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VIA FACSIMILE, EMAIL AND UPS NEXT DAY AIR

Mr. Michael Courlander
Public Affairs Officer
United States Sentencing Commission
One Columbus Circle, N.E.
Suite 2-500
Washington, D.C. 20002-8002

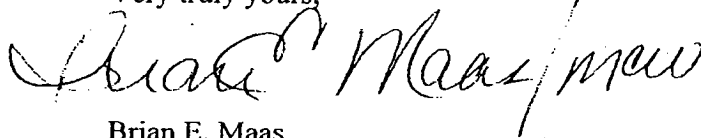
Re: Proposed Comments to 1/27/06
Amendments to Sentencing Guidelines

Dear Mr. Courlander:

Enclosed please find the comments of the New York Council of Defense Lawyers
Regarding Certain of the Proposed Amendments to the Sentencing Guidelines.

Should you have any questions, please do not hesitate to contact me.

Very truly yours,

A handwritten signature in black ink, appearing to read "Brian E. Maas" followed by a stylized flourish or initials "mcw".

Brian E. Maas

BEM:mcw
Enclosure

**NEW YORK COUNCIL OF DEFENSE LAWYERS
COMMENTS REGARDING JANUARY 25, 2006
PROPOSED AMENDMENTS TO THE SENTENCING GUIDELINES**

The New York Council of Defense Lawyers ("NYCDL") is an organization comprised of approximately 200 attorneys whose principal area of practice is the defense of criminal cases in the federal courts. Many of our members are former Assistant United States Attorneys, including previous Chiefs of the Criminal Division in the Southern and Eastern Districts of New York. Our membership also includes attorneys from the Federal Defender Services offices in the Eastern and Southern Districts of New York.

Our members thus have gained familiarity with the Sentencing Guidelines and their application both as prosecutors and defense lawyers. In the comments that follow, we address two issues that are of particular interest to our members, which are raised by the amendments published in the Federal Register, 71 Fed. Reg. 4782-01 (Jan. 27, 2006).

8. PROPOSED REVISIONS TO § 3C1.1 (OBSTRUCTION)

The NYCDL continues to view enhancements such as those included in §3C1.1 ("Obstructing or Impeding the Administration of Justice") as improper because they allow conduct that could have been prosecuted as an independent crime to be used to enhance sentences where proven only by a mere preponderance of the evidence. Even putting that issue aside, however, we believe it is extremely important that the expansion of § 3C1.1 contemplated by this proposed revision not sweep in conduct that cannot fairly be construed as obstruction of justice with respect to the underlying offense; our comments and suggestions revolve around that concern.

The Revision to the Guideline. The heart of the Commission's proposal with respect to § 3C1.1 is to add as subsection (2)(A) language requiring the enhancement to apply to conduct by the defendant that occurred "prior to the investigation of the instant offense of conviction, and

was intended to prevent or hinder the investigation, prosecution, or sentencing of the instant offense of conviction.” As drafted, this language sweeps in broad categories of conduct that are part of the underlying offense and not, in any traditional or practical sense, obstruction of justice. For example, the commonplace situation in which a criminal wears gloves during the commission of a crime, so as not to leave behind fingerprints, or uses a disguise or a false name would come within amended Guideline § 3C1.1(2)(A) as drafted because that conduct is both “prior to the investigation” of the offense and certainly “intended to prevent or hinder the investigation,” and yet surely that is not obstruction of justice in the sense of § 3C1.1 (or, for that matter, obstruction statutes). Similarly, if an employee has been generating phony documentation to conceal that he has been embezzling money from his employer, that is plainly pre-investigative conduct designed to hinder any subsequent investigation, but again, that should not constitute obstruction of justice within § 3C1.1. In both instances, the conduct at issue is part and parcel of the underlying offense and should be considered, if at all, under other sections of the Guidelines.

Thus, the NYCDL suggests that subsection (2)(A) of § 3C1.1 be amended to read as follows, with our proposed language noted in italics:

prior to the investigation of the instant offense of conviction (*and not as an aspect of the commission of that offense*), and was intended to prevent or hinder the investigation, prosecution, or sentencing of the instant offense of conviction, *which investigation, prosecution, or sentencing was believed to be ongoing or reasonably imminent.*

We believe that these changes will allow the amended § 3C1.1 to cover pre-investigative conduct that is truly conduct specifically intended to obstruct justice – as such conduct has traditionally been defined and understood – without also encompassing conduct that is logically connected to the commission of the underlying offense and therefore not a proper basis for a § 3C1.1 enhancement.

The Revisions to the Application Notes. We support the proposed changes to the Application Notes, subject to our comment above and the two comments below.

