
PUBLIC COMMENT

2006 AMENDMENT CYCLE



United States Sentencing Commission

March 2006



U.S. Department of Justice

Criminal Division

Office of the Assistant Attorney General

Washington, DC 20530-0001

March 28, 2006

The Honorable Ricardo H. Hinojosa
Chair, U.S. Sentencing Commission
One Columbus Circle, NE
Suite 2-500, South Lobby
Washington, DC 20002-8002

Dear Judge Hinojosa:

On behalf of the Department of Justice, I am pleased to submit the following comments regarding the proposed amendments to the federal sentencing guidelines and issues for comment published in the Federal Register in January 2006. Thank you for addressing these important issues. In addition, the Department commends the valuable work the Commission and its staff have done over the course of this amendment cycle to assess the impact of *United States v. Booker*, including the monthly updates and the one-year report. We look forward to continuing to work with you to ensure a fair sentencing system that serves the interests of justice and the American people.

IMMIGRATION

Starting with the immigration roundtable held in September 2005, the Commission has taken an in-depth look at the current immigration guidelines and identified the biggest problems they pose. There was a consensus that the sentencing of re-entry cases needs to be simplified by reducing the number of complex determinations associated with prior convictions. In addition, the guidelines need to recognize the risk factors and aggravating factors that have been increasingly associated with alien smuggling and passport fraud. The Commission's proposals in these areas, particularly those addressing alien smuggling, are an important step toward addressing these issues. We do, however, have some recommendations, noted below, to improve the proposals further.

Amendments to Section 2L1.1

The Department believes the current alien smuggling guidelines under Section 2L1.1 result in sentences that rely too heavily on the number of aliens transported, and do not take into account many of the risk factors and potential dangers posed by these offenses, such as the

growing numbers of children unaccompanied by parents or relatives being smuggled across the borders under extremely dangerous and inhumane conditions. These dangerous conditions have resulted in well-publicized tragedies where those being transported have been seriously injured or killed. Yet often, in sentencing the responsible offenders under the guidelines, only the most serious injury or the death of one person is taken into account while additional deaths or injuries have no impact on the sentencing range. In other cases, aliens being smuggled have been restrained in "safe houses" through fear or intimidation, but the facts do not constitute extortion or other similar offenses. The guidelines have no enhancement for such conduct. The Department supports the Commission's effort to address many of these concerns in the proposed amendments.

With regard to offenders who smuggle aliens into this country whose entry is forbidden because they are aggravated felons or because they pose other security risks, we believe such offenders should receive a higher base offense level even in cases where there is no conviction under 8 U.S.C. § 1327. Rather, as is in Section 2K2.1 when certain dangerous firearms are involved, higher base offense levels should apply regardless of the offense of conviction.

Although Option 1 of the proposal provides a base offense level of 25 for any defendant convicted under 8 U.S.C. § 1327 and Option 2 provides a specific offense characteristic for defendants who smuggle, harbor, or transport inadmissible aliens under 8 U.S.C. § 1182(a)(3), we do not see the two as mutually exclusive and support adoption of both of these options. We would also recommend including aggravated felons in the second option. Moreover, the Department feels very strongly that the standard needs to be "strict liability" in order to provide some incentive for smugglers to identify the people they are helping to move illegally across our border, rather than attempting to benefit from conscious ignorance of the background of the individuals they are bringing into the United States.

The Commission's proposals also include amendments changing the table of number of aliens involved in the offense; adding an offense characteristic for kidnapping, abducting or unlawfully restraining; taking into account deaths and bodily injuries that occur during transport; and addressing the transportation of minors. The Department fully supports these proposed amendments and believes they are necessary responses to the increased violence and danger we have seen in these cases and would result in sentences that serve the purposes of sentencing and reflect the threat alien smuggling poses to the United States.

Passport Fraud

The Department believes the proposed amendments to the guidelines pertaining to passport fraud offenses are a step in the right direction. However, we recommend a number of modifications.

The current document fraud table in Section 2L2.1 has three tiers for the number of documents involved in the offense, the highest of which applies to cases with "100 or more"

documents. Cases involving more than 100 documents are addressed by an invited departure in Application Note 5. This construct is problematic because the Department now regularly prosecutes cases that involve documents numbering in the high hundreds and low thousands. Application Note 5 does not provide sufficient guidance to deal with such large figures. As such, courts have struggled to fashion appropriate departures in these cases. While the proposed amendment to Section 2L2.1 would increase the top level from 100 to 300 documents, we suggest that the Commission add an additional tier or tiers to the table to capture a larger number of cases sentenced under this guideline and to give some sense of an appropriate departure in Application Note 5 for those cases that exceed the highest figure in the table.

In addition, document fraud involving non-immigration documents does not have a table. Rather, the relevant guideline – Section 2B1.1 – is driven by pecuniary loss, which is a largely meaningless calculation in document fraud cases. Accordingly, the Department recommends the sentencing guideline for document fraud cases (which are prosecuted mainly under 18 U.S.C. § 1028) be based on an identical table to the table we propose for Section 2L2.1. As a result, sentences would be based on the number of documents rather than their pecuniary value.

Amendments to Section 2L1.2

With the staggering number of unlawful re-entry cases now being prosecuted, we believe an important goal of this amendment cycle should be to ensure that the guidelines account for the risk factors and aggravating circumstances presented by criminal aliens who return to the United States after being deported. By accounting for such risks and aggravating circumstances, the guidelines will increase deterrence and target those cases where longer sentences and incapacitation are most appropriate. At the same time, we are keenly aware of the burdens the large numbers of these cases place on all elements of the criminal justice system and the need for sensible reform that simplifies application of Section 2L1.2 in a fair manner in order to relieve the litigation burden on participants in the sentencing process.

Under the current Section 2L1.2, the specific offense characteristics require duplicate and sometimes conflicting analysis when first determining the statutory maximum penalty and then determining which, if any, of the specific offense characteristics apply. Indeed, the “categorical” analysis has led to counter-intuitive, if not arbitrary, results in some cases. The result is that truly dangerous aliens avoid appropriate punishment on seemingly technical grounds.

The categorical analysis of qualifying convictions is performed according to the Supreme Court’s decisions in *Taylor v. United States*, 495 U.S. 595 (1990), and *Shepard v. United States*, 125 S. Ct. 1254, 1261 (2005). Under these decisions, a conviction qualifies as an aggravated felony or triggers a specific offense characteristic only (1) if the statute of conviction fits within the definition of the qualifying offense (for instance, the “modern generic” definition of “burglary”), or (2) if the statute of conviction contains offenses that fall within the definition and others that do not, and limited judicial records establish that the conviction was for an offense

that fits within the definition. This analysis is cumbersome, and obtaining the necessary records is a time-consuming process for prosecutors, defense attorneys and probation officers.

In addition, this categorical analysis has sparked a seemingly endless wave of litigation in the trial and appellate courts. Eliminating the need for this analysis would greatly reduce the workload for participants in the sentencing process and improve the efficiency and reliability of sentencing determinations. As such, the Department favors moving towards a system in which the length of the prior sentences is the guiding factor. Such a system could still include enhancements for prior convictions for certain serious offenses such as murder, rape, kidnapping or terrorism. Defendants who believe their sentences were unduly harsh in the underlying case and therefore trigger too stiff an enhancement could move for downward departures and rely on the reports and other records in the underlying case to support their requests, similar to current practice.

Of the options presented by the Commission to address the categorical approach, the Department favors Option 1, with one modification. This option requires an aggravated felony conviction to trigger the enhancements in subsections (b)(1)(A), (B) & (C) of Section 2L1.2. As the *Interim Staff Report* notes, this would result in only one categorical analysis being performed, but would not do away with that analysis entirely.

However, as proposed, this option may create an unduly narrow class of cases subject to the enhancement in subsection (b)(1)(B) through the use of the term "aggravated felony" in that subsection. Many of the crimes included as "aggravated felonies" in 8 U.S.C. § 1101(a)(43), including crimes of violence, and theft and burglary offenses, require an imposed sentence of at least 12 months of imprisonment in order to qualify. As a result, a requirement that a conviction must be an aggravated felony to trigger the enhancement in subsection (b)(1)(B) means only defendants who received a sentence between 12 and 13 months of imprisonment would be subject to that specific offense characteristic. We suggest that this is not a large enough class of repeat criminals to justify a special guideline enhancement. Instead, the Department recommends dropping the word "aggravated" from subsection (b)(1)(B), which would result in enhancements ranging from four levels, for those defendants convicted of three or more misdemeanors or ordinary felonies with a sentence of probation; to 16 levels, for defendants convicted of aggravated felonies with sentences of imprisonment exceeding 13 months.

Federal Defenders' Proposal

The Department is aware that the Commission has received and is considering a proposal drafted by federal defenders to amend Section 2L1.2. We believe this proposal would significantly weaken the guideline by reducing the maximum total offense level for all offenders other than convicted terrorists to level 16. This would be counterproductive in that it would remove the deterrent and incapacitating effect that is present in the existing guideline. Moreover, the proposal would raise the burden on the government to establish multiple aggravated felony convictions, only to trigger a *lower* maximum enhancement for aggravated felonies. In addition,

the proposal would retain the requirement of performing different categorical analyses to determine whether a conviction qualifies both as an aggravated felony and as a qualifying offense under the incorporated guideline definitions. Weakening the guideline in this fashion would be contrary to the intention of Congress, as expressed in its increase to the penalties in § 1326 as part of the Violent Crime Control and Law Enforcement Act of 1994, and in its directive to the Commission in the Illegal Immigration Reform and Immigrant Responsibility Act of 1996 to increase the base offense level in Section 2L1.2. It is also bad policy.

Subsection (b)(1) of the federal defenders' proposal would entitle a defendant to a reduction in the base offense level if the defendant returned or remained to visit immediate family for such purposes as securing medical treatment or humanitarian care or if the family member is in extremis. Likewise, the proposal would entitle a defendant to a reduced offense level if the defendant returned to or remained in the United States because of "cultural assimilation." These are matters best left to Congress in the first instance. At present, the immigration laws make no provision for aggravated felons to return to the United States under any circumstances. Building a reduction into the Sentencing Guidelines for these purposes would contradict the expressed intent of Congress. Moreover, captioning these reductions in the form of entitlements is inappropriate. In truly extraordinary cases, where the guidelines do not fully take into account the facts and circumstances of a particular defendant's situation, courts have – and always have had – the flexibility to fashion an appropriate departure from the guideline range.

Recognizing that some aliens will re-enter after deportation regardless of the penalty imposed actually militates against the approach supported by the federal defenders. Law enforcement at the border is difficult enough as it is without having to apprehend such aliens more often because they are receiving less time in prison each time they are caught. Similarly, such an amendment will encourage rather than discourage illegal re-entry at a time when such a policy is inconsistent with the policies of the President, laws enacted by Congress and the will of the American people.

Issues for Comment

As for the remaining issues for comment, the Department believes that expressly requiring terms of imprisonment to trigger the enhancements in subsections (b)(1)(A) and (b)(1)(B) would adequately address the issue of drug trafficking offenses resulting in sentences of probation. Likewise, the proposals adequately address the application of Section 2L1.2 to felony simple possession convictions involving large quantities of narcotics that clearly would be intended for distribution. Adopting a separate category for such offenses would be very difficult to apply in practice due to the restrictions imposed in the *Taylor* and *Shepard* decisions. Placing imprisonment thresholds on the enhancements in subsections (b)(1)(A) and (b)(1)(B) provides a fair and objective method for ensuring that less-serious offenders will be much less likely to face those enhancements based purely on a personal-use drug conviction.

With regard to criminal history calculations, we believe the present system of imposing adjustments under Section 2L1.2 for all convictions regardless of date is consistent with the scheme adopted by Congress in 8 U.S.C. § 1326 and expressed elsewhere in the immigration statutes. Simply put, Congress has made it clear that individuals convicted of aggravated felonies are barred from returning without express consent for the remainder of their lives. The penalties in 8 U.S.C. § 1326 are not time-dependent, and neither should the penalties imposed under Section 2L1.2.

The age of a conviction remains a factor in determining whether the conviction adds to a defendant's criminal history score, which ameliorates the effect of so-called "double-counting." Addressing the prior conviction as part of the offense-level calculation as well as the criminal history score is appropriate because the defendant's prior conviction is an element of the offense. This scheme is consistent with the structure of other guidelines, such as the firearms guideline in Section 2K2.1, that provide offense level enhancements for prior convictions without barring consideration of those convictions to add to a defendant's criminal history score. We believe the current structure is appropriate and need not be amended.

FIREARMS TRAFFICKING

Definition of Firearms Trafficking

The Commission's proposal defines firearms "trafficking" as a simple firearm transfer that meets certain conditions. The proposal seeks comment on whether it should apply to a single firearm or to more than one firearm. On this question, the Department favors having the enhancement apply only where the offense and any relevant conduct involve more than one firearm. The unlawful transfer of more than one firearm demonstrates that the defendant knew he or she was participating in a scheme that is part of the unlawful market in guns. Transfer of a single firearm typically will not reflect conscious participation in a scheme and does not justify a significant increase in the length of imprisonment.

The Department is concerned, however, about the proposal being overly broad in some respects and under-inclusive in one respect. The proposal requires only a showing of an ongoing unlawful scheme when nothing of value was exchanged; showing an unlawful scheme, however, is not required when the transfer is for something of value. The proposal also does not require any showing that the defendant knew, had reason to believe, or was wilfully blind to the fact that the transfer would be to a person whose possession or receipt would be unlawful or who intended to use or dispose of the firearm unlawfully.

Under the Commission's proposed definition, proving the existence of a "trafficking" offense may be simpler, but the Department notes that the definition leaves the potential for covering conduct that is broader than what is regarded as the genuine gun-trafficking problem. For example, under the Commission's proposed definition, a prohibited person with an old felony conviction who has a gun

collection (itself prohibited by law) and sells two guns to a non-prohibited friend or relative would be considered a gun trafficker. Also, a person regularly selling firearms who is found to be dealing without a license would automatically be considered a gun trafficker, without any showing that he knew he was selling, had reason to believe he was selling, or was wilfully blind to the fact that he was selling the guns to prohibited persons. The Department does not think that the definition should result in all dealing-without-a-license cases being considered "gun trafficking" cases. The Department likewise does not believe that any transfer of firearms by a prohibited person for value should automatically be considered firearms "trafficking."

On the other hand, the Commission's proposed definition is under-inclusive in that it covers only the transfer and not the receipt of a firearm, even when the recipient is part of a gun-trafficking scheme. A person who receives a firearm as part of a trafficking scheme but who has not yet had an opportunity himself to transfer the firearm in furtherance of the scheme should also be covered by the definition ultimately adopted by the Commission.

If the conduct covered by the trafficking definition is better tailored to the core trafficking conduct involving unlawful schemes to divert firearms from lawful commerce to facilitate the acquisition of firearms by prohibited persons or others for unlawful purposes, then the Department believes a substantial increase in the penalty is justified. With respect to the Commission's request for comment on whether pecuniary gain is necessary for a defendant to qualify as a gun trafficker under the proposed enhancement, the Department supports a definition that includes transfers for anything of value, including drugs. The Department also supports the provision proposed by the Commission clarifying that the trafficking enhancement applies to illegal transfers that are part of an unlawful scheme, even if nothing of value was exchanged.

The Department is aware that the federal defenders have proposed a definition of trafficking that requires the defendant to have been "engaged in the business of trafficking" by engaging in "the regular and repetitive acquisition and transport, transfer or disposition of firearms" with the predominant objective in doing so for "livelihood or profit" or criminal purposes or terrorism. We strongly believe that this definition is too narrow, essentially limiting firearms trafficking enhancements to cases where it can be proved that the defendant was unlawfully dealing in firearms without a license, as it borrows the terminology used in defining the latter offense. This ignores the reality that the vast majority of trafficking takes place through transactions involving small numbers of guns. The definition we propose takes this fact into account and more appropriately covers the core trafficking conduct.

The federal defenders have also suggested that there is "a serious double counting problem" with the Commission's proposal. We disagree. The Department notes that the enhancements suggested presuppose that the additional enhancements based on the number of guns involved under subsection (b)(1) would be applicable. Yet we do not oppose having a separate table of enhancements for firearms trafficking. If, however, the Commission decides not to have the (b)(1) enhancement apply to the enhancements for trafficking schemes, then the separate table for trafficking enhancements should be increased to approximate the cumulative enhancement under the Department's current proposal. Because trafficked firearms frequently are recovered from crime scenes, we believe that the

enhancements for unlawful firearms trafficking schemes should be significantly higher than those for comparable numbers of firearms involved in a simple unlawful possession case.

Proposed Firearms Trafficking Enhancements

The Commission's proposed enhancement for firearm trafficking breaks the enhancement into two categories: 2 to 24 firearms and 25 or more firearms. Because most trafficking takes place through transactions involving small numbers of firearms, the Department believes that there should be additional incremental increases between 2 and 25 firearms. For example, increases could be made for cases involving 2 to 7 firearms; 8 to 15 firearms; 16 to 24 firearms; and 25 or more firearms, or for some formulation akin to the existing enhancements in the Guidelines. The Department believes the enhancement should be four levels for the lowest increment, with an additional two-level increase for each additional increment, with the highest increment having a 10-level enhancement. Together with the existing table of enhancements in Section 2K2.1 for the number of firearms involved in the offense, these new enhancements will provide an appropriate increase in punishment for offenses involving a gun-trafficking scheme that meets the criteria set forth in the definition provided above.

In light of the proposed enhancements for firearms trafficking, the Commission should consider whether the application note under Section 2K2.1 regarding upward departures should be amended to provide that an upward departure may be warranted when, in the case of an offense involving firearms trafficking, the number of trafficked firearms substantially exceeded 25.

Stolen and Altered or Obliterated Serial Numbers

The Department strongly supports the Commission's proposal to increase the enhancement from two levels to four levels for offenses involving a firearm that had an altered or obliterated serial number. Because the intentional obliteration or alteration of a serial number can be intended only to make it more difficult for law enforcement to trace the firearm through a licensed seller to the firearm retail buyer, serial number alteration or obliteration is a clear indicator of firearms trafficking or an intent to otherwise use the firearm unlawfully. We believe the higher enhancement better reflects the culpability of this conduct.

Enhancement for Use of High-Capacity Semiautomatic Firearms

The Department also supports the Commission's proposal to create an upward departure based on an offender's possession of a high-capacity semiautomatic firearm. While the possession of large-capacity ammunition-feeding devices and semiautomatic assault weapons is no longer prohibited, the potential for harm created by the possession of a high-capacity semiautomatic firearm by those who would misuse them or otherwise illegally possess them is significant.

A provision allowing for an upward departure will afford the sentencing judge the opportunity to consider the characteristic of the weapon and the offense on a case-by-case basis without requiring the judge to do so as part of the offense-level calculation. The Department favors this upward-

departure approach over the offense-level approach in light of the fact that possession of such firearms is no longer illegal *per se*. We also believe that the Commission's proposed definition adequately covers the types of firearms of greatest concern, specifically those capable of rendering significant harm through the rapid discharge of large numbers of rounds without a need to reload.

"Lesser Harms"

The Department supports the proposed amendment to Section 5K2.11 regarding "Lesser Harms." The amendment would prohibit the use of the section in felon-in-possession cases. The Department believes this proposed change most accurately captures the purpose behind the Lesser Harms provision. Section 5K2.11 allows a sentencing judge to depart when a defendant commits a crime that did not cause or threaten the harm sought to be prevented by the law at issue. Applying Section 5K2.11 in felon-in-possession cases directly contravenes the fundamental purpose for the statutory prohibition, namely to prevent persons who have demonstrated an inability to conform their conduct to the requirements of the law from having control of lethal weapons. The harm is the fact that the felon is in possession of a firearm; it is irrelevant what the felon's intentions are with respect to that firearm. There is no "lesser harm" in a felon-in-possession case. The application of Section 5K2.11 therefore should be prohibited in felon-in-possession cases.

"In Connection With"

The Commission proposes to remedy a split among the Courts of Appeals in applying the "in connection with" requirement for possessing a firearm in burglary and drug cases. The Department supports the objective of remedying the split among the circuits, but questions whether the proposal will accomplish that objective. The Department is still studying the three options outlined by the Commission and has no specific comment to offer with respect to any of them. The Department does note a potential drafting error, because subsequent to redesignation, it appears that the Application Note should be "13" rather than "14."

Clarification of "Brandishing" and "Otherwise Used"

The Department supports the Commission's proposal to elevate the offense level for "brandishing" a firearm during the commission of another offense to the same level currently applied for "otherwise using" a firearm during the offense. The proposal is consistent with the definition of "brandishing" set out in 18 U.S.C. § 924(c) and appropriately elevates the offense level to the same applied for "otherwise used." The higher enhancement for "brandishing" to make it consistent with the enhancement for "otherwise using" better reflects the culpability of the conduct than the present guideline. Indeed, the Department believes that the proposal should be extended to other Guidelines addressing "brandishing" and "otherwise using" a firearm during the commission of an offense.

ATTORNEY-CLIENT PRIVILEGE

Two years ago, after a lengthy, careful, and deliberative process, and based on the recommendation of an *ad hoc* committee which included some of the leading organizational and white collar crime practitioners, the Commission amended Note 12 to Section 8C2.5, which applies to the sentencing of business organizations and provides for a reduction in sentence for cooperation. Specifically, the section as amended states that waivers of privilege are *not* a prerequisite to securing a reduction in sentence for cooperation, except where necessary to provide timely and thorough disclosure of all known pertinent information. The Commission is now being petitioned to eliminate or amend this provision by those who originally sought its inclusion.

Although the Department did not seek or support the provision, we believe the alternatives proposed by the interest groups petitioning the Commission would be counterproductive to legitimate and important law enforcement efforts, and as such, we urge you not to revisit this recent amendment. Chapter 8 of the guidelines is intended to promote greater compliance, self-examination, and cooperation with law enforcement. In some cases, voluntarily sharing privileged material is a necessary part of that regime. It is important to note that the language at issue applies only in cases in which the corporation has already admitted wrongdoing and been convicted of a federal offense. Corporations willing to cooperate, by sharing privileged materials if necessary, should get credit for doing so, just as individual defendants may have their sentences reduced for providing substantial assistance to the government.

The current commentary recognizes that waiver is not necessary for cooperation, except in certain circumstances. The proposed amendments, on the other hand, would provide that non-disclosure may *never* be considered in determining whether a corporation has been cooperative. Hence, a corporation could claim full credit for cooperation with an investigation – a fact it would no doubt tout in the press – without having disclosed proof certain of its guilt. Such conduct would undermine, rather than further, the Commission's efforts to develop greater transparency and ethical conduct by corporate management, and would further undermine the public's trust in our markets and business leaders. Accordingly, the Department respectfully submits that the guidelines should not be amended to sanction such an outcome.

POLICY STATEMENT ON REDUCTION IN SENTENCE

The proposed policy statement deviates from the statutory language in material ways, and the Department urges the Commission to track the statutory language more closely in order to avoid an interpretation of the policy statement that differs from the plain language of the statute. First, the first unnumbered portion of this section omits the following statutory language after the phrase, "the court may reduce a term of imprisonment":

... (and may impose a term of probation or supervised release with or without conditions that does not exceed the unserved portion of the original term of imprisonment).

This is important language that gives courts significant discretion to review the previously-imposed conditions of supervised release and, in appropriate cases, extend the term or modify the conditions of release. Additionally, the statutory language "to the extent that they are applicable" is omitted following "set forth in 18 U.S.C. § 3553(a)." This language is useful, instructive, and necessary for completeness. By omitting it in the policy statement, the Commission inadvertently would suggest that the sentencing court must consider *all* of the factors set forth in 3553(a), even those that might not be applicable in a particular case.

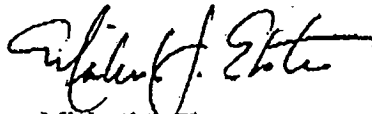
Proposed Section 1B1.13(1)(A) changes the statutory language from "extraordinary and compelling reasons," to "extraordinary and compelling reason." It is not clear why this was changed from plural to singular, and it may be a typographical error. However, this could be a potential source of confusion and should, therefore, track the statutory language precisely.

The Department also notes that the policy statement purports to expand § 3582(c)(1)(A)(ii) – which was expressly intended by Congress to be a safety valve for prisoners sentenced under the 1994 "Three Strikes" law, *see* House Report 103-463 (March 25, 1994) – to convictions for any other offense. It is unclear what authority the Commission relies upon in attempting to expand the coverage of the statute through the guidelines. In any event, in the absence of clear Congressional authority, the Department does not anticipate authorizing a motion for a reduction in sentence in a case that fits within the Commission's expansion of the statute.

In addition to the question of the Commission's authority to expand § 3582(c)(1)(A)(ii), the Department believes that this section of the policy statement will not have any measurable impact, either as Congress drafted it or as the Commission proposes expanding it, because of the extremely small pool of inmates who will (eventually) meet the highly restrictive criteria. Only about 1.2% of the federal inmate population is 66 years of age or older. Furthermore, the majority of inmates in the custody of the Bureau of Prisons who are advanced in age (55 years or older), entered Bureau custody after committing their offenses at an advanced age. For example, generally, inmates in Bureau custody ages 55 to 64 committed their offenses in the year prior to their 55th birthday; inmates 65-69 committed their offenses within the two years prior to their 65th birthday; and inmates 70 or older committed their offenses within the four years prior to their 70th birthday. As a result, few if any elderly inmates will ever satisfy the 30 year service requirement. The Department, therefore, simply questions the utility of this proposal.

Thank you for this opportunity to provide the Commission with the views, comments, and suggestions of the Department of Justice. We look forward to continuing to work with the Commission to improve the federal sentencing guidelines.

Sincerely,



Michael J. Elston

Senior Counsel to the Assistant Attorney General

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February 9, 2006

The Honorable Ricardo H. Hinojosa, Chair
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Dear Judge Hinojosa:

The Probation Officers Advisory Group (POAG) met in Washington, D.C. on February 7 and 8, 2006 to discuss and formulate recommendations to the United States Sentencing Commission. We are submitting comments relating to several issues which were published for comment in January 2006.

IMMIGRATION:

Part One: USSG § 2L1.1:

National Security Concerns:

POAG recommends Option One under National Security Concerns as it would require the government to make the charging decision at the time of indictment, rather than a probation officer attempting to make the determination on facts which may not be readily available and difficult to obtain.

Number of Aliens:

As to the number of aliens proposal, POAG identified no application issues but recommends Option Two due to the specificity of the table.

Endangerment of Minors:

POAG recommends Option One which makes no distinction relative to the age of the illegal minor as

information to establish the age of an illegal minor would be difficult, if not impossible to obtain.

Offenses Involving Death:

POAG discussed whether this proposal captures multiple harms to a large number of victims. If there is more than one death, the harm can be addressed in USSG §5K2.1 which lists an encouraged upward departure for multiple deaths. However, if multiple victims suffer bodily injury, serious bodily injury, or permanent or life-threatening bodily injury, is it the intent of the Commission to treat cases involving one victim in the same manner as cases involving multiple victims? Perhaps a special instruction should be included explaining how this enhancement would apply in a case involving multiple victims with a variety of injuries. POAG does agree with the proposal in the cross reference to apply the appropriate homicide guideline, rather than solely directing application of the murder guideline.

Abducting Aliens, or Holding Aliens for Ransom:

The group agrees with the proposed change at USSG §2L1.1(b)(10) addressing concerns that sometimes aliens are coerced without the use of physical force which is unaccounted for in the current guideline system. Based on our discussion, the group believes this is a separate harm from the "typical" smuggling case. The proposed increase appears consistent with the application in USSG §2A4.1 and the minimum base offense level in USSG §2A4.2.

Part Two: USSG § 2L2.1:

Fraudulently Obtaining or Using United States Passports or Foreign Passports:

POAG would not recommend the inclusion of documents other than passports for the proposed enhancements at USSG §§2L2.1 and 2L2.2. Identity documents relating to naturalization, citizenship, resident status, and passports provide the basis for the offense of conviction and are therefore addressed in the base offense level. It is unclear why identity documents such as drivers' licenses and Social Security cards should receive a further increase. In the past, we were told an increase for U.S. passports was needed because they were "the gold standard" in identity documents. This factor does not seem to apply with respect to other identity documents. In addition, the ease in obtaining other identification documents varies from state to state. If the Commission chooses to provide for this increase, then an application note is requested addressing a potential double counting issue.

The group would also suggest adding an application note similar to the note in USSG §2B5.1 instructing the court not to apply the increase if the documents are obviously counterfeit.

Alternative Approaches to Sentencing Under USSG §2L1.2:

The members recommend Option One in the Alternative Approaches to Sentencing Under §2L1.2. The group has experienced no difficulty in determining whether a sentence of imprisonment exceeded thirteen months. However, officers have struggled when trying to interpret a time-served sentence less than thirteen months. Obtaining verification from local jails to corroborate the amount of time spent in detention is difficult to accomplish in a timely fashion. Option One alleviates this application problem. Furthermore, Option One appears to simplify application of this guideline as the

analysis to be made is limited to a determination of aggravated felony and the sentence of imprisonment imposed resulting in a more consistent application of the guideline.

FIREARMS:

POAG appreciates the attempt to resolve the issue surrounding the Sunset Provision for weapons described in 18 U.S.C. § 921(a)(30). Based on our discussion, courts are handling this issue in a variety of manners, whether applying it and granting a downward departure and/or variance, or not applying it and giving an upward departure and/or variance, resulting in disparity in sentences imposed nationally. POAG's preference is Option One as the upward departure method would not resolve the disparity issue. POAG does recommend the definition of "high-capacity semiautomatic firearm" be consistent between USSG §2K2.1 and §5K2.17.

There was great concern that the definition of trafficking as written was overly broad and could apply to low level "straw purchasers," some of whom may commit this offense under duress. For example, the girlfriend of a weapons trafficker who is a victim of domestic violence buys the weapon(s) and does not receive any monetary gain or receives a small amount of drugs for her participation. The convicted felon then turns around and sells the weapon on the street for a substantial amount of money. Yet, under the proposed definition, if the government cannot prove that the convicted felon sold the weapon on the street, the girlfriend would receive a higher sentence. We recognize that putting any firearm on the street has the potential for serious harm, however, this proposal may result in sentencing disparity.

If the Commission chooses to use the number of firearms in conjunction with the trafficking enhancement, the group perceives a potential double counting issue between USSG §§ 2K2.1(b)(1) and (b)(7). POAG requests an application note be provided giving direction as to whether this is "permissible double counting."

POAG believes the majority of the investigations completed by group members involve the exchange of guns for drugs. As such, we recommend the trafficking definition include "as consideration for anything of value" rather than inserting the pecuniary gain clause.

The group sees no application issues in raising the enhancement for an altered or obliterated serial number, however, members recommend also capturing illegally manufactured guns with no serial numbers.

As the "in connection with" issue has produced ongoing application issues, POAG recommends resolution of this circuit conflict. There does appear to be an inconsistency among all three of the proposed options and the gun enhancement in USSG §2D1.1. In Options One and Two, the mere presence of the firearm would justify the application in USSG §2K2.1, however, the standard in USSG §2D1.1(b)(1) provides a provision that the adjustment should be applied if the weapon was present unless it was clearly improbable that the weapon was connected with the offense. Option Three presents an additional application problem for defendants convicted of both drug and firearm offenses. It appears mere presence of the weapon is not enough to trigger this enhancement in USSG §2K2.1 which would then appear to be inconsistent with the application provision at USSG §2D1.1. This could also produce disparity in charge bargaining if the defendant is not eligible to receive this enhancement in both guidelines.

POAG does not think it necessary to add language prohibiting downward departures in USSG §5K2.11 for cases involving a conviction under 18 U.S.C. § 922(g). In some instances where this departure has been applied, it appeared to be appropriate given the circumstances of the offense and the characteristics of the defendant. Therefore, the group recommends this policy statement be left to the Court's discretion based upon the specific facts of each case.

Officers have difficulty determining the distinction between the terms "brandishing" and "otherwise used." In reviewing the proposed changes, the majority view in Option 2(A) appears to resolve many of our concerns, however, the group recognizes there may be some inconsistency between this option and the definition of brandishing in 18 U.S.C. § 924(c).

STERIODS:

Although Option One provides for a more precise measure of the actual amount of steroids, the drug analysis could prove problematic due to the many different forms of steroids available and whether the DEA or state laboratories are equipped to make a qualitative analysis. Currently, probation officers have difficulty in obtaining laboratory results in routine drug cases. We would therefore expect greater difficulty in obtaining reports in this specialized area. POAG believes steroids should be punished as other schedule III controlled substances. Based on our discussion it appears defendants abusing steroids should be treated in a similar fashion as those defendants who abuse other schedule III controlled substances as the groups share many similar characteristics. As such, POAG recommends Option Two.

Regarding masking agents, POAG agrees an enhancement is warranted, however, the current definition of a masking agent appears somewhat limited.

POAG recommends adoption of Option One regarding coaches of athletic activities for the following reasons. It is felt many times Chapter Three adjustments are overlooked by the new or inexperienced practitioner, whereas Chapter Two specific offense characteristics generally are not. As such, it appears this increase would be applied in a more uniform manner in Chapter Two. Secondly, the group recognizes the current proposal is for a two-level increase, however, in our discussions, POAG believes there is a large distinction between the coach who provides the substance to a professional athlete versus a college or high school athlete. It is recommended that a larger increase be applied to a coach for a college or high school athlete to reflect the greater degree of vulnerability of the athlete, and the greater degree of influence a coach has over those young athletes. Recognizing this is not a current issue for comment, we suggest at a future time, the Commission revisit this issue as to whether a distinction should be made between these two groups in Chapter Two.

When the Commission re-promulgates this emergency amendment as permanent, POAG agrees the proposed enhancements pertaining to masking agents and distribution of a steroid to an athlete should be expanded to involve any controlled substance as we see no distinction between steroids and other controlled substances.

As to Issue for Comment Two, in this type of quantity-based penalty structure, this change appears consistent. While we realize there is precedent for the language "mid-level" to "high-level" dealers in Amendment 621 regarding MDMA, some members of POAG initially confused the language with a

possible Chapter Three role adjustment. POAG takes no position on what offense levels should be established.

MISCELLANEOUS LAWS:

The proposed new guideline at USSG §2X5.2 would greatly benefit those districts with numerous Class A misdemeanor offenses not referenced elsewhere. We would not recommend consolidating all misdemeanor offenses under this new guideline as it could result in charge bargaining practices by the parties.

The suggested language at USSG §2X5.1 is confusing and appears circular. The members felt the example in the synopsis more clearly explained the application principals than the guideline as written. However, problems appear to exist for multiple offenses. For example, if the indictment alleged the death or bodily injury to a child in utero was caused by an assault during the commission of a robbery, which guideline should the officer apply? Would the assault guideline, the robbery guideline or the higher of the two apply?

APPLICATION ISSUES:

POAG agrees with all the recommended changes in this section, many of which have been outlined as problematic in our past position papers. We appreciate the Commission's proposals to address these issues.

USSG §3C1.1 - CIRCUIT CONFLICT RE: OBSTRUCTION OF ADMINISTRATION OF JUSTICE:

The suggested change for pre-investigative conduct appears to unnecessarily complicate the application of this guideline and could capture unintended behavior, potentially punishing defendants on a broader scope than a relevant conduct standard. This recommended change in all likelihood will result in lengthier sentencing hearings to respond to additional objections.

POAG agrees with the proposal to include "perjury in the course of a civil proceeding," as members have previously applied an Obstruction of Justice enhancement for this conduct. However, we do not recommend inclusion of "false statement on a financial affidavit" as we do not see a clear connection between this conduct and its relationship to the offense of conviction.

Closing

We trust you will find our comments and suggestions beneficial during your discussion and appreciate the opportunity to provide our perspective on guideline sentencing issues. As always, should you have any questions or need clarification, please do not hesitate to contact us.

Sincerely,

Cathy A. Battistelli
Chair



Practitioners' Advisory Group

A Standing Advisory Group of the United States Sentencing Commission

March 15, 2006

The Honorable Ricardo H. Hinojosa, Chair
United States Sentencing Commission
One Columbus Circle, N.E.
Suite 2-500, South Lobby
Washington, D.C. 20002-8002

Re: Comment on Omnibus Proposals for 2006 Amendment Cycle

Dear Judge Hinojosa:

The Practitioners' Advisory Group ("PAG") submits the following comments to the Commission's January 25, 2006 notice, pursuant to 71 FR 4782-4804, proposing various sentencing guideline amendments for the 2006 amendment cycle. As always, PAG appreciates the opportunity to formally participate in this process.¹

1. Proposed Amendments to Immigration Guidelines

PAG submits that the Commission's proposed amendments to the immigration guidelines are not appropriate at this time, but rather, should await any Congressional action. In the alternative, we address these proposed amendments and provide you with our comments.

a. Interim Staff Report Fails To Provide a Compelling Basis
For Immigration Guideline Amendments at this Time

The Interim Staff Report recommends across-the-board increases in the severity of immigration sentences, based primarily upon its perception that immigration reform is a high Congressional priority. The Interim Report cites an increase in illegal immigration, as well as an alleged increase in violence associated with it, as underlying Congressional interest in additional immigration reform measures. This Report, however, is deficient in several important ways.

¹ PAG wishes to thank its members Pat Mullin, Mary Price, Tim Hoover, David Debold, Barry Boss, Amy Baron-Evans, Anne Blanchard, Margy Love, Richard Crane, and Steve Jacobson, who made various contributions to this submission, as well as members Lyle Yurko and Tom Dawson, who made significant contributions to PAG's February 23, 2006 comment on the Commission's proposed emergency steroids amendments, referenced herein.

First, the Report repeatedly references H.R. 4437 which, among other things, would make illegal presence in the United States a federal crime by increasing the statutory maximum sentences from six months to one year and a day. The House measure would also increase the severity of penalties for other immigration-related offenses. At this juncture, however, this House Bill has not yet received Senate approval. The Senate Judiciary Committee only began its markup of a separate immigration bill this month, and no Senate vote will occur on any bill until March 27 at the earliest; even if a Senate bill passes, it would still need to be reconciled with H.R. 4437 in conference. The Senate bills under consideration appear to include Senator (and Judiciary Chair) Arlen Specter's proposal that sentencing enhancements be based not on an "aggravated felony," but on the length of the sentence for the prior conviction; moreover, under his bill, prior convictions would need to be charged in the indictment and proved beyond a reasonable doubt. These provisions would differ markedly from the Commission's proposals.

It makes no sense for the Commission to rely upon incomplete, unenacted legislation, passed in the House but awaiting Senate review and amendment, as a basis for ratcheting up immigration sentences. Rather, the Commission should utilize its expertise in crafting amendments to existing immigration guidelines only after Congress speaks again on this issue. The immigration issues in Congress are complex, and the potential tradeoffs palpable. The Commission should not endeavor to read the tea leaves, but instead should await a final word from Congress that might (or might not) then trigger the Commission's involvement.

The Interim Staff Report also fails to proffer meaningful evidence that violence is routinely associated with violation of immigration offenses. There is, in fact, only one reference in the Report to immigration-related violence – a segment of a television program aired January 5, 2006 on CNN. One would have expected the Interim Staff Report to contain far more compelling evidence of immigration-related violence before advancing its position that such violence is an underlying basis for increasing the severity of immigration-related sentences.

Perhaps most significant is the history of increased immigration sentences since the inception of the guidelines. Since 1987, there have been 25 separate amendments to the immigration guidelines. *See* U.S.S.G. § 2L1.1 (Amendments 35, 36, 37, 192, 335, 375, 450, 543, 561); U.S.S.G. § 2L1.2 (Amendments 38, 193, 375, 523, 562, 632, 637, 658); U.S.S.G. § 2L2.1 (Amendments 195, 450, 481, 524, 544, 563); U.S.S.G. § 2L2.2 (Amendments 39, 196, 450, 481, 524, 544, 563, 671). Many of these amendments have increased the severity of sentences meted out for immigration crimes.

For example, re-entry cases under § 2L1.2 were originally set at a base offense level 6. In year 1988, without explanation, the re-entry's base offense level was raised to level 8. In 1989, the following year, yet another amendment was imposed that distinguished between illegal re-entry and illegal re-entry after deportation for a prior felony. A specific offense characteristic was created that imposed a 4-level increase for a

defendant who had previously been deported after a felony conviction for a crime other than an immigration offense.

In 1991, the concept of aggravated felonies was introduced into the immigration guideline scheme, with a 16-level increase for defendants previously deported as aggravated felons. In 1995, yet another amendment was passed which granted further potential for increased sentences for re-entry offenses. Thus, within an 8-year span, there had been 4 separate amendments that each increased the severity of sentences for re-entry cases – often substantially. The guidelines for other immigration offenses, including smuggling and document offenses, also have reflected similar guideline increases.

PAG does not believe that the purposes of sentencing under 18 U.S.C. § 3553(a) were advanced through these increased immigration guidelines. Between years 1987 and 1993, the federal courts saw somewhere between 1,000 and 2,000 immigration cases annually. Since then, the rate of immigration cases in the federal courts has exploded. In year 2003, 15,066 immigration convictions represented 21.9% of all guideline cases. In year 2004, the percentage of immigration cases rose further to 22.5% of all federal sentences. According to the Interim Staff Report at page 2, Post-Booker 2005 data (January 12, 2005 through November 1, 2005) indicates that 23.1% of all guideline cases sentences were immigration offenses.

Though arguments can be made that increased enforcement and fast-track programs account for a substantial increase in immigration sentences, the reality is that the increased severity of the immigration guidelines has failed to result in deterrence to criminal conduct, nor has it protected the public from further crimes as contemplated by Congress in enacting 18 U.S.C. § 3553(a)'s sentencing purposes.

PAG therefore believes that the Interim Staff Report provides no compelling basis for an increase in the severity of immigration sentences as contemplated in many of the proposed amendments. The Report's reliance upon H.R. 4437 is misplaced; it also fails to provide any significant evidence of increased violence and immigration offenses. The Report further ignores the 25 amendments to the guideline amendments enacted during the past 19 years that have already had the cumulative impact of significantly increasing immigration sentences.

PAG submits that the Commission should await final Congressional action on the immigration laws before unilaterally considering additional changes to these guidelines.

b. Specifically-Proposed Immigration Guideline Amendments

Should the Commission decide nevertheless to proceed with consideration of the proposed immigration amendments, we request that the following comments be considered:

§ 2L1.1 (Smuggling, Transporting, or Harboring an Unlawful Alien)

A. National Security Concerns

The Commission proposes two options for a proposed amendment that would increase sentences for defendants convicted under 8 U.S.C. § 1327. Option 1 would provide a base offense level of 25 where the crime involved an alien who was inadmissible because of "security or related grounds," as defined in 8 U.S.C. § 1182(a)(3). Option 2 would provide a specific offense characteristic with an increase somewhere between 2-6 levels for smuggling, transporting, or harboring an alien who was inadmissible because of security or related grounds, was convicted under 8 U.S.C. § 1327, or some other statute.

We are concerned, among other things, by the very broad sweep of both options. First, we note that § 1182(a)(3) encompasses, among other persons, aliens whom the Attorney General "knows, or has reason to believe" seek to enter the United States to engage in some form of security-related activity. Implementation of these guidelines would grant enormous discretion to the Justice Department in determining which aliens may be subject to significantly increased penalties. For example, Option 2 could result in an 87-108 month guideline level for a defendant suspected of smuggling, transporting, or harboring a suspected security risk.

Also, Option 2's 2-6 level increase may be triggered solely upon relevant conduct and not require that the crime of conviction involve a security risk. Given that fact, PAG believes a heightened standard of proof such as a "beyond a reasonable doubt" standard should be utilized in determining whether an increased level is appropriate. It should be noted that the guidelines contemplate such a higher standard in addressing hate crimes or vulnerable victim enhancements under § 3A1.1. A similar, higher standard of proof should be applied here as well.

B. Number Of Aliens

The Commission's proposal also has two options to amend § 2L1.1(b)(2) concerning the number of aliens involved in an immigration offense. Option 1 maintains the current table under § 2L1.1, which provides a 3-level enhancement for offenses involving 6-24 aliens, a 6-level enhancement for offenses involving 25-99 aliens, and a 9-level enhancement for 100 or more aliens. Option 1's proposal, which further has an additional 3-level increase for offenses involving 200-299 aliens and an additional 6-level increase for offenses involving 300 or more aliens, has no support in the available data. As noted at page 7 of the Interim Report, only 1.4% of all year 2005 post-*Booker* cases involved 100 or more aliens. In egregious cases, a judge can always depart upward from the applicable guideline range. There is therefore no reason then to codify the unusual, additional punishments as is being proposed in this option.

Nor does the Interim Report provide justification for an additional 3-level increase at the lower end of the table as contained in Option 2. There has already been at least a 50% increase in sentencing based on the number of aliens, which was adopted in 1997. No good reason is presented to again increase these sentences. Moreover, as noted at page 8 in the Report, relevant conduct allows a court to include not only the number of aliens smuggled during the offense of conviction but also those smuggled during other smuggling operations related to a common scheme or plan. Any concerns regarding an ongoing course of conduct, then, can be met through application of the § 1B1.3 relevant conduct provisions and does not require the proposed additional 3-level increase at the lower end of the table.

C. Endangerment Of Minors

The proposed amendment also presents two options and an issue for comment relating to the smuggling of alien minors. Option 1 provides a potential 6-level increase for the smuggling of a minor unaccompanied by a parent. Option 2 provides a graduated increase based upon the age of the alien minor, with an additional 4-level increase for minors under the age of 12 and a 2-level increase where an unaccompanied minor has attained age 12 but not yet attained age 16.

We submit that the Interim Report fails to provide compelling reasons for a guideline increase for unaccompanied minors. The provisions of § 3A1.1(b) already provide a guideline increase where vulnerable victims are involved. Smuggled unaccompanied minors, where appropriate, would provide a basis for such increased sentences under § 3A1.1(b). Moreover, Judges may upwardly depart outside the applicable guideline range in egregious cases. Therefore, this amendment is unnecessary.

D. Offenses Involving Death

PAG also finds no justification for the proposed amendment's additional 2-level increase through a new specific offense characteristic under U.S.S.G. § 2L1.1(9), with cumulative enhancements where both bodily injury and death occur as well as a cross-reference to § 2L1.1(c)(1) which cover deaths other than murder. As noted at page 12 of the Interim Report, only slightly over 1% of all § 2L1.1 cases involve an increase for an offense involving death. A better course of action would be to maintain the current 8-level increase for death under § 2L1.1(6)(4) and permit judges to upwardly depart from the applicable guideline range for egregious cases. If the Commission considers adopting this proposal despite our objection, the new guideline at least should be modified to make clear that any separate sentencing enhancements for bodily injury and death can only be applied where two separate victims exist; otherwise, this would be improper double-counting.

E. Abducting Aliens, Or Holding Aliens For Ransom

A new specific offense characteristic is proposed where an alien is kidnapped, abducted, or unlawfully restrained for a period of time. In this proposed amendment, there is a 4-level increase in the base offense level with a minimum level of 23. It must be noted, however, that this course of conduct is presently criminalized under 18 U.S.C. § 1203, which imposes sanctions up to life imprisonment and, where appropriate, death for hostage-taking. The applicable guidelines for such an offense are found under § 2A4.1.

Therefore, the almost 7½% of all instances involving hostage-taking, cited in a 2005 Immigration Coding Project, are already subject to prosecution under 18 U.S.C. § 1203, with severe potential sanctions. The proposed amendment to § 2L1.1 to cover alien hostage-taking would be duplicative of existing law and is therefore unnecessary.

§ 2L2.1 (Trafficking In A Document Related To Naturalization, Citizenship, Or Legal Resident Status, Or A United States Passport; Et Cetera) and § 2L2.2 (Fraudulently Acquiring Documents Related To Naturalization, Citizenship, Or Legal Resident Status For Own Use; Et Cetera)

A. Number of Documents

The proposed amendment to § 2L2.1 provides two options to amend the specific offense characteristic involving the number of documents and passports involved in the offense. Employing the same model as set forth in the proposed amendment to § 2L1.1, these options create additional increased levels at, respectively, the higher or lower end of the table.

The Interim Report provides no basis for the proposed increase in sentences based upon the number of documents, but rather reiterates at page 15 that document guideline sentencing was first initiated in 1992 to include a specific offense, and was the subject of increased sentencing in 1997. The Interim Report fails to recite any data or other sound reason that supports the proposed increase in severity of punishment based upon the number of documents involved. This amendment should not be approved.

B. Fraudulently Obtaining Or Using U.S. Passports Or Foreign Passports

While we do not dispute the symmetry argument raised by the Commission that the 4-level increase in § 2L2.1(b)(3) (defendant knew that passport and visa was to be used to facilitate the commission of a felony offense other than an offense involving violation of immigration laws) should also encompass fraudulent use of a United States passport to facilitate an immigration crime, there is no compelling justification for the proposed two-level increase where a foreign passport is used. We further concur with the Federal and Community Defender's proposal that a downward adjustment for obviously counterfeit documents be added if this proposal is enacted over our objections, since the

bearer's ability to evade detection or cross international borders will not be significantly enhanced by use of such a document.

§ 2L1.2 (Unlawfully Entering Or Remaining In The United States)

The Commission presents five separate options modifying the current illegal re-entry guideline. Four of these options require the continued use of a 16-level enhancement under § 2L1.2(b)(1)(a), implemented in November 2001.

According to the Interim Report, 49.3% of all "unlawfully entry" or "unlawfully remaining in the U.S." cases were subjected to a 20-year statutory maximum penalty, as their removal was subsequent to a conviction for commission of an "aggravated felony". Of those cases, the majority received the 16-level increase provided under the guidelines.

The initial issue the Commission should address is whether implementing a threefold level increase (eight levels to 24 levels) is warranted in these cases. We find that the proposal set forth by the Federal and Community Defenders, which is similar to the structure of the firearms guideline, presents a more appropriate means of enhancement based upon the nature and number of prior felony convictions.

We are further concerned that the proposed use of the statutory definition of "aggravated felony" in Options 1, 2, and 3 would create the distinct possibility that persons with only a misdemeanor conviction could see their sentences drastically increase, after being deemed an aggravated felon under 8 U.S.C. § 1101(a)(43)(G). A defendant may then be subject to a potential 8-12 level enhancement. In our experience, one of the most difficult (if not impossible) tasks we have ever faced in our practice is to try to rationally explain to any person, much less an immigrant with broken English, how a misdemeanant with no felony restrictions can nevertheless be classified as not only a felon, but also an aggravated felon. In 2001, the Commission at least ameliorated some of the effects of overbroad "aggravated felony" classifications by reducing this enhancement for certain individuals who were deemed aggravated felons under the statute, while reserving the 16-level enhancement for the most serious offenses. Nothing has changed in the past five years. The facts and general principles of proportionality do not warrant drastically increasing the sentences of misdemeanants and other individuals convicted of non-violent offenses.

We further oppose Option 1's reliance upon 18 U.S.C. § 924 for the definition of "drug trafficking offense". While the Interim Report at pages 27-28 reflects the Commission's desire to tie all immigration drug trafficking offenses to the statutory definition, including those cases in which an individual pleads guilty to possession of a controlled substance where the amount involved would reflect trafficking rather than simple possession, there is a growing circuit split over application of the statutory term "drug trafficking," which already impacts upon the guideline application of this statute. In fact, the Solicitor General has urged the Supreme Court to resolve the matter in *Lopez*

v. Gonzalez, No. 05-527 (U.S. Jan. 24, 2006), which addresses this issue. We urge the Commission to defer further action on this issue pending Supreme Court consideration.

As to Option 5 (which creates a significantly higher base offense level and then provides for a possible reduction based on the nature of the prior conviction), we believe that a troubling precedent would be set if this option is adopted, as the burden would lie upon a defendant to justify a reduction by establishing facts relative to a prior conviction. This proposal, even if it could pass constitutional muster (which we doubt), would be unwise. Even beyond the fact that these defendants are likely to have limited English language skills and even more limited understanding of the American legal system that may hinder their ability to find and prove facts about prior convictions, there are the practical limits stemming from even competent and diligent defendant's counsel's inability to run NCIC criminal history checks, or to obtain copies of former prosecutors' or agents' case files – limits that federal prosecutors and their agents would not face, at least to the same degree. Prosecutors have always had this burden of proving prior convictions – and they will continue to have the burden where prior convictions are an element of the offense – including under 8 U.S.C. § 1326(b). The government already has systems in place to allow it to conduct research and meet this long-established burden; defendants' counsel (especially appointed counsel) have few or none. In sum, PAG believes it makes no sense to suddenly shift this burden only in this singular context of immigration sentencing enhancements. Rather, the government should continue to shoulder this burden of proving prior convictions justify higher sentences.

In sum, for all the reasons stated herein, we request that the Commission postpone any further action on these proposed immigration amendments until Congress has affirmatively acted on this issue, and clarified the issues the Commission should consider. Congress, if it does soon enact new immigration legislation, should not then be presented with additional (or even contrary) submissions from the Commission that would then need to be considered anew by Congress before the October 31, 2006 deadline.

2. Proposed Amendments to Firearms Guidelines

a. Introduction

PAG offers the following comments on certain of the proposed amendments to the Guidelines covering firearm offenses. For those proposals on which we do not comment, we join in the positions outlined by the Federal Public and Community Defenders in their March 9, 2006 letter to the Commission.

b. Special Offense Characteristics for Trafficking in Firearms

PAG adopts the comments on this set of proposed amendments made by the Defenders. *See* March 9, 2006 Letter from Jon Sands to the Honorable Ricardo H. Hinojosa, as well as the alternative proposed by the defenders. We share the Defenders' concern about the dissonance between the Commission's proposed language defining

trafficking and that contained in 18 U.S.C. § 921(a)(21)(A-F)&(a)(22) and readily appreciate the risk to defendants whom Congress would not consider traffickers but who would be treated as such by the Guidelines' elastic definition.

c. Stolen and Altered or Obliterated Serial Numbers

The proposed amendment to U.S.S.G. § 2K2.1(b)(4) should be rejected. Whether or not the amendment is adopted, § 2K2.1(b)(4) should be amended to require that the enhancement should apply only if the defendant had knowledge either that the firearm was stolen or that it had an altered or obliterated serial number.

The existing 2-level enhancement for possessing a firearm that is either stolen or has an obliterated serial number is already a strict liability provision, and results in double-counting. The effect is to increase punishment even though, in almost all firearms offenses, the fact that the firearm is stolen or has an obliterated serial number has nothing to do with the offense of conviction, and likely did not make the firearms possession more dangerous or conceal any other crime. That is the obvious effect of current Application Note 8, which provides that the aggravating enhancement applies even where the defendant does not know and has no reason to believe that the firearm was stolen, or that the serial number was altered or obliterated. Absent such knowledge, PAG believes that a felon who possesses a weapon that he does not know is stolen commits no more serious an offense than a felon who possesses a weapon that has not been stolen. Thus, § 2K2.1(b)(4) already works an enhancement without any clear purpose or connection to increased culpability.

With an already shaky basis for the enhancement as it presently exists, the proposed amendment would raise the number of levels for having an altered or obliterated serial number to 4, from 2. There is no plausible justification for raising the enhancement and putting it on par with the large, 4-level specific offense characteristics that actually have some value in appropriately measuring the increased seriousness of the offense, such as § 2K2.1(b)(5). And the only justification offered – that "[t]he 3-level increase reflects the difficulty in tracing firearms with altered or obliterated serial numbers" – is insufficient to support the four-level increase, for several reasons.

First, this "difficulty" in tracing altered firearms appears to be the reason for the current two-level enhancement. It does not justify any particular number of levels for an enhancement beyond a 2-level enhancement, and certainly does not justify a 4-level enhancement, the type typically reserved for particularly aggravating specific offense characteristics.

Second, this "difficulty" does not have any relationship with the federal crime of being a felon-in-possession, or federal gun possession crimes generally, since knowing the serial number does not in any way make proving the offense more difficult or allow an offender to escape detection. A person or felon standing on a street corner with a gun in his waistband is guilty of the offense of possessing a firearm with an obliterated serial

number or being a felon in possession, period.

Third, it is subject to debate whether this "difficulty" even exists. In our experience, the "tracing" of firearms recovered by law enforcement is not a normal or even usual part of federal firearms prosecutions, either by federal authorities or state and local police that make street arrests that are later adopted for federal prosecution. The most that will happen is that the firearm's serial number is entered into an agency database to discover where and when it was manufactured, sold and the like. But rarely is there ever any additional investigation to determine whether the firearm was illegally sold or transferred at a previous point. It simply does not occur. At the same time, federal law enforcement has a series of tools at its disposal to discover the actual serial number or path the weapon traveled to reach the defendant's hand, clothes or car. These include a cooperation reduction, laboratory work to "recover" the serial number, and old-fashioned investigation techniques (such as the use of informants, witness interviews).

While the Commission should reject the proposed amendment, whatever it does it should add a knowledge requirement to the specific offense characteristic. A knowledge requirement, even under the softer "knew or had reason to believe" standard, will ensure that the purported increased harm from having a firearm with either of these characteristics is applied only where that harm actually bears on the federal offense by the possessor's knowledge of the characteristic at issue.

d. "In connection with" in Burglary and Drug Offenses

The Commission should adopt Option Three, because it is the only option that is consistent with the standard in the clear majority of circuits. This majority-endorsed standard does not permit application of the enhancement (and does not allow an 18 U.S.C. § 924(c) charge to be sustained) where the possession of the firearm is merely coincidental to another felony – even where the other felony is a drug offense. Also, Option Three is the option that accurately reflects the holdings of a clear majority of circuits that a § 2K2.1(b)(5) enhancement cannot be applied in the case of a contemporaneous burglary where firearms are stolen but not otherwise used.

As the Commission's synopsis to the Amendment recognizes, an unquestioned majority of circuits have adopted the standard for applying the enhancement from *Smith v. United States*, 508 U.S. 223 (1993), and interpret the "in connection with" language in U.S.S.G. § 2K2.1(b)(5) consistently with the "in relation to" language in 18 U.S.C. § 924(c). See, e.g., *United States v. Spurgeon*, 117 F.3d 641 (2d Cir. 1997) (per curiam); *United States v. Wyatt*, 102 F.3d 241, 247 (7th Cir. 1996); *United States v. Nale*, 101 F.3d 1000, 1003-04 (4th Cir. 1996); *United States v. Thompson*, 32 F.3d 1 (1st Cir. 1994); *United States v. Routon*, 25 F.3d 815 (9th Cir. 1994); *United States v. Gomez-Arrellano*, 5 F.3d 464 (10th Cir. 1993). This is a rigorous standard that provides:

So long as the government proves by a preponderance of the evidence that the firearm served some purpose with respect to the felonious conduct, section 2K2.1(b)(5)'s 'in connection with' requirement is satisfied; conversely, where the firearm's presence is merely coincidental to that conduct, the requirement is not met.

Sprugeon, 117 F.3d at 644 (quoting *Wyatt*, 102 F.3d at 247).

The majority of the circuits that have decided the issue also will decline to apply the enhancement when firearms are possessed as the result of a burglary, but are not otherwise used. *United States v. Blount*, 337 F.3d 404, 407-410 (4th Cir. 2003); *United States v. Fenton*, 309 F.3d 825, 826 (3d Cir. 2002); *United States v. Szakacs*, 212 F.3d 344 (7th Cir. 2000); *United States v. McDonald*, 165 F.3d 1032 (6th Cir. 1999); *United States v. Sanders*, 162 F.3d 396 (6th Cir. 1998); see also *United States v. Lloyd*, 361 F.3d 197, 201-204 (3d Cir. 2004).²

Adopting Option One or Option Two would not clarify current U.S.S.G. § 2K2.1(b)(5), but instead would effectively override almost every circuit that has ruled on the applicable standard, and the application of that standard to the burglary context. Options One and Two would overrule the correct standard and replace it with a loose, automatic standard that would apply the enhancement even if the possession of the firearm was coincidental – in all cases under Option One, and in all drug cases under Option Two. Put another way, the appropriate standard under the case law would be eviscerated by Option One and Option Two, not as a matter of resolving any circuit split, but simply by watering down the Guideline to make the enhancement a strict liability provision, regardless of whether the offense conduct justified any increased punishment. These options therefore should be rejected – especially for the stiff 4-level enhancement that this specific offense characteristic provides.

