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**Business Law Section**  
**Committee on Securities Regulation**

August 15, 2005

United States Sentencing Commission  
One Columbus Circle, NE  
Suite 2-500, South Lobby  
Washington, DC 20002-8002

Attention: Public Affairs-Priorities Comment

**Re: Amendment Cycle Ending May 1, 2006**  
**Waiver of Attorney-Client Privilege and Work Product Protections**

Commissioners:

The Committee on Securities Regulation of the Business Law Section of the New York State Bar Association appreciates the request by the United States Sentencing Commission (the "Commission") for comments on possible priority policy issues for the amendment cycle ending May 1, 2006, and possibly continuing into the amendment cycle ending May 1, 2007 (the "Amendment Cycle") in accordance with Rule 5.2 of its Rules of Practice and Procedure, as noticed at 70 FR 37145-46 (the "Notice").

The Committee on Securities Regulation is comprised of members of the New York Bar whose practices focus, in principal part, in the field of securities regulation. The Section includes lawyers in private practice and in-house counsel of corporate legal departments. A draft of this letter was circulated for comment among members of the Committee, and the views expressed in this letter are generally consistent with those of a majority of its members who reviewed and commented on this letter in draft form. Also, the Executive Committee of the Commercial and Federal Litigation Section of the New York State Bar Association has approved a draft form of this letter circulated to Executive Committee members. In addition, a draft of this letter was circulated to members of the Executive Committee of the Corporate Counsel Section of the Association, and the views expressed in this letter are generally consistent with those of a majority of the Executive Committee members who reviewed and responded to the draft letter.

The views set forth in this letter, however, are those of the Committee and those two Sections' Executive Committees, and do not necessarily reflect the views of the

organizations with which its members are associated or the New York State Bar Association.

The Notice identifies seven priorities for the Amendment Cycle. This letter addresses item 5 which specifies the "review, and possible amendment, of commentary in Chapter Eight (Organizations) regarding the waiver of the attorney-client and work product protections[.]"

In 2004, the commentary to USSG § 8C2.5 was amended to include the following language:

"Waiver of attorney-client privilege and of work product protections is not a prerequisite to a reduction in culpability score under subdivisions (1) and (2) of subsection (g) unless such waiver is necessary in order to provide timely and thorough disclosure of all pertinent information known to the organization."

As discussed below, we respectfully submit that the requirement that a company waive the attorney-client privilege in order to obtain a reduction of points under the guidelines should be eliminated on the grounds that such a waiver requirement undermines the purpose and value of the privilege. Furthermore, although couched in terms of waiver being required only if necessary to provide pertinent information, we believe that the commentary provides no protection for companies as prosecutors may feel obligated to press for waiver in order to assure that they find out as much as possible. Accordingly, we urge the Commission to eliminate the commentary and instead include an express statement that waiver of the attorney-client privilege and of the work product protections is not required for a reduction in culpability score.

## Introduction

The requirement that a company<sup>1</sup> waive the attorney-client privilege for a reduction of points under the sentencing guidelines is a mistake, as previously and repeatedly warned in the form of the strong opposition to such requirement as voiced by the American Bar Association, the American Chemistry Council, the Association of Corporate Counsel, Business Civil Liberties, Inc., Frontiers of Freedom, the National Association of Criminal Defense Lawyers, the U.S. Chamber of Commerce, the Business Roundtable, the National Association of Manufacturers, and the American Civil Liberties Union.

The nature of this concern may be summarized as follows:

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<sup>1</sup> The term "company" or "companies" includes all forms of business entities including without limitation corporations, partnerships, limited liability companies and limited liability partnerships.

- The attorney-client privilege between companies and their lawyers will become weakened by prosecutors typically requesting the waiver.
- Companies may feel coerced into waiving the privilege because those who do not run the risk that the government will label them as “uncooperative,” which, in turn, will affect their public image, stock price, and credit worthiness.
- Companies may be reluctant to consult with their lawyers for fear that confidential information will be divulged through a waiver of the privilege thereby impeding the lawyers’ ability to effectively counsel clients and avoid wrongdoing that causes harm to companies and the investing public.

