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March 28, 2006

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 the Issue of "Chapter Eight – Privilege Waiver"

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 Notice of Proposed Amendments, Request for Public Comment, and Notice of Public Hearings for the amendment cycle ending May 1, 2006.¹ In particular, we would like to express our views regarding Final Priority (6), described in the Notice as the "review, and possible amendment" of the language regarding waiver of attorney-client privilege and work product protections contained in the Commentary in Section 8C2.5 of the Federal Sentencing Guidelines.² We urge the Commission to amend this language 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 a new policy recommending that Congress

¹ 71 Fed. Reg. 4782-4804 (January 27, 2006)

² In addition to this comment letter on the issue of "Chapter Eight – Privilege Waiver," the ABA is also filing separate comments with the Commission today on the specific issue of "Sentence Reduction Motions under 18 U.S.C. § 3582(c)(1)(A)(i)."

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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.

Although the ABA opposes broad changes to the Sentencing Guidelines at this time, we continue to have serious concerns regarding certain narrow amendments to the 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 Guidelines relating to “organizations”—a broad term that includes corporations, partnerships, unions, non-profit organizations, governments, and other entities. While the ABA has serious concerns regarding several of these recent amendments, most alarming is the amendment that added the following new language to the Commentary for Section 8C2.5 of the Guidelines:

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.³

Before the adoption of this privilege waiver amendment, the Commentary was silent on the issue of privilege and contained no suggestion that such a waiver would ever be a factor in charging or sentencing decisions. This was true, even though the Department of Justice—acting in accordance with the 1999 “Holder Memorandum” and 2003 “Thompson Memorandum”⁴—was increasingly requesting that companies and other organizations waive their privileges as a condition for certifying their cooperation during investigations.

³ In August 2004, the ABA 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 detailed background reports discussing the history and importance of the attorney-client privilege and work product doctrine and recent governmental assaults on these protections, are available at <http://www.abanet.org/poladv/acprivilege.htm>. In addition, other useful materials regarding privilege waiver are available on the website of the ABA Task Force on Attorney-Client Privilege at <http://www.abanet.org/buslaw/attorneyclient/>.

⁴ The Justice Department’s privilege waiver policy originated with the adoption of a 1999 memorandum by then-Deputy Attorney General Eric Holder, also known as the “Holder Memorandum,” that encouraged federal prosecutors to request that companies waive their privileges as a condition for receiving cooperation credit during investigations. The Department’s waiver policy was expanded in a January 2003 memorandum written by then-Deputy Attorney General Larry Thompson, also known as the “Thompson Memorandum.” Subsequently, then-Acting Deputy Attorney General Robert McCallum sent a memorandum to all U.S. Attorneys and Department Heads in October 2005 instructing each of them to adopt “a written waiver review process for your district or component,” although the directive—also known as the “McCallum Memorandum”—does not establish any minimum standards for, or require national uniformity regarding, privilege waiver demands by prosecutors. The Thompson and McCallum Memoranda are available online at http://www.usdoj.gov/dag/cftf/business_organizations.pdf and <http://www.abanet.org/poladv/mccallummemo212005.pdf>, respectively.

Since the adoption of the privilege waiver amendment to the Sentencing Guidelines in 2004, the ABA has been working in close cooperation with a broad and diverse coalition of legal and business groups—ranging from the U.S. Chamber of Commerce to the American Civil Liberties Union—in an effort to persuade the Commission to reconsider, and perhaps modify, the waiver provision. Towards that end, the coalition sent a letter to the Commission expressing its concerns over the privilege waiver amendment on March 3, 2005 and the ABA sent a similar letter on May 17, 2005.

In June 2005, the Sentencing Commission issued its “Notice of Proposed Priorities and Request for Public Comment” for the amendment cycle ending May 1, 2006 in which it stated its tentative plans to reconsider the 2004 privilege waiver amendment to the Federal Sentencing Guidelines during its 2005-2006 amendment cycle. In response, the ABA, the informal coalition, and a prominent group of nine former senior Justice Department officials⁵—including three former Attorneys General—and Rep. Dan Lungren (R-CA) submitted separate comment letters to the Sentencing Commission on August 15, 2005 urging it to reverse the 2004 privilege waiver amendment and add language to the Guidelines stating that waiver should not be a factor in determining cooperation.⁶ Later that month, the Commission issued its “Notice of Final Priorities” for the amendment cycle ending May 1, 2006 in which it stated its intent to formally reconsider the 2004 privilege waiver amendment to the Federal Sentencing Guidelines.

