offense level of six but includes enhancements for specific offense characteristics, most notably incremental increases of the base level for crimes involving losses that exceed $5,000.

FDA believes that the primary guideline, Section 2N2.1, inappropriately treats some FDCA violations as minor regulatory offenses. This guideline applies to offenses with statutory maximum sentences ranging from 1 to 10 years. However, as noted, Section 2N2.1 does not include enhancements for specific offense characteristics to account for the wide range of offenses that it addresses. In addition, Section 2N2.1 does not provide for any enhancements to address the public health purposes of the FDCA. Therefore, FDA believes Section 2N2.1 should be amended to ensure that all criminals who endanger the public health by violating the FDCA receive appropriate punishment.

Particular Concerns with the Existing Guidelines and Suggested Amendments

I. Offenses with Higher Statutory Penalties

Most violations of the FDCA are felonies with a 3-year maximum sentence if the offense is committed with an "intent to defraud or mislead." However, certain FDCA offenses are felonies whether or not the offense involves fraudulent intent, and some of these offenses have statutory maximum sentences that exceed 3 years. The current guideline at Section 2N2.1 fails to account for these offenses that warrant more significant penalties without requiring a showing of fraud.

A. Certain Prescription Drug Marketing Act Offenses

The Prescription Drug Marketing Act of 1987 (PDMA) prohibits, among other things, the unlicensed wholesale distribution of prescription drugs; the sale, purchase, or trading of prescription drug samples and coupons; and the reimportation by anyone other than the manufacturer of prescription drugs manufactured in the United States [see 21 U.S.C. §§ 331(t), 353(c), 353(e)(2)(A), and 381(d)]. Congress enacted these prohibitions because it found that such conduct created, as stated in H. Rep. No. 100-76 at 2 (1987), "an unacceptable risk that counterfeit, adulterated, misbranded, subpotent, or expired drugs will be sold to American consumers."

These PDMA prohibitions are an important tool to combat the large-scale distribution of counterfeit or substandard prescription drugs. Unlicensed wholesale distributors of prescription drugs are less likely than legitimate licensed wholesalers to store and handle prescription drugs properly and are more likely to purchase prescription drugs from disreputable sources that sell counterfeit, misbranded, adulterated, or expired drugs. Sellers of prescription drug samples typically repackage the drugs to remove any indication that the drugs are not intended for sale and, in the process, mislabel the drugs with inaccurate lot numbers, expiration dates, and, in some cases, the wrong drug name or strength.

Because of the public health risk posed by these PDMA offenses and the importance of protecting the integrity of the Nation's prescription drug supply, Congress made these offenses felonies without requiring proof that the defendants acted with intent to defraud or mislead, as is required for most other FDCA felonies. And, unlike other FDCA violations that have a maximum penalty of 3 years in prison, Congress provided for a maximum prison sentence of 10 years for these PDMA offenses [21 U.S.C. § 333(b)(1)].

The guidelines, however, do not distinguish between these PDMA offenses and other FDCA violations under Section 2N2.1. The guidelines treat all FDCA offenses the same and provide for a base offense level of six. The higher maximum penalties for these PDMA offenses generally come into play *only* when there is evidence of fraud *and* significant pecuniary loss under Section 2B1.1(b)(1). It is difficult to prove fraud because buyers and sellers are often complicit in the offense, and, even when the government can prove fraud, it is difficult to demonstrate substantial pecuniary loss, because the buyers and sellers involved in the fraud often do not retain records pertaining to the illegal drug distributions.

In FDA's view, the current guidelines do not carry out the intention of Congress: to provide significant penalties for these PDMA offenses without requiring a showing of fraud. FDA believes that an amendment to Section 2N2.1 to provide for a higher base offense level (e.g., 12-14) for these PDMA offenses, with incremental increases based on the quantity or dollar value of the drugs involved in the offense, would better reflect congressional intent and significantly increase the effectiveness of the PDMA as a means to protect the integrity of the Nation's prescription drug supply.[1]

B. Second Offense Felonies

Under 21 U.S.C. § 333(a)(2), a second conviction for violating the FDCA is a felony punishable by up to 3 years imprisonment, even absent a showing of intent to defraud or mislead. Without a showing of fraud, however, the prior FDCA conviction will likely have no effect under the current guidelines because it will not have resulted in a sentence of imprisonment (see U.S.S.G. § 4A1.1). The prior FDCA conviction probably would not increase a defendant's criminal history category, and Section 2N2.1 does not provide for any increase of the base offense level for a second FDCA conviction, even though Congress made a second FDCA offense a felony.

The guidelines should be amended to include a specific offense characteristic under Section 2N2.1 for repeat FDCA offenders. FDA believes that an increase of six levels for a prior FDCA

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[1] To give greater effect to this and the other suggested amendments, we believe that Section 2N2.1(b)(1) also should be amended to provide that Section 2B1.1 would apply only if the resulting offense level would be greater than the offense level under Section 2N2.1.

conviction, with an increase of two levels for each additional unrelated prior FDCA conviction, would be appropriate.

C. Human Growth Hormone Offenses

Under 21 U.S.C. § 333(e), it is unlawful knowingly to distribute, or to possess with intent to distribute, human growth hormone for any use not approved by FDA. The statutory maximum penalty for violating this provision is 5 years in prison under 21 U.S.C. § 333(e)(1). When the offense involves distribution to a person under age 18, the statutory maximum increases to 10 years in prison under 21 U.S.C. § 333(e)(2). The Commission has not yet promulgated a guideline to cover these human growth hormone offenses (see U.S.S.G. § 2N2.1, comment (n.4). As a result, it is unclear how the offenses will be treated under the guidelines. This lack of clarity undermines the goals of uniformity, transparency, and deterrence. In recent years, FDA has investigated an increasing number of cases involving the distribution of human growth hormone for unapproved uses. We request that the Commission promulgate a guideline to address such offenses. An amendment to Section 2N2.1 that provides for a higher base offense level [e.g., 12-14, for violations of 21 U.S.C. § 333(e)] with incremental enhancements based on the quantity or dollar value of human growth hormone involved in the offense, and a separate enhancement for offenses that involve a person under 18 years of age, would adequately address the conduct.

II. Offenses that Do Not Involve Fraud

FDCA cases frequently arise in which prosecutors cannot prove intent to defraud or mislead to establish felony liability. Misdemeanor violations of the FDCA encompass a wide range of conduct, from record-keeping offenses to the willful distribution of dangerous products that could seriously injure or kill consumers. Section 2N2.1, which provides for a base offense level of six with no enhancements, is inadequate to address the wide-ranging degrees of culpability that may occur in FDCA misdemeanors. Despite the lack of provable fraud, the conduct addressed in most FDCA misdemeanor prosecutions warrants more significant punishment than is available under the current guidelines, either because of the defendant's state of mind or a significant risk to the public health, or both.

An example is a wholesale distributor who sells counterfeit or diverted prescription drugs but claims not to have known that the drugs were counterfeit or diverted. In such cases, it is often difficult to prove that the distributor acted with intent to defraud and mislead, even though such distributors often deliberately choose not to verify the legitimacy of the drugs under circumstances where the source is highly suspicious.[2] This lack of fraud (or difficulty proving it)

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[2] If the distributor acted in good faith and had no reason to believe that the drugs were counterfeit, he would not be subject to criminal penalties under the FDCA [see 21 U.S.C. § 333(c)(5)].

in no way undercuts the potentially serious public health consequences caused by a wholesale distributor who recklessly distributes drugs of unknown origin to an unsuspecting public. The distributor's willful blindness endangers the public by ignoring the risk that counterfeit or otherwise substandard prescription drugs may enter the retail market.

Another type of misdemeanor offense that we believe warrants more significant punishment than is available under the current guideline is the distribution of dangerous or ineffective drugs for the treatment of disease. Even when these offenses do not involve fraud, they often involve substantial risk to the public health, take advantage of patients who are desperate for a cure, and are perpetrated by defendants who are aware that their conduct is unlawful. For example, FDA's Office of Criminal Investigations has investigated the illegal sale of DNP (a notoriously deadly product commonly used as a pesticide) as a weight-loss drug and cancer treatment. If a defendant sells DNP openly, it may be difficult to prove fraud sufficient to establish felony liability, even in those cases where the defendant is aware of the illegality of his conduct.

