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August 14, 2005

SENT BY EMAIL AND UNITED STATES MAIL

United States Sentencing Commission
Attention: Public Affairs-Priorities Comment
One Columbus Circle, N.E.
Suite 2-500, South Lobby
Washington, DC 20002-8002

Re: Request for Public Comment for the Amendment Cycle
Ending May 1, 2006

Dear Commission:

In my Public Comment to the Commission dated February 27, 2004 and in my letter to the Committee on the Judiciary on August 6, 2004, I expressed my firm belief that INTERNAL DETECTION AND APPROPRIATE REMEDIAL ACTION must be KEY components in any compliance program. However, both of these components cannot function properly in the workplace when *attorney-client privilege* and *work product* protections are compromised at the expense of seeking a criminal conviction. Since the *attorney-client privilege* "exists to protect not only the giving of professional advice to those who act on it but also the *giving of information to the lawyer* to enable him to give sound and informed advice."¹ and the *work product privilege* "applies only to materials prepared in anticipation of litigation,"² until such time as it is determined through an internal investigation that a reportable criminal offense has been committed, these civil law privileges must not be waived for any reason. An internal investigation as a component of appropriate remedial action "sets the tone: (1) to officers, directors and employees of the conduct permitted in the workplace; (2) to the public and consumers about ethical, safe and community-oriented business practices; (3) that the goal of any type of appropriate remedial action is intended to cure ONLY and NOT as punitive measures; and (4) to PROTECT and DEFEND the workplace."³

¹ *Upjohn Co. v. United States*, 449 U.S. 383 (1981).

² *National Tank v. Brotherton*, 851 S.W.2d 193 (Tex. 1993).

³ Wright, L.A. (2005). *The Triangle Workplace*. Austin: The Wright Word Publishing.
*Protecting the Workplace for All Employers
and EmployeesSM*

August 12, 2005

While truly applauding the efforts of the Commission to elicit the corporate responsibility of organizations by promulgating more stringent guidelines, without INTERNAL DETECTION and APPROPRIATE REMEDIAL ACTION utilizing attorney-client privilege and the work product privilege, the Commission injects criminal law into an otherwise civil law workplace that pits employees against management, law enforcement against corporations and in-house/outside counsel against the officers of the corporations it represents. *Arthur Andersen* brought to light the importance of such privileges, "Nor is it necessarily corrupt for an attorney to 'persuad[e]' a client 'with intent to ... cause' that client to 'withhold' documents from the Government. In *Upjohn Co. v. United States*, 449 U.S. 383 (1981), for example, we held that Upjohn was justified in withholding documents that were covered by the attorney-client privilege from the Internal Revenue Service (IRS). See *id.* at 395. No one would suggest that an attorney who 'persuade[d]' Upjohn to take that step acted wrongfully, even though he surely intended that his client keep those documents out of the IRS' hands."⁴ For these reasons, the Commission should make the review, and possible amendment, of commentary in Chapter Eight (Organizations) regarding waiver of the attorney-client privilege and work product protections a priority.

Many opportunities exist within Chapter Eight to foster INTERNAL DETECTION and APPROPRIATE REMEDIAL ACTION, examples of which are as follows:

Insert Section 8B2.1(5)(D) as follows:

"(D) to implement internal detection and appropriate remedial action measures that protect attorney-client and work product privileges until such time as it is determined that reportable criminal conduct has occurred."

Insert at the end of Section 8C2.5(f)(1) as follows:

"... ONLY if the organization conducted an internal investigation as a component of appropriate remedial action once the criminal offense was discovered."

Introductory Commentary

Amend the end of the THIRD general principle as follows:

"Culpability generally will be determined by seven factors ... The three factors that mitigate the ultimate punishment of an organization are: (i) the existence of an effective compliance and ethics program; (ii) the completion of an internal investigation as a component of appropriate

⁴ *Arthur Andersen LLP v. United States*, 544 U.S. ____ (2005).
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remedial action once possible criminal conduct is detected; and (iii) self-reporting, cooperation, or acceptance of responsibility."

Section 8C2.5 Commentary / Application Notes as follows:

Insert within Commentary 12 as follows:

"A prime test ... is whether the organization conducted an internal investigation as a component of appropriate remedial action that detected reportable criminal conduct and the"

Amendment to the end of Commentary 12 as follows:

"Waiver of attorney-client privilege and of work product protections SHALL NOT be a prerequisite to a reduction in culpability score under subdivisions (1) and (2) of subsection (g) when the organization conducted an internal investigation as a component of appropriate remedial action."

Thank you very much for the opportunity to have provided the above Public Comments.

Sincerely,

/s/

L.A. Wright
Legal Criminalist/Consulting Expert

/law