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August 15, 2005

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: Comments on Notice of Proposed Priorities -- Chapter 8 Organizational
Guidelines, Section 8C2.5, Waiver of Attorney-Client Privilege

Dear Sir/Madam:

On behalf of the American Bar Association ("ABA") and its more than 400,000 members, I write in response to the Commission's request for comments on the above Notice of Proposed Priorities for the amendment cycle ending May 1, 2006.¹ In particular, although this letter does not address the issue of broad Sentencing Guidelines reform, we would like to express our views regarding the Commission's tentative priority number (5), described in the Notice as "review, and possible amendment, of commentary in Chapter Eight (Organizations) regarding waiver of the attorney-client privilege and work product protections." Towards that end, we urge the Commission to retain this issue on its final list of priority issues for the 2005-2006 amendment cycle, and at the end of that process, amend the applicable language in the Commentary to clarify that waiver of attorney-client privilege and work product protections should not be a factor in determining whether a sentencing reduction is warranted for cooperation with the government.

The ABA has long supported the use of sentencing guidelines as an important part of our criminal justice system. In particular, our established ABA policy, which is reflected in the Criminal Justice Standards on Sentencing (3d ed.), supports an individualized sentencing system that guides, yet encourages, judicial discretion while advancing the goals of parity, certainty and proportionality in sentencing. Such a system need not, and should not, inhibit judges' ability to exercise their informed discretion in particular cases to ensure satisfaction of these goals.

In February 2005, the ABA House of Delegates met and reexamined the overall Sentencing Guidelines system in light of the recent Supreme Court decision in *United States v. Booker* and *United States v. Fanfan* (the "*Booker/Fanfan* decision"). At the conclusion of that process, the ABA adopted new policy recommending that Congress

¹ 70 Fed. Reg. 37145 (June 28, 2005)

take no immediate legislative action regarding the overall Sentencing Guidelines system, and that it not rush to any judgments regarding the new advisory system, until it is able to ascertain that broad legislation is both necessary and likely to be beneficial.

In the meantime, however, the ABA continues to have serious concerns regarding several narrow amendments to the Sentencing Guidelines that took effect on November 1, 2004. These amendments, which the Commission submitted to Congress on April 30, 2004, apply to that section of the Sentencing Guidelines relating to "organizations"—a broad term that includes corporations, partnerships, unions, non-profit organizations, governments, and other entities. Although the ABA has serious concerns regarding several of these recent amendments², our greatest concern involves a change in the Commentary to Section 8C2.5 that authorizes and encourages the government to require entities to waive their attorney-client and work product protections in order to show "thorough" cooperation with the government and thereby qualify for a reduction in the culpability score—and a more lenient sentence—under the Sentencing Guidelines (the "privilege waiver amendment"). Prior to the change, the Commentary was silent on the issue and contained no suggestion that such a waiver would ever be required.

Since the adoption of the privilege waiver amendment to the Sentencing Guidelines, the ABA—working with a large and diverse group of business and legal organizations from across the political spectrum—has evaluated the substantive and practical impact of the amendment on the business and legal communities³. As a result, the ABA has concluded that the new privilege waiver amendment, though perhaps well intentioned, will have a number of profoundly negative consequences. Therefore, we respectfully urge that the Commission retain this issue on its final list of priority issues for the 2005-2006 amendment cycle, and remedy the previous amendment, for the following reasons.

The ABA believes that as a result of the privilege waiver amendment, companies and other organizations will be forced to waive their attorney-client and work product protections on a routine basis. The Commentary to Section 8C2.5 states that "waiver of attorney-client privilege and of

² In August 2004, the ABA House of Delegates adopted a resolution supporting five specific changes to the then-proposed amendments to the Federal Sentencing Guidelines for Organizations, including amending the Commentary to Section 8C2.5 to state affirmatively that waiver of attorney-client and work product protections "should not be a factor in determining whether a sentencing reduction is warranted for cooperation with the government." Subsequently, on August 9, 2005, the ABA adopted a resolution, sponsored by the ABA Task Force on Attorney-Client Privilege, supporting the preservation of the attorney-client privilege and work product doctrine, opposing governmental actions that erode these protections, and opposing the routine practice by government officials of seeking the waiver of these protections through the granting or denial of any benefit or advantage. Both ABA resolutions, and the related background reports, are available at <http://www.abanet.org/poladv/acprivilege.htm>.