Finally, the apparent purpose of the original Guideline enhancement was to enhance a sentence where there was an increased danger or other criminal conduct that was facilitated by gun possession. As the majority of courts have recognized, there is no “other criminal conduct” when a burglary occurs and guns, not used, often unloaded and not even held in hand, are taken away. Moreover, the offense is not made more

² In the Third, Fourth, Sixth and Seventh Circuits, the Guideline as presently written is not applied in the case of a burglary when firearms are taken because the firearms are not possessed in connection with another felony offense (the Fourth Circuit), or the burglary is not “another felony offense” for purposes of U.S.S.G. § 2K2.1(b)(5) (the Third, Sixth and Seventh Circuits). And in the minority of circuits that would allow the enhancement to be applied, at least one of those circuits (the Fifth) allows the enhancement based on its minority-view standard of “in connection with” that is different than almost every other circuit. *United States v. Blount*, 337 F.3d 404, 407-410 (4th Cir. 2003); *United States v. Kenney*, 283 F.3d 934 (8th Cir. 2002); *United States v. Armstead*, 114 F.3d 504 (5th Cir. 1997); see also *United States v. Hedger*, 354 F.3d 792 (8th Cir. 2004); *United States v. English*, 329 F.3d 615 (8th Cir. 2003).

dangerous when guns are possessed in this fashion. Option Three accounts for this; it allows the enhancement to be applied when there is actual additional criminal conduct beyond the burglary, and an upward departure is always available when there is no other felony offense or use of the firearm, but the sentencing judge believes an enhanced sentence is required. As the Fourth Circuit, in interpreting current § 2K2.1(b)(5), has explained, the purpose of the enhancement is to provide increased punishment where the offense was made “more dangerous by the presence of the firearm . . .” *Blount*, 337 F.3d at 406. With that said, the *Blount* court ruled that the enhancement could not be applied in the garden variety burglary context. That common sense, majority interpretation, shared by then-Judge Alito (authored the *Lloyd* opinion), Chief Judge Wilkins (authored the *Blount* opinion) and Judge Easterbrook (joined in the *Szakacs* opinion), and grounded in the appropriate standard for applying the “in connection with” language, should not be disturbed.

In maintaining the clear majority standard, and following the lead of a majority of circuits have ruled on this precise issue, the subdivision (C) language should be amended to reflect that a burglary as discussed in Option Three is not “another felony offense.” This will maintain the current circuit majority interpretation of “another felony offense” in the current Guideline.

e. Lesser Harms and Felon in Possession

Without explanation, the Commission proposes to bar departures based on lesser harms under U.S.S.G. § 5K2.11 to anyone convicted under 18 U.S.C. § 922(g), which prohibits felons from possessing firearms. PAG opposes this blanket prohibition because the scope is unprecedented, the change is unwarranted (stemming neither from a circuit split nor from any obvious need to resolve a situation that the courts are not already equipped to handle), and the offense-specific prohibition is so random and inexplicable that it suggests the action may be motivated by concerns other than those that should inform guideline amendments.

First, the scope of this prohibition is unprecedented. The Commission has from time to time defined classes of departures as prohibited or discouraged, sometimes because they were placed off-limits by the Sentencing Reform Act itself.³ These restrictions apply to all cases where a departure might otherwise be entertained. However unwise such blanket prohibitions may be, they apply, with “majestic equality,” to thieves, drug dealers and fraudsters alike.⁴ PAG is aware of no situation, however, in

³ See e.g., U.S.S.G. §§ 5H1.4, Drug or Alcohol Dependence; 5H1.10, Race, Sex, National Origin, Creed, Religion and Socio-Economic Status; 5H1.12, Lack of Guidance as Youth and Similar Circumstances.

⁴ “The law in its majestic equality forbids the rich as well as the poor to sleep under bridges, to beg in the streets, and to steal bread.” Anatole France, *The Red Lily*, Chap. 7, available at: <http://education.yahoo.com/reference/quotations/quote/33040> (last visited March 12, 2006).

which the Commission has forbidden a departure for one class of offenses but retained it for all others.⁵ And we can discern no reason to do so here.

The Commission's restraint in this respect is consistent with its general approach to departure policy. Congress provided for departures from the guidelines where the court finds "an aggravating or mitigating circumstance of a kind, or to a degree, not adequately taken into consideration by the Sentencing Commission in formulating the guidelines that should result in a sentence different from that described." 18 U.S.C. § 3553(b); *see also* §5K2.0. According to the Commission, it adopted its departure policy for two reasons:

First, it is difficult to prescribe a single set of guidelines that encompasses the vast range of human conduct potentially relevant to a sentencing decision. . . . Second, the Commission believes that despite the courts' legal freedom to depart from the guidelines, they will not do so very often. This is because the guidelines, offense by offense, seek to take account of those factors that the Commission's data indicate made a significant difference in pre-guidelines sentencing practice.⁶

These observations obtain in felon-in-possession cases just as in other cases for which the Commission would not forbid lesser harms departures. The vigorous departure case law confirms the Commission's first observation that the guidelines cannot be expected to account for the range of human conduct and condition.⁷ The scarcity of lesser harms departures also bear out the Commission's prediction. Despite what must be the rather tantalizing prospect that a court can account for lesser harms at sentencing that could not be credited at conviction, the departure is extremely rarely invoked. Between 2000 and 2003 lesser harms departures comprised fewer than 1 percent of all departures.⁸ While it is impossible to determine from available data, PAG is confident from our experience that felon-in-possession cases comprise a very small subclass of these already-infrequent "Lesser Harms" departures.

⁵ Of course, Congress in the Protect Act limited the application of certain departures in certain offenses involving crimes against children, *see United States v. Van Leer*, 270 F. Supp. 2d 1318, 1321-22 & n.20 (D. Utah 2003), citing PROTECT Act, Pub. L. No. 108-21 § 401, 117 Stat. 650, 667 (discussing the "Feeney Amendment" limitations on downward departures), much as it has enacted mandatory minimum sentences that limit departures for certain offenses. The Commission, however, has never declared departures off-limits for any particular offense category, and has long criticized Congress' enactment of mandatory minimums as inconsistent with a rational Guidelines system.

⁶ United States Sentencing Commission, *Departures*, at 15 (April, 2003).

⁷ *Id.* at 11-113, discussing treatment of cases that illustrate various grounds for departure.

⁸ According to the Sentencing Commission's Sourcebooks for the identified years: in 2003 lesser harms departures accounted for only 46 or 0.8% of the 5950 other-than-government initiated departures granted; in 2002, 34 or 0.3% of the 10,995 departures, in 2001 23 or 0.2% of the 11,044 departures; and in 2000, they were 24 or 0.2% of the 10,288 departures. Lesser harms departures never exceeded 1%, even after the Commission began isolating judicial from government-sponsored departures in 2003.

The Commission's history of restraint in establishing "forbidden" departures is therefore appropriate, and borne out by this history of judicial restraint. The recently-proposed offense-specific prohibition, by contrast, is surprising and ill-considered in light of Congress' and the Commission's concern to ensure that the breadth of the human condition not be lost forever at sentencing by overly rigid guidelines. The Commission cannot and should not take the unprecedented step of declaring that, with felon-in-possession cases only, the penalties it is establishing "encompass[] the vast range of human conduct potentially relevant to a sentencing decision."

Second, there is simply no need to forbid "lesser harms" departures in felon-in-possession cases. The Commission carefully monitors developments in guideline sentencing and occasionally proposes amendments to clarify existing guidelines, respond to congressional directives, or resolve circuit conflicts. For example, the Commission seeks to resolve two circuit conflicts in the firearms section of the current set of proposals. See Proposed Amendment to the Sentencing Guidelines, at 27-28 (January 25, 2006). In contrast, the lesser harms departure needs no clarification, as it is relatively uncomplicated. Congress has not directed the Commission to eliminate this departure in § 922(g) cases, and there is no significant Circuit split developing in this area. In fact, the majority of the Courts of Appeals that have encountered lesser harms departures in § 922(g) cases have either ruled they are available or ruled in such a way that it can be inferred the court accepts the propriety of the departure's use in at least some 922(g) contexts.⁹

⁹ A number of courts have explicitly recognized the authority to depart for lesser harms in § 922(g) cases, while others have implied in their rulings that the departure authority was available to judges. See, e.g., *United States v. Bunnell*, 280 F.3d 46, 50 (1st Cir. 2001) (rejecting appeal based on failure to grant § 5K2.11 departure in § 922(g) case by holding that lower court did not misunderstand its authority to depart on this ground); *United States v. Clark*, 128 F.3d 122, 123 (2d Cir. 1997) (remanding case because of doubt that sentencing judge appreciated his available authority to depart for lesser harms in § 922(g) case); *United States v. Cutright*, 2000 WL 166345, at *3-4 (4th Cir., Nov. 6, 2000) (collecting cases and rejecting district court lesser harms departure in § 922(g) because not adequately supported); *United States v. Washington*, 1998 WL 13533, at *1 (4th Cir., Jun. 15, 1998) (holding that the sentencing court was aware of, but properly declined to exercise, its authority to depart based on lesser harms in § 922(g) case); *United States v. Williams*, 432 F.3d 621, 623-24 (6th Cir. 2005) (holding that departure from § 922(g) sentence for, *inter alia*, lesser harms, reasonable based on court's consideration of appropriate factors); *United States v. Peterson*, 37 Fed. Appx. 789, 792 (7th Cir. 2002) (rejecting appellant's contention that district court's failure to depart for lesser harms was because court thought it was powerless to do so in gun case); *United States v. Dubuse*, 289 F.3d 1072, 1075-76 (8th Cir. 2002) (finding that district court understood it had authority to depart for lesser harms in § 922(g) case); *United States v. Wentz*, 46 Fed. Appx. 461, 461 (9th Cir. 2002) (finding that district court was aware of authority to depart for lesser harms but nonetheless declined to do so); *United States v. Styles*, 139 Fed. Appx. 249, 253 (11th Cir. 2005) (clarifying that court had authority to depart downward under § 5K2.11 and remanding so that court could consider downward departure in § 922(g) case); *but see United States v. Riley*, 376 F.3d 1160 (D.C. Cir. 2004) (rejecting downward departure under § 5K2.11, even though defendant had no unlawful purpose because statute does not distinguish between unlawful possession and purpose).

Indeed, there are important reasons to retain the departure. The Sentencing Guidelines routinely permit departures when statutes have been violated, and allow lesser harms departures when the violation does not "threaten the harm or evil sought to be prevented by the statute." *United States v. Lewis*, 249 F.3d 793, 796 (8th Cir. 2001). "[T]he guidelines authorize reasonable departure for an act that is technically unlawful, yet not committed for an unlawful purpose." *Id.* at 797 (discussing departure in context of § 922(a)(6) false statements case). While not widespread, a number of courts have at least considered and occasionally found grounds to depart because the weapons' possession, while criminal conduct, merited a lower sentence. Other conceivable examples abound. For example, suppose a defendant who had attained a prior conviction, perhaps even on felony tax charges, at age 20 or 25, is later is found in his home at age 75, passively possessing in his closet a firearm that his grandchildren bought him for self-protection after his neighborhood became less safe. This would be a felon-in-possession, but does the Commission really want to make a "lesser harms" departure off-limits in this situation and all others? Retaining the possibility of a departure makes good sense, particularly in light of its limited current use in only the most deserving cases. The Courts of Appeals have proven adept at evaluating these few cases and should be permitted to continue its management of this area.

Finally, PAG must note that the Commission has chosen to present this proposal without any type of explanation, suggesting that it might be prompted by complaints about recent use of this infrequently-used departure. Whatever the reason behind the proposed amendment, the defense bar and the courts deserve some explanation from the Commission about why it feels the change may be necessary, and also deserve an opportunity to respond to that specific rationale. Particularly striking in this regard is that the Commission would forbid the departure even in a class of cases where the defendant has come into possession of a weapon and is acting in haste to dispose of it. For example, in *United States v. Hancock*, 95 F. Supp. 280 (E.D. Pa. 2000), the Court granted a § 5K2.11 departure when it found that the defendant had found a gun by chance and fired two times into the ground to empty the gun of ammunition and then quickly threw the gun away. The defendant possessed the gun for only a short time and then only to determine if it was loaded and to remove its harm. This seems the right result in such a case where the possession of the weapon by the former felon is only for the purpose of disarming it. Tellingly, the Government did not appeal the *Hancock* departure. We can think of no reason to deny such considerations of a departure to other defendants whom the court determines did what they could as quickly as possible to dispose of a weapon.

For these reasons, we strongly urge that the Commission not amend the guidelines to forbid the use of the Lesser Harms departure at U.S.S.G. § 5K2.11 for otherwise deserving defendants convicted of being felons in possession under 18 U.S.C. § 922(g). If the Commission continues to feel this amendment is warranted, the public should be given a meaningful opportunity to evaluate the specific reasons behind the proposed change, and consideration of this change should be deferred to the next amendment cycle.

3-5. Proposals to Make Permanent Emergency Amendments on Steroids, Intellectual Property (FECA), & Terrorism/Obstruction of Justice

On these proposed amendments, PAG calls the Commission's attention to the comments previously submitted by PAG and others in response to the Commission's requests for input on the emergency amendments. In particular, PAG references its February 23, 2006 letter on Anabolic Steroids, and a letter on Intellectual Property/FECA submitted by PAG member and University of Richmond Law Professor James Gibson on August 2, 2005, as well as letters submitted by the Federal and Community Defenders.

6. Proposed Amendments Implementing the Transportation Act

The Commission has proposed certain amendments designed to implement Pub. L. 109-59 (the "Transportation Act"), and also issued a related request for comment.

In its proposed amendments, the Commission plans to implement Section 4210 of the Transportation Act, and its new criminal offense for a knowing failure to deliver household goods, by simply adding a cross-reference to U.S.S.G. § 2B1.1. PAG agrees that § 2B1.1 is a catch-all for this type of offense. But we are troubled at the notion that this new Class E felony, established by Congress with a two-year maximum, will be lumped in with far more serious offenses. Under this guideline, the statutory maximum might be reached so easily that the normal incentives to plead guilty in an effort to get an acceptance of responsibility adjustment would prove meaningless.

We note that U.S.S.G. § 2B1.1 was amended to establish a higher base offense level of 7 for offenses with statutory maximums of 20 years or more. The mirror-image should be established for low-end offenses. We ask that a new base offense level of 5 be established for offenses that carry a statutory maximum of less than five years.

On the issue for comment, the Commission's acknowledges that its 2004 amendment to 2Q1.2 was intended to capture the increase in harm associated with offenses involving transportation of hazardous materials. That 2-level increase means that an Offense Level 26 will ordinarily be applied in this situation, and that defendants with a Criminal History Category of VI already will be in a 120-150 month range before any Chapter 3 adjustments. Although the Transportation Act increased the statutory maximum in 49 U.S.C. § 5124 to ten years, these existing guideline numbers are already entirely consistent with a 10-year statutory maximum. Congress did not direct the Commission to revisit this guideline, and no further adjustment is necessary here.

7. Proposed Amendments Implementing the Intelligence Reform and Terrorism Prevention Act of 2004

PAG submits a few comments on these proposed amendments. First, the Commission suggests three options for implementing § 5401 of the Act. Section 5401 increases maximum penalties by up to 10 years if a defendant meets three elements: (1)

the criminal conduct is part of an ongoing commercial organization or enterprise, (2) aliens were transported in groups of 10 or more, *and* (3) aliens were transported in a manner that either endangered their life or presented a life-threatening health risk to people in the United States. We are asked to comment on the proposed options.

As noted, the new statutory enhancement *does not* apply if *only one* of these three elements is met. This fact points squarely against the Commission's options that would add an enhancement or departure any time only one of these elements (an "ongoing commercial organization") exists. If the statute itself is strong on this, the legislative history is even stronger. The Commission should know that, in an earlier, rejected version of what became Pub. L. 108-458, the House of Representatives had suggested applying this enhancement if any one of these elements applied. See H. Rep. No. 108-724 (Part 5), at 69 (then-§ 3041 would have allowed 10-year enhancement if any element existed). That "disjunctive" suggestion was rejected by Conference Committee, with Congress instead passing a law applying the enhancement only in the conjunctive – i.e., only when all three of these elements exist. If the Commission were to enact a new sentencing enhancement that applied whenever an "ongoing commercial organization" is found, it would essentially codify the rejected House approach. The guidelines instead should be modified to enact the final law that Congress passed. In implementing § 5401, the Commission should adopt only proposed Option One, or the Option Three alternative requiring a conviction under 8 U.S.C. § 1324(a)(4).¹⁰

If the Commission follows this approach, it will also gain the benefit of no longer needing to define "ongoing commercial organization," since an enhancement would only apply if a defendant is found guilty under § 1324(a)(4) (and an "ongoing commercial organization" is found by a jury or via a guilty plea). In any event, however, PAG responds to the Issue for Comment by discouraging any new definition of "ongoing commercial organization." As the Commission notes, the Act did not define the term, and PAG has not located any legislative history that elucidates its meaning. The Commission would essentially be creating a definition from scratch, and before the courts have faced real-world examples that might put meat on these bones. In sum, even if the Commission were inclined to define an "ongoing commercial organization," it would be wise at least to wait until some facts and a real dispute (or circuit conflict) develop instead of trying to establish artificial parameters in the abstract at this time.

On the other proposed amendments, PAG notes a few additional concerns, particularly given the breadth of some of these directives. For example, in implementing § 6903 of the Act, the Commission plans to reference only U.S.S.G. § 2K2.1, since the weapons described "would seem to be covered as destructive devices under 26 U.S.C. § 5845(a)." If they are indeed covered by § 5845(a), PAG does not oppose the suggested reference to § 2K2.1, but PAG must note that § 6903 of the Act also punishes "any part

¹⁰ Tracking the statute will also avoid potential double-counting concerns that would otherwise arise if a defendant received an enhancement for being part of an "ongoing commercial organization" and then other, seemingly-similar adjustments under § 3B1.1 (aggravating role) or § 4B1.4 (criminal livelihood) as well.

or combination of parts” used in “fabricating” a rocket or missile – items that would clearly seem to fall outside of § 5845(a). In such circumstances, the Commission at least should allow for a downward departure. Similarly, under the Commission’s proposed implementation of § 6803 of the Act, we question whether providing “material support or resources” is always as culpable as the direct development of the weapons themselves. The divergent statutory maximums (20 years v. life) suggests they are not, yet the Commission suggests that all 18 U.S.C. § 832 convictions must be referenced only to U.S.S.G. § 2M6.1. PAG suggests instead that 18 U.S.C. § 832 be cross-referenced to both § 2M6.1 and § 2M6.2, or at least that a downward departure option be considered.

Finally, on the Commission’s implementation of § 6702 of the Act, PAG has no objection to the proposed referral to U.S.S.G. § 2A6.1, but does not understand the proposed cross-reference to § 2M6.1. This new law involves “hoaxes” – where there is, by definition, no intent to carry out a threat. The proposed cross-reference, by contrast, would apply § 2M6.1 when there is “an intent to carry out a threat.” In other words, the proposed change does not appear to be an implementation of § 6702 of the Act at all. It instead appears to be a general broadening of 2M6.1’s application to cover offenses previously covered by § 2A6.1.

8. Proposed Guideline Amendments on False Domain Names

The Commission proposes to create a new U.S.S.G. § 3C1.3, in an effort to implement the directive in § 204(b) of Pub. L. 108-482. The Commission proposes an increase of 1-4 levels, with no indication of which increase might be chosen, or why.

PAG suggests that any increase should not exceed 2 levels. A higher increase would actually be inconsistent with Pub. L. 108-482, since at the high end of the guidelines (such as an Offense Level 32 with a Criminal History Category VI), a 4-level increase would increase ranges more than 7 years, despite the 7-year cap on increases in the statutory maximum established in the Act’s § 204(a). PAG also notes the Commission’s recently-proposed 2-level increase for steroids “masking.” PAG sees some logic in treating “masking” and hiding one’s identity through false domain names as similar, and accordingly believes that any increase here should not exceed 2 levels.

Finally, as the introduction to the Commission’s proposed amendment notes, the statute only directs the Commission to establish this enhancements when an underlying “felony” offense is “furthered” through false domain names. Consistent with this statutory directive, the amendment should be changed to clarify that any enhancement does not apply to misdemeanors, and that the underlying offense must be “furthered” by the false domain name before this enhancement can be applied.

9. Proposed Guideline Amendments for “Miscellaneous Laws”

PAG submits two comments to the Commission’s proposed “Miscellaneous” changes, the first of which relates to the new proposed Class A Misdemeanor guideline.

PAG believes that a general misdemeanor base offense level of 4, rather than 6, is appropriate. There are several reasons for this. First, the guidelines have historically been structured in ways that preserve a benefit to defendants who accept responsibility. The newly-proposed misdemeanor guideline, U.S.S.G. § 2X5.2, would start at an Offense Level of 6, and then add 2 points for a person who had committed the same offense before.¹¹ A Category VI offender in this situation would find no guideline benefit at all to pleading guilty in an effort to gain an acceptance of responsibility adjustment, since this would only move him to a 12-18 month range (still in Zone D). Starting at 4 (or even 5), by contrast, would preserve these traditional guideline incentives of skipping a trial. Second, PAG believes the Commission should recognize, and codify, the fundamental difference between a misdemeanor and a felony. Congress has made a formal classification decision that misdemeanors are simply not the same as felonies. The guidelines' catch-all misdemeanor guideline should reflect that difference. The Commission is proposing that this guideline will apply only to misdemeanors not already covered by another guideline, suggesting that it will be used with many unusual regulatory violations. PAG submits that it is simply illogical to start these types of documentation-type offenses at the same base offense level as Class C and D felony thefts and frauds, for example. Regulatory offenses involving controlled substances in U.S.S.G. § 2D3.2, for example, have a Base Level of 4, and PAG believes that is where this catch-all Class A Misdemeanor guideline should start as well. The new guideline would then be in line with numerous similar offenses. *See, e.g.*, U.S.S.G. § 2A2.3 (Base Offense Level 3 for some forms of Minor Assault); § 2B2.3 (Base Offense Level 4 for Criminal Trespass); § 2J1.5 (Base Offense Level of 4 for a material witness' failure to appear at a misdemeanor trial); § 2P1.2 (Base Offense Level of 4 for providing or possessing certain contraband in prison); § 2T1.7 (Base Level of 4 for Failing to Deposit Collected Taxes in Trust Account as Required After Notice); § 2T1.8 (Base Offense Level of 4 for Offenses Relating to Withholding Statements); § 2T2.2 (Base Offense Level of 4 for Regulatory Offenses); § 2T3.1 (Base Offense Level of 4 for smuggling if the tax loss does not exceed \$100).

Second, PAG wishes to comment on the two options proposed for Plant Protection Act ("PPA") sentences. PAG does not believe that a new specific offense characteristic is necessary here, especially given the expected infrequency of PPA prosecutions, which the Commission concedes. At most, the Commission should adopt Option Two's establishment of an encouraged upward departure in PPA cases, especially given the wide array of divergent plants (ranging from biological control organisms down to far less significant plants) that may fall within the parameters of the PPA, and the need for judges to factor those into departure decisions. Unfair disparities would arise from lumping all such plants together into a single and uniform specific offense characteristic.

¹¹ PAG does not object to the general concept of adding 2 offense levels when a defendant has committed the same misdemeanor before, but as noted, believes this adjustment fits into the general guidelines scheme only if the starting point for Class A misdemeanors is placed at a Base Offense Level of 5.

10. **Proposed Guideline Amendments Relating to "Application Issues"**

The Commission proposes to create a new U.S.S.G. § 3C1.3 for Offenses Committed While on Release, eliminating § 2J1.7. Although PAG does not object generally to the movement of this guideline to Chapter 3, we do object to the proposed elimination of § 2J1.7's background commentary. Among other things, the existing commentary notes that, although a court should impose a consecutive sentence, "there is no requirement as to any minimum term." That analysis, gleaned from § 3147's legislative history, has been the law and remains the law, yet the proposed amendment would eliminate it. PAG is concerned that this elimination may be improperly construed as a substantive change in the law where none (according to the Commission's explanations for its amendment in a mere "Application" change) was intended. PAG believes that § 2J1.7's background comment should be carried forward to § 3C1.3.

Carrying forward the background commentary would also properly continue the Commission's notice requirement. The Commission claims that "[t]he majority of circuit courts have found that there is no notice requirement in order for 18 U.S.C. § 3147 to apply." But this statement ignores that two very different types of "notice" issues that these circuits have discussed. As the circuits note, cases raising § 3147 and § 2J1.7 issues involve both "pre-release" and "pre-sentencing" notice. "Pre-release" notice arguments have claimed that a defendant might avoid § 3147's enhancement if a defendant did not receive notice of the possibility of additional punishment when released, either on an earlier offense or at the time bond was granted. PAG acknowledges that a majority of circuits have rejected this argument as inconsistent with the mandatory requirements of § 3147 itself. As Judge (now Justice) Alito explained:

We read the commentary to mandate, not pre-release notice in the first case, but simply pre-sentencing notice in the second case.

United States v. Hecht, 212 F.3d 847, 849 (3d Cir. 2000). This distinction is important, however, for it explains why the subject commentary is worth keeping, even if the Commission believes (as it reasonably may) that this commentary should be clarified so that judges know that only "pre-sentencing" notice is required. To PAG's knowledge, *no circuit* has ever held that "pre-sentencing" notice is unnecessary in this context. And PAG submits that such "pre-sentencing" notice serves a highly useful function here. When a § 3147 enhancement is applied, defendants are being hit with a sentencing enhancement based on another, wholly collateral "offense." In this context, defense counsel should be given advance notice of the possibility of this enhancement, so that counsel can investigate the sometimes-complicated underlying facts of an entirely different offense, and then present whatever relevant arguments may be gleaned, so that the Court can reach a more-informed judgment on what sentence is fair and just. In short, defendants and their counsel should not be surprised at sentencing by an enhancement based upon another "offense" about which they had no earlier notice. The Commission

dangerous when guns are possessed in this fashion. Option Three accounts for this; it allows the enhancement to be applied when there is actual additional criminal conduct beyond the burglary, and an upward departure is always available when there is no other felony offense or use of the firearm, but the sentencing judge believes an enhanced sentence is required. As the Fourth Circuit, in interpreting current § 2K2.1(b)(5), has explained, the purpose of the enhancement is to provide increased punishment where the offense was made "more dangerous by the presence of the firearm . . ." *Blount*, 337 F.3d at 406. With that said, the *Blount* court ruled that the enhancement could not be applied in the garden variety burglary context. That common sense, majority interpretation, shared by then-Judge Alito (authored the *Lloyd* opinion), Chief Judge Wilkins (authored the *Blount* opinion) and Judge Easterbrook (joined in the *Szakacs* opinion), and grounded in the appropriate standard for applying the "in connection with" language, should not be disturbed.

In maintaining the clear majority standard, and following the lead of a majority of circuits have ruled on this precise issue, the subdivision (C) language should be amended to reflect that a burglary as discussed in Option Three is not "another felony offense." This will maintain the current circuit majority interpretation of "another felony offense" in the current Guideline.

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should keep its notice requirement, and at most clarify that it is intended to require only pre-sentence notice akin to what is required when an upward departure is sought.

11. 3C1.1 (Obstruction of Administration of Justice) Circuit Conflicts

The Commission has proposed certain changes to the text and commentary of Section 3C1.1 (Obstructing or Impeding the Administration of Justice). PAG believes the Commission should adhere to the approach, clarified in 1998 through amendment 581, that this guideline does *not* apply to pre-investigative conduct. The proposed change to expand the guideline to pre-investigative is both unnecessary and unwise. Unnecessary, because the purported circuit conflict that has prompted the proposal is not as significant as appears at first blush and could be cured by re-affirmation of the 1998 clarifying amendment. And unwise, because the amendment would create thorny applicability issues that are likely to produce more, rather than less, unwarranted sentence disparity. We also believe that the Commission's proposed new examples of "covered conduct" are in tension with the definition of obstructive conduct found in the text of the guideline itself, and these new examples would unduly complicate sentencing proceedings. To the extent the conduct mentioned in these examples occurs in individual cases, the sentencing judges and others have sufficient and more desirable options for addressing that conduct.

The synopsis of the proposed amendment to Section 3C1.1 states that it addresses a circuit conflict regarding whether pre-investigative conduct can form the basis for the 2-level enhancement. But the Commission has already addressed and resolved the stated conflict. In 1998, the Commission added a new application note to the guideline which reads, in part: "This adjustment applies if the defendant's obstructive conduct (A) occurred during the course of the investigation, prosecution, or sentencing of the defendant's instant offense of conviction" The stated purpose of this amendment was to "clarify the temporal element of the obstruction guideline (*i.e.*, that the obstructive conduct must occur during the investigation, prosecution, or sentencing, of the defendant's offense of conviction)." USSG, App. C (Amendment 581).

Although the synopsis of the proposed 2006 amendment identifies four circuits that "have concluded that pre-investigative conduct can be used to support an obstruction enhancement," not one of those cases applied the 1998 clarifying amendment to the facts before it. The case from the D.C. Circuit was decided in 1991. *See United States v. Barry*, 938 F.2d 1327 (D.C. Cir. 1991). The Tenth Circuit case, decided shortly after the 1998 amendment went into effect, merely relied on a pre-1998 case to hold that the enhancement can apply where the defendant is aware of an "impending investigation"; the court made no mention of the effect of the 1998 amendment on the pre-1998 ruling. *See United States v. Mills*, 194 F.3d 1108, 115 (10th Cir. 1999). The Seventh Circuit case, also decided in 1999, noted the promulgation of the 1998 amendment but found it "need not resolve" whether it precludes an enhancement "when the obstructive conduct occurs before any investigation has begun," because the defendant in that case engaged in (and continued) the threatening conduct after the investigation had begun. *United States v. Snyder*, 189 F.3d 640, 649 (7th Cir. 1999). Finally, the First Circuit case mentioned in

the synopsis relied on a pre-1998 case, in addition to *Mills* and *Barry, supra*, again without discussing or even acknowledging the 1998 clarifying amendment. See *United States v. McGovern*, 329 F.3d 247, 252 (1st Cir. 2003).

The Commission made the right decision in 1998 when it added language expressly limiting the enhancement to post investigative conduct, and it should not reverse course now. Not surprisingly, most criminals try to avoid getting caught. They do so in a number of ways. Some take steps to shield their identity when they are committing or concluding their offense (e.g., using false identities, disguises or convoluted transactions that make conduct difficult to trace, or destroying a paper trail that would otherwise lead back to themselves). Some endeavor to hide the fact that a crime has occurred, in the hope either that the victim will not realize there is anything to report or that the government will never know there is something to investigate (e.g., structuring a fraudulent investment to make it appear that losses to investors had an innocent explanation). And so on. It is therefore very difficult to draw a predictable line between conduct that is part and parcel of the offense and conduct designed to "prevent" or "hinder" the investigation, prosecution or sentencing of the offense. On which side of the line should the sentencing judge put the structuring of a securities fraud to make it look like the drop in price was the result of market forces, or the disposal of clothing immediately after a bank robbery? By abandoning a clear and logical temporal line – the start of the official investigation – the Commission would be inviting individual judges to draw different lines. Without any logical guidance, the inevitable result is unwarranted disparity.

There undoubtedly will continue to be cases from time to time where pre-investigation conduct designed to prevent or hinder deserves an incremental level of punishment. One of types of conduct that the Commission's proposal would add to application note 4 is a good example. The Commission has proposed making explicit that the obstruction enhancement applies to defendants who make threats to a victim for the purpose of "prevent[ing] the victim from reporting the conduct constituting the offense of conviction." A threat designed to prevent an investigation is usually worthy of enhanced punishment because it results in a separate and tangible psychic harm to another person. In order to address examples like this, the Commission should encourage a higher sentence, perhaps through a departure, as is done with other guideline provisions. But it should not expand the scope of the guideline to cover pre-investigative conduct.

In addition to "victim threats," the Commission has proposed two other categories to add to its list of "Examples of Covered Conduct" in application note 4 to the guideline. Neither should be adopted. New application note 4(l) would include within the guideline "making false statements on a financial affidavit in order to obtain court-appointed counsel." The main problem with this "example" is that the conduct described does not satisfy one of the elements of the enhancement. That is, to receive the enhancement the defendant's object must be to "obstruct" or "impede" the administration of justice. As the Second Circuit has correctly noted, the defendant who lies on a financial affidavit is "not seeking to prevent justice or even delay it." *United States v. Khimchiachvili*, 372

F.3d 75, 80 (2d Cir. 2004). Rather, he is trying to avoid paying his legal fees. *Id.* When the Commission uses, as an example of obstruction, conduct that by its nature does not meet the provision's definition of obstruction, it runs the risk that judges will apply the "object to obstruct or impede" requirement in an inconsistent manner when dealing with other types of allegedly obstructive conduct.

A further problem with this proposed example is that it is likely to cause significant disruption in those cases where the example is invoked. If the government or the probation department alleges that the defendant made false statements to qualify for appointment of the lawyer who has been representing him in the criminal case, that attorney will likely be unable to continue representing the defendant due to a conflict of interest. As a result, new counsel would need to be brought in very late in the case to complete the criminal proceedings, resulting in delay and even greater public expense. This problem is readily avoided. There are a number of ways the courts can remedy lies on a financial affidavit, including separate contempt proceedings. PAG is also unaware of any showing that this type of problem has become both widespread and incapable of redress in those other ways.

The other example that would be added under the proposed amendment is similarly flawed. It would recognize, as an example of obstruction, perjury "during the course of a civil proceeding pertaining to conduct constituting the offense of conviction." The first problem, again, is that the conduct described in the proposed example is not really an "example" of what the guideline covers. Perjury in a civil proceeding, even where the subject matter of the criminal case is identical, does not by its nature obstruct or impede the administration of justice during the course of the investigation, prosecution or sentencing of the instant offense of conviction, nor is such perjury necessarily "related to" the offense of conviction or other closely related offenses (even though the subject matter of the testimony may in fact be "related"). If the new example is meant to enhance the sentence for defendants who perjure themselves in a civil case in order to thwart the criminal investigation, the proposed amendment needs to be rewritten. It should read: "(b) committing, suborning, or attempting to suborn perjury, including during the course of a civil proceeding pertaining to conduct constituting the offense of conviction, with the intent to obstruct or impede the criminal investigation, prosecution or sentencing." (Proposed new language underscored).

To expand the scope of Section 3C1.1 perjury, as proposed in application note 4(b), would do more than conflict with the limiting language of the guideline itself. It would unnecessarily complicate the sentencing process by requiring the judge presiding over the criminal case to assess the impact on "the administration of justice" of alleged perjury that occurred in a separate non-criminal proceeding with which the judge may have little or no familiarity. For example, the sentencing judge would need to review substantially all of the record in a state court private civil suit before he could determine whether the defendant's alleged perjury was an attempt to obstruct or impede the administration of justice in that other proceeding. Even if perjury in civil proceedings that "pertain to conduct constituting the offense of conviction" is common enough to warrant separate mention in the guidelines – a point for which we have seen no data – the

officials that preside over these other proceedings, and the prosecutors with jurisdiction over perjury offenses committed in those tribunals, are well equipped to attach consequences to such misconduct.

In sum, the proposed changes to the obstruction guideline are not needed, would generate little benefit, and impose high costs on the system. PAG urges the Commission to reject these proposals. Instead, the Commission should revise the commentary of Section 3C1.1 to reiterate that the provision applies only to post-investigation conduct. If sufficient evidence is available that judges do not properly account for those instances of pre-investigation obstructive conduct that are outside the heartland (such as threats of physical violence for reporting an offense), the Commission may wish to add language to the commentary recognizing that a departure of up to two levels is available in unusual cases. Cf. USSG §§ 2A2.4, comment. (n.3) (encouraging upward departure under offense guidelines for obstructing or impeding officers where substantial interference with government function results) 2B1.1, comment. (n.19) (encouraging upward departures for various reasons where fraud and theft guideline understates seriousness of the offense); 2C1.1, comment. (n.7) (encouraging upward departure where amount paid in bribery case understates seriousness of offense); 2Q1.2, comment. (nn. 4-9) (encouraging various guided departures for environmental offenses).

12. Chapter Eight (Privilege Waiver)

The Commission has solicited comment on whether it should modify or replace the following sentence from the commentary to U.S.S.G. § 8C2.5:

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.

PAG believes that this sentence should be deleted from Chapter 8 and that the Commission should state, either in the commentary or in the Reasons For Amendment, that the purpose of the change is to establish that an organization's decision whether to waive the attorney-client privilege or work product protections is not a factor for the court to consider in calculating an organization's culpability score. Such an amendment would harmonize U.S.S.G. § 8C2.5(g) with corresponding guideline provisions applicable to individuals – specifically, U.S.S.G. §§ 3E1.1 & 5K1.1 – and would thereby reduce the undue pressure currently placed on organizations to waive these paramount privileges and protections.

A number of diverse groups, including those that provided testimony and written submissions in October 2005, have already offered extensive input on the problems caused by the waiver language in the commentary to § 8C2.5. PAG concurs in the views expressed by these groups. In particular, we echo their reminder of the special status held

by the attorney-client privilege and work-product protections. The attorney-client privilege, in particular, is an irreplaceable element of the American legal system. Without a vibrant privilege, individuals are less likely to seek advice of counsel on how to comply with the law and less likely to report questionable conduct in a timely manner, if at all. Waiver of the privilege in any particular case has negative consequences well beyond that proceeding. In the corporate context, the privilege works – and can only work – if employees and officers can be reasonably certain that the promise of confidentiality will be kept, or at least that a decision by others in the corporation to waive the privilege will not be coerced. The language found in Chapter 8, however, has resulted in greater pressure on organizations to waive the attorney-client privilege and work product protections in order to satisfy government investigators. For that reason, we endorse the recommendation of the American Bar Association that the waiver language be replaced.

It is apparent from the wording of the commentary that the Commission made a good faith attempt in 2004 to strike a balance between promotion of the attorney-client privilege and work product protections on the one hand, and legitimate law enforcement objectives on the other. In practice, however, this language has the unintended consequence of placing undue pressure on organizations to waive such privilege and protections at the early stages of an administrative, civil or criminal investigation.

The problem lies in the inherent inability of organizations to know, until it is too late, whether waiver is needed to satisfy the requirements for a reduced sentence. The commentary makes waiver a prerequisite to reductions in the culpability score for self-reporting and cooperation (along with acceptance of responsibility) if “such waiver is necessary” to provide “timely” and “thorough” disclosure of “all pertinent information known to the organization.” Because the commentary requires disclosure in a “timely” manner, the organization must make its decision whether to turn over the protected information early in the investigation, usually before counsel for the organization has had time to assess the facts in anything approaching a thorough manner. Especially at this early stage, the organization also is not in a position to know the scope of information already in the government’s possession. Indeed, it is the rare case where a lawyer for an organization is aware of the full universe of pertinent information known to the government until the government’s investigation is complete (and many times, not even then). Counsel for the organization therefore simply cannot know, until it is too late, whether the government has, from its own sources, all of the pertinent information that the organization’s counsel has separately acquired through an attorney-client communication or as the product of work conducted by counsel.

A second reason organizations feel undue pressure to waive their rights is this: Even assuming the decision-makers at the organization know the government lacks certain information that the organization gathered in a privileged or otherwise protected manner, the organization cannot reliably predict *when* the government might acquire that information absent waiver. If the organization incorrectly predicts that the government will independently acquire the pertinent information sooner rather than later, it may learn after-the-fact that it still has failed the “timely” and “thorough” disclosure test. Thus, in

all but the rarest of investigations, an organization cannot rationally choose whether to waive a privilege that serves as the foundation for our legal system—the privilege that enables individuals to seek the advice and guidance of legal counsel.

The undue pressure to waive that the commentary creates is confirmed by the recent survey conducted by a coalition of organizations including the National Association of Criminal Defense Lawyers and the Association of Corporate Counsel. Among other things, the majority of outside counsel responding to the survey reported that enforcement officials have directly or indirectly requested waiver of the attorney-client privilege in investigations involving companies that the responders represent. These counsel also report that the commentary to Section 8C2.5 is second only to the relevant DOJ memoranda on prosecution policies on the list of reasons cited by the government for the company to waive the privilege.

The attorney-client privilege retains its value in our legal system only if the client can count on the confidentiality of the communications covered by the privilege. As the Supreme Court emphasized in the seminal case on the availability of the attorney-client privilege to organizations, “an uncertain privilege . . . is little better than no privilege at all.” *Upjohn Co. v. United States*, 449 U.S. 383, 393 (1981). As more and more corporations give in over time to undue pressure to waive the privilege, it is inevitable that employees – whatever their level – in corporations across the country will be deterred from seeking advice about how to comply with an increasingly complex matrix of rules, regulations and statutes.

It is no answer that waiver serves a valuable purpose, or even that its benefits outweigh its costs in some instances. That may be true sometimes, and in those cases the organization may very well choose on its own to waive the privilege. But such a choice should not be coerced through the threat of harsher treatment – or the unavailability of more lenient treatment – if it “insists” on playing by the venerable rules of our adversary system.

The language of the relevant guidelines for individuals is instructive on this point and, in our view, dispositive. To qualify for acceptance of responsibility credit or a substantial assistance downward departure, an individual must make difficult choices including the possible waiver of certain constitutional rights. For example, the extra one-level reduction for acceptance of responsibility in § 3E1.1(b) is conditioned upon timely waiver of the Sixth Amendment right to a jury trial and the Fifth Amendment right not to incriminate one’s self. Although these required waivers have generated controversy, to our knowledge it has never been suggested that the Commission include as a factor in the availability of either of these provisions the individual’s decision whether to waive the attorney-client privilege or work-product protections. No doubt this is due to a universal recognition that these protections are basic to the operation of our legal system, even in those instances where the defendant has ultimately agreed to “give up the fight.” Before a defendant can get to the point where he decides to accept responsibility or cooperate or both, he must be able to discuss his conduct and his options in confidence with counsel,

safe in the belief that he will not be coerced into revealing those confidences at some later date.

The same is true for organizations. The attorney-client privilege and work-product protection are part of the basic rules that make the adversary system work. Indeed, they are the very tools that make it possible for defendants – be they individuals or organizations – to get to the place where they can make the fully informed decision whether to self-report, cooperate and accept responsibility. We urge the Commission to harmonize the commentary of § 8C2.5 with the guideline provisions applicable to individuals and remove the decision whether to waive from the sentencing guidelines calculus.

13. Proposed New Guideline Related to Crime Victims' Rights

On this proposal, PAG does not object generally to the new U.S.S.G. § 6A1.5's directive that courts must afford crime victims the rights described in 18 U.S.C. § 3771. PAG does, however, object to the Commission's call for new sentencing procedures that would extend beyond § 3771. In particular, we do not understand what might be encompassed in the Commission's policy statement calling on courts to adopt procedures related to "any other provision of Federal law pertaining to the treatment of crime victims." PAG can envision how a court might use this phrase to create new procedural rights for victims that Congress never intended. As the Justice for All Act of 2004's Crime Victims' Rights Amendment ("CVRA") itself showed, the establishment of new procedural rights in this area involves a very careful balancing of interests, not only for defendants, but also for prosecutors who inherently lose certain control of a case when victims' procedural rights increase. PAG respectfully suggests that the Commission should respect that procedural balancing established by Congress in the CVRA, and omit the clause quoted above so that § 6A1.5's new language is tailored specifically to the procedural rights the CVRA intended. If the Commission wishes to expand the list of procedural rights, it should do so later upon reflection of specific requests, rather than adopting a catch-all clause whose meaning and parameters are wholly unknown.

14. Proposed New Guideline for Bureau of Prisons Motions to Reduce Terms of Imprisonment Pursuant to 18 U.S.C. § 3582(c)(1)(A)

We commend the Commission for its decision to promulgate policy guidance for courts considering motions filed by the Bureau of Prisons to reduce sentences under 18 U.S.C. § 3582(c)(1)(A)(i). As we noted in our June 14, 2005 letter to the Commission, it is essential to have some "safety valve" in a determinate sentencing scheme, so that the government may respond to any extraordinary and compelling situations that arise after sentencing that render continued imprisonment unjust or meaningless. We believe that Congress intended § 3582(c)(1)(A)(i) to serve just such a safety valve function, and the legislative history of the Sentencing Reform Act of 1984 supports this interpretation. See S. Rep. No. 225, 98th Cong., 1st Sess. 37-150 at p. 121 ("safety valves" contained in § 3582(c) "keep[] the sentencing power in the judiciary where it belongs, yet permits later review of sentences in particularly compelling situations").

We are concerned, however, that the Commission's new policy statement at U.S.S.G. § 1B1.13 is largely a restatement of the statutory language in § 3582(c)(1)(A), and that it still does not respond to the directive in 28 U.S.C. § 994(t) that the Commission describe what should be considered extraordinary and compelling reasons, "including the criteria to be applied and a list of specific examples." In the expectation and hope that the Commission intends to include criteria and examples in its final rule, we make some recommendations below.

Before doing so, however, we note that proposed U.S.S.G. § 1B1.13(2) appears to improperly narrow the statutory circumstances in which sentence reduction may be sought. First, it extends the requirement in § 3582(c)(1)(A)(ii) that the court determine that the prisoner "is not a danger to the safety of any other person or the community, as provided in 18 U.S.C. § 3142(g)," to motions under § 3582(c)(1)(A)(i). Subsection (i) contains no such requirement. While we agree that a determination of *present* dangerousness is an appropriate consideration when deciding whether or not to reduce a prisoner's sentence, we do question whether § 3142(g), which governs pretrial release decisions, is the appropriate source of standards in this situation. For example, § 3142(g)(1) requires consideration of the nature and circumstances of the offense of conviction, "including whether the offense is a crime of violence or involves narcotic drug," and § 3142(g)(2) refers to "the weight of the evidence against the person." Neither of these sections is necessarily relevant to the question of present dangerousness, which may be many years after the original offense. It would be particularly inappropriate to infer present dangerousness from the mere fact that the underlying offense "involves narcotic drugs." Even § 3142(g)(3), which requires the court to consider of "the history and characteristics of the person," may not always be relevant to a finding of present dangerousness. It would seem preferable in this context to refer only to § 3142(g)(4), which requires consideration of "the nature and seriousness of the danger to any person or the community that would be posed by the person's release." Applying the broader standard of dangerousness under § 3142(g)(1) through (3) may unfairly invite rejection of prisoner petitions at the administrative level on grounds that have no relevance to any danger the prisoner may currently present.

We also note what may simply be a drafting oversight – the Commission's reference to a singular "extraordinary and compelling reason" in proposed U.S.S.G. § 1B1.13(1)(A). We assume that the Commission did not mean to suggest that a court must rely upon a single reason that is both extraordinary and compelling, as opposed to a combination of such reasons. We therefore recommend that proposed § 1B1.13(1)(A) be amended to state "reasons" in the plural, as in the statute.¹²

¹² Alternatively, the Commission could adopt the language in the FAMM Proposal for Policy Guidance published in the Federal Sentencing Reporter in 2001:

An "extraordinary and compelling reason" may consist of several reasons, each of which alone is not extraordinary and compelling, that

We now turn to the matter of criteria and examples of “extraordinary and compelling reasons” warranting sentence reduction. As a general matter, we do not believe that Congress intended this statute to apply only to medical cases, much less cases involving terminal illness. Rather, Congress intended a court to be able to respond affirmatively to a government motion for sentence reduction in a broad range of circumstances, both medical and non-medical. The language of § 3582(c)(1)(A)(i) suggests no specific limits on the government’s ability to bring cases warranting sentence reduction to the court’s attention, and the reference to “rehabilitation alone” in § 994(t) strongly suggests that Congress contemplated use of the statute in circumstances where rehabilitation would be a relevant reason to consider sentence reduction together with other factors.

The legislative history of the 1984 Sentencing Reform Act also indicates that § 3582(c)(1)(A)(i) was intended to be applied in circumstances other than those involving a prisoner’s health. See S. Rep. No. 225, 98th Cong., 1st Sess. 37-150 at p. 5 (statute available to deal with “the unusual case in which the defendant’s circumstances are so changed, *such as* by terminal illness, that it would be inequitable to continue the confinement of the prisoner”); *id.* at 55 (changed circumstances warranting sentence reduction would include “cases of severe illness, [and] cases in which other extraordinary and compelling circumstances justify a reduction of an unusually long sentence”). The use of terminal illness as one example (“such as”) of an extraordinary and compelling reason in the first quoted passage, and the distinction drawn between “severe illness” and “other extraordinary and compelling circumstances” in the second, demonstrate that Congress clearly expected the statute to be available in circumstances other than those involving the prisoner’s medical status.

While in practice the Bureau of Prisons (BOP) has thus far not invoked this statute except in cases of imminent death, its own regulations recognize that sentence reduction may be sought for both medical and non-medical reasons. See 28 C.F.R. § 571.61 (directing prisoner to describe plans upon release, including where he will live and how he will support himself and, “if the basis for the request involves the inmate’s health, information on where the inmate will receive medical treatment.” See also 28 C.F.R. § 571.62 (a) through (c) (describing a process by which sentence reduction requests based on medical reasons are reviewed by the Medical Director, and non-medical cases are reviewed by the Assistant Director for Correctional Programs). Moreover, BOP’s policy under the predecessor statute § 4205(g) was to invoke the statute “in particularly meritorious or unusual circumstances which could not reasonably have been foreseen by the court at the time of sentencing,” including “if there is an

together make the rationale for a reduction extraordinary and compelling.

See Mary Price, *The Other Safety Valve: Sentence Reduction Motions under 18 U.S.C. § 3582(c)(1)(A)*, 13 Fed. Sent. Rep. 188, 191 (2001).

extraordinary change in an inmate's personal or family situation or if an inmate becomes severely ill." BOP Program Statement No. 5050.41 (October 5, 1983). In practice, BOP invoked § 4205(g) in cases involving a broad range of equitable circumstances. *See, e.g., United States v. Diaco*, 457 F. Supp. 371 (D.N.J. 1978)(federal prisoner's sentence reduced because of unwarranted disparity among codefendants); *United States v. Banks*, 428 F. Supp. 1088 (E.D. Mich. 1977)(good behavior in prison). In the *Banks* case, the Director of the Bureau of Prisons noted that "Prior to the passage of the Parole Commission and Reorganization Act, applications for relief in cases of this type had to be processed through the Pardon Attorney to the President of the United States. The new procedure offers the Justice Department a faster means of achieving the desired result." 428 F. Supp. at 1089. *See also Diaco*, 457 F. Supp. at 372 (same).

It may be, as Vice Chairman Steer has suggested, that BOP's reluctance to invoke this statute more broadly and frequently stems from the absence of codified standards and policy guidance from this Commission, as well as from its conception of its own role in as that of turnkey. *See John Steer and Paula Biderman, "Impact of the Federal Sentencing Guidelines on the President's Power to Commute Sentences," 13 Fed. Sent. R. 154 (2001).* If that is the case, it is all the more imperative for this Commission to step forward to give explicit policy guidance in this area, and to spell out the criteria and give examples so that the statute can begin to function as the "safety valve" that Congress intended it to be.

In developing specific criteria and examples, we cannot improve upon the thorough and thoughtful approach taken in the Families Against Mandatory Minimums (FAMM) Proposal for Policy Guidance, published as an Exhibit to Mary Price's article. *See Mary Price, The Other Safety Valve: Sentence Reduction Motions under 18 U.S.C. § 3582(c)(1)(A), 13 Fed. Sent. Rep. 188, 191 (2001).* Both the general criteria in FAMM's proposed § 1B1.13(b) and the more specific examples set forth in the proposed "application note," deserve the Commission's careful consideration. The criteria define "extraordinary and compelling reasons" to include a situation or condition 1) that was unknown to the court at sentencing; 2) that may have been known to the court but has changed significantly since sentencing; and 3) that the court was prohibited from taking into account at the time of sentencing but would no longer be prohibited from considering. Examples include terminal illness, severely diminished physical capacity, deteriorating health as a result of aging, substantial assistance to the government, changes in the applicable law that have not been made retroactive, disparity among codefendants, and compelling family circumstances. Rehabilitation may be relevant and properly be taken into account in many of these situations, even though it cannot serve as the sole reason for sentence reduction. The FAMM proposal is appended to this letter.

In addition to the criteria and examples proposed by FAMM, we would suggest that the Commission consider the criteria for equitable reduction in sentence that the Department of Justice itself has identified in the United States Attorneys' Manual as grounds for recommending commutation of sentence to the President. Section 1-2.113 of the U.S.A.M. states that commutation may be recommended in cases involving

"disparity or undue severity of sentence, critical illness or old age, and meritorious service rendered to the government by the petitioner, e.g. cooperation with investigative or prosecutive efforts that has not been adequately rewarded by other official action." The section goes on to say that "a combination of these and/or other equitable factors may also provide a basis for recommending commutation in the context of a particular case." Particularly in light of the original purpose of the sentence reduction authority when it was enacted in 1976 to provide a judicial alternative to clemency, it seems appropriate that the circumstances identified by the government as appropriate for clemency should also be appropriate in this situation.

Thank you in advance for considering our comments, and please let us know if we may be of further assistance to the Commission.

Sincerely,

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March 9, 2006

Honorable Ricardo H. Hinojosa
United States Sentencing Commission
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Washington, D.C. 20002-8002

Re: Proposed Amendments to the Firearms Guideline, § 2K2.1

Dear Judge Hinojosa:

On behalf of the Federal Public and Community Defenders, we write to provide our comments on the proposed amendments to the firearms guideline, § 2K2.1.1

As of 2003, firearms offenders comprised approximately 10% of offenders sentenced in federal court, the fourth largest proportion of the federal docket.² Average time served for illegal firearms trafficking and possession under 18 U.S.C. § 922(g) doubled from the guidelines' inception to 2002.³ From 2002 to the present, average sentence length for offenders sentenced under § 2K2.1 increased from 53 months to 58 months.⁴

¹ Thanks to Assistant Federal Defenders John Reichmuth and Richard Ely for their technical expertise and research. Thanks to Steve Jacobson, Brian Rademacher, John Rhodes, and Kristen Rogers for their practical and legal input.

² The Commission has acknowledged that, to date, the Guidelines have been used to increase sentence severity, but that they *could be* used to reduce sentence severity for targeted offenses or offenders, and *could be* used to carry out its statutory duty to "minimize the likelihood that the Federal prison population will exceed the capacity of the Federal prisons," 28 U.S.C. § 994(g).

³ U.S. Sentencing Commission, Fifteen Years of Guidelines Sentencing: An Assessment of How Well the Federal Criminal Justice System is Achieving the Goals of Sentencing Reform at 139 (2004).

⁴ U.S. Sentencing Commission, Federal Sentencing Statistics by State, District and Circuit, Table 7 (average sentence length for firearms offenders receiving prison sentence increased from 71 to 75.8 months from 2002 to 2003) (2002-2003), <http://www.ussc.gov/JUDPACK>; U.S. Sentencing Commission, Sourcebook of Federal Sentencing Statistics, Table 13 (average sentence length for all firearms offenders increased from 65.8 to 70 months from 2002 to 2003 (2002-2003), <http://www.ussc.gov/JUDPACK>; U.S.

As of 2004, the Bureau of Prisons was 40% overcapacity,⁵ with over 188,000 inmates,⁶ at a cost to the taxpayers of over \$4 billion a year.⁷ The Commission is required by statute to “minimize the likelihood that the Federal prison population will exceed the capacity of the Federal prisons,”⁸ to assure that the purposes of sentencing, including proportionate punishment, are met, and to avoid unwarranted disparity and inappropriate uniformity.⁹

Yet, most of the proposed amendments would raise penalties for less serious conduct. As set forth below, by following Congress’ lead in the firearms area and relying on accurate information about firearms, the Commission can and should lower firearms sentences, or at least not indiscriminately raise them, and assure that any enhancements in this area are appropriately focused and narrowly drawn.

(A) § 921(a)(30)

The proposed amendment sets forth two options. Option One would replace a “firearm described in [the now-repealed] 18 U.S.C. § 921(a)(30)” with a “high-capacity, semiautomatic firearm” in the enhanced base offense levels set forth in § 2K2.1(a).¹⁰ Option Two would encourage upward departure if the offense involved a “high-capacity, semiautomatic firearm.” Under either option, “high capacity, semiautomatic firearm” would be defined as a “semiautomatic firearm that has a magazine capacity of more than [15] cartridges,” the same definition as in § 5K2.17 (upward departure if possessed in connection with a crime of violence or controlled substance offense), except that the threshold magazine capacity in § 5K2.17 is “more than 10 cartridges.”

Sentencing Commission, Special Post-Booker Coding Project at 13-15 (average sentence length for offenders sentenced under § 2K2.1 increased from 53 to 58 months from 2002 to 2005) (Prepared Feb. 14, 2006), http://www.ussc.gov/Blakely/postBooker_021406.pdf.

5 U.S. Department of Justice, Bureau of Justice Statistics Bulletin, Prisoners in 2004 at 7, available at <http://www.ojp.usdoj.gov/bjs/pub/pdf/p04.pdf>.

6 <http://www.bop.gov/news/quick.jsp#1>.

7 FY 2004 Costs of Incarceration and Supervision, The Third Branch, Vol. 37, No. 5 (May 2005) (\$23,205.59 per inmate in FY 2004), available at <http://www.uscourts.gov/ttb/may05ttb/incarceration-costs/index.html>; U.S. Department of Justice, Bureau of Justice Statistics, State Prison Expenditures, 2001 1 (June 2004) (\$22,632 per federal inmate in FY 2001), available at <http://www.ojp.usdoj.gov/bjs/pub/ascii/spe01.txt>.

8 28 U.S.C. § 994(g).

9

28 U.S.C. § 991(b); 18 U.S.C. § 3553(a)(2).

10

The enhanced base offense levels are 26 for any firearms offender with two prior felony convictions of a crime of violence or controlled substance offense, U.S.S.G. § 2K2.1(a)(1), 22 for any firearms offender with one such prior conviction, U.S.S.G. § 2K2.1(a)(3), 20 for possession by or transfer to a prohibited person, U.S.S.G. § 2K2.1(a)(4)(B), and 18 for any other firearms offense. U.S.S.G. § 2K2.1(a)(5).

The Commission seeks comment on (1) whether an alternative definition should be considered, (2) whether there are other categories of firearms that should form the basis for an enhanced base offense level or upward departure, and (3) whether the Commission should make similar changes to the definition of "high capacity, semiautomatic firearm" in § 5K2.17.

Congress allowed the semiautomatic assault weapons legislation to lapse because there was no empirical justification for it while it was in effect.¹¹ The Commission has a non-controversial opportunity to simplify and lower penalties in what appears to be a small number of cases. Thus, the Commission should delete the references to the repealed legislation, and take no action unless and until a particular action is demonstrated to be necessary based on (1) analysis of sentencing data, and (2) research about the types of weapons it is considering for more severe punishment. In the meantime, courts can take into account under § 3553(a) in any case any heightened seriousness of the offense or need to protect the public flowing from the type of weapon. Further, upward departure is available for multiple "military type assault rifles," § 2K2.1, comment. (n.13), and for "high capacity, semiautomatic firearms" possessed "in connection with" a crime of violence or controlled substance offense, § 5K2.17.

As set forth in subsection (c), the proposed definition of "high capacity, semiautomatic weapon" would sweep in ordinary firearms with legitimate uses, including target shooting at Boy Scout camps, quite *unlike* the bombs, machine guns and sawed-off shotguns described in 26 U.S.C. § 5845, and also well beyond the firearms described in 18 U.S.C. § 921(a)(30) which Congress has repealed. If the Commission feels compelled to act in this amendment cycle for reasons that seem contrary to congressional intent and are not apparent in any reason offered in support of the amendment or in any data of which we are aware, it should provide for an upward departure for involvement of a semiautomatic assault weapon, as defined in former 18 U.S.C. § 921(a)(30) and subject to the exemptions in former 18 U.S.C. § 922(v)(2) and (3).