Civil Perjury. The proposal is to amend item (b) in Application Note 4 – which presently reads “committing, suborning or attempting to suborn perjury” – by adding the words “, including during the course of a civil proceeding pertaining to conduct constituting the offense of conviction.” If the supposed civil perjury meets the 2(A) obstruction standard as we have articulated it above (i.e., with the language changes we proposed), then we support this change to the Application Note. Without the amended 2(A) language, however, this Note would suggest that the revised § 3C1.1 could be applied to civil perjury where the defendant was not specifically focused upon the possibility of a criminal investigation or prosecution, but rather simply lied at an unrelated deposition or other proceeding rather than confess a crime. We believe such an expansion of § 3C1.1 would do violence to the natural and proper construction of the term “obstruction of justice,” particularly in light of the fact that civil perjury not amounting to obstruction of justice nonetheless can and, and indeed should, be addressed as a substantive offense where the evidence warrants that approach.

False Statements to Obtain Court-Appointed Counsel. The NYCDL opposes proposed Application Note 4(l), which would add as an example of conduct warranting a §3C1.1 enhancement “making false statements on a financial affidavit in order to obtain court-appointed counsel.” Such conduct can never be obstruction of justice under § 3C1.1 because making a false statement on a financial affidavit “in order to obtain court-appointed counsel” is, by definition, not conduct undertaken in order to “prevent or hinder the investigation, prosecution, or sentencing of the instant offense of conviction.” Such conduct by a defendant can and probably should be prosecuted, if the false statement can be proven beyond a reasonable doubt, but this proposed revision to the Application Note would directly contradict the plain language

(and intent) of § 3C1.1. Indeed, we note that a stronger argument could be made that lying to a probation or pretrial services officer about drug use while on pre-trial release is obstruction of justice, and yet that conduct is expressly excluded from § 3C1.1 by Application Note 5(e).

Proposed Additional Application Notes. For the reasons noted above, we suggest that the following be added as section (f) of Application Note 5, which provides examples of conduct that typically does not warrant application of § 3C1.1: “generating false or misleading documentation in the course of the commission of the offense of conviction.”

We also urge that the following sentence be added at the very end of Application Note 5: “Enhancements under 2(A) for conduct pre-dating the investigation, prosecution and sentencing of the instant offense should be limited to those instances in which the defendant’s conduct was unambiguously directed at obstructing such future investigation or proceeding, which was believed to be ongoing or reasonably imminent.”

12. CHAPTER EIGHT – PRIVILEGE WAIVER

The United States Sentencing Commission has requested comment with respect to the following sentence in the commentary to the Organizational Sentencing Guidelines that relates to the culpability score for defendant organizations:

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) [Self-Reporting, Cooperation, and Acceptance of Responsibility] *unless such waiver is necessary in order to provide timely and thorough disclosure of all pertinent information known to the organization.*

U.S.S.G. § 8C2.5(g) (emphasis added). At the time this language was adopted by the Commission, “the Commission stated that it expect[ed] such waivers [would] be required on a limited basis....”¹

¹ U.S.S.G. Supplement to Appendix C (Amendment 673) (2004).

As a preliminary matter, the NYCDL joins the positions taken by the Coalition to Preserve the Attorney-Client Privilege² and commends to you its survey research, which confirms what our members have experienced in their daily practice. When charging and sentencing decisions are made, Assistant United States Attorneys regularly put corporations in the position of having to waive the attorney-client privilege during the course of a criminal investigation in order to be considered to have cooperated fully with the government. Further, we agree with the recommendations of the American Bar Association that waiver of the 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."³ At a minimum, we recommend that the commentary be amended to delete the exception for when "such waiver is necessary in order to provide timely and thorough disclosure of all pertinent information known to the organization."

In our experience, the exception, which falls completely within the unreviewable discretion of the prosecutor, has become the rule. We live in what has become a "culture of waiver."⁴ In every investigation, prosecutors and criminal investigators believe it is necessary to have access to the privileged communications and work product of a corporation's lawyers. By

² The Coalition is comprised of the American Chemistry Council, the American Civil Liberties Union, the Association of Corporate Counsel, the Business Civil Liberties, Inc., the Business Roundtable, the National Association of Criminal Defense Lawyers, the National Association of Manufacturers, and the United States Chamber of Commerce. See *Oversight Hearing on White Collar Crime Enforcement (Part 1): Attorney Client Privilege and Corporate Waivers*, before the Subcomm. on Crime, Terrorism and Homeland Security of the House Comm. on Judiciary, 109th Cong., 2d Sess. (Mar. 7, 2006).

