

August 15, 2005

The Honorable Ricardo H. Hinojosa
Chairman
U.S. Sentencing Commission
One Columbus Circle, N.E.
Washington, D.C. 20002-8002

Re: Organizational Sentencing Guidelines Commentary Involving Waiver of Attorney-Client Privilege and Work Product Doctrine -- Comments on Notice of Proposed Priorities

Dear Judge Hinojosa:

We, the undersigned former Justice Department officials, are pleased that the Commission has included, on its list of tentative priorities for the upcoming amendment cycle, the recent amendment to the Commentary to the Organizational Guidelines involving waiver of attorney-client privilege and work product protection in the context of cooperation.¹ We believe that this new amendment is eroding and weakening the attorney-client and work product protections afforded by the American system of justice, and we urge the Commission to address and remedy this amendment as soon as possible.

As you know, on April 30, 2004, the Commission submitted to Congress a number of amendments to Chapter 8 of the Sentencing Guidelines relating to "organizations"—a broad term that includes corporations, partnerships, unions, non-profit organizations, governments, and other entities. Among these amendments— all of which became effective on November 1, 2004— was a change in the Commentary to Section 8C2.5 which 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 more lenient sentence under the Guidelines.

Prior to the adoption of this privilege waiver amendment, the Sentencing Guidelines were silent on the privilege issue and contained no suggestion that such a waiver would ever be required. Although it is true that the Justice Department has followed a general policy of commonly requiring companies to waive privileges as a sign of cooperation since the 1999 "Holder Memorandum" and the 2003 "Thompson Memorandum," this was merely the Department's internal policy for its prosecutors. Now that the privilege waiver amendment has been incorporated into the official Commentary to the Sentencing Guidelines, the Justice Department, as well as other enforcement agencies, are contending that this amendment provides Congressional ratification of the Department's policy of routinely asking that privilege be waived.² In practice, companies are

¹ 70 Fed. Reg. 37145 (June 28, 2005).

² See, e.g., Mary Beth Buchanan, "Effective Cooperation by Business Organizations and the Impact of Privilege Waivers," 39 WAKE FOREST L. REV. 587, 589 (Fall 2004) ("This Article seeks to demonstrate that the [Justice] Department's consideration of waiver is based squarely on the definition of cooperation set forth in the Organizational Sentencing Guidelines.").

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finding that they have no choice but to waive these privileges whenever the government demands it. The threat to label them as "uncooperative" in combating corporate crime simply poses too great a risk of indictment and further adverse consequences in the course of prosecution. Even if the charge is unfounded, the charge of "noncooperation" can have such a profound effect on a company's public image, stock price and credit worthiness that companies generally yield to waiver demands.

As former Justice Department officials, we appreciate and support the Commission's ongoing efforts to amend and strengthen the Sentencing Guidelines in order to reduce corporate crime. Unfortunately, however, we believe that the privilege waiver amendment, though well-intentioned, is undermining rather than strengthening compliance with the law in a number of ways.

In our view, the privilege waiver amendment seriously erodes and weakens the attorney-client privilege between companies and their lawyers by discouraging corporate personnel at all levels from consulting with counsel on close issues. Lawyers are indispensable in helping companies and their officials understand and comply with complex laws and act in the entity's best interests. In order to fulfill this important function, lawyers must enjoy the trust and confidence of the board, management and line operating personnel so they may represent the entity effectively and ensure that compliance is maintained (or that noncompliance is quickly remedied). By enabling routine demands for waiver of the attorney-client and work product protections, the amendment discourages personnel within companies and other organizations from consulting with their lawyers, thereby impeding the lawyers' ability to effectively counsel compliance with the law. This, in turn, will harm not only the corporate client, but the investing public and society as well.

The privilege waiver amendment will also 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, have become 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 in 2002. Because the effectiveness of internal investigations depends on the ability of employees and other individuals with knowledge to speak candidly and confidentially with the lawyer conducting the investigation, any uncertainty as to whether attorney-client and work product protections will be honored makes it harder for companies to detect and remedy wrongdoing early. As a result, we believe that the privilege waiver amendment undermines rather than promotes good compliance practices.

Finally, we are concerned that the privilege waiver amendment will encourage excessive "follow-on" civil litigation. In virtually all jurisdictions, waiver of attorney-client or work product protections for one party constitutes waiver to all parties, including subsequent civil litigants. Forcing companies and other entities to routinely waive their privileges during criminal investigations provides plaintiff lawyers with a great deal of sensitive—and sometimes confidential—information that can be used against the entities in class action, derivative and similar suits, to the detriment of the entity's employees and shareholders. This risk of future litigation and

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all its related costs unfairly penalizes organizations that choose to cooperate on the government's terms. Those who determine that they cannot do so—in order to preserve their defenses for subsequent actions that appear to involve a far greater financial risk—instead face the government's wrath.

In sum, we believe that the new privilege waiver amendment is seriously flawed and undermines, rather than enhances, compliance with the law and the many other societal benefits that arise from the confidential attorney-client relationship. Therefore, we urge the Commission to retain this issue on its list of priorities for the upcoming amendment cycle, and to address and remedy the issue as soon as possible. In particular, we recommend that the Commission revise the amendment 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 during an investigation.

Respectfully submitted,

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Attention: Public Affairs—Priorities Comment

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