

March 27, 2006

VIA ELECTRONIC FILING

United States Sentencing Commission  
One Columbus Circle, N.E.  
Suite 2-500, South Lobby  
Washington, D.C. 20002-8002  
Attention: Public Affairs—Priorities Comment

Re: Follow up pursuant to the testimony of the Coalition to Preserve the Attorney Client Privilege: Request for changes to the commentary language of Section 8C2.5 regarding waiver of the attorney-client privilege.

Dear Commissioners and Staff:

On behalf of the Coalition to Preserve the Attorney-Client Privilege,<sup>1</sup> please accept our thanks for allowing us time to present our views to you on March 15, 2006, during Panel Three of your hearings schedule.

You have our testimony – both oral and written, as well as the document providing the results of our privilege survey of in-house and outside lawyers. On March 28, we are filing under separate cover a formal comment letter on behalf of this Coalition, as well. And of course, you have our previous testimonies and submissions.

I only wish to offer one follow-up from our testimony based on the back-and-forth discussion with the Commissioners. Ex-Officio Commissioner Michael Elston of the Department of Justice challenged our testimony regarding the statement of Associate Attorney General Robert McCallum before Members of Congress at the March 7, 2006, House Judiciary Committee Subcommittee hearings on the erosion of the attorney client privilege. The Coalition noted in its testimony to you that Mr. McCallum suggested at the Congressional hearing that the Department of Justice would not challenge the removal of the privilege waiver language; Mr. Elston suggested that our report of that hearing was incorrect, and that our statement that Mr. McCallum was retracting what he told Congress when he testified before the Sentencing Commission earlier in the morning on March 15 was inappropriate.

While we did not wish to argue the issue further at the hearing and while we certainly do not dispute what Mr. McCallum told the Commission on March 15 during its first panel of speakers (namely, that the Department would object to any changes in the language), we think it important for the Commission to know what it is that Mr. McCallum actually did say to the Congress on March 7, since the Members who were pressing him on waiver issues eased off their questioning on

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<sup>1</sup> The complete listing of Coalition members appears at the end of this letter. Please note that the American Bar Association is not a member of this coalition, but regularly cooperates in the Coalition's work and has participated side by side with the Coalition in regard to this effort.

the Sentencing Guidelines language after he made the following statement. (And Representative Lundgren was not the only Member who mentioned concern about the Sentencing Guidelines' privilege waiver language – see our March 28 submission for more quotes from other Members of the House.) Members of Congress who were present at this hearing and who oversee the work of this Commission may have reason to believe that the privilege waiver language will not be a continuing issue of contention as a result of Mr. McCallum's statements.

We have produced the relevant text of the preliminary transcript for your reference below. (The final transcript of this session is not available to us to submit with this letter.)

*Beginning at line 1295 and ending at line 1325 of the preliminary transcript of the Office of the Clerk of the U.S. House [White Collar Enforcement (Part I): Attorney-Client Privilege and Corporate Waivers, Tuesday, March, 7, 2006, House of Representatives, Subcommittee on Crime, Terrorism, and Homeland Security, Committee on the Judiciary, Washington, DC]:*

Mr. Lundgren: ... And here you have a situation where you want a corporation to follow the law, I presume. And you would want the corporation to listen to good counsel, I would think. And here we have got a rule that seems to me to work in the opposite direction.

And I think that that weighs heavy on me and other members here on this panel. And so I would ask, don't you see the creeping intrusion here? I mean, first you have the first memorandum. Now we have the second memorandum, which is a little tighter and a little tougher. And then, following that, you have the Sentencing Commission saying, well, that is a bad idea. As a matter of fact, we are going to have that as evidence of cooperation, and the lack of it as evidence of lack of cooperation.

What is a corporate counsel to do under those circumstances?

Mr. McCallum: Well, there are a series of questions there, Mr. Lundgren. Number one, with respect to the Sentencing Commission, the Department's position has been we would be comfortable with the Sentencing Commission going back to where it was before that amendment.

Mr. Lungren: Well, is that your position? Is that the administration's position?

Mr. McCallum: I believe that that is the Department of Justice's review –

Mr. Lungren: That is what I mean.

Mr. McCallum: -- underway at this particular time. I do not know whether that has been absolutely finalized. But my review of that is that there would not necessarily be an objection to going back to the way it was before, where it was not addressed.

I do not believe that there were any other issues that you requested we address during or after the hearing, and so I thank you once again for your time and your courtesy in

allowing us to present our survey findings for your consideration. Please feel free to contact me or any of the other members of our Coalition if we can be of assistance to you in your deliberations.

Respectfully Submitted For the Coalition to Preserve the Attorney-Client Privilege by:



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BUSINESS ROUNDTABLE  
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NATIONAL ASSOCIATION OF CRIMINAL DEFENSE LAWYERS  
NATIONAL ASSOCIATION OF MANUFACTURERS  
NATIONAL DEFENSE INDUSTRIAL ASSOCIATION  
RETAIL INDUSTRY LEADERS ASSOCIATION  
THE U.S. CHAMBER OF COMMERCE  
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