In the foregoing types of cases, the sentence will be governed by Section 2N2.1, with a base offense level of six and no enhancements for specific offense characteristics. FDA believes that Section 2N2.1 should be amended to provide for stiffer sentences for misdemeanor offenses that --while not involving demonstrable fraud--involve reckless, knowing, or willful conduct, a significant risk to the public health, or both. The amendments should enhance the offense level based on the defendant's level of criminal intent by, for example, enhancing the offense level for reckless, knowing, and willful conduct. These enhancements would serve to distinguish knowing, reckless, and willful offenses from those involving mere negligence or no criminal intent whatsoever.

In addition, enhancements based on the risk of harm created by the offense conduct, similar to the enhancements for likelihood of serious bodily injury used in the guidelines for environmental offenses, would be appropriate in certain cases [see, e.g., U.S.S.G. § 2Q1.3(b)(2)]. Enhancements for risk of harm or serious bodily injury would serve to distinguish mere technical, regulatory offenses from those with the potential to cause significant harm to the American public. Appropriate amendments would ensure that misdemeanor offenses involving, for example, the distribution of counterfeit drugs that lack active ingredients or the sale of ineffective or toxic drugs for the treatment of cancer would be treated more seriously than offenses involving mere record-keeping or regulatory violations that pose no cognizable risk to the public health. The amendments could provide for different levels of enhancement depending on the nature of the risk and the number of people placed at risk. Such enhancements, together with enhancements based on the defendant's culpable state of mind, would help provide an appropriate range of punishment for the wide range of conduct that falls under the misdemeanor provisions of the FDCA.

Conclusion

For the above reasons, FDA believes that the guidelines applicable to FDCA offenses should be amended to establish offense levels that reflect the serious nature of the conduct, promote deterrence, and address offenses with differing levels of culpability and disregard for the public health. At the Commission's request, FDA will provide any assistance and input to help draft appropriate amendments. If you have any questions regarding this matter, please contact Associate Chief Counsel Sarah Hawkins by telephone at (301) 827-1130 or by e-mail at sarah.hawkins@fda.gov.

Sincerely,

Lester M. Crawford, D.V.M., Ph.D.
Acting Commissioner of Food and Drugs

cc: John M. Taylor, III, Associate Commissioner for Regulatory Affairs, FDA
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July 26, 2005

Sentencing Commission
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ATTN: Public Affaris-Prioritics Comment (BOOKER)

RE: Comments on Booker Ruling

Dear Commission:

Thank you for opening the door for these comments on the recent United States Supreme Court Ruling in: United States v. Booker.

My personal opinion is that the ruling is in error: the guidelines themselves are not unconstitutional, the point of the matter is that it is against our constitution for a Judge to decide the facts of a case. The Court chose to protect itself from the backlash of its previous unauthorized conduct, allowing Judges to determine facts by a preponderance of the evidence, this practice has been wrong, unconstitutional, from its inception.

I would urge the Commission to reinstate the guidelines as mandatory, but remove any rules that allows a Judge to find facts by any standard of evidence. Plus, I would urge the Commission to promulgate an Amendment that would allow those who are unable to pursue this new rule, due to it not being ruled retroactive by the Court, to have their sentence corrected under 18 U.S.C. 3582.

On a separate note, why is there no publication that list the elements to each federal statutory and regulatory offense and the element of federal jurisdiction for each of those offenses? I believe this would resolve the majority of the confusion in appeals and relieve the court of 70% of the motions filed.

I respectfully request that these comments be presented before the Commission in full assembly.

Sincerely,

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July 26, 2005

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RE: Priorities Comments-United States Guidelines
Amendment Cycle-May 1, 2006

Dear Sentencing Commission:

Thank you for taking the time to read this letter. At the outstart, I would like to commend the Sentencing Commission on its continuation of its work on cocaine sentencing policy and on appropriate responses to United States v. Booker, 125 S.Ct. 738 (2005). I have been imprisoned for almost ten years for federal drug crimes. Consequently, at the request of the Sentencing Commission, I would like to share my comments and personal experience with the Sentencing Guidelines.

At sentencing, I stood in shock and disbelief as I watched my guideline sentence increase from 12-16 months imprisonment to life imprisonment. The trial jury did not determine any of the facts used to increase my guideline range. Rather, the sentencing judge determined the disputed facts under the preponderance of the evidence standard. The sentencing judge also "approximated" and "aggregated" the drug amounts used to set my base offense level. The sentencing judge's approximation and factual findings were based exclusively on the information and testimony of cooperating witnesses who had huge incentives to exaggerate and shift blame. The sentencing judge simply ignored the fact that the

cooperating witnesses kept no record of the alleged drug transactions or that most of the cooperating witnesses were high on drugs and alcohol during the relevant time period. Moreover, the sentencing judge disregarded the fact that no police testimony corroborated the aggregated drug amount or that my lifestyle did not indicate I was responsible for the aggregated drug amount.

I strongly urge the Sentencing Commission to address the Guidelines' relevant conduct/aggregation rule. A sentencing procedure that permits a sentencing judge to "approximate" and "aggregate" uncharged drug amounts based solely on information provided by cooperating witnesses "is a procedure that can be subject to much error." See, United States v. Hiveley, 61 F.3d 1358, 1362 n.2 (8th Cir. 1995). Most disturbingly, it is not uncommon for the Guidelines' relevant conduct/aggregation rule to increase a hundred-fold a defendant's guideline sentence based on facts uncharged and unproven beyond a reasonable doubt. See, Booker, 125 S.Ct. at 752 (collecting case). In fact, the Supreme Court has noted the unfairness when a defendant see his maximum potential sentence "balloon" from 5 years to life imprisonment based on facts "extracted after trial from a report compiled by a probation officer who judge thinks more likely got it right than got it wrong." See, Blakely v. Washington, 124 S.Ct. 2531, 2542 (2004).

Today, there is a heighten concern for procedural fairness in the finding of facts. Sentencing judges across the country are now requiring the government to prove beyond a reasonable doubt all disputed facts used to increase a defendant's guideline range. See, e.g., United States v. Huerta-Rodriguez, 355 F.Supp.2d 1019,

1025 (D. Neb. 2005)(Bataillon, J.); United States v. Barkley, 369 F.Supp.2d 1309, 1319 (N.D. Okla. 2005)(Holmes, C.J.); United States v. Gray, 362 F.Supp.2d 714, 723 (S.D.W Va. 2005)(Goodwin, J.); United States v. Malouf, Crim. No. 03-CR-10298-NG (D. Mass. June 15, 2005)(Gertner, J.). It is now accepted in courts across the country that a heighten standard of proof is necessary to ensure an accurate determination of the defendant's degree of culpability. I encourage the Sentencing Commission to make this new and enhanced fact-finding procedure universal throughout the Federal System and to make it retroactive.

For too long, the Guidelines have permitted sentencing judges to increase (sometimes a hundred-fold) a defendant's guideline sentence based on facts uncharged and unproven beyond a reasonable doubt. The Guidelines, in particular, for too long have permitted sentencing judges to "approximate" uncharged drug amounts under the preponderance of the evidence standard. This method is arbitrary and unreliable and raises serious questions about the accuracy of fact-findings in past cases. True, a misallocation of fact-finding responsibility (judge versus jury) does not necessary improves the accuracy of the fact-finding and thus does not warrant retroactive application. Schriro v. Summerlin, 124 S.Ct. 2519, 2523 (2004). But, the same cannot be said for an heighten standard of proof. See, Hankerson v. North Carolina, 432 U.S. 233, 243 (1977). Therefore, if the Sentencing Commission adopts a heighten standard of proof, it should be made retroactive.

In short, the contention that Booker singals a return to pre-Guidelines' discretion is an overstatement. In truth and in fact, Booker has created a hybrid (not totally discretionary and

not totally mandatory) sentencing system controlled by reasonableness. See, Booker, 125 S.Ct. at 765-766 (a sentencing judge's discretion is constrained by the notion of "reasonableness.") Interestingly, courts are declining to define "reasonableness." See, United States v. Haack, 403 F.3d 997 (8th Cir. 2005); United States v. Mykytiuk, 7th Cir. No. 04-1196 (7th Cir. July 7, 2005). Therefore, if not properly restricted, the Guidelines' relevant conduct/aggregation rule still has the potential of circumventing Booker's substantive holding. I urge the Sentencing Commission to implement a procedure that would prohibit the Guidelines' relevant conduct/aggregation rule from becoming "a tail which wags the dog of the substantive offense." See, McMillan v. Pennsylvania, 477 U.S. 79, 87 (1986)(due process will be violated when the finding of a sentencing factor becomes "a tail which wags the dog of the substantive offense.") In other words, a sentencing judge may still use the Guidelines' relevant conduct/aggregation rule. But, a single enhancement or upward departure should not overwhelm or be extremely disproportionate to the punishment that would otherwise be imposed based on facts proven beyond a reasonable doubt or admitted by the defendant.