11

A study mandated by Congress to be performed thirty months after enactment of the semiautomatic assault weapons ban concluded that, "[a]t best, the assault weapons ban can have only a limited effect on total gun murders, because the banned weapons and magazines were never used in more than a fraction of all gun murders," and that there was no detectable reduction "in two types of gun murders that are thought to be closely associated with assault weapons, those with multiple victims in a single incident and those producing multiple bullet wounds per victim." See Roth, Koper, et. al, Urban Institute, Impact Evaluation of the Public Safety and Recreational Firearms Use Protection Act of 1994 at 2, 97 (March 13, 1997), http://www.urban.org/UploadedPDF/aw_final.pdf. Semiautomatic assault weapons are used in only 1-2% of crimes. See David B. Kopel, Rational Basis Analysis for "Assault Weapon" Prohibition, 20 J. Contemp. L. 381 (1994) (SAWs used in 1% of gun crime); U.S. Department of Justice, Bureau of Justice Statistics, Survey of State Prison Inmates 1991 (3/93) ("fewer than 1% of all violent inmates, were armed with a military-type weapon, such as an Uzi, AK-47, AR-15, or M-16"), <http://www.ojp.usdoj.gov/bjs/pub/ascii/sospi91.txt>; U.S. Department of Justice, Bureau of Justice Statistics, Firearm Use by Offenders (2/5/02) ("about 2% had a military-style semiautomatic gun or machine gun"), <http://www.ojp.usdoj.gov/bjs/pub/ascii/fuo.txt>.

1. **Consistent with congressional intent and the Commission's duty to revise guidelines based on data and research, the Commission should delete the reference to weapons described in 18 U.S.C. § 921(a)(30) and take no further action unless indicated by sentencing data and research regarding semiautomatic weapons.**

The Violent Crime Control and Law Enforcement Act of 1994 ("the Act") became law on September 13, 1994. Subtitle A of Title XI of the Act, among other things, criminalized the manufacture, transfer or possession of a "semiautomatic assault weapon," 18 U.S.C. § 922(v)(1) (repealed September 13, 2004), defined in 18 U.S.C. § 921(a)(30) (repealed September 13, 2004) with numerous exemptions set forth in 18 U.S.C. § 922(v)(2)-(4) (repealed September 13, 2004), subject to a maximum penalty of five years, 18 U.S.C. § 924(a)(1)(B) (amended to delete § 922(v) September 13, 2004); enacted a ten-year mandatory minimum for a violation of § 924(c) with a "semiautomatic assault weapon," 18 U.S.C. § 924(c)(1)(B)(i) (repealed September 13, 2004); and directed the Commission to enhance punishment for a crime of violence or drug trafficking offense involving a "semiautomatic firearm," defined as "any repeating firearm that utilizes a portion of the energy of a firing cartridge to extract the fired cartridge case and chamber the next round and that requires a separate pull of the trigger to fire each cartridge." Pub. L. 103-322 § 110501 (repealed September 14, 2004).

In response to the congressional directive, the Commission provided for a potential upward departure in § 5K2.17 in recognition that any increased risk of harm from a "high capacity, semiautomatic firearm" would vary substantially with the inherent dangerousness of the weapon and the circumstances of the offense.¹² Without a congressional directive, the Commission amended § 2K2.1 to subject "semiautomatic assault weapons" as defined in 18 U.S.C. § 921(a)(30) to the same enhanced base offense levels as the sawed-off firearms, machine guns, bombs and silencers described in 26 U.S.C. § 5845(a).¹³

By the terms of the Act, Subtitle A in its entirety was repealed effective September 13, 2004.¹⁴ Congress has taken no action to reinstate any of its provisions. Nonetheless, the Commission proposes to either maintain the enhancements or replace them with an upward departure, and in either case to vastly broaden the definition of the enhancing type of firearm. Compared to firearms offenses *not* involving a "semiautomatic firearm with a magazine capacity of more than 15 cartridges," Option One would increase sentences for offenders with prior drug trafficking or crime of violence convictions by 20-25%, more than double sentences for most other offenders, and place offenders convicted of record-keeping offenses otherwise subject to probation in prison for more than two years. Taking two common offenses, Option One would more than double the sentence for a first time offender convicted of possession by or transfer to a

¹²
U.S.S.G., App. C., amend. 531.

¹³
U.S.S.G., App. C., amend. 522.

¹⁴
Pub. L. 103-322 § 110105(2).

prohibited person (from 15-21 months to 33-41 months),¹⁵ and more than double the sentence for a first time offender convicted of possession or transfer of a stolen firearm or one with an altered serial number (from 10-16 to 27-33 months).¹⁶ Further, the six-level reduction for sporting or collection purposes would be precluded for any offense involving a semiautomatic firearm with a magazine capacity of more than 15 cartridges. This reduction is not precluded for many such weapons now.

The only explanation offered for these substantial sentences is that "possession of certain weapons, particularly by a prohibited person, may still be considered an aggravating factor warranting an increase in the base offense level." This begs a number of questions: Which certain firearms warrant aggravating status? What is the rationale for doing so? Why does the proposal apply to all firearms offenses if the concern is possession by a prohibited person? Is the cost justified? When the Commission equalized penalties for semiautomatic assault weapons with bombs, machine guns and sawed-off shotguns in 1995, it estimated that this would increase the prison population by 82 inmates,¹⁷ which, at today's rates, would cost nearly \$2 million annually.¹⁸ Pursuant to the Commission's duty to formulate guidelines that are "effective" in meeting the purposes of punishment and that minimize prison overcrowding,¹⁹ the Commission should answer these questions before taking any action.

a. The proposal is unsupported by published data.

Recently published data on the frequency of use of different base offense levels and specific offense characteristics does not separate enhancements for weapons described in 18 U.S.C. § 921(a)(30) from those for firearms described in 26 U.S.C. § 5845(a), or from enhancements under § 2K2.1(a)(4)(A) that involved neither.²⁰ Thus, at present, the frequency and circumstances of offenses involving weapons described in 18 U.S.C. § 921(a)(30) appears to

¹⁵ 18 U.S.C. § 922(d), (g).

¹⁶ 18 U.S.C. § 922(j), (k).

¹⁷ U.S. Sentencing Commission, 1995 Annual Report at 149, http://www.ussc.gov/ANNRPT/1995/CH5_95.PDF.

¹⁸

FY 2004 Costs of Incarceration and Supervision, The Third Branch, Vol. 37, No. 5 (May 2005) (\$23,205.59 per inmate in FY 2004), available at <http://www.uscourts.gov/ttb/may05ttb/incarceration-costs/index.html>; U.S. Department of Justice, Bureau of Justice Statistics, State Prison Expenditures, 2001 1 (June 2004) (\$22,632 per federal inmate in FY 2001), available at <http://www.ojp.usdoj.gov/bjs/pub/ascii/spe01.txt>.

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²⁰ 28 U.S.C. § 991(b)(1)(A), (2); § 994(g).

²⁰ Guideline Application Frequencies for Fiscal Year 2003 at 35, http://www.ussc.gov/GAF/03_guideline_application_frequency.htm.

be unknown. According to anecdotal reports from Defenders, the enhanced base offense levels are rarely if ever used for weapons described in 18 U.S.C. § 921(a)(30).

According to the Commission's Sourcebooks, the upward departure in § 5K2.17 for a "high capacity, semiautomatic firearm in connection with a crime of violence or controlled substance offense," in which the weapon is defined the same as in the proposed new definition for § 2K2.1 but with a lower threshold magazine capacity, has never been used.²¹

As explained in subsection (c) below, the proposed definition would sweep in numerous ordinary firearms with legitimate uses, unlike those described in 26 U.S.C. § 5845, and well beyond those Congress temporarily included in the now-repealed 18 U.S.C. § 921(a)(30). Thus, Option One would require unwarranted uniformity among dissimilarly situated offenders. Option 2 would invite upward departure when there is no apparent basis for it. The Commission should devote careful study to the attributes and common uses of whatever weapon it is considering for enhanced punishment.

b. The proposal is contrary to congressional intent.

All firearms potentially could be used as instruments of unlawful violence, but § 2K2.1 applies to firearms offenses, not crimes of violence. The offenses covered by § 2K2.1 are prophylactic in nature, *i.e.*, to prevent violent crimes by prohibiting possession and transfers that would be legal but for the individual's criminal record, mental health or drug addiction background, or failure to comply with various licensing or record-keeping requirements.²² The question for purposes of *enhanced* punishment based on certain weapons is whether those certain weapons are largely used for violent purposes or have substantial legitimate uses.

Congress requires registration of any sawed-off shotgun or rifle, machine gun, silencer or bomb, and failure to register is a crime punishable by up to ten years.²³ This reflects Congress' judgment that these devices have a very high likelihood of use for unlawfully violent purposes.²⁴ Congress has never required blanket registration of semiautomatic firearms, not as narrowly defined in 18 U.S.C. § 921(a)(30) much less as broadly defined in the Commission's proposal. This demonstrates Congress' recognition that, unlike machine guns, sawed-off shotguns, silencers and bombs, semiautomatic firearms have lawful uses, such as target shooting, hunting, defense of self, property or others, and as collectibles, and are less likely than sawed-off shotguns, machine guns and bombs to be used as instruments of unlawful violence. Even while

²¹ U.S. Sentencing Commission Sourcebooks, Table 24 (1996-2003).

²² United States v. Lewis, 249 F.3d 793, 796-97 (8th Cir. 2001).

²³ 26 U.S.C. §§ 5841, 5845, 5862(d), 5871.

²⁴ United States v. Serna, 435 F.3d 1046 (9th Cir. 2006); United States v. Brazeau, 237 F.3d 842, 845 (7th Cir. 2001); United States v. Jennings, 195 F.3d 795, 799 (5th Cir. 1999).

the semiautomatic assault weapons legislation was in effect, any firearm lawfully possessed before its passage as well as over 650 semiautomatic weapons were exempt.²⁵ Further, Congress indicated that when semiautomatic weapons *are* used for unlawful purposes, the offense is still less serious than an offense involving a machine gun, sawed-off shotgun or bomb, providing in § 924(c) for a thirty-year mandatory minimum for the latter, and a ten-year mandatory minimum for the former (now repealed). The Commission too has recognized that weapons described in 26 U.S.C. § 5845(a) are *sui generis*, having deemed mere possession of such a weapon, but no other kind of weapon, a “crime of violence” for career offender purposes.²⁶

Congress has allowed all of the semiautomatic weapons provisions to lapse, finding them unnecessary and placing semiautomatic weapons on the same footing as any other firearm other than those described in 26 U.S.C. § 5845.²⁷ It would be unwarranted for the Commission to continue to equate these weapons with those described in 26 U.S.C. § 5845, much less to broaden the category to include ordinary firearms with substantial legitimate uses.

- c. The proposed definition would include even more ordinary firearms with substantial legitimate uses and with little risk of unlawful violence than did 18 U.S.C. § 921(a)(30) before it was repealed.**

The Commission proposes to replace the references to § 921(a)(30) in the enhanced base offense levels in § 2K2.1 with a “firearm that is a high-capacity, semiautomatic firearm,” defined as a “semiautomatic firearm that has a magazine capacity of more than 15 cartridges,” or to create an upward departure in § 2K2.1 for offenses involving a firearm so defined. The definition is both artificial and exceedingly broad.

A “semiautomatic firearm that has a magazine capacity of more than 15 rounds”

²⁵ 18 U.S.C. § 922(v)(2)-(3).

²⁶ U.S.S.G. § 4B1.2, comment. (n. 1).

²⁷ As Judge Kozinski of the Ninth Circuit recently wrote:

The most plausible inference to be drawn from the evolution of federal law as to assault weapons is that Congress allowed the ban to lapse, having found it unnecessary. Because current federal policy places assault weapons on the same footing as other non-registerable weapons, we see this, on balance, as supporting [the defendant’s] position. We find more significant the fact that, when the federal assault-weapon ban ended, Congress didn’t require previously-banned semiautomatic weapons to be registered. The fact that semiautomatic weapons are not now, nor have ever been, subject to a blanket registration requirement suggests that mere possession of them does not pose the same risk of physical injury as possession of weapons subject to a blanket federal registration requirement-like silencers and sawed-off shotguns.

Serna, 435 F.3d at 1049.

encompasses many weapons that have never been considered “assault weapons.” Among others, it describes several standard-sized pistols not within the scope of former § 921(a)(30). These include the Glock 17,²⁸ the Beretta 92-SB,²⁹ the Heckler and Koch USP 9,³⁰ and the Smith and Wesson Sigma SW9F.³¹ There is nothing remarkable about these guns; they were all commercially available self-defense handguns released by major manufacturers. They are not considered to be examples of “paramilitary design.”³² They are completely distinct in appearance from all of the weapons included within § 921(a)(30).

The proposed amendment would divide the category of full-sized 9 mm semi-automatics arbitrarily down the middle. It is extremely common for full-sized 9 mm handguns to have a magazine capacity at or near 15 rounds. Those sold with factory magazines holding greater than 15 rounds are mentioned above. Those with 15-round magazines are also extremely common, including, but not limited to, popular models like the Ruger P85,³³ Sig-Sauer P226,³⁴ Smith and Wesson 915,³⁵ Taurus PT-92,³⁶ Beretta 92F,³⁷ Glock 19,³⁸ and Springfield P9.³⁹ Since the proposed change would only affect guns with magazines holding more than 15 rounds, it would not affect these common guns, thereby creating an artificial, inexplicable distinction between virtually identical handguns.

No handgun of the type mentioned above was included in 18 U.S.C. § 921(a)(30). Guns included in the ban were marketed with larger magazine capacities. The Tec-9 came with a 32-

2817 rounds. S.P. Fjestad, Blue Book of Gun Values (19th Ed.) 544 (hereinafter “Blue Book”).

2916 rounds. Id. at 206.

3016 rounds. Id. at 579.

3117 rounds. Id. at 1056.

32 See id. at 631, referring to Intra-Tec Tec-9, a weapon included within § 921(a)(30), as of “paramilitary design.”

33Id. at 1093.

34Id. at 1017.

35Id. at 1050.

36Id. at 1114.

37Id. at 207.

38Id. at 544.

39Id. at 1067.

round magazine.⁴⁰ The Tec-22, also of “paramilitary design,” came standard with a 30-round magazine.⁴¹ The Cobray/SWD M-11 was issued and sold with a 32-round magazine.⁴² The Uzi pistol came with a 20-round magazine.⁴³ Nearly all of the firearms included in the former ban are based on military designs and have fully automatic analogues. They are essentially semiautomatic versions of submachine guns. Placing standard 9 mm handguns in that category and giving them the same enhanced base offense levels as machine guns would significantly broaden the guideline’s scope.

A significant problem with the proposed definition is that many, indeed most, semiautomatic firearms do not have a magazine capacity inherent to them. Instead, *magazines* have a capacity, and a number of different magazines may fit any specific gun.⁴⁴ Would the proposal be interpreted to apply where a firearm is found without a magazine or with a magazine that holds 15 or fewer rounds? The government could argue that an SWD M-11 found without a magazine has a magazine capacity of more than 15 rounds, because there exists a factory-made magazine holding more than 15 rounds. But there also exist factory and after-market ten-round magazines for this gun. Read one way, enhanced base offense levels would hinge on what magazine a defendant was caught possessing. Read another way, the enhanced base offense levels would apply based on a firearm’s ability to accept a greater-than-15 round magazine. Aftermarket high-capacity magazines are available for more than a dozen models,⁴⁵ so the enhanced base offense levels could be creatively applied to vastly more cases of firearm possession than ever before, including to firearms never actually outfitted with a 15+-round magazine.

The proposed definition would thus elevate any firearm that accepts a detachable box magazine to the status of a machine gun, sawed-off shotgun, or bomb. In contrast, 18 U.S.C. § 921(a)(30)(B) and (C) described semiautomatic rifles and pistols that accepted a detachable magazine *and* had at least two constant physical features (e.g., bayonet mount, pistol grip, flash suppressor, etc.). To illustrate, the Ruger 10/22 .22LR rifle is a semi-automatic firearm that shoots .22LR cartridges.⁴⁶ The .22LR cartridge is not a military round. It is commonly used for recreational target shooting and to teach marksmanship to new shooters and children, and is used at Boy Scout camp shooting ranges. Aftermarket twenty-five round magazines are available for

⁴⁰Id. at 633.

⁴¹Id. at 632.

⁴²Id. at 971.

⁴³Id. at 1150.

⁴⁴See www.brownells.com (Well known shooting supply company offering high-capacity magazines for numerous firearms).

⁴⁵Id.

⁴⁶Blue Book at 1101.

this rifle to allow extended target shooting sessions without reloading.⁴⁷ Under the proposed definition, possession of this firearm would be treated the same as the possession of a machine gun, sawed-off shotgun, or bomb.

Similarly, magazine capacity for rifles varies widely; they may be 10, 12, 15, 20, 25, 30, or 40 rounds, to name only a few. Does the definition require that 15+ rounds be inserted in the rifle, present in the area of the rifle, or merely potentially used in the rifle even if no such rounds had ever been used in the rifle? The government could argue, and some judges would accept, that the definition encompasses all rifles and pistols that accept a detachable magazine, vastly expanding the application of the enhanced base offense levels without a reasoned justification. Increased litigation and inconsistency in application would result.

In sum, reacting to the lapse of the assault weapons ban by creating heightened base offense levels for an even broader range of weapons makes no sense.

If the Commission feels compelled to act at this time without more careful study and despite apparently contrary congressional intent, the Commission should, at most, provide for a discretionary upward departure for firearms offenses involving firearms described in former § 921(a)(30) and subject to the exemptions in former 18 U.S.C. § 922(v)(2) and (3). If so, the Commission should provide an application note stating that the statute has been repealed, explaining that conduct involving firearms previously identified in it may warrant an upward departure, and providing the text of the former statute. This would at least provide clear guidance as to when the upward departure may apply.

2. There is no other category of firearms that should form the basis of an enhanced base offense level or upward departure.

As explained above, Congress treats weapons described in 26 U.S.C. § 5845, and only those weapons, as requiring registration and deserving of increased penalties. The Commission should accept Congress' judgment in this regard. As Justice Breyer has advised, the Commission should not add further adjustments, but should "act forcefully to diminish significantly the number of offense characteristics attached to individual crimes," because the existing Guidelines already make distinctions without a difference and create a false façade of precision.⁴⁸ Moreover, further adjustments seem particularly wasteful of judicial resources now that the overarching sentencing mandate is to impose a sentence that is sufficient but not greater than necessary to achieve sentencing purposes, with the Guidelines "advisory" within that framework.

⁴⁷Id.

⁴⁸ See Justice Stephen Breyer, Federal Sentencing Guidelines Revisited, 11 Fed. Sent. R. 180 (Jan./Feb. 1999).

• If the Commission has any particular weapons in mind, we would appreciate the opportunity to comment on them specifically.

3. **The Commission should either delete § 5K2.17, revise the definition to focus on features more pertinent to dangerousness than magazine capacity, or at least increase the magazine capacity.**

The Commission has asked for comment on whether it should make “similar changes” to the definition of “high capacity, semiautomatic firearm” in § 5K2.17. Since the legislation that prompted § 5K2.17 has been repealed, see Pub. L. 103-322 §§ 110501, 110105(2), and the departure appears never to have been used, the Commission should delete § 5K2.17. If retained, based on the information in section 1(c), infra, and further study, the definition should be revised to capture increased dangerousness. Failing that, the threshold magazine capacity should be increased to at least “more than 15 cartridges.”

4. **The Commission should promulgate a downward departure for inoperable firearms and firearms and ammunition with no intended use.**

There is a difference relevant to the purposes of sentencing in § 3553(a)(2), which § 2K2.1 does not recognize, between possession of a loaded gun and possession of an unloaded gun, as well as between possession of an operable gun and possession of an inoperable gun. Further, there is unwarranted uniformity between the punishment for possession of a single bullet and that for possession of a loaded firearm. These disparities should be addressed in an application note inviting downward departure. C.f. U.S.S.G. § 2B5.1, comment. (n.4) (enhancement does not apply to “persons who produce items that are so obviously counterfeit that they are unlikely to be accepted even if subjected to only minimal scrutiny”). We propose the following language:

When the firearm involved was inoperable, or the firearm was unloaded and the defendant did not intend to load it in the future, a downward departure may be warranted. Similarly, possession of only a small amount of ammunition and no firearm, where the defendant did not intend to use the ammunition in the future, may justify downward departure.

(B) Trafficking SOC

1. **The proposed amendment lacks any criteria that would limit the SOC to “firearms trafficking.”**

The proposed amendment would add a specific offense characteristic at § 2K2.1(b)(7) as follows:

- (7) If the defendant engaged in trafficking of (A) [[2]-24] firearms, increase by [2][4] levels; or (B) [25 or more] firearms, increase by [6][8] levels.

The proposed corresponding application note 13 would state:

- (A) Definition of "Trafficking".—For purposes of subsection (b)(7), "trafficking" means transporting, transferring, or otherwise disposing of, [firearms][a firearm] to another individual, (i) [as consideration for anything of value][for pecuniary gain]; or (ii) as part of an ongoing unlawful scheme, even if nothing of value was exchanged.
- (B) Use of the Term "Defendant".—Consistent with §1B1.3 (Relevant Conduct), the term "defendant" limits the accountability of the defendant to the defendant's own conduct and conduct that the defendant aided or abetted, counseled, commanded, induced, procured, or willfully caused.

There is no description in the synopsis of what kind of activity this proposed specific offense characteristic is intended to cover, nor can one be discerned from the language of the proposal. We assume the Commission would want to confine this specific offense characteristic to offenses that involved engaging in the business of selling firearms, for monetary profit or a criminal purpose, consistent with commonsense understanding, legal definitions, and the nature of the cases subject to sentencing under § 2K2.1.

The essence of the definition of "illicit trafficking in firearms" is the "business or merchant nature" of the defendant's firearms conviction.⁴⁹ In the firearms chapter itself, Congress defined the concept of "in the business" as meaning one who "devotes time, attention, and labor ... as a regular course of trade or business with the principal objective of livelihood and profit through the sale or distribution" of firearms or, alternatively, one who engages in the "regular and repetitive purchase and disposition of firearms for criminal purposes or terrorism," specifically defined. See 18 U.S.C. § 921(a)(21)(A-F) & (a)(22). Using Congress' definitions in the firearms area is appropriate, while borrowing from entirely dissimilar areas like identity theft and counterfeit labels is a mis-match and not in keeping with congressional intent.⁵⁰

Similarly, if the purpose is to focus on firearms trafficking, the only scheme that should be considered for enhancement is one involving the regular and repeated unlawful dealing in firearms for profit or a criminal purpose, *i.e.*, an ongoing "firearms trafficking scheme." See U.S.S.G. § 2B1.1(b)(11) & comment. (n.10) (an increase for trafficking in stolen goods – the "chop shop" enhancement – must be based on a scheme involving the offense at issue, *i.e.*, the unlawful "organized scheme to steal vehicles or vehicle parts").⁵¹

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Kuhali v. Reno, 266 F.3d 93, 107-08 (2d Cir. 2001) (analyzing the meaning of "illicit trafficking in firearms" under 8 U.S.C. § 1101(a)(43)).

50 Under other guidelines, trafficking connotes "for profit." See U.S.S.G. § 2L1.1(b)(1) & comment. (n.1); § 2L2.1(b)(1) & comment. (n.1) (immigration offenses, involving trafficking in persons).

51

As proposed below, the unlawful scheme should be confined to the transport, transfer or disposition of firearms to an individual whose possession, receipt, or use the defendant knows or has reason to know will be either (i) unlawful (consistent with Congress' rationale that a prohibited possessor is more likely

As presently written, the proposal lacks any limiting criteria and this would commonly apply to activity well beyond the scope of any commonsense understanding or legal definition of "firearms trafficking." For example, a licensed dealer in firearms who violates (with respect to two or more firearms) any one of a host of regulatory directives in 18 U.S.C. § 922, such as selling firearms to an adult who did not appear in person or submit a sworn statement as to his age, § 922(c), though the buyer is a lawful possessor planning to use the firearms for a lawful purpose, since dealers dispose of firearms for pecuniary gain. A legitimate common carrier that violates (with respect to two or more firearms) a regulatory directive, such as delivering firearms without obtaining a receipt from the recipient, § 922(f), though the recipient is a lawful possessor planning to use the firearms for a lawful purpose would be a firearms trafficker, as common carriers transport firearms for pecuniary gain.

Any individual who violated the law with respect to two or more firearms he bought for personal use and without any intent at the time to profit would be a firearms trafficker if he later disposed of them in exchange for money or something of value. This would include a lawful possessor who sells personal firearms to a relative, friend or neighbor he knows to be law-abiding but is a juvenile only days shy of turning 21 or was dishonorably discharged from the Armed Forces, or whom he knows has a drug problem or a prior conviction for misdemeanor domestic violence. See §§ 922(x)(1); 922(d)(3), (6), (9). It would include an individual who is an unlawful possessor but sells, trades, or pawns his personal firearms, acquired before he was a prohibited person, to a lawful possessor for rent money or to meet other financial needs, not unusual among the poor, or trades them for farm equipment, car parts, or other necessary items, quite common in rural America. See §922(g). This was the situation in United States v. VanLeer, 270 F.Supp.2d. 1318 (D. Utah 2003). VanLeer was a felon who, because he "was destitute and needed money for rent," took a gun he had purchased before he was a felon then later gave to a friend and sold it to a pawn shop, using his own name and fingerprints. Id. at 1319. These facts, and that he was divesting himself of the gun rather than keeping it, showed he was less culpable and less harmful than the typical felon-in-possession at which the statute was aimed. Id. at 1326-27. Under this proposal, if he had divested himself of two guns instead of one, he would be punished as a "firearms trafficker," a ludicrous result.

As demonstrated by these examples, it makes no meaningful difference whether "pecuniary gain" or "anything of value" is used. Moreover, if "pecuniary gain" were defined as elsewhere in the Guidelines, it is the same as "anything of value." See § 2B1.5, comment. (n.5(A)).

Further, an individual who transferred firearms "even if nothing of value was exchanged" would be a "firearms trafficker" if done as part of *any* "ongoing unlawful scheme," regardless of its nature.

In addition, the proposal suffers from a serious double counting problem. The defendant should not receive, in addition to the additional 2 to 10 levels based on the number of guns

to use the firearm in an illegal manner) or (ii) in connection with another felony offense.

involved under subsection (b)(1), another 2 to 8 levels for the number of guns involved under subsection (b)(7).

2. Defenders' Proposed Substitute

To avoid application to persons who simply are not "firearms traffickers," we suggest the following modification to the proposed amendment and accompanying application note, which relies on statutory language in the firearms area and avoids double counting:

The proposed amendment should be modified to read:

- (7) If the defendant engaged in the business of trafficking in firearms, increase by 2 levels.

The proposed corresponding application note should be modified to read:

- (13) Application of Subsection (b)(7).--
 - (A) Definition of "engaged in the business of trafficking." —For purposes of subsection (b)(7), "engaged in the business of trafficking" means a defendant who (1) engages in the regular and repetitive acquisition and transport, transfer or disposition of firearms, (2) has as his predominant objective in doing so (i) livelihood and profit, or (ii) criminal purposes or terrorism, and (3) knows or has reason to believe that the transport, transfer, or disposition (i) would be to another individual or individuals whose possession or receipt would be unlawful or (ii) would be used or possessed in connection with another felony offense.

"Livelihood and profit" is defined for purposes of subsection (b)(7) and this application note in the first sentence of 18 U.S.C. § 921(a)(22).

"Terrorism" is defined for purposes of subsection (b)(7) and this application note in 18 U.S.C. § 921(a)(22)(A)-(C).

- (B) Use of the Term "Defendant".—Consistent with §1B1.3 (Relevant Conduct), the term "defendant" limits the accountability of the defendant to the defendant's own conduct and conduct that the defendant aided or abetted, counseled, commanded, induced, procured, or willfully caused,
- (C) An increase to the offense level under § 2K2.1(b)(7) is in addition to any increase to the offense level under § 2K2.1(b)(1) for the number of firearms involved in the offense.
- (C) If an increase of 4 levels is made under § 2K2.1(b)(5), and § 2K2.1(b)(7) would otherwise apply because the defendant trafficked in firearms to

another individual or individuals whose possession or receipt the defendant knew or had reason to believe would be used or possessed in connection with another felony offense, [do not apply § 2K2.1(b)(7)] [increase the offense level by 1 level rather than 2 levels under § 2K2.1(b)(7)].

3. Issues for Comment

1) As in our proposed Application Note 13(A), the definition of trafficking should be restricted to offenses in which the defendant knew or had reason to believe that the transfer would be to an individual whose possession or receipt would be unlawful. It should not include offenses in which the defendant was willfully blind to the fact that the transfer would be to an individual whose possession or receipt would be unlawful. Willful blindness is not the standard under § 2K2.1(b)(5), nor is it used in any other guideline in the Manual, for good reason. Many courts have cautioned against use of the willful blindness standard in criminal cases because it essentially holds defendants responsible for mere negligence, and entails a presumption of guilt. See United States v. Alston-Graves, 435 F.3d 331, 341 n.10-n.14 (D.C. Cir. 2006) (citing cases); United States v. Heredia, 429 F.3d 820, 824 (9th Cir. 2005); United States v. de Francisco-Lopez, 939 F.2d 1405, 1411 (10th Cir. 1991). When combined with the elastic and exceedingly forgiving preponderance of the evidence standard that remains in § 6A1.3 (despite the likelihood of unconstitutionality under guidelines with “substantial weight”/a “presumption of reasonableness”), a willful blindness standard for firearms trafficking would result in intolerably unfair and unreliable enhancements.

2) The definition should not include merely receiving firearms from another individual. A trafficker is one who distributes an illegal product after first acquiring (i.e., receiving) it, not one who only receives it. One who simply receives without taking any further action with respect to the firearm, though he may be an unlawful possessor, is not a “firearms trafficker.”

(C) Stolen Firearms/Altered or Obliterated Serial Numbers

The Commission proposes changing § 2K2.1(b)(4), which currently provides for a two-level enhancement for a firearm that either is stolen or has an altered or obliterated serial number regardless of knowledge or reason to believe, see comment. (n.16), to require the greater of a two-level enhancement for a stolen firearm or a four-level enhancement for an altered or obliterated serial number regardless of knowledge or reason to believe.

We object to the proposed increase, and instead recommend that the Commission either make no change to subsection (b)(4), or provide that the altered/obliterated serial number enhancement not be applied at all where the serial number is recovered. In either event, a *mens rea* requirement should be added in order to assure punishment *proportionate* to the defendant’s culpability. See 18 U.S.C. § 3553(a)(2)(A).

The increased enhancement for an altered or obliterated serial number -- which, depending on the base offense level, other SOCs, and criminal history, would result in anywhere

from six months to eight years additional time in prison at a cost to the taxpayers of approximately \$23,000 per year -- is said to "reflect[] the difficulty in tracing firearms with altered or obliterated serial numbers."

The addition of any number of levels (two or four) in every case based on this rationale assumes that altered or obliterated serial numbers are unable to be restored. In fact, in many cases, they are restored by a simple laboratory procedure:

Serial numbers are usually stamped on a metal frame or plate, with hard steel dies. These dies are applied with enough force to sink each digit into the metal. Restoration of obliterated serial numbers can *many times* be accomplished because the metal crystals under the stamped numbers are placed under a permanent strain. When a suitable etching agent is applied, the strained crystals will dissolve at a faster rate as compared to the unaltered metal, thus permitting the etched pattern to appear in the form of the original numbers. *If* the number is ground to a depth that removes the strained crystals, or if the area has been impressed with a different strain pattern, it is *usually* not possible to restore.

See Division of Criminal Investigation, Iowa Department of Public Safety, Restoration of Obliterated Serial Numbers, <http://www.state.ia.us/government/dps/dci/lab/firearms/serialno.htm> (emphasis supplied). According to anecdotal reports from Defenders, the number is recovered more often than not because the numbers are removed very superficially.

An altered or obliterated serial number results in no additional harm unless it makes the firearm untraceable. An additional hour of routine laboratory work, whether to recover a serial number, to lift fingerprints from an object, or to determine the type or quantity of drugs, is not an additional harm to society warranting increased punishment.

We therefore recommend that the Commission make no increase in the adjustment for an altered or obliterated serial number, or revise subsection (b)(4) as follows:

- (4) If any firearm was stolen, or had an altered or obliterated serial number that was unable to be recovered, increase by two levels.

By way of explanation, the following could be added to Application Note 9:

The adjustment under subsection (b)(4) for an altered or obliterated serial number seeks to address the harm of the firearm being rendered untraceable by the alteration or obliteration. Thus, for the adjustment in subsection (b)(4) to apply on the basis that the offense involved a firearm that had an altered or obliterated serial number, the serial number must have been unable to be recovered.

We also urge the Commission to delete application note 16, and to provide for a *mens rea* requirement for the adjustment in subsection (b)(4) to apply. The Commission is required to assure that the purposes of sentencing set forth in 18 U.S.C. § 3553(a)(2) are met. One of those

purposes is “just punishment” in light of the “seriousness of the offense,” a concept that entails personal culpability. When punishment is disproportionate to the offense, it squanders resources, creates disrespect for law, and fails to achieve just punishment. When the same punishment is required for a person who does not know or have reason to believe that a firearm is stolen or has an obliterated serial number as one who does have knowledge or reason to know, this creates punishment that is disproportionate to the seriousness of the offense and unwarranted disparity. As the Commission has said, “Unwarranted disparity is defined as different treatment of *individual* offenders who are similar in relevant ways, or similar treatment of *individual* offenders who differ in characteristics that are relevant to the purposes of sentencing.” See Fifteen Year Report at 113 (emphasis in original).

We assume that the reason for not requiring any *mens rea* for this adjustment is that the government does not want to have to prove it. But the Commission was not instructed to assure that the government was relieved of any burden of proof as to facts that increase punishment to reflect increased seriousness of the offense. Moreover, the Commission’s advice that the preponderance of the evidence standard meets due process requirements remains in § 6A1.3. While we believe this advice is wrong in light of the Appendi to Booker line of cases and particularly in light of the Commission’s instructions to the courts to give the Guidelines “substantial weight,” see Letter from Federal Defenders Regarding Report on Federal Sentencing Since United States v. Booker at 18-21 (January 10, 2006), that is the standard most courts are applying. It is not too much to ask that the government prove the facts that put people in prison for months or years by a mere preponderance.

We therefore propose that Application Note 16 be deleted and that § 2K2.1(b)(4) be changed as follows:

(4) (A) If the defendant knew or had reason to believe that any firearm was stolen, increase by 2 levels.

(B) If the defendant knew or had reason to believe that any firearm had an altered or obliterated serial number, and the serial number was unable to be recovered, increase by 2 levels.

(D) “In Connection With” in Burglary and Drug Offenses (and other offenses)

The proposed amendment provides that subsections (b)(5) and (c)(1) of § 2K2.1 apply if the firearm “facilitated, or had the potential of facilitating, another felony offense or another offense, respectively.”

We generally support the adoption of the “facilitation” test. A substantial majority of courts have concluded that the firearm must “facilitate” the other felony offense. These courts treat the “in connection with” language as coterminous with the “in relation to” language in §

924(c)(1),⁵² as interpreted by the Supreme Court in Smith v. United States, *infra*. See United States v. Blount, 337 F.3d 404 (4th Cir. 2003); United States v. DeJesus, 347 F.3d 500 (3d Cir. 2003); United States v. Brown, 314 F.3d 1216, 1222 (10th Cir. 2003); United States v. Letts, 264 F.3d 787, 791 (8th Cir. 2001); United States v. Spurgeon, 117 F.3d 641 (2d Cir. 1997); United States v. Wyatt, 102 F.3d 241, 247 (7th Cir. 1996); United States v. Thompson, 32 F.3d 1, 7 (1st Cir. 1994); United States v. Routon, 25 F.3d 815 (9th Cir. 1994).

The Eleventh Circuit has rejected the facilitation test and interpreted the “in connection with” language more broadly. United States v. Rhind, 289 F.3d 690, 694 (11th Cir. 2002). The Fifth Circuit did the same, United States v. Condren, 18 F.3d 1190, 1195-96 (5th Cir. 1994), then limited that approach to drug cases, United States v. Fadipe, 43 F.3d 993 (5th Cir. 1995), then made clear that there was no “*ipso facto* nexus rule between firearms and illicit drugs every time a defendant who is convicted of the abuse of one has some relationship with the other, no matter how attenuated.” United States v. Mitchell, 166 F.3d 748, 753-56 (5th Cir. 1999). In any event, some of these cases (and some earlier cases in the Eighth Circuit as well) appear to treat the “in connection with” language as interchangeable with the standard in § 2D1.1(b)(1) and its commentary. This is inappropriate. First, § 2D1.1(b)(1) requires only that a weapon “was possessed” with no “in connection with” or “in relation to” requirement; its commentary states that it does not apply only if it is “clearly improbable that the weapon was connected with the offense.”⁵³ Second, § 2K2.1(b)(5) and (c)(1) reference and cross-reference offenses other than drug offenses. Thus, the policy underlying the commentary accompanying § 2D1.1(b)(1), *i.e.*, an “increased danger of violence when drug traffickers possess weapons,”⁵⁴ is inapplicable in many cases to which § 2K2.1(b)(5) and (c)(1) apply. Third, the § 2K2.1(b)(5) and (c)(1) adjustments are more substantial than the § 2D1.1(b)(1) adjustment, *i.e.*, four levels or a cross-reference compared to two levels, and thus should require more culpable conduct. Fourth, some courts have interpreted U.S.S.G. § 2D1.1, comment. (n.3), to place the burden on the defendant to disprove a connection between the drugs and the firearm. See United States v. Hall, 46 F.3d 62, 63 (11th Cir. 1995); United States v. Roberts, 980 F.2d 645, 647 (10th Cir. 1992); United States v. Corcimiglia, 967 F.2d 724, 727-28 (1st Cir. 1992); *Contra* United States v. Richmond, 37 F.3d 418, 419 (8th Cir. 1994). We believe that this is an incorrect and unconstitutional interpretation in any case, but an additional danger of equating “in connection with” in § 2K2.1 with “mere possession unless a connection is clearly improbable” in § 2D1.1, comment. (n.3) is

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Section 924(c)(1) prohibits the use of a firearm during and “in relation to” the commission of a drug trafficking or violent crime.

53 Section 2D1.1(b)(1) provides for a 2-level upward adjustment “[i]f a dangerous weapon (including a firearm) was possessed” in a drug manufacturing, importing, exporting, or trafficking offense. Application note 3 to § 2D1.1 provides: “The enhancement for weapon possession reflects the increased danger of violence when drug traffickers possess weapons. The adjustment should be applied if the weapon was present, unless it is clearly improbable that the weapon was connected with the offense. For example, the enhancement would not be applied if the defendant, arrested at his residence, had an unloaded hunting rifle in the closet.”

54 U.S.S.G. § 2D1.1, comment. (n.3).

that the burden would be shifted to the defendant to disprove the even more substantial adjustments under § 2K2.1(b)(5) and (c)(1).

While we generally support adoption of a facilitation test, we believe the phrase “had the potential of facilitating” requires a narrowing clarification, because a firearm always “has the potential of facilitating” another offense. The language comes from Smith v. United States, 508 U.S. 223 (1993) (quoted below), in which the Supreme Court articulated the facilitation test, but the Court made clear in Smith that “potential of facilitating” does not include mere possession or presence of a firearm during another offense, even a drug trafficking offense. Id. at 238. While clarification is needed, the cases are highly fact specific, such that examples may only confuse matters. A simple statement that “mere possession or presence of a firearm is not enough to establish a ‘potential of facilitating’” should be adequate.

The proposed amendment also addresses a circuit split regarding “whether the presence of a firearm by mere coincidence during the course of a burglary or drug offense ‘facilitated or had the potential of facilitating’ another offense.”

Both Option One (applicable to all “other felony offenses” or “other offenses”) and Option Two’s Application Note 14(C) (applicable to other offenses that are drug offenses) are inconsistent with the facilitation test. In Smith v. United States, 508 U.S. 223 (1993), the Supreme Court interpreted the phrase “in relation to” as follows:

The phrase “in relation to” thus, at a minimum, clarifies that the firearms must have some purpose or effect with respect to the drug trafficking crime; its presence or involvement cannot be the result of accident or coincidence. . . . [T]he “in relation to” language allays explicitly the concern that a person could be punished under § 924(c)(1) for committing a drug trafficking offense while in possession of a firearm even though the firearm’s presence is coincidental or entirely unrelated to the crime. Instead, the gun at least must facilitate, or have the potential of facilitating, the drug trafficking offense.

Id. at 238 (internal citations and quotation marks omitted). In short, the facilitation test excludes both mere coincidence and mere possession or presence even when the other offense is a drug trafficking offense. Further, a firearm cannot be coincidentally present, and at the same time facilitate or potentially facilitate another offense. Thus, the Commission cannot adopt Option One or Option Two’s Note 14(C) consistent with the facilitation test.

Option Two’s Note 14(C) has further problems. Even if one accepts that “the mere presence” of a firearm presents a heightened risk of violence in connection with drug *trafficking*, it sweeps too broadly. First, subsection (b)(5) is not limited to drug trafficking. “Another felony offense” for purposes of subsection (b)(5) is any federal, state or local offense punishable by more than one year. Simple drug possession is punishable by more than one year in many states. Thus, subsection (b)(5) would add four levels to the sentences of drug *users* who possess firearms for reasons unrelated to the drugs. See § 2D1.1, comment. (n.3) (“enhancement for weapon possession reflects the increased danger of violence when drug traffickers possess

weapons”; compare § 2D2.1 (no gun enhancement for simple possession). Second, the note is even broader than § 2D1.1, comment. (n.3), in that it would apply when a firearm was merely present even when clearly improbable that it was connected with the offense.

Option Three is the only option that is consistent with the facilitation test and with the purposes underlying § 2K2.1(b)(5) and (c)(1). Sections 2K2.1(b)(5) and (c)(1) were created in response to a concern about the *increased* risk of violence when firearms are used or possessed during commission of another offense. See United States v. McDonald, 165 F.3d 1032, 1037 (6th Cir. 1999). Because there is no *increased* risk of violence when a firearm’s presence is merely coincidental, see Smith, *supra*, § 2K2.1(b)(5) and (c)(1) should apply only when there is evidence that the firearm was not merely coincidentally present, but was used, possessed or intended to be used or possessed to facilitate the other offense.

Finally, the last sentence of Option Two’s Application Note 14(B) should be added to Option Three after the second sentence, amended with the language in bold as follows: “However, if the defendant subsequently **uses or possesses the firearm in connection with another felony offense (under subsection (b)(5)) or another offense (under subsection (c)(1))** that is separate and distinct from the initial taking of the firearm, subsection (b)(5) or subsection (c)(1) **may** apply.”

(E) Lesser Harms and Felon in Possession

This proposal would prohibit a downward departure under § 5K2.11 (Lesser Harms) “in any case in which a defendant is convicted under 18 U.S.C. § 922(g), even if the possession of a firearm were brief or existed because the defendant was disposing, or attempting to dispose of, a firearm.” No explanation is given for this proposal, but we understand that it was proposed by the Department of Justice based on a single case, United States v. VanLeer, 270 F. Supp.2d 1318 (D. Utah 2003), about which the Department is unhappy.

In VanLeer, Judge Cassell relied on § 5K2.11 to grant a four-level downward departure in a felon-in-possession case. The facts were as follows:

VanLeer has a history of non-violent criminal offenses, all apparently stemming from his use of illegal drugs. On September 10, 2002, VanLeer was released from prison after serving time connected with a forgery charge. Several weeks after his release, he met a friend who was in possession of a shotgun that VanLeer had purchased and owned before acquiring a felony conviction. As VanLeer was destitute and needed money for rent, he took the firearm—a Ted Williams 12 gauge shotgun—to a local pawn shop and sold it. During this transaction on October 1, 2002, VanLeer gave his correct name, address, and an inked fingerprint to verify his identity as owner of the firearm to the pawn shop clerk. On November 5, 2002, an investigator from the Salt Lake City Police Department conducted a record check and determined that VanLeer was a previously convicted felon. This led to the filing of a one-count indictment, charging felon in possession of a firearm in violation of 18 U.S.C. § 922(g)(1).

Id. at 1319. Finding that VanLeer's conduct -- briefly possessing the gun so that he could dispose of it to obtain money for rent, giving his own name and fingerprints -- did not threaten the harm that the felon in possession statute seeks to prevent -- violent crimes and consequent personal injury or death -- and was less harmful and less culpable than a felon continuing to possess a gun, Judge Cassell departed by four levels and sentenced Mr. VanLeer to 18 months in prison. Id. at 1326-27.

This proposal is indefensible for several reasons. First, it would fly in the face of Booker for the Commission to prohibit departure based on a factor that is plainly relevant to the statutory mandate to impose a sentence minimally sufficient to achieve the purposes of sentencing, and would represent a move by the Commission to reinstate mandatory guidelines. Second, judges who blindly adhere to the Guidelines despite Booker would not depart or vary in any felon-in-possession case, unnecessarily using prison space in the already overcrowded Bureau of Prisons and wasting tax dollars. Third, other judges would impose a sentence below the guideline range for the reasons prohibited by this proposal, citing the lesser seriousness of the offense, see § 3553(a)(2)(A). This would result in different treatment in different courts, with the latter approach *required* by the governing law. See 18 U.S.C. § 3553(a). Fourth, such a move would marginalize and foster disrespect for the Guidelines. Before Booker, the Commission prohibited or restricted consideration of many offender characteristics and offense circumstances that were relevant to the purposes of sentencing.⁵⁵ To continue in that vein after Booker is contrary to the statute that now governs sentencing. As Justice Breyer said at the Guidelines' inception and again recently, the Commission was intended to learn from judicial departures.⁵⁶ The Commission should not begin anew to eliminate departures, especially based on the Department of Justice's unhappiness with a plainly justified result.

(F) "Brandished" or "Otherwise Used"

The proposed amendment addresses a circuit conflict regarding whether waiving a firearm or pointing it at a specific person constitutes "brandishing" or "otherwise using." This normally comes up in the robbery guideline, where there is a several tiered system of increases for threats and weapons in § 2B3.1(b)(2). Currently, the three tiers for firearms are a 7 level increase for discharge, a 6 level increase for "otherwise used," and a 5 level increase for "brandish" or possess.

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Without any congressional directive to do so, the Commission prohibited consideration of drug or alcohol dependence, gambling addiction, lack of guidance as a youth, similar circumstances indicating a disadvantaged background, and post-sentencing rehabilitation on re-sentencing, and strictly limited consideration of age, mental and emotional conditions, physical condition or appearance, and military, civic, charitable or public service, and good works.

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Stephen Breyer, The Federal Sentencing Guidelines and the Key Compromises Upon Which They Rest, 17 Hofstra L. Rev. 1, 7-8 (1988); Justice Stephen Breyer, Federal Sentencing Guidelines Revisited, 11 Fed. Sent. R. 180, *30 (Jan./Feb. 1999).

The interpretive difficulty has been in deciding where to draw the line between “brandishing” and “otherwise used” on the continuum of factual possibilities. This has been made particularly difficult by the definition of “otherwise used,” which merely states that it is less than discharging, but “more than brandishing, displaying or possessing.” § 1B1.1, App. Note 1(I).

The typical scenario in which this issue comes up is a bank robbery where the defendant waves a firearm about or points the firearm at a specific bank employee. A majority of courts have held that “pointing a weapon at a specific person or group of people in a manner that is explicitly threatening is sufficient to make out ‘otherwise use’ of that weapon.” United States v. Orr, 312 F.3d 141, 145 (3d Cir. 2002); see also United States v. LaFortune, 192 F.3d 157 (1st Cir. 1999); United States v. Nguyen, 190 F.3d 656 (5th Cir. 1999); United States v. Warren, 279 F.3d 561 (7th Cir. 2002); United States v. Fuller, 99 F.3d 926 (9th Cir. 1996); United States v. Rucker, 178 F.3d 1369 (10th Cir. 1999). These courts do not require that the defendant physically contact the victim or victims with the firearm or dangerous weapon for the “otherwise use” adjustment to apply. Some courts have made clear that explicit threats need not be verbal for the conduct to qualify as “otherwise use.” See, e.g., Nguyen, 190 F.3d at 661; Orr, 312 F.3d at 145.

A minority position holds that “the pointing of [a] weapon in a threatening manner, even when coupled with a verbal threat, constitutes ‘brandishing,’ rather than ‘other use’ of the weapon.” United States v. Matthews, 20 F.3d 538, 554 (2d Cir. 1994). At the time of the Matthews case, the definition of brandishing specifically stated that brandishing meant “that the weapon was pointed or waved about, or displayed in a threatening manner.” § 1B1.1, App. Note 1(C). Since Matthews, the Commission amended the definition of brandishing, excising the language about pointing or waving a firearm and using a new definition imported from 18 U.S.C. § 924(c), which emphasizes situations where the firearm is not seen at all, or only partially visible, so long as its presence is made known in order to intimidate. The reason for the amendment evinces no intention that the deletion of the language about pointing, waving or displaying in a threatening manner to alter the meaning of brandishing or to move those fact patterns to “otherwise used.” See U.S.S.G. App. C, amend. 601.

A middle ground has been struck by other courts by not applying the “otherwise used” enhancement when a firearm was pointed at a person with orders to open the register, but no other threats were made. United States v. Gonzales, 40 F.3d 735 (5th Cir.), cert. denied, 514 U.S. 1074 (1995); United States v. Moerman, 233 F.3d 279 (6th Cir. 2000). These decisions emphasize that a broader interpretation of “otherwise used” would subsume all brandishing cases and make that intermediate increase meaningless.

Option 1 of the proposed amendment “combines brandished and otherwise used with respect to firearms under the theory that the same risk of harm, and the same fear, exists whether a firearm is generally waved about or specifically pointed at a particular individual.” It effectively broadens the definition of “otherwise used” to include what has classically been

described as “brandishing” (pointing or waving the firearm).⁵⁷ It then moves brandishing to the same 6 level increase as otherwise used in the robbery and extortionate threat guidelines.

Option 1 is inappropriate for several reasons. Under this proposal, a defendant who allows a firearm to be seen in a holster during a robbery will be punished the same as one who waves a firearm about in a threatening manner, and the same as a defendant who strikes a bank employee with a firearm or holds a firearm to the head of a bank employee during a robbery. The latter examples present both a greater risk of harm to, and a greater fear by, the targeted employee(s). This option simply collapses any attempt to have a continuum and appropriately graded penalties when a firearm is involved. If the Commission chooses to expand the definition of “otherwise used” to clearly encompass general pointing and waving in order to address the circuit conflict, then brandishing should be left at a level 5 increase. It should be noted that the only brandishing cases remaining would be those in which the firearm was not taken out and used other than to make its presence known.

Option 1 also calls for comment as to whether, if the Commission chooses this approach, it should make similar changes in other guidelines with weapon increases. The other guidelines at issue do not have the same set of increases as §§2B3.1 and 2B3.2. Rather, they treat dangerous weapons and firearms the same and only deal with 3, 4, and 5 level increases. Therefore, the same solution would not work. More important, the same observation would apply to the collapsing of the graded responses to a continuum of behavior. Moving all “brandishing” cases to the “otherwise used” level punishes a wide range of less culpable behavior more harshly than necessary. Therefore, this solution should not be applied to other guidelines.

Option 2A is unsatisfactory because, while it purports to distinguish between “otherwise using” and “brandishing,” it blurs the distinction by including “implicit threats” in the definition of “otherwise used,” while including “generally point[ing] or wav[ing a firearm] in a threatening manner” in the definition of “brandished.” It appears that rather than solve the circuit conflict, these definitions will perpetuate it. As one court has concluded, “When a robber points a gun, or what appears to be a gun, at a robbery victim or bystander, that gesture is inherently threatening . . . [W]e should not have to point out, for it is tautological, that there can be no ‘display of the gun in a threatening manner’ . . . without an implicit threat.” Matthews, 20 F.3d at 554. Thus, it appears that the same actions are covered by both definitions. This will likely generate extensive litigation and additional circuit splits rather than solving the problem.

We urge the Commission to adopt Option 2B. Defining “otherwise used” to require physical contact (or attempted physical contact) with the victim creates a bright-line rule that

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“Brandish” is defined by Merriam-Webster as:

- 1 : to shake or wave (as a weapon) menacingly
- 2 : to exhibit in an ostentatious or aggressive manner

<http://www.m-w.com/dictionary/brandish>.

would reduce litigation. It also incrementally increases punishment for more culpable offenders. It accords with a common sense definition of brandishing, which includes showing and pointing a firearm, but leaves room for greater punishment for those who do more than that.

Thank you for considering our comments, and please let us know if we can be of any further assistance.

Very truly yours,

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March 27, 2006

Honorable Ricardo H. Hinojosa
United States Sentencing Commission
One Columbus Circle, N.E.
Suite 2-500, South Lobby
Washington, DC 20002-8002

Re: Comment on Proposed Emergency Amendments to Anabolic Steroids Guidelines

Dear Judge Hinojosa:

We write on behalf of the Federal Public and Community Defenders to comment further on the Commission's proposed emergency amendments to the anabolic steroids guidelines.

In written testimony presented to the Commission on March 15, 2006, Jodi L. Avergun, Chief of Staff of the Drug Enforcement Administration, argued against using a purity-based scheme to measure anabolic steroids. In her testimony, Ms. Avergun acknowledged that there are other controlled substances which are currently measured by purity. Written Testimony of Jodi L. Avergun, 03/15/06 ("Avergun Testimony") at 12. Those substances are: methamphetamine, amphetamines, PCP and oxycodone. Avergun Testimony at 13. Ms. Avergun supports using a purity-based measure for these substances because it is "particularly crucial to ensure that the resulting sentences are justified by the offense conduct" in light of the fact that the maximum penalty for trafficking in any of these substances is life imprisonment. Avergun Testimony at 13.

The implication of Ms. Avergun's testimony is that it is less crucial to ensure that the resulting sentences are justified in cases involving trafficking in anabolic steroids because the maximum penalty is only five years imprisonment. We strongly object and urge the Commission to adopt a purity-based measure precisely because it is crucial to ensure that all sentences – including those for trafficking in anabolic steroids – are justified by the offense conduct.

Ms. Avergun also stated that using a dosage methodology instead of a purity-based one would only result in a two-level increase regardless of whether Option 1 or Option 2 is adopted. Avergun Testimony at 15. The costs and delays Avergun suggested would result if a purity-based model were adopted would, in her opinion, far outweigh the "cost" of a two-level increase for anabolic steroid traffickers. Avergun Testimony at 15. This aspect of the testimony fails to appreciate both human and institutional costs of increased punishment. A two-level increase is

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approximately six (6) additional months of a person's life. Given that it costs the Bureau of Prisons approximately \$25,000/year to incarcerate someone, the cost/benefit analysis set forth in Avergun's testimony does not capture the real costs of using a dosage rather than purity-based method of measurement.

Finally, Ms. Avergun explained that most penalties for drug offenses rely on the weight of the mixture or substance containing a controlled substance and not the actual amount of controlled substance in the mixture and that Congress adopted such an approach with street drugs in mind. Avergun Testimony at 11. Anabolic steroids are not street drugs and the reasons for using the weight of the total quantity distributed rather than the amount of pure drug involved do not apply to steroids. For one thing, street drugs do not carry labels indicating the amount of pure steroid.

The Commission has recognized that "the weight of different inactive ingredients mixed with the drug – dilutants, carrier media, and even humidity – can result in disparate sentences for offenders who sell similar numbers of doses of a drug" and that "arbitrary variations due to the weight of inactive ingredients remain." Fifteen Years of Guideline Sentencing at 50. Using the "mixture or substance" approach urged by Ms. Avergun to determine the quantity of anabolic steroid involved only ensures more disparity and more arbitrary variations – a result the Commission cannot permit.

Thank you for considering our comments, and please let us know if we can be of any further assistance.

Sincerely,



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March 13, 2006

Honorable Ricardo H. Hinojosa
United States Sentencing Commission
One Columbus Circle, N.E.
Suite 2-500, South Lobby
Washington, D.C. 20002-8002

Re: 2006 Proposed Amendments to the Sentencing Guidelines

Dear Judge Hinojosa:

We write on behalf of the Federal Public and Community Defenders to comment on the proposed amendments pertaining to the Transportation Act, the Intelligence Reform and Terrorism Prevention Act of 2004, False Registration of Domain Names, Miscellaneous Laws, Application Issues, Obstruction of Justice Circuit Conflicts, Privilege Waiver, Crime Victims' Rights, and Reductions in Terms of Imprisonment Based on Bureau of Prisons Motion.¹

We incorporate by reference the comments we submitted regarding proposed amendments pertaining to Steroids (see letter dated February 28, 2006); Immigration (see written and oral testimony, February 21 and March 6, 2006); Firearms (see letter dated March 9, 2006); Intellectual Property (see letter dated August 3, 2005); and Obstruction of Justice in terrorism investigations (see letter dated October 7, 2005).

We thank you for the opportunity to comment and hope that our input is useful.

I. Transportation Act

Section 4210 of the Transportation Act creates a new offense at 49 U.S.C. § 14915 for failure to give up possession of household goods, defined as "the knowing and willful failure, in violation of a contract" to deliver or unload household goods, with a maximum penalty of two years. The Commission proposes to implement 49 U.S.C. § 14915 by referring it to § 2B1.1. Section 2B1.1 covers offenses involving theft, embezzlement, property destruction, fraud and deceit. This Class E Felony is essentially

¹ Thanks to Assistant Federal Defenders Randy Alden, Alan DuBois, Beverly Dyer, Corey Endo, Lisa Freeland, Steve Jacobson, Esther Salas, and Fredilyn Sison for their assistance in preparing these comments.

a civil contract breach that Congress criminalized. A violation occurs merely by failure to deliver; no theft or destruction of property, fraud or deceit is required. Disputes between trucking companies and individuals are typically resolved and household items returned, causing no lasting harm.

A first offender who failed to deliver \$125,000 worth of household goods (a reasonable estimate for a middle class household), though later returned, would, if the court interpreted the "intended pecuniary harm" to be the value of the property not delivered in compliance with the contract, be punished by 21-27 months, at the statutory maximum, and the same as an embezzler or thief who permanently stole \$125,000. In many cases, the guideline sentence would exceed the statutory maximum. In short, the punishment would be disproportionate to the offense. The appropriate solution would be to promulgate a new guideline for this unique offense with a graduated table that goes no higher than two years. Alternatively, the Commission should promulgate an application note in § 2B1.1 stating that in cases under 49 U.S.C. § 14915, the loss is "actual loss" as defined in Application Note 3(A)(i).

The Commission requests comment on whether, and if so how, it should implement section 7121 of the Transportation Act. Section 7121 amends 49 U.S.C. § 5124, which already criminalizes knowing and willful violations, to increase the maximum penalty to ten years if a release of hazardous materials occurs and results in death or serious bodily injury. Congress did not direct the Commission to increase penalties, and rightly so.

Under the current guideline, § 2Q1.2, which provides for a 9-level increase for a substantial likelihood of death or serious bodily injury and a 2-level increase for any violation of 49 U.S.C. § 5124, a release of hazardous materials resulting in death or serious bodily injury results in a base offense level of 23, 25, 27, 29, 31 or 33. In Criminal History Category I, the corresponding guideline ranges are 46-57 months, 57-71 months, 70-87 months, 87-108 months, 108-135 months, and 135-168 months. Thus, we think it is obvious that the Commission should not increase penalties under the guideline. If anything, the Commission should reduce the 9-level increase for a substantial likelihood of death or serious bodily injury, and provide for a 9-level increase if death or serious bodily injury actually results.

II. Intelligence Reform and Terrorism Prevention Act of 2004

A. Section 5401: 8 U.S.C. § 1324

Section 5401 of the Act added a new subsection (a)(4) to 8 U.S.C. § 1324 as follows:

(4) In the case of a person who has brought aliens into the United States in violation of this subsection, the sentence otherwise provided for may be increased by up to 10 years if--

- (A) the offense was part of an ongoing commercial organization or enterprise;
- (B) aliens were transported in groups of 10 or more; and
- (C)(i) aliens were transported in a manner that endangered their lives; or
- (ii) the aliens presented a life-threatening health risk to people in the United States.

The Commission proposes three options. Option One would create a specific offense characteristic that would add 2 levels if "the defendant was convicted under 8 U.S.C. § 1324(a)(4)." Option Two would create a specific offense characteristic that would add 2 levels if "the offense was part of an ongoing commercial organization or enterprise." One version of Option Three would provide for a potential upward departure if "the defendant was convicted under 8 U.S.C. § 1324(a)(4)." The other version of Option Three would provide for a potential upward departure if "the offense was part of an ongoing commercial organization or enterprise."