On November 15, 2005, the ABA, several organizations from the coalition, and former Attorney General Dick Thornburgh testified before the Sentencing Commission on the subject of privilege waiver.⁷ In response to questions from several Commissioners regarding the frequency with which governmental entities have been requesting that businesses waive their privileges as a condition for cooperation credit, as well as the effects of these waiver requests, the coalition and the ABA subsequently undertook a detailed survey of in-house and outside corporate counsel, and the results were presented to the Commission in early March 2006.⁸ Several representatives of the coalition also testified before the Commission on March 15, 2006 regarding the results of the new survey.

⁵ The August 15, 2005 comment letter signed by the nine former senior Justice Department officials—including three former Attorneys General, one former Acting Attorney General, two former Deputy Attorneys General, and three former Solicitors General—is available at http://www.abanet.org/poladv/acpriv_formerdojofficialstetter8-15-05.pdf.

⁶ The signatories to the coalition’s August 15, 2005 comment letter to the Commission were the American Chemistry Council, American Civil Liberties Union, Association of Corporate Counsel, 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, U.S. Chamber of Commerce, and Washington Legal Foundation. In addition, the ABA, which is not a formal member of the coalition but has worked in close cooperation with that entity, also submitted similar comments to the Commission on August 15, 2005. Links to the ABA, coalition and other August 15, 2005 comment letters and most other privilege waiver materials referenced in this letter are available at <http://www.abanet.org/poladv/acprivilege.htm>.

⁷ The November 15, 2005 testimony of the American Bar Association, American Chemistry Council, American Civil Liberties Union, Association of Corporate Counsel, National Association of Criminal Defense Lawyers, National Association of Manufacturers, U.S. Chamber of Commerce, and former Attorney General Dick Thornburgh are available at http://www.ussc.gov/AGENDAS/agd11_05.htm.

⁸ The detailed results of the new March 2006 surveys of in-house and outside corporate counsel are available online at <http://www.acca.com/Surveys/attyclient2.pdf>. The new March 2006 surveys expanded upon the coalition’s previous surveys of in-house and outside counsel that were completed in April 2005. Executive summaries of the April 2005 surveys are available at www.acca.com/Surveys/attyclient.pdf and [www.nacdli.org/public.nsf/Legislation/Overcriminalization002/\\$FILE/AC_Survey.pdf](http://www.nacdli.org/public.nsf/Legislation/Overcriminalization002/$FILE/AC_Survey.pdf), respectively.

Meanwhile, the Commission issued its Notice of Proposed Amendments, Request for Public Comment, and Notice of Public Hearings on January 27, 2006. One of the issues on which the Commission sought public comment was the issue of "Chapter Eight – Privilege Waiver." In particular, the Commission sought additional comment on the following specific issues:

(1) whether this commentary language [in Application Note 12 of Section 8C2.5 of the Guidelines] is having unintended consequences; (2) if so, how specifically has it adversely affected the application of the sentencing guidelines and the administration of justice; (3) whether this commentary language should be deleted or amended; and (4) if it should be amended, in what manner.⁹

Unintended Consequences of the Privilege Waiver Amendment

In response to the first two issues posed by the Commission, the ABA believes that the 2004 privilege waiver amendment to the Sentencing Guidelines has helped cause a variety of profoundly negative, if unintended, consequences.

