



VIA FEDEX EXPRESS

March 27, 2006

United States Sentencing Commission
One Columbus Circle, N.E., Suite 2-500
Washington, D.C. 20002-8002
Attention: Public Affairs

Re: Comments on Chapter 8 Organizational Guidelines, Section 8C2.5,
Waiver of Attorney-Client Privilege and Work Product Protections

Dear Sir or Madam:

On January 27, 2006, the United States Sentencing Commission proposed guideline amendments that included a request for public comment on whether the following language from the commentary to Section 8C2.5(g) of the Federal Sentencing Guidelines for Organizations (the "Guidelines") should be deleted or amended:

Waiver of attorney-client privilege and of work product protections is not a prerequisite to a reduction in culpability score . . . unless such waiver is necessary in order to provide timely and thorough disclosure of all pertinent information known to the organization.

On behalf of FedEx Corporation and together with the American Bar Association, the Association of Corporate Counsel, the Business Roundtable, the U.S. Chamber of Commerce and many others, I respectfully urge the Commission not only to delete the above sentence — the so-called "privilege waiver language" — from the Guidelines, but to insert new language stating affirmatively that waiver of attorney-client privilege and work product protections should not be a factor in determining cooperation.

Section 8C2.5(g) of the Guidelines significantly reduces the culpability score of a corporate defendant that provides timely and thorough cooperation with a governmental investigation. The privilege waiver language, which was added in November 2004, singles out the attorney-client privilege and work product protections and suggests that, in certain circumstances, these protections must be waived in order to demonstrate cooperation sufficient to receive a culpability score reduction.

[228]

We believe that the privilege waiver language is having the unintended yet deleterious effect of making waiver of the attorney-client privilege and work product protections virtually mandatory for corporate defendants. In particular, we believe that the language authorizes and encourages prosecutors to require companies to waive these protections in the early stages of governmental investigations in order to show "thorough" cooperation and thereby qualify for a more lenient sentence. We believe that from a practical standpoint companies increasingly have no choice but to waive these protections whenever prosecutors demand it, as the government's threat to label them as "uncooperative" can have a profound effect on their public image, stock price and creditworthiness.

Substantial new evidence suggests that coerced waiver of these protections is becoming almost routine. According to a recent survey of over 1,400 in-house and outside corporate counsel conducted by the Association of Corporate Counsel and others (results available at <http://www.acca.com/Surveys/attyclient2.pdf>), almost 75% of respondents believe that a "culture of waiver" has evolved in which governmental agencies believe it is reasonable and appropriate for them to expect a company under investigation to broadly waive attorney-client privilege and work product protections. In addition, a majority of survey respondents believe there has been a marked increase in such waiver requests as a condition of cooperation in recent years. Finally, the survey confirmed that the prosecutors who are increasingly requiring such waivers are frequently citing the privilege waiver language in the Guidelines as a reason.

We are deeply concerned that routine coerced waiver of these essential protections will seriously weaken the confidential attorney-client relationship between companies and their lawyers, thereby undermining corporate compliance and harming the investing public and society as a whole. FedEx's attorneys play a key role in helping the company and its directors, officers and employees comply with the law and act in the best interests of the company and our stockholders. To fulfill this role, we must enjoy the trust and confidence of these individuals and must be provided with all relevant information necessary to properly represent the company. If these individuals know that their conversations with us may not be protected, they may simply choose not to seek our legal guidance. This, in turn, would seriously impede our ability to ensure FedEx's compliance with the law and ultimately harm the company and our stockholders.

In sum, FedEx joins the organizations previously identified in strongly supporting preservation of the attorney-client privilege and work product protections and opposing any governmental policies or practices that have the effect of eroding these vital protections. Accordingly, we urge the Commission to amend the privilege waiver language in the Guidelines to clarify that waiver of these fundamental rights should not be a factor in determining whether a sentencing reduction is warranted for cooperation with the government.

United States Sentencing Commission
March 27, 2006
Page 3

We sincerely appreciate your considering FedEx's comments and concerns. If you would like more information regarding our position on this issue, please feel free to contact me at your convenience.

Sincerely yours,

FedEx Corporation

A handwritten signature in cursive script, appearing to read "Christine P. Richards".

Christine P. Richards

cc: Frederick W. Smith
Robert T. Molinet

[230]