Option Two and the latter version of Option Three would be contrary to congressional intent, on the face of the statute which requires that all three requirements are met, and in the legislative history which rejected a prior version that would have enhanced the sentence if any one of the requirements was met. See H. Rep. No. 108-724, § 3041. We recommend a potential upward departure if "the defendant was convicted under 8 U.S.C. § 1324(a)(4)."

As to the Issue for Comment, the Commission should not define "ongoing commercial organization" in a vacuum. It should wait until fact patterns develop and it appears that a definition is necessary based, for example, on an unfair interpretation by the courts or a circuit split.

B. Section 6702: 18 U.S.C. § 1038(a)

Section 6702 creates a new offense at 18 U.S.C. § 1038(a), entitled "False Information and Hoaxes," prohibiting "conduct with intent to convey false or misleading information under circumstances where such information may reasonably be believed and where such information indicates that an activity has taken, is taking, or will take place that would constitute" a variety of violations of the law ranging from minor firearms offenses to aircraft piracy,² and prohibiting "a false statement, with intent to convey false or misleading information, about the death, injury, capture, or disappearance of a member of the Armed Forces" during a war or armed conflict. The maximum penalties are 5 years, 20 years if serious bodily injury results, or life if death

² *i.e.*, Title 18, chapter 2 (destruction of aircraft or motor vehicles, violence at international airports, fraud involving aircraft parts), 10 (biological weapons), 11B (chemical weapons), 39 (explosives and combustibles), 40 (explosive materials), 44 (firearms), 111 (shipping), or 113B (terrorism); 42 U.S.C. § 2284 (sabotage of nuclear facilities or fuel); Title 49 §§ 46502 (aircraft piracy), 46504 (use of dangerous weapon in assaulting or intimidating flight crew member or attendant), 46505(b)(3) (explosive or incendiary device on aircraft) or (c) (weapon or explosive on aircraft willfully or with reckless disregard for human life), 46506 (commission of homicide or attempted homicide on an aircraft), or 60123(b) (damaging or destroying pipeline facility).

results. Most convictions would be subject to a maximum punishment of five years, since it is unlikely that serious bodily injury or death would result from a hoax or false information.

The proposed amendment would refer an offense under 18 U.S.C. § 1038(a) to § 2A6.1. It is inappropriate to equate a hoax or false statement with a threat. A threat, at minimum, is a “statement that *expresses an intent* to inflict bodily harm,” in addition to being susceptible to reasonable belief.³ Based on our experience, many of these offenses are going to involve mentally unstable people who either believe that some disaster is afoot or who think that the hoax is a joke. A false report that a neighbor or estranged spouse is a convicted felon or drug user and possesses a gun would also be subject to prosecution under 18 U.S.C. § 1038(a). Many of these offenses, in other words, will be akin to a harassing telephone call, which has a base offense level of 6 rather than 12 if it “did not involve a threat to injure a person or property.” § 2A6.1(a)(2).

If the Commission is going to include hoaxes and false statements in a threats guideline, it should likewise distinguish it from a threat by providing for a lesser base offense level, or an invited downward departure, if the offense did not involve an expression of intent to injure a person or property. We suggest two alternatives:

Defenders’ Option One would amend § 2A6.1(a)(2) as follows:

- (2) 6, if the defendant is convicted of an offense under 47 U.S.C. § 223(a)(1)(C), (D), or (E), or 18 U.S.C. § 1038, that did not involve a threat to injure a person or property.

Defenders’ Option Two would create an application note stating as follows:

If the defendant is convicted of an offense under 18 U.S.C. § 1038 that did not involve a threat to injure a person or property, a downward departure may be warranted.

We strongly object to the proposal to create a cross reference to §2M6.1 for conduct “evidencing an intent to carry out a threat to use a weapon of mass destruction, as defined in 18 U.S.C. § 2332a(c)(2)(B), (C), and (D).” This would permit “relevant conduct” which could have been but was not charged, was dismissed, or of which the defendant was acquitted, rather than the offense of conviction, to increase the sentence dramatically based on a mere preponderance of the evidence. Title 18 U.S.C. § 2332a prohibits, *inter alia*, “threaten[ing]” to use a weapon of mass destruction, as defined in 18 U.S.C. § 2332a(c)(2)(B), (C), and (D), which is punishable by imprisonment for life (or the death penalty), and is already referenced to §2M6.1. If the government obtains a conviction under 18 U.S.C. § 2332a for a threat to use a weapon of mass destruction, the guideline range will be determined under §2M6.1. If the government does not obtain

³ United States v. Fulmer, 108 F.3d 1486, 1495 (1st Cir. 1997).

such a conviction, a cross reference to that guideline is not currently and should not be made available. Nothing in Section 6702 suggests that the Commission should "implement" the new hoax statute by creating a cross reference for a threat to use weapons of mass destruction. Thus, we fail to see why the Commission would expand the most criticized and constitutionally suspect features of the Guidelines.⁴ See Blakely v. Washington, 542 U.S. 296, 306 (2004).

C- F. Sections 6803, 6903, 6905, 6906: 18 U.S.C. §§ 832, 2332g, 2332h, 175c

Part C of the proposal would reference the new offense in 18 U.S.C. § 832 to § 2M6.1. This new offense includes participating in or providing "material support or resources" to a nuclear or weapons of mass destruction program or attempting or conspiring to do so, with a statutory maximum of 20 years, and also development, possession, threats to use, or use of a radiological weapon, with a statutory maximum of life. "Material support or resources" is defined to include a broad range of support or resources,⁵ which (as indicated by the lower statutory maximum) defines much less serious conduct than developing or using a radiological weapon. Yet, under § 2M6.1, a person who was convicted of conspiring to provide material support or resources to such a program (for example, by providing lodging to a relative involved in developing a nuclear weapon), would be punished exactly the same as the person who actually developed or used the weapon. Since this offense is new and it is difficult to predict the fact patterns to which it may be applied, we recommend that the Commission promulgate an Application Note providing for downward departure as follows:

If the defendant was convicted under 18 U.S.C. § 832(a), a downward departure may be warranted if the offense level overstates the seriousness of the offense.

⁴ American College of Trial Lawyers, Proposed Modifications to the Relevant Conduct Provisions of the Federal Sentencing Guidelines, 38 Am. Crim. L. Rev. 1463 (2001); Kate Stith & Jose Cabranes, Fear of Judging: Sentencing Guidelines in the Federal Courts 140, 159 (1998); David Yellen, Illusion, Illogic and Injustice: Real Offense Sentencing and the Federal Sentencing Guidelines, 78 Minn. L. Rev. 403, 425-54 (1993); Kevin R. Reitz, Sentencing Facts: Travesties of Real Offense Sentencing, 45 Stan. L. Rev. 523, 524 (1993); Pamela B. Lawrence & Paul J. Hofer, An Empirical Study of the Application of the Relevant Conduct Guideline § 1B1.3, Federal Judicial Center, Research Division, 10 Fed. Sent. Rep. 16 (July/August 1997); Paul J. Hofer, Implications of the Relevant Conduct Study for the Revised Guideline, 4 Fed. Sent. Rep. 334 (May/June 1992).

⁵ "Material support or resources" is defined in 18 U.S.C. § 2339A(b) as "any property, tangible or intangible, or service, including currency or monetary instruments or financial securities, financial services, lodging, training, expert advice or assistance, safehouses, false documentation or identification, communications equipment, facilities, weapons, lethal substances, explosives, personnel (1 or more individuals who may be or include oneself), and transportation, except medicine or religious materials."

Parts C, E and F of the proposal would reference the new offenses in 18 U.S.C. §§ 832, 2332h and 175c to § 2M6.1. The first two statutes include threats to use radiological weapons or dispersal devices; the third includes threats to use the variola virus. At present, § 2M6.1(a)(4) provides for a base offense level of 20 if the offense involved a threat to use a list of weapons or materials if there was no intent or ability to carry out the threat. Though “nuclear weapon” in this list probably includes a “radiological weapon” (as in § 832(c)) and might include a “radiological dispersal device” (as in § 2332h), and “biological agent” probably includes the variola virus (as in § 175c), it would be clearer if “radiological weapon,” “radiological dispersal device,” and “virus” were specifically added to § 2M6.1(a)(4).

Part D would reference the new offense in 18 U.S.C. § 2332g to U.S.S.G. § 2K2.1. This offense includes a threat to use a rocket, missile, launching device or parts, but § 2K2.1 would result in an offense level of at least 31 even if there was no intent or ability to carry out the threat. See § 2K2.1(a)(5), (b)(3)(A). This is in stark contrast to § 2M6.1(a)(4), which provides for a base offense level of 20 for threats under those circumstances involving equivalent weapons and materials. Thus, we recommend that the Commission amend § 2K2.1(b)(3)(B) to provide for a 2-level rather than a 15-level increase under those circumstances:

- (B) a destructive device other than a destructive device referred to in subdivision (A), or a threat to use a destructive device referred to in subdivision (A) that did not involve any conduct evidencing an intent or ability to carry out the threat, increase by two levels.

III. False Registration of Domain Name

Section 204(b) of Pub. L. 108-482 directs the Commission to “review and amend the sentencing guidelines and policy statements to ensure that the applicable guideline range for a defendant convicted of any felony offense *carried out online* that may be facilitated through the use of a domain name registered with materially false contact information is sufficiently stringent to deter commission of such acts,” and, specifically, to “provide sentencing enhancements for anyone convicted of any felony offense *furthered* through knowingly providing or knowingly causing to be provided materially false contact information to a domain name registrar, domain name registry, or other domain name registration authority in registering, maintaining, or renewing a domain name used *in connection with* the violation.”

The proposed amendment would create a new Chapter Three adjustment, whenever a “statutory enhancement under 18 U.S.C. § 3559(f)(1) applies,” of 1, 2, 3 or 4 levels.

18 U.S.C. § 3559(f)(1) provides for an increased statutory maximum (the lesser of doubling the maximum or an additional seven years) if a defendant who is “convicted of a felony offense (other than an offense of which an element is the false registration of a domain name) knowingly falsely registered a domain name and knowingly used that

domain name in the course of that offense.” Under (f)(2), “falsely registers” means “registers in a manner that prevents the effective identification of or contact with the person who registers.”

We have two concerns with the proposal. First, while it incorporates the requirement of a felony and the statutory definition of “falsely registers,” it omits certain requirements from the statutory directive, italicized above. The Commission should not go further than Congress required. Second, it does not exclude the possibility that this adjustment would apply in addition to an adjustment for obstruction of justice, resulting in impermissible double counting. U.S.S.G. §2B1.1, Application Note 8(C) addresses an analogous double counting concern by precluding the addition of an adjustment for Obstruction of Justice where an enhancement for Sophisticated Means per §2B1.1(b)(9) has already been applied.

We believe that a one-level enhancement is an appropriate adjustment for this conduct and is consistent with the overall scheme of the Guidelines Manual. To add two levels would suggest that the conduct in question was as serious as: (1) the possession of a dangerous weapon (including a firearm) during a controlled substance offense (see U.S.S.G. §2D1.1(b)(1)); (2) causing bodily injury during a robbery (see U.S.S.G. §2B3.1(b)(3)(A)); (3) making a threat of death during the course of a robbery (see U.S.S.G. §2B3.1(b)(2)); (4) using a minor to commit a crime (see U.S.S.G. §3B1.4); (5) using body armor to commit a crime (see U.S.S.G. §3B1.5); and (6) reckless endangerment during flight (see U.S.S.G. §3C1.2), to name just a few examples.

We recommend the following replacement language:

If (1) a statutory enhancement under 18 U.S.C. § 3559(f)(1) applies, (2) the felony offense was carried out online, and (3) the felony offense was furthered through knowingly falsely registering a domain name, increase by 1 level. If the conduct that forms the basis for an adjustment under this section is the only conduct that forms the basis for an adjustment under Section 3C1.1, do not apply that adjustment under Section 3C1.1.

IV. Miscellaneous Laws

A. Section 9(A): 18 U.S.C. § 1369

The Veterans’ Memorial Preservation and Recognition Act of 2003, section 2, codified at 18 U.S.C. § 1369(a), prohibits the destruction of veterans’ memorials and establishes a ten-year maximum sentence. The proposed amendment would (1) refer violations of the new offense to USSG §§ 2B1.1 (Theft, Property, Destruction, and Fraud) and 2B1.5 (Theft of, Damage to, or Destruction of Cultural Heritage Resources), and (2) establish an enhancement of two, four, or six levels if the offense involved a national cemetery or veteran’s memorial.

The Commission should use a uniform two-level enhancement rather than raising it (for both national cemeteries and veterans' memorials) to four or six levels. The Commission previously determined that a two-level increase was appropriate for offenses involving the property of a national cemetery. See USSG §§ 2B1.1(b)(6), 2B1.1(b)(2). Both the Veterans' Cemetery Protection Act, which called for a two-level enhancement for property offenses against cemeteries, and the Veterans' Memorial Preservation and Recognition Act, were enacted by Congress to punish offenders who willfully injure or destroy protected property of the United States. Congress did not instruct the Commission to increase penalties for either national cemeteries or veterans' memorials. No explanation is offered for an increased enhancement. Sentences are too high already; they should not be increased without a congressional directive or very compelling reason.

B. Section 9(B): 7 U.S.C. § 7734

The Plant Protection Act of 2002 increased the maximum penalties available for certain violations of 7 U.S.C. § 7734. Specifically, the Act increased the maximum penalty for knowingly importing or exporting plants, plant products, biological control organisms, and like products for distribution or sale "in violation of this chapter" to five years for the first offense and ten years for any subsequent offense. The Act did not change the maximum one-year penalty for other knowing violations of Title 7 and other offenses involving documents covered by Title 7.

In response to the legislative change, the Commission has proposed two options. Option One would increase the base offense level to either 8 or 10; Option Two would provide for an upward departure.

We believe the current reference to § 2N2.1 (Violations of Statutes and Regulations Dealing with Any Food, Drug, Biological Product, Device, Cosmetic, or Agricultural Product), which has a base offense level of 6, is sufficient and object to both proposed options. Although Congress increased the maximum punishment for such offenses, Congress did not instruct the Commission to increase the applicable guideline ranges. When Congress decides that an increase in the guideline range is necessary, it passes legislation suggesting or mandating such an increase. Congress has not done so here and thus the Commission should make no change.

The proposed amendment is unnecessary because the guideline already provides for an upward departure if "death or bodily injury, extreme psychological injury, property damage or monetary loss resulted." USSG § 2N2.1, comment. (n.3). Sentencing courts therefore have the means to increase the sentence in unusual circumstances. Moreover, because the guidelines are now advisory, see United States v. Booker, 125 S. Ct. 738 (2005), courts have the flexibility to increase the sentence if the movement of the plants resulted in some greater harm other than those addressed in the departure provision. See 18 U.S.C. § 3553(a)(1) (instructing courts to consider "nature and circumstances of the offense"); § 3553(a)(2)(A) (instructing courts that sentence must "reflect the seriousness of the offense").

If the Commission believes it is necessary to adopt one of the two proposed options, Option Two is more appropriate, for the reasons the Commission stated: "because of the expected infrequency of plant protection offenses and because it provides the court with a viable tool to account for the harm involved during the commission of these offenses on a case-by-case basis."

In addition to imposing unnecessary rigidity, Option One would also lead to unnecessarily severe sentences. Individuals convicted of violating the Plant Protection Act are likely to be first-time offenders. Increasing the base offense level from a six to a ten would increase the guideline range, for an individual with a criminal history category I, from 0-6 months to 6-12 months. Such an increase would contravene the Commission's mandate to "insure that guidelines reflect the general appropriateness of imposing a sentence other than imprisonment in cases in which the defendant is a first offender who has not been convicted of a crime of violence or an otherwise serious offense." 18 U.S.C. § 994(j).

C. Section 9(D): 18 U.S.C. § 1841

The Unborn Victims of Violence Act of 2004 created a new offense, codified at 18 U.S.C. § 1841, for causing death or serious bodily injury to a fetus while engaging in conduct that violates one of several enumerated statutes. The statute provides that the maximum penalty for the offense shall be the penalty "for that conduct had that injury or death occurred to the unborn child's mother." 18 U.S.C. § 1841(a)(2)(A). In cases where the person "intentionally kills or attempts to kill the unborn child that person shall be punished under sections 18 U.S.C. §§ 1111 [murder], 1112 [manslaughter], and 1113 [attempted murder or manslaughter]." 18 U.S.C. § 1841(a)(2)(C).

The proposed amendment refers violations of 18 U.S.C. § 1841(a)(1) to USSG § 2X5.1 (Other Offenses), which instructs courts to apply "the most analogous offense guideline." Thus, if the defendant is convicted under 18 U.S.C. § 1841(a)(1), the court would apply the guideline that covers the conduct the defendant is convicted of having engaged in, as that conduct is described in 18 U.S.C. § 1841(a)(1) and listed in 18 U.S.C. § 1841(b).

We object to the proposed upward departure provision set forth in proposed Application Note 2(B). This proposal states that "an upward departure may be warranted if the offense level under the applicable guideline does not provide an adequate sentence to account for the death of or serious bodily injury to the child in utero."

The upward departure provision is contrary to Congress's intent. A violation of the Unborn Victims of Violence Act "does not require proof that . . . the person engaging in the conduct had knowledge or should have had knowledge that the victim of the underlying crime was pregnant" or proof that "the defendant intended to cause the death of, or bodily injury to, the unborn child." 18 U.S.C. §§ 1841(a)(2)(B)(i) and (ii). In all circumstances other than the intentional killing or attempted killing of the unborn child, which is covered separately by 18 U.S.C. § 1841(a)(2)(C), Congress mandated that the

punishment for the new offense be the same as that provided under Federal law had the injury or death occurred to the child in utero's mother. See 18 U.S.C. § 1841(a)(2)(A). Thus, the enhancement is contrary to Congress's intent. Again, the Commission should not encourage higher sentences than Congress intended or required.

Moreover, in light of the nature of the offense, a defendant convicted under 18 U.S.C. § 1841(a)(1) will likely be exposed to emotional and other volatile influences at sentencing. The proposed invitation for an upward departure is objectionable because of the risk that these influences might provoke inappropriately harsh sentences. Finally, given the highly-charged nature of the offense, the proposed upward departure provision would invite unwarranted sentencing disparities among different defendants in different districts sentenced by different judges with different views.

We strongly oppose the proposed upward departure.

D. Section 9(E): Proposed Guideline § 2X5.2

Title 18 U.S.C. § 3559(a)(6) classifies as a Class A misdemeanor an offense punishable by one year or less but more than six months. The Commission has proposed guideline USSG § 2X5.2 to apply to five new Class A misdemeanor offenses⁶ -- one of which, the Social Security Administration Act, 42 U.S.C. § 1129, we have been unable to locate on Westlaw or <http://thomas.loc.gov/> -- and any Class A misdemeanor not referenced to a more specific Chapter Two guideline.

Proposed § 2X5.2 provides a base offense level of six and a specific offense characteristic of two for subsequent convictions under the same provision of law as the instant offense of conviction.

We believe that a base offense level of four, rather than six, is appropriate, consistent with guidelines for other Class A misdemeanors. See, e.g., USSG § 2B2.3 (base offense level 4 for criminal trespass); § 2D2.1(a)(3) (base offense level 4 for simple possession of certain controlled substances and list I chemicals); § 2J1.5 (base offense level 4 for material witness's failure to appear at misdemeanor trial); § 2P1.2 (base offense level 4 for providing or possessing certain contraband in prison); § 2T1.7 (base offense level 4 for failing to deposit collected taxes in trust account as required after notice); § 2T2.2 (base offense level 4 for regulatory offenses); § 2T3.1 (base offense level 4 for smuggling if tax loss did not exceed \$100).

⁶ As listed in the Synopsis, these are (1) the interstate movement of animals for fighting, in violation of 18 U.S.C. § 2156; (2) the corrupt and forcible interference with the administration of the Social Security Administration Act committed by threats of force, in violation of 42 U.S.C. § 1129(a); (3) illegal tampering with a consumer product, in violation of 18 U.S.C. § 1365(f); (4) the misuse or illegal disclosure of DNA analyses, in violation of 42 U.S.C. § 14133; and (5) the knowing capture of an image of an individual's "private area" without that person's consent and under circumstances in which the person has a reasonable expectation of privacy, in violation of 18 U.S.C. § 1801.

No explanation is given as to why some Class A misdemeanors should be subject to a base offense level 1 ½ times higher than that for other Class A misdemeanors. As the Commission points out, many misdemeanors not covered by another Chapter Two guideline are regulatory violations. Moreover, a base offense level of four would, and should, reflect the fundamental difference between a misdemeanor and a felony.

The proposed two-level SOC for subsequent offenses would import the unwise policy in the immigration area of double counting criminal history into a broad range of Class A misdemeanors. This would foster litigation, and the Commission has not offered any justification for it.

We do not believe that the Commission should reference any Class A misdemeanors currently referenced to a guideline with a lower base offense level to proposed § 2X5.2, and have not identified any Class A misdemeanors not currently referenced in Appendix A that should be included in Appendix A and referenced to proposed §2X5.2.

Again, with sentences that are already too severe and the BOP 40% overcapacity, we do not believe that the Commission should be raising penalties absent a congressional directive or a very compelling reason to do so.

V. Application Issues

A. Cross Reference to Second Degree Murder Guideline in § 2D1.1

The Commission proposes adding another cross reference to § 2D1.1 (Unlawful Manufacturing, Importing, Exporting, or Trafficking; Possession with Intent to Commit These Offenses; Attempt or Conspiracy) to permit courts to apply § 2A1.2 (Second Degree Murder) in drug cases in which the conduct involved is second degree murder if the resulting offense level is greater than that determined under the drug guideline.

We oppose any expansion of unconvicted conduct because it is unfair and only serves to transfer sentencing power to the government. The resulting guideline range would be severe -- 20 years to life, depending on criminal history -- based on a mere preponderance of the evidence. If death results and the conduct does not amount to first degree murder, the court can use its discretion to increase the sentence commensurate with the seriousness of the offense and other relevant factors. See 18 U.S.C. § 3553(a). Again, we strongly urge the Commission not to expand one of the most pernicious aspects of the Guidelines, criticized by most participants, disinterested observers, and the Supreme Court. See Blakely v. Washington, 542 U.S. 296, 306 (2004).

B. § 3C1.3 (Offenses Committed While on Release)

The Commission proposes eliminating § 2J1.7 and moving the three-level enhancement for cases in which the statutory sentencing enhancement at 18 U.S.C. §

3147 applies, to a new Chapter Three Adjustment, § 3C1.3 (Offenses Committed While on Release), but eliminating important commentary protective of defendants' rights.

Without explanation, the proposal would eliminate the commentary explaining, based on the legislative history, that the sentence must be consecutive but that there is no requirement as to any minimum term. The commentary should be retained. Otherwise, some courts (but not others) will believe that a substantive change was intended, when that is not the case. This will complicate sentencings by requiring the parties and courts to try to divine the meaning of the change, resulting in different interpretations, and unwarranted disparity.

Without explanation, the Commission proposes to eliminate the commentary stating that the enhancement may be imposed "only in the case of a conviction for a federal offense that is committed while on release on another federal charge." This commentary is consistent with the statutory definition of "offense." See 18 U.S.C. § 3156(a)(2). As above, eliminating it would create confusion and unwarranted disparity. The commentary should be retained.

The proposal would also eliminate the commentary requiring "sufficient notice to the defendant by the government or the court," claiming that a majority of courts have found that there is no notice requirement for 18 U.S.C. § 3147 to apply. This is not correct. Three circuits have squarely held that the statutory enhancement may not be applied unless the court gave the defendant specific warning *in the pretrial release order* of potential enhancement under 18 U.S.C. § 3147. See United States v. Cooper, 827 F.2d 991, 994 (4th Cir. 1987); United States v. Onick, 889 F.2d 1425, 1434 (5th Cir. 1989); United States v. DiCaro, 852 F.2d 259, 264-65 (7th Cir. 1988). Five circuits have held that pre-release notice is not required but that *pre-sentence* notice is required by the Guideline and/or the Due Process Clause. United States v. Kentz, 251 F.3d 835, 840-41 (9th Cir. 2001) (citing guideline and due process); United States v. Hecht, 212 F.3d 847, 849 (3^d Cir. 2000) (citing guideline) (Alito, J.); United States v. Bozza, 132 F.3d 659, 661 (11th Cir. 1998) (citing guideline and opportunity to prepare and defend against the enhancement); United States v. Browning, 61 F.3d 752, 757 (10th Cir. 1995) (citing guideline and opportunity to prepare and defend against the enhancement); United States v. Feldhacker, 848 F.2d 293, 299 (8th Cir. 1988) (citing guideline and due process). The Second Circuit has not decided if pre-release notice must be given, but recognized that notice must be given before sentencing. United States v. Vazquez, 113 F.3d 383, 389-90 (2^d Cir. 1997). The Sixth Circuit has stated in *dicta* that pre-release notice was not required, and declined to decide whether pre-sentence notice was required because the defendant waived the argument. United States v. Lewis, 991 F.3d 322, 324 (6th Cir. 1993).

Particularly in light of the Appendi to Booker line of cases, the Commission should not eliminate any notice requirement when a *majority of circuits has held that pre-sentence notice* is required by the Guideline or both the Guideline and the Due Process Clause and *no circuit has ever held that pre-sentence notice is not required*. This, of course, makes sense, because a defendant must prepare to defend himself against an

allegation of an entirely separate offense. Instead, the Commission should change the sentence to read as follows:

An enhancement under 18 U.S.C. § 3147 may be imposed only if the defendant is given sufficient notice prior to sentencing, and applies only in the case of a conviction for a federal offense committed while on release on another federal charge.

Defendants do not always receive notice, see Lewis, supra, and this enhancement is not covered by Rule 32(h). As with elimination of the other commentary noted above, elimination of the notice provision could be interpreted as meaning that no pre-sentence notice need be given, and will create confusion, unfairness, and unwarranted disparity.

VI. §3C1.1 (Obstruction of Administration of Justice) Circuit Conflicts

We have a number of serious concerns about the Commission's proposed amendments to U.S.S.G. § 3C1.1. An enhancement for obstruction of justice should apply when the purpose of the conduct is to obstruct or impede the investigation, prosecution or sentencing of the offense of conviction, the defendant's relevant conduct or a closely related offense. In other words, it should apply only to conduct which is intended to thwart the truth-seeking function of the proceeding. It should not apply to obstructive conduct related to administrative or ancillary matters, such as pre-investigation conduct not directed at thwarting the investigation itself, to perjury in a civil proceeding between private parties, or to misrepresentations on CJA applications, since such conduct does not have the purpose or potential to impede the investigation or subvert the outcome of the case. Dishonesty of this sort may be dealt with through denial of the acceptance of responsibility reduction or through the district court's discretionary choice of sentence either within or outside the advisory guideline range. Therefore, we support the addition of language which makes it clear that, in order for the obstruction enhancement to apply, the conduct must have been "intended to prevent or hinder the investigation, prosecution, or sentencing" of the offense of conviction. For the reasons below, we oppose expanding the reach of the obstruction enhancement to include conduct that occurs before the onset of an official investigation, to non-governmental civil proceedings or to CJA applications. The current guideline, which limits the enhancement to post-investigation conduct, provides a clear, bright-line rule for courts to follow.

By contrast, the proposed amendment would open up an essentially unlimited range of conduct for courts to scrutinize for some sign of obstructive intent. Such an inquiry would present a host of evidentiary and epistemological problems. How would a court go about determining whether an act was intended to hinder an investigation that did not exist at the time the act was committed? Does a defendant who hides questionable bookkeeping decisions from an employer to avoid being fired commit obstruction, even if no criminal investigation has begun and the defendant is unaware of the relevant law? Does the defendant have to know that an investigation is likely or merely that there is a possibility the conduct will be investigated? Can obstruction take

place before the crime if, for instance, the defendant lays the groundwork for an alibi or obtains false identification in case of apprehension?

The problem with expanding the enhancement to pre-investigation conduct is the inevitable dilution of the bond between the allegedly obstructive conduct and the offense, as well as the difficulty of accurately discerning an obstructive intent in pre-investigative conduct which may have been motivated by a host of factors at the time it occurred, but will invariably be viewed through the distorting lens of post-conviction hindsight (and the preponderance of the evidence standard) at sentencing. Though some courts have criticized the temporal requirement contained in the current guideline, even they have recognized it serves a purpose. For instance, the Sixth Circuit has noted that it served "to require, at least in an indirect sense, a nexus between the acts of obstruction and the crime of conviction. With no causal link to the crime of conviction, obstructive conduct could conceivably include acts wholly unrelated to the crime of conviction or conduct that should have been the subject of separate criminal charges." United States v. Baggett, 342 F.3d 536, 542 (6th Cir. 2003).

The temporal requirement also serves to limit the reach of what could otherwise be an extraordinarily broad enhancement. Offenders hide their loot, destroy their disguises, discard their weapons. All of these acts are part and parcel of the offense itself, but arguably "obstructive" in the sense that they make discovery of the crime more difficult. Rare is the criminal who does not attempt to cover his tracks in some way. Absent some means of singling out defendants who act with the specific purpose of obstructing justice, the §3C1.1 enhancement could be applied in almost every case. Requiring that the obstructive conduct take place after the investigation began is the most reasonable and reliable way of ensuring that the enhancement captures something more than the offense conduct itself.

Simply put, the balance struck by the existing guideline is the proper one. The Commission has considered this issue in the past and decided that the obstruction enhancement should be limited to post-investigation conduct. This rule has the value of clarity, simplicity and ease of application. In any case where a court sees a clear instance of pre-investigation obstruction, it may upwardly depart or impose a non-Guideline sentence. There is no need to amend the current Guideline.

In addition, the Commission should limit any consideration of perjury during the course of a civil proceeding to material matters in proceedings brought by or involving a governmental agency. While issues involved in an action brought by an administrative agency might be closely related to those later involved in a criminal case, a civil lawsuit between private parties typically involves issues unrelated to criminal justice. Therefore, perjury occurring in a civil suit should not be the subject of an obstruction of justice enhancement even if facts at issue in the lawsuit overlap with conduct required to prove a criminal offense. Cf. United States v. Kirkland, 985 F.2d 535, 537-38 (11th Cir. 1993) (U.S.S.G. § 3C1.1 inapplicable to obstructive conduct occurring during internal bank audit). In addition, perjury should not be considered obstruction unless it pertains to

material issues that hinder the investigation, prosecution or sentencing in the case. The proposed requirement that the perjury “pertain” to the offense of conviction is too broad.

We recommend that subsection (b) of application note 4 be amended to read:

- (b) committing, suborning, or attempting to suborn perjury regarding material evidence in the case, including during the course of a civil proceeding brought by or involving a government agency and pertaining to conduct constituting the offense of conviction.

To limit its otherwise overly broad application, application note 6, which defines “material” evidence or information, should be amended to replace the phrase “the issue under determination” with “an issue under determination affecting the investigation, prosecution or sentencing of the offense of conviction.”

Making false statements on a financial affidavit in order to obtain court-appointed counsel does not warrant an obstruction enhancement because that conduct is not aimed at impeding justice or at affecting the outcome of the case. Instead, it affects only the allocation of resources. In United States v. Khimchiachvili, 372 F.3d 75, 80 (2d Cir. 2004), the Second Circuit rejected an enhancement for a false CJA financial affidavit, describing “a common sense definition of what constitutes obstruction of justice [as] conduct that willfully interferes with or attempts to interfere with the disposition of the criminal charges against a defendant.” Continuing, the court stated:

An enhancement for obstruction is therefore only warranted “if the court finds that the defendant willfully and materially impeded *the search for justice in the instant offense*.” Or, as we have written, the “conclusion that obstruct,’ in this context, relates to anything that can make it more difficult to carry out a just result in a criminal case [is] erroneous as a matter of law.” For a defendant’s conduct to qualify as obstruction of justice, it must have the “potential to impede” the investigation, prosecution, or sentencing of the defendant. It cannot simply be a misrepresentation.

Id. (citing United States v. Zagari, 111 F.3d 307, 328 (2d Cir. 1997) (emphasis added in Khimchiachvili); United States v. Stroud, 893 F.2d, 504, 507 (2d Cir. 1990); and United States v. McKay, 183 F.3d 89, 95 (2d Cir. 1999)). Of the circuits that have considered this issue, the Second Circuit’s decision is the most extensively reasoned. Compare United States v. Hernandez-Ramirez, 254 F.3d 841, 843-44 (9th Cir. 2001); United States v. Ruff, 79 F.3d 123, 125 (11th Cir. 1996). As the Second Circuit explained, the defendant did not want to pay for a lawyer, but “[h]e was not seeking to prevent justice or even delay it.” Id. The Second Circuit recognized that “[w]hat happened here may amount to fraud” and that it was “reprehensible,” “possibly deserving a higher sentence,” but that it nonetheless did not require an enhancement for obstruction of justice. Id.

The misrepresentation of financial information to obtain appointment of counsel is even less apt to have any affect on the outcome of the case than other behavior not

subject to the obstruction enhancement, such as lying about drug use while on pretrial release, providing false identification to the police upon arrest, or fleeing from arrest. See § 3C1.1, comment. (n.5). It is in no way similar to conduct that typically constitutes obstruction of justice by attempting to alter the outcome of a case, such as destroying evidence, tampering with witnesses, or lying on the stand about facts necessary to prove a criminal offense, or to delay justice, such as failure to appear at a court hearing. Id., comment. (n.4).

Moreover, many defendants who are potentially eligible for court-appointed counsel complete financial affidavits shortly after arrest and without access to their bank statements and other financial records, increasing the risk of mistakes that may be construed as intentional. In addition, requiring a court to enhance the sentence for obstruction of justice where a defendant misrepresented assets to obtain court-appointed counsel creates a conflict of interest between counsel and the defendant. Finally, a court can easily remedy a defendant's understatement of assets by ordering the defendant to repay amounts used to appoint counsel under the Criminal Justice Act.

Therefore, the Commission should not list making false statements on a financial affidavit in order to obtain court-appointed counsel under application note 4 as proposed. Instead, that conduct should be listed under application note 5, as an example of conduct that does not justify an enhancement for obstruction.

VII. Privilege Waiver

We join in the comments of the Practitioners' Advisory Group. While we do not represent organizations, we believe that the current commentary contributes to the undue pressure placed on organizations by the government to waive the attorney-client and work product privileges, and thus threatens those fundamental basics of our adversary system and the right to counsel.

VIII. Crime Victims' Rights

This proposal would add a new guideline, § 6A1.5, stating that "[i]n any case involving the sentencing of a defendant for an offense against a crime victim, the court shall ensure that the crime victim is afforded the rights described in 18 U.S.C. § 3771 and any other provision of Federal law pertaining to the treatment of crime victims," with "crime victim" defined as in 18 U.S.C. § 3771(e).

The Crime Victim Rights Act (CVRA) reflects a careful balancing of the rights of defendants, the discretion of prosecutors, and new rights for victims. The Commission should therefore strictly adhere to the statutory language. Requiring the court "in any case" to ensure that the crime victim is afforded the statutory rights departs from the statute, which states that "[i]n any *court proceeding* involving an offense against a crime victim, the court shall ensure that the crime victim is afforded the rights described in subsection (a)." Beyond that, the statute states that "[o]fficers and employees of the Department of Justice and other departments and agencies of the United States engaged

in the detection, investigation, or prosecution of crime shall make their best efforts to see that crime victims are notified of, and accorded, the rights described in subsection (a).” The Federal Rules Advisory Committee has interpreted this to mean that the government is in charge of giving notice of proceedings.⁷ Another good reason for the Commission to strictly adhere to the statutory language is that the Rules Committee has not yet even published for comment its rules implementing the CVRA.

The phrase “and any other provision of Federal law pertaining to the treatment of crime victims” should be deleted. It is undefined and undefinable. It could be interpreted by victims and their counsel in unexpected and unforeseeable ways to enforce “rights” that may not exist in the CVRA, inviting litigation, an undue burden on the courts, and either disappointment for victims or unwarranted incursions on defendants’ rights. The phrase should be deleted.

We suggest the following substitute:

A crime victim, as defined in 18 U.S.C. § 3771(e), shall be afforded the rights described in 18 U.S.C. § 3771(a).

IX. Reductions in Term of Imprisonment Based on Bureau of Prisons Motion

The proposed amendment is the Commission’s first attempt to provide guidance for court consideration of Bureau motions to reduce sentences based on extraordinary and compelling reasons as provided in 18 U.S.C. § 3582(c)(1)(A)(i). We applaud that attempt and offer suggestions which we believe may improve the initial draft and respond more definitively to the congressional directive in 28 U.S.C. § 994(t). We also respond to the issues for comment regarding release after age 70 pursuant to 18 U.S.C. § 3582(c)(1)(A)(ii). First, we offer some background regarding the “extraordinary and compelling” reduction statute.

A. Background of Reduction for “Extraordinary and Compelling Reasons”

Many people who work in the federal criminal justice system are unfamiliar with this statute. It is little known and little utilized. However, some of us have learned of it after a client, already sentenced, inquires whether some radical change of circumstance can qualify him or her for some relief or reduction of sentence. Sometimes, the circumstance is some sort of family emergency, sometime a matter of life or death, sometime concern about the welfare of a child, which the prisoner can only assist with if released early. Initially, the provisions of 18 U.S.C. § 3582(c)(1)(A)(i) appear to offer relief, if the situation truly appears compelling and extraordinary. However, that hope is quickly dashed when we learn that the BOP only rarely makes the motion and then only when a prisoner is about to die or is completely incapacitated. This state of affairs and unduly cramped usage of the statute could be altered by this Commission’s policy

⁷ Report to Standing Committee at 5-6 (December 8, 2005), <http://www.uscourts.gov/rules/Reports/CR12-2005.pdf>.

statement. The policy statement should reflect congressional intent that the mechanism be used, however rarely, to address a variety of post-sentencing developments.

Prior to the advent of the Sentencing Reform Act and the Sentencing Guidelines, the federal criminal justice system used indeterminate sentences and a parole model in which various factors, including progress toward rehabilitation, would result in release on parole before the term of a sentence expired. The sentencing court could impose a mandatory minimum period to be served of up to one third of the sentence before parole eligibility. 18 U.S.C. § 4205(b)(1) (repealed effective Nov. 1, 1987). In that system, Congress allowed the Bureau of Prisons to move the court, at any time post-sentence, for a reduction of a minimum time before parole eligibility. 18 U.S.C. § 4205(g) (repealed effective Nov. 1, 1987). This motion was not confined to extraordinary and compelling circumstances and could even be made based on prison overcrowding.

The Sentencing Reform Act of 1984 (SRA) established a determinate sentencing system with sentencing guidelines to aid the courts in establishing an appropriate sentence. The parole system, and the rehabilitative model it embodied, were rejected in favor of a system which provided more certainty, finality and uniformity.⁸ However, Congress also recognized that post-sentencing developments might provide appropriate grounds to reduce a sentence. Using §4205(g) as a model for the mechanism, the SRA provided a way to adjust a sentence if necessary to accommodate post-sentence developments, which is codified in 18 U.S.C. § 3582(c)(1)(A)(i):

The court may not modify a term of imprisonment once it has been imposed except that-

(1) in any case-

(A) the court, upon motion of the Director of the Bureau of Prisons, may reduce the term of imprisonment (and may impose a term of probation or supervised release with or without conditions that does not exceed the unserved portion of the original term of imprisonment), after considering the factors set forth in section 3553(a) to the extent that they are applicable, if it finds that-

(ii) extraordinary and compelling reasons warrant such a reduction;

Congress also mandated that the United States Sentencing Commission, created by the SRA, promulgate policy statements regarding how that section should operate and what should be considered extraordinary and compelling:

The Commission, in promulgating general policy statements regarding the sentencing modification provisions in section 3582(c)(1)(A) of title 18, shall describe what should be considered extraordinary and compelling reasons for sentence reduction, including the criteria to be applied and a list of specific examples. Rehabilitation of the defendant alone shall not be considered an extraordinary and compelling reason.

⁸ See, generally, Mistretta v. United States, 488 U.S. 361, 363-370 (1989).

The legislative history of these provisions demonstrates that Congress intended this release motion as a way to account for changed circumstances. The Senate Judiciary Committee's Report, the authoritative source of legislative history on the SRA, said, in pertinent part:

The Committee believes that there may be unusual cases in which an eventual reduction in the length of a term of imprisonment is justified by changed circumstances. These would include cases of severe illness, cases in which other extraordinary and compelling circumstances justify a reduction of an unusually long sentence, and some cases in which the sentencing guidelines for the offense of which the defend[ant] was convicted have been later amended to provide a shorter term of imprisonment....the bill...provides...for court determination, subject to consideration of Sentencing Commission standards, of the question whether there is justification of reducing a term of imprisonment in situations such as those described.⁹

B. History of Sentence Reductions

Despite the broad language of the statutory provision, the BOP has historically used §3582(c)(1)(A)(i) only to seek release of dying inmates. See, Mary Price, *The Other Safety Valve: Sentence Reduction Motions under 18 U.S.C. § 3582(c)(1)(A)*, 13 FED. SENT. R. 188, 2001 WL 1750559 (Vera Inst. Just.) (2001). Originally, BOP policy allowed consideration of release when death was predictable within six months. In 1994, the policy was amended to include other serious medical situations where disease resulted in markedly diminished public safety risk and quality of life. Although there is nothing in the statute or in the BOP policy statement to disqualify a reduction based on something other than medical condition of the inmate, the BOP has never acted on any other basis.

During the first two decades of the SRA, the Sentencing Commission has not responded to the congressional directive to issue policy statements and give examples of extraordinary and compelling reasons. A Vice Chairman of the Commission opined that the lack of policy statements might be partly responsible for the BOP's narrow use of this provision:

Without the benefit of any codified standards, the Bureau, as turnkey, has understandably chosen to file very few motions under this section. It is not unreasonable to assume, however, that Congress may have envisioned compelling and extraordinary circumstances to encompass more than a terminally ill individual with a nonviolent criminal record.

⁹ S.Rep.No.225, 98th Cong., 1st Sess. 37-150 at p. 55, reprinted in 1984 U.S. Code Cong. & Ad. News 3182, 3220-3373.

John Steer and Paula Biderman, Impact of the Federal Sentencing Guidelines on the President's Power to Commute Sentences, 13 Fed. Sent. R. 154, 2001 WL 1750551 (Vera Inst. Just.). The actual numbers collected and appended to Ms. Price's article reflect extremely rare usage of the § 3582 reduction through 2000. The numbers for 2001 through 2004 continue to be quite low despite a growing prison population.¹⁰

C. The Proposed Amendment; Extraordinary and Compelling Reasons

The Commission's proposed amendment provides a first step and a structure for a policy statement regarding 18 U.S.C. § 3582(c)(1)(A) reductions. However, it does not comply with the statutory directives to describe what should be considered extraordinary and compelling reasons, nor does it provide examples as required by statute. 28 U.S.C. § 944(t). We believe the Commission should tackle this admittedly difficult task and we provide our suggestions for doing so below, along with other comments on the draft. Luckily, there is already a very good model for addressing these difficult issues in the Appendix of Ms. Price's previously cited article (copy attached).

First, as a drafting matter, proposed U.S.S.G. § 1B1.13(1)(A) should be amended to state "reasons" in the plural, as in the statute, instead of singular. Otherwise, this drafting change would alter the clear intent of the statute to allow consideration of multiple reasons and their combination as opposed to one single reason. In the alternative, the Commission could adopt the language in Ms. Price's proposal, which is to add a defining statement as follows:

An "extraordinary and compelling reason" may consist of several reasons, each of which alone is not extraordinary and compelling, that together make the rationale for a reduction extraordinary and compelling.

This option has the advantage of clearly restating the statutory intent that reasons may be plural, to prevent a mechanistic approach to this broadly worded provision.

Second, the proposed draft, in § 1B1.13(2), requires that the person not be a danger. This imports the statutory requirement of 18 U.S.C. § 3582(c)(1)(A)(ii) and applies it to § 3582(c)(1)(A)(i) as well. As a practical matter, this expanded requirement will probably have little effect, since it is difficult to envision the BOP moving to reduce a sentence and release a prisoner who is still dangerous. In our experience, the BOP takes great care to eliminate any prisoners from early release consideration if they are considered a danger to the community. However, we believe the proposal should insert the word "present" before the word "danger" in order to assure the proper interpretation stated in the Synopsis, *i.e.*, that the person is "no longer" a danger.

Third, the Synopsis states that the policy statement creates a rebuttable presumption when there is a BOP motion. Presumably, this refers to proposed Application Note 1A, where the only definition of "extraordinary and compelling reasons" appears. The actual language used--"shall be considered as such"--does not

¹⁰ The 2001 through 2004 figures received from BOP are attached.

appear to operate to create a rebuttable presumption. If that is what is intended, it should be stated simply and in those words. More importantly, this definition provides no guidance whatsoever to the Bureau of Prisons in making their determination, which is the whole purpose of the policy statement and Congress' directive to the Commission.

We believe that providing only a circular definition of extraordinary and compelling reasons, i.e. they presumptively exist when BOP makes a motion, does not comport with the Commission's directive from Congress. We suggest that such reasons should be broadly defined to include all basic post-sentencing changes that could support a reduction, as was intended by Congress. These should not be limited to terminal illness or other extreme medical conditions of the inmate, as has been BOP policy.

Again, Ms. Price's article contains a description of extraordinary and compelling reasons in the proposed policy statement:

An "extraordinary and compelling reason" is a reason that involves a situation or condition that—

- (1) was unknown to the court at the time of sentencing;
- (2) was known to or anticipated by the court at the time of sentencing but that has changed significantly since the time of the sentencing; or
- (3) the court was prohibited from taking into account at the time of sentencing but would no longer be prohibited because of changes in applicable law.

This proposed language covers the basics of changed conditions or circumstances which could support a reduction of sentence consistent with the SRA and the guidelines. As previously outlined, the §3583(c)(1)(A)(i) provision was placed in the Act to allow some safety valve for post-sentencing changed circumstances. Congress clearly understood that in enacting a determinate sentencing system, there had to be some outlet for compelling changed circumstances after sentencing. This definition provides a flexible model which does not unduly emphasize or confine itself to extreme illness of the inmate. It would allow the court to consider facts or law which changed after sentencing and which present a compelling case for a reduction of the sentence.

Finally, we believe that the Commission should provide a non-exclusive list of examples of what could qualify as extraordinary and compelling reasons. Again, the list proposed in Ms. Price's article appears to offer an excellent starting place in an application note:

- The term "extraordinary and compelling reason" includes, for example, that—
- (A) the defendant is suffering from a terminal illness that significantly reduces life expectancy;
 - (B) the defendant's ability to function within the environment of a correctional facility is significantly diminished because of permanent physical or mental condition for which conventional treatment promises no significant improvement;
 - (C) the defendant is experiencing deteriorating physical or mental health as a result of the aging process;

- (D) the defendant has provided significant assistance to the government to a degree and under circumstances that was not or could not have been taken into account at the time of sentencing or in a post-sentencing proceeding;
- (E) the defendant would have received a significantly lower sentence had there been in effect a change in applicable law that has not been made retroactive;
- (F) the defendant received a significantly higher sentence than other similarly situated co-defendants because of factors beyond the control of the sentencing court;
- (G) the death or incapacitation of family members capable of caring for the defendant's minor children, or other similarly compelling family circumstance, occurred.

These examples do not purport to be exhaustive, but can provide some guidance as to possible categories of changed circumstances which could provide extraordinary and compelling reasons for a reduction in sentence.

D. Issues for Comment

The Commission solicits comment regarding whether the suggested policy statement regarding release of those over 70 years old who have already served 30 years should be expanded to include those sentenced under statutes other than 18 U.S.C. § 3559(c). Further, the Commission asks whether, if so, certain offenses should be excluded, such as terrorism or sexual offenses involving minors.

Extending the possibility of release for aged inmates to sentences outside of 3559(c) sentences would be good policy.¹¹ There are many other statutes which provide for extremely long, even life terms, e.g., the drug statutes found in 21 U.S.C. § 841(b)(1)(A). As the Commission has concluded, risk of recidivism drops dramatically after age 50, and surely even more dramatically after age 70.¹² With increased sentence severity over the past twenty years has come an aging prison population, with medical problems, and little risk of re-offense.¹³ It has been estimated that housing an elderly prisoner costs \$60,000 annually.¹⁴ It would make just as much sense to expand the release possibility to other cases.

¹¹ This portion of the statute was passed in 1994 as part of the "Three Strikes" legislation creating life sentences in § 3559(c), which is the only reason it was restricted to those sentenced under that statute.

¹² U.S. Sentencing Commission, Measuring Recidivism: The Criminal History Computation of the Federal Sentencing Guidelines 12 & Exhibit 9.

¹³ U.S. Department of Justice, Bureau of Justice Statistics, Prisoners in 2003 8 (85% increase in inmates 55 or older since 1995), <http://www.ojp.usdoj.gov/bjs/pub/pdf/p03.pdf>; U.S. Department of Justice, Bureau of Justice Statistics, Medical Problems of Inmates (1997) (48% of federal inmates age 45 or older reported medical problems), <http://www.ojp.usdoj.gov/bjs/pub/ascii/mpi97.txt>.

¹⁴ Sentencing Project, Aging Behind Bars: "Three Strikes" Seven Years Later (August 2001) 12, <http://www.sentencingproject.org/pdfs/9087.pdf>.

If the expansion were available, it would be unnecessary and unduly broad to exclude certain offenses from the operation of the policy as a categorical matter. The statute and policy statements requiring a current lack of dangerousness fully address the concerns about public safety implicit in the issue for comment. After 30 years served and with defendants over 70 years old, there would be little reason to categorically exclude any conviction, so long as the current lack of dangerousness requirement remains.

Thank you for considering our comments, and please let us know if we can be of any further assistance.

Very truly yours,

JON M. SANDS
Federal Public Defender
Chair, Federal Defender Sentencing Guidelines
Committee
AMY BARON-EVANS
ANNE BLANCHARD
Sentencing Resource Counsel

cc: Hon. Ruben Castillo
Hon. William K. Sessions III
Commissioner John R. Steer
Commissioner Michael E. Horowitz
Commissioner Beryl A. Howell
Commissioner Edward F. Reilly, Jr.
Commissioner *Ex Officio* Michael J. Elston
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March 23, 2006

The Honorable Ricardo H. Hinojosa
Chair, United States Sentencing Commission
One Columbus Circle, NE
Suite 2-500
Washington, DC 20002-8002

Dear Judge Hinojosa,

As President of the Archaeological Institute of America (AIA), I am writing to comment on the proposed amendments to Section 2B1.5 of the United States Sentencing Guidelines. The Archaeological Institute of America is the oldest and largest organization in the United States devoted to archaeology and the preservation of the human record. Founded in 1889 and chartered by an act of Congress in 1906, the AIA's 8,000 members include not only professional archaeologists and students but a majority of members from all walks of life united by a passion for archaeology and what it has to tell us about our shared human past. For over a century the AIA has cultivated the interests of and educated the American public about the past.

Of particular concern to both the professional and avocational members of the AIA is the preservation of archaeological sites, historic monuments and museum collections, which form the basis for our understanding and knowledge of the past. The AIA today leads the debate concerning the trade in illicit antiquities. It was one of the first organizations in the United States to call for adherence to the 1970 UNESCO Convention on the Means of Prohibiting and Preventing the Illicit Import, Export, and Transfer of Ownership of Cultural Property and to incorporate UNESCO principles into its Code of Ethics. The AIA has been instrumental in the enactment of United States cultural heritage legislation from the Antiquities Act of 1906 to the Convention on Cultural Property Implementation Act of 1983 and the Emergency Protection for Iraqi Cultural Antiquities Act of 2004.

The AIA submitted comments to the Sentencing Commission in support of the original Cultural Heritage Resource Crimes Sentencing Guideline when it was proposed in 2002. Today I write in support of the new proposed amendment, which would refer a new offense, created under the Veterans' Memorial Recognition and Preservation Act of 2003, 18 U.S.C. § 1369, to § 2B1.5 (Theft of, Damage to, or Destruction of Cultural Heritage Resources). The AIA supports the addition of Veterans' Memorials to the list of culturally significant places in § 2B1.5(b)(2). The proposed amendment also raises the question of whether the enhancement for damage or destruction to a Veterans' Memorial should be raised to four or six levels instead of the current two-level enhancement provided under § 2B1.5(b)(2). The AIA strongly supports an increase in the amount of enhancement to four or six levels for all the offense characteristics listed in §

2B1.5(b)(2) (offenses involving specially protected places) and § 2B1.5(b)(3) (offenses involving specially protected cultural items). This type of uniform increase in the enhancement will send an even clearer message to those who loot, deface or destroy cultural sites and monuments that the United States government is serious about protecting our cultural heritage for future generations of Americans. However, the AIA does not support an increase in the enhancement level if it applies only to Veterans' Memorials, but only if it applies to all the special offense characteristics listed in § 2B1.5(b)(2) and § 2B1.5(b)(3).

Particularly with respect to the characteristics listed in § 2B1.5(b)(2), there seems to be no policy justification for treating one type of protected location differently from other types of protected locations. For example, § 2B1.5(b)(2) currently lists museums and sites listed on the World Heritage List. There is no apparent reason to subject an offense involving any of these different locations to different levels of punishment. The AIA has a particular interest in the sentence to be given to those involved in the trafficking of cultural items stolen from museums located both in the United States and in other countries. For example, the looting of the Iraq Museum in Baghdad in April 2003 and the world's reaction to that event illustrate the deep concern of the American public as well as that of museum professionals and archaeologists for the losses suffered from these types of thefts. The AIA feels strongly that all these types of cultural losses should be treated equally under the Cultural Heritage Resource Crimes Sentencing Guideline and none should be subjected to disparate or inconsistent treatment.

Congress has demarcated all of the cultural places and types of cultural resources listed in the special offense characteristics in § 2B1.5(b)(2) and § 2B1.5(b)(3) for heightened protection through specific statutory treatment. Therefore, the Sentencing Guidelines should also treat them in a uniform and consistent manner, particularly as one of the goals of the Sentencing Guidelines is to achieve consistency in the punishments given to similar crimes. In the past, when the sentence was determined primarily by market value, defendants involved in the trafficking of looted and stolen archaeological artifacts might receive a different sentence depending on whether the artifact involved was a Classical sculpture from Italy, a ceramic vessel from Peru or a Native American artifact from the Southwest, even though the cultural harm inflicted was comparable. The AIA would not want to see this type of inconsistency reintroduced to the Cultural Heritage Resource Crimes Sentencing Guideline through the proposed amendment. As the AIA commented in its 2002 letter to the Sentencing Commission, "the places and types of objects included have all been recognized by federal law, international agencies, or international conventions as having particular value to the cultural history of humankind."

An increase in the offense level enhancements will raise again the issue of the statutorily imposed maximum sentences contained in the Archaeological Resources Protection Act (ARPA), the Native American Graves Protection and Repatriation Act and the Theft from Indian Tribal Organizations act. This issue was addressed in the Sentencing Commission's statement on Reason for Amendment and in a letter from the former Chair of the Sentencing Commission, Judge Diana Murphy, to Congress at the time the Cultural Heritage Resource Crimes Sentencing Guideline was submitted to Congress in 2002. These statutory maxima can prevent imposition of the full sentence permitted under the Sentencing Guideline and therefore help to defeat the goals of the Guideline to achieve more meaningful punishment of cultural heritage resource crimes.

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The AIA has a particular interest in the sentence that can be imposed for violation of ARPA. While the primary goal of ARPA is the protection of archaeological sites located on federally owned and controlled lands, the trafficking provision of ARPA also pertains to archaeological resources that are stolen in other countries and brought to the United States. This section of ARPA has been applied, for example, to prosecutions involving manuscripts stolen from the Vatican library, ancient Etruscan ceramics looted from archaeological sites in Italy, and ancient Inca and Huari ceramics and textiles looted from Peru. The statutory maximum, however, can limit unreasonably the sentence that can be given in similar cases that may be prosecuted in the future. The AIA therefore urges you to suggest again to Congress that it take up the issue of changing the statutory maximum sentences provided in ARPA and the other affected legislation.

I thank you for this opportunity to provide comments on the proposed changes in the Sentencing Guideline for Cultural Heritage Resource Crimes. If any additional explanation or comments are requested, please feel free to contact me.

Sincerely,

Jane C. Waldbaum
President, Archaeological Institute of America
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March 24, 2006

The Honorable Ricardo H. Hinojosa
Chair, United States Sentencing Commission
One Columbus Circle, NE
Suite 2-500
Washington, DC 20002-8002

Dear Judge Hinojosa,

I am submitting this letter on behalf of the Lawyers' Committee for Cultural Heritage Preservation commenting on the proposed amendments to Section 2B1.5 of the United States Sentencing Guidelines. The Lawyers' Committee for Cultural Heritage Preservation (<http://www.culturalheritagelaw.org>) is an association of lawyers who have joined together to promote the preservation and protection of cultural heritage resources in the United States and internationally through education and advocacy.

The proposed amendment would refer a new offense, created under the Veterans' Memorial Recognition and Preservation Act of 2003, 18 U.S.C. § 1369, to § 2B1.5 (Theft of, Damage to, or Destruction of Cultural Heritage Resources) of the Sentencing Guidelines. The Lawyers' Committee supports the addition of Veterans' Memorials to the list of culturally significant places. The current guideline provides as one of its specific offense characteristics that if the offense involves property damage to one of the protected places, the base offense level will be enhanced by two levels.

The proposed amendment also raises the question of whether the enhancement for damage or destruction to a Veterans' Memorial should be raised to four or six levels. The Lawyers' Committee supports this increase in the enhancement but only if the increase applies to all the special offense characteristics listed in § 2B1.5(b)(2) (offenses involving specially protected places) and § 2B1.5(b)(3) (offenses involving specially protected cultural items). Particularly with respect to the characteristics listed in § 2B1.5(b)(2), there seems to be no policy justification for treating one type of protected location differently from other types of protected locations. For example, § 2B1.5(b)(2) currently lists national monuments, national memorials and national cemeteries, as well as the national park system, National Historic Landmarks, national marine sanctuaries, museums, and sites listed on the World Heritage List. There is no apparent reason to subject an offense involving any of these different locations to different levels of punishment. By the same reasoning, offenses involving human remains (listed in § 2B1.5(b)(3)) should be subject to the same punishment as offenses involving cemeteries and memorials.

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What unites all of the special offense characteristics listed in § 2B1.5(b)(2) and § 2B1.5(b)(3) is that Congress has singled out all of these culturally significant places and types of cultural resources for special treatment. This is reiterated in the Reason for Amendment given by the Sentencing Commission at the time that § 2B1.5 was adopted:

The first two of these enhancements, at subsections (b)(2) and (b)(3), relate to whether the offense involves a place or resource that Congress has designated for special protection. A two level enhancement attaches if the offense involves a resource from one of eight locations specifically designated by Congress for historic commemoration, resource preservation, or public education. ... An additional two level enhancement attaches to offense conduct that involves any of a number of specified resources, including human remains and other resources that have been designated by Congress for special treatment and heightened protection under federal law.

The Lawyers' Committee strongly believes therefore that all of the offense characteristics listed in § 2B1.5(b)(2) and § 2B1.5(b)(3) should be treated in a uniform and consistent manner. Only uniform treatment is justified under the Sentencing Commission's own original rationale for the enactment of these sections of the Sentencing Guideline. Establishing an unfortunate precedent for non-uniform treatment may create misunderstanding of the purpose and application of the Guideline. One of the central accomplishments of the Cultural Heritage Resource Crimes Sentencing Guideline is its capacity to achieve uniformity in sentencing because the sentencing provisions are based primarily on the cultural significance of the resource involved without regard for extraneous factors such as whether the resource was found within the United States or in another country and whether the resource has a relatively high or low commercial value.

At the same time, the Lawyers' Committee strongly supports an increase in the amount of enhancement to four or, even preferably, six levels for all the offense characteristics listed in § 2B1.5(b)(2) and § 2B1.5(b)(3). This type of uniform increase in the enhancement will send an even clearer message to those who loot, deface or destroy cultural sites and monuments that the United States government is serious about protecting our cultural heritage for future generations of Americans.

