

August 15, 2005

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: 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 undersigned organizations, please accept this letter as our 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, 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. These comments are presented on behalf of the American Chemistry Council, the American Civil Liberties Union, the Association of Corporate Counsel, Business Civil Liberties, Inc., the Business Roundtable, the Financial Services Roundtable, Frontiers of Freedom, the National Association of Criminal Defense Lawyers, the National Association of Manufacturers, the National Defense Industrial Association, the Retail Industry Leaders Association, the U.S. Chamber of Commerce, and the Washington Legal Foundation.

On April 30, 2004, the U.S. Sentencing Commission submitted to Congress a number of amendments to Chapter 8 of the Guidelines relating to "organizations"—a broad term that includes corporations, partnerships, unions, non-profit organizations, governments, and other entities. Included in these amendments was 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 demonstrate cooperation with the government and thereby qualify for a reduction in the culpability score—and a more lenient sentence—under the Guidelines. All of these amendments became effective on November 1, 2004.

¹ 70 Fed. Reg. 37145 (June 28, 2005)

Before the adoption of the privilege waiver amendment, the Commentary was silent on privilege and contained no suggestion that such a waiver would ever be required, even though the Justice Department has increasingly requested that companies waive their privileges as a condition for certifying their cooperation during investigations. Privilege waiver was the subject of substantial consideration by the Commission's Ad Hoc Advisory Group on the Organizational Guidelines, which proposed the changes after considering information from the Department of Justice, some bar associations, and regulated entities.

During the Advisory Group's deliberations, numerous representatives of the business community and various legal groups expressed concerns about the Group's proposal regarding the waiver issue, which was not dramatically different than the version ultimately adopted by the Commission. Since the adoption of the final version, a broader cross-section of organizations, including many of the undersigned entities, has evaluated the substantive and practical impact of the waiver provision on their operations—and on the legal and business communities in general—and has identified profoundly negative unintended consequences². As a result, we respectfully urge 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 attorney-client privilege is the bedrock of a defendant's rights to effective counsel and confidentiality in seeking legal advice. It also serves a key practical role in the process of corporate self-investigation and reporting by allowing corporate officials and staff to talk with lawyers without concern that their admissions, questions or requests for legal guidance will be required to be shared with government investigators.

The privilege also encourages clients to place lawyers on mission-critical teams so that legal advice can be regularly integrated into the company's day-to-day and strategic business decisions. Removing the protections of the privilege from the corporate or other organizational contexts makes it far more difficult for companies, associations, unions, and other entities to detect employee wrongdoing when it occurs and correct it early.

While the Commentary to Section 8C2.5 states that "waiver of attorney-client privilege and of 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," the exception is likely to swallow the rule. Now that the amendment has become effective, the Justice Department—which has followed a

² 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/.

general policy of requiring companies to waive privilege in many cases as a sign of cooperation since the 1999 "Holder Memorandum" and 2003 "Thompson Memorandum"—is likely to pressure companies to waive 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, organizations will have no choice but to waive these privileges whenever the government demands it, as the threat to label them as "uncooperative" in combating corporate crime—even if the charge is unfounded—could have a profound effect on their public image, stock price and credit worthiness.

These changes to the Section 8C2.5 Commentary—resulting in the routine compelled waiver of attorney-client privilege and work product protections—unfairly harms companies, associations, unions and other entities in the following ways:

- The amendment weakens the attorney-client privilege between companies and their lawyers.** Lawyers for companies and other organizations play a key role in helping these entities and their officials comply with the law and 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 that 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.
- The privilege waiver amendment undermines internal compliance programs.** Instead of aiding in the prosecution of corporate criminals, the privilege waiver amendment makes 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. However, because the effectiveness of these internal investigations depends 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 privilege waiver amendment unfairly harms employees.** The privilege waiver amendment also 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 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. It is fundamentally unfair to force employees to choose between keeping their jobs and preserving their legal rights.

Unfortunately, the Supreme Court's recent decision in *United States v. Booker/Fanfan* did not alleviate the problems caused by the privilege waiver amendment. Although the Supreme Court struck down as unconstitutional those provisions of the Sentencing Guidelines that made them mandatory and binding on the courts, it preserved the overall Guidelines as non-binding standards that the courts must consider when crafting sentences. Therefore, the privilege waiver amendment will continue to cause adverse consequences as long as it remains in place.

For all these reasons, we believe that the privilege waiver amendment is flawed and uniquely dangerous to our shared goal of protecting the policies that are advanced by the attorney-client relationship. Therefore, we urge the U.S. Sentencing 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 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 follows³:

"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-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*

³ 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.

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 the opportunity to present our views on this important matter.

Respectfully submitted,

AMERICAN CHEMISTRY COUNCIL

AMERICAN CIVIL LIBERTIES UNION

ASSOCIATION OF CORPORATE COUNSEL
(formerly the American Corporate Counsel Association)

BUSINESS CIVIL LIBERTIES, INC.

BUSINESS ROUNDTABLE

THE FINANCIAL SERVICES ROUNDTABLE

FRONTIERS OF FREEDOM

NATIONAL ASSOCIATION OF CRIMINAL DEFENSE LAWYERS

NATIONAL ASSOCIATION OF MANUFACTURERS

NATIONAL DEFENSE INDUSTRIAL ASSOCIATION

RETAIL INDUSTRY LEADERS ASSOCIATION

THE U.S. CHAMBER OF COMMERCE

WASHINGTON LEGAL FOUNDATION

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