Lastly, I encourage the Sentencing Commission to address the Guidelines' quantity-driven, "market-oriented" approach and 100:1 sentencing ratio between crack cocaine and powder cocaine. Under the new sentencing system, judges are again questioning the justification of the 100:1 ratio between crack cocaine and powder cocaine. See, United States v. Nellum, 2005 WL 300073 at *4 (N.D. Ind. Feb. 3, 2005). One district judge has already imposed a lower sentence than called for by the Guidelines to

avoid an "unwarranted disparity between defendants convicted of possessing powder cocaine and defendants convicted of possessing crack cocaine." See, United States v. Smith, 359 F.Supp.2d 771, 781 (E.D. Wis. 2005)(Adelman, J.). Judge Adelman reasoned that "[c]ourts, commentators, and the Sentencing Commission have long criticized this disparity, which lacks persuasive penological and scientific justification and creates a racially disparate impact in federal sentencing." Id. at 777 (citations ommitted).

It is also worth noting that the Guidelines' 100:1 ratio can lead to anomalous results in which retail crack dealers receive longer prison terms than the wholesale drug distributor who supply the powder cocaine from which the crack is produced. Indeed, my case illustrates this point very well. At age 23, I was sentenced to life imprisonment while those the government claimed supplied the powder cocaine are now free.

The Guidelines' quantity-driven, "market-oriented" approach also contributes to disparity and unreliability in drug sentencing. The quantity system was developed to punish bigger distributors more harshly, but practices of charging conspiracies over a long period of time has the result of aggregating many small distributions so as to make a long-term small quantity street vendor look like a large-quantity "kingpin." Consequently, because the Guidelines quantity-driven, "market-oriented" approach often overstates the seriousness of the defendant's crime, a small quantity street vendor often receives the same type sentence as a large quantity kingpin. See, Huerta-Rodriquez, 355 F.Supp.2d at 1025-26 n.6; see also, United States v. Lacy, 99 F.Supp.2d 108, 116 (D.Mass. 2000)(Gertner, J.); United States v.

Perez, 321 F.Supp.2d 574, 581-82 (S.D.N.Y. 2003)(Lynch, J.). Many legal commentators have also urged that the Sentencing Commission to reduce the impact drug amount has on setting a defendant's base offense level under §2D1.1 Drug Table. See, e.g., Marc Miller & Daniel J. Freed, The Disproportionate Imprisonment of Low-Level Drug Offenders, 7 Fed.Sent.Rep. 3 (1994); Jon O. Newman, Five Guideline Improvements, 5 Fed.Sent.Rep. 190 (1993); Douglas A. Berman, The Second Circuit: Attributing Drug Quantities to Narcotics Offenders, 6 Fed.Sent.Rep. 217 (1994). Simply put, there are other enhancements such as offense role, gun possession, and career offender that are adequate to address more serious drug offenses and repeated offenders.

In conclusion, no one suggest courts should go easy on drug offenders. But, its impossible to believe that the public would say that justice is served when first-time, non-violent drug offenders receive prison terms greater than many convicted murders and sex offenders. Numerous judges and commentators have publicly stated that most federal drug sentences are too long. See, e.g., Rhonda McMillion, "ABA Supports Push to Restore Judicial Discretion in Sentencing," 90 A.B.A.J. 62 (Jan.2004)(noting speech by Justice Anthony M. Kennedy stating that "prison sentences are too long, mandatory minimum sentences should be repealed, and sentencing guidelines should be reconsidered.") In short, a society can be tough on crime without being cruel and unjust.

Sincerely,

Kelby R. Franklin

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August 15, 2005

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Washington, D.C. 20002-8002
Attention: Public Affairs—Priorities Comment

Re: Comments on Notice of Proposed Priorities -- Chapter 8 Organizational Guidelines, Section 8C2.5, Waiver of Attorney-Client Privilege

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 request for comments on the above Notice of Proposed Priorities for the amendment cycle ending May 1, 2006.[1] In particular, although this letter does not address the issue of broad Sentencing Guidelines reform, we would like to express our views regarding the Commission's tentative priority number (5), described in the Notice as "review, and possible amendment, of commentary in Chapter Eight (Organizations) regarding waiver of the attorney-client privilege and work product protections." Towards that end, we urge the Commission to retain this issue on its final list of priority issues for the 2005-2006 amendment cycle, and at the end of that process, amend the applicable language in the Commentary 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 new policy recommending that Congress

[1] 70 Fed. Reg. 37145 (June 28, 2005)

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.

In the meantime, however, the ABA continues to have serious concerns regarding several narrow 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. Although the ABA has serious concerns regarding several of these recent amendments[2], 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 of the amendment on the business and legal communities[3]. As a result, the ABA has concluded that the new privilege waiver amendment, though perhaps well intentioned, will have a number of profoundly negative consequences. Therefore, we respectfully urge that the Commission retain this issue on its final list of priority issues for the 2005-2006 amendment cycle, and remedy the previous amendment, for the following reasons.

The ABA believes that as a result of the privilege waiver amendment, companies and other organizations will be forced 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

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[2] 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.

[3] For example, the National Association of Criminal Defense Lawyers and the Association of Corporate Counsel each recently conducted surveys of in-house and outside counsel in order to determine the extent to which attorney-client and work product protections have been eroded in the corporate context. Executive summaries of these surveys are available online at www.nacdl.org/public.nsf/Legislation/Overcriminalization002/$FILE/AC_Survey.pdf and www.acca.com/Surveys/attyclient.pdf, respectively. 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 subjects. Materials relating to the work of the ABA Task Force are available on the entity's website at www.abanet.org/buslaw/attorneyclient/.

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.

Now that this amendment has become effective, the Justice Department—which 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"—is likely to pressure 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 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 will have a profound effect on their public image, stock price, and credit worthiness.

We also believe 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 authorizing routine government demands for waiver of attorney-client and work product protections, the 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.

In addition, while the privilege waiver amendment was intended to aid government prosecution of corporate criminals, 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 tools for detecting and flushing out malfeasance. 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. Therefore, we believe that the privilege waiver amendment undermines rather than promotes good compliance practices.

The ABA also 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 our 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 new privilege waiver amendment to the Sentencing Guidelines. These concerns were formally brought to the Commission's attention on March 3, 2005, when an informal coalition of nine prominent business, legal, and public policy organizations[4] submitted a joint letter 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 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 to retain this issue on its final list of priority issues for the 2005-2006 amendment cycle. In addition, at the end of that process, we urge the Commission to amend 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 our recommendations were adopted, the relevant portion of the Commentary would read as follows[5]:

> "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-

[4] 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. In addition, several other influential groups, including the National Association of Criminal Defense Lawyers and the Financial Services Roundtable, have also publicly voiced similar concerns regarding the privilege waiver amendment.

[5] 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.

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 your consideration of our comments. If you would like more information regarding the ABA's positions on these issues, please contact our senior legislative counsel for business law issues, Larson Frisby, at (202) 662-1098.

Sincerely,

Robert D. Evans

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

August 15, 2005

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 Notice of Proposed Priorities -- Chapter 8 Organizational Guidelines, Section 8C2.5, Waiver of Attorney-Client Privilege

Dear Sir/Madam:

On behalf of the undersigned organizations, please accept this letter as our response to the Commission's request for comments on the above Notice of Proposed Priorities for the amendment cycle ending May 1, 2006.[1] In particular, we would like to express our views regarding the Commission's tentative priority number (5), described in the Notice as "review, and possible amendment, of commentary in Chapter Eight (Organizations) regarding waiver of the attorney-client privilege and work product protections." Towards that end, we urge the Commission to retain this issue on its final list of priority issues for the 2005-2006 amendment cycle, and at the end of that process, amend the applicable language in the Commentary 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. These comments are presented on behalf of the American Chemistry Council, the American Civil Liberties Union, the Association of Corporate Counsel, Business Civil Liberties, Inc., the Business Roundtable, the Financial Services Roundtable, Frontiers of Freedom, the National Association of Criminal Defense Lawyers, the National Association of Manufacturers, the National Defense Industrial Association, the Retail Industry Leaders Association, the U.S. Chamber of Commerce, and the Washington Legal Foundation.