The ABA believes that as a result of the privilege waiver amendment and related Justice Department policies and practices, companies have been forced to waive their attorney-client and work product protections in most cases. The problem of coerced waiver that began with the 1999 Holder Memorandum and the 2003 Thompson Memorandum was exacerbated when the Commission added the new privilege waiver language to the Section 8C2.5 Commentary in 2004. While the new language begins by stating a general rule that a waiver is "not a prerequisite" for a reduction in the culpability score—and leniency—under the Guidelines, that statement is followed by a very broad and subjective exception for situations where prosecutors contend that waiver "is necessary in order to provide timely and thorough disclosure of all pertinent information known to the organization." Without some meaningful oversight over what waivers prosecutors may deem to be "necessary," this exception essentially swallows the rule. Prior to the change, the Commentary was silent on the issue and contained no suggestion that such a waiver would ever be required.

Now that this amendment has become effective, the Justice Department is even more likely than it was before to require companies to waive their privileges in almost all cases. Adding to our concern is that the Justice Department, as well as other enforcement agencies, is viewing the lack of congressional disapproval of this amendment as congressional ratification of the Department's policy of routinely requiring privilege waiver. From a practical standpoint, companies increasingly have no choice but to waive these privileges whenever the government demands it, as 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 standing in the marketplace.

Substantial new evidence confirms that the privilege waiver amendment, combined with the Justice Department's waiver policies, has resulted in the routine compelled waiver of attorney-client and work product protections. According to the new survey of over 1,200 in-house and outside corporate

⁹ See Notice of Proposed Amendments, Request for Public Comment, and Notice of Public Hearings, 71 Fed. Reg. 4782-4804 (January 27, 2006).

counsel that was completed by the coalition and the ABA in March 2006, almost 75% of corporate counsel respondents believe that a "culture of waiver" has evolved in which governmental agencies believe that it is reasonable and appropriate for them to expect a company under investigation to broadly waive attorney-client or work product protections. In addition, 52% of in-house respondents and 59% of outside respondents have indicated that there has been a marked increase in waiver requests as a condition of cooperation in recent years. Corporate counsel respondents also indicated that when prosecutors give a reason for requesting privilege waiver, the Sentencing Guidelines rank second only to the Justice Department's waiver policies among the reasons most frequently cited.

The ABA is concerned that that the 2004 privilege waiver amendment to the Guidelines and the related Justice Department waiver policies—which together have resulted in routine government requests for waiver of attorney-client and work product protections—will continue to unfairly harm companies, associations, unions and other entities in a number of ways. First and foremost, the 2004 privilege waiver has helped to seriously weaken the confidential attorney-client relationship 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 the managers and the board and must be provided with all relevant information necessary to properly represent the entity. By authorizing and encouraging routine government demands for waiver of attorney-client and work product protections, the privilege waiver 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, thereby harming not only companies, but the investing public as well.

Second, while the privilege waiver amendment—like the Justice Department's waiver policies—was intended to aid government prosecution of corporate criminals, it has actually made detection of corporate misconduct more difficult by helping to undermine companies' internal compliance programs and procedures. These compliance 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. Unfortunately, because the effectiveness of these internal mechanisms 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 protections will be honored makes it more difficult for companies to detect and remedy wrongdoing early. Therefore, by further encouraging prosecutors to seek waiver on a routine basis, the privilege waiver amendment undermines, rather than promotes, good corporate compliance practices.

Third, the privilege waiver amendment unfairly harms employees by infringing on their individual rights. By fostering a system of routine waiver, the 2004 privilege waiver amendment and the other related governmental policies place 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.

In recent months, many others—including the coalition of business and legal groups and the former senior Justice Department officials referenced above—have expressed similar concerns regarding the unintended consequences of the 2004 privilege waiver amendment to the Sentencing Guidelines. 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.

Congressional Oversight of Governmental Waiver Policies

On March 7, 2006, the House Judiciary Subcommittee on Crime, Terrorism, and Homeland Security held an oversight hearing on the subject of government-coerced waiver policies. The hearing, titled “White Collar Enforcement (Part 1): Attorney-Client Privilege and Corporate Waivers,” included a number of prominent witnesses, including Associate Attorney General Robert McCallum, former Attorney General Dick Thornburgh, U.S. Chamber of Commerce President Thomas Donohue, and William Sullivan, Jr. of the law firm of Winston & Strawn.¹⁰ With the exception of Mr. McCallum, all of the other witnesses expressed serious concerns regarding the growing trend of government-coerced privilege waiver and identified the Justice Department’s waiver policies and the 2004 privilege waiver amendment as major contributing factors causing the erosion of the privilege.