Any increase in the offense level enhancements will make even more urgent a point made in the Sentencing Commission's statement on Reason for Amendment and in a letter from the former Chair of the Sentencing Commission, Judge Diana Murphy, to Congress—that the statutory maxima established under three of the relevant statutes, the Archaeological Resources Protection Act, the Native American Graves Protection and Repatriation Act, and the Theft from Indian Tribal Organizations Act, prevent full implementation of the Cultural Heritage Resource Crimes Sentencing Guideline. The Sentencing Commission previously pointed out that "full implementation of this new guideline for the most serious offenders often will be limited in its application because of the extremely low statutory maxima of some of the potentially applicable statutes, such as the criminal provisions of ARPA, NAGPRA, and 18 U.S.C. § 1163 (covering theft of tribal property)." These statutes have either a one or two year statutory maximum term of imprisonment for the first offense and a statutory maximum term of five years for second and subsequent offenses. At the time the Commission submitted the Guideline to Congress it recommended that Congress raise the statutory maximum terms of imprisonment for these offenses.

In her letter to Senators Leahy and Hatch, Judge Murphy gave several examples where an individual who violates one or more of these statutes would not receive the sentence allowable under the Guidelines because of the statutory maxima. In order to achieve uniformity in sentencing and to accomplish the goal of greater enforcement of these statutes that protect our cultural heritage, Judge Murphy urged Congress to change these statutory maxima to ten years, consistent with other general property crimes and the Theft of Major Artwork statute, 18 U.S.C. § 668. The Lawyers' Committee strongly urges you to send a similar letter to Senators Specter and Leahy this year suggesting that the Judiciary Committee consider increasing the statutory maxima for ARPA, NAGPRA and the Theft from Tribal Organizations Act so that judges can give the sentences provided for under the Sentencing Guideline.

I thank you for this opportunity to provide comments on the proposed changes in the Sentencing Guideline for Cultural Heritage Resource Crimes. If any additional explanation or comments are requested, please feel free to contact me.

Sincerely,

Patty Gerstenblith
Professor
President, Lawyers' Committee for
Cultural Heritage Preservation

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March 28, 2006

United States Sentencing Commission
One Columbus Circle, N.E.
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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
Charles R. Tetzlaff, General Counsel, U.S. Sentencing Commission
Paula Desio, Deputy General Counsel, U.S. Sentencing Commission
Amy L. Schreiber, Assistant General Counsel, U.S. Sentencing Commission

March 27, 2006

VIA ELECTRONIC FILING

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: Follow up pursuant to the testimony of the Coalition to Preserve the Attorney Client Privilege: Request for changes to the commentary language of Section 8C2.5 regarding waiver of the attorney-client privilege.

Dear Commissioners and Staff:

On behalf of the Coalition to Preserve the Attorney-Client Privilege,¹ please accept our thanks for allowing us time to present our views to you on March 15, 2006, during Panel Three of your hearings schedule.

You have our testimony – both oral and written, as well as the document providing the results of our privilege survey of in-house and outside lawyers. On March 28, we are filing under separate cover a formal comment letter on behalf of this Coalition, as well. And of course, you have our previous testimonies and submissions.

I only wish to offer one follow-up from our testimony based on the back-and-forth discussion with the Commissioners. Ex-Officio Commissioner Michael Elston of the Department of Justice challenged our testimony regarding the statement of Associate Attorney General Robert McCallum before Members of Congress at the March 7, 2006, House Judiciary Committee Subcommittee hearings on the erosion of the attorney client privilege. The Coalition noted in its testimony to you that Mr. McCallum suggested at the Congressional hearing that the Department of Justice would not challenge the removal of the privilege waiver language; Mr. Elston suggested that our report of that hearing was incorrect, and that our statement that Mr. McCallum was retracting what he told Congress when he testified before the Sentencing Commission earlier in the morning on March 15 was inappropriate.

While we did not wish to argue the issue further at the hearing and while we certainly do not dispute what Mr. McCallum told the Commission on March 15 during its first panel of speakers

¹ The complete listing of Coalition members appears at the end of this letter. Please note that the American Bar Association is not a member of this coalition, but regularly cooperates in the Coalition's work and has participated side by side with the Coalition in regard to this effort.

(namely, that the Department would object to any changes in the language), we think it important for the Commission to know what it is that Mr. McCallum actually did say to the Congress on March 7, since the Members who were pressing him on waiver issues eased off their questioning on the Sentencing Guidelines language after he made the following statement. (And Representative Lundgren was not the only Member who mentioned concern about the Sentencing Guidelines' privilege waiver language – see our March 28 submission for more quotes from other Members of the House.) Members of Congress who were present at this hearing and who oversee the work of this Commission may have reason to believe that the privilege waiver language will not be a continuing issue of contention as a result of Mr. McCallum's statements.

We have produced the relevant text of the preliminary transcript for your reference below. (The final transcript of this session is not available to us to submit with this letter.)

Beginning at line 1295 and ending at line 1325 of the preliminary transcript of the Office of the Clerk of the U.S. House [White Collar Enforcement (Part I): Attorney-Client Privilege and Corporate Waivers, Tuesday, March, 7, 2006, House of Representatives, Subcommittee on Crime, Terrorism, and Homeland Security, Committee on the Judiciary, Washington, DC]:

Mr. Lundgren: ... And here you have a situation where you want a corporation to follow the law, I presume. And you would want the corporation to listen to good counsel, I would think. And here we have got a rule that seems to me to work in the opposite direction.

And I think that that weighs heavy on me and other members here on this panel. And so I would ask, don't you see the creeping intrusion here? I mean, first you have the first memorandum. Now we have the second memorandum, which is a little tighter and a little tougher. And then, following that, you have the Sentencing Commission saying, well, that is a bad idea. As a matter of fact, we are going to have that as evidence of cooperation, and the lack of it as evidence of lack of cooperation.

What is a corporate counsel to do under those circumstances?

Mr. McCallum: Well, there are a series of questions there, Mr. Lundgren. Number one, with respect to the Sentencing Commission, the Department's position has been we would be comfortable with the Sentencing Commission going back to where it was before that amendment.

Mr. Lungren: Well, is that your position? Is that the administration's position?

Mr. McCallum: I believe that that is the Department of Justice's review –

Mr. Lungren: That is what I mean.

Mr. McCallum: -- underway at this particular time. I do not know whether that has been absolutely finalized. But my review of that is that there would not necessarily be an objection to going back to the way it was before, where it was not addressed.

I do not believe that there were any other issues that you requested we address during or after the hearing, and so I thank you once again for your time and your courtesy in allowing us to present our survey findings for your consideration. Please feel free to contact me or any of the other members of our Coalition if we can be of assistance to you in your deliberations.

Respectfully Submitted For the Coalition to Preserve the Attorney-Client Privilege by:

Original sent 10/13/09
at 10:10 AM on 10/13/09
by Susan Hackett to Mr. McCallum

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COALITION MEMBERS:

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
THE U.S. CHAMBER OF COMMERCE
WASHINGTON LEGAL FOUNDATION

March 28, 2006

VIA ELECTRONIC FILING

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 “Chapter Eight – Privilege Waiver”

Dear Sir/Madam:

The Coalition to Preserve the Attorney-Client Privilege, which is composed of the undersigned organizations,¹ is pleased to provide these comments on the Commission's Notice of Proposed Amendments, Request for Public Comment, and Notice of Public Hearings for the amendment cycle ending May 1, 2006.² These comments exclusively address Final Priority (6): “review, and possible amendment,” of the language regarding waiver of attorney-client privilege and work product protections contained in the Commentary to Section 8C2.5 of the Federal Sentencing Guidelines. For the reasons explained below, we urge the Commission to amend that language to clarify that waiver of attorney-client privilege and work product protections should not be a factor in determining whether a sentencing reduction for cooperation with the government is warranted.

Background

On April 30, 2004, the Commission submitted to Congress a number of amendments to Chapter 8 of the Guidelines relating to organizations. Included in these amendments, all of which became effective on November 1, 2004, was the addition of 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.

¹The Coalition to Preserve the Attorney-Client Privilege includes the following organizations: American Chemistry Council, 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, the U.S. Chamber of Commerce, and Washington Legal Foundation. The American Civil Liberties Union (ACLU) is a part of the coalition as well but was not able to secure approval to co-sign this comment letter prior to today's deadline. The ACLU did sign the coalition's August 15, 2005 comment letter to the Commission, referenced in footnote 5, *infra*, which makes many of the same substantive points outlined in this comment letter. Although the American Bar Association is prevented by internal policies from formally joining coalitions, it is working in close cooperation with the Coalition to Preserve the Attorney-Client Privilege on the privilege waiver issue and will be filing separate comments with the Commission today on the issue of “Chapter Eight – Privilege Waiver.”

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

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Before the adoption of the privilege waiver amendment, the Commentary was silent on privilege and contained no suggestion that such a waiver would ever be a factor in charging or sentencing decisions. The issue of waiver emerged during deliberations of the Commission's Ad Hoc Advisory Group on the Organizational Guidelines. The Advisory Group was concerned about the effect on effective corporate compliance programs of the Justice Department's privilege waiver policies, as spelled out in the Holder and Thompson Memoranda.³ After considering the views of the Department of Justice, various bar associations, and regulated entities—and weighing the concerns raised by numerous representatives of the business community and various legal groups—the Advisory Group recommended privilege waiver language somewhat similar to, though more general than, the language quoted above. The Commission revised that language and incorporated it into the 2004 amendments to the Guidelines.

After the 2004 privilege waiver amendment to the Guidelines was adopted, a broader cross-section of business, legal, and public policy organizations, including many of the undersigned entities and the American Bar Association (ABA), began to evaluate the substantive and practical impact of the waiver provision on their operations—and on the legal and business communities in general—and communicated their concerns to the Commission. On March 3, 2005, the coalition sent a letter to the Commission expressing its concerns over the privilege waiver amendment. The ABA expressed similar concerns in its separate letter to the Commission dated 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 coalition submitted a comment letter to the Commission on August 15, 2005, urging it to reverse the privilege waiver amendment and add language to the Guidelines stating that waiver should not be a factor in determining cooperation. Similar comment letters opposing the November 2004 privilege waiver amendment were also filed by a prominent group of nine former senior Justice Department officials—including three former Attorneys General—and by the ABA.

In August 2005, the Sentencing 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. Subsequently, several organizations from the coalition, former Attorney General Dick Thornburgh, and the ABA, testified before the Commission on November 15, 2005, on the subject of privilege waiver. During the November 15 hearing, the coalition presented the results of its April 2005 surveys of in-house and

³ 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.

outside counsel, both of which confirmed the importance of the privilege to corporate counsel and the growing trend of government-coerced privilege waiver.⁴ At that hearing, the Commission asked coalition members to help to gather additional information and data 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.

After considering the comments and testimony presented by the coalition, the ABA, and others,⁵ 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.⁶

In response to the Commission's November 15, 2005, request for additional information and data on the frequency of government demands for privilege waiver and their effects, the coalition undertook a second, more detailed survey of in-house and outside corporate counsel. The results of the new survey were presented to the Commission in early March 2006.⁷ Subsequently, on March 15, 2006, two representatives of the coalition—Susan Hackett of the Association of Corporate Counsel (ACC) and Kent Wicker of the National Association of Criminal Defense Lawyers (NACDL)—testified before the Commission regarding the results of the new survey.

Unintended Consequences of the 2004 Privilege Waiver Amendment to the Guidelines

The coalition continues to believe that the 2004 changes to the Section 8C2.5 Commentary of the Sentencing Guidelines, though well-intentioned, have helped cause a number of profoundly negative unintended consequences. The results of our new survey provide substantial and compelling evidence supporting the validity of these concerns. In our view, the 2004 privilege waiver amendment to the Guidelines, combined with the existing Justice Department privilege waiver policy as expressed in the Holder and Thompson Memoranda, has led to the following negative consequences:

⁴ Executive summaries of these April 2005 surveys are available online at www.acca.com/Surveys/attyclient.pdf and [www.nacdl.org/public.nsf/Legislation/Overcriminalization002/\\$FILE/AC_Survey.pdf](http://www.nacdl.org/public.nsf/Legislation/Overcriminalization002/$FILE/AC_Survey.pdf), respectively.

⁵ Links to all of the comment letters, written testimony, and other statements that the coalition, the ABA, and the former senior Justice Department officials previously presented to the Sentencing Commission and Congress are available at <http://www.abanet.org/poladv/acprivilege.htm>. In addition, other useful materials regarding privilege waiver are available on the ABA Task Force on Attorney-Client Privilege website at <http://www.abanet.org/buslaw/attorneyclient/>.

⁶ See Notice of Proposed Amendments, Request for Public Comment, and Notice of Public Hearings, 71 Fed. Reg. 4782-4804 (January 27, 2006).

⁷ 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 privilege waiver amendment and related Justice Department policies and practices have forced companies 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, it is the experience of our members that 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, it is our perception that the Justice Department, as well as other enforcement agencies, view 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 indict them for being “uncooperative” presents an unacceptable prospect of diminished or destroyed public image, stock price, and standing in the marketplace.

The concerns previously expressed by the coalition that government-coerced waiver had become routine—and that the 2004 privilege waiver amendment was a significant factor contributing to that trend—were confirmed by the results of the new coalition survey. In particular, the survey revealed the following trends:

A Government “Culture of Waiver” Exists. Almost 75% of both inside and outside corporate counsel respondents believe (almost 40% believe strongly) 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 or work product protections.” (Only 1% of inside counsel and 2.5 % of outside counsel disagreed with the statement.)

Waiver is a Condition of Cooperation. Fifty-two percent of in-house respondents and 59% of outside respondents confirmed that they believe that there has been a marked increase in waiver requests as a condition of cooperation. Consistent with that finding, roughly half of all investigations or other inquiries experienced by survey respondents resulted in privilege waivers.

A “Government Expectation”⁸ of Waiver of Attorney-Client Privilege Confirmed. Of the respondents who confirmed that they or their clients had been subject to investigation in the last

⁸ The survey defined ‘government expectation’ of waiver as a demand, suggestion, inquiry or other showing of expectation by the government that the company should waive the attorney-client privilege.

five years, approximately 30% of in-house respondents and 51% of outside respondents said that the government expected waiver in order for a company to engage in bargaining or to be eligible to receive more favorable treatment.

Prosecutors Typically Request Privilege Waiver – It Is Rarely “Inferred” by Counsel. Of those who have been investigated, 55% of outside counsel responded that waiver of the attorney-client privilege was requested by enforcement officials either directly or indirectly. Twenty-seven percent of in-house counsel confirmed this to be true.⁹ Only 8% percent of outside counsel and 3% of in-house counsel said that they “inferred it was expected.”

Sentencing Guidelines Rank Second Only to Justice Department Policies Among the Reasons Given For Waiver Demands. Outside counsel indicated that while the Justice Department’s waiver policies (i.e., the Thompson/Holder/McCallum Memoranda) are cited most frequently when a reason for waiver is provided by an enforcement official, the Sentencing Guidelines are cited second. In-house counsel placed the Guidelines third, behind “a quick and efficient resolution of the matter,” and Justice Department policies, respectively.

Based on this survey data, and the voluminous anecdotal evidence provided by the in-house and outside corporate counsel in the essay portions of our survey, it is clear that government demands for privilege waiver have become routine and that the 2004 privilege waiver amendment to the Guidelines have been a significant contributing factor to this growing trend.

•The 2004 privilege waiver amendment has helped to weaken the confidentiality of communications between companies and their lawyers. Lawyers for companies and other organizations play a key role in helping these entities and their officials comply with the law and act in the entity’s best interests. To fulfill this role, lawyers must enjoy the trust and confidence of managers, boards, and other key personnel of the entity and must be provided with all relevant information necessary to properly represent that 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.

The results of the original, April 2005 surveys of in-house and outside corporate counsel conducted by the ACC and the NACDL confirmed the important purpose that privilege and work product doctrines serve in facilitating the lawyer’s work, with over 95% of respondents expressing agreement with this principle. (See April 2005 ACC and NACDL surveys at pgs. 4 and 5, respectively) In addition, over 90% of respondents in both surveys believed that the privilege enhances the likelihood that company employees will discuss sensitive/difficult issues regarding legal compliance. (*Id.* at pgs. 4 and 6, respectively) The April 2005 surveys also confirmed the chilling effect that privilege waiver would have on the confidential attorney-client relationship. According to those surveys, approximately 95% of both in-house and outside corporate counsel agreed that there would be “a ‘chill’ in the flow/candor of information provided to counsel if the

⁹ Sixty percent of in-house counsel who had experience with a waiver request responded “N/A” (not applicable) to this question, suggesting they had not been present when privilege waivers were discussed.

privilege did not offer protection to client communications or your attorney work-product.” (*Id.* at p. 3)

In addition, in response to the open-ended text questions offered at the end of the new March 2006 survey, numerous in-house and outside corporate counsel confirmed that government-coerced waiver policies have had a severe chilling effect on the attorney-client relationship and on the ability of corporate attorneys to counsel their clients to comply with the law. The following quotations are typical of the many narrative responses to the survey’s open-ended questions:

“The fear of privilege waiver has curtailed my ability to frankly and strongly direct my colleagues in areas of risk. I can no longer send memos that say: ‘under no circumstances may you do this,’ or the like, for fear of reprisal [in the future]. My inability to speak forthrightly forces my advice to be sugar-coated in ways that I believe lessen my power and effectiveness to force others to do the right thing... When things appear as if they will be highly sensitive, I carefully retain outside counsel, often in matters I could handle better internally, thereby wasting significant not-for-profit dollars because of the government’s inappropriate intrusion in this formerly sacrosanct land.” (*See* March 2006 survey results at p. 15)

“Our corporate strategy is to have in-house counsel active and involved in business deals early and often. We have found that this significantly minimizes the risk that employees engage in questionable behavior. This ‘prevention’ strategy demands on open dialogue with employees. DOJ demands for waiver have a chilling effect on our employees seeking out in-house counsel to discuss potentially tricky legal situations. We depend on open lines of communication with employees and these are being strained by DOJ’s policy and their push to alter the Sentencing Guidelines. We should have policies in place that encourage dialogue with employees. DOJ’s waiver push is short sighted and counter productive.” (*Id.*)

“It is my opinion that the concept of the government asking any person (either individual or corporate) to waive attorney-client privilege in order to facilitate their investigation is a travesty of justice. The attorney-client privilege is there as a means to have open discussions between the client and their attorney regarding all possibilities. To allow for this type of request will merely result in many corporations no longer including in-house counsel in important decision making processes which may in fact lead to even more wrongdoing.” (*Id.*)

“In my experience, it is remarkably difficult for corporations and their employees to get legal advice in today’s environment. There is a clear expectation -- sometimes unspoken, often spoken -- that any communication, privileged or not, will be shared with the government. There is no balancing of the advantages of waiver against the risks, including the company’s ability to defend itself in ongoing civil litigation. This puts company counsel in a completely untenable position, unable to give or seek advice freely. The important purposes behind the privilege are simply being ignored.” (*Id.* at p. 16)

“Reviewing the reports of waivers and requested waivers in the general press and in the legal periodicals has had a chilling effect on my function as general counsel. I warn our

senior managers regularly that they should not count on having any privilege regarding their communications with me. We try hard to follow the law at this organization, so criminal prosecution is not a concern. What is a concern is that the continued erosion of privilege in prosecution by state and federal agencies will spill over into the civil arena. We are in a business sector in which litigation is common and the stakes are often very large. The self-censoring I feel compelled to do at this point hinders the company's ability to protect against or plan for anticipated claims." (*Id.*)

"As a result of our experiences, we now routinely advise our clients that there is...[no] such thing as information protected by the attorney client privilege. Although I have no belief that the prosecutors requiring the waivers understand what they have done, within a matter of a few years, these attorneys have utterly eviscerated the attorney client privilege and undermined the most important aspect of the attorney client relationship. As a result, instead of advancing the interests of the public, government attorneys have now created a situation where clients are going to be less, not more, forthcoming; a result that will only lead to more corporate misdeeds." (*Id.*)

"At this stage, much of the damage is done--one has to conduct affairs, take (or not) notes, write communications and obtain information on the assumption that there will be no protection. In that environment, lawyers are already much less effective in discovering information and counseling compliant conduct." (*Id.*)

The sheer number of these and the many other unequivocal responses to the new survey demonstrate that prosecutors' routine demands for waiver—further exacerbated by the 2004 amendment to the Guidelines—have seriously weakened the confidential attorney-client relationship between many companies and their lawyers and made it more difficult for the lawyers to counsel compliance with the law.

•The privilege waiver amendment helps to undermine internal compliance programs. The net effect of the privilege waiver amendment and other government policies encouraging routine waiver is to make the detection of corporate misconduct more difficult by undermining companies' internal compliance programs and procedures. As the Commission itself has repeatedly emphasized, effective corporate 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. The April 2005 surveys confirmed the important contribution that the attorney-client privilege makes to internal compliance programs, with over 94% of corporate counsel respondents agreeing that the privilege improves the lawyer's ability to monitor, enforce, and improve compliance initiatives. (*See* April 2005 ACC and NACDL surveys at pgs. 4 and 6, respectively.) Unfortunately, because the effectiveness of these internal investigations depends 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 privileges 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 compliance practices.

The new March 2006 survey confirmed the fact that when prosecutors request that a company waive its privileges, they often seek sensitive documents directly relating to companies' internal investigations, including (1) written reports of an internal investigation, (2) files and work papers that supported an internal investigation, (3) lawyers' interview notes or memos or transcripts of interviews with employees who were targets, (4) notes/oral recollections of privileged conversations with or reports to senior executives, board members, or board committees, and (5) lawyers' interview notes with employees who were not available for interviews by the government or memos/transcripts of the same. (See March 2006 survey at pgs. 8-10) Clearly, prosecutors are taking a very expansive view regarding the types of sensitive internal materials that companies should be forced to turn over during investigations.

•**The privilege waiver amendment unfairly harms employees by infringing on their individual rights.** The privilege waiver amendment and the other governmental policies encouraging routine waiver 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 losing their employment. It is fundamentally unfair to force employees to choose between keeping their jobs and preserving their legal rights.

In the new survey, many outside corporate counsel confirmed that government-coerced waiver has had substantial adverse effects on companies' employees in a number of specific ways. A majority of the outside counsel who responded to the survey cited instances in which prosecutors encouraged or required companies to take certain actions against employees, including (1) not advancing legal expenses to, or agreeing to reimburse, a targeted employee, (2) not entering into, or breaching, a joint defense agreement with a targeted employee, (3) refusing to share requested documents with a targeted employee, or (4) discharging an employee who would not consent to be interviewed by the government. (See March 2006 survey at p. 13.)

Moreover, many if not most corporate criminal investigations do not involve black-and-white types of potential criminality, such as embezzlement. Particularly in the environmental field, there can be substantial question whether the conduct that the government posits is even illegal. In such cases, companies are often being coerced to identify, and treat as possible criminals, employees whose conduct they regard as lawful. In such "gray" areas, the possibility that employees' conversations with company counsel may be turned over to the government can quickly and prematurely squelch such communications.

For all these reasons, we believe that the privilege waiver amendment is flawed and uniquely dangerous to our shared goal of protecting the policies that are advanced by the attorney-client relationship.

Congressional Concern Regarding Privilege Wavier

In addition to the coalition, the ABA, and the former senior Justice Department officials referenced above, many prominent Congressional leaders have also expressed serious concerns regarding both the 2004 privilege waiver amendment to the Sentencing Guidelines and the Justice Department's internal privilege waiver policy.

On March 7, 2006, the House Judiciary Subcommittee on Crime, Terrorism, and Homeland Security held a hearing on the subject of "White Collar Enforcement (Part 1): Attorney-Client Privilege and Corporate Waivers." Witnesses testifying at the hearing included 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

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. After noting the "institutional tension between preserving corporate attorney-client and work product privileges and a prosecutor's quest to unearth the truth about criminal acts," Chairman Coble made the following remarks:

Prosecutors must be zealous and vigorous in their efforts to bring corporate actors to justice. However, zeal does not in my opinion equate with coercion in fair enforcement of these laws. To me, the important question is whether prosecutors seeking to investigate corporate crimes can gain access to the information without requiring a waiver of the attorney-client privilege. There is no excuse for prosecutors to require privilege waivers as a routine matter, it seems to me. This subcommittee will examine the important issue with a keen eye to determine whether Federal prosecutors are routinely requiring cooperating corporations to waive such privilege...[In addition to the McCallum Memorandum of October 21, 2005,] I am also aware of the fact that the Sentencing Commission is examining its current policy of encouraging such waivers when determining the nature and extent of cooperation. 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...

During the March 7 hearing, the Subcommittee's Ranking Member, Rep. Robert Scott (D-VA), expressed similar concerns regarding erosion of the attorney-client privilege. After acknowledging the many policy reasons for preserving the privilege, Rep. Scott noted:

For some time now I have been concerned about reports that the Department of Justice is coercing corporations to waive their attorney-client privilege during criminal investigations of the corporation and its employees by making waiver a prerequisite for consideration by the Department and its recommendation for not challenging leniency should criminal conduct be established...It is one thing for officials of a corporation to break the attorney-client privilege in their own self-interest by their own volition. It is another thing for the Department to require or coerce it by making leniency considerations contingent upon it, even when it is merely on a fishing expedition on the part of the Department. Complaints have indicated that the practice of requiring a waiver of the corporate attorney-client privilege has become routine. And of course, why wouldn't it be the case? What is the advantage to the Department of not requiring a waiver in the corporate investigation?...Now, coercing corporate attorney-client privileges has not been—has not long been the practice in

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>.

the Department. It has really been the last two administrations that have practiced this, and it has been growing by leaps and bounds...

Similar concerns were also raised during the hearing by Reps. Dan Lungren (R-CA)—who previously served as California Attorney General—and William Delahunt (D-MA)—a long-time former prosecutor. During the question and answer period, Rep. Lungren reiterated his longstanding opposition to the 2004 privilege waiver amendment to the Sentencing Guidelines:

Just to put it on the record, I have submitted a letter last August to the Sentencing Commission regarding my concerns about the Sentencing Commission's commentary with respect to the rule. It looks to me like that amendment authorizes and encourages the Government to require entities to waive the attorney-client privilege and work product protections as a condition of showing cooperation. And that is the huge concern that I have here.

During his questioning of Associate Attorney General McCallum, Rep. Lungren favorably compared companies' current efforts to preserve their attorney-client privilege with the Bush Administration's recent attempts to invoke and preserve executive privilege:

If we in the Congress were to every time the President says that there is a reason to protect executive privilege, not only for his administration but for future administrations, that every time he did that he was violating the sense of cooperation that should prevail between two equal branches of government, I think we would be wrong. And I see the Justice Department taking a position that if a corporate defendant or potential defendant refuses to waive that privilege, that is a priori evidence of the fact that they are not cooperating. And that is the problem I really have here... And so I would ask, don't you see the creeping intrusion here? I mean, first you have the first [Holder] memorandum. Now we have the second [Thompson] memorandum, which is a little tighter and a little tougher. And then, following that, you have the Sentencing Commission...[adding privilege waiver language to the Guidelines], well, that is a bad idea...

Rep. Delahunt expressed similar concerns regarding the erosion of the privilege in recent years and questioned Associate Attorney General McCallum's assertion that government-coerced waiver may be necessary to effectively investigate complex corporate frauds. Rep. Delahunt stated:

You know what I can't understand, Mr. McCallum, is what happened in the past 10 years?... For 20 years of my own professional life...I was a prosecutor. Did a number of sophisticated white collar crime investigations. And, I mean, there are grand juries. There is the use of informants... We knew how to squeeze people without sacrificing or eroding the attorney-client privilege...I just have this very uneasy feeling that it is the easy way to do it...There is a certain level of...why should I have to really exercise myself to secure the truth...I got to tell you something. I am a little annoyed with the Sentencing Commission, too, making this [e.g., privilege waiver] a factor...

At the conclusion of the hearing, Rep. Delahunt summed up the serious concerns that various Subcommittee members had previously expressed regarding governmental privilege waiver policies. In his final comments to Mr. McCallum, Rep. Delahunt explained:

I think you can probably sense by the questions that have been posed, as well as observations by individual members, that there is a real concern here. And you don't want someone like [Rep.] Lungren from California, you know a far right conservative Republican, and [Rep.] Delahunt, this Northeast liberal, filing legislation on this because I think that is the order of magnitude that is being expressed here. So respectfully, that is a message that I think you can bring back to Justice, is that there is concern about the Thompson/McCallum Memorandum. Okay?

The concerns that the members of the House Judiciary Subcommittee expressed during the March 7 hearing are consistent with those previously expressed 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

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

In order to stop and reverse the negative consequences resulting from the 2004 privilege waiver amendment to the Guidelines, 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 for cooperation with the government.

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 conference dealing with the erosion of the attorney-client privilege that was sponsored by the U.S. Chamber of Commerce, the ABA, the ACC, the NACDL, and the American Civil Liberties Union. A transcript of Sen. Specter's comments and Rep. Sensenbrenner's prepared statement are available online at http://www.abanet.org/poladv/acpriv_transcriptofsenspecter11-16-05.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.

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 the opportunity to present our views on this important matter.

Respectfully submitted,

AMERICAN CHEMISTRY COUNCIL

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

THE U.S. CHAMBER OF COMMERCE

WASHINGTON LEGAL FOUNDATION

United States Sentencing Commission

March 28, 2006

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cc: Members of the U.S. Sentencing Commission
Charles R. Tetzlaff, General Counsel, U.S. Sentencing Commission
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March 27, 2006

United States Sentencing Commission
One Columbus Circle, NE
Suite 2-500
Washington, DC 20002-8002
Attention: Public Affairs

**Re: The 2004 Amendment to the Commentary
to Section 8C2.5 of the United States Sentencing Guidelines**

Dear Sir or Madam:

I am pleased to enclose the report of our Association's Task Force on Attorney-Client Privilege, commenting on the 2004 amendment to the Commentary to Section 8C2.5 of the United States Sentencing Guidelines. This report was approved unanimously by our Association's Executive Committee earlier today, and represents the position of the New York State Bar Association. As set forth in the report, we urge that the 2004 amendment language be eliminated and replaced with an express statement that waiver of the attorney-client privilege and work-product protection is not to be considered in evaluating the level of cooperation and culpability score.

The attorney-client privilege is one of the most fundamental and sacred principles of our legal system. We believe that the 2004 amendment undermines the attorney-client privilege and thus undermines clients' confidence in the confidentiality of attorney-client communications, affects the quality and candor of communications, and adversely affects the ability of counsel to provide clients with effective representation. Given the potential of significant increases in penalties in the absence of waiver, there is tremendous pressure on corporations to waive a privilege that, for centuries, has been recognized as serving the public interest.

I commend this report to you for your review and consideration. If our Association can provide additional information or comment on this issue, please do not hesitate to contact me.

Very truly yours,

A. Vincent Buzard



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Report of Task Force on Attorney-Client Privilege

March 27, 2006

The Task Force on Attorney-Client Privilege of the New York State Bar Association, joined by the Business Law Section of the Association, welcomes the opportunity to respond to the request by the United States Sentencing Commission (the "Commission") for comments on the 2004 amendment to the Commentary to Section 8C2.5 of the United States Sentencing Guidelines (the "Guidelines").¹ This amendment stated that waiver by a corporation of its attorney-client privilege and work product protections (hereinafter jointly referred to as the "Privilege") can be considered in determining whether a corporation qualifies for a reduction in its sentence under the Guidelines.²

Summary of Issue and Conclusion

The amended Commentary authorizes and encourages the government to require entities to waive the Privilege and, by its express appearance in the Guidelines, has contributed to the pressure on entities to waive the Privilege. As a result, in the experience of the members of the Task Force, waiver has become the rule, not the exception. Many attorneys have come to believe that it is necessary for their clients to offer to waive the Privilege in the hope of obtaining credit for cooperation, even when waiver has not been requested, and there have been many situations where corporate clients have felt compelled to waive the Privilege, before even being asked, lest they be viewed as less than fully cooperative and less than fully interested in having the truth revealed.

We believe that this has, and will have, the effect of undermining the confidence of clients in the confidentiality of their communications with their attorneys, will have a "chilling effect" upon

¹ The Task Force on Attorney-Client Privilege was appointed by President Vincent Buzard of the New York State Bar Association to examine and make recommendations concerning the practice of state and federal prosecutors, regulators and agencies of requesting that corporations waive their attorney-client privilege and the protection of the work product rule in various circumstances, including plea agreements, deferred prosecution agreements, decisions as to whether to commence enforcement proceedings, and sentencing. The Task Force consists of fifteen members from private practice, the government, self-regulatory organizations, and law school faculty, including two former United States Attorneys for the Eastern District of New York, three former Assistant United States Attorneys for the Southern and Eastern Districts of New York, a former SEC Division of Enforcement Branch Chief, an attorney for the New York Stock Exchange, a professor of Law at Fordham Law School and well known and highly distinguished criminal and civil defense counsel.

The Business Law Section is comprised of members of the New York Bar whose practices focus in the fields of securities regulation, corporation law, finance, banking, and commercial law. The Section includes lawyers in private practice, in-house counsel of corporate legal departments, law school faculty, and self-regulatory agencies.

² The views set forth in these comments are those of the New York State Bar Association, the Task Force and Business Law Section and do not necessarily reflect the views of the organizations with which its members are associated.

the quality and candor of those communications, and will compromise the ability of counsel to provide effective representation of their clients.

We urge the Commission to remove the amended Commentary and, instead, to include an express statement in the Commentary that waivers of the attorney-client privilege and work product rule are not to be considered in evaluating the level of cooperation of a defendant or in determining the appropriate sentence under the Guidelines.³ We recognize that there may be rare instances in which prosecutors may need to request that a corporation waive the Privilege as part of an investigation; removal of the Privilege waiver language from the Commentary will not deprive prosecutors of that option.

Introduction

The first formal written suggestion that a corporation seeking to avoid criminal prosecution and demonstrate cooperation waive the attorney-client privilege and work product protections arose in a June 1999 Department of Justice memorandum prepared by Deputy Attorney General Eric H. Holder, Jr. That document, entitled "Bringing Criminal Charges against Corporations", outlined the factors for a prosecutor to consider in charging a target corporation. One such factor was the target's degree of cooperation in the criminal investigation. In gauging the extent of cooperation, the prosecutor was to consider the corporation's willingness to identify the culprits, to make witnesses available, to disclose the results of its internal investigation, and to waive the attorney-client privilege and work product protection.

In discussing the reasons for seeking waiver, the Holder Memorandum noted the advantages of obtaining the results of the corporation's internal investigation and communications between specific employees and counsel. This permits the government to obtain witness statements without having to negotiate individual cooperation or immunity agreements. In addition, it enables the government to evaluate the completeness of a corporation's voluntary disclosure and cooperation.

On its heels in October 2001 was the Securities and Exchange Commission 21(a) Report entitled the "Statement on the Relationship of Cooperation to Agency Enforcement Decisions" (the so-called "Seaboard Report"). In the Seaboard Report, the SEC announced that no action was being taken against a corporation for fraudulent activities by a former controller of a subsidiary. In making this determination, the SEC stated that the corporation cooperated in the SEC's investigation and did not assert the applicable attorney-client privilege and work product protection. The Report sets forth a number of criteria that the SEC will consider in determining whether and how much to credit cooperation, including the following: "Did the company voluntarily disclose information our staff did not directly request and otherwise might not have uncovered?" By so stating, the SEC was, in our view, encouraging companies to consider not asserting, or waiving, privileges they otherwise might have, even when not requested by the SEC staff.

In 2003, Deputy Attorney General Larry D. Thompson issued a Memorandum to the heads of Department Components and United States Attorneys. Mr. Thompson reiterated the statements from

³ Two members of the Task Force, Loretta E. Lynch, Esq. and Jean I. Walsh, Esq., dissent from the recommendation that the Commentary contain an express statement that waivers of the Privilege not be considered.

the Holder Memorandum about the advantages of seeking waiver, and that the Department of Justice did not consider waiver of the corporation's attorney-client privilege and work product protection an "absolute requirement." He further stated that the willingness of a corporation to waive the Privilege "when necessary to provide timely and complete information" is one factor to consider in evaluating a corporation's cooperation.

In November 2004, the Sentencing Commission added the language to the Commentary to Section 8C2.5 of the Guidelines that is addressed in these comments. That language encourages prosecutors to request that corporations that are criminal targets or defendants waive the Privilege in the hope of a lesser sentence. The amendment, which is close to the language of the Holder and Thompson memoranda, contains 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."

Last October, Acting Deputy Attorney General Robert D. McCallum, Jr. issued a memorandum that directed each federal office to establish "a written waiver review process." While one might argue that this is a useful first step, the memorandum allowed each office to make its own guidelines and did not provide for any central review of the waiver request process, and we know of individual offices that still have no meaningful process in place.

In January 2006, the SEC issued a "Statement Concerning Financial Penalties", listing factors it will consider in deciding whether and how to impose financial penalties on a corporation. The two principal considerations set forth by the SEC are the presence or absence of a direct benefit to the corporation from the violation and the degree to which a financial penalty will recompense or further harm the injured shareholders. In addition, the SEC identifies several other factors including the extent of cooperation with the SEC and other law enforcement. Thus, to avoid civil SEC charges, and substantial monetary penalties, a corporation is encouraged to cooperate by, among other things, waiving the Privilege.

The Task Force believes that the Commentary to Section 8C2.5 of the Guidelines, and the foregoing pronouncements by the Department of Justice and the SEC, have brought about a sea change in how attorneys advise their clients when they are faced with possible prosecution and have resulted in a substantial increase in the frequency with which corporate clients have been waiving the Privilege. While one could argue that the increased corporate fraud culture over the past ten years has brought this about, that neither justifies it nor merits its continuation. The attorney-client privilege and work product doctrine are predicated upon jurisprudence which recognizes the critical importance of the confidentiality of communications between client and counsel. An important first step in reversing this sea change would be to amend the Guidelines as proposed herein.

Analysis and Comments

The Attorney-Client Privilege in our Society

The attorney-client privilege is "the oldest of the privileges for confidential communications."⁴ For centuries, in English and American law, the attorney-client privilege has been firmly grounded in the recognition that a client's opportunity to consult with counsel, in confidence, serves the public interest.⁵ In the words of Dean John Wigmore, "the privilege appears as unquestioned."

The attorney-client privilege is expressly recognized in both the Federal Rules of Civil Procedure and the Federal Rules of Evidence.⁶ Except in limited circumstances, absent a knowing and voluntary waiver by the client, no third party, or government authority, can learn the contents of attorney-client communications made for the purpose of obtaining legal advice. The confidentiality of such communications has been protected because of the long-standing consensus that we all are best served when lawyers are able to provide their clients with legal advice based on a full understanding of the relevant facts.

Although the courts have recognized that protecting communications between lawyer and client may hinder the search for truth, the courts have consistently held that this "impairment is outweighed by the social and moral values of confidential consultations. The attorney-client privilege provides a zone of privacy within which a client may more effectively exercise the full autonomy that the law and legal institutions allow."⁷ The attorney-client privilege benefits society because it helps create the trust that must exist between client and attorney in order to encourage open and full discussion with counsel. The attorney-client privilege makes it possible for an attorney to obtain the information necessary to prepare an informed defense and to provide clients with the advice they need to comply with the law.

Our laws have become so complex, particularly in the financial, health and securities fields, that it is virtually impossible for a corporation to comply with the law without the advice of counsel that is based on a full communication of the underlying facts by the client. If the client believes that, down the road, it may be required to waive the privilege and make those communications available to others, there is the real risk that, over time, the corporation's officers and employees will be less willing to seek out legal advice, or they may fail to disclose all the relevant facts for fear that their statements may at a later day be made available to the SEC or prosecutors. In addition, a lawyer may modify his or her advice over concern that it may be subject to second guessing later by others in litigation or overzealous government prosecutors seeking to criminally charge attorneys for purported wrongdoing. The United States Supreme Court stated in Upjohn Co. v. United States, 449 U.S. 383 (1981), that failure to respect the privilege of these communications "threatens to limit the valuable efforts of corporate counsel to ensure their client's compliance with the law."

⁴ J. WIGMORE, EVIDENCE IN TRIALS AT COMMON LAW at 542 (McNaughton rev. 1961).

⁵ See, e.g., WIGMORE, supra note 12, §2291, at 545-49.

⁶ See Fed. R. Civ. P. 26(b)(1) and Fed. R. Evid. 502.

⁷ American Law Institute, RESTATEMENT OF THE LAW GOVERNING LAWYERS, § 68. c, at 520 (2000).

This chilling effect upon communications between attorney and client is harmful to society overall, and we believe it a deleterious and unintended effect of the 2004 amendment. It cannot be the goal of the Department of Justice, the SEC, or this Commission to discourage compliance with the law, or the communications by which corporate clients seek out the legal advice they need in order to comply. In order to reach the goal of having clients fully and truthfully communicate with counsel, so that they may be guided in their dealings and compliance with the law, there needs to be a reliable assurance to clients and attorneys of the confidentiality of the communications. Unfortunately, this is no longer the case, in large measure because of the Holder and Thompson memoranda, the SEC Seaboard Report, and the Commission's 2004 Amendment.

The Prevalence of Waiver

When a corporation learns of wrongdoing, it frequently engages counsel to ferret out the facts of what occurred, analyze the applicable law, and advise the corporation. As part of this process, which may or may not be known to government authorities at the time, counsel will usually conduct an investigation, which involves interviewing company employees and reviewing and analyzing documents, and then render advice to the client about what to do to stop or correct any wrongful conduct. Counsel will also advise on whether any laws have been violated, whether the violations are civil or criminal, whether criminal prosecution or civil litigation is likely, and whether the corporation needs to or should disclose the findings and conclusions.

At some point, civil and criminal investigators get involved, and in this current environment, the corporation needs to consider whether to waive the Privilege and disclose attorney-client communications made at the time of the conduct that is under investigation, communications by agents of the corporation with counsel during the investigation, and the notes, memoranda and correspondence written by the attorneys in connection with the investigation. In the experience of the members of our Task Force, this was unheard of a generation ago, and was rarely considered or explored even ten years ago.⁸

The inclusion of the language concerning waiver in the 2004 amendments to the Guidelines has put the waiver issue into "play". While stated in the negative (that waiver of the Privilege should not be a prerequisite to a reduction in culpability score) and providing an exception, the exception unfortunately has become the rule. It is not so much that the Department of Justice, the SEC and other regulators now regularly request a waiver, although a recent survey suggests that the practice is prevalent.⁹ They need not even do so, as the practice of expecting a waiver to occur has

⁸ A further consideration is whether privileged materials may be provided to the government, but not to others such as plaintiffs in class action litigation. There is a body of law that is followed in a majority of the federal circuits which states that if a client waives the privilege or work product protection as to one set of parties, such as a prosecutor or regulatory body, the privilege is waived for at least those same communications and materials for all purposes and all others. See, e.g., *In re Columbia/HCA Healthcare Corporation Billing Practices Litigation*, 293 F.3d 289 (6th 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). Accordingly, advising a client to waive the Privilege so it can cooperate with the Department of Justice and obtain a benefit in sentencing is a challenging task.

⁹ A March 2006 Survey Report by a coalition of organizations, aided by the ABA, had the following findings. About 75% of outside counsel have had to consider the issue of waiver for a client during the last five years, and

become so prevalent, and the benefits of doing so have become so tempting, that corporate counsel are now encouraged to convince their clients to forsake the protections of the Privilege so as to obtain the benefit of being seen as cooperative. The amendment itself, by being included as part of the Guidelines, thus codifies a trend that has accelerated in the last several years. The inevitable effect has been that corporations that do not hasten to waive the Privilege are quickly viewed as hiding something of value behind the Privilege; thus, in practice, there has been an *in terrorem* effect on counsel and their clients who want to cooperate with authorities – they must waive or be deemed uncooperative and engaged in a conspiracy of silence.

The Task Force recognizes that the Department of Justice and SEC pronouncements on cooperation list numerous factors, only one of which is waiver of the Privilege. Moreover, there are times when it may be appropriate for the government, in the interests of justice and in the search for the truth, to request that the Privilege be waived. Target corporations may also sometimes hide behind the Privilege, either improperly or by an over expansive interpretation of its parameters. However, there is no empirical study known to us which proves that law enforcement today is any more effective than, say 20 or 40 years ago—when waiver of the Privilege was rarely done or considered.

High profile cases such as Enron, Adelphia and WorldCom have produced a more diligent and aggressive enforcement program for criminal and civil authorities alike. Now, more than at any other time, there is a coordination of activities by prosecutors and regulators, and parallel investigations and proceedings. This development is expected. The Task Force recognizes the value and need for such programs.

However, the parallel investigations present difficult choices for clients and counsel. Each agency and authority has its own view and guidelines on whether cooperation is expected by a client, how to gauge that cooperation, and whether waiver of the Privilege is a factor considered for cooperation and resolution of the matter. For example, the SEC will consider waiver as a factor of cooperation, but agree in writing that disclosure of privileged communications and work product is only selective and will not be deemed a general waiver as to others. The CFTC has on occasion demanded waiver of privileged communications immediately at the commencement of an investigation, and has refused to give any written comfort that the waiver would be deemed limited. The Guidelines Commentary, however, trumps any nuances of these civil regulators when there are parallel investigations. This is an unfortunate result, and we believe an unintended consequence of the 2004 amendment. An attorney may counsel a client not to waive the Privilege for a civil regulator. However, with the Holder and Thompson memoranda, and the language of the 2004 amendment, with the possibility of criminal charges and sentencing, there is an overriding, almost compulsive, urge to waive. This should not be so, and is exactly the opposite of what the language of the Commentary suggests.

approximately 50% of in-house counsel have had to do so. Over 50% of both groups confirmed that they believed there has been a marked increase in waiver requests by prosecutors. 55% of outside counsel who have represented clients under investigation said that prosecutors had requested waiver, directly or indirectly, as part of cooperation. *The Decline of the Attorney-client Privilege in the Corporate Context* available at <http://www.acca.com/Surveys/attyclient2.pdf>

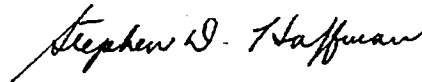
Conclusion

The attorney-client privilege has served the true administration of justice for centuries by protecting confidentiality and promoting the candor that results in accurate fact-finding and effective legal advice. The 2004 amendment language, together with the Holder and Thompson Memoranda and their regulatory progeny, threaten to seriously compromise this ancient privilege to the detriment of the legal system and the society it serves. The exception in the amendment has become the norm.

For this and the reasons cited herein, we urge the Commission to eliminate the 2004 amendment language that encourages a corporation to waive the attorney-client privilege and work product protections to obtain a reduction in sentence under the Guidelines. There should instead be an express statement that waiver of the attorney-client and work product protections is not to be considered in evaluating the level of cooperation of the defendant and its culpability score.

Respectfully submitted,

New York State Bar Association
Task Force on the Attorney-Client Privilege ¹⁰



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¹⁰ While an Assistant U.S. Attorney from the U.S. Attorney's Office for the Eastern District of New York is on the Task Force, she did not participate in drafting the position set forth in this letter, and the letter does not represent her views, the views of her Office or the views of the Department of Justice.

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March 28, 2006

U.S. Sentencing Commission
Attn: Public Affairs
One Columbus Circle NE
Washington, DC 20002-8002

***Re: Proposed Amendments on Privilege Waiver Language in
the Federal Sentencing Guidelines***

Dear Sir/Madam:

The Association of the Bar of the City of New York¹ (the "Association"), respectfully submits this letter, prepared by its Committee on Criminal Law ("the Committee"), in response to the Commission's January 27, 2006 Notice of Proposed Amendments, 71 F.R. 4782-4804, which seeks public comment on whether the privilege waiver language in the commentary at Section 8C2.5 should be deleted or amended. *See* U.S. Sentencing Commission, *Guidelines Manual*, § 8C2.5(g), comment 12 (Nov. 2004). This letter explores a few of the principal concerns that arise in connection with waivers of the attorney-client privilege and work product protection during corporate investigations, and provides the Committee's recommendations to help ensure that these

¹ The Committee is one of the oldest and largest local bar Committees in the United States, with a current membership of over 22,000 lawyers. The Committee serves not only as a professional Committee, but also as a leader and advocate through the work of over 170 committees. Among other activities, the Committee's committees prepare comments for legislative bodies, regulatory agencies, and rule making committees on pending and existing laws, regulations, and rules that have broad legal, regulatory, practical, or policy implications. Further information regarding the Committee can be found at its web site, <http://www.abcny.org>.

fundamental legal protections, which are essential to fair and effective corporate compliance regimes, will be respected and maintained.

1. *The current language is having unintended consequences.*

By 2004, when the Commission amended the Commentary to Section 8C2.5 of the Sentencing Guidelines for Organizations, requests for a waiver of the attorney-client privilege, once a rare event, had become a frequently used practice of prosecutors. The 2004 amendment effectively codified the practice, establishing it as a benchmark for regulators and prosecutors to determine whether an organization had engaged in the “timely and thorough cooperation” needed to obtain leniency. In the wake of this amendment, the Holder and Thompson Memoranda, and the Seaboard Report,² there has been a dramatic increase in government demands for access to privileged attorney-client communication and attorney work product. According to a survey recently conducted by the National Committee of Criminal Defense Lawyers, nearly three-quarters of the 1,400-plus inside and outside counsel who responded agreed that a “culture of waiver” has evolved in which government agencies expect a company under investigation to waive the attorney-client privilege or work product protection. Moreover, nearly three-quarters of outside counsel said that the expectation of privilege waiver was communicated rather than implied.³

The Committee’s members counsel their clients within this “culture of waiver” every day. Our members are active in the Southern and Eastern Districts of New York, and their practices routinely involve discussions of presumptive waivers with federal prosecutors, the SEC, and, as the practice has grown increasingly commonplace, with state authorities as well. Indeed, many of the Committee’s members find that, in the current climate, waivers of the attorney-client privilege and work product protection are almost always implied, and frequently directly discussed, in their conversations with federal prosecutors as well as state and federal agencies; often, such waivers are

² *Report of Investigation Pursuant to Section 2(a) of the Securities Exchange Act of 1934 and Commission Statement on the Relationship of Cooperation to Agency Enforcement Decisions*, SEC Release Nos. 34-44969 and AAER-1470 (October 23, 2001), available at <http://www.sec.gov/litigation/investreport/34-44969.htm>.

³ This survey is available online at <http://www.acca.com/Surveys/attyclient2.pdf>.

demanding at the outset of investigations, before other alternatives for gathering information have even been considered.

Although the language in the Commentary of Section 8C2.5 does not explicitly require companies to surrender the attorney-client privilege and work product protection in order to receive a reduction in culpability score for cooperation under the Guidelines, and is in fact meant to limit compelled waiver, when a company's lawyers have gathered information about a potential violation and prosecutors and regulators do not have the same information, these prosecutors and regulators routinely assert that waiver would lead to "timely and thorough disclosure." This language has thus helped to reinforce the expectation of waiver among regulators, prosecutors, and defense lawyers.

Significantly, there is no obvious mechanism for challenging the government's routine assertion that waiver is "necessary." The government often demands waiver of a corporation's attorney-client privilege and work product protection as a precondition for the grant of cooperation that might prevent indictment or reduce punishment. In actual practice, these policies provide prosecutors and regulators with tremendous incentives and ability to push for ever greater disclosures. In contrast, companies under investigation have essentially no ability to resist the government's demands.

The Justice Department's McCallum Memorandum, issued on October 21, 2005, does not address the problem of a corporation's inability to mount a meaningful challenge to waiver. It is concerned principally with process and merely calls for each U.S. Attorney's Office to "establish a written waiver review process"; the McCallum Memorandum does not question the substance of Justice Department policy or even seek national uniformity of decision-making in this area.

In short, it appears that a company's decision to broadly waive work product protection and the attorney-client privilege – and all too frequently, *only* the decision to broadly waive – will be the test of whether the government deems a company to be cooperative. Because the charge of non-cooperation will typically have profoundly serious adverse effects on a company's public image and bottom line, companies are routinely forced to waive these protections whenever the government seeks it.

In addition, in virtually every jurisdiction – including the jurisdictions where the majority of the Committee's members commonly practice – the waiver of the attorney-

client privilege and work product protection for one party constitutes a waiver as to all parties. The Association is concerned that compelled waiver increases the cost of cooperation with the government. Once they are disclosed to the government, work product and privileged materials will inevitably be turned over to private plaintiffs, who can capitalize on the disclosure of sensitive information turned over to the government during a criminal investigation to strengthen their civil cases. The risk of expensive and time-consuming future litigation is a harsh penalty, particularly for organizations that have chosen to cooperate with the government on its terms.

Even if, in a given case, a waiver will speed the government's access to relevant information, it is not at all clear that the benefit in a given case outweighs these substantial systemic harms caused by a culture of routine waiver.

2. The Commentary has had serious adverse effects on the administration of justice.

The public policy justification for encouraging corporate waivers appears to be that waiver will lead to quicker and increased access to information for the government and that the justice system as a whole will benefit as a result. We suspect that the opposite is true. Compelled waivers do not enhance compliance with the law. Rather, corporate officers and employees who are reluctant to involve lawyers in business activities translates into a greater risk that those officers and employees will break the law. Routine government demands for waiver of attorney-client privilege and work product protection cause lawyers to lose the trust and confidence of the employees of the companies they represent. In turn, this erosion of trust and confidence undercuts lawyers' abilities to counsel compliance with the law effectively.

Compelled waivers also hobble internal corporate investigations and prevent companies from detecting and correcting illegal activity. When employees suspect that anything said to a company lawyer can and will be used against them, both by their employer and, potentially, by a prosecutor, they may refuse to say anything at all.

3. *The Commentary should be amended to stress that waiver is not a required element of cooperation.*

The Association notes that, in addition to the unintended consequences noted above, waivers of attorney-client privilege and work product protection may simply not be appropriate in all cases of corporate wrongdoing. We therefore recommend that the Commission adopt affirmative language that emphasizes, without exception, that waivers of attorney-client privilege and work product protection should not be used to determine whether a sentence reduction under the Guidelines is warranted. Moreover, we urge the Commission to adopt language that ensures that cooperation requires the disclosure only of "all pertinent *non-privileged* information known to the organization," and that such waivers are to be requested, if at all, on a case-by-case basis, rather than demanded uniformly in order for a corporation to receive credit for cooperation with the government during an investigation.

Finally, the Association is concerned that this issue has broader implications for the integrity of the attorney-client relationship generally, beyond the context of business organizations. A robust attorney-client relationship is fundamental to our adversarial system of justice. Without it, and its accompanying frank disclosures to informed counsel, the system cannot function effectively. Individuals and organizations would have less ability to protect their rights. This is especially true in the context of criminal law. The current language of the Commentary suggests that a waiver of the attorney-client privilege is a necessary condition of cooperation. The logical corollary of that position is that a refusal to grant such a waiver amounts to a failure to cooperate, which the government may effectively view as obstruction. This result would be a troubling and unwelcome burden on the attorney-client relationship. Our system of justice should encourage counsel to gather facts and give advice in confidence, not treat these essential functions as obstacles to be overcome.

Thank you for the opportunity to share the Association's views on this matter of critical importance.

Respectfully submitted,



Bettina B. Plevan

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March 28, 2006

VIA FACSIMILE, EMAIL AND UPS NEXT DAY AIR

Mr. Michael Courlander
Public Affairs Officer
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Washington, D.C. 20002-8002

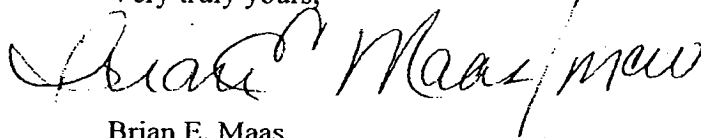
Re: Proposed Comments to 1/27/06
Amendments to Sentencing Guidelines

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 dark 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.



**THE STATE BAR
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**COMMITTEE ON PROFESSIONAL
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March 22, 2006

Michael Courlander, Public Affairs Officer
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Washington D.C. 20002-8002

Subject: Request for Public Comment on Proposed Amendments to the Sentencing Guidelines for the United States Courts (71 FR 4782-4804)

Dear Mr. Courlander:

The State Bar of California's Standing Committee on Professional Responsibility and Conduct ("COPRAC")¹ appreciates this opportunity to submit its views on the commentary (the "Commentary") to Section 8C2.5 of the United States Sentencing Commission's ("Commission") 2004 amendments to Chapter Eight, the "Organizational Sentencing Guidelines."²

COPRAC's charge is to assist the more than 150,000 active members of the California State Bar in their desire to appreciate and adhere to ethical and professional standards of conduct. In so doing, we recognize that one of our primary constituencies is the public, and that our actions are governed by the objective of serving the public interest. These comments are submitted with those objectives in mind.

As explained below, COPRAC urges the Commission to delete the Commentary and instead adopt an alternate commentary providing that "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]."

¹ This position is only that of the State Bar of California's Standing Committee on Professional Responsibility and Conduct. This position has not been adopted by the State Bar's Board of Governors or overall membership and should not be construed as representing the position of the State Bar of California. Committee activities relating to this position are funded from voluntary sources.

² The Commentary provides: "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."

COPRAC begins by noting the purposes behind the attorney-client privilege and work product protection. Over a century ago, the United States Supreme Court declared that the assistance of lawyers "can only be safely and readily availed of when free from the consequences or the apprehension of disclosure." *Upjohn Company v. United States*, 449 U.S. 383, 389 (1981), quoting *Hunt v. Blackburn*, 128 U.S. 464 (1888). The existence of the privilege facilitates an important process. Privilege begets client trust, which in turn induces clients to make full and frank disclosures to their lawyers. Those disclosures enable effective legal representation, which entails the lawyer's assistance in helping the client comply with law. Any regulations or administrative policies that inhibit that process will impinge on the "broader public interests in the observance of law and administration of justice." *Upjohn*, 449 U.S. at 389. These concerns are more pressing than ever. We live in an evermore complicated regulatory environment where organizations turn to lawyers for assistance in compliance with law—compliance that inures to the benefit of the clients and the public as well.

The work product protection has different purposes but, like the attorney-client privilege, serves to "promote justice." As Justice Murphy noted in *Hickman v. Taylor*, 329 U.S. 495, 510-511 (1947):

Historically, a lawyer is an officer of the court and is bound to work for the advancement of justice while faithfully protecting the rightful interests of his clients. In performing his various duties, however, it is essential that a lawyer work with a certain degree of privacy, free from unnecessary intrusion by opposing parties and their counsel. Proper preparation of a client's case demands that he assemble information, sift what he considers to be the relevant from the irrelevant facts, prepare his legal theories and plan his strategy without undue and needless interference. That is the historical and the necessary way in which lawyers act within the framework of our system of jurisprudence to promote justice and to protect their clients' interests.

Because the work product protection dealt with representation before or during litigation, the protection historically served the legitimate adversarial needs of litigants. Consistent with that historical framework, an organization accused by the federal government of wrongdoing has a compelling need to draw upon the services of a lawyer who can prepare a legitimate defense without fearing that the government will coerce a waiver of the work product protection. But the work product protection does more than that. Today, a great deal of compliance activity is driven by the threat or presence of litigation that is then resolved through settlement, consent decrees, stipulated injunctions, and similar mechanisms. The vast majority of litigated cases now settle out of court—and that is particularly true for large organizational clients facing litigation initiated by the federal government. Thus, the work product protection now not only serves the legitimate adversarial needs of litigants but also facilitates the compliance function as well.

Unless the Commission deletes the Commentary and expressly provides that waiver of the attorney-client privilege or work product protections will never be a prerequisite to a reduction in culpability score under subdivisions (1) and (2) of subsection (g) [Self-Reporting, Cooperation, and

Acceptance of Responsibility], the Commission will be doing serious long-term damage to the public benefits derived from the confidential nature of the attorney-client relationship.