On April 30, 2004, the U.S. Sentencing Commission submitted to Congress a number of amendments to Chapter 8 of the Guidelines relating to "organizations"—a broad term that includes corporations, partnerships, unions, non-profit organizations, governments, and other entities. Included in these amendments was 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 demonstrate cooperation with the government and thereby qualify for a reduction in the culpability score—and a more lenient sentence—under the Guidelines. All of these amendments became effective on November 1, 2004.

[1] 70 Fed. Reg. 37145 (June 28, 2005)

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 required, even though the Justice Department has increasingly requested that companies waive their privileges as a condition for certifying their cooperation during investigations. Privilege waiver was the subject of substantial consideration by the Commission's Ad Hoc Advisory Group on the Organizational Guidelines, which proposed the changes after considering information from the Department of Justice, some bar associations, and regulated entities.

During the Advisory Group's deliberations, numerous representatives of the business community and various legal groups expressed concerns about the Group's proposal regarding the waiver issue, which was not dramatically different than the version ultimately adopted by the Commission. Since the adoption of the final version, a broader cross-section of organizations, including many of the undersigned entities, has evaluated the substantive and practical impact of the waiver provision on their operations—and on the legal and business communities in general—and has identified profoundly negative unintended consequences[2]. As a result, we respectfully urge the Commission retain this issue on its final list of priority issues for the 2005-2006 amendment cycle, and remedy the previous amendment, for the following reasons.

The attorney-client privilege is the bedrock of a defendant's rights to effective counsel and confidentiality in seeking legal advice. It also serves a key practical role in the process of corporate self-investigation and reporting by allowing corporate officials and staff to talk with lawyers without concern that their admissions, questions or requests for legal guidance will be required to be shared with government investigators.

The privilege also encourages clients to place lawyers on mission-critical teams so that legal advice can be regularly integrated into the company's day-to-day and strategic business decisions. Removing the protections of the privilege from the corporate or other organizational contexts makes it far more difficult for companies, associations, unions, and other entities to detect employee wrongdoing when it occurs and correct it early.

While 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," the exception is likely to swallow the rule. Now that the amendment has become effective, the Justice Department—which has followed a

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[2] For example, the National Association of Criminal Defense Lawyers and the Association of Corporate Counsel each recently conducted surveys of in-house and outside counsel in order to determine the extent to which attorney-client and work product protections have been eroded in the corporate context. Executive summaries of these surveys are available online at www.nacdl.org/public.nsf/Legislation/Overcriminalization002/$FILE/AC_Survey.pdf and www.acca.com/Surveys/attyclient.pdf, respectively. 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 subjects. Materials relating to the work of the ABA Task Force are available on the entity's website at www.abanet.org/buslaw/attorneyclient/.

general policy of requiring companies to waive privilege in many cases as a sign of cooperation since the 1999 "Holder Memorandum" and 2003 "Thompson Memorandum"—is likely to pressure companies to waive 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 Congressional ratification of the Department's policy of routinely requiring privilege waivers. From a practical standpoint, organizations will have no choice but to waive these privileges whenever the government demands it, as the threat to label them as "uncooperative" in combating corporate crime—even if the charge is unfounded—could have a profound effect on their public image, stock price and credit worthiness.

These changes to the Section 8C2.5 Commentary—resulting in the routine compelled waiver of attorney-client privilege and work product protections—unfairly harms companies, associations, unions and other entities in the following ways:

•**The amendment weakens the attorney-client privilege 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 routine government demands for waiver of attorney-client and work product protections, the 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 privilege waiver amendment undermines internal compliance programs.** Instead of aiding in the prosecution of corporate criminals, the privilege waiver amendment makes 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 tools for detecting and flushing out malfeasance. Indeed, Congress recognized the value of these compliance tools when it enacted the Sarbanes-Oxley Act. However, 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, we believe that the privilege waiver amendment undermines rather than promotes good compliance practices.

•**The privilege waiver amendment unfairly harms employees**. The privilege waiver amendment also 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 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.

Unfortunately, the Supreme Court's recent decision in *United States v. Booker/Fanfan* did not alleviate the problems caused by the privilege waiver amendment. Although the Supreme Court struck down as unconstitutional those provisions of the Sentencing Guidelines that made them mandatory and binding on the courts, it preserved the overall Guidelines as non-binding standards that the courts must consider when crafting sentences. Therefore, the privilege waiver amendment will continue to cause adverse consequences as long as it remains in place.

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. Therefore, we urge the U.S. Sentencing Commission to retain this issue on its final list of priority issues for the 2005-2006 amendment cycle. In addition, at the end of that process, we urge the Commission to amend the applicable language in the Commentary 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 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 our recommendations were adopted, the relevant portion of the Commentary would read as follows[3]:

> "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*

[3] 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.

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

AMERICAN CIVIL LIBERTIES UNION

ASSOCIATION OF CORPORATE COUNSEL
(formerly the American Corporate Counsel Association)

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

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

August 15, 2005

The Honorable Ricardo H. Hinojosa
Chairman
U.S. Sentencing Commission
One Columbus Circle, N.E.
Washington, D.C. 20002-8002

Re: Organizational Sentencing Guidelines Commentary Involving Waiver of Attorney-Client Privilege and Work Product Doctrine -- Comments on Notice of Proposed Priorities

Dear Judge Hinojosa:

We, the undersigned former Justice Department officials, are pleased that the Commission has included, on its list of tentative priorities for the upcoming amendment cycle, the recent amendment to the Commentary to the Organizational Guidelines involving waiver of attorney-client privilege and work product protection in the context of cooperation.[1] We believe that this new amendment is eroding and weakening the attorney-client and work product protections afforded by the American system of justice, and we urge the Commission to address and remedy this amendment as soon as possible.

As you know, on April 30, 2004, the Commission submitted to Congress a number of amendments to Chapter 8 of the Sentencing Guidelines relating to "organizations"—a broad term that includes corporations, partnerships, unions, non-profit organizations, governments, and other entities. Among these amendments- all of which became effective on November 1, 2004— was a change in the Commentary to Section 8C2.5 which authorizes and encourages the government to require entities to waive their attorney-client and work product protections in order to demonstrate cooperation with the government and thereby qualify for a more lenient sentence under the Guidelines.

Prior to the adoption of this privilege waiver amendment, the Sentencing Guidelines were silent on the privilege issue and contained no suggestion that such a waiver would ever be required. Although it is true that the Justice Department has followed a general policy of commonly requiring companies to waive privileges as a sign of cooperation since the 1999 "Holder Memorandum" and the 2003 "Thompson Memorandum," this was merely the Department's internal policy for its prosecutors. Now that the privilege waiver amendment has been incorporated into the official Commentary to the Sentencing Guidelines, the Justice Department, as well as other enforcement agencies, are contending that this amendment provides Congressional ratification of the Department's policy of routinely asking that privilege be waived.[2] In practice, companies are

[1] 70 Fed. Reg. 37145 (June 28, 2005).

[2] See, e.g., Mary Beth Buchanan, "Effective Cooperation by Business Organizations and the Impact of Privilege Waivers," 39 WAKE FOREST L. REV. 587, 589 (Fall 2004) ("This Article seeks to demonstrate that the [Justice] Department's consideration of waiver is based squarely on the definition of cooperation set forth in the Organizational Sentencing Guidelines.").

finding that they have no choice but to waive these privileges whenever the government demands it. The threat to label them as "uncooperative" in combating corporate crime simply poses too great a risk of indictment and further adverse consequences in the course of prosecution. Even if the charge is unfounded, the charge of "noncooperation" can have such a profound effect on a company's public image, stock price and credit worthiness that companies generally yield to waiver demands.

As former Justice Department officials, we appreciate and support the Commission's ongoing efforts to amend and strengthen the Sentencing Guidelines in order to reduce corporate crime. Unfortunately, however, we believe that the privilege waiver amendment, though well-intentioned, is undermining rather than strengthening compliance with the law in a number of ways.