³ American Bar Association, Stmt. Of Donald C. Klawiter, *Proposed Amendment of Commentary in Section 8C2.5 of the Federal Sentencing Guidelines Regarding Waiver of Attorney-Client Privilege and Work Product Doctrine*, Nov. 15, 2005 at 3.

⁴ See *Oversight Hearing on White Collar Crime Enforcement (Part 1): Attorney Client Privilege and Corporate Waivers*, before the Subcomm. on Crime, Terrorism and Homeland Security of the House Comm. on Judiciary, 109th Cong., 2d Sess. (Mar. 7, 2006) (noting that almost 75% of both inside and outside counsel expressed agreement that a "culture of waiver" has evolved).

the same token, our clients have unfortunately come to believe that if an indictment is to be avoided, the government will unquestionably have to have access not only to the privileged communications, but also to the innermost thoughts and analyses of the corporation's lawyers. Requiring such a waiver runs counter to the fundamental rights protected by our criminal justice system and undercuts the trust and confidence that define the relationship between lawyer and client and are necessary to its functioning. The exception is also troubling for two very concrete reasons. First, a prosecutor's determination that a particular investigation takes priority over these long-established protections is not subject to non-partisan review. Second, as discussed further below, a client's decision to waive a privilege typically has serious consequences in any future civil litigation and may even spark a civil lawsuit so that plaintiffs can have access to formerly privileged communications.

Furthermore, our experience suggests that the drive of prosecutors and regulators to obtain privileged communications, including work product, is not abating but increasing. It now appears that not only are law enforcement officials regularly determining that such waivers are necessary, they also are requiring a corporation's lawyers to provide information gathered during the course of an internal investigation on a "real time" basis – which is to say that a corporation's counsel is asked to turn over information as soon as it is acquired before counsel can evaluate whether it is relevant, appropriate or significant to the investigation, let alone whether the information is complete or trustworthy. This rush to share information with the government deprives a corporation of the opportunity to utilize fully its counsel to determine what really happened, how it can be documented, and who has critical information necessary to tell the whole story.

In the NYCDL, we know first-hand that there can be serious unintended consequences when waivers of the attorney-client privilege are required and implemented. In 2004, senior

executives of Computer Associates were indicted for obstructing justice and conspiring to obstruct justice, in violation of 18 U.S.C. §§ 1512(c)(2) and 1512(k), by failing to disclose, falsely denying and concealing from lawyers representing the corporation in parallel investigations by the United States Attorney's Office for the Eastern District of New York and the Securities and Exchange Commission irregularities in the corporation's accounting practices.⁵ When a corporation engages legal counsel in connection with an investigation, it should be entitled to the full benefit of that counsel, which requires giving counsel the opportunity to conduct an investigation on behalf its client. A company's lawyers should not become *de facto* prosecutors and government investigators.

Our deep concerns about the theory on which these obstruction charges were brought have only been heightened by the continuing demands for waiver and a recent indictment in United States District Court for the Southern District of Texas, where it appears that the same theory is currently being employed to prosecute an employee of El Paso Corporation because of statements he made and failed to make to the corporation's outside lawyers during an interview they conducted regarding his natural gas trading practices.⁶

This "culture of waiver" also has unintended consequences in private civil litigation. The New York courts have experienced an onslaught of private class actions under the federal securities laws, many of which are routinely filed within days of any public disclosure of the existence of a government investigation. With the regular – if not routine – demand by prosecutors that corporations waive the attorney-client privilege and work product doctrine, plaintiffs in such cases appear ever more eager to file such lawsuits, secure in the belief that they

⁵ *United States v. Sanjay Kumar and Stephen Richards*, Case No. 04-CR-846 (E.D.N.Y. Sept. 22, 2004), Counts 6 and 7.

⁶ *United States v. Greg Singleton*, Case No. 4:06CR080 (S.D. Tex., Mar. 8, 2006), Count 10.

can piggy-back on the waiver required by the government in requesting discovery, and they try to choose jurisdictions that do not accept "selective waiver." Thus, ironically, by indiscriminately requiring waiver, the government is fueling lawsuits and class actions.

Even when the government's investigation results in no charges, the corporation must expend enormous time and resources on defending itself in the private class action context. Thus, in many cases, the privilege waivers that prosecutors frequently require ultimately result in no real justice for the corporation.

In sum, we believe that the exception is unnecessary and has led to unintended consequences in its implementation. Our clients want to avoid indictment, and they recognize that usually means that the best course of action is to work with the government to help uncover wrongdoing. It is not necessary for the Sentencing Commission to express a preference for having a corporation waive its attorney-client privilege or work product protections in order to receive recognition from the government for its efforts to find, investigate, and ultimately prevent corporate crime.