First, although the Commentary suggests that waivers will not be a prerequisite to a reduction in culpability score except when necessary to provide timely and thorough disclosure, the exception is likely to swallow the rule. At sentencing, a federal prosecutor who did not receive the organization's privileged communications and work product is likely to argue in virtually all instances that waivers were necessary to effect a more timely and thorough disclosure from the organization. And, since the organization will at that time have been found culpable, there is a substantial likelihood that its earlier failure to provide a waiver will outweigh all other aspects of its self-reporting, cooperation and acceptance of responsibility. Thus, retaining this aspect of the 2004 amendment to the sentencing guidelines will contribute significantly to a new climate in which organizations expect that communications with their counsel will not be protected.³

But, in fact, waivers will virtually never be necessary to a timely and thorough investigation by a federal agency or prosecutor. Federal agencies and prosecutors will still have the full subpoena powers provided by federal law. Organizations will still have strong incentives to provide information to investigating agencies, and those agencies will have ample tools to test the veracity of that factual information. Further, federal prosecutors will still be able to assert the crime fraud exception to the attorney-client privilege and, if a prima facie showing is made, will gain access to otherwise privileged materials. However, there is a material difference between having a judge determine the privilege has been waived due to commission of a crime or fraud, and creating a climate where no organization can take comfort that any of its consultations with its counsel are confidential because a federal agency or prosecutor has essentially been empowered to demand a waiver without any finding that the attorney's services have been used in the commission of a crime or fraud.

Second, as waivers become more commonplace, compliance with law will suffer. The judicial opinions cited above, which draw on centuries of practical wisdom, make that point. But it also follows from common sense. In the modern regulatory environment, and especially after enactment of the Sarbanes-Oxley Act in 2002, organizations rely heavily on in-house and outside lawyers to gather facts, analyze compliance issues, conduct investigations and recommend courses of conduct that comply with law. Lawyers cannot represent organizations effectively if they are routinely seen by their clients as actively working as an arm of the federal government. For lawyers to fulfill their role, everyone at the organization from the board members down to the line employees must trust that the lawyers are working to represent the organization consistent with the long-recognized duty of undivided loyalty, and not as agents of the government.

The negative effects of having sentencing guidelines that result in routine waivers will only increase over time, as more and more organizations will come to doubt their lawyers' loyalties and as

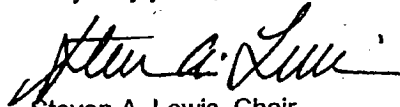
³ See the March 6, 2006 Association of Corporate Counsel Survey indicating that [in light of the Thompson Memorandum as well as the 2004 Amendments to the Organizational Sentencing Guidelines] the vast majority of corporations and their counsel are now operating in a climate in which they expect a request for waiver to be a part of any regulatory or prosecutorial investigation initiated by an arm of the federal government.

organizational agents will come to fear that the organization's lawyers are future federal informants. Those doubts and fears will necessarily reduce the amount and quality of information shared with the organization's lawyers as well as the amount and quality of legal advice provided by counsel. This slow erosion of the lawyers' role as agents of legal compliance would then take many years to reverse. In the meantime, the organization, its employees, its investors, and the public itself will be deprived of the benefits of the organization's compliance with law in accordance with the advice of counsel.

For these reasons, COPRAC urges that the Commentary be deleted and that the Commission take affirmative steps to prevent further erosion of the attorney-client privilege and work product protection by finding that waiver is not a prerequisite to a reduction in culpability score.

Thank you for your consideration of our opinion in this matter.

Very truly yours,



Steven A. Lewis, Chair
Committee on Professional
Responsibility and Conduct

cc: Hon. Dianne Feinstein, United States Senate
Hon. Elton Gallegly, United States House of Representatives
Hon. Daniel E. Lungren, United States House of Representatives
Hon. Darrell E. Issa, United States House of Representatives
Hon. Howard L. Berman, United States House of Representatives
Hon. Zoe Lofgren, United States House of Representatives
Hon. Maxine Waters, United States House of Representatives
Hon. Adam B. Schiff, United States House of Representatives
Hon. Linda T. Sánchez, United States House of Representatives
Members of COPRAC
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Mark A. Taxy, COPRAC Staff Counsel



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CISC

March 22, 2006

United States Sentencing Commission
One Columbus Circle, N.E.
Suite 2-500, South Lobby
Washington, D.C. 20002-8002
Attention: Public Affair – Sentencing Guidelines Comment

Re: Comments on Proposed Amendments to the Sentencing Guidelines
Chapter Eight – Privilege Waiver
Section 8C2.5, Waiver of Attorney-Client Privilege

Dear Sir/Madam:

On behalf of the Bar Association of San Francisco, representing 8,500 attorneys in the State of California, we write in response to the Commission's request for comments on the above-referenced Proposed Amendments, Chapter Eight, Privilege Waiver. In particular, we write in regard to the 2004 Amendment to the commentary regarding Section 8C2.5(g). This new commentary authorizes the government to require entities to waive the attorney-client and related work product protections in order to show 'thorough' cooperation with the government.

We have several concerns, all flowing from our strongly-held belief in the fundamental character of the lawyer's duty of confidentiality to the client. In California, this duty of confidentiality has been expressed for more than 130 years in near-absolute terms through California Business and Professions Code Section 6068(e), which states: "It is the duty of an attorney ... [t]o maintain inviolate the confidence, and at every peril to himself or herself to preserve the secrets, of his or her client." There has only been one express exception to this statutory duty: a very recent amendment, effective July 1, 2004, to allow disclosure to prevent a criminal act reasonably likely to result in death or substantial bodily harm.

California has been extremely zealous in guarding and protecting client confidences and secrets. We believe that such protection is necessary for the client to obtain sound legal advice. Such advice can only come after the client has fully disclosed the facts of the case without fear that these facts might later be disclosed to adverse parties. Without such protection, we believe a client would be far more guarded in discussions with counsel. This would have a direct negative effect on the quality of the legal advice.

Good legal advice assists clients in increased compliance with the law. Full knowledge of the client's facts and issues enables counsel to guide the client through complex issues and thus stay within the confines of the law. Limited knowledge hampers counsel and may lead to inappropriate advice, with resulting damage to the client and harm to the society. Fear of eventual disclosure through erosion of the attorney-client privilege and related work product rules is likely to hamper candid discussions with counsel, limit effective internal investigations, and curtail effective internal audits and compliance initiatives.

One of the purposes of work product protection is to prevent the parties from borrowing the work, insights, and wits of their adversaries. *Hickman v. Taylor*, 329 U.S. 495, 510-11 (1947). Work product protection is a right of the attorney, not of the client. The attorney has an independent right to assert the protection of his or her own work product. *In re Grand Jury Proceeding (FMC Corp.)*, 604 F.2d 798, 801-02 (3d Cir. 1979). *In re Sealed Case*, 676 F.2d 793, 812, fn. 75 (D.C. Cir. 1982).

The sentence added in 2004 to the Commentary at Section 8C2.5(g) is capable of misapplication, particularly in light of policies adopted by the Department of Justice. As set forth in the Holder Memorandum, attorney-client privilege and work product protections are not protected. Instead, they are deemed to be "... necessary in order to provide timely and thorough discussion of all pertinent information known to the organization." Waivers of privilege have become the standard for measuring the adequacy of cooperation in charging decisions and sentencing arguments. This means that prosecutors force the accused to have the accused's attorneys, accountants, and investigators prepare cases for them instead of using prosecutors' own diligence in preparing cases. As stated in the Holder Memorandum, "Such waivers permit the government to obtain statements of possible witnesses, subjects, and targets without having to negotiate individual cooperation or immunity agreements." The hidden agenda behind this statement is the implied addition of the phrase "... and so we do not have to conduct such investigations ourselves."

The requirements that cooperation be both "timely" and "thorough" are also abused. The requirement of "timeliness" means that disclosure must begin "... essentially at the same time as the organization is officially notified of a criminal investigation." Sentencing Guidelines § 2.5(g), Comment 12. This can be self-defeating. For example, it takes time to conduct an investigation. If a criminal investigation has begun before the organization's own internal investigation has been completed, the information disclosed when the organization is notified of a criminal investigation may be incomplete or inaccurate and therefore misleading. "Thoroughness" requires "the disclosure of all pertinent information known by the organization." *Ibid*. However, an organization can disclose the substance of its knowledge without having to disclose attorney-client communications and without having to divulge the work product of its counsel. For example, an organization can disclose that John Jones falsified a bookkeeping entry that materially affected a financial statement without also having to disclose that the organization's attorney communicated that information to its board of directors.

We suggest that the sentencing guidelines should honor attorney-client confidentiality and the work product doctrine. The philosophy that ought to be reflected in the sentencing guidelines appears in the United States Attorneys' Manual at Title 9, § 9-13.200:

Department of Justice attorneys should recognize that communications with represented persons at any stage may present the potential for undue interference with attorney-client relationships and should undertake any such communications with great circumspection and care. This Department as a matter of policy will respect *bona fide* attorney-client relationships whenever possible, consistent with its law enforcement responsibilities and duties.

After all, when the Department of Justice represents federal employees, its own standards explicitly recognize the value of attorney-client confidentiality:

Attorneys employed by any component of the Department of Justice ... undertake a full and traditional attorney-client relationship with the employee with respect to application of the attorney-client privilege. ... Any adverse information communicated by the client-employee to an attorney during the course of such attorney-client relationship shall not be disclosed to anyone, either inside or outside the Department, other than attorneys responsible for representation of the employee, unless such disclosure is authorized by the employee.

28 C.F.R. § 50.15(a)(3).

The sentencing guidelines should honor that attitude when addressing issues of privilege for the accused. It should be unethical for a prosecutorial agency to demand that an accused waive attorney-client confidentiality or work product protection on threat of increased culpability scores. Whether the accused is an individual or a corporation, he, she, or it should be entitled as a matter of right to protection of the confidentiality of attorney-client

11-77



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responsible for representation of the employee, unless such disclosure is authorized by the employee.

28 C.F.R. § 50.15(a)(3).

The sentencing guidelines should honor that attitude when addressing issues of privilege for the accused. ~~It should be unethical for a prosecutorial agency to demand that an accused waive attorney-client confidentiality or work product protection on threat of increased culpability scores.~~ Whether the accused is an individual or a corporation, he, she, or it should be entitled as a matter of right to protection of the confidentiality of attorney-client communications.

The sentencing guidelines ~~should affirmatively state that:~~

1. Waiver of the confidentiality of attorney-client communications is not a prerequisite to a reduction in culpability score, without exception.
2. If the cooperation of the accused is timely and thorough, the refusal of the accused to waive privileges or to disclose otherwise privileged information is irrelevant.
3. Disclosure "... of all pertinent information ..." should be modified to say "of all non-privileged, pertinent information. ..."
4. If counsel for the accused asserts protection of the work product doctrine, that assertion will not affect the culpability score of the accused.

We believe that these amendments are consistent with those proposed by the American Bar Association in the submission to the Commission dated November 15, 2005. Such amendments would accomplish three important goals in the protection of client confidentiality:

- Make clear that cooperation only requires the disclosure of non-privileged information and
- Eliminate the concept that waiver of attorney-client privilege and related work product protections is a factor in the determination of the client's 'thorough' cooperation with the government.

We appreciate this opportunity to present our views to the Commission.

Yours very truly,

Joan Mei Haratani

Joan Haratani
President, The Bar Association of San Francisco
Bar Association of San Francisco

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March 28, 2006

2005-06 Term

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VIA E-MAIL TO pubaffairs@ussc.gov
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Washington, D.C. 20002-8002
Attention: Public Affairs

Re: Proposed Amendments to the United States Sentencing Guideline
§ 8C2.5 contained in 71 Fed. Reg. 4782-4804

Dear Sir or Madam:

Kindly accept this letter to state the position of the Middlesex County Bar Association regarding whether the Commission should reconsider a portion of its 2004 amendments to Chapter Eight, the Organizational Sentencing Guidelines, namely, the portion of commentary at §8C2.5(g) regarding waiver of attorney-client privilege and of work product protection.

The Middlesex County Bar Association strongly supports the November 15, 2005 Statement of Donald C. Klawiter, Chair Of The ABA Antitrust Law Section, on behalf of the American Bar Association, appearing before The United States Sentencing Commission, on this issue. A copy of Mr. Klawiter's statement is attached for reference.

We thank the Commission for considering the views of our organization. Thank you.

Yours truly,

Stephen E. Klausner

STEPHEN E. KLAUSNER
President

Enclosure

SEK/jpc

cc: Darren M. Gelber, Esq., MCBA Trustee

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STATEMENT OF
DONALD C. KLAWITER
CHAIR OF THE ABA ANTITRUST LAW SECTION
on behalf of
THE AMERICAN BAR ASSOCIATION
appearing before the
UNITED STATES SENTENCING COMMISSION
concerning
PROPOSED AMENDMENT OF COMMENTARY IN SECTION 8C2.5 OF THE
FEDERAL SENTENCING GUIDELINES
REGARDING WAIVER OF ATTORNEY-CLIENT PRIVILEGE
AND WORK PRODUCT DOCTRINE
NOVEMBER 15, 2005

[160]

Mr. Chairman and Members of the Commission:

My name is Donald C. Klawiter. I have been asked by Michael S. Greco, President of the American Bar Association (ABA), to present the ABA's views concerning recent changes to the Federal Sentencing Guidelines that we believe weaken both the attorney-client privilege and the work product doctrine. In particular, I have been asked to express the ABA's support for the Commission's decision to make it a policy priority this year to review, and possibly amend, the Commentary in Chapter Eight (Organizations) of the Guidelines regarding waiver of the attorney-client privilege and work product protections.¹ The ABA has suggested several specific changes to the Commentary that are set out at the end of my statement.

It is my privilege to serve as the Chair of the Antitrust Law Section of the American Bar Association, a section consisting of approximately 10,000 antitrust lawyers, professors and other professionals throughout the country. In that capacity, I have been authorized to express the position of the American Bar Association, and its more than 400,000 members, on the important issue of privilege waiver. We welcome the opportunity to work with you and your staff to improve the law and serve the interests of the public.

On August 15, 2005, the ABA filed a formal comment letter² with the Commission in response to its Notice of Proposed Priorities for the amendment cycle ending May 1, 2006.³ In that comment letter, the ABA urged the Commission to retain its tentative policy priority number (5), described in the Notice as a "review, and possible amendment, of commentary in Chapter Eight (Organizations) regarding waiver of the attorney-client privilege and work product protections." The ABA also urged the Commission, at the end of its review, to amend the applicable language in the Commentary to clarify that waiver of attorney-client privilege and work product protections

¹See the United States Sentencing Commission's Notice of Final Priorities for the 2005-2006 amendment cycle, policy priority number (6), 70 Fed. Reg. 51398 (August 30, 2005).

²The ABA's August 15 comment letter to the Commission is available at: <http://www.abanet.org/buslaw/attorneyclient/materials/049/049.pdf>.

³70 Fed. Reg. 37145 (June 28, 2005).

should not be a factor in determining whether a sentencing reduction is warranted for cooperation with the government. The ABA is very pleased that the Commission has decided to retain the privilege waiver issue on its final list of priorities for the upcoming amendment cycle, and we continue to urge the Commission to adopt our suggested amendment.

The ABA has long supported the use of the 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*. At the conclusion of that process, the ABA adopted a new policy recommending that Congress 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 Federal Sentencing Guidelines at the present time, we have serious concerns regarding several specific amendments to the Sentencing 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 Sentencing 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 amendments⁴, our greatest concern involves a change in the Commentary to Section 8C2.5 that authorizes and encourages the government to require entities to waive their attorney-client and work product protections in order to show “thorough” cooperation with the government and thereby qualify for a reduction in the culpability score—and a more lenient sentence—under the Sentencing Guidelines (the “privilege waiver amendment”). Prior to the change, the Commentary was silent on the issue and contained no suggestion that such a waiver would ever be required.

Since the adoption of the privilege waiver amendment to the Sentencing Guidelines, the ABA—working with a large and diverse group of business and legal organizations from across the political spectrum—has evaluated the substantive and practical impact that ever-increasing demands for privilege waiver have had on the business and legal communities. For example, the National Association of Criminal Defense Lawyers and the Association of Corporate Counsel each recently conducted surveys⁵ of in-house and outside counsel to determine the extent to which attorney-client and work product protections have been eroded in the corporate context. In addition, the American Bar Association’s Task Force on Attorney-Client Privilege is examining various issues involving erosion of attorney-client and work product protections, including the privilege waiver amendment, and has held several public hearings on these subjects⁶. As a result, the ABA has concluded that the

⁴ In August 2004, the ABA House of Delegates 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 the related background reports, are available at <http://www.abanet.org/poladv/acprivilege.htm>.

⁵ Executive summaries of these surveys are available online at [www.nacdl.org/public.nsf/Legislation/Overcriminalization002/\\$FILE/AC_Survey.pdf](http://www.nacdl.org/public.nsf/Legislation/Overcriminalization002/$FILE/AC_Survey.pdf) and www.acca.com/Surveys/attyclient.pdf, respectively.

⁶ Materials relating to the work of the ABA Task Force on Attorney-Client Privilege are available on its website at www.abanet.org/buslaw/attorneyclient/.

new privilege waiver amendment, though undoubtedly well intentioned, will bring about a number of profoundly negative consequences.

First, the ABA believes that as a result of the privilege waiver amendment, companies and other organizations will be required to waive their attorney-client and work product protections on a routine basis. The Commentary to Section 8C2.5 states that "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." But the exception is likely to swallow the rule. Prosecutors will make routine requests for waivers, and organizations will be forced routinely to grant them, because, among other things, there is no obvious mechanism for challenging the government's assertion that waiver is "necessary."

The Justice Department has followed a general policy of requiring companies to waive privileges in many cases as a sign of cooperation since the 1999 "Holder Memorandum" and the 2003 "Thompson Memorandum." Anecdotal evidence abounds where companies have been asked to turn over internal investigation reports and waive both attorney-client privilege and work product protection in cooperating with the government, even though "on the record" examples, by the very nature of the process, are hard to come by. Companies are reluctant to speak publicly about their experiences for good reason. They deal with the agencies that regulate them on a routine basis, and it is generally in a company's best interest to stay on good terms with those agencies. Companies also guard their public image and are reticent to reveal unnecessarily the existence or details of governmental investigations into their conduct. Where companies *can* come forward with their experiences, the routine nature of the government's practice is clear. For example, we recently learned that some fifty general counsel met with Paul McNulty of the Justice Department regarding

abuses of the privilege. The former General Counsel of a now defunct steel company was one of them, and his story follows.

When Bethlehem Steel was still in existence, a disgruntled former employee told authorities that the company was burying toxic waste at one of its sites in Texas. Fifty federal agents arrived at the company with a search warrant and backhoes and started digging up the yard. No buried drums were ever found, but, in the course of the search, the investigators found evidence of garden variety environmental violations that, in most circumstances, likely would have been pursued as civil violations. Perhaps understandably, the Justice Department did not want to drop the matter altogether, and decided to pursue a criminal investigation.

At their very first meeting with the General Counsel, the Justice Department demanded the privileged internal report prepared by outside counsel and sought cooperation from the company in pursuing charges against individual employees. No middle ground alternative was entertained. Firmly believing that no knowing or intentional violation had occurred, the General Counsel declined the request, and the company prepared its defenses. In the end, the Justice Department did not charge a single individual; the company negotiated a plea and paid a fine.

The Bethlehem Steel example demonstrates that the Justice Department prosecutors—operating under an increasingly expansive interpretation of the Holder and Thompson Memoranda—will seek internal investigation reports and privilege waivers even in cases that arguably never should have been prosecuted. Now that the privilege waiver amendment to the Sentencing Guidelines has become effective, there may be no limit on the Justice Department's ability to put pressure on companies to waive their privileges in almost all cases. Our concern is that the Justice Department, as well as other enforcement agencies, will contend that this change in the Commentary to the Guidelines provides Commission and Congressional ratification of the Department's policy of routinely requiring privilege waivers. From a practical standpoint,

companies will have no choice but to waive these privileges whenever the government demands it, because the government's threat to label them as "uncooperative" in combating corporate crime would profoundly threaten their public image, stock price, and credit worthiness.

Second, the ABA believes that the privilege waiver amendment seriously weakens the attorney-client privilege 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 managers, boards and other key personnel of the entity and must be provided with all relevant information necessary to properly represent the entity. By encouraging routine government demands for waiver of attorney-client and work product protections, the amendment discourages personnel within companies and other organizations from consulting—or being completely candid—with their lawyers. This, in turn, seriously impedes the lawyers' ability to counsel compliance with the law effectively.

Third, while the privilege waiver amendment was intended in good faith to aid government prosecution of corporate criminals, the ABA believes that its actual effect is to make detection of corporate misconduct more difficult, by undermining companies' internal compliance programs and procedures. These mechanisms, which often include internal investigations conducted by the company's in-house or outside lawyers, are one of the most effective and efficient tools for detecting and flushing out improper conduct. Indeed, Congress recognized the value of these compliance tools when it enacted the Sarbanes-Oxley Act. Because the effectiveness of these internal investigations 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 privileges will be honored makes it more difficult for companies to detect and remedy wrongdoing early or even stop improper conduct before it takes

place. Therefore, rather than promoting good compliance practices, the privilege waiver amendment undermines this laudable goal.

Fourth, the ABA believes that the privilege waiver amendment unfairly harms employees. The amendment places 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 run the 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. In the ABA's view, it is fundamentally unfair to force employees to choose between keeping their jobs and preserving their legal rights.

In recent months, many other organizations have expressed similar concerns regarding the privilege waiver amendment to the Sentencing Guidelines. These concerns were formally brought to the Commission's attention on March 3, 2005—and again on August 15, 2005—when an informal coalition of numerous prominent business, legal and public policy organizations⁷ submitted joint comment letters urging the Commission to reverse or modify the privilege waiver amendment. The remarkable political and philosophical diversity of that coalition, with members ranging from the U.S. Chamber of Commerce and the National Association of Manufacturers to the American Civil Liberties Union and the National Association of Criminal Defense Lawyers, shows just how widespread these concerns have become in the business, legal and public policy communities.

The ABA shares these concerns and believes that the privilege waiver amendment is

⁷ The signatories to the March 3, 2005 letter to the Commission were the American Chemistry Council, American Civil Liberties Union, Association of Corporate Counsel, Business Civil Liberties, Inc., Business Roundtable, Frontiers of Freedom, National Association of Manufacturers, U.S. Chamber of Commerce, and Washington Legal Foundation. The ABA also expressed similar concerns to the Commission in its separate letter dated May 17, 2005. The coalition's August 15, 2005 comment letter was signed by the same groups that signed the March 3 letter, as well as the Financial Services Roundtable, National Association of Criminal Defense Lawyers, National Defense Industrial Association and Retail Industry Leaders Association. The coalition's August 15, 2005 comment letter is available online at: <http://www.abanet.org/buslaw/attorneyclient/materials/047/047.pdf>.

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.

Because of the serious and immediate nature of this harm, we urge the Commission during its 2005-2006 amendment cycle to modify the applicable language in the Commentary to clarify that the 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 for cooperation with the government.

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 to 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 the ABA's recommendations were adopted, the relevant portion of the Commentary would read as follows⁸:

"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 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.~~"

⁸ 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.

We appreciate the opportunity to appear before the Commission and present our views on the important issue of privilege waiver, and we look forward to working with you and your staff on this matter throughout the current amendment cycle.



March 27, 2006

United States Sentencing Commission
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Elizabeth K. Ainslie
eainslie@schnader.com

William G. McGuinness
mcguilwi@ffhsj.com

RE: Review and Possible Amendment of
Application Note 12 to Guidelines Section 8C2.5(g)

Dear Chairman Hinojosa and Members of the Commission:

As Chairs of the Federal Criminal Procedure and Attorney-Client Relations Committees of the American College of Trial Lawyers (the "College"), we write on behalf of the College, and with the approval of its Executive Committee, to provide its views on the waiver language contained in the present version of Application Note 12 to Section 8C2.5.¹ We appreciate the Commission's willingness to receive public comment on this important issue.

As currently formulated, the Application Note reads in pertinent part:

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.

¹ The American College of Trial Lawyers, founded in 1950, is an association of the trial bar from the United States and Canada. Fellowship in the College is extended by invitation only, after careful investigation, to those experienced trial lawyers who have mastered the art of advocacy and whose professional careers have been marked by the highest standards of ethical conduct, professionalism, civility and collegiality. There are currently more than 5,500 Fellows who practice throughout the United States and Canada; fellowship is limited to a maximum of 1% of the total lawyer population of any state or province. Fellows are carefully selected from among those who represent plaintiffs and those who represent defendants in civil cases, and those who prosecute and those who defend persons accused of crime. The College is thus able to speak with a balanced voice on important issues affecting the administration of justice. The College strives to improve and elevate the standards of trial practice, the administration of justice and the ethics of the trial profession.

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The College recommends that the Commission amend the Application Note to make clear that waiver of the attorney-client privilege and the work product doctrine (collectively, the "Privilege") should not be taken into account in determining an organization's Culpability Score under §8C2.5. Rather, whether an organization has "fully cooperated in the investigation" for purposes of subsection (g)(1) or (g)(2) should be determined by whether the organization has made timely disclosure of all pertinent *non-privileged* information known to it. The final sentence of the Application Note, as currently written, unfortunately creates an exception that swallows the rule, and also requires sentencing judges to make unnecessarily difficult hindsight determinations about whether a particular defendant organization that has provided all pertinent non-privileged information to the government should also have waived the Privilege.

This recommendation flows directly from the College's long-standing concern that developments in the conduct of federal criminal investigations pose substantial threats to the integrity of the Privilege. In 2002, the College published a report titled "The Erosion of the Attorney-Client Privilege and Work Product Doctrine in Federal Criminal Investigations" (the "2002 Report"), a copy of which is attached to this letter at tab A. The 2002 Report addresses threats to the Privilege beyond the sentencing issue presented here. However, the College believes that the Sentencing Commission has an important role to play in safeguarding the Privilege. As an independent agency in the judicial branch, beholden neither to the institutional interests of the Department of Justice nor to the self-interest of corporations potentially subject to investigation, the Commission is uniquely well-situated to take a stand that will promote the effective administration of justice in the long term by protecting Privilege, thereby protecting the important values it serves.

The 2002 Report sets forth at length the many benefits produced by the Privilege — we will not list all of these benefits separately here, but it is worth emphasizing that, especially for corporate clients trying to navigate today's complex legal and regulatory environment, these benefits are tangible and practical, not simply a matter of high-toned rhetoric. Moreover, by encouraging effective compliance and risk management programs, the Privilege benefits not only the corporate clients but society and the legal system as a whole.

However, as set forth at length in the 2002 Report, routine prosecutorial demands for a privilege waiver in order to show "cooperation" with an investigation create a number of systematic



problems that far outweigh whatever public benefit might be gained by the incremental information made available to the prosecution in a particular case. Pressure on a company to waive the Privilege in order to secure lenient treatment from prosecutors can and does easily build to the point where the decision to waive is effectively coerced. Just as importantly, this pressure leads to a "culture of waiver," which systematically undercuts effective representation of companies by both inside and outside counsel even before a request to waive is made, because a privilege known to be of uncertain durability is in effect no privilege at all. Without a reasonable expectation that the Privilege can be and will be maintained in practice, the free flow of information from client to attorney and of advice from attorney to client, which the privilege aims to promote, will simply not take place with the same degree of effectiveness. In particular:

- Awareness by management that any knowledge gained by their lawyers is at risk of disclosure to the government will tend to dissuade management from investigating potential problems in the first place, undercutting early detection of compliance risks.
- Indeed, companies may become reluctant to conduct thorough and comprehensive investigations even when alerted to potential wrongdoing, for fear that with inevitable pressure to waive the Privilege their interests will be compromised in subsequent civil litigation.
- Individual employees and officers may view the company's lawyers as adversaries and de facto agents of the government, and for that reason be less willing to provide information.
- Employees and counsel alike will be loathe to commit important matters to writing but instead will tend to communicate orally, as well as by euphemisms and "nods and winks," in order to avoid creating a paper trail that will be turned over to the government.

Corporate counsel and members of the practicing bar have already observed these phenomena, and have observed the situation growing worse rather than better over the last several years, as documented in the recently-published results of a survey conducted by a broad coalition of groups concerned with this issue, which were presented to the Commission in connection with the testimony of Susan Hackett at the March 15, 2006 public hearing and are available at <http://www.acca.com/Surveys/attyclient2.pdf>. In the aggregate, the



"culture of waiver" risks crippling the ability of counsel and management to work together to prevent wrongful behavior by corporate employees and/or mitigate its consequences.

For these reasons, treating a waiver of the privilege as potentially relevant evidence of cooperation for purposes of determining an organizational defendant's Culpability Score is highly undesirable. While the current wording attempts to suggest that waiver will be relevant only in exceptional cases, we respectfully submit that that is not how it will inevitably work in practice. Under §8C2.5(g), whether the defendant "fully cooperated with the investigation" is an all-or-nothing determination. Cooperation that is deemed after the fact to have been less than "full" will have no positive impact whatsoever on the defendant's Culpability Score. A company setting out at the beginning of an investigation to cooperate fully will find it almost impossible under the current wording to gain sufficient comfort that a decision to maintain, rather than waive, the Privilege will not be held against it for sentencing purposes. It will always be possible in hindsight for the court (perhaps pressed by the prosecutor) to decide that waiver was "necessary in order to provide timely and thorough disclosure of all pertinent information known to the organization" because it would have presumably led to the disclosure of additional information. Indeed, the present wording suggests that waiver will be "necessary" in the ordinary case, unless 100% of the information the organization has learned in a privileged capacity is not "pertinent." Thus, declining to waive the Privilege at the outset of the investigation will raise a very real risk that no credit will be received for otherwise full cooperation, including timely and thorough disclosure of all non-privileged pertinent information known to the organization.

This is not just a problem with the wording of the Application Note as it now reads. In this area, any approach that says, in effect, that waiver is not necessary except under the extremely broad and undefined terms of the current formulation will ensure that the exception swallows the rule. There will always be enough uncertainty at the time the decision to maintain the Privilege or to waive it must be made that the failure to waive will seem unacceptably risky. This also may mean in some instances that the decision to cooperate may appear unacceptably risky. That is, if the company decides that it is not willing to waive but cannot be comfortable that it will derive any benefit from cooperation absent a waiver, it will not have a sufficient incentive to make timely and thorough disclosure to the investigators of the non-privileged information it may know, and may instead wish to take its chances on



the prosecution being unable to make a case without the company's cooperation.

Moreover, deciding in hindsight whether an organization that has provided timely and thorough cooperation in all respects except for a privilege waiver should be deemed to have "fully cooperated" is not a task most sentencing judges will find palatable. It requires speculation as to how much greater a benefit to the investigation might have been provided by a waiver. Indeed, since the issue will only come up when the company has maintained the Privilege, the court will be unable to determine precisely what additional benefit a waiver might have provided unless the company were to waive the Privilege in connection with the sentencing proceeding.

Finally, treating waiver as relevant to full cooperation for sentencing purposes also sends a negative message about the legitimacy of the Privilege and the interests it protects. It is appropriate to treat an organization that cooperates with an investigation more leniently than one that does not cooperate, because cooperation can fairly be said to mitigate culpability. But there is nothing culpable about maintaining the confidentiality of privileged information, and neither the Commission nor individual judges making sentencing determinations should be seen to suggest that there is. For purposes of determining "Culpability Score," an organization that maintains its right to safeguard the Privilege should not be deemed more culpable than one that is willing to succumb to pressure to waive that right.

The most practical way to avoid these problems is to amend the Application Note to make clear that waiver of the Privilege is not required nor even relevant to the determination of whether an organization has "fully cooperated" under §8C2.5(g), and that timely and thorough disclosure of all non-privileged pertinent information is what is required. The College believes that the proposed alternative language submitted to the Commission by the American Bar Association at the Commission's November 15, 2005 meeting would satisfactorily accomplish these goals.

We note that the Commission has requested comments only on the relevance of privilege waiver to determining Culpability Score under §8C2.5(g). A question might arise as to whether, under unusual circumstances outside the "heartland" of the Guidelines, a Privilege waiver might be relevant to an organizational defendant's eligibility for a downward departure from the range of sanctions determined pursuant to



the Guidelines (including the determination of Culpability Score). That, however, is a separate question not presently before the Commission, and we accordingly do not address that issue.

Again, we appreciate the Commission's willingness to consider public comment on this issue, and we hope the College's submission will assist the Commission in its important work of promoting justice under the law.

Respectfully submitted,

Elizabeth K. Ainslie
(by *WGA*)

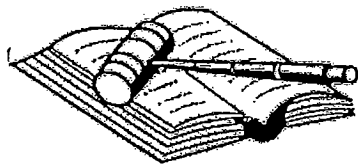
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American College of Trial Lawyers



THE EROSION OF THE ATTORNEY-CLIENT PRIVILEGE AND WORK PRODUCT DOCTRINE IN FEDERAL CRIMINAL INVESTIGATIONS

Approved by the Board of Regents
March, 2002

American College of Trial Lawyers

The American College of Trial Lawyers, founded in 1950, is composed of the best of the trial bar from the United States and Canada. Fellowship in the College is extended by invitation only, after careful investigation, to those experienced trial lawyers who have mastered the art of advocacy and those whose professional careers have been marked by the highest standards of ethical conduct, professionalism, civility and collegiality. Lawyers must have a minimum of 15 years' experience before they can be considered for Fellowship. Membership in the College cannot exceed 1% of the total lawyer population of any state or province. Fellows are carefully selected from among those who represent plaintiffs and those who represent defendants in civil cases; those who prosecute and those who defend persons accused of crime. The College is thus able to speak with a balanced voice on important issues affecting the administration of justice. The College strives to improve and elevate the standards of trial practice, the administration of justice and the ethics of the trial profession.

♦ ♦ ♦

"In this select circle, we find pleasure and charm in the illustrious company of our contemporaries and take the keenest delight in exalting our friendships."

—Hon. Emil Gumpert,
Chancellor-Founder, ACTL

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COMMITTEE ON ATTORNEY-CLIENT RELATIONSHIPS

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THE EROSION OF THE ATTORNEY-CLIENT PRIVILEGE AND WORK PRODUCT DOCTRINE IN FEDERAL CRIMINAL INVESTIGATIONS

SUMMARY

The American College of Trial Lawyers (the "College") expresses its concern in this Report that the attorney-client privilege and work product doctrine are being eroded in federal criminal investigations and prosecutions in a way inimical to the fair administration of justice. We believe that the attorney-client privilege and the work product doctrine are essential to the adversary process and the criminal justice system, and request that the federal government review and modify its policies to ensure that these historic privileges are preserved.

I. INTRODUCTION

Federal prosecutors increasingly rely on counsel for the defense to build the government's case by insisting that the individual or corporate defendant waive the attorney-client privilege and turn over both client-lawyer communications and the work product of the lawyer. This provides prosecutors at the outset of an investigation with information defense counsel has obtained from their client, as well as with defense counsel's factual and legal analysis. In previous years, federal prosecutors were more likely to rely primarily on their own investigation of the facts and seek a waiver of the attorney-client privilege only rarely and then in very limited circumstances.

Today, federal prosecutors are able to obtain waivers of the attorney-client privilege and work product protections both by threatening to prosecute and by seeking more serious charges or sanctions if such cooperation is not provided. After the government has selected the crimes to be charged and obtained a conviction, courts must impose the sentence for that level crime prescribed by the Federal Sentencing Guidelines. As a result, prosecutors are able to exert a great measure of control over both the charging and sentencing process, thus requiring that defense counsel take into account the often harsh effect of the Sentencing Guidelines before responding to a federal prosecutor's request for a waiver of the attorney-client privilege or work product protections.

In seeking a waiver of the attorney-client or work product privilege, the government's demands change the very nature of the criminal justice system as well as the adversary process. These demands, which erode the attorney-client privilege and the work product doctrine, commonly include not only waiver of these protections, but also disclosure of corporate internal investigations by counsel, discouragement of payment by the corporation for counsel for individual employees whom the government prosecutor believes are culpable, and requests that information regarding the nature of the government's investigation not be relayed to other suspects through joint defense agreements. This government approach has been likened to the sound of "a requiem marking the death of privilege in corporate criminal investigations."¹

¹ David M. Zornow & Keith D. Krakaur, *On the Brink of a Brave New World: The Death of Privilege in Corporate Criminal Investigations*, 37 AM. CRIM. L. REV. 147, 147 (2000).

Inherent in this approach is that the prosecutor's initial view of the case must be accepted as fact and not be opposed by counsel for the individual or the corporation; to do so is to act at the client's peril. And this approach has recently become more widespread, if not universal, by embodiment in the United States Department of Justice ("Justice Department") standards for the federal prosecution of corporations.² Initially circulated as an internal memorandum by then-Deputy Attorney General Eric Holder in June of 1999, these standards are applied to individuals as well as corporations.³

The Holder Memo Standards encourage federal prosecutors to seek waivers of the attorney-client and work product privilege. They state that, when weighing whether the corporation has sufficiently cooperated in the investigation phase so as to not be charged with a crime, the prosecutor may consider whether the corporation has identified culprits, turned over its internal investigation and waived the attorney-client and work product protections. The Holder Memo Standards provide:

In gauging the extent of the corporation's cooperation, the prosecutor may consider the corporation's willingness to identify the culprits within the corporation, including senior executives, to make witnesses available, to disclose the complete results of its internal investigation, and to waive the attorney-client and work product privileges.⁴

The Holder Memo Standards do emphasize that such a waiver is not an absolute requirement, but merely one factor the government should consider in evaluating the corporation's cooperation.⁵ For example, the Holder Memo Standards note that:

This waiver should ordinarily be limited to the factual internal investigation and any contemporaneous advice given to the corporation concerning the conduct at issue. Except in unusual circumstances, prosecutors should not seek a waiver with respect to communications and work product related to advice concerning the government's criminal investigation.⁶

Yet, it is difficult to see or to make this distinction, which is, in any event, left to the sole discretion of the prosecutor.

The Holder Memo Standards also suggest that providing counsel for corporate officers, directors or employees⁷ and entering into joint defense agreements may indicate a corporation's

² U.S. ATTORNEYS' MANUAL, tit. 9, Criminal Resource Manual, art. 162, *Federal Prosecutions of Corporations* (2000), available at http://www.usdoj.gov/usao/eousa/foia_reading_room/usam/title9/crm00162.htm, [hereinafter "Criminal Resource Manual"]; see also Jonathan D. Polkes & Renee L. Jarusinsky, *Waiver of Corporate Privileges in a Government Investigation: Reaction to the New DOJ Policy*, WHITE COLLAR CRIME 2001 J-31, J-31 to J-33 (ABA 2001).

³ See generally Memorandum from Eric Holder, Jr., Deputy Attorney General, to All Heads of Department Components and U.S. Attorneys (June 16, 1999) (including attachment entitled "Federal Prosecution of Corporations"), reprinted in Criminal Resource Manual, arts. 161, 162, available at http://www.usdoj.gov/usao/eousa/foia_reading_room/usam/title9/crm00100.htm. The attachment to the Holder Memo will be hereinafter referred to as the "Holder Memo Standards."

⁴ Criminal Resource Manual, art. 162, § VI.A.

⁵ *Id.* § VI.B.

⁶ *Id.* § VI.B n.2.

⁷ The Holder Memo Standards do recognize in a footnote that "[s]ome states require corporations to pay the legal fees of officers under investigation prior to a formal determination of their guilt. Obviously, a corporation's compliance with governing law should not be considered a failure to cooperate." *Id.* § VI.B n.3.

lack of cooperation; *i.e.*, the company that engages in these practices is more likely to be indicted than the company that avoids them. Indeed, the Holder Memo Standards provide:

Another factor to be weighed by the prosecutor is whether the corporation appears to be protecting its culpable employees and agents. Thus, while cases will differ depending on the circumstances, a corporation's promise of support to culpable employees and agents, either through the advancing of attorneys fees, through retaining the employees without sanction for their misconduct, or through providing information to the employees about the government's investigation pursuant to a joint defense agreement, may be considered by the prosecutor in weighing the extent and value of a corporation's cooperation.⁸

In addition to the policies expressed in the Holder Memo Standards, the federal government has further undermined the attorney-client privilege and work product doctrine by increasingly attacking the existence of these protections in *ex parte* proceedings, asserting that the crime-fraud exception vitiates any privilege.⁹ In these situations, the defendant or person under investigation has no opportunity to be heard and the government need make only a *prima facie* showing. As a result, courts often adopt the government's view of the available facts and defense counsel may be required to testify against his or her client on short notice if the court finds that the crime-fraud exception applies.

The College is concerned that these government policies undermine and erode the attorney-client privilege and work product doctrine to an alarming extent and change the balance in the adversary system from one in which opposite points of view may be pursued by opposing counsel to a system in which the federal prosecutor's view can be challenged only at great peril, thereby reducing the ability of defense counsel in a criminal investigation to provide effective assistance to his or her client.¹⁰

II. THE ATTORNEY-CLIENT PRIVILEGE AND THE WORK PRODUCT DOCTRINE

A. ORIGIN AND PURPOSE OF THE ATTORNEY-CLIENT PRIVILEGE

The Federal Rules of Evidence have adopted the attorney-client privilege as it existed at common law. Rule 501 states that "the privilege of a witness . . . shall be governed by the

⁸ *Id.* § VI.B (footnote omitted).

⁹ Under this exception, a client who seeks assistance from counsel for the purpose of committing a crime or fraud is not entitled to the protections of confidentiality. Indeed, "[t]he privilege ends when the client seeks to involve the attorney in wrongdoing." David J. Fried, *Too High A Price for Truth: The Exception to the Attorney-Client Privilege for Contemplated Crimes and Frauds*, 64 N.C. L. REV. 443, 443-44 (1986) (tracing the history of the exception, discussing its rationale, and reviewing its expansion).

¹⁰ In addition to the concerns expressed in this Report, the College also notes that it recently submitted comments to the Bureau of Prisons, the Attorney General and the Senate Judiciary Committee, regarding the interim rule and amendments to the Code of Federal Regulations that became effective on October 30, 2001, and that authorize the monitoring and recording of communications and meetings between inmates and counsel. See generally Letter from Stuart D. Shanor, President, American College of Trial Lawyers, to Rules Unit, Office of General Counsel, Bureau of Prisons, (Dec. 21, 2001) (on file with the College). These comments stated that, despite the College's support of our government's ongoing efforts to eliminate terrorism, the monitoring authorized in the amendments:

[W]ill have a chilling effect, inhibit the free exchange between defendant and lawyer and is therefore (i) a threat to the effective assistance of counsel at a time when a defendant who is being held for trial has a constitutional right to competent and effective counsel and (ii) an unwarranted intrusion on the attorney-client privilege of both individuals awaiting trial and of unindicted detainees.

The College refers to these comments for a complete statement of the College's views on the monitoring issue.

principles of the common law as they may be interpreted by the courts of the United States in the light of reason and experience."¹¹ As recognized by Wigmore in his comprehensive and oft-cited work setting forth the history of the attorney-client privilege, this privilege is "the oldest of the privileges for confidential communications."¹²

The earliest reported cases recognizing the privilege date as far back as the early part of the reign of Elizabeth I.¹³ The attorney-client privilege is likely not reported prior to this era because the testimony of witnesses and defendants was not a common source of proof at trial and, in general, testimonial compulsion had not been previously authorized.¹⁴

Although modern federal courts tend to apply the attorney-client privilege narrowly, the elements for establishing the privilege reflect the basic contours of the privilege since its establishment in England. In the seminal case of *United States v. United Shoe Machinery Corp.*, Judge Wyzanski first pronounced that the privilege applies if:

(1) the asserted holder of the privilege is or sought to become a client; (2) the person to whom the communication was made (a) is a member of the bar of a court, or his subordinate and (b) in connection with this communication is acting as a lawyer; (3) the communication relates to a fact of which the attorney was informed (a) by his client (b) without the presence of strangers (c) for the purpose of securing primarily either (i) an opinion on law or (ii) legal services or (iii) assistance in some legal proceeding, and not (d) for the purpose of committing a crime or tort; and (4) the privilege has been (a) claimed and (b) not waived by the client.¹⁵

The *United Shoe* rule essentially remains the prevailing law as it relates to the attorney-client privilege when applied by federal courts.¹⁶

Thus, for centuries in English and American law, the attorney-client privilege has been firmly grounded in the recognition that legal consultation serves the public interest.¹⁷ Federal

¹¹ FED. R. EVID. 501; see also *Upjohn Co. v. United States*, 449 U.S. 383, 389 (1981) (citing this rule with approval).

¹² 8 JOHN HENRY WIGMORE, EVIDENCE IN TRIALS AT COMMON LAW § 2290, at 542 (McNaughton Rev. 1961) [hereinafter "WIGMORE"]; see also *Upjohn*, 449 U.S. at 389; WIGMORE, *supra*, at 542 n.1 (citing, for example, *Berd v. Lovelace*, Cary 88, 21 Eng. Rep. 33 (Ch. 1577), and *Dennis v. Codrington*, Cary 143, 21 Eng. Rep. 53 (Ch. 1580)).

¹³ WIGMORE, *supra* note 12, § 2290, at 542 n.1 (collecting cases from the late 1500s to the 1600s and indicating that the privilege first appeared as unquestioned in these cases); see also 1 CHARLES TILFORD MCCORMICK, MCCORMICK ON EVIDENCE § 87, at 343-44 (John William Strong ed., 5th ed. 1999) [hereinafter "MCCORMICK ON EVIDENCE"].

¹⁴ WIGMORE, *supra* note 12, § 2290, at 542-43 (noting that the privilege "appears to have commended itself at the very outset as a natural exception to the then novel right of testimonial compulsion").

¹⁵ 89 F. Supp. 357, 358-59 (D. Mass. 1950); see also John E. Sexton, *A Post-Upjohn Consideration of the Corporate Attorney-Client Privilege*, 57 N.Y.U. L. REV. 443, 449 (1982) (indicating that the *United Shoe* court was the first federal court to discuss the corporate attorney-client privilege at length); Zornow & Krakaur, *supra* note 1, at 149 n.9 (indicating that the *United Shoe* rule is one of the most inclusive recitations of the elements of the attorney-client privilege).

¹⁶ See, e.g., *In re Grand Jury Subpoena*, 204 F.3d 516, 520 n.1 (4th Cir. 2000); *Montgomery County v. Microvote Corp.*, 175 F.3d 296, 301 (3d Cir. 1999); *In re Fed. Grand Jury Proceedings 89-10(MIA)*, 938 F.2d 1578, 1581 (11th Cir. 1991); *In re Sealed Case*, 737 F.2d 94, 98-99 (D.C. Cir. 1984); *Diversified Indus., Inc. v. Meredith*, 572 F.2d 596, 601-02 (8th Cir. 1977). The only part of *United Shoe* that has been called into question is the application of the rule to patent matters. See, e.g., *Am. Standard v. Pfizer Inc.*, 828 F.2d 734, 745-46 (Fed. Cir. 1987); *Woods v. N.J. Dep't of Educ.*, 858 F. Supp. 51, 54 (D.N.J. 1993).

¹⁷ See, e.g., WIGMORE, *supra* note 12, § 2291, at 545-49 (quoting decisions from the 1700s and 1800s that expound on the importance of the privilege).

common law in the United States has long embraced this justification,¹⁸ in both a criminal and civil law context. Indeed, the application of the privilege to criminal as well as to civil cases has been largely unquestioned.¹⁹ Moreover, the privilege is generally considered absolute unless waived by the client.²⁰ As such, today, the "attorney-client privilege may well be the pivotal element of the modern American lawyer's professional functions."²¹

B. ORIGIN AND PURPOSE OF THE WORK PRODUCT DOCTRINE

The work product doctrine, like the attorney-client privilege, derives from common law origins. As a leading commentator has explained:

The natural jealousy of the lawyer for the privacy of his file, and the courts' desire to protect the effectiveness of the lawyer's work as the manager of litigation, have found expression, not only as we have seen in the evidential privilege for confidential lawyer-client communications, but in rules and practices about the various forms of pretrial discovery. Thus, under the chancery practice of discovery, the adversary was not required to disclose, apart from his own testimony, the evidence which he would use, or the names of the witnesses he would call in support of his own case. The same restriction has often been embodied in, or read into, the statutory discovery systems.²²

At common law, the privilege was much broader than its modern day analog: a document in the hands of the attorney, even if it did not come into existence as a communication to

¹⁸ See, e.g., *Hatton v. Robinson*, 31 Mass. (14 Pick.) 416, 422 (1833) ("[S]o numerous and complex are the laws . . . , so important is it that [citizens] should be permitted to avail themselves of the superior skill and learning of those who are sanctioned by the law as its ministers and expounders, . . . that the law has considered it the wisest policy to encourage and sanction this confidence [between client and attorney], by requiring that on such facts the mouth of the attorney shall be for ever sealed."); see also *Upjohn Co. v. United States*, 449 U.S. 383, 389 (1981) (explaining that the privilege encourages "full and frank communication between attorneys and their clients and thereby promote[s] broader public interests in the observance of law and administration of justice" and acknowledging that the "rationale for the privilege has long been recognized by the [Supreme] Court"); *Hunt v. Blackburn*, 128 U.S. 464, 470 (1888) (stating that the privilege is necessary "in the interest and administration of justice").

¹⁹ See, e.g., *Swidler & Berlin v. United States*, 524 U.S. 399, 408-09 (1998) (rejecting any effort to apply the attorney-client privilege differently in criminal cases); *Schwimmer v. United States*, 232 F.2d 855, 863-66 (8th Cir. 1956) (assuming without discussion that the attorney-client privilege applied in a criminal case); *Gunther v. United States*, 230 F.2d 222, 223-24 (D.C. Cir. 1956) (per curiam) (same).

²⁰ See, e.g., *Westinghouse Elec. Corp. v. Republic of Philippines*, 951 F.2d 1414, 1429 (3d Cir. 1991) (indicating that the attorney-client privilege affords "absolute protection" and discussing waiver standards).

²¹ Geoffrey C. Hazard, Jr., *An Historical Perspective on the Attorney-Client Privilege*, 66 CAL. L. REV. 1061, 1061 (1978) (stating that the privilege "is considered indispensable to the lawyer's function as advocate on the theory that the advocate can adequately prepare a case only if the client is free to disclose everything," and that a "legal counselor can properly advise the client what to do only if the client is free to make full disclosure").

In fact, the Justice Department itself recognizes the value and usefulness of the attorney-client privilege with respect to its representation of federal employees. In the Justice Department's codified statement of policy, it states that:

Attorneys employed by any component of the Department of Justice . . . undertake a full and traditional attorney-client relationship with the employee with respect to application of the attorney-client privilege Any adverse information communicated by the client-employee to an attorney during the course of such attorney-client relationship shall not be disclosed to anyone, either inside or outside the Department, other than attorneys responsible for representation of the employee, unless such disclosure is authorized by the employee.

28 C.F.R. § 50.15(a)(3) (2000).

²² MCCORMICK'S HANDBOOK OF THE LAW OF EVIDENCE 201-02 (Edward W. Cleary ed., 2d ed. 1972) (footnotes omitted); see also *In re Grand Jury Proceedings*, 473 F.2d 840, 844 (8th Cir. 1973).

the attorney, would have been exempt from production.²³ The modern work product doctrine is more narrowly tailored and traces back to the Supreme Court's decision of more than half a century ago in *Hickman v. Taylor*.²⁴ As articulated by the Court, the work product doctrine is distinct from and broader than the attorney-client privilege: "[W]ritten statements, private memoranda and personal recollections prepared or formed by an [attorney] in the course of his legal duties," and with an eye toward litigation, are not discoverable, as "[d]iscovery was hardly intended to enable a learned profession to perform its functions . . . on wits borrowed from the adversary."²⁵ The work product doctrine, however, unlike the attorney-client privilege, is not absolute, and can be overcome if a party seeking discovery shows that "relevant and non-privileged facts remain hidden in an attorney's file and where production of those facts is essential to the preparation of one's case."²⁶

The Court in *Hickman* explained that the doctrine serves both a public and a private purpose. With respect to the former, the work product doctrine directly promotes the adversary system by enabling attorneys to prepare their cases without fear that their work product will be used against their clients.²⁷ At the same time, it also serves a private purpose by affording an attorney "a certain degree of privacy" so as to discourage "unfairness" and "sharp practices."²⁸ These same policies remain vital today. The rule first pronounced in *Hickman* has been codified in Federal Rule of Criminal Procedure 16(a)(2), (b)(2) and in Federal Rule of Civil Procedure 26(b)(3).

In contrast to the attorney-client privilege, which may be asserted only by the client, either the attorney or the client usually may invoke the work product doctrine.²⁹ Courts have recognized that "the interests of attorneys and those of their clients may not always be the same. To the extent that the interests do not conflict, attorneys should be entitled to claim [work product] privilege even if their clients have relinquished their claims."³⁰ The ability of the lawyer to claim the privilege has been broadly construed by the courts. For example, the Court of Appeals for the District of Columbia has held that a lawyer had the right to assert the privilege for work product materials even where the attorney was consulted in furtherance of the client's fraud, at least to the extent that the lawyer was unaware of the fraud.³¹

²³ See WIGMORE, *supra* note 12, § 2318, at 620-21 & n.3 (collecting extensive list of cases from nineteenth century English courts).

²⁴ 329 U.S. 495 (1947). In *Hickman*, the Supreme Court dealt with two forms of work product: written statements from witnesses interviewed by defense counsel and the contents of oral interviews with witnesses, some of which had been summarized in memoranda prepared by the defense lawyers. The court reasoned that the protection for the latter category, often referred to as "opinion" product, exceeded that of the former. *Id.* at 512-13.

²⁵ *Id.* at 510 (Murphy, J.), 516 (Jackson, J., concurring).

²⁶ *Id.* at 511.

²⁷ *Id.* at 510-11.

²⁸ *Id.*

²⁹ See, e.g., *In re Sealed Case*, 676 F.2d 793, 809 n.56 (D.C. Cir. 1982) (indicating that work product privilege belongs to the lawyer as well as the client); *In re Grand Jury Proceeding (Duffy)*, 473 F.2d 840, 848 (8th Cir. 1973) (allowing an attorney to invoke the doctrine).

³⁰ *In re Sealed Case*, 676 F.2d at 809 n.56 (citing *In re Grand Jury Proceedings (FMC Corp.)*, 604 F.2d 798, 801 (3d Cir. 1979)). The Supreme Court has identified several interrelated interests that the work product doctrine seeks to protect, ranging from a client's interest in obtaining sound legal advice to the interests attorneys have in protecting their own intellectual product. *Id.* (discussing *Hickman*, 329 U.S. at 511).

³¹ *Id.* at 812 & n.75 (citing *FMC Corp.*, 604 F.2d at 801 n.4, 802 n.5).

C. THE JOINT DEFENSE PRIVILEGE

The joint defense privilege, first recognized in *Chahoon v. Commonwealth*,³² enables multiple parties to share information protected by the attorney-client privilege without waiving the privilege, where the parties "have common interests in defending against a pending or anticipated proceeding."³³ This privilege, however, is not an independent privilege; it is only an extension of the attorney-client privilege and acts as an exception to the general rule that the privilege is waived when privileged information is shared with a third party.³⁴

Accordingly, courts have generally recognized that this privilege, also known as the "common interest rule," protects "the confidentiality of communications passing from one party to the attorney for another party where a joint defense effort or strategy has been decided upon and undertaken by the parties and their respective counsel."³⁵

D. BALANCING THE UNAVAILABILITY OF EVIDENCE AGAINST NEED FOR THE PRIVILEGE

The attorney-client privilege and the work product doctrine frequently operate to deny powerful evidence to the opposition, *i.e.*, the defendant's very own statement of the case against him. Our courts, however, have consistently found that "[t]he systemic benefits of the privilege are commonly understood to outweigh the harm caused by excluding critical evidence."³⁶ Federal courts have supported the need for these protections on public policy grounds and have repeatedly recognized that the attorney-client privilege advances the administration of justice, as a "public good transcending the normally predominant principle of utilizing all rational means for ascertaining truth."³⁷ As the Court of Appeals for the Ninth Circuit has stated, "[t]his valuable social service of counseling clients and bringing them into compliance with the law cannot be performed effectively if clients are scared to tell their lawyers what they are doing, for fear that their lawyers will be turned into government informants."³⁸ In similar terms, the Supreme Court has observed that the work product doctrine serves "the cause of justice" by preventing "[i]nefficiency, unfairness and sharp practices."³⁹

Any perceived harm to the fact-finding process attributable to the attorney-client privilege and work product doctrine may be exaggerated because, without these protections, clients

³² 62 Va. (21 Gratt.) 822 (1871).

³³ John F. Savarese & Carol Miller, *Protecting Privilege and Dealing Fairly with Employees While Conducting an Internal Investigation*, 1178 PLI/CORP 665, 719 (2000); see also Michael J. Chepiga, *Federal Attorney-Client Privilege and Work Product Doctrine*, 653 PLI/LIT 519, 589 (2001); Deborah Stavile Bartel, *Reconceptualizing the Joint Defense Doctrine*, 65 FORDHAM L. REV. 871, 871-72 (1996).

³⁴ See *United States v. Schwimmer*, 892 F.2d 237, 243 (2d Cir. 1989); *Waller v. Fin. Corp. of Am.*, 828 F.2d 579, 583 n.7 (9th Cir. 1987).

³⁵ *Schwimmer*, 892 F.2d at 243; see also *United States v. Bicoastal Corp.*, No. 92-CR-261, 1992 WL 693384, at *5 (N.D.N.Y. Sept. 28, 1992) ("[D]efendants with common interests in multi-defendant actions are entitled to share information protected by the attorney-client privilege without danger that the privilege will be waived by disclosure to a third person.").

³⁶ *Swidler & Berlin v. United States*, 524 U.S. 399, 412 (1998) (O'Connor, J., dissenting); see also *Sampson Fire Sales, Inc. v. Oaks*, 201 F.R.D. 351, 356 (M.D. Pa. 2001).

³⁷ *Trammel v. United States*, 445 U.S. 40, 50 (1980) (quoting *Elkins v. United States*, 364 U.S. 206, 234 (1960) (Frankfurter, J., dissenting)); see also *Jaffee v. Redmond*, 518 U.S. 1, 9 (1996).

³⁸ *United States v. Chen*, 99 F.3d 1495, 1500 (9th Cir. 1996).

³⁹ *Hickman v. Taylor*, 329 U.S. 495, 511 (1947); see also *United States v. Noble*, 422 U.S. 225, 236-38 (1975).

may well choose not to disclose sensitive information to their attorneys, and lawyers may not commit their thoughts and analysis to paper in the first instance.⁴⁰

E. THE PRIVILEGE AND CORPORATIONS

It is well established that the attorney-client privilege and work product doctrine may be asserted by corporations, as well as by natural persons.⁴¹ The attorney-client privilege protects confidential communications between the attorney and anyone within the corporate structure – directors, officers, as well as middle and lower-level employees – whose duties relate to the issues upon which the attorney is asked to provide legal assistance and who has information that the attorney would need to render adequate legal advice.⁴² The Supreme Court has expressly rejected the argument that the privilege should cover only those in the corporate control group (*i.e.*, the directors and officers of the corporation), because such a view ignores the fact that “the privilege exists to protect not only the giving of professional advice to those who can act on it but also the giving of information to the lawyer to enable him to give sound and informed advice.”⁴³

F. SPECIAL NEED FOR THE CORPORATE ATTORNEY-CLIENT AND WORK PRODUCT PRIVILEGE

A corporation faced with evidence or allegations of illegal behavior will generally conduct an internal investigation to determine the scope of wrongdoing and the extent of its potential liability. Typically, the corporation will retain outside counsel who will interview employees, prepare notes of interviews, review documents (privileged and otherwise), create a chronology of events, and write client memos. Counsel may also prepare a written report of such an inquiry including conclusions and recommendations, but this is not always the case. To accomplish these tasks, the investigating attorney must induce cooperation from numerous employees who, for various reasons, may not wish to cooperate. In a properly conducted investigation, the employees are informed at the outset that communications with counsel for the corporation are not privileged as to the employee; that is, the company lawyer is not the employee’s lawyer, and the corporation is free to disclose such communications without the consent of the employee.⁴⁴ Nonetheless, corporate employees and officers are generally more willing to cooperate where they receive a measure of assurance that their conversations with counsel will not be divulged to government investigators or prosecutors.⁴⁵ An internal investigation would be far less useful, and its demoralizing effect on employees would be far greater, if the investigator’s sole means of inducing cooperation was the threat of discipline or termination of employment, and not the protection of confidentiality.⁴⁶

⁴⁰ See, e.g., *Hickman*, 329 U.S. at 511 (noting that were privileged materials open to the opposition on demand, “much of what is now put down in writing would remain unwritten”).