In our view, the privilege waiver amendment seriously erodes and weakens the attorney-client privilege between companies and their lawyers by discouraging corporate personnel at all levels from consulting with counsel on close issues. Lawyers are indispensable in helping companies and their officials understand and comply with complex laws and act in the entity's best interests. In order to fulfill this important function, lawyers must enjoy the trust and confidence of the board, management and line operating personnel so they may represent the entity effectively and ensure that compliance is maintained (or that noncompliance is quickly remedied). By enabling routine demands for waiver of the attorney-client and work product protections, the amendment discourages personnel within companies and other organizations from consulting with their lawyers, thereby impeding the lawyers' ability to effectively counsel compliance with the law. This, in turn, will harm not only the corporate client, but the investing public and society as well.

The privilege waiver amendment will also 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, have become 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 in 2002. Because the effectiveness of internal investigations depends on the ability of employees and other 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 harder for companies to detect and remedy wrongdoing early. As a result, we believe that the privilege waiver amendment undermines rather than promotes good compliance practices.

Finally, we are concerned that the privilege waiver amendment will encourage excessive "follow-on" civil litigation. In virtually all jurisdictions, waiver of attorney-client or work product protections for one party constitutes waiver to all parties, including subsequent civil litigants. Forcing companies and other entities to routinely waive their privileges during criminal investigations provides plaintiff lawyers with a great deal of sensitive—and sometimes confidential—information that can be used against the entities in class action, derivative and similar suits, to the detriment of the entity's employees and shareholders. This risk of future litigation and

all its related costs unfairly penalizes organizations that choose to cooperate on the government's terms. Those who determine that they cannot do so—in order to preserve their defenses for subsequent actions that appear to involve a far greater financial risk-- -instead face the government's wrath.

In sum, we believe that the new privilege waiver amendment is seriously flawed and undermines, rather than enhances, compliance with the law and the many other societal benefits that arise from the confidential attorney-client relationship. Therefore, we urge the Commission to retain this issue on its list of priorities for the upcoming amendment cycle, and to address and remedy the issue as soon as possible. In particular, we recommend that the Commission revise the amendment 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 during an investigation.

Respectfully submitted,

Griffin B. Bell
Attorney General
(1977-1979)

Stuart M. Gerson
Acting Attorney General (1993)
Assistant Attorney General,
Civil Division (1989-1993)

Edwin Meese, III
Attorney General
(1985-1988)

Dick Thornburgh
Attorney General
(1988-1991)

Carol E. Dinkins
Deputy Attorney General
(1984-1985)

George J. Terwilliger III
Deputy Attorney General
(1991-1992)

Theodore B. Olson
Solicitor General
(2001-2004)

Kenneth W. Starr
Solicitor General
(1989-1993)

Seth P. Waxman
Solicitor General
(1997-2001)

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

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

August 15, 2005

The Honorable Ricardo H. Hinojosa
Chairman
U.S. Sentencing Commission
One Columbus Circle, N.E.
Washington, D.C. 20002-8002

Re: Sentencing Guidelines Commentary Involving Waiver of Attorney-Client Privilege and Work Product Doctrine -- Comments on Notice of Proposed Priorities

Dear Judge Hinojosa:

As a member of the House Judiciary Committee and its Subcommittee on Crime, Terrorism and Homeland Security, I have been following with great interest the debate over the recent amendment to the Commentary to Section 8C2.5 of the Federal Sentencing Guidelines, which I believe threatens to erode the long-standing attorney-client and work product protections afforded under our system of justice. As one who played an active role in the adoption of the Sentencing Guidelines statute, this causes me great concern. Although I am pleased that the Commission has announced plans to reconsider this issue during its regular 2005-2006 amendment cycle—and urge the Commission to follow through on this process—I remain concerned that the amendment process does not provide a more timely remedy for the problem. Therefore, I would appreciate hearing your thoughts about possible ways to address this problem more urgently.

As you know, on April 30, 2004, the Commission submitted to Congress a number of amendments to Chapter 8 of the Sentencing Guidelines relating to "organizations"—a broad term that includes corporations, partnerships, unions, non-profit organizations, governments, and other entities—which became effective on November 1, 2004. One of these amendments involved 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 as a condition of showing cooperation with the government during investigations. Prior to the adoption of this privilege waiver amendment, the Sentencing Guidelines were silent on the privilege issue and contained no suggestion that such a waiver would ever be required.

Although the Justice Department has followed a general internal policy—with the adoption of the 1999 "Holder Memorandum" and the 2003 "Thompson Memorandum"—of requiring companies to waive privileges in certain cases as a sign of cooperation, I am concerned that the privilege waiver amendment might erroneously be seen as Congressional ratification of this policy, resulting in even more routine demands for waiver. I am informed that, in practice, companies are finding that they have no choice but to waive these privileges whenever the government demands it, as the threat to label them as "uncooperative" in combating corporate crime simply poses too great a risk of indictment and further adverse consequences in the course of prosecution. Such an

unbalanced dynamic simply goes too far. Even if the charge is unfounded, an allegation of "noncooperation" can have such a profound effect on a company's public image, stock price and credit worthiness that companies generally yield to waiver demands.

As both a former California Attorney General and a current Member of Congress, I appreciate and support the Commission's ongoing efforts to amend and strengthen the Sentencing Guidelines in order to reduce corporate crime. Creating incentives to increase the practice of corporate ethics and legal compliance is imperative. Unfortunately, I believe the privilege waiver amendment is likely to undermine rather than strengthen compliance with the law in several ways.

First of all, the privilege waiver amendment seriously weakens the attorney-client privilege between companies and their lawyers and undermines their internal corporate compliance programs, resulting in great harm to the public. Lawyers can play a key role in helping companies and other organizations to understand and comply with complex laws, but to fulfill this role, lawyers must enjoy the trust and confidence of the entity's leaders and must be provided with all relevant information necessary to represent the entity effectively, ensure compliance with the law, and quickly remedy any violations. By authorizing the government to demand waiver of attorney-client and work product protections *on a routine basis*, the amendment discourages entities from consulting with their lawyers. This, in turn, impedes the lawyers' ability to effectively counsel compliance with the law and discourages them from conducting internal investigations designed to quickly detect and remedy misconduct. As a result, companies and the investing public will be harmed.

I am also concerned that the privilege waiver amendment will encourage excessive civil litigation. In California and most other jurisdictions in the nation, waiver of attorney-client or work product protections in one case waives the protections for all future cases, including subsequent civil litigation matters. Thus, forcing companies and other entities to routinely waive their privileges during criminal investigations results in the waiver of those privileges in subsequent civil litigation as well. As a result, companies are unfairly forced to choose between waiving their privileges, thereby placing their employees and shareholders at an increased risk of costly civil litigation, or retaining their privileges and then facing the wrath of government prosecutors.

For these reasons, I believe that the recent privilege waiver amendment to the Sentencing Guidelines is likely to undermine, rather than strengthen, compliance with the law. In addition, I believe that it will undermine the many other societal benefits that arise from the essential role that the confidential attorney-client relationship plays in our adversarial system of justice. My concerns are also shared by many former senior Justice Department officials—including former Attorneys General Ed Meese and Dick Thornburgh, former Deputy Attorneys General George Terwilliger and Carol Dinkins, former Solicitors General Ted Olson, Seth Waxman and Ken Starr, and many others—who I understand are preparing to submit their own joint letter to the Commission in the near future. Therefore, I urge the Commission to follow through on its initial plan to address and remedy the privilege waiver issue as part of the 2005-2006 amendment cycle.

The new amendment should state affirmatively that waiver of attorney-client and work product protections should not be a mandatory factor for determining whether a sentencing reduction is warranted for cooperation with the government during investigations.

While I believe that such an amendment is appropriate and desirable, it is my understanding that changes made during the upcoming 2005-2006 amendment cycle will not become effective until November 1, 2006. Because the current privilege waiver language in the Commentary to the Guidelines will continue to cause the problems described above until it is removed, I would appreciate your thoughts regarding any additional remedies—legislative or otherwise—that could resolve this problem more promptly.

Thank you for your consideration, and I look forward to hearing from you at your earliest convenience.

