TESTIMONY OF THE UNITED STATES DEPARTMENT OF JUSTICE

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ATTORNEY-CLIENT PRIVILEGE

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BEFORE THE
UNITED STATES SENTENCING COMMISSION

MARCH 15, 2006

Thank you Chairman Hinojosa, and members of the committee, for inviting the Justice Department to testify today--.

I will address the attorney-client privilege issue. Mr. Hertling will then address firearms, and Ms. Avergun will address steroids. We appreciate the opportunity to provide the Commission with our insights and experience.

As you know, Chapter 8 of the sentencing guidelines, which regards the sentencing of business organizations, provides for a reduction in sentence for cooperation. Note 12 to Section 8C2.5 addresses the nature of cooperation. Specifically, it states that waivers of privilege are <u>not</u> a prerequisite to securing a reduction in sentence for cooperation, except where necessary to provide timely and thorough disclosure of all known pertinent information.

I find myself in the peculiar position of defending text that the Department neither sought nor enforces. This provision was in fact sought only two years ago by some of the very parties who now petition for its amendment. However, because the alternatives proposed would be counterproductive to legitimate and important law enforcement efforts, the Department urges the Commission not to revisit this recent amendment.

The contested text must be understood in its historical context. Three years ago, this Commission undertook a lengthy, careful, and deliberative process to amend Section 8 in light of Sarbanes-Oxley and the climate of heightened corporate responsibility. The Commission formed an ad hoc advