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February 13, 2006

The Honorable Alberto Gonzales
Attorney General
U.S. Department of Justice
Robert F. Kennedy Building
950 Pennsylvania Avenue, N.W.
Washington, DC 20530

By Hand

Re: Concerns of the Association of Corporate Counsel (ACC) on the erosion of attorney-client privilege and work product protections in the corporate legal context

Dear Attorney General Gonzales:

On behalf of the Association of Corporate Counsel (“ACC”), thank you for the opportunity to provide input from the business community’s lawyers regarding the U.S. Department of Justice’s policy regarding waiver of the attorney-client and work product protections in the corporate context. As you know, ACC is the in-house bar association, serving over 19,300 individual members who work as in-house counsel in over 8,000 public, private, and not-for-profit organizations. Our officers (who send their regrets that they could not join us today), board of directors, and general members from across the country (and increasingly from around the world) appreciate the invitation to air our concerns with you today.

Concerns of the Business Community Regarding Attorney-Client and Work Product Protections

As you know, attorney-client privilege and the work product doctrine are fundamental protections in the U.S. legal system that foster corporate compliance by encouraging employees and corporate leaders alike to communicate candidly with the company’s counsel. Unfortunately, our members tell us of increasing concerns that their clients’ rights to privileged meetings with counsel are under attack in a number of ways:

1. when prosecutors (at the federal and state level) begin investigations into allegations of wrongdoing and suggest (demand or infer) that privilege waiver is necessary to any company that wishes to engage in dialogue or influence settlement discussions, charging decisions, or the prosecutors’ designation of the company as cooperative.
2. when regulators from the SEC, but also other federal and state level agencies, engage in similar kinds of co-opting behaviors in order to secure access to communications protected by the attorney-client privilege or lawyer work product.

3. when auditors, hearing the sharper scrutiny mandates present in the post-Andersen world, are no longer satisfied when any stone is left unturned, and refuse to certify a company's books or audit unless privilege has been waived and all attorney-client confidences divulged.

4. when third-party plaintiffs demand access to once-privileged records, which – because of these forced waivers – are now open to public scrutiny.

Summary of Key Revisions to the Thompson Memorandum

ACC and a number of its partner associations in the business and legal community would like to offer you our input on how we would propose that the Department of Justice could help us reverse the trend of privilege erosion within their spheres of influence.

ACC would like to see revisions to key sections of the Thompson Memorandum. We feel that the time has come for us all to sit at the table as parties interested in ensuring that our justice system works well for all participants: we know that we both have constructive thoughts on concrete ways that the Justice Department could work with the business community to address these concerns in a mutually beneficial way. And we believe that your offices' outreach to the regional field offices is a part of that process and an important key to any solution we might craft.

Because we wish to encourage you to focus on the larger areas of common ground that we must find first, rather than starting with a re-draft of the specifics that we'd like to see changed (and that will likely engender a more argumentative response), we're only offering a summary of our general direction, below, to see if we can come to some general agreements in theory before we start looking at the technicalities and the words.

Indeed, ACC, the ABA's Task Force on Attorney-Client Privilege, and a number of our coalition partners have in mind specific language suggestions that we would be pleased to present to you and your legal / policy team at the time and with the persons you designate as you deem appropriate. After you've had time to consider our general concerns, we would like to follow up with the appropriate leaders to arrange a meeting to further discuss our ideas in specific: perhaps in a few weeks (perhaps once Mr. McNulty is confirmed and seated?).

Here is a summary of the revisions ACC proposes for the Thompson Memorandum; they are consistent with the ABA proposals and are supported by the US Chamber. We believe that other business groups will sign on to support these requests as well:

1. Delete the waiver requirement for corporate leniency. We believe that prosecutors should be barred from requesting any waiver of attorney-client or work product protections and from "consider[ing] whether a corporation has waived its attorney-client and work product protections in assessing that corporation's cooperation for any purpose, including in the course of conducting an investigation, determining whether to bring charges, or negotiating plea agreements." Consistent with this approach, we are suggesting that references to production of information subject to attorney-client or work product protections should be eliminated or limited to the production of information not subject to these protections. These proposed revisions directly address the policy issue of greatest concern to the business community.
2. Differentiate isolated cases from a broad pattern of misconduct. These proposed revisions acknowledge the reality that even law-abiding corporate citizens occasionally have rogue

employees that engage in misconduct. Conclusions about the culture, compliance programs, or even supervision of employees should be based upon a corporation's general patterns and practices, and should not be extrapolated from an isolated incident.

3. Identify practical limitations on corporate cooperation regarding individual employees. Although the Department's expectation of assistance from a corporation in targeting culpable employees and agents is appropriate in general, there are practical limitations that corporations want the DOJ to acknowledge. These include provisions addressing the recognition that companies may be bound by state indemnification laws to pay the legal fees of certain employees until they have been proven guilty, and that employees have a variety of individual rights that company's must respect, as well.

We appreciate your consideration of our concerns regarding the Department's policy on waiver of attorney-client privilege and work product protections in the corporate context.

Please do not hesitate to contact me on this or any other matter. ACC thanks you for your time and your gracious invitation to join you in your offices to open the lines of communication between our constituencies.

Sincerely,

A handwritten signature in cursive script that reads "Susan Hackett". The signature is written in black ink and is positioned below the word "Sincerely,".

Susan Hackett
Senior Vice President and General Counsel