### Analysis and Comment

A company being investigated for committing, or alleged to have committed, a crime must consider waiving the privilege under USSG § 8C2.5 to obtain favorable treatment by the government under the guidelines. This daunting decision cannot be made lightly under any circumstances, especially considering that the waiver to a governmental authority could act as a waiver in other civil litigation.<sup>2</sup>

In any event, a provision that could cause companies to waive the attorney-client privilege would undermine the purpose and value of this ancient privilege. Historically, the attorney-client privilege possibly dates back to the Roman Empire. *Berd v. Lovelace*, 21 Eng. Rep. 33 (1577), *Dennis v. Codrington*, 21 Eng. Rep. 53 (1580), and *Kelway v. Kelway*, 21 Eng. Rep. 47 (Ch. 1580) decided during the reign of Elizabeth I, are the earliest written opinions known to have recognized the privilege. The attorney-client privilege is said to be the most ancient of evidentiary privileges. In the words of Dean John Wigmore, “the privilege appears as unquestioned . . . . It is therefore the oldest of the privileges for confidential communications.”<sup>3</sup>

The attorney-client privilege is a rule of evidence. It is embodied in Rule 26(b)(1) of the Federal Rules of Civil Procedure, which provides, “Parties may obtain discovery regarding any matter, not privileged . . . .”

Attorneys support the attorney-client privilege because it encourages clients to make full disclosure of information to their attorneys, making it more likely that an attorney will obtain the information needed to provide good legal advice. Clients value the privilege because it makes them feel comfortable disclosing information to their

<sup>2</sup> See, e.g., *In re Columbia/HCA Healthcare Corporation Billing Practices Litigation*, 293 F.3d 289 (6<sup>th</sup> Cir. 2002); *In Re Syncor Erisa Litigation*, No. CV03-2446-RGKRCX, 2005 WL 1661875 (C.D. Cal. July 6, 2005); *In re Natural Gas Commodity Litigation*, No. 03 Civ. 6186VMAJP, 2005 WL 1457666 (S.D.N.Y. June 21, 2005).

<sup>3</sup> J. WIGMORE, EVIDENCE IN TRIALS AT COMMON LAW at 542 (McNaughton rev. 1961).

attorneys. The judicial process supports the privilege because it recognizes a social good as being "derived from the proper performance of the functions of lawyers acting for their clients (which) is believed to outweigh the harm that may come from the suppression of the evidence in specific cases"<sup>4</sup>

The privilege benefits society because it helps create the trust that must exist between a client and attorney in order to encourage open and full discussion with counsel. Not only is this necessary in order to promote the development of an informed defense, but the reliance on the privilege encourages open communication with counsel that can lead to advice to avoid conduct that the client might have otherwise undertaken in possible violation of the law. We do not believe that the purpose of requiring waiver in this context outweighs the purpose and value of the privilege.

We recognize that the commentary is worded to say that the waiver is not required unless "necessary in order to provide timely and thorough disclosure of all pertinent information known to the organization." However, any protection apparently provided companies by that formulation is illusory. A prosecutor will not know whether he or she will learn pertinent information only through waiver of the privilege until after the waiver is demanded and the privileged information is revealed. Therefore, we would expect prosecutors in good faith to frequently request waiver in order to expand discovery to assure that they find out as much as possible.

### Conclusion

The attorney-client privilege has served the legal process as we know it today in the United States from its inception by protecting confidentiality and thus promoting the candor that results in accurate fact-finding and effective legal advice. The commentary would operate to abrogate this ancient privilege to the detriment of the legal system and the society it serves. For this and the reasons cited herein, we urge the Commission to eliminate the commentary that could cause a company to waive the attorney-client privilege and work product protections to obtain a reduction of points under the guidelines. In addition, we urge the Commission to include in the guidelines an express statement that waiver of the attorney-client privilege and of the work product protections is not required for a reduction in culpability score.

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<sup>4</sup> Wyzansky, J., in *United States v. United Shoe Machinery Corporation*, 80 F. Supp. 357, 358 (D.Mass. 1950).

United States Sentencing Commission

August 15, 2002

Respectfully submitted,

COMMITTEE ON SECURITIES REGULATION

By Michael J. Holliday  
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