Sincerely,

Daniel E. Lungren
Member of Congress

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

Members of the U.S. Sentencing Commission

The Honorable F. James Sensenbrenner, Jr.
Chairman, House Judiciary Committee

The Honorable John Conyers, Jr.
Ranking Member, House Judiciary Committee

New York State Bar Association
One Elk Street
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518-463-3200

Business Law Section
Committee on Securities Regulation

August 15, 2005

United States Sentencing Commission
One Columbus Circle, NE
Suite 2-500, South Lobby
Washington, DC 20002-8002

Attention: Public Affairs-Priorities Comment

Re: **Amendment Cycle Ending May 1, 2006**
Waiver of Attorney-Client Privilege and Work Product Protections

Commissioners:

The Committee on Securities Regulation of the Business Law Section of the New York State Bar Association appreciates the request by the United States Sentencing Commission (the "Commission") for comments on possible priority policy issues for the amendment cycle ending May 1, 2006, and possibly continuing into the amendment cycle ending May 1, 2007 (the "Amendment Cycle") in accordance with Rule 5.2 of its Rules of Practice and Procedure, as noticed at 70 FR 37145-46 (the "Notice").

The Committee on Securities Regulation is comprised of members of the New York Bar whose practices focus, in principal part, in the field of securities regulation. The Section includes lawyers in private practice and in-house counsel of corporate legal departments. A draft of this letter was circulated for comment among members of the Committee, and the views expressed in this letter are generally consistent with those of a majority of its members who reviewed and commented on this letter in draft form. Also, the Executive Committee of the Commercial and Federal Litigation Section of the New York State Bar Association has approved a draft form of this letter circulated to Executive Committee members. In addition, a draft of this letter was circulated to members of the Executive Committee of the Corporate Counsel Section of the Association, and the views expressed in this letter are generally consistent with those of a majority of the Executive Committee members who reviewed and responded to the draft letter.

The views set forth in this letter, however, are those of the Committee and those two Sections' Executive Committees, and do not necessarily reflect the views of the

organizations with which its members are associated or the New York State Bar Association.

The Notice identifies seven priorities for the Amendment Cycle. This letter addresses item 5 which specifies the "review, and possible amendment, of commentary in Chapter Eight (Organizations) regarding the waiver of the attorney-client and work product protections[.]"

In 2004, the commentary to USSG § 8C2.5 was amended to include 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."

As discussed below, we respectfully submit that the requirement that a company waive the attorney-client privilege in order to obtain a reduction of points under the guidelines should be eliminated on the grounds that such a waiver requirement undermines the purpose and value of the privilege. Furthermore, although couched in terms of waiver being required only if necessary to provide pertinent information, we believe that the commentary provides no protection for companies as prosecutors may feel obligated to press for waiver in order to assure that they find out as much as possible. Accordingly, we urge the Commission to eliminate the commentary and instead include an express statement that waiver of the attorney-client privilege and of the work product protections is not required for a reduction in culpability score.

Introduction

The requirement that a company[1] waive the attorney-client privilege for a reduction of points under the sentencing guidelines is a mistake, as previously and repeatedly warned in the form of the strong opposition to such requirement as voiced by the American Bar Association, the American Chemistry Council, the Association of Corporate Counsel, Business Civil Liberties, Inc., Frontiers of Freedom, the National Association of Criminal Defense Lawyers, the U.S. Chamber of Commerce, the Business Roundtable, the National Association of Manufacturers, and the American Civil Liberties Union.

The nature of this concern may be summarized as follows:

[1] The term "company" or "companies" includes all forms of business entities including without limitation corporations, partnerships, limited liability companies and limited liability partnerships.

- The attorney-client privilege between companies and their lawyers will become weakened by prosecutors typically requesting the waiver.
- Companies may feel coerced into waiving the privilege because those who do not run the risk that the government will label them as "uncooperative," which, in turn, will affect their public image, stock price, and credit worthiness.
- Companies may be reluctant to consult with their lawyers for fear that confidential information will be divulged through a waiver of the privilege thereby impeding the lawyers' ability to effectively counsel clients and avoid wrongdoing that causes harm to companies and the investing public.

Analysis and Comment

A company being investigated for committing, or alleged to have committed, a crime must consider waiving the privilege under USSG § 8C2.5 to obtain favorable treatment by the government under the guidelines. This daunting decision cannot be made lightly under any circumstances, especially considering that the waiver to a governmental authority could act as a waiver in other civil litigation.[2]

In any event, a provision that could cause companies to waive the attorney-client privilege would undermine the purpose and value of this ancient privilege. Historically, the attorney-client privilege possibly dates back to the Roman Empire. *Berd v. Lovelace,* 21 Eng. Rep. 33 (1577), *Dennis v. Codrington*, 21 Eng. Rep. 53 (1580), and *Kelway v. Kelway*, 21 Eng. Rep. 47 (Ch. 1580) decided during the reign of Elizabeth I, are the earliest written opinions known to have recognized the privilege. The attorney-client privilege is said to be the most ancient of evidentiary privileges. In the words of Dean John Wigmore, "the privilege appears as unquestioned . . . . It is therefore the oldest of the privileges for confidential communications." [3]

The attorney-client privilege is a rule of evidence. It is embodied in Rule 26(b)(1) of the Federal Rules of Civil Procedure, which provides, "Parties may obtain discovery regarding any matter, not privileged . . ."

Attorneys support the attorney-client privilege because it encourages clients to make full disclosure of information to their attorneys, making it more likely that an attorney will obtain the information needed to provide good legal advice. Clients value the privilege because it makes them feel comfortable disclosing information to their

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[2] *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).

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

attorneys. The judicial process supports the privilege because it recognizes a social good as being "derived from the proper performance of the functions of lawyers acting for their clients (which) is believed to outweigh the harm that may come from the suppression of the evidence in specific cases"[4]

The privilege benefits society because it helps create the trust that must exist between a client and attorney in order to encourage open and full discussion with counsel. Not only is this necessary in order to promote the development of an informed defense, but the reliance on the privilege encourages open communication with counsel that can lead to advice to avoid conduct that the client might have otherwise undertaken in possible violation of the law. We do not believe that the purpose of requiring waiver in this context outweighs the purpose and value of the privilege.

We recognize that the commentary is worded to say that the waiver is not required unless "necessary in order to provide timely and thorough disclosure of all pertinent information known to the organization." However, any protection apparently provided companies by that formulation is illusory. A prosecutor will not know whether he or she will learn pertinent information only through waiver of the privilege until after the waiver is demanded and the privileged information is revealed. Therefore, we would expect prosecutors in good faith to frequently request waiver in order to expand discovery to assure that they find out as much as possible.

Conclusion

The attorney-client privilege has served the legal process as we know it today in the United States from its inception by protecting confidentiality and thus promoting the candor that results in accurate fact-finding and effective legal advice. The commentary would operate to abrogate this ancient privilege to the detriment of the legal system and the society it serves. For this and the reasons cited herein, we urge the Commission to eliminate the commentary that could cause a company to waive the attorney-client privilege and work product protections to obtain a reduction of points under the guidelines. In addition, we urge the Commission to include in the guidelines an express statement that waiver of the attorney-client privilege and of the work product protections is not required for a reduction in culpability score.

* *

[4] Wyzansky, J., in *United States v. United Shoe Machinery Corporation*, 80 F. Supp. 357, 358 (D.Mass. 1950).

Respectfully submitted,

COMMITTEE ON SECURITIES REGULATION

By Michael J. Holliday /MC
MICHAEL J. HOLLIDAY
Chair of the Committee

Drafting Committee:

Robert J.A. Zito, Chair
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Micalyn S. Harris

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August 14, 2005

SENT BY EMAIL AND UNITED STATES MAIL

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

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

Dear Commission:

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

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1 *Upjohn Co. v. United States*, 449 U.S. 383 (1981).
2 *National Tank v. Brotherton*, 851 S.W.2d 193 (Tex. 1993).
3 Wright, L.A. (2005). *The Triangle Workplace*. Austin: The Wright Word Publishing.

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

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

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

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

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

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

Introductory Commentary

Amend the end of the THIRD general principle as follows:

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

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4 *Arthur Andersen LLP v. United States*, 544 U.S. _____ (2005).

remedial action once possible criminal conduct is detected; and (iii) self-reporting, cooperation, or acceptance of responsibility."