³ For example, the National Association of Criminal Defense Lawyers and the Association of Corporate Counsel each recently conducted surveys of in-house and outside counsel in order to determine the extent to which attorney-client and work product protections have been eroded in the corporate context. Executive summaries of these surveys are available online at [www.nacdl.org/public.nsf/Legislation/Overcriminalization002/\\$FILE/AC_Survey.pdf](http://www.nacdl.org/public.nsf/Legislation/Overcriminalization002/$FILE/AC_Survey.pdf) and www.acca.com/Surveys/attyclient.pdf, respectively. In addition, the American Bar Association's Task Force on Attorney-Client Privilege is examining various issues involving erosion of attorney-client and work product protections, including the privilege waiver amendment, and has held several public hearings on these subjects. Materials relating to the work of the ABA Task Force are available on the entity's website at www.abanet.org/buslaw/attorneyclient/.

work product protections is not a prerequisite to a reduction in culpability score [for cooperation with the government]...unless such waiver is necessary in order to provide timely and thorough disclosure of all pertinent information known to the organization.” But the exception is likely to swallow the rule; prosecutors will make routine requests for waivers and organizations will be forced routinely to grant them.

Now that this amendment has become effective, the Justice Department—which has followed a general policy of requiring companies to waive privileges in many cases as a sign of cooperation since the 1999 “Holder Memorandum” and the 2003 “Thompson Memorandum”—is likely to pressure companies to waive their privileges in almost all cases. Our concern is that the Justice Department, as well as other enforcement agencies, will contend that this change in the Commentary to the Guidelines provides Congressional ratification of the Department’s policy of routinely requiring privilege waivers. From a practical standpoint, companies will have no choice but to waive these privileges whenever the government demands it because the government’s threat to label them as “uncooperative” in combating corporate crime will have a profound effect on their public image, stock price, and credit worthiness.

We also believe that the privilege waiver amendment seriously weakens the attorney-client privilege between companies and their lawyers, resulting in great harm both to companies and the investing public. Lawyers for companies and other organizations play a key role in helping these entities and their officials to comply with the law and to act in the entity’s best interests. To fulfill this role, lawyers must enjoy the trust and confidence of managers, boards and other key personnel of the entity and must be provided with all relevant information necessary to properly represent the entity. By authorizing routine government demands for waiver of attorney-client and work product protections, the amendment discourages personnel within companies and other organizations from consulting with their lawyers. This, in turn, seriously impedes the lawyers’ ability to effectively counsel compliance with the law.

In addition, while the privilege waiver amendment was intended to aid government prosecution of corporate criminals, its actual effect is to make detection of corporate misconduct more difficult by undermining companies’ internal compliance programs and procedures. These mechanisms, which often include internal investigations conducted by the company’s in-house or outside lawyers, are one of the most effective tools for detecting and flushing out malfeasance. Indeed, Congress recognized the value of these compliance tools when it enacted the Sarbanes-Oxley Act. Because the effectiveness of these internal investigations depends in large part on the ability of the individuals with knowledge to speak candidly and confidentially with the lawyer conducting the investigation, any uncertainty as to whether attorney-client and work product privileges will be honored makes it more difficult for companies to detect and remedy wrongdoing early. Therefore, we believe that the privilege waiver amendment undermines rather than promotes good compliance practices.

The ABA also believes that the privilege waiver amendment unfairly harms employees. The amendment places the employees of a company or other organization in a very difficult position when their employers ask them to cooperate in an investigation. They can cooperate and run the risk that statements made to the company’s or organization’s lawyers will be turned over to the government by

the entity or they can decline to cooperate and risk their employment. In our view, it is fundamentally unfair to force employees to choose between keeping their jobs and preserving their legal rights.

