ or SEC wants to challenge their assertion of privileges.

Corporate counsel aren't asking to change the rules; they're asking you, and the federal bench, and now the US Congress, to enforce the existing rules on privilege so that their legitimate attorney-client confidences can be protected, most especially from the government.

There are many good folks at DOJ and the SEC and other offices of government who have never abused the privilege rights of corporate defendants or targets. And there are many in the field who abuse these fundamental client rights all the time in the name of assuring corporate responsibility and transparency. For those prosecutors who think that the corporate attorney-client privilege operates primarily to cloak the fraud of corrupt executives, undermining corporate transparency, there's little I can do to convince them otherwise; there's even less that the McNulty Memo will do to change their behaviors.

But if you believe, as I do, that there is a legitimate public policy purpose behind supporting corporate attorney-client privilege, and that -- rather than frustrating transparency – a strong attorney-client privilege helps companies be more compliant and enables them to establish the infrastructure to report all the facts necessary to offer transparency in their operations, then I hope that you will join me in focusing your attention first on the underlying problem of prosecutorial practices which undermine the ability of a company to assert its guaranteed rights to confidential counsel.

In conclusion, I thank you for your time and indulgence, as well as your consideration of these issues. I wish I had a crystal ball so that I could tell you if the Specter Bill – which we support and which would prohibit the prosecutorial abuses we're concerned about here – will pass. Because if I could foresee the passage of the Specter Bill before

the implementation of these rules, I'd be here talking about waving pom poms (instead of talking about waiving my members' client's rights!) and cheering you on toward a speedier passage of 502(c)'s reforms. But ACC has no other choice than to address the issues in the order that they're presented, and thus, 502(c) must be declined until the current culture of waiver is addressed by something far more powerful than Mr. McNulty's assurances that prosecutors will be very judicious in making privilege waiver demands that they have no right to make in the first place.

ACC commends you for your work on this issue, including your much-appreciated efforts to try to address a problem that is a huge concern for the corporate in-house community. Together, we share a common interest and a mutual desire to fix the privilege waiver problems plaguing companies, but suffer from a case of terribly bad timing, and from the lingering effects of prosecutorial and enforcement practices that prevent us from engaging in a meaningful conversation about truly voluntary waiver and the resulting opportunities for selective waiver protections.