⁴¹ See *Upjohn Co. v. United States*, 449 U.S. 383, 390-95 (1981) (allowing a corporation to invoke the privilege).

⁴² See *id.* at 391-92.

⁴³ *Id.* at 390.

⁴⁴ Despite this caution, many employees as a practical matter consider the corporation’s lawyers to be their lawyers and are otherwise hesitant for job security reasons not to answer their questions.

⁴⁵ Judson W. Starr and Joshua N. Schopf, *Cooperating with the Government’s Investigation: The New Dilemma*, SE72 ALI-ABA 353, 360-61 (2000).

⁴⁶ *Id.* at 361.

In short, by facilitating internal investigations, the corporate attorney-client privilege and work product doctrine advance the administration of justice by enabling the corporation to gather the information necessary to understand the relevant issues, to receive competent legal advice, to identify culpable employees, to determine its own liability, to change existing or institute new compliance programs, and, finally, to fully cooperate with the government. It is important to note that information and documents may be provided to the government to assist it in conducting its investigation and to others without divulging such specific privileged communications.

III. REVIEW OF THE GOVERNMENT ENCROACHMENT ON THE ATTORNEY-CLIENT PRIVILEGE AND WORK PRODUCT DOCTRINE

A. WAIVER OF THE ATTORNEY-CLIENT AND WORK PRODUCT PRIVILEGE

When a corporation has learned – whether through receipt of a grand jury subpoena, self-reporting by employees, or internal monitoring under a corporate compliance program – that its employees may have acted illegally and an internal investigation has begun, the corporation generally expects that communications with its lawyers and their investigators and documents produced at their request will be protected by the attorney-client privilege and/or the work product doctrine. Unfortunately, in light of the recent practices and policy statements by the Justice Department, particularly those set forth in the Holder Memo Standards, this assumption is no longer tenable.

The Justice Department's policy, as expressed in the Holder Memo Standards, is to obtain waivers of the corporate attorney-client and work product privilege where, in the government's view, these protections might keep information relevant to a criminal investigation from discovery. Indeed, there is no pretense that the values underlying these privileges are to be sacrificed for any reason other than to make the prosecution's job easier: "Such waivers permit the government to obtain statements of possible witnesses, subjects, and targets, without having to negotiate individual cooperation or immunity agreements."⁴⁷ The obvious alternative not widely favored by government prosecutors is to conduct a factual investigation by taking statements and obtaining documents from a corporation and its employers, yet without insisting on also obtaining privileged statements made to counsel and attorney work product. It is not inconsistent with preserving the attorney-client privilege and work product protections for a company to provide information and documents to aid the government, since the privilege goes to the specific communication with the client and not necessarily to the information and documents obtained during the course of an internal investigation.

The Holder Memo Standards, now incorporated into the United States Attorneys' Manual's Criminal Resource Manual, provide a blueprint for maximizing the government's leverage to induce waivers of the corporate attorney-client privilege and work product doctrine. For example, one source of leverage arises from the possibility that the prosecutor may enter into a non-prosecution agreement with a corporate target. The Criminal Resource Manual authorizes prosecutors to offer not to indict a corporation where its "timely cooperation appears to be necessary to the public interest and other means of obtaining the desired cooperation are unavailable or would not be effective."⁴⁸ And in determining whether a non-prosecu-

⁴⁷ Criminal Resource Manual, art. 162, § VI.B.

⁴⁸ *Id.* (internal quotation omitted).

tion agreement would be appropriate, prosecutors are instructed to consider the "completeness" of the corporation's disclosure, including whether the corporation granted "a waiver of the attorney-client and work product protections, both with respect to its internal investigation and with respect to communications between specific officers, directors, and employees and counsel."⁴⁹ Although the Holder Memo Standards do not consider a waiver as an "absolute requirement," they still authorize and even encourage prosecutors to "request a waiver in appropriate circumstances."⁵⁰ Fluid and ambiguous terms such as "necessary," "necessary to the public interest" and "appropriate circumstances" are left to the sole discretion of the government and generally to the individual prosecutor.

Another source of leverage that the government enjoys is its control over the sentencing decision. At the outset, the government selects the crime to be charged and the Sentencing Guidelines set forth the appropriate sentence range for such charge from which the court generally may not depart. The Sentencing Guidelines also give credit to corporations that have engaged in self-reporting, cooperation, and acceptance of responsibility for purposes of calculating the corporation's "culpability score."⁵¹ To qualify for this credit, "cooperation must be both timely and thorough."⁵² Here, "timeliness" means cooperation must begin "essentially at the same time as the organization is officially notified of a criminal investigation," while "thoroughness" requires "the disclosure of all pertinent information known by the organization."⁵³ Although courts ultimately decide what sentence must be imposed under the Sentencing Guidelines, the government's recommendation, based on its assessment of whether a corporation has cooperated in a "timely," "thorough," and complete manner, has tremendous influence on the ultimate sentence.⁵⁴ Similarly, the government can materially affect the sentencing decision by favorably or unfavorably calculating either the amount of pecuniary gain to the corporation or the pecuniary loss from the offense caused by the corporation.⁵⁵

With regard to the government's raw power implicit under the Sentencing Guidelines, the government is often not willing to make a binding non-prosecution commitment without a reciprocal commitment from a defendant, oftentimes seeking in exchange a full and complete waiver of the attorney-client privilege and the work product doctrine. Yet, as commentators have queried:

Do such demands ultimately benefit the cause of justice? Are the costs of coercing companies to waive the attorney-client privilege worth the short-term gains in the immediate case? The long-term damage inflicted on both corporate and societal interests by the government's emerging coercive waiver policy far outweighs any short-term utility.⁵⁶

⁴⁹ *Id.*

⁵⁰ *Id.*

⁵¹ U.S. SENTENCING GUIDELINES MANUAL § 8C2.5(g) (2001) [hereinafter "U.S.S.G."].

⁵² *Id.*, cmt. 12.

⁵³ *Id.*

⁵⁴ See Zornow & Krakaur, *supra* note 1, at 154-55.

⁵⁵ See *id.*

⁵⁶ Starr and Schopf, *supra* note 45, at 356.

If the government, however, demands a waiver of the attorney-client privilege and, more specifically, the protections for counsel's work product, the corporation is forced to make a classic Hobson's choice. It either gives in to the government's demand, thereby sending a message to its employees that they should not cooperate in future internal investigations, or rejects the government's conditions and risks indictment and conviction. The chilling effect on corporate self-scrutiny is obvious and there will be a serious adverse impact on the ability of corporations to prevent the occurrence of future violations of law, and of counsel to conduct meaningful and effective internal investigations. Furthermore, this practice serves to drive a harmful wedge between employees and the corporation.

While individual prosecutors may advance a particular case more quickly and effectively under the Holder Memo Standards, the Justice Department's waiver policy is indefensible from a systemic perspective. First, the waiver policy is ultimately counterproductive to the Justice Department's stated objective of obtaining "critical" assistance from the corporation "in identifying the culprits and locating relevant evidence."⁵⁷ As a result of this policy, outside counsel for a corporation now commences an internal investigation with the knowledge that the statements taken by the lawyer will likely be sought by and turned over to the prosecution and that the lawyer may be called as a witness. The likelihood of this occurring – and fairness to a company's employees dictates that they be so advised before their interviews – has the dual effect of chilling the inquiry from the outset and of eroding trust between management and staff.⁵⁸ Moreover, it can only complicate the task of detecting and preventing future wrongdoing.

Indeed, it has been suggested that today, in response to current Justice Department pressure on corporations to waive the protections of the work product doctrine, counsel often anticipate at the outset of an investigation that "the fruits of the investigation stand a substantial chance of being delivered to the government," and that this may, again, have a chilling effect on the investigative process.⁵⁹ As a result, counsel may simply refrain from putting inculpatory information in written form.

Second, the waiver policy also undermines our adversarial legal system. When a company decides to waive its privileges, "the role of the criminal counsel is repositioned from that of the client's confidential legal advisor and the government's adversary into a conduit of information between the client and the government."⁶⁰ Contrary to the *Hickman* Court's admonition, the prosecution then performs its duties "on wits borrowed from the adversary."⁶¹ Moreover, counsel for the company is forced to become a witness against it and its employees, stripping both of their counsel of choice and generally impairing the client's trust in the lawyer.

Third, the government's approach, as expressed in the Holder Memo Standards, may enable federal prosecutors to circumvent employees' Fifth Amendment privilege against self-incrimination. This risk tends to be greatest when the government agrees to defer its investiga-

⁵⁷ Criminal Resource Manual, art. 162, § VI.B.

⁵⁸ Zornow & Krakaur, *supra* note 1, at 157.

⁵⁹ *Id.* at 156.

⁶⁰ *Id.* at 156-57.

⁶¹ 329 U.S. at 516 (Jackson, J. concurring).

tion pending completion of the corporation's internal inquiry. Under such circumstances, the government defers with the knowledge that an employee speaking with the corporation's lawyers is less likely to retain separate counsel who, presumably, would advise the employee to invoke the Fifth Amendment privilege against self-incrimination.⁶² As a result, the employee is lured into a false sense of security and speaks more freely than perhaps is wise. If, under pressure to demonstrate "complete" cooperation in pursuit of its own interest, the company subsequently decides to reveal the substance of the employee's interview, the government may gain a significant advantage in obtaining incriminating evidence from an employee without having to negotiate immunity or plea agreements.⁶³ Furthermore, counsel for the corporation could eventually be disqualified if called as a witness by the prosecution to impeach testimony given by one of the interviewed employees. Of course, in rare cases, calling the lawyer as a witness could also be used as a tactical tool by the prosecution to rid the corporation of the counsel of its choice.

Finally, the timing of a corporation's decision to affect a waiver of the protections may also exacerbate the waiver's detrimental impact on the case. A premature waiver may result in the corporation being "deprived of legal advice based on counsel's full development of the facts and an assessment of the strengths and weaknesses of the government's case."⁶⁴ Again, because disclosure of an internal investigation to the government by a corporation waives the protections of the attorney-client and work product privilege, the corporation may be subjected to additional litigation regarding what information must be turned over to the government.⁶⁵

In most complicated government criminal investigations, there are parallel proceedings upon which the government's conduct also has an impact. These include civil cases against the company and individuals as well as various civil enforcement proceedings brought by federal or state agencies. If the company has waived the attorney-client privilege in the criminal investigation, it is likely to be found to have waived the privilege in these proceedings as well.

Although the current United States Attorneys' Manual recognizes the value of the attorney-client privilege and seeks to provide some protection and balance before the government may invade it, these provisions seem now to be either outdated or increasingly ignored. For example, the United States Attorneys' Manual states:

Department of Justice attorneys should recognize that communications with represented persons at any stage may present the potential for undue interference with attorney-client relationships and should undertake any such communications with great circumspection and care. This Department as a matter of policy will respect *bona fide* attorney-client relationships whenever possible, consistent with its law enforcement responsibilities and duties.⁶⁶

⁶² Zornow & Krakaur, *supra* note 1, at 157.

⁶³ See Criminal Resource Manual, art. 162, § VI.B.

⁶⁴ Zornow & Krakaur, *supra* note 1, at 157.

⁶⁵ See, e.g., *Westinghouse Elec. Corp. v. Republic of Philippines*, 951 F.2d 1414, 1418 (3d Cir. 1991) (indicating that disclosure of internal investigation report to the SEC and the Justice Department constituted waiver of both protections).

⁶⁶ U.S. ATTORNEYS' MANUAL, tit. 9, § 9-13.200, available at http://www.usdoj.gov/usao/eousa/foia_reading_room/usam/title9/13mcrm.htm#9-13.200.

Another section of the United States Attorneys' Manual provides:

In considering a request to approve the issuance of a subpoena to an attorney for information relating to the representation of a client, the Assistant Attorney General in charge of the Criminal Division applies the following principles:

- ♦ The information shall not be protected by a valid claim of privilege.
- ♦ All reasonable attempts to obtain the information from alternative sources shall have proved to be unsuccessful.
- ♦ In a criminal investigation or prosecution, there must be reasonable grounds to believe that a crime has been or is being committed, and that the information sought is reasonably needed for the successful completion of the investigation or prosecution.

.....

- ♦ The need for the information must outweigh the potential adverse effects upon the attorney-client relationship.⁶⁷

These expressions of support for the value of the attorney-client privilege and the work product doctrine, however, are belied by the current Justice Department practices and guidelines and appear to be in conflict with the Holder Memo Standards.

B. JOINT DEFENSE AGREEMENTS

In addition to government pressure to waive the protections of the attorney-client and the work product privilege, lawyers representing clients in corporate criminal matters today encounter federal prosecutors who view joint defense agreements with suspicion and sometimes even as improper or illegal, although such agreements have long been recognized in the law as appropriate and necessary to the function of providing adequate legal advice.

The sharing of information by co-defendants under the joint defense privilege can greatly assist counsel in their efforts to represent their clients while offering substantial benefits to the agreement's participants.⁶⁸ Indeed, lawyers increasingly seek to enter into formal joint defense agreements with another party's counsel which set forth the applicability and scope of the privilege prior to the sharing of any otherwise privileged information.⁶⁹

⁶⁷ *Id.* § 9-13.410C, available at http://www.usdoj.gov/usao/eousa/foia_reading_room/usam/title9/13mcrim.htm#9-13.410.

⁶⁸ Bartel, *supra* note 33, at 879.

⁶⁹ Under certain circumstances, disqualification issues may arise when a joint defense agreement exists. Indeed, seeking disqualification is one method by which the government may seek to attack a joint defense agreement. Several commentators discuss this matter in greater detail. *See, e.g.,* Chepiga, *supra* note 33, at 593 (indicating that although the government has moved in several criminal cases to disqualify an attorney who represented one party to a joint defense agreement after another party became a witness for the prosecution, courts have routinely rejected these motions) (citing *United States v. Anderson*, 790 F. Supp. 231 (W.D. Wash. 1992), and *United States v. Bicoastal Corp.*, No. 92-CR-261, 1992 U.S. Dist. LEXIS 21445, at *17-18 (N.D.N.Y. 1992)); Arnold Rochvarg, *Joint Defense Agreements and Disqualification of Co-Defendant's Counsel*, 22 AM. J. TRIAL ADVOC. 311 (1998) (reviewing and analyzing cases dealing with joint defense agreements and disqualification); A. Howard Matz, *Lawyers on the Attack: Prosecutors' and Defense Lawyers' Efforts to Curb the Other Side's Perceived Misconduct*, 161 PLI/CRIM 177, 181-90 (1991) (discussing attempts to disqualify counsel, potential conflicts of interest and measures to avoid disqualification).

An attorney seeking to invoke the joint defense privilege on behalf of a client must be aware that the definition and scope of the privilege, as well as factors relevant to its existence, differ markedly among the Circuits. For instance, while a defendant in the Ninth Circuit need only point to a "common interest" between himself and a co-defendant in order to assert the privilege,⁷⁰ that same defendant in the Third Circuit must demonstrate that the communications he seeks to protect arose from an "on-going and joint effort to set up a common defense strategy."⁷¹ These differences between the Circuits can have a profound impact on whether or not a client can successfully invoke the privilege.

The Courts of Appeals for the First, Second, Third and Tenth Circuits have set rigid standards for invoking the joint defense privilege. The law in these Circuits requires evidence of common defense strategy between parties before allowing the privilege to be invoked.⁷² Indeed, the Court of Appeals for the Second Circuit has held that "only those communications made in the course of an ongoing common enterprise and intended to further the enterprise are protected."⁷³

The Court of Appeals for the Fourth Circuit also espouses a more limited scope for the joint defense privilege. Although the court has stated in one case that, "persons who share a common interest in litigation should be able to communicate with their respective attorneys and with each other to more effectively prosecute or defend their claims,"⁷⁴ the facts of that case actually suggest a narrower holding. Specifically, the parties were engaged in a joint effort to prosecute a claim and had documented their cooperation in a written agreement.⁷⁵

Arguably, the Circuit most vigorous in protecting otherwise privileged communications divulged to third parties is the Ninth Circuit.⁷⁶ The Court has stated that the common interest exception was "not limited . . . to situations where codefendants share a common defense or have interests that are not adverse."⁷⁷ The Ninth Circuit has also indicated that the criterion for invoking a joint defense privilege is not whether the meeting was called to prepare trial strategy, stating:

⁷⁰ See, e.g., *Hunydee v. United States*, 355 F.2d 183, 185 (9th Cir. 1965).

⁷¹ *Matter of Beville, Bresler & Schulman Asset Mgt Corp.*, 805 F.2d 120, 126 (3d Cir. 1986) (citing *Eisenberg v. Gagnon*, 766 F.2d 770, 787 (3d Cir. 1985)).

⁷² *Id.* (citing *In re Grand Jury Subpoena Duces Tecum Dated Nov. 16, 1974*, 406 F. Supp. 381 (S.D.N.Y. 1975)). Moreover, the communications must be made in confidence to further the joint defense effort. *Id.* The party must also present concrete evidence of an actual agreement between the parties to adopt a joint defense strategy. *Id.* See also *Grand Jury Proceedings v. United States*, 156 F.3d 1038, 1043 (10th Cir. 1998) (stating that failure to "produce any evidence, express or implied, of a joint defense agreement" precluded application of the joint defense privilege to documents); *United States v. Bay St. Ambulance and Hosp. Rental Serv.*, 874 F.2d 20, 28-29 (1st Cir. 1989) (adopting the *Beville* test and finding that while the parties at issue had "many interests in common," a particular document was not covered by the joint defense privilege because there was no evidence that it related to the joint defense).

⁷³ *United States v. Weissman*, 195 F.3d 96, 99 (2d Cir. 1999) (citing *United States v. Schwimmer*, 892 F.2d 237, 243 (2d Cir. 1989)). The Court of Appeals for the Seventh Circuit is also moving toward the Second Circuit's restrictive interpretation of the joint defense privilege and currently requires that the parties be engaged in an actual joint defense strategy. See *United States v. McPartlin*, 595 F.2d 1321, 1336 (7th Cir. 1979); see also *United States v. Keplinger*, 776 F.2d 678, 701 (7th Cir. 1985) (applying *McPartlin*, but finding no joint defense privilege because the communications at issue were not made in confidence).

⁷⁴ *In re Grand Jury Subpoenas*, 89-3 and 89-4, 902 F.2d 244, 249 (4th Cir. 1990).

⁷⁵ *Id.* at 246; see also *Sheet Metal Workers Int'l Ass'n v. Sweeney*, 29 F.3d 120, 124-25 (4th Cir. 1994) (indicating that a defendant's belief that he shared a common interest with another party would not suffice to invoke the common interest privilege).

⁷⁶ See *United States v. Montgomery*, 990 F.2d 1264, 1993 WL 74314 (9th Cir. Mar. 15, 1993) (unpublished); *Hunydee v. United States*, 355 F.2d 183, 185 (9th Cir. 1965); see also *United States v. Zolin*, 809 F.2d 1411, 1417 (9th Cir. 1987) (holding that the defendant need not show that the party with whom he allegedly shared a "common interest" faced any immediate liability; a shared interest in "sorting out . . . affairs" was sufficient), *vacated in part on other grounds*, 842 F.2d 1135 (9th Cir. 1988).

⁷⁷ *Montgomery*, 1993 WL 74314, at *4.

[W]here two or more persons who are subject to possible indictment in connection with the same transactions make confidential statements to their attorneys, these statements, even though they are exchanged between attorneys, should be privileged to the extent that they concern common issues and are intended to facilitate representation in possible subsequent proceedings.⁷⁸

Another Ninth Circuit case highlights the expansiveness of this prior holding, noting that while the "paradigm case [of joint defense privilege] is where two or more persons subject to possible indictment arising from the same transaction make confidential statements that are exchanged among their attorneys," the privilege is not limited to such a case.⁷⁹ Indeed, "[e]ven where the non-party who is privy to the attorney-client communications has never been sued on the matter of common interest and faces no immediate liability, it can still be found to have a common interest with the party seeking to protect the communications."⁸⁰

With regard to the existence of a joint defense privilege as to documents and not just oral communications, the Court of Appeals for the Tenth Circuit has held that for a privilege to apply to documents, the party invoking the privilege must establish that "(1) the documents were made in the course of a joint-defense effort; and (2) the documents were designed to further that effort."⁸¹

In sum, although courts tend to impose different requirements before validating a joint defense agreement, courts nonetheless recognize the importance of, and generally uphold, such agreements. The agreements, however, still make prosecutors "uneasy."⁸² Indeed, commentators suggest that prosecutors disfavor the use of joint defense agreements because they fear that the cooperation and confidentiality amongst defendants inherent in a joint defense agreement will shield pertinent evidence and hinder the government's ability to get convictions because it will be more difficult for prosecutors to isolate individuals.⁸³ Moreover, prosecutors worry that joint defense agreements "may include unlawful efforts to impede justice, provide a group of co-defendants with the opportunity to influence improperly the memories of witnesses, or otherwise permit a concerted attempt to obstruct grand jury investigations."⁸⁴ Prosecutors also express concern that the joint defense privilege enables the continuation of criminal conspiracies.⁸⁵

During the past two decades, as the Justice Department prosecuted corporations with increasing frequency, it began to discourage the use of joint defense agreements. In 1991, the

⁷⁸ *Huntydee*, 355 F.2d at 184.

⁷⁹ *Zolin*, 809 F.2d at 1417.

⁸⁰ *Id.*

⁸¹ *Grand Jury Proceedings v. United States*, 156 F.3d 1038, 1042-43 (10th Cir. 1998); see also *Chepiga*, *supra* note 33, at 586. In fact, one court has held that the privilege was not waived where an attorney shared his work product with another attorney representing a different client with a common interest, but not involved in the same litigation. *Chepiga*, *supra*, at 586-87 (citing *United States v. AT&T*, 642 F.2d 1285, 1299 (D.C. Cir. 1980)). Of course, transferring documents to another party's attorney under a joint defense agreement does not work to extend the privilege if the protection did not apply before the transfer. *Id.* at 588 (citing *Aiken v. Texas Farm Bureau Mut. Ins. Co.*, 151 F.R.D. 621, 624 (E.D. Tex. 1993)).

⁸² *Savarese & Miller*, *supra* note 33, at 720.

⁸³ *Chepiga*, *supra* note 33, at 591; *Bartel*, *supra* note 33, at 879.

⁸⁴ *Bartel*, *supra* note 33, at 879 (citation omitted).

⁸⁵ *Id.*

Justice Department outwardly expressed its suspicion of such agreements in an article published in "The DOJ Alert," which reported, "a select group of DOJ's senior white-collar prosecutors has launched a systematic survey of the nation's U.S. attorneys to gauge their views on joint defense agreements."⁸⁶ The then chief of the Criminal Division's Fraud Section also noted in the article that "[p]rosecutors are uneasy . . . because they see in [joint defense agreements], even unintentionally, an opportunity to get together and shape testimony."⁸⁷ Yet, despite this uneasiness, prosecutors were still cautioned in the article against having a "knee-jerk reaction" against joint defense agreements and were directed to focus instead on the investigation, unless there was a "specific reason to believe the agreement [was] being used for improper purposes."⁸⁸

The Justice Department's view of joint defense agreements is consistent with the notion of cooperation found in the Organizational Sentencing chapter of the federal Sentencing Guidelines ("Corporate Sentencing Guidelines").⁸⁹ The Corporate Sentencing Guidelines, which became effective in November 1991, aid federal prosecutors in determining whether a target for prosecution should receive a more lenient sentence based on the quality of the cooperation with the government. Under the Corporate Sentencing Guidelines, corporations receive a more lenient sentence if they disclose the violation prior to an "imminent threat" of disclosure or if they "fully cooperate" with the government investigation.⁹⁰ The Corporate Sentencing Guidelines require that the cooperation be "timely" and "thorough."⁹¹ "Thorough" cooperation requires the corporation to provide pertinent information "sufficient for law enforcement personnel to identify the nature and the extent of the offense and the individual(s) responsible for the criminal conduct."⁹² In applying the Corporate Sentencing Guidelines, prosecutors have interpreted "cooperate" broadly and pressed corporations to disclose privileged information in order to receive credit for cooperating.⁹³ Therefore, the Justice Department's uneasiness with joint defense agreements reflects the fact that these agreements are perceived as inherently uncooperative since they seek to benefit the parties, while hindering the free flow of information to the government if one party seeks to cooperate under the Corporate Sentencing Guidelines. (In fact, that perception is exaggerated since the agreements hinder the flow only of privileged information which, but for the agreement, the recipient would not have.)

It is unclear whether the Holder Memo Standards, when first issued, were meant merely to clarify the Justice Department's view of joint defense agreements or whether they were meant as a warning to attorneys that pressure on corporations to waive privilege to receive

⁸⁶ *White-Collar Prosecutors Probe Joint Defense Agreements*, 1 THE DOJ ALERT 3, July 1991 [hereinafter "DOJ ALERT"].

⁸⁷ *Id.* (internal quotation omitted) (alteration in original); see also Savarese & Miller, *supra* note 33, at 720.

⁸⁸ DOJ ALERT, *supra* note 86, at 3.

⁸⁹ U.S.S.G. ch. 8.

⁹⁰ *Id.* § 8C2.5(g)(1), (2).

⁹¹ *Id.* § 8C2.5(g), cmt. 12.

⁹² *Id.*

⁹³ See, e.g., Zornow & Krakaur, *supra* note 1, at 148. One former United States Attorney described this cooperation as an "enforced partnership" between prosecutors and corporations, declaring it the best route to compliance with the law. *Id.* (citing Otto G. Obermaier, *Drafting Companies to Fight Crime*, N.Y. TIMES, May 24, 1992, at 11). Legal commentators have documented how this "enforced partnership" conflicts with *Upjohn Co. v. United States*, 449 U.S. 383, 389 (1981), in which the Supreme Court held that the best route to corporate compliance with the law is "full and frank communication between attorneys and their clients." See, e.g., Zornow & Krakaur, *supra*, at 148-49.

credit for cooperating will increase, thereby indicating that joint defense agreements that undermine this cooperation would not be viewed favorably.⁹⁴ A former Assistant Attorney General, however, has denied that the Justice Department requires corporations to waive privilege in order to receive the benefits of cooperation.⁹⁵ "There certainly is no department policy requiring companies to waive the attorney-client privilege to receive credit for cooperating with the government . . . [and] I, for one would be opposed to [such a] policy."⁹⁶ But, this same former Justice Department official also noted that it "should not be surprising" that prosecutors will continue "to give greater consideration to a corporation which cooperates extensively and provides substantial assistance" to the government, and stated:

I should fully disclose that when I was doing white collar criminal defense work, I certainly participated in joint defense agreements and recognized their value. On the other hand, their value has to be balanced because there is the potential for mischief and the potential for utilizing the agreements to allow targets to circle the wagons and make it difficult for prosecutors successfully to complete an investigation or prosecution. That is, of course, why these agreements are viewed by some investigators and prosecutors as potential vehicles to obstruct a successful investigation and prosecution.⁹⁷

While the Holder Memo Standards and this former Justice Department official's comments outwardly seem to suggest some Justice Department suspicion of joint defense agreements, the United States Attorney's Office for the Southern District of New York has been more explicit in its disapproval of the use of joint defense agreements for at least a decade. In cases where individual employees have entered into joint defense agreements with a target corporation:

[T]he office of the United States Attorney for the Southern District of New York routinely coerces corporate waivers of the privilege by informing corporate managers that their failure to waive the privilege will be evaluated in determining whether the corporation has been sufficiently cooperative to avoid indictment and/or a severe guidelines sentence.⁹⁸

Indeed, the United States Attorney for the Southern District of New York "has publicly called for a complete waiver of the attorney-client privilege by all corporate targets wishing to obtain credit for their cooperation."⁹⁹ Accordingly, both corporations and individual employees need to take this hostility towards joint defense agreements into account prior to formalizing such agreements.

⁹⁴ See generally Polkes & Jarusinsky, *supra* note 2.

⁹⁵ Irvin B. Nathan, *Assistant Attorney General James Robinson Speaks to White Collar Criminal Issues*, 6 No. 12 BUS. CRIMES BULL. 3 (Jan. 2000).

⁹⁶ *Id.*

⁹⁷ *Id.*

⁹⁸ Robert Morvillo, *The Decline of the Attorney Client Privilege*, N.Y.L.J., Dec. 2, 1997, at 3.

⁹⁹ Judson W. Starr & Brian L. Flack, *The Government's Insistence on a Waiver of Privilege*, WHITE COLLAR CRIME 2001 J-1, at J-4 (ABA 2001); see also Polkes & Jarusinsky, *supra* note 2, at J-31 (noting that beginning in the early 1990s, the United States Attorney's Office for the Southern District of New York began transgressing former standards for corporate cooperation).

In addition, the Government view, as expressed in the guidelines and elsewhere, sees all joint defense agreements as similar, while in fact they vary widely--from full disclosure of client communications to providing corporate documents to merely explaining the corporate structure and process.

It has been suggested, however, that, despite the apparent lack of clarity as to the government's position regarding joint defense agreements, the Justice Department's stance may actually be relaxing. The American Bar Association ("ABA") a few years ago held a session addressing attacks on the joint defense privilege,¹⁰⁰ and a lawyer who spoke at the session commented that several years ago the Justice Department saw joint defense agreements mainly as a "mechanism simply to obstruct justice," but that "[t]hrough education, the [Justice] Department has come to see that these agreements are simply a way for defense counsel to legitimately preserve privileges while sharing information."¹⁰¹ It was further noted that the federal prosecutor who has a negative "knee-jerk" reaction against joint defense agreements has become "the exception rather than the rule."¹⁰² If this is in fact the case, this positive development needs to be further supported by Justice Department policies and guidelines.

C. ADVANCEMENT OF ATTORNEYS' FEES

Defense counsel and their clients increasingly find government resistance to corporate efforts to advancing attorneys' fees to individual employees once a government investigation has been commenced. Although individuals under investigation or charged by the government are entitled to obtain qualified, independent counsel without interference from the government, federal prosecutors frequently object to a corporation providing counsel for its employees and penalizes the company for not cooperating with the government investigation. This federal government policy, however, undermines a well-established and necessary practice and imposes itself where law enforcement has no real interest.

In recognition that "[t]he sort of litigation in which corporate executives are involved . . . is likely to be protracted, complex, and expensive,"¹⁰³ the vast majority of states have enacted statutes that expressly authorize corporations to adopt provisions within the company's by-laws, articles of incorporation, or employment contracts that automatically provide for the advancement of legal fees of officers and directors.¹⁰⁴ Given today's litigious environment, many corporations have adopted such provisions.¹⁰⁵ Since these bylaws, articles, and employment agreements are enforceable contracts, corporations that refuse to advance the fees to

¹⁰⁰ The session was entitled "Assault on the Privilege: Protecting and Defending the Attorney-Client Privilege, Work Product, and Joint Defense Agreements in Criminal Investigation." *Interview with Jan Handzlik, Kirkland & Ellis and Vincent J. Marella, Bird, Marella, Boxer & Wolpert, Los Angeles, California*, 13 CORP. CRIME REP. 12 (1999).

¹⁰¹ *Id.* at 15.

¹⁰² *Id.*

¹⁰³ JOSEPH WARREN BISHOP, JR., *LAW OF CORPORATE OFFICERS AND DIRECTORS - INDEMNIFICATION AND INSURANCE* § 6.27, at 45 (Gail A. O'Gradney ed., 2000).

¹⁰⁴ See, e.g., DEL. CODE ANN. tit. 8, § 145(f) (2000); MODEL BUS. CORP. ACT ANNOTATED § 8.58(a) (3d. ed. Supp. 1998/99) [hereinafter "MBCA"]. Some state statutes directly require a corporation to advance fees. See, e.g., MINN. STAT. ANN. § 300.083(3) (West 2000); N.D. CENT. CODE § 10-19.1-91(4) (1999).

¹⁰⁵ See 1 RODMAN WARD, JR. ET AL., *FOLK ON THE DELAWARE GENERAL CORPORATION LAW* § 145.7, at 237 (4th ed. Supp. 2000-1) ("Mandatory advancement provisions frequently appear in corporate charters, by-laws, and indemnification agreements.").

directors and officers in accordance with the agreements face declaratory judgments and damages verdicts.¹⁰⁶

For example, Delaware's code extends the scope of this authority allowing for the adoption of mandatory advancement provisions to include employees, as well as directors and officers.¹⁰⁷ Although some corporations have bound themselves to advance fees to employees pursuant to a bylaw or merger agreement,¹⁰⁸ the far more common practice is for corporations to adopt provisions that provide the corporation with *discretion* to advance fees to employees:

Under bylaws, articles of incorporation, or other contractual provisions, a corporation may provide for advancement of expenses, including attorneys' fees. The corporation may agree to make such advancements mandatory The provisions in bylaws and articles of incorporation dealing with indemnification all cover directors and officers, and a substantial minority apply also to "employees" and "agents," even if the statute does not But . . . , most of those that cover employees provide that the corporation "may" indemnify employees¹⁰⁹

A discretionary fee advancement provision allows the corporation's board of directors to assess the circumstances underlying an employee's need for separate counsel (and a concomitant need for fees to be paid in advance) and render a decision that is subject to a reasonableness requirement.¹¹⁰ Typically, the corporations that adopt such discretionary provisions will require the employee to provide a written affirmation of good faith or an undertaking to repay the fees if he or she is later found to be ineligible for indemnification.¹¹¹

Significantly, Delaware's corporate code and the codes of many other states expressly permit this discretionary advancement of fees to employees.¹¹² The Model Business Corporation Act, which endeavors to leave unregulated the issue of advancement of expenses to employees, similarly acknowledges that its provisions are "not in any way intended to cast doubt on the power of the corporation to indemnify or advance expenses to . . . employees and agents"¹¹³

In addition to the state corporation codes, legal ethics rules also permit a corporation to pay an employee's attorney's fees, provided that the attorney maintains professional independence and loyalty to the employee. For example, Model Rule 1.8(f) of the ABA Model Rules of Professional Conduct ("Model Rules") requires a lawyer who accepts compensation from a third party to take steps to ensure no conflict of interest exists:

¹⁰⁶ See generally *Ridder v. CityFed Fin. Corp.*, 47 F.3d 85 (3d Cir. 1994) (holding that officer is entitled to injunction requiring corporation to advance fees prior to final disposition of the claim); *Citadel Holding Corp. v. Roven*, 603 A.2d 818 (Del. 1992) (awarding damages and prejudgment interest to director after corporation refused to advance fees as mandated in employment agreement).

¹⁰⁷ See DEL. CODE ANN. tit. 8, § 145(f).

¹⁰⁸ See *Ridder*, 47 F.3d at 86-87 (indicating bylaw required advancement of expenses to all employees).

¹⁰⁹ BISHOP, *supra* note 103, §§ 7.07.50 to 7.08, at 18-19 (footnote omitted).

¹¹⁰ See *Citadel Holding*, 603 A.2d 823-24.

¹¹¹ See, e.g., BISHOP, *supra* note 103, App. 7A, at 5-8 (reprinting resolution that confers the discretion to advance fees to an employee and agent if an undertaking is provided on his or her behalf).

¹¹² See, e.g., DEL. CODE ANN. tit. 8, § 145(f).

¹¹³ MBCA § 8.58(e) & cmt.

A lawyer shall not accept compensation for representing a client from one other than the client unless:

- (1) the client consents after consultation;
- (2) there is no interference with the lawyer's independence of professional judgment or with the client-lawyer relationship; and
- (3) information relating to representation of a client is protected as required by Rule 1.6.¹¹⁴

The ABA's Standards for Criminal Justice contain a comparable direction:

In accepting payment of fees by one person for the defense of another, defense counsel should be careful to determine that he or she will not be confronted with a conflict of loyalty since defense counsel's entire loyalty is due the accused. Defense counsel should not accept such compensation unless:

- (i) the accused consents after disclosure;
- (ii) there is no interference with defense counsel's independence of professional judgment or with the client-lawyer relationship; and
- (iii) information relating to the representation of the accused is protected from disclosure as required by defense counsel's ethical obligation of confidentiality.

Defense counsel should not permit a person who recommends, employs, or pays defense counsel to render legal services for another to direct or regulate counsel's professional judgment in rendering such legal services.¹¹⁵

Accordingly, the exercise of discretion by a corporation to advance fees on behalf of an employee is permitted by law and ethical codes. Corporations that exercise this discretion are guided by a legitimate concern for employee morale as well as the view that it is unfair to require employees whose corporate conduct is under investigation to pay for their own defense before any adjudication of guilt, much less before any determination of their individual guilt or responsibility could even be made. Moreover, the principles underlying the advancement of expenses to directors and officers – *i.e.*, that those who serve the corporation should not be forced to bear the expense of their own defense, as that would discourage competent people from serving in such capacity – apply equally to a corporation's decision to advance fees to employees.¹¹⁶ Therefore, the exercise of discretion to advance fees typically reflects sound corporate governance goals, rather than an effort to not cooperate with a government investigation.

¹¹⁴ MODEL RULES OF PROF'L CONDUCT R. 1.8(f) (1999). Rule 1.8(f) is very similar to its predecessor, Disciplinary Rule 5-107 of the Model Code of Professional Responsibility, which is still in force in some states.

¹¹⁵ A.B.A. STANDARDS FOR CRIMINAL JUSTICE Standard 4-3.5(e) (1993). If the lawyer could not exercise independence, such as in a "crime family" case, the court may order disqualification. *See, e.g., United States v. Locascio*, 6 F.3d 924, 932-33 (2d Cir. 1993).

¹¹⁶ *See* MBCA § 8.58 & cmt (recognizing that the authority also exists for corporations to indemnify or advance fees to employees).

The legitimacy of the policy goals espoused by these state statutes and ethical standards is confirmed by the Justice Department's own internal regulations, which permit the Justice Department itself to pay for a prosecutor's outside counsel if the prosecutor is a subject of a federal criminal investigation.¹¹⁷ Unfortunately, the guidance recently issued to federal prosecutors in the Holder Memo Standards could, and does, generate interference with the principle that non-government employees facing government investigation or prosecution are entitled to qualified, competent representation. Today, it is common for defense counsel to be confronted by a federal prosecutor who believes that a corporation is not fully cooperating with the government in a federal criminal investigation solely because the corporation is paying the legal fees for an officer, director or employee.

Although the Holder Memo Standards quite logically instruct prosecutors that the cooperation of the corporation may be a relevant factor in determining whether to charge the company, this guidance includes flawed commentary that authorizes a prosecutor to view as non-cooperative the advancement of legal fees for employees that have been deemed "culpable" by the prosecutor. Specifically, the Holder Memo Standards state that:

[W]hile cases will differ depending on the circumstances, a corporation's promise of support to culpable employees and agents, either through the advancing of attorneys fees, through retaining the employees without sanction for their misconduct, or through providing information to the employees about the government's investigation pursuant to a joint defense agreement, may be considered by the prosecutor in weighing the extent and value of a corporation's cooperation.¹¹⁸

A footnote, fortunately, does add that "[s]ome states require corporations to pay the legal fees of officers under investigation prior to a formal determination of their guilt. Obviously, a corporation's compliance with governing law should not be considered a failure to cooperate."¹¹⁹ But where this state requirement is lacking, the Holder Memo Standards undermine an otherwise legal, ethical and useful practice.

The Justice Department policy expressed in the Holder Memo Standards may unfairly prejudice corporations and their employees and, thus, compromise the administration of justice. Although corporations are often obligated under state law and their by-laws to advance fees to officers and directors, they may have statutory authority not to pay attorneys' fees for officers and directors if the corporation determines that an officer or director acted with criminal intent or acted to harm the company.¹²⁰ In addition, corporations typically retain discretion to advance fees for lower-ranking employees. Since a decision to advance fees most often must be made long before there is a sufficient factual basis to allow a corporation to assess "culpability" of the employee, the Holder Memo Standards may cause premature judgments by a corporation about an employee's criminal intent and conduct and will have a chilling effect on a corporation's exercise of discretion to advance fees.

¹¹⁷ See 28 C.F.R. §§ 50.15(a)(7), 50.16.

¹¹⁸ Criminal Resource Manual, art. 162, § VI.B (footnote omitted) (emphasis added). Section VI.B. contains numerous other relevant provisions as well.

¹¹⁹ *Id.* at n.3.

¹²⁰ See, e.g., Del. Code Ann. tit. 8, § 145(a) (2000).

In addition, the Holder Memo Standards are subject to abuse by prosecutors who could gain a strategic advantage by interfering with the ability of corporate employees to retain competent counsel if they are unable to do so absent financial support from the company.

The purported application of the Holder Memo Standards to the advancement of fees only to "culpable" employees creates a paradigm that is both incompatible with the legal standards governing advancement and impractical in its application to white-collar criminal investigations. Culpability may play a role in a corporation's decision whether to ultimately indemnify an employee, as the corporation may choose not to indemnify an employee who acted in bad faith or with reason to believe that his or her conduct was unlawful.¹²¹ Whether an employee is guilty of the offense for which he or she is under investigation, however, frequently cannot be determined by a corporation at the investigation or pre-trial stage. Indeed, the ultimate decision to not indemnify an employee is often made long after the need to do so has arisen and fees have already been advanced.

Under Delaware law, for example, a corporation's decision to advance fees is an issue resolved independently of the employee's ultimate entitlement to indemnification, and is instead resolved by answering questions that do not touch upon culpability.¹²² In general, courts applying Delaware law will first determine whether the employee is entitled to the advancement of fees by virtue of a bylaw, resolution, or contractual provision.¹²³ If not, the decision to advance fees is left to the discretion of the corporation and the sole requirement that must be fulfilled is for the employee to file an undertaking to repay the advanced fees if such an undertaking is required by the relevant bylaw, resolution, or contract.¹²⁴

In contrast, the Holder Memo Standards would require a corporation to determine an employee's "culpability" well before such a determination is ripe. As noted by one state legislature, "during the early stages of a proceeding (when advances are often needed) the facts underlying the claim cannot be fully evaluated and the board of directors therefore cannot accurately ascertain the ultimate propriety of indemnification."¹²⁵ This is particularly the case in corporate criminal investigations, where the proscribed behavior "is often difficult to distinguish from the gray zone of socially acceptable and economically justifiable business conduct."¹²⁶ As summarized by one commentator, "[t]he jurisprudence of white collar crime, in particular, is littered with examples of courts and legislatures struggling to clarify what is or is not a crime."¹²⁷

¹²¹ *Id.* § 145(a)-(b).

¹²² See *Ridder v. CityFed Fin. Corp.*, 47 F.3d 85, 87 (3d Cir. 1994) ("Under Delaware law, appellants' right to receive the costs of defense in advance does not depend upon the merits of the claims asserted against them and is separate and distinct from any right of indemnification they may later be able to establish.").

¹²³ See, e.g., *id.*

¹²⁴ See DEL. CODE ANN. tit. 8, § 145(e).

¹²⁵ S.C. CODE ANN. § 33-8-530 cmt. (Law. Co-op. 2000).

¹²⁶ *United States v. U.S. Gypsum Co.*, 438 U.S. 422, 441 (1978); see also Pamela H. Bucy, *Indemnification of Corporate Executives Who Have Been Convicted of Crimes: An Assessment and Proposal*, 24 IND. L. REV. 279, 293 (1991) (concluding that many white-collar criminal statutes and regulations create a "gray area between legal and illegal conduct").

¹²⁷ Bucy, *supra* note 126, at 293.

In light of this uncertain legal backdrop and the large volume of documents that typically must be reviewed in corporate investigations, a company will often be unable to realistically assess the culpability of its employees until the conclusion of the legal proceedings. In the case where an employee has made a serious mistake in judgment, the company may not have sufficient information to conclude that the employee had the necessary criminal intent. In most United States corporations, a basic tenet of human resources management is that an employee should be given the benefit of the doubt when determining something as serious as whether he or she acted with criminal intent. As a result, companies often properly refrain from premature determinations regarding an employee's criminal culpability. The Holder Memo Standards, however, unwisely pressures a company to rush to judgment.

In addition, the guidance set forth in the Holder Memo Standards is subject to abuse. Every lawyer – including a prosecutor – has an obligation not to interfere with an individual's legal representation, particularly in a criminal matter.¹²⁸ As Model Rule 8.4 states: "It is professional misconduct for a lawyer to . . . engage in conduct that is prejudicial to the administration of justice."¹²⁹ Although the paramount duty of a prosecutor is to seek justice,¹³⁰ the Holder Memo Standards unfortunately create a framework that allows a prosecutor to use his or her leverage to interfere with an employee's ability to obtain a well-qualified lawyer, which in fact undermines the interests of justice.

Given that most business-related investigations concern complex regulatory issues, an experienced attorney is frequently necessary to competently safeguard an employee's interests. Many employees, however, lack sufficient funds to retain such an attorney. An employee who is denied the advancement of fees is unlikely to be able to obtain competent counsel. This reasoning applies with equal – if not greater – force to low-ranking employees. Prosecutors may gain a strategic advantage by chilling a company's exercise of discretion to advance fees for employees and impeding an employee's ability to retain a capable and experienced attorney. Such strategic interference with an individual's ability to obtain representation is inconsistent with the ethical standards governing attorney conduct and ultimately impedes the fair administration of justice.¹³¹

D. CRIME-FRAUD EXCEPTION

Today, defense lawyers are confronted by government efforts to overcome the attorney-client privilege by assertion of the crime-fraud exception. A defense counsel's first notice of such a claim is often in an *ex parte* order of a court requiring the lawyer to provide testimony regarding communications with a client.

¹²⁸ Under the McDade Amendment adopted in 1998, federal prosecutors are subject to state ethics rules and local federal court rules governing attorneys in each state where such attorney engages in that attorney's duties. See 28 U.S.C. § 530B(a).

¹²⁹ MODEL RULES OF PROF'L CONDUCT R. 8.4(d) (1999).

¹³⁰ "The United States Attorney is the representative not of an ordinary party to a controversy, but of a sovereignty whose obligation to govern impartially is as compelling as its obligation to govern at all; and whose interest, therefore, in a criminal prosecution is not that it shall win a case, but that justice shall be done." *Berger v. United States*, 295 U.S. 78, 88 (1935).

¹³¹ The Holder Memo Standards' guidance regarding advancement of attorney's fees is also incompatible and inconsistent with the apparent approval of this practice as expressed in state statutes permitting corporations to exercise discretion to advance fees, despite the exemption in the Justice Department guidelines when such advances are required by law.

Although the crime-fraud exception to the attorney-client privilege is as universally recognized as the privilege itself, it is justified only on the grounds that the traditional rationale for the privilege – attorneys may give sound legal advice only if clients can fully and frankly communicate with them – does not apply when the intent of the communications is to further criminal activity.¹³² The crime-fraud exception to the privilege dates back to the 1743 English case of *Annesley v. Earl of Anglesea*.¹³³ A later English case, *Regina v. Cox*, was the first to give widespread effect to the exception, applying it to both civil and criminal wrongs in 1884.¹³⁴ *Regina* established the principle that the client's intent in consulting an attorney controls whether the communication is privileged, holding, "[i]n order that the rule may apply there must be both professional confidence and professional employment, but if the client has a criminal object in view in his communications with his solicitor one of these elements must necessarily be absent."¹³⁵

In the 1891 case of *Alexander v. United States*, the United States Supreme Court endorsed the *Regina* rule, but added the limitation that the exception should only apply to wrongs for which the party is *currently* being tried.¹³⁶ This restriction, however, has since become a dead letter.¹³⁷ The Court further refined the crime-fraud exception in *Clark v. United States* by limiting its application to cases in which the party opposing the privilege had presented "*prima facie* evidence that it has some foundation in fact."¹³⁸ Another early limitation to the exception was the "independent evidence" requirement, whereby the government was required to establish its *prima facie* case through evidence acquired independently of the communications at issue.¹³⁹ Yet, since prosecutors invoked it relatively infrequently, the crime-fraud exception remained an undeveloped doctrine throughout much of this century.

More recently, federal prosecutors have taken advantage of the increased criminalization of white-collar and regulatory offenses to invade the attorney-client privilege by asserting the crime-fraud exception.¹⁴⁰ Such government efforts have a low procedural threshold, allowing prosecutors to compel testimony about attorney-client communications based only on an *ex parte* showing that the exception applies. In most cases, the decision to proceed and the *ex parte* showing to the court are both made by the individual prosecutor handling the investigation without any additional review or approval within the Justice Department.

Most courts recognize that in order for the exception to apply, prosecutors must demonstrate two elements: (1) the client was involved in planning criminal conduct at the time of the

¹³² *In re Grand Jury Proceedings*, 87 F.3d 377, 381 (9th Cir. 1996); *Haines v. Liggett Group, Inc.*, 975 F.2d 81, 90 (3d Cir. 1992); *Coleman v. Am. Broad. Co., Inc.*, 106 F.R.D. 201, 206 (D.D.C. 1985).

¹³³ 17 How. St. Tr. 1225 (1743), quoted in WIGMORE, *supra* note 12, § 2291; see also MCCORMICK ON EVIDENCE, *supra* note 13, § 87, at 344 n.3 (citing *Annesley*); Fried, *supra* note 9, at 446-50 (discussing the history and significance of *Annesley*).

¹³⁴ 14 Q.B.D. 153 (Cr. Cas. Res. 1884); see also Christopher Paul Galanek, Note, *The Impact of the Zolin Decision on the Crime-Fraud Exception to the Attorney-Client Privilege*, 24 GA. L. REV. 1115, 1123 (1990) (discussing *Regina*).

¹³⁵ 14 Q.B.D. at 168; see also Galanek, *supra* note 134, at 1123 n.45 (quoting *Regina*).

¹³⁶ 138 U.S. 353, 360 (1891); see also Fried, *supra* note 9, at 460.

¹³⁷ Fried, *supra* note 9, at 460.

¹³⁸ 289 U.S. 1, 15 (1933) (internal quotation omitted); see also Fried, *supra* note 9, at 462-63.

¹³⁹ See, e.g., *United States v. Shewfelt*, 455 F.2d 836, 840 (9th Cir. 1972); *United States v. Bob*, 106 F.2d 37, 40 (2d Cir. 1939); see also Fried, *supra* note 9, at 463-65. This limitation has since been abrogated by *United States v. Zolin*, 491 U.S. 554 (1989), discussed *infra*.

¹⁴⁰ Fried, *supra* note 9, at 470.

consultation; and (2) the attorney's assistance was obtained in furtherance of this activity.¹⁴¹ It is the client's subjective intent, and not the attorney's knowledge of the planned criminal activity, that controls.¹⁴² In most federal Circuits, the exception applies even if the client never completed the planned crime or fraud.¹⁴³

The minimal *prima facie ex parte* showing required of prosecutors underlies the current concern regarding the government's efforts to use the crime-fraud exception. The Supreme Court has addressed this issue only once, in *United States v. Zolin*, a case in which the IRS sought to compel the defendant in a criminal tax investigation to produce various documents and audiotapes that the defendant claimed were protected by the attorney-client privilege.¹⁴⁴ The IRS submitted statements from agents working on the case, as well as partial transcripts of the tape recordings obtained from a confidential source, to demonstrate that the crime-fraud exception applied. The district court refused to conduct an *in camera* review of the privileged material, but ordered that the defendant produce five of the requested documents based on the prosecutor's evidence. The Court of Appeals for the Ninth Circuit affirmed.¹⁴⁵

The Supreme Court vacated and remanded, holding that a court can review privileged material *in camera* to determine whether the exception applies. To obtain an *in camera* review, the party opposing the privilege "must present evidence sufficient to support a reasonable belief that *in camera* review may yield evidence that establishes the exception's applicability."¹⁴⁶ Disposing of the traditional "independent evidence" requirement, the Court held that any relevant evidence that was lawfully obtained and not privileged could be used to make this threshold showing.¹⁴⁷ Furthermore, the decision whether to grant the *in camera* review is within the district court's discretion.¹⁴⁸

The *Zolin* Court declined to define the quantum of proof ultimately necessary to invoke the crime-fraud exception following the *in camera* review.¹⁴⁹ Most federal courts, however, continue to apply the *Clark prima facie* standard when deciding whether the exception applies. Although various Circuits have different formulations of what constitutes a *prima facie* case, none of the standards are very stringent.¹⁵⁰

¹⁴¹ See, e.g., *United States v. Jacobs*, 117 F.3d 82, 87 (2d Cir. 1997); *United States v. Collis*, 128 F.3d 313, 321 (6th Cir. 1997); *In re Grand Jury Proceedings*, 87 F.3d 377, 381 (9th Cir. 1996).

¹⁴² See, e.g., *In re Grand Jury Proceeding*, 87 F.3d at 381-82; *United States v. Chen*, 99 F.3d 1495, 1504 (9th Cir. 1996).

¹⁴³ See, e.g., *Collis*, 128 F.3d at 321; *In re Grand Jury Subpoena Duces Tecum Dated Sept. 15, 1983*, 731 F.2d 1032, 1039 (2d Cir. 1984). But see *In re Sealed Case*, 107 F.3d 46, 49 (D.C. Cir. 1997) ("[T]he client must have carried out the crime or fraud [T]he exception does not apply even though, at one time, the client had bad intentions.").

¹⁴⁴ 491 U.S. 554, 557 (1989).

¹⁴⁵ *Id.* at 558-61.

¹⁴⁶ *Id.* at 574-75.

¹⁴⁷ *Id.* at 575.

¹⁴⁸ *Id.* at 572.

¹⁴⁹ *Id.* at 563.

¹⁵⁰ See, e.g., *Haines v. Liggett Group, Inc.*, 975 F.2d 81, 96 (3d Cir. 1992) (indicating that all that may be required is "evidence which, if believed by the fact finder, supports plaintiff's theory of fraud"); *In re Grand Jury Proceedings*, 857 F.2d 710, 712 (10th Cir. 1988) (holding that a partial transcript of grand jury proceedings and affidavits established *prima facie* case that documents were not privileged, because the evidence showed that the allegation of attorney participation in a crime or fraud has some foundation in fact); *In re Int'l Sys. & Controls Corp. Sec. Litig.*, 693 F.2d 1235, 1242 (5th Cir. 1982) (endorsing Black's Law Dictionary definition of *prima facie* case - evidence that "will suffice until contradicted and overcome by other evidence" - and finding that mere allegations in plaintiff's pleadings did not meet this standard).

In applying *Zolin*, Circuits have generally required that prosecutors either make an *ex parte* showing to meet the threshold for an *in camera* review or establish a *prima facie* case. According to the Ninth Circuit, *Zolin* does not require that a court consider "other available evidence" outside of what the prosecutor presents to it in determining whether the exception applies.¹⁵¹ In an *in camera* review of privileged statements, a defendant asserting the privilege also has no right to notice or opportunity to be heard. Instead, the "*prima facie* foundation may be made by documentary evidence or good faith statements by the prosecutor as to testimony already received by the grand jury."¹⁵² For example, in one case, the government subpoenaed defense counsel for a hospital that was the target of a grand jury investigation and, in arguing that the crime-fraud exception applied to counsel's testimony, prosecutors submitted an *in camera*, *ex parte* "good faith" statement of evidence about the alleged criminal activity. The district court ruled that the government had established a *prima facie* case and refused to allow the hospital's counsel to view the government's evidence or to present rebuttal evidence. The Tenth Circuit affirmed, holding that instead of affording an opportunity to be heard, the court need only protect the privileged communication by defining the "scope of the crime-fraud exception narrowly enough so that information outside of the exception will not be elicited."¹⁵³

Courts' willingness to rely on a *prima facie*, *ex parte* showing to establish the applicability of the crime-fraud exception likely stems from dual concerns. First, that a determination of this foundational issue will become a "preliminary minitrial" and waste judicial resources.¹⁵⁴ Second, in the context of grand jury proceedings, that the government's interest in protecting the secrecy of the proceedings outweighs a defendant's due process rights.¹⁵⁵ Although the increasing use of the crime-fraud exception stems in large part from the courts' willingness to find it applies, the detrimental effect of this development is greatly exacerbated by the efforts of federal prosecutors to invoke the exception, often in *ex parte* proceedings.

The United States Attorneys' Manual contains no specific guidelines regarding the invocation of the crime-fraud exception by federal prosecutors. Despite the warnings against invading the attorney-client relationship, federal prosecutors have increasingly invoked the crime-fraud exception to compel testimony about privileged communications. One review of reported case law in the mid-1980's alone indicated an "extraordinary increase" in attempts to compel attorney testimony throughout the previous twenty years.¹⁵⁶ Invocations of the excep-

¹⁵¹ *In re Grand Jury Subpoena 92-1(SJ)*, 31 F.3d 826, 830 (9th Cir. 1994). In *Zolin*, the government sought documents relating to the defendant corporations' allegedly illegal exports and presented affidavits from former employees to demonstrate that the exception applied. The district court found the government's evidence sufficient to obtain an *in camera* review of the documents and declined to consider countervailing evidence from the corporation. 491 U.S. at 573-74.

¹⁵² *In re Grand Jury Subpoenas*, 144 F.3d 653, 662 (10th Cir. 1998).

¹⁵³ *Id.* at 661. But see *Haines*, 975 F.2d at 97 ("The importance of the privilege . . . as well as fundamental concepts of due process require that the party defending the privilege be given the opportunity to be heard, by evidence and argument, at the hearing seeking an exception to the privilege."). The Third Circuit, however, eventually distinguished *Haines* and held that relying solely on an *ex parte* affidavit to determine the application of the crime-fraud exception does not violate due process. *In re Grand Jury Subpoena*, 223 F.3d 213, 218 (3d Cir. 2000) ("This case differs from *Haines* not only because *Haines* was a civil case and this is a criminal one but, even more important, because *Haines* involved adversarial proceedings whereas grand jury proceedings are investigative, and the rules of the game are different.").

¹⁵⁴ See, e.g., *In re Grand Jury Proceedings*, 857 F.2d at 712 (expressing such concern); see also H. Lowell Brown, *The Crime-Fraud Exception to the Attorney-Client Privilege in the Context of Corporate Counseling*, 87 Ky. L.J. 1191, 1259 (1999) (discussing courts' concerns).

¹⁵⁵ See, e.g., *In re Grand Jury Subpoena*, 884 F.2d 124, 126 (4th Cir. 1989) (holding that *in camera* review of the government's evidence did not violate defendant's due process rights); see also Brown, *supra* note 154, at 1259 (discussing these secrecy concerns).

¹⁵⁶ Fried, *supra* note 9, at 445 (citing a review of the case digests).

tion "proliferate" in the context of federal grand juries.¹⁵⁷ Federal prosecutors' use of subpoenas for lawyers have been described as a "growing trend . . . [that] has troubled both practitioners and legal scholars."¹⁵⁸ This trend can be at least partially explained by the increase in criminalization of regulatory offenses and in federal prosecutions for white collar and organized crime.¹⁵⁹

Although federal prosecutors are increasingly using the crime-fraud exception to overcome the attorney-client privilege, the evidence presented by prosecutors to make a *prima facie* case is often not disclosed in court opinions, thus making an analysis of the full extent of the problem difficult. Nonetheless, the current Justice Department practices that jeopardize the privilege and undermine the policies behind it include: (1) using unsubstantiated statements to establish the application of the exception; (2) utilizing communications outside the bounds of the exception; and (3) not following the proper procedures for the introduction of privileged evidence.

As various legal scholars have commented, there are significant consequences arising from the Justice Department's increased reliance on the crime-fraud exception, particularly because of the potential for prosecutorial abuse inherent in the law pertaining to the exception itself. The most common criticisms are the abandonment of the "independent evidence" requirement, the lack of restrictions on the legitimacy and accuracy of evidence, and the *ex parte* nature of the proceeding. The current rules allow prosecutors to obtain an *in camera* review based on unsubstantiated information that they may have collected through an unlawful intrusion into the privilege, without giving defendants an opportunity to challenge the reliability or validity of that evidence.¹⁶⁰ Safeguards are necessary even during an *in camera* review because "each time a court entertains a motion to defeat the privilege with any information, qualitatively acceptable or not, the court risks disclosing privileged information that should not be disclosed to any party."¹⁶¹ In addressing the *ex parte* nature of the *in camera* review, this process has also come under attack by commentators who criticize its inherent weaknesses:

The absence of notice of the basis of the crime-fraud claim further aggravates the inability of the privilege holder to meaningfully respond and to preserve the privilege. The court is also deprived of the robust factual development and legal argument necessary for an informed judicial decision.¹⁶²

Oftentimes, the evidence that prosecutors use either to obtain an *in camera* review or to establish a *prima facie* case contains no indicia of reliability or derives from third parties with

¹⁵⁷ Ann M. St. Peter-Griffith, *Abusing the Privilege: The Crime-Fraud Exception to Rule 501 of the Federal Rules of Evidence*, 48 U. MIAMI L. REV. 259, 279 (1993).