During the hearing, the Chairman of the Subcommittee, Rep. Howard Coble (R-NC), expressed his strong support for the attorney-client privilege and his concerns regarding routine prosecutor demands for waiver during investigations. In addition, after acknowledging that prosecutors “must be zealous and vigorous in their efforts to bring corporate actors to justice,” Chairman Coble said that “there is no excuse for prosecutors to require privilege waivers as a routine matter.” In addition, Chairman Coble vowed that his subcommittee would “examine the important issue with a keen eye to determine whether Federal prosecutors are routinely requiring cooperating corporations to waive such privilege.” After noting that the Sentencing Commission is now reexamining the privilege waiver issue as part of the current amendment cycle, he concluded that “while the guidelines do not explicitly mandate a waiver of privileges for the full benefit of cooperation, in practical terms we have to make sure that they do not operate to impose a requirement...”

Later in the hearing, similar concerns regarding government-coerced waiver were also raised by Rep. Dan Lungren (R-CA), who previously served as California Attorney General. During the question and answer period, Rep. Lungren reiterated his longstanding opposition to the 2004 privilege waiver amendment to the Sentencing Guidelines as explained in his August 15, 2005 letter to the Commission, and he said that he had a “huge concern” with the 2004 amendment to the extent that it “require[d] entities to waive the attorney-client privilege and work product protections as a condition of showing cooperation.” In addition, Rep. Lungren criticized the 1999 Holder Memorandum, the

¹⁰ The written testimony of each of the witnesses who appeared at the March 7, 2006 hearing and the letter submitted by the ABA to the Subcommittee regarding the hearing are available at <http://www.abanet.org/poladv/testimony306.pdf>.

2003 Thompson Memorandum, and the 2004 privilege waiver amendment as together constituting a "creeping intrusion" on the attorney-client privilege.

Rep. William Delahunt (D-MA), himself a former long-time prosecutor, expressed similar misgivings at the hearing regarding government-coerced waiver in general and both the Justice Department's waiver policy and the 2004 privilege waiver amendment to the Sentencing Guidelines in particular. At the conclusion of the hearing, Rep. Delahunt summed up the serious concerns that all the Subcommittee members had previously expressed regarding governmental privilege waiver policies, and he respectfully asked Associate Attorney General McCallum to convey those concerns to the Justice Department in order to avoid having to face bipartisan legislation designed to resolve the issue.

The concerns that the members of the House Judiciary Subcommittee expressed during the March 7 hearing are consistent with those previously expressed to the ABA and the coalition on November 16, 2005 by Sen. Arlen Specter (R-PA), Chairman of the Senate Judiciary Committee, and Rep. James Sensenbrenner (R-WI), Chairman of the House Judiciary Committee.¹¹

Recommended Changes to the 2004 Privilege Waiver Amendment to the Sentencing Guidelines

In order to reverse the negative consequences that have resulted from the 2004 privilege waiver amendment to the Guidelines and help prevent further erosion of the attorney-client privilege, we urge the Commission to amend the applicable language in the Commentary to Section 8C2.5 of the Guidelines 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. 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 by 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 follows¹²:

"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

¹¹ On November 16, 2005, Sen. Specter and Rep. Sensenbrenner spoke at a legal conference dealing with the erosion of the attorney-client privilege that was sponsored by the U.S. Chamber of Commerce, the ABA, the Association of Corporate Counsel, the National Association of Criminal Defense Lawyers, and the American Civil Liberties Union. A transcript of Sen. Specter's comments on the privilege waiver issue, as well as the full text of Rep. Sensenbrenner's prepared remarks, are available online at http://www.abanet.org/poladv/acpriv_transcriptofsensspecter11-16-05.pdf and <http://www.abanet.org/poladv/acprivsensenbrenner11-16-05.pdf>, respectively.

¹² 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.

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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 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 considering our comments. If you would like more information regarding the ABA's position 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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