In recent months, many other organizations have expressed similar concerns regarding the new privilege waiver amendment to the Sentencing Guidelines. These concerns were formally brought to the Commission's attention on March 3, 2005, when an informal coalition of nine prominent business, legal, and public policy organizations⁴ submitted a joint letter urging the Commission to reverse or modify the privilege waiver amendment. The remarkable political and philosophical diversity of that coalition, with members ranging from the U.S. Chamber of Commerce and the National Association of Manufacturers to the American Civil Liberties Union and the National Association of Criminal Defense Lawyers, shows just how widespread these concerns have become in the business, legal, and public policy communities.

The ABA shares these concerns and believes that the privilege waiver amendment is counterproductive and undermines, rather than enhances, compliance with the law as well as the many other societal benefits that are advanced by the confidential attorney-client relationship. Because of the serious and immediate nature of this harm, we urge the Commission to retain this issue on its final list of priority issues for the 2005-2006 amendment cycle. In addition, at the end of that process, we urge the Commission to amend the applicable language in the Commentary to clarify that the waiver of attorney-client privilege and work product protections should not be a factor in determining whether a sentencing reduction under the Guidelines is warranted for cooperation with the government.

To accomplish this, we recommend that the Commission (1) add language to the Commentary clarifying that cooperation only requires the disclosure of "all pertinent non-privileged information known to the organization", (2) delete the existing Commentary language "unless such waiver is necessary in order to provide timely and thorough disclosure of all pertinent information known to the organization", and (3) make the other minor wording changes in the Commentary outlined below. If our recommendations were adopted, the relevant portion of the Commentary would read as follows⁵:

"12. To qualify for a reduction under subsection (g)(1) or (g)(2), cooperation must be both timely and thorough. To be timely, the cooperation must begin essentially at the same time as the organization is officially notified of a criminal investigation. To be thorough, the cooperation should include the disclosure of all pertinent non-privileged information known by the organization. A prime test of whether the organization has disclosed all pertinent non-

⁴ The signatories to the March 3, 2005 letter to the Commission were the American Chemistry Council, American Civil Liberties Union, Association of Corporate Counsel, Business Civil Liberties, Inc., Business Roundtable, Frontiers of Freedom, National Association of Manufacturers, U.S. Chamber of Commerce, and Washington Legal Foundation. The ABA also expressed similar concerns to the Commission in its separate letter dated May 17, 2005. In addition, several other influential groups, including the National Association of Criminal Defense Lawyers and the Financial Services Roundtable, have also publicly voiced similar concerns regarding the privilege waiver amendment.

⁵ Note: The Commission's November 1, 2004 amendments on the privilege waiver issue are shown in italics. Our suggested additions are underscored and our suggested deletions are noted by strikethroughs.

privileged information is whether the information is sufficient for law enforcement personnel to identify the nature and extent of the offense and the individual(s) responsible for the criminal conduct. However, the cooperation to be measured is the cooperation of the organization itself, not the cooperation of individuals within the organization. If, because of the lack of cooperation of particular individual(s), neither the organization nor law enforcement personnel are able to identify the culpable individual(s) within the organization despite the organization's efforts to cooperate fully, the organization may still be given credit for full cooperation. *Waiver of attorney-client privilege and of work product protections is not a factor in determining whether a prerequisite to a reduction in culpability score under subdivisions (1) and (2) of subsection (g) is warranted unless such waiver is necessary in order to provide timely and thorough disclosure of all pertinent information known to the organization."*

Thank you for your consideration of our comments. If you would like more information regarding the ABA's positions on these issues, please contact our senior legislative counsel for business law issues, Larson Frisby, at (202) 662-1098.

Sincerely,



Robert D. Evans

cc: Members of the U.S. Sentencing Commission
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