¹⁵⁸ Ross G. Greenberg, et al., *Eighth Survey of White Collar Crime Procedural Issues: Attorney-Client Privilege*, 30 AM. CRIM. L. REV. 1011, 1021 (1993).

¹⁵⁹ Fried, *supra* note 9, at 445.

¹⁶⁰ See Brown, *supra* note 154, at 1252; St. Peter-Griffith, *supra* note 158, at 269-71; Galanek, *supra* note 134, at 1139-40 (each noting these concerns).

¹⁶¹ St. Peter-Griffith, *supra* note 157, at 271.

¹⁶² Brown, *supra* note 154, at 1259-60 (footnotes omitted); see also Michael M. Mustokoff, et al., *The Attorney/Client Privilege: A Fond Memory of Things Past An Analysis of the Privilege Following United States v. Anderson*, 9 ANNALS HEALTH L. 107, 114-17 (2000) (reflecting the current criticism of these practices).

an interest in the matter. For example, in one case, the government relied on affidavits from two former employees of the defendant corporation to meet the threshold for an *in camera* review of documents it claimed were in furtherance of export control violations.¹⁶³ Both employees' affidavits contained hearsay evidence about specific words and acts of the company's executives:

According to one former employee, the Corporation's president shipped GPS units to the [United Arab Emirates] in July 1989 and, a short time later, received a telex from Iran thanking him for the units He further stated that both an Iranian trainee and the Corporation's vice-president indicated that the GPS units in Iran came from a [United Arab Emirates] front company deliberately set up for that purpose.¹⁶⁴

In another case, the prosecutor used testimony from a government agent that likely included hearsay to make its *prima facie* case.¹⁶⁵ In both of these cases, the courts accepted the evidence and revoked the privilege. Furthermore, although the exception is supposed to apply to communications that take place before an intended crime or fraud is committed, federal prosecutors frequently attempt to apply it to communications after the crime has occurred.¹⁶⁶ Indeed, the district courts in two cases compelled production of documents dated after the completion of the alleged crime. Fortunately, the appellate courts reversed and limited the lower courts' orders to evidence of communications *before* the crime occurred.¹⁶⁷ These efforts to use such evidence, however, is alarming.

Federal prosecutors have also attempted to circumvent the two-step procedure outlined in *Zolin*. For example, in one case, the prosecutor sought application of the exception, and the trial court initially applied it to a letter to the defendant from his attorney. Because the prosecutor did not establish a basis for an *in camera* review, the Court of Appeals for the Ninth Circuit found this to be error.¹⁶⁸ In another Ninth Circuit case, a federal prosecutor relied on disclosures of attorney-client communications from a former employee of the defendant and from an agent's affidavit regarding these communications, but without first requesting an *in camera* review or making a *prima facie* showing.¹⁶⁹

Federal prosecutors have also argued that attorney-client communications can be evidence of a particular "crime" and are therefore not privileged, even if the facts of the case do not make out the elements of the alleged crime.¹⁷⁰ Another "extraordinary ploy" used by prosecutors is to turn a past offense into a continuing one so that the communications fall

¹⁶³ *In re Grand Jury Subpoena 92-1(SJ)*, 31 F.3d 826, 830 (9th Cir. 1994).

¹⁶⁴ *Id.*

¹⁶⁵ *In re Grand Jury Subpoena*, 884 F.2d 124, 127 (4th Cir. 1989).

¹⁶⁶ See, e.g., *In re Grand Jury Subpoena*, 31 F.3d at 831; *In re Grand Jury Subpoena Duces Tecum Dated Sept. 15, 1983*, 731 F.2d 1032, 1041 (2d Cir. 1984).

¹⁶⁷ See, e.g., *In re Grand Jury Subpoena*, 31 F.3d at 831; *In re Grand Jury Subpoena*, 731 F.2d at 1041-42.

¹⁶⁸ *United States v. de la Jara*, 973 F.2d 746, 749 (9th Cir. 1992). The Ninth Circuit admitted the letter on other grounds, however, and, as a result, did not reverse the lower court decision. *Id.* at 750.

¹⁶⁹ *United States v. Chen*, 99 F.3d 1495, 1502 (9th Cir. 1996). Although the evidence was admitted, the lower court expressly stated that it had disregarded the privileged statements in ruling that the crime-fraud exception applied to them. *Id.* at 1503-04.

¹⁷⁰ See *In re Grand Jury Subpoena*, 731 F.2d at 1039-40 (stating that the court was "skeptical" that defendant corporation's sale of its stock could be considered an obstruction of justice or part of a conspiracy to defraud the United States, as the prosecutor had argued).

within the exception.¹⁷¹ For example, in a Fifth Circuit case, following the defendant's indictment for extortion, defense counsel wrote a letter to the alleged victim enclosing the money allegedly extorted.¹⁷² The prosecutor then subpoenaed the attorney to testify about conversations that occurred prior to the return of the money, which, according to the prosecutor, acted as an obstruction of justice.¹⁷³

Last, while evidence about attorney-client communications can take a variety of forms, prosecutors most often invoke the crime-fraud exception in order to force attorneys to testify against their clients.¹⁷⁴ As a result, "opposing counsel could use the subpoena to eliminate troublesome, qualified defense counsel" by compelling an attorney to testify about the client's communications and thereby forcing the subpoenaed attorney to withdraw as counsel.¹⁷⁵ It is particularly troubling when the government's use of this exception results in the lawyer being compelled to testify against his or her client.

Because of the extraordinary impact this result necessarily has on the attorney-client privilege and relationship, the government should establish a level of review within the Justice Department that would be required before the prosecutor could make such an *ex parte* application to the Court.

IV. RECOMMENDATIONS AND CONCLUSION

The current Justice Department policies and practices regarding the attorney-client privilege and the work product doctrine have significant negative consequences. By eroding the attorney-client privilege and work product doctrine, they undermine defense counsel's ability to effectively represent his or her client. The values enshrined in these protections are deep-rooted and broadly embraced by the entire legal community. As the Supreme Court has stated:

The attorney-client privilege is the oldest of the privileges for confidential communications known to the common law Its purpose is to encourage full and frank communication between attorneys and their clients and thereby promote broader public interests in the observance of law and administration of justice.¹⁷⁶

Rather than undermining and eroding the attorney-client privilege and work product doctrine by viewing them as obstacles to the legitimate prosecution of crimes, the Justice Department should recognize that these protections provide the foundation for a lawyer to offer an informed opinion and sound legal advice to a client based upon full knowledge of the issue at hand, and play a vital role in the American system of justice. Federal prosecutors should not exact a waiver of these important protections. The Justice Department should modify and clarify its guidelines regarding the attorney-client privilege and the work product doctrine in order to ensure the fullest protection possible for these fundamental principles of American

¹⁷¹ Fried, *supra* note 9, at 474.

¹⁷² *United States v. Dyer*, 722 F.2d 174, 176 (5th Cir. 1983); see also Fried, *supra* note 9, at 474-75.

¹⁷³ *Dyer*, 722 F.2d at 176; see also Fried, *supra* note 9, at 474-75.

¹⁷⁴ See, e.g., Mustokoff, *supra* note 162, at 110 (discussing a case in which this occurred).

¹⁷⁵ Greenberg, *supra* note 158, at 1022.

¹⁷⁶ *Upjohn Co. v. United States*, 449 U.S. 383, 389 (1981) (citation omitted).

law, while still allowing vigorous enforcement of the criminal statutes. The two are not incompatible.

Cooperation with the government in its investigation may be full and complete without the coerced waiver of these protections. The proliferation of a policy of prosecutorial coercion is, in the long run, a disservice to the public interest and to the fair administration of justice. The waiver of the attorney-client and work product privilege should only be made voluntarily and not as a result of government coercion. And the government has a long standing policy in conflict with seeking such waivers. The U.S. Attorney's Manual requires that all reasonable attempts be made to obtain the information from other sources and only when these efforts have been unsuccessful, may a prosecutor serve a subpoena on an attorney for testimony or documents, and then only after approval of the Assistant Attorney General in charge of the Criminal Division.¹⁷⁷ There is no reason to abandon this policy.

The government has also weakened these protections by attacking joint defense agreements. Joint defense agreements provide the opportunity for defense attorneys to preserve the attorney-client privilege and work product protections while sharing information crucial to the preparation of an adequate defense. The Justice Department policy regarding joint defense agreements, however, appears to be in flux, leaving ample discretion to individual prosecutors to develop their own policies and strategies.

Some prosecutors recognize the importance of a joint defense agreement in order for a corporation's counsel to be able to obtain adequate information to advise the corporate client and provide accurate information to the government as well as its importance for an individual employee. Other prosecutors, however, find the existence of a joint defense agreement a basis for charging the corporation with interfering with a government investigation. This is an issue the Justice Department should clarify with a statement of policy supporting a presumption that joint defense agreements are valid unless there is substantial reason to believe one is being used in an illegal manner. Prior to such a determination, the fact that a joint defense agreement exists should not be used by the government as evidence of non-cooperation or obstruction on the part of a corporation.

With regard to the advancement of fees, it should be recognized in the Justice Department guidelines that this practice is permitted under state corporation law and ethical codes and is necessary to enable employees to be adequately represented in a criminal investigation of corporate conduct. The current Justice Department guidelines discourage the legitimate advancement of fees and permit prosecutors to abuse their authority and impose law enforcement where it has no real interest in order to gain a strategic advantage and thereby deprive the employee of a funded defense.

Finally, while developing case law has made it easy for prosecutors to invoke the crime-fraud exception, and perhaps this is a matter of concern best addressed to the courts, it is important that Justice Department attorneys not seek to use every opportunity available to them to invade the attorney-client privilege and work product doctrine for the purpose of building a case when other avenues are available. The government should make *ex parte* claims that these protections have been breached by the crime-fraud exception only after facts are estab-

¹⁷⁷ See discussion *supra* at 22.

lished that fully support that a challenge to the attorney-client privilege is warranted. Such a challenge should not be merely an advocate's tool. Prosecutors must be mindful of the societal importance of the attorney-client privilege and the work product doctrine and the dangers that result from their erosion by excessive invocation of the crime-fraud exception. The Justice Department should establish more specific guidelines on compelling disclosure of attorney-client communications or work product that stress strict compliance with the few safeguards and limits that do exist in the law, particularly in regard to the *ex parte* showing that prosecutors must make to invoke the crime-fraud exception.

Since courts will not customarily provide the party asserting the privilege the opportunity to challenge the evidence establishing a *prima facie* case, the Justice Department guidelines should assure that the government's evidence originates from reliable, credible sources without a personal interest in the matter. Any *ex parte* application should first be approved by the Attorney General or appropriately designated person following a review of the facts. And prosecutors should not attempt to compel disclosure of communications that do not relate directly to a planned crime.

A. SPECIFIC RECOMMENDATIONS

In order to alleviate the concerns expressed in this report that the attorney-client privilege and the work product doctrine have been and continue to be eroded in federal criminal investigations, the College makes the following specific recommendations:

- ♦ The policies and guidelines of the Justice Department should reflect the critical importance of the attorney-client privilege and work product doctrine and incorporate alternatives to circumventing them. The following proposed guideline should be incorporated into the Holder Memo Standards:

The attorney-client privilege and work product doctrine are essential to the American justice system and should not be diluted for the sake of expediting a prosecution. Prosecutors should exhaust other alternatives to obtain information before requesting that a corporation cooperate by waiving privilege.

- ♦ The current guidelines provide in part, as follows:

"In gauging the extent of the corporation's cooperation, the prosecutor may consider the corporation's willingness to identify the culprits within the corporation, including senior executives, to make witnesses available to disclose the complete results of its internal investigation, and to waive the attorney-client and work product privileges."

This should be changed to read:

In gauging the extent of the corporation's cooperation, the prosecutor may consider the corporation's willingness to identify those within the corporation whom it is aware or becomes aware have engaged in culpable wrong doing, including senior executives, to make witnesses available and otherwise cooperate.

- ♦ The Justice Department, in assessing whether a corporation is cooperative, should consider its refusal to disclose the results of internal investigations by counsel or otherwise

waive the attorney-client and work product privilege only when evidence is unavailable from any other sources.

♦ With regard to joint defense agreements or payment of employees' legal fees, the guidelines should state:

A corporation's promise of support to employees and agents, either through advancing of legal fees or through providing information to the employees about the government's investigation pursuant to a joint defense agreement, should be considered by the prosecutor in weighing the value of a corporation's cooperation only if such support continues in an inappropriate manner after a determination of culpability or misconduct on the part of an employee.

♦ The government should not attempt to breach the attorney-client privilege and work product protections by an *ex parte* application to the court claiming a crime-fraud exception to the privileges without clearly establishing a solid factual basis that this exception applies. The proposed guideline should state:

In every case in which a claim of crime-fraud is to be made to a court for the purpose of voiding the attorney-client or work product privilege, the application should be approved by the Attorney General or an appropriately designated person within the Justice Department following a review of the factual basis for such an application.

B. CONCLUSION

Any impediment to obtaining relevant information that is presented by the attorney-client privilege and work product doctrine is counterbalanced by the benefits these protections afford the criminal justice system and society in general. While a prosecutor's job may be rendered more difficult by a corporation's or its attorney's invocation of a privilege, this is not a valid reason to compromise the longstanding and important legal principles that underlie the privilege. Despite the challenges that the attorney-client privilege and work product doctrine may present to prosecutors, the overall benefits make these protections indispensable and deserving of preservation.

The attorney-client privilege and work product doctrine play a central role in corporate governance. In order to fully comply with the law, corporate employees must be able to seek the advice of corporate and outside counsel. It is necessary for the communication between counsel and corporate employees to be privileged to ensure an open and honest exchange of information. Any policy that equates the assertion of the attorney-client privilege and work product protections with non-cooperation or obstruction ignores the harmful consequences to proper corporate governance. It is in society's interest to ensure that corporations have the means to comply with often complicated and intricate regulations and laws. Corporate officers and employees need to be assured that what they reveal to corporate or outside counsel will not be used against them at a later date.

Whether invoked by a corporation or an individual, the attorney-client privilege and the work product doctrine are essential to the due administration of the American criminal justice system. Justice Department guidelines and prosecutorial standards should be revised to reflect adequately the central importance of these protections. ♦



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March 28, 2006

Via Electronic Filing

United States Sentencing Commission

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Washington, D.C. 20002-0082

Re: Comments on the Waiver Language of Application Note 12 of the Commentary to Section 8C2.5(g) of the *Organizational Guidelines*

Dear Judge Hinojosa and Members of the Commission:

We thank the Commission for taking time to review the November 2004 amendment to the Commentary to Section 8C2.5(g) of the *Organizational Guidelines* and for inviting public comment on this language. All members of the legal profession, including law faculties and students, have a great deal at stake with respect to measures pertaining to the attorney-client privilege. We recognize that the government has legitimate reasons to request information to ensure that corporations and other organizations comply with the law, and we understand that prosecutors must leverage resources to address the widespread improprieties that have occurred in recent years. However, exerting virtually irresistible pressure on entities to relinquish attorney-client and work product protections is unfair to both organizations and their human constituents. Because the waiver language of Application Note 12 invites this practice,¹ we urge the

¹ This is particularly evident when the waiver language of Application Note 12 of the Commentary to § 8C2.5(g) is read in conjunction with relevant Department of Justice (DOJ) policies. See Memorandum from Deputy Attorney General Larry D. Thompson to Heads of Department Components, United States Attorneys, on Principles of Federal Prosecution of Business Organizations (Jan. 20, 2003), available at http://www.usdoj.gov/usao/eousa/foia_reading_room/usam/title9/crm00161.htm. See U.S. Department of Justice, *Federal Prosecution of Business Organizations*, in Criminal Resource Manual No. 162 (2003) (incorporating Thompson Memorandum), available at http://www.usdoj.gov/usao/eousa/foia_reading_room/usam/title9/crm00162.htm. See also Memorandum from Eric H. Holder, Jr., Deputy Attorney General, to All Component Heads and United States Attorneys, on Bringing Criminal Charges Against Corporations (June 16, 1999) (predecessor of Thompson Memorandum), available at <http://www.usdoj.gov/criminal/fraud/policy/Chargingcorps.html>, and Memorandum from Robert D. McCallum, Jr., Acting Deputy Attorney General, to Heads of Department Components, United States Attorneys, on Waiver of Corporate Attorney-Client Privilege and Work Product Protection, (Oct. 21, 2005) (instructing United States Attorneys Offices to develop written waiver reviews processes), available at http://www.usdoj.gov/usao/eousa/foia_reading_room/usam/title9/crm00163.htm.

Commission to amend this portion of the Commentary.² In its place we propose a specific provision stating that waiver of attorney-client and work product protections should not be a factor in determining an entity's "cooperation," except in those rare instances in which the government demonstrates that the entity has inappropriately invoked these safeguards to shield specific, otherwise unprivileged, factual material.

In addition to the compelling arguments offered by the American Bar Association and others who previously have commented on the adverse impact of the November 2004 amendment of Application Note 12, we request the Commission to consider three specific points in support of our proposal: (1) As currently written, the waiver language invites unfair prosecutorial tactics inconsistent with the special responsibilities of government lawyers to seek justice under law; (2) it threatens to compromise constitutional rights of corporate constituents, particularly individuals who participate in corporate internal investigations; and (3) it undermines the legitimacy of our adversarial system.

I. THE CURRENT WAIVER LANGUAGE INVITES UNFAIR CONDUCT AT ODDS WITH THE SPECIAL RESPONSIBILITY OF GOVERNMENT COUNSEL TO SEEK JUSTICE

By empowering prosecutors to label an entity "uncooperative" for refusing to waive attorney-client and work product protections, the waiver language of Application Note 12 allows government lawyers to require corporations and other entities to do what the government itself would not do – relinquish safeguards critical to our adversarial system. At a very early point in their legal education students discover that zeal in representing clients is both a professional virtue and an ethical obligation. They learn that diligence is critical to good lawyering and that a careful lawyer searches out all potentially significant information. While, as noted below, government attorneys have a special obligation to work for justice, it is unrealistic to expect the dedicated, conscientious lawyers who represent the United States to refrain from seeking all material available to them within the bounds of ethics and the law. As currently written, the waiver language of Application Note 12 provides prosecutors with a means of pressuring corporations and other entities to jettison attorney-client and work product protections, thereby affording the government essentially unfettered access to the confidential communications of "cooperating" entities. Consequently, this language unfairly and unnecessarily encourages prosecutorial conduct that undermines attorney-client and work product protections. As recent incidents have shown, overly aggressive prosecutorial tactics can have disastrous consequences. *See, e.g., Editorial,*

² In expressing this view, we join with the American Bar Association, the Coalition to Preserve the Attorney-Client Privilege, former senior DOJ officials, and others who have requested the Commission to delete or revise Application Note 12 on various prior occasions.

Another Blown Case?, The Washington Post at A14 (Mar. 20, 2006) (discussing troubled prosecutions of alleged terrorists). At a minimum, in the corporate context coerced waivers are likely to chill the full and frank attorney-client communications essential to achieving justice in an adversarial system.

Government attorneys, no less than lawyers in private practice, rely on the protections of the attorney-client privilege and the work product doctrine in representing their client and its constituents. Permitting prosecutors unilaterally to coerce entities to abandon these important protections unfairly tilts the balance against organizational defendants and forces corporate constituents into the proverbial space between a rock and a hard place. If an entity's constituents avoid requesting legal advice, the corporation may violate the law or fail to correct an existing problem. If they do seek out the organization's lawyers, at some point everything they say in connection with a problem may end up in the hands of prosecutors. Forcing defendant entities and their constituents into these binds is inconsistent with the obligation of government attorneys first and foremost to seek justice.

While all members of the bar have a duty to uphold justice, this responsibility is especially important for those who represent the federal government. In *Berger v. United States*, 295 U.S. 78 (1935), *overruled on other grounds*, *Stirone v. United States*, 361 U.S. 212 (1960), the United States Supreme Court recognized the special obligation of government attorneys to ensure that justice is done, particularly in criminal proceedings. In the Court's words:

The United States Attorney is the representative not of an ordinary party to a controversy, but of a sovereignty whose obligation to govern impartially is as compelling as its obligation to govern at all; and whose interest, therefore, in a criminal prosecution is not that it shall win a case, but that justice shall be done. As such, he is in a peculiar and very definite sense the servant of the law, the twofold aim of which is that guilt shall not escape or innocence suffer. He may prosecute with earnestness and vigor – indeed, he should do so. But, while he may strike hard blows, he is not at liberty to strike foul ones. It is as much his duty to refrain from improper methods calculated to produce a wrongful conviction as it is to use every legitimate means to bring about a just one. *Id.* at 88.

The Supreme Court clearly affirmed the vitality of corporate attorney-client privilege and work product protections in *Upjohn Co. v. United States*, 449 U.S. 383 (1981). Any measure that entitles law enforcement personnel to impose a high cost on the exercise of these protections threatens to strike the very kind of foul blow the Court condemned in *Berger*. We urge the Commission to amend the waiver language of Application Note 12 because we believe that it invites this kind of prosecutorial overreaching.

II. EMPOWERING PROSECUTORS TO PRESSURE ENTITIES TO WAIVE ATTORNEY-CLIENT AND WORK PRODUCT PROTECTIONS THREATENS TO COMPROMISE IMPORTANT INDIVIDUAL RIGHTS

In a pivotal scene in Arthur Miller's classic play *The Crucible*, the judge presiding over the Salem witchcraft trials declares: "The pure in heart need no lawyers." Arthur Miller, *The Crucible* at 93 (New York: Penguin Books 1973). Even so, when protagonist John Proctor rises to present evidence on behalf of his wife and others accused of witchcraft, Reverend Hale begs the court, "In God's name, sir, stop here; send him home and let him come again with a lawyer." *Id.* at 99. The judge, however, refuses to suspend the proceedings to allow Proctor to obtain counsel. Ultimately, the accused and Proctor himself are found guilty of working for the devil and sentenced to death. Nearly three hundred years after the Salem witchcraft trials, few Americans would be so foolish as to believe that even the purest among us have no need for lawyers. As a society, we hold the right to counsel in such high regard that we have incorporated it into our Constitution, and we require law enforcement authorities to inform individuals taken into custody of this safeguard. The right, however, has little meaning if clients cannot count on the confidentiality of their communications with counsel.

Coerced waivers of the corporate attorney-client privilege have far-reaching impacts for individuals. In an internal corporate investigation, for example, an employee has no right to counsel, and refusal to answer questions posed by investigators may result in termination. Consequently, employees face intense pressure to talk with internal investigators, even though they may inadvertently lose the protection of the Fifth Amendment when they do so. See Sarah Helene Duggin, *Internal Corporate Investigations: Legal Ethics, Professionalism and the Employee Interview*, 2003 Col. Bus. L. Rev. 859, 907-09; David M. Zornow and Keith D. Krakaur, *On the Brink of a Brave New World: The Death of Privilege in Corporate Criminal Investigations*, 37 Am. Crim. L. Rev. 147, 157-58 (2000). See generally Joseph F. Coyne and Charles F. Barker, *Employees' Rights and Duties During an Internal Investigation*, in *Internal Corporate Investigations* at 169, 173 (Brad D. Brian, et al. eds., 2d ed. 2002).

For many years, although ethical investigators ordinarily informed interviewees that they represented the entity and that the entity could choose to disclose any information provided by the employee, corporate waivers of attorney-client and work product protections were rare. See Zornow and Krakaur, *supra*, at 153. In the current environment, however, disclosure is much more likely. By making waiver of attorney-client and work product protections a *quid pro quo* for recognition of corporate "cooperation," prosecutors can pressure entities to surrender these safeguards, thereby accomplishing indirectly what they could not do directly. When an organization discloses the fruits of an internal investigation to the government, prosecutors benefit from both the loyalty employees have to their employers and the threat that employees who refuse to participate in an investigation will lose their jobs. See Kathryn W. Tate, *Lawyer Ethics and the Corporate Employee: Is the Employee Owed More Protection Than the Model Rules Provide?*,

23 Ind. L. Rev. 1, 11-13 (1990); Duggin, *supra* at 907-12. As many of those who oppose the practice have recognized, in conditioning recognition of corporate cooperation on attorney-client privilege and work product waivers, the government effectively “deputizes” corporate counsel to exploit the loyalty and fear of employees and then turn over the fruits of this labor to law enforcement personnel. N. Richard Janis, *Deputizing Company Counsel as Agents of the Federal Government: How Our Adversary System of Justice Is Being Destroyed*, 19 Wash. Lawyer No. 7, 32, 36 (Mar. 2005); Zornow and Krakaur, *supra*, at 156-57.

The metamorphosis of corporate counsel into government agents is particularly dangerous for those employees who are least legally sophisticated and therefore unlikely to realize that responding to questions from corporate attorneys conducting an internal investigation may waive constitutional protections. *See, e.g.*, Tate, *supra*, at 5, 68; Duggin, *supra*, at 910. Ironically, even employees who regularly deal with corporate attorneys may be at risk because longstanding personal relationships may blind them to the ethical obligation of corporate counsel to represent the interests of the entity over all others. *See, e.g.*, *id.* at 910-11 (even savvy managers may respond on the basis of personal connections rather than consideration of attorney obligations); Geoffrey Hazard and William Hodes, *The Law of Lawyering* § 17.13, at 17-53 (2003) (corporate officials “may incorrectly assume that the entity lawyer is also ‘their’ lawyer”). The Commentary to the *Organizational Sentencing Guidelines* should not invite prosecutors to take unfair advantage of such circumstances.

III. ROUTINE PRESSURE ON ENTITIES TO WAIVE THE ATTORNEY-CLIENT PRIVILEGE UNDERMINES THE LEGITIMACY OF OUR ADVERSARIAL SYSTEM

Our adversarial system rests on the notion that truth can be distilled and justice meted out in the structured battle that takes place in the courtroom – or in the preliminary encounters that so often lead parties to resolve their differences prior to trial. Lawyers keep faith with their clients by holding the matters they share in confidence. While ethical rules forbid lawyers to assist clients in ongoing illegal activity, as a society we have come to rely on the understanding that a client can disclose almost anything to his or her lawyer knowing that such a confidence will remain inviolate. Under Model Rule 1.13 and its analogues, a lawyer who represents an organization owes allegiance to the entity rather than to any of its constituents. However, while a lawyer’s ultimate duty is to the entity itself, the core relationships exist with living, breathing human beings. Constituents must have at least some level of trust that communications with corporate counsel are likely to remain confidential, or they will neither seek legal advice on behalf of the entity nor share confidences pertaining to its business.

When a corporate agent acts against the interests of an entity, corporate counsel have a duty to report the transgression – to the entity’s highest authority if necessary – and to advise the entity to correct any corporate legal violations resulting from the agent’s misconduct. On occasion, corporate decision makers may determine that they should or must disclose the matter to

government authorities and, in so doing, reveal otherwise privileged information. It is unjust, however, to refashion our legal system – formally or informally – to give prosecutors an unconstrained right to coerce such disclosures. Unfortunately, this is one of the unintended consequences of the waiver language of Application Note 12. This language, like any government measure that weakens the safeguards that keep the power of the state in balance, undermines the basic legitimacy of our adversarial system.

As law teachers, one of our most important tasks is to help our students understand that justice is not simply an abstract concept, but the concrete goal of our adversarial system. Achieving justice in an adversarial framework requires lawyers to represent their clients zealously within the bounds of law and professional ethics. The ability to hold client confidences inviolate in the absence of deliberate attempts to implicate counsel in illegal conduct is critical to the accomplishment of this objective. As the Supreme Court noted in *Upjohn*, “if the purpose of the attorney-client privilege is to be served, the attorney and client must be able to predict with some certainty whether particular discussions will be protected.” 449 U.S. at 393. Similarly, where work product protections are uncertain, “much of what is now put down in writing [will] remain unwritten. . . [and] “[i]nefficiency, unfairness and sharp practices [will] inevitably develop in the giving of legal advice and in the preparation of cases for trial.” *Id.* at 398 (quoting *Hickman v. Taylor*, 329 U.S. 495, 511 (1947)). Ultimately, “[t]he effect on the legal profession [will] be demoralizing. And the interests of the clients and the cause of justice [will] be poorly served.” *Id.* (quoting 329 U.S. at 511). By empowering prosecutors to deprive corporate decision makers of a real choice whether or not to relinquish attorney-client and work product protections, the waiver language of Application Note 12 inappropriately and unwisely tilts the scales in favor of securing convictions rather than attaining justice.

IV. PROPOSED REVISION OF APPLICATION NOTE 12

In its current form, the waiver language of Application Note 12 sweeps far too broadly. Accordingly, we urge the Commission to amend it. We respectfully propose the following revision:

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 the government demonstrates with particularity that a defendant has inappropriately attempted to shield specific factual material under a claim of privilege or work product protection and that reasonable efforts to obtain knowledge through alternative means have proved unavailing.

The working premise of the adversary system is that each side builds its own case. As Justice Jackson wrote in his famous concurrence in *Hickman v. Taylor*, members of a learned profession should not be permitted to perform their functions "on wits borrowed from the adversary." 329 U.S. at 516. The above language safeguards the attorney-client privilege and, unlike the current formulation, strikes a balance between giving prosecutors unconstrained discretion to decide when a waiver is "necessary" and affording entity lawyers *carte blanche* to invoke protections.

In sum, our adversarial system of justice cannot operate fairly without safeguards designed to keep the playing field level. Providing prosecutors with leverage to coerce organizations to surrender attorney-client and work product protections under the guise of facilitating "cooperation" upsets the critical balance. When these protections lose their vitality, justice is unlikely to be done. We therefore respectfully request the Commission to amend the waiver language of Application Note 12 to the Commentary to Section 8C2.5(g) of the Organizational Sentencing Guidelines.

Respectfully submitted,

Sarah Helene Duggin
Associate Professor of Law

Stephen M. Goldman
Distinguished Lecturer in Law

Robert A. Destro
Professor of Law

Lisa G. Lerman
Professor of Law

Marin Scordato
Associate Professor of Law

Members of other law faculties joining in these comments:

David Cummins
Professor of Law Emeritus
Texas Tech University School of Law

Susan Saab Fortney
George H. Mahon Professor of Law
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Nickolas J. Kyser
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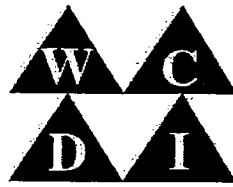
United States Sentencing Commission

March 28, 2006

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cc: Pamela O. Barron, Deputy General Counsel, U.S. Sentencing Commission
Paula J. Desio, Deputy General Counsel, U.S. Sentencing Commission
Amy L. Schreiber, Assistant General Counsel, U.S. Sentencing Commission
Michael S. Greco, President, American Bar Association
William Ide, Chair, ABA Presidential Task Force on the Attorney-Client Privilege
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March 28, 2006

SENT BY EMAIL

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

Re: Written Public Comment
Chapter Eight - Privilege Waiver

Dear Commission:

Waiver of the attorney-client privilege and work product protections in hopes of reducing a culpability score encourages defendant organizations to completely destroy the relationship between the attorney and client, a relationship that exists solely for the benefit of the client. Commentary language that states "... unless such waiver is necessary in order to provide timely and thorough disclosure of all pertinent information known to the organization" allows privileges that should be stringently guarded for the proper administration of justice in our legal system to be at risk of waiver.

Additionally, such language effectively operates to encourage the defendant organization to produce privileged documents that may or may not demonstrate criminal actions without requiring a showing that the organization actually engaged in or planned to engage in criminal or fraudulent behavior. The attorney-client privilege belonging to the organization and the work product protections belonging to both the organization and the attorney are effectively wiped out, leaving both to defend their confidential relationship. Thus, the completion of an internal investigation as a component of appropriate remedial action, instead of showing the organization's responsible behavior, incriminates the organization and the attorney.

UNITED STATES SENTENCING COMMISSION

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March 28, 2006

In our last Priorities Comment submitted on August 14, 2005, we recommended the following revisions to the Commentary since it pits employees against management, law enforcement against corporations and in-house/outside counsel against the officers of the organization they represent:

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."

We continue to recommend this language because it truly reflects the goals and incentives for organizations to maintain an effective compliance program. It also effectively safeguards the attorney and client relationship for the benefit of the organization in the event of prosecution and/or in anticipation of litigation.

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

Sincerely,

/s/

L.A. Wright
Legal Criminalist/Consulting Expert

/law

March 28, 2006

Kenneth R. Meade

United States Sentencing Commission
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Re: Comments of the Corporate Environmental Enforcement Council
Chapter Eight Privilege Waiver
United States Sentencing Commission Notice of Proposed Amendments and
Request for Public Comment

Dear Docket Clerk:

On behalf of the Corporate Environmental Enforcement Council ("CEEC"), an organization of 29 major corporations that focuses exclusively on civil and criminal environmental enforcement issues, we appreciate the opportunity to submit these comments to the United States Sentencing Commission ("the Commission") regarding the Commission's proposed amendments to the United States Sentencing Guidelines ("the Guidelines") and request for public comment (71 Fed.Reg. 4782 (Jan. 27, 2006)), and specifically topic B.12, the Chapter Eight Privilege Waiver.

CEEC has worked extensively on all aspects of environmental enforcement, and has previously submitted comments to the Commission and to the Advisory Group on Organizational Guidelines and met with members and staff to address issues of concern, including specifically issues relating to Chapter Eight, the Organizational Sentencing Guidelines. CEEC has also worked on environmental enforcement issues closely with the United States Environmental Protection Agency, the United States Department of Justice, and state environmental agencies and enforcement officials.

CEEC's members have been at the forefront of the development and implementation of innovative environmental management systems and self-assessment by the regulated community over the past decade. CEEC's members have long recognized the substantial benefits that are realized when effective voluntary compliance programs are put in place – benefits including improved environmental performance, reduced risk to human health and the environment, and higher compliance levels.

To that end, while CEEC has supported the inclusion of provisions in the Organizational Guidelines recognizing the importance of such a voluntary program to prevent and detect criminal conduct, we have consistently expressed our concern with respect to provisions that could weaken or undermine the incentives for and effectiveness of such voluntary compliance programs. CEEC is concerned that the sentence that was added to the commentary at §8C2.5(g)

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Wilmer Cutler Pickering Hale and Dorr LLP

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with respect to the waiver of attorney-client privilege and work product protections is such a provision, and we urge the Commission to delete this sentence from the commentary and replace it with a statement that waiver of this privilege and protection is not to be considered in assessing the degree to which a company cooperates in a government investigation.

As set forth in the Federal Register Notice announcing the proposed amendments to the Guidelines and requesting comment on specific issues, the Commission has been asked to reconsider the commentary at §8C2.5(g) that was added as part of the Commission's 2004 amendments to Chapter Eight. The sentence at issue involves the potential decrease in the culpability score if a defendant organization has "self-reported, cooperated with the authorities, and accepted responsibility," and specifically the issue of whether waiver of attorney-client privilege and of work product protections is a prerequisite to such a decrease.

The commentary as amended provides that such waiver is not a prerequisite "unless such waiver is necessary in order to provide timely and thorough disclosure of all pertinent information known to the organization." USSG, §8C2.5(g), comment. (n.12) (Nov. 2005). The issue of whether this language is having or could have "unintended but deleterious effects" has been raised in numerous requests to modify or remove this language that have been submitted to the Commission since the effective date of the amendments, and in testimony offered to the Commission at its public meeting in November, 2005. 71 Fed. Reg. 4803-04. As a result, the Commission is seeking comment on whether the commentary language is having unintended consequences and whether it should be deleted or amended to address these consequences.

As an initial matter, it is our experience that organizations look to Chapter 8, and specifically Section 8B2, for guidance as to what the government believes constitutes an effective compliance program. It is critical to recognize that most companies do not look for this guidance in the context of evaluating potential decreases in the culpability score in an ongoing governmental investigation or prosecution; rather, as companies set up internal compliance programs, including programs involving compliance with environmental laws and regulations, they look to a broad array of sources for information, and Chapter 8 of the Guidelines serves as one of the more important resources. It is also worth noting the stated goal of the Chapter 8B2 guideline: "the requirements set forth in this guideline are intended to achieve reasonable prevention and detection of criminal conduct for which the organization would be vicariously liable." USSG, §8B2.1, comment. (backg'd).

Internal environmental compliance programs are much more sophisticated and developed than they were in 1991, when Chapter 8 was added to the Guidelines. These compliance programs rely in large part on the free flow of information between corporate officials, including corporate counsel, compliance managers, environmental health and safety professionals, and employees whose day to day jobs involve, in some part, compliance with environmental laws. They also include various types of "reporting up" provisions, both formal/written and informal/oral.

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It is the experience of CEEC member companies that many of the individuals in the environmental compliance chain are cognizant of the fact that they will, at some point, be reporting directly to legal counsel, whether within the corporation or outside counsel. It has also been a widely held belief that these types of communications fall within the well-established attorney-client relationship, and are protected in the same manner as an individual's communications with his or her lawyer. This is critical, as the free flow of information is the lynchpin of these internal compliance programs.

Conversely, the free flow of communications can be adversely affected if the person communicating the information believes, correctly or incorrectly, that the information will not be protected. While the Commission included language in the Reason for Amendment (Supplement to Appendix C (Amendment 673)) regarding its expectation that the government would require such waivers "on a limited basis," the adverse impact on the free flow of information is felt whether or not that expectation is correct.¹

From the perspective of a company employee that is reporting on an environmental compliance issue to legal counsel, he or she must assume that the government may require that the company waive the attorney-client privilege and/or work product protection that applies to that communication in the context of a governmental investigation. Further, it is our experience that the employee would also likely believe that a company from whom such a waiver is requested would presumably agree to waive the protections, in its own self-interest. This is especially true as the issue of waiver arises in the context of evaluating whether the company is "cooperating" with an government investigation – refusing a request/demand to waive would almost ensure a negative finding on cooperation.

As a result, while the Commission may expect that the government will not require a waiver as a matter of course, in fact that is exactly what an employee (such as an environmental compliance manager) would expect. In that situation, those who report up the environmental compliance chain may rightly view legal counsel conducting an investigation as simply as a potential conduit for enforcement sensitive material to be channeled to the government. The effect is that such persons may be discouraged from making full disclosure to legal counsel. As a result, the environmental management systems and self-assessment/compliance programs suffer, as the success of those systems depends on full and frank assessment and reporting of environmental compliance issues.

¹ Although we do not address the issue in these comments, we cite with approval two statements presented to the Commission at its November 15, 2005 Public Meeting: the Statement of Tina S. Van Dam, National Association of Manufacturers, on behalf of The American Chemistry Council, The Association of Corporate Counsel, and The National Association of Manufacturers, and the Statement of Donald C. Klawiter on behalf of the American Bar Association, with respect to surveys conducted by the Association of Corporate Counsel and the National Association of Criminal Defense Lawyers that indicate that in practice the government's practice of seeking or demanding a waiver is not, in fact, limited, and citing to a specific example where Justice Department prosecutors have demanded privileged materials in the context of an environmental investigation.
http://www.ussc.gov/corp/11_15_05/VanDam-ACC-NAM.pdf; http://www.ussc.gov/corp/11_15_05/Klawiter-ABA.pdf.

CEEC submits that this result is unacceptable at all levels. If this language in the Guidelines causes environmental self-assessment/compliance systems to break down due to an unwillingness on the part of employees to engage in full and frank assessment and disclosure, this section of the Guidelines is not only not achieving its intended result (promoting existence of a program that prevents and detects criminal conduct), it is in fact defeating it. Likewise, from a company's perspective the goal of promoting environmental compliance and promptly identifying and correcting noncompliance is defeated if the person responsible for detecting and reporting such noncompliance is disincentivized from doing so for fear that the company could be forced to waive the attorney-client privilege and disclose the information to the government.

CEEC does not believe that the Commission intended this result when it adopted the subject commentary. Despite the lack of intent, we believe that these unintended consequences are occurring, and that the Commission must affirmatively act to address the situation. In order to reverse course, CEEC urges the Commission to delete the commentary at issue and replace it with a statement that waiver of attorney-client privilege and/or work product protection is not to be considered by the government when evaluating whether a company in question is "cooperating" with a government investigation for purposes of Section 8C2.5(g) of the Guidelines.

CEEC appreciates the opportunity to submit these comments to the Commission, and looks forward to continuing to work with the Commission on issues relating to the Guidelines. Please do not hesitate to call me if you have any questions with respect to these comments or would like any additional information.

Sincerely yours,



Kenneth R. Meade
Counsel, Corporate Environmental Enforcement Council

cc: Steve Hellem, Exec. Dir.
Corporate Environmental Enforcement Council

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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.

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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
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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

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Students for a Responsible Life

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From the Office of the Founder and Executive Director

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January 29, 2006

The Honorable Ricardo H. Hinojosa
Chairman
U.S. Sentencing Commission
One Columbus Circle, N.E.
Washington, DC 20002-8002

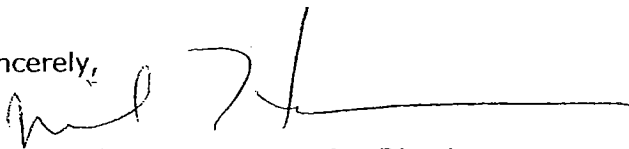
Dear Chairman Hinojosa:

Students for a Responsible Life has for some time been disaffected by the Justice Department's tactics of backing potential white-collar, executive criminal defendants into a corner such that they would have to choose between their constitutional rights, or a "package" guilty plea crafted by, in our opinion, overzealous prosecutors.

We unequivocally support the rescindment of any prior U.S. Sentencing Commission Justice Department rule allowing leniency to companies and executives **who waive special legal privileges** in plea deals proffered by prosecutorial staff (we understand this is now in the Federal Register seeking Public comment). We believe this practice has led (predictably in our opinion) to results harmful to America's economic and business interests, and harmful to corporate entities, their employees, and their stockholders, without any demonstrable societal benefit.

No responsible person can be "for" white collar crime. But America's strength and power come from its incredibly successful economic machine. We believe that the proper way to ferret out business criminal activity is by reverting to the tried and true methods that have served us well over the years, viz., the SEC, the various banking, insurance and stock boards of exchanges, the FBI, and to some degree, law enforcement. One need only look back on the tragedy of the senseless loss of Arthur Andersen & Company to realize how much damage has already been done.

Sincerely,



(Ms.) Ariel Huberts, Executive Director

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NORTHWESTERN SCHOOL of LAW
of LEWIS & CLARK
COLLEGE



Public Affairs
U.S. Sentencing Commission
One Columbus Circle NE
Washington, D.C., 20002-8002
VIA FedEx

Dear Sentencing Commission:

I note that the U.S. Sentencing Commission has proposed and circulated for public comment a new policy statement that says, "In any case involving the sentencing of a defendant for an offense against a crime victim, the court shall ensure that the crime victim is afforded the rights described in 18 U.S.C. sec. 3771 and in any other provision of federal law pertaining to the treatment of crime victims." While I appreciate the (somewhat belated) recognition of victims' rights in the federal sentencing guidelines, I am gravely concerned that the Commission has undertaken a meaningless gesture. Of course, federal judges will follow federal law in sentencing. Instructing judges to follow the law is not, in our view, particularly helpful. To be frank, it gives the appearance that the Commission is intent on doing as little as possible for crime victims.

What would be more helpful is for the Sentencing Commission, as the expert sentencing agency in the federal system, to provide guidance to judges on how to afford victims' rights in the sentencing process. In particular, 18 U.S.C. 3771(a) guarantees crime victims the right "to be heard" and "to be treated with fairness and with respect for the victim's dignity and privacy" throughout the federal criminal justice process, including the sentencing phase of the process. I believe that the Commission could helpfully instruct judges on how to provide that congressionally-mandated rights to be "heard" and to "fairness" to victims in that process. Of particular concern to us is that crime victims have access to relevant parts of the pre-sentence report. As Judge Cassell cogently explained in his testimony before the Commission on the subject, access to the pre-sentence report is critically important to crime victims. He recently expanded his arguments in "Recognizing Victims in the Federal Rules of Criminal Procedure: Proposed Amendments in Light of the Crime Victims Rights Act," 2005 BYU L. Rev. 835, 892-903. I will not repeat his arguments other than to say we concur.

In brief, I don't understand how the Commission, which must fully appreciate the importance of the PSR to the sentencing process, could possibly take the position that denying victims access to the report is treating them with "fairness." Nor do I see how the Commission could possibly take the position that refusing a victim a chance to comment on guideline issues is treating them with "fairness." Accordingly, I specifically request that you either expand your policy statement to explain how victims should be treated fairly or expand the discussion of your "application notes" to section 6A1.5 to explain that federal law requires that victims be treated fairly and that victims should therefore be given access to relevant parts of the pre-sentence

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report and should be given a chance to speak to disputed guideline issues (when they have something relevant to say on the subject). I also specifically request the crime victims be integrated into other aspects of the sentencing process, in ways that the Commission believes are appropriate.

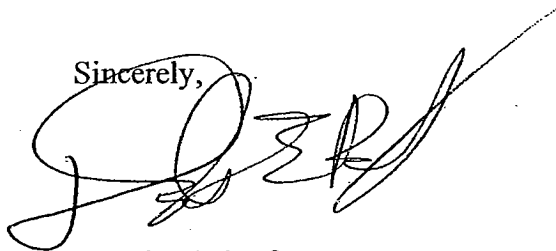
These steps would be in keeping with the trend in state courts to allow victims access to pre-sentence report information. The following is but a sample of state laws giving victims access to presentence reports. Alaska Rev. Stat. Sec. 12.55.023(a)(1)-(4) ("If a victim requests, the prosecuting attorney shall provide the victim before the sentencing hearing, with a copy of the following portions of the presentence report: (1) the summary of the offense prepared by the Department of Corrections; (2) the defendant's version of the offense; (3) all statements and summaries of statements of the victim; and (4) the sentence recommendation of the Department of Corrections"; Ariz. Const. art. II, ' 2.1(A)(7): "To preserve and protect victims' rights to justice and due process, a victim of crime has a right ... 7. To read pre-sentence reports relating to the crime against the victim when they are available to the defendant." Ariz. Rev. Stat. ' 13-4425: "If the presentence report is available to the defendant, the court shall permit the victim to inspect the presentence report, except those parts excised by the court or made confidential by law. If the court excises any portion of the presentence report, it shall inform the parties and the victim of its decision and shall state on the record its reasons for the excision. On request of the victim, the prosecutor's office shall provide to the victim a copy of the presentence report"; Idaho Const. art. 1, ' 22(9): "A crime victim, as defined by statute, has the following rights ... (9) To read presentence reports relating to the crime." Idaho Code ' 19-5306(1)(h): "Each victim of a criminal or juvenile offense shall be ... allowed to read, prior to the sentencing hearing, the presentence report relating to the crime. The victim shall maintain the confidentiality of the presentence report, and shall not disclose its contents to any person except statements made by the victim to the prosecuting attorney or the court ..."; Fla. Stat. Ann. ' 960.001(1)(g)(2) "Upon request, the state attorney shall permit the victim, the victim's parent or guardian if the victim is a minor, the lawful representative of the victim or of the victim's parent or guardian if the victim is a minor, or the victim's next of kin in the case of a homicide to review a copy of the presentence investigation report prior to the sentencing hearing if one was completed. Any confidential information that pertains to medical history, mental health, or substance abuse and any information that pertains to any other victim shall be redacted from the copy of the report. Any person who reviews the report pursuant to this paragraph must maintain the confidentiality of the report and shall not disclose its contents to any person except statements made to the state attorney or the court"; Ind. Code ' 35-40-5-6 "the victim has the right to read presentence reports; relating to the crime committed against the victim; except those parts of the reports containing the following; (1) The source of confidential information.; (2) Information about another victim. Other information determined confidential or privileged by the judge in a proceeding. The information given to the victim; must afford the victim; a fair opportunity to respond to the material included in the presentence report."

Accordingly, I specifically request that you either expand your policy statement to explain how victims should be treated fairly or expand the discussion of your "application notes" to section 6A1.5 to explain that federal law requires that victims be treated fairly and that victims should therefore be given access to relevant parts of the pre-sentence report and should be given

a chance to speak to disputed guideline issues (when they have something relevant to say on the subject). I also specifically request the crime victims be integrated into other aspects of the sentencing process, in ways that the Commission believes are appropriate.

In closing, the Commission now has a chance to use its expertise to craft appropriate procedures to treat crime victims fairly. If the Commission is unwilling to do anything more on crime victims rights than instruct judges to follow the law, I will ask Congress to take the lead on this issue.

Sincerely,

A handwritten signature in black ink, appearing to read 'Douglas Beloof', written over the word 'Sincerely,'.

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Honorable Ricardo H. Hinojosa
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Washington, D.C. 20002-8002

Re: 2006 Proposed Amendments to the Sentencing Guidelines:
Sentence Reduction Motions under 18 U.S.C. §
3582(c)(1)(A)(i)

Dear Judge Hinojosa:

On behalf of the American Bar Association (ABA) and its over 400,000 members, I write to amplify our March 15 testimony on policy for sentence reduction in cases presenting "extraordinary and compelling reasons" pursuant to 18 U.S.C. § 3582(c)(1)(A)(i).¹ In our testimony we noted that the Commission's proposed guidelines amendments on this subject did not contain "the criteria to be applied and a list of specific examples," as contemplated by 28 U.S.C. § 994(t). Following our testimony, Judge Castillo invited us to submit specific language for the Commission's consideration, and we are pleased to do so.²

As noted in our March 15 testimony, the ABA strongly supports the adoption of sentence reduction mechanisms within the context of a determinate sentencing system, to respond to those extraordinary changes in a prisoner's situation that arise from time to time after a sentence has become final. In February 2003, the ABA House of Delegates adopted a policy recommendation urging jurisdictions to

¹ In addition to this comment letter, the ABA is submitting a second, separate statement on the issue of "Chapter Eight – Privilege Waiver" in response to the Commission's request for comments pursuant to the Notice of Proposed Amendments, Request for Public Comment, and Notice of Public Hearings for the amendment cycle ending May 1, 2006, published at 71 Fed. Reg. 4782-4804 (January 27, 2006).

² The ABA has taken no position on the sentence reduction authority applicable to "three strikes" cases in subsection (ii) of § 3582(c)(1)(A). While our proposed policy statement includes a provision referring to subsection (ii) cases, this provision is copied verbatim from the Commission's proposed policy statement. We assume that any expansion of the authority in subsection (ii) to non-three-strikes cases, as suggested by the Commission in its request for comment, would necessarily have to rely on some statutory ground other than subsection (ii) itself.

“develop criteria for reducing or modifying a term of imprisonment in extraordinary and compelling circumstances, provided that a prisoner does not present a substantial danger to the community.” The report accompanying the recommendation noted that “the absence of an accessible mechanism for making mid-course corrections in exceptional cases is a flaw in many determinate sentencing schemes that may result in great hardship and injustice, and that “[e]xecutive clemency, the historic remedy of last resort for cases of extraordinary need or desert, cannot be relied upon in the current political climate.” In 2004, in response to a recommendation of the ABA Justice Kennedy Commission, the ABA House urged jurisdictions to establish standards for reduction of sentence “in exceptional circumstances, both medical and non-medical, arising after imposition of sentence, including but not limited to old age, disability, changes in the law, exigent family circumstances, heroic acts, or extraordinary suffering.” It also urged the Department of Justice to make greater use of the federal sentence reduction authority in Section 3582(c)(1)(A)(i), and asked this Commission to “promulgate policy guidance for sentencing courts and the Bureau of Prisons in considering petitions for sentence reduction, which will incorporate a broad range of medical and non-medical circumstances.”

Section 3582(c)(1)(A)(i), enacted as part of the original 1984 Sentencing Reform Act, contains a potentially open-ended safety valve authority whereby a court may at any time, upon motion of the Bureau of Prisons (“BOP”), reduce a prisoner’s sentence to accomplish his or her immediate release from confinement. The only apparent limitation on the court’s authority under this provision, once its jurisdiction has been established by a BOP motion, is that it must find that “extraordinary and compelling reasons” justify such a reduction. As part of its policy-making responsibility under the 1984 Act, the Commission is directed to promulgate general policy for sentence reduction motions under § 3582(c)(1)(A), if in its judgment this would “further the purposes set forth in § 3553(a)(2).” See 28 U.S.C. §§ 994(a)(2)(C), 994(t). In promulgating any such policy, the Commission is directed by § 994(t) to “describe what should be considered extraordinary and compelling reasons for sentence reduction, including the criteria to be applied and a list of specific examples.” The only normative limitation imposed on the Commission by § 994(t) is that “Rehabilitation of the defendant alone shall not be considered an extraordinary and compelling reason.”

The Commission’s proposal to implement the directive in § 994(t) consists of a new policy statement at USSG § 1B1.13. The proposed policy reiterates the statutory bases for reduction of sentence under § 3582(c)(1)(A)(i), including the limitation in § 994(t) on consideration of rehabilitation as grounds for sentence reduction. However, it does not include “the criteria to be applied and a list of specific examples” that are required by § 994(t). Instead, the Commission appears to propose that courts considering sentence reduction motions should defer to the judgment of the Bureau of Prisons on a case-by-case basis: “A determination by the Director of the Bureau of Prisons that a particular case warrants a reduction for extraordinary and compelling reasons shall be considered as such for purposes of section (1)(A).” We find this approach problematic because it fails to satisfy the mandate of § 994(t) that the Commission should establish general policy guidance for sentence reduction under § 3582(c)(1)(A)(i) and because it contemplates

that any policy for implementation of § 3582(c)(1)(A)(i) would emerge only in a case-by-case process controlled by the Bureau of Prisons, and not in a general rule-making by the Commission.

We believe the text of § 994(t) requires the Commission to develop general policy on the criteria for sentence reduction under § 3582(c)(1)(A)(i), rather than to defer to case-by-case decision-making by the BOP. We also believe that a sentencing court must make an independent determination as to whether sentence reduction is warranted in a particular case.

To assist the Commission in carrying out the mandate of § 994(t), and in response to Judge Castillo's invitation, we have drafted language for a policy statement that describes specific criteria for determining when a prisoner's situation warrants sentence reduction under § 3582(c)(1)(A)(i), and gives specific examples of situations where these criteria might apply. Our proposed policy statement would also make several other changes in the language of the Commission's proposal, as discussed in our March 15 testimony: it would make clear that the court in considering sentence reduction should concern itself only with a defendant's present dangerousness, and that the court could properly rely on several factors in combination as justification for sentence reduction.

We propose three criteria for determining when "extraordinary and compelling reasons" justify release: 1) where the defendant's circumstances are so changed since the sentence was imposed that it would be inequitable to continue the defendant's confinement, without regard to whether or not any changes in the defendant's circumstances could have been anticipated by the court at the time of sentencing; 2) where information unavailable to the court at the time of sentencing becomes available and is so significant that it would be inequitable to continue the defendant's confinement; or 3) where the court was prohibited at the time of sentencing from taking into account certain considerations relating to the defendant's offense or circumstances; the law has subsequently been changed to permit the court to take those considerations into account; and the change in the law has not been made generally retroactive so as to fall under 18 U.S.C. § 3582(c)(2).

We then propose, as part of an application note, eight specific examples of extraordinary and compelling reasons, all of which find support in the legislative history of the 1984 Act, in past administrative practice under this statute, and in the history of and practice under its old law predecessor, 19 U.S.C. § 4205(g). These reasons are: 1) where the defendant is suffering from a terminal illness; 2) where the defendant is suffering from a permanent physical or mental disability or chronic illness that significantly diminishes the prisoner's ability to function within the environment of a correctional facility; 3) where the defendant is experiencing deteriorating physical or mental health as a consequence of the aging process; 4) where the defendant has provided significant assistance to any government entity that was not or could not have been taken into account by the court in imposing the sentence; 5) where the defendant would have received a significantly lower sentence under a subsequent change in applicable law that has not been made retroactive; 6) where the defendant received a significantly higher

sentence than similarly situated codefendants because of factors beyond the control of the sentencing court; 7) where the defendant has experienced an extraordinary and compelling change in family circumstances, such as the death or incapacitation of family members capable of caring for the defendant's minor children; or 8) where the defendant's rehabilitation while in prison has been extraordinary. We propose further that neither changes in the law nor rehabilitation should, by themselves, be sufficient to justify sentence reduction.

We appreciate the opportunity to provide these comments, and hope that they will be helpful.

Respectfully submitted,

Robert D. Evans

Robert D. Evans

American Bar Association
Proposed Policy Statement

**§ 1B1.13 Reduction in Term of Imprisonment Upon Motion of Director of the
Bureau of Prisons (Policy Statement)**

- (a) Upon motion of the Director of the Bureau of Prisons under 18 U.S.C. § 3582(c)(1)(A), the court may reduce a term of imprisonment if, after considering the factors set forth in 18 U.S.C. § 3553(a), the court determines that –
- (1) either –
 - (A) extraordinary and compelling reasons warrant such a reduction; or
 - (B) the defendant (i) is at least 70 years old, and (ii) has served 30 years in prison on a sentence imposed under 18 U.S.C. § 3559(e) for the offense or offenses for which the defendant is imprisoned;
 - (2) the Director of the Bureau of Prisons has determined that the defendant is not a present danger to the safety of any other person or to the community pursuant to 18 U.S.C. § 3142(g)(4); and
 - (3) the reduction is consistent with this policy statement and the purposes of sentencing set forth in 18 U.S.C. § 3553(a).
- (b) “Extraordinary and compelling reasons” may be found where
- (1) the defendant’s circumstances are so changed since the sentence was imposed that it would be inequitable to continue the defendant’s confinement; or
 - (2) information unavailable to the court at the time of sentencing becomes available and is so significant that it would be inequitable to continue the defendant’s confinement, or
 - (3) the court was prohibited at the time of sentencing from taking into account certain considerations relating to the defendant’s offense or circumstances; the law has subsequently been changed to permit the court to take those considerations into account; and, the change in the law has not been made generally retroactive so as to fall under 18 U.S.C. § 3582(c)(2).

Commentary

Application Note:

Application of subdivisions (a)(1)(A) and (b):

- 1) The term "extraordinary and compelling reasons" includes, for example, that –
 - (a) the defendant is suffering from a terminal illness;
 - (b) the defendant is suffering from a permanent physical or mental disability or chronic illness that significantly diminishes the prisoner's ability to function within the environment of a correctional facility;
 - (c) the defendant is experiencing deteriorating physical or mental health as a consequence of the aging process;
 - (d) the defendant has provided significant assistance to any government entity that was not or could not have been taken into account by the court in imposing the sentence;
 - (e) the defendant would have received a significantly lower sentence under a subsequent change in applicable law that has not been made retroactive;
 - (f) the defendant received a significantly higher sentence than similarly situated codefendants because of factors beyond the control of the sentencing court;
 - (g) the defendant has experienced an extraordinary and compelling change in family circumstances, such as the death or incapacitation of family members capable of caring for the defendant's minor children; or
 - (h) the defendant's rehabilitation while in prison has been extraordinary.
- 2) "Extraordinary and compelling reasons" may consist of a single reason, or it may consist of several reasons, each of which standing alone would not be considered extraordinary and compelling, but that together justify sentence reduction; *provided that* neither a change in the law alone, nor rehabilitation of the defendant alone, shall constitute "extraordinary and compelling reasons" warranting sentence reduction pursuant to this section.
- 3) "Extraordinary and compelling reasons" may warrant sentence reduction

without regard to whether or not any changes in the defendant's circumstances could have been anticipated by the court at the time of sentencing.

Background: The Commission is directed by 28 U.S.C. § 994(t) to "describe what should be considered extraordinary and compelling reasons for sentence reduction under 18 U.S.C. § 3582(c)(1)(A)(i), including the criteria to be applied and a list of specific examples." This section provides that "rehabilitation of the defendant alone shall not be considered an extraordinary and compelling reason." This policy statement implements 28 U.S.C. § 994(t).