

COALITION TO PRESERVE THE ATTORNEY-CLIENT PRIVILEGE

American Chemistry Council
American Civil Liberties Union
Association of Corporate Counsel
Business Civil Liberties, Inc.
Business Roundtable
The Financial Services Roundtable
Frontiers of Freedom
Lawyers for Civil Justice
National Association of Criminal Defense Lawyers
National Association of Manufacturers
Retail Industry Leaders Association
U.S. Chamber of Commerce

COMPREHENSIVE REFORM STILL CRITICALLY NEEDED TO PROTECT ATTORNEY-CLIENT PRIVILEGE AND EMPLOYEE LEGAL RIGHTS

In response to growing concerns raised by Congressional leaders, former Justice Department officials, and many in the legal and business communities, the Department of Justice replaced the 2006 “McNulty Memorandum” in August 2008 with new corporate charging guidelines that direct U.S. Attorneys and Assistant U.S. Attorneys not to coerce companies and other organizations to waive their attorney-client privilege or work product protections, or to pressure their individual employees to waive their own legal and constitutional rights during investigations in return for cooperation credit. The Securities and Exchange Commission subsequently issued a new Enforcement Manual in October 2008 that provides additional guidance on its privilege waiver policy outlined in the 2001 “Seaboard Report.” Though helpful, the SEC’s new language still contains numerous loopholes and does not provide adequate protection for the privilege and employee legal rights.

In November 2007, the House overwhelmingly approved comprehensive legislation known as the “Attorney-Client Privilege Protection Act” (H.R. 3013). Many of the bill’s reforms were later adopted by the Justice Department in its new corporate charging guidelines. But unlike the limited scope of the DOJ policy, the reforms in the House bill—sponsored by Representatives John Conyers (D-MI), Bobby Scott (D-VA), and Lamar Smith (R-TX)—would apply to *all* federal agencies. A Senate companion bill, S. 3217, sponsored by Senators Arlen Specter (R-PA), (Vice President-elect) Joseph Biden (D-DE) and 12 other Senators from both parties, was also introduced in the 110th Congress but failed to receive a vote.

While the new Justice Department policy is a welcome and important improvement over its previous policy outlined in the McNulty Memorandum, a comprehensive solution to the ever-widening problem of government-coerced waiver is still critically needed. **Therefore, the Coalition strongly supports the adoption of a Presidential Executive Order to all federal agencies requiring them to adopt effective DOJ-type reforms or the enactment of comprehensive federal legislation like the Attorney-Client Privilege Protection Act (ACPPA) for the following reasons:**

- **The new DOJ policy, standing alone, does not provide a comprehensive solution to the problem of government-coerced waiver.** Under the Justice Department’s new policy, companies will be required to provide all relevant facts to government investigators in order to receive full cooperation credit, but they cannot be asked or required to waive their attorney-client privilege or work product protections. In addition, where DOJ is the only investigating agency, the policy specifically bars prosecutors from pressuring companies, as a condition for receiving cooperation credit, not to pay their employees’

attorneys fees or to take other unfair actions to undermine their employees' rights and ability to mount a legal defense. Although these reforms are promising and constitute a significant improvement over DOJ's previous policy, the new policy is limited to just the Department's prosecutors and does not alter the harmful waiver policies adopted by the SEC, the EPA, HUD, and many other agencies.

- **The new SEC Enforcement Manual also contains many loopholes and fails to solve the government-coerced waiver problem.** Although Section 4.3 of the SEC Manual states that agency staff should not directly ask companies to waive the attorney-client privilege or work product, it permits the staff to demand waiver if approved by a supervisor. The SEC Manual also pressures companies to “voluntarily” waive the privilege—and to take punitive actions against employees who decline to waive their legal rights—in return for full cooperation credit. Thus, the new Manual cannot be viewed as a substantial departure from past SEC policies and practices that have led to widespread government-coerced waiver.
- **Government-coerced waiver has become a multi-agency problem that requires a multi-agency solution.** In addition to the SEC, many other federal agencies have adopted policies that erode the attorney-client privilege, the work product doctrine, and employee legal rights. For example, the EPA's “Audit Policy,” like the Justice Department's previous McNulty Memorandum, authorizes agency officials to pressure companies to waive their attorney-client privilege and work product protections during investigations. In addition, HUD and the Treasury Department's Office of Foreign Asset Control (OFAC) have adopted policies that threaten to erode not only the attorney-client privilege and the work product doctrine, but also employees' Sixth Amendment right to counsel and Fifth Amendment right against self-incrimination. As more and more federal agencies adopt similar waiver policies, broad administrative or legislative reform is still needed to protect these fundamental rights and reverse the “culture of waiver.”
- **A Presidential Executive Order applying reforms like the Justice Department's recent reforms to all federal agencies—or new comprehensive legislation like ACPA—would protect fundamental attorney-client privilege, work product, and employee constitutional rights during investigations.** By applying the new DOJ reforms to the SEC, HUD, the EPA, and all other federal agencies, a Presidential executive order should prevent the agencies from pressuring companies to waive their attorney-client privilege and work product protections in order to receive full cooperation credit during investigations. Such an order also would help protect employees' Sixth Amendment right to counsel and Fifth Amendment right against self-incrimination by preventing federal prosecutors from pressuring companies not to pay employees' legal fees during investigations, to fire employees for not waiving their rights, or to take other punitive measures against the employees before their guilt has been established under law. Enactment of comprehensive legislation like S. 3217 and H.R. 3013 would offer similar benefits to a Presidential order, with the added advantage of making these critical reforms permanent and enforceable in a court of law.
- **A Presidential executive order or comprehensive legislation would both strike the proper balance between effective law enforcement and the preservation of essential attorney-client privilege, work product and employee legal protections.** Adoption of the Presidential order—or passage of legislation like the ACPA—would prevent all agencies from forcing companies and employees to waive their fundamental legal rights while preserving the ability of prosecutors and other agency officials to obtain the important, non-privileged factual materials they need to punish wrongdoers and enforce the law.