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

Insert within Commentary 12 as follows:

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

Amendment to the end of Commentary 12 as follows:

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

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

Sincerely,

/s/

L.A. Wright
Legal Criminalist/Consulting Expert

/law

COMMITTEE ON CRIMINAL LAW
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August 9, 2005

Honorable Ricardo H. Hinojosa
Chair, United States Sentencing Commission
United States District Court
Texas Commerce Center
1701 West Highway 83
McAllen, TX 78501

Dear Ricardo:

I write on behalf of the Judicial Conference Committee on Criminal Law in response to the Sentencing Commission's request for public comment on its proposed priorities for the amendment cycle ending May 1, 2006, and beyond. The Committee has reviewed the proposed Commission priorities and has voted unanimously to reiterate our request that the sentencing guidelines be simplified.

In our testimony before the Commission in November of 2004, recognizing the increasing complexity of the sentencing guideline system and in anticipation of the *Booker* decision, we asked the Commission to renew its efforts to simplify the guidelines. In 1995, at the Committee's urging, then-Commission Chair Judge John Conaboy determined a need for the Commission to take a hiatus from the amendment process in order to allow the Commission to focus on an extensive assessment of the sentencing guidelines. The Commission began its assessment of the sentencing guidelines to determine how they could be streamlined or simplified. Hearings were held in Washington, DC, and Denver, Colorado, and Commission staff prepared a series of working papers to examine relevant conduct, the level of detail in specific offense guidelines, sentencing options, departures, and the Sentencing Reform Act itself. Due to turnover in Sentencing Commissioners, this review effort was not completed.

While the sentencing guidelines are now advisory in nature, courts will continue to calculate the guidelines and rely on them in their sentencing decisions. Simplification of the guidelines will greatly assist judges in complying with *Booker*. We hope that the Commission will designate simplification of the sentencing guidelines as a priority for the next amendment cycle. We stand ready to provide whatever assistance the Commission may need for this initiative.

Very truly yours,

Sim Lake

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August 9, 2005

The Honorable Ricardo H. Hinojosa, Chair
Office of Public Affairs
United States Sentencing Commission
One Columbus Circle, N.E.
Washington, D.C. 20002-8002

RE: 2006 Amendment Cycle

Dear Judge Hinojosa:

On behalf of the American Bar Association Criminal Justice Section's Corrections and Sentencing Committee, we are writing in regard to the U.S. Sentencing Commission's priorities for the amendment cycle ending May 1, 2006. Specifically, the purpose of this letter is to urge the Commission to return the development of guidance for the issuance of sentence reduction orders under 18 U.S.C. § 3582(c)(1)(A)(i) to its list of priorities.

As seen in the enclosed letters from our predecessors, the Commission's responsibility for developing policy guidance for motions under § 3582(c)(1)(A)(i) is a matter of longstanding concern to this Committee, and reflects the ABA's larger interest in the issue of post-conviction mechanisms for sentence reduction. Since we last wrote, in August 2004, the ABA House of Delegates adopted a recommendation from the Justice Kennedy Commission supporting expanded use of sentence reductions pursuant to § 3582(c)(1)(A), and urging the 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." ABA Justice Kennedy Commission, Reports with Recommendations to the House of Delegates 64 (August 2004) (enclosed). Significantly, that recommendation recognizes that "exceptional circumstances" may arise following the imposition of sentence that warrant relief, "including but not limited to old age, disability, changes in

the last, exigent family circumstances, heroic acts, or extraordinary suffering."

Where the Commission made sentence modification under 18 U.S.C. § 3582(c)(1)(A) a priority for both the 2004 and 2005 amendment cycles, we are discouraged by its removal from this year's list. Recognizing the tumult wrought by Booker, that decision does not obviate the need for continued attention to § 3582(c)(1)(A) and the delineation of what constitutes "extraordinary and compelling" circumstances that may warrant early release from federal custody. The federal prison population has experienced sustained growth dating back to the inception of the Guidelines, with more and more aged and infirm inmates vying for limited beds in chronically overcrowded institutions. Concurrently, the Bureau of Prisons, like many federal agencies, is faced with mounting budget problems; its appropriations frozen in the face of perpetual expansion. Despite these difficulties, the BOP remains relatively reluctant to employ its § 3582(c) authority. See, e.g., Maureen Hayden, Dying Inmate's Options Diminish, Courier & Press (Evansville, IN August 4, 2005) (BOP yet to release nonviolent, female prisoner serving three-year sentence despite being in advanced stages of cancer). As this Committee has previously submitted, lack of policy guidance from the Commission may account, in part, for the Bureau's conservative tack. See also, John R. Steer and Paula Biderman, Impact of the Federal Sentencing Guidelines on the Presidential Power to Commute Sentences, 13 Fed. Sent. Rptr. 154, 157 (2001).

In sum, we respectfully submit that the U.S. Sentencing Commission act as contemplated by 28 U.S.C. § 994(t) and provide the Bureau of Prisons necessary criteria, content and examples on which it may rely in assessing cases that warrant presentation to sentencing courts.

Thank your for your time and consideration. We stand ready to assist the Commission in any way we can.

Sincerely,

James E. Felman
Co-Chair
Corrections & Sentencing Committee

Todd A. Bussert
Co-Chair
Corrections & Sentencing Committee

Enclosures

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June 15, 2001

The Honorable Diana E. Murphy
Chair, U.S. Sentencing Commission
One Columbus Circle, N.E.
Washington, D.C. 20002-8002

Dear Judge Murphy:

I enjoyed visiting with you briefly at the recent PLI conference on corporate compliance programs. As you may know, I serve as Chair of the Corrections and Sentencing Committee of the American Bar Association's Criminal Justice Section. The Committee recently voted to urge that the U.S. Sentencing Commission give high priority in the next amendment cycle to the development of guidance for the issuance of sentence reduction orders under18 U.S. C. § 3582(c)(1)(A), as required by 28 U.S.C. § 994(t).

In 18 U.S.C. § 3582(c)(1)(A), Congress recognized that "extraordinary and compelling" circumstances may warrant a prisoner's early release. Upon motion of the Director of the Bureau of Prisons, the court may reduce a sentence if the reduction is consistent with "applicable policy statements issued by the Sentencing Commission." In 28 U.S.C. § 994(t), Congress directed the Commission to "describe what shall 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." The Commission has not yet responded to this directive.

In an article to be published in a forthcoming issue of the Federal Sentencing Reporter, Commissioner John Steer notes that, without benefit of guidance from the Commission, the Bureau of Prisons has interpreted § 3582(c)(1)(A) narrowly and implemented it cautiously:

> Although the Bureau has no formal criteria, the few motions filed each year have been on behalf of inmates who are terminally ill, with a prognosis of having less than a year to live. The Bureau takes into account the nature of the defendant's criminal activity and a proposed written release plan. Before the Director of the Bureau considers whether to file a motion, a request for compassionate release is subject to multiple levels of review; the warden, the regional director, the General Counsel, and then a Bureau medical professional must approve the request.

Because the statute grants absolute discretion to the Director, the decision to file a motion is not subject to review. If a motion is filed, there is no meaningful review of a court's refusal to grant the motion, because, at least at this time, there are no policy statements applicable to modification of a sentence under 18 U.S.C. § 3582(c)(1).

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.

See John Steer and Paula Biderman, "Impact of the Federal Sentencing Guidelines on the President's Commutation Power," 13 Fed. Sent. Rptr ___ (2001)(forthcoming).

Commissioner Steer's observations are consistent with the legislative history to this provision. In pertinent part, the accompanying Senate Report states:

> 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.

S. Rep. No. 98-225, 98th Cong., 1st Sess. 55, *reprinted in* 1984 U.S.C.A.A.N. 2338-39 (emphasis added).

The issue of what constitutes "extraordinary and compelling" grounds for sentence reduction is an important and timely one, in light of (a) the growing number of aged and ill inmates in the federal system, (b) the economic costs of incarceration, and (c) the Congressionally recognized need to respond appropriately to equitable considerations arising after the imposition of sentence. Accordingly, the Committee respectfully urges

the Commission to make the development of standards for the implementation of § 3582(c)(1)(A) a priority matter during the coming year.

Sincerely,

Michael Goldsmith
Chair and Professor of Law

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October 10, 2001

The Honorable Diana E. Murphy
Chair, U.S. Sentencing Commission
One Columbus Circle, N.E.
Washington, D.C. 20002-8002

Dear Judge Murphy:

As co-chairs of the Committee on Corrections and Sentencing of the American Bar Association's Criminal Justice Section, we have been authorized to write to reiterate an earlier request from this Committee that the Commission adopt a policy statement regarding sentence reduction motions pursuant to 18 U.S.C. § 3582(c)(1)(A) in the upcoming amendment cycle.

ABA policy provides that procedures relating to compassionate release should be "fully integrated into the law of sentencing, especially with respect to issues such as eligibility for such release." ABA House of Delegates, February 1996, Report 113B. We are concerned that in the absence of guidance from the Commission it has been difficult to identify substantive bases for sentence reduction motions under 18 U.S.C. § 3582(c)(1)(A), and develop appropriate procedures for obtaining judicial consideration of deserving cases.

For your convenience, we enclose a copy of a letter sent to you last June by Professor Michael Goldsmith, our immediate predecessor as chair of this Committee. As Professor Goldsmith's letter points out, the Sentencing Reform Act of 1984, in a provision codified at 28 U.S.C. § 994(t), specifically directed the Commission to describe and give examples of "extraordinary and compelling circumstances" warranting early release under 18 U.S.C. § 3582(c)(1)(A). However,

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August 9, 2002

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

Re: Notice of Proposed Priorities for cycle ending May 1, 2003

Dear Judge Murphy:

We respond on behalf of the Corrections and Sentencing Committee of the American Bar Association's Criminal Justice Section to your publication of proposed priorities for the amendment cycle that will end on May 1, 2003. We are particularly pleased to see that the Commission plans to consider drafting policy guidance for courts considering motions filed pursuant to 18 U.S.C. § 3582(c)(1)(A), the provision that authorizes sentence reduction in cases presenting extraordinary and compelling circumstances.

You may recall that the Committee has previously encouraged the Commission to promulgate such a policy statement. And, in [June] of 2001, former Committee Chair (and former Commissioner) Michael Goldsmith referred to the legislative history as indicative of the breadth of the statute's applicability:

> 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.

S. Rep. No. 98-225, 98th Cong., 1st Sess. 55, *reprinted in* 1984 U.S.C.C.A.N. 2338-39.

This passage seems to indicate Congress' intent that the sentence reduction authority in 18 U.S.C. § 3582(c)(1)(A) should, in some cases, be used for prisoners whose circumstances, while not medical in nature, nonetheless present extraordinary and compelling reasons for reduction. Accordingly, the Committee encourages the Commission to take a broad view of the matter in constructing guidance for courts considering sentence reduction motions.

In coming months the Corrections and Sentencing Committee expects to be taking a closer look at appropriate bases for early release for extraordinary equitable reasons, and we expect to be able to communicate further with the Commission on these important issues. In the meantime, let us reiterate our appreciation for your willingness to consider of them.

Sincerely,

Jeffrey G. Shorba, Co-Chair
Corrections and Sentencing Committee

Margaret C. Love, Co-Chair
Corrections and Sentencing Committee

cc: Michael Courlander

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August 1, 2003

The Honorable Diana E. Murphy
Chair, United States Sentencing Commission
One Columbus Circle, N.E.
Suite 2-500, South Lobby
Washington, D.C. 2002-8002

Re: Notice of Proposed Priorities for Cycle ending May 1, 2004

Dear Judge Murphy:

I am writing in my capacity as chair of the ABA Criminal Justice Section's Corrections and Sentencing Committee, to commend the Commission for proposing the issue of sentence modification under 18 U.S.C. § 3582(c)(1)(A) as a priority during the coming amendment cycle. This issue has long been of particular concern to this Committee, and we have written twice in recent years to urge the Commission to take up this important piece of unfinished business. We are gratified that it has now apparently decided to do so. (Copies of our letters of October 10, 2001, and June 15, 2002, are attached.)

Since we last wrote to the Commission on this subject in the spring of 2002, the ABA House of Delegates adopted in February 2003 new ABA policy on sentence modification mechanisms. This new ABA policy speaks directly to the issues implicated by § 3582(c)(1)(A) and the Commission's mandate under 28 U.S.C. § 994(t), and provides further support for the argument that the Commission should give a generous construction to the open-ended language of § 3582 (c)(1)(A). We attach that resolution and accompanying report for your consideration.

The report speaks to the importance of having some "safety valve" in a determinate sentencing scheme to permit the government to address "extraordinary and compelling" situations that arise after sentencing:

> If a safety valve was considered an essential component of a sentencing scheme prior to the advent of determinate sentencing, today it is

> even more essential, because rule-based sentencing may preclude or limit a court's ability to take into account at sentencing the potential for extraordinary developments in a particular case. For example, a prisoner sentenced while in the early stages of a serious chronic illness may have no possibility of release if the progress of his disease makes his sentence more onerous than anticipated or intended. Similarly, when a mother must leave behind young children in the care of family members, there may be no way to ensure that intervening events do not leave them effectively orphaned. Particularly where a sentencing court is permitted to take into account serious health problems and exigent family circumstances in determining an offender's sentence in the first instance, it would seem reasonable to provide a means of bringing these circumstances to the court's attention when they develop or become aggravated unexpectedly mid-way through a prison term.

Report at 3.

As to what may constitute an "extraordinary and compelling" situation, the report takes the position that government should not "restrict use of a 'safety valve' mechanism to cases involving medical or health-related concerns." Report at 5. Rather, "[w]e hope that jurisdictions will want their criteria to be sufficiently broad and elastic to allow consideration of such non-medical circumstances as old age, changes in the law, heroic acts or extraordinary suffering of a prisoner, unwarranted disparity of sentence, and family-related exigencies." Report at 5.

The ABA report specifically discusses the federal "safety valve" mechanism in § 3582(c)(1)(A), noting the breadth and flexibility of the statutory language. Moreover, "the legislative history of this statute indicates that Congress intended its authority to be used broadly, if not routinely, to respond to a variety of circumstances that exceed the burdens normally attendant upon incarceration." Report at 4, citing Mary Price, *The Other Safety Valve: Sentence Reduction Motions Under 18 U.S.C. § 3582(c)(1)(A),* 13 Fed. Sent. Rptr. 188 (2001). For example, the Senate Report accompanying the statute states:

> 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.

S. Rep. No. 98-225, 98th Cong., 1st Sess. 55, *reprinted in* 1984 U.S.C.C.A.N. 2338-39.

That Congress intended § 3582(c)(1)(A) to be used in a variety of non-medical circumstances is further evidenced by the admonition to the Commission in the final sentence of § 994(t) that "rehabilitation of the defendant alone shall not be considered an extraordinary and compelling reasons." This sentence shows that Congress expected rehabilitation to be a relevant if not determinative criterion in some cases, and thus that terminal illness and medical disability would not be the only circumstances in which sentence modification might be appropriate under this section. In fact, the predecessor "old law" analogue to § 3582(c)(1)(A), 18 U.S.C. § 4205(g), whose authority Congress professed to be continuing unchanged, was used to reduce sentences in a variety of non-health-related circumstances. *See, e.g., U.S. v. Diaco*, 457 F. Supp. 371 (D.N.J., 1978)(federal prisoner's sentence reduced on motion under § 4205(g) because of unwarranted disparity among codefendants); *U.S. v. Banks*, 428 F. Supp. 1088 (E.D. Mich. 1977)(same).

The Bureau of Prisons, which is charged with the gate-keeping function of bringing motions under § 3582(c)(1)(A), has interpreted its mandate under this statute very narrowly, reserving it for cases of terminal illness and profound disability. In the ten years between 1990 and 2000, only 226 prisoners had their sentences reduced pursuant to this authority, almost exclusively on grounds that they were near death. *See* Price, *sup*ra, at 189. Lack of policy guidance from the Commission may in part account for the Bureau's conservative interpretation of its statutory mandate. *See, e.g.,* John R. Steer and Paula Biderman, *Impact of the Federal Sentencing Guidelines on the Presidential Power to Commute Sentences*, 13 Fed. Sent. Rptr. 154, 157 (2001). The Commission is thus in an excellent position to ensure that the statutory authority can be utilized as intended by Congress, by providing criteria, content, and examples on which the BOP may rely in bringing cases to the attention of courts.

Thank you for considering our comments. We stand ready to assist the Commission in any way we can in this very important matter.

Sincerely,

Margaret Colgate Love
Chair, Corrections and
Sentencing Committee

Enclosures

cc: All Commissioners
Charles Tetzlaff, Esq.
Timothy McGrath, Esq.
Albert J. Krieger, Chair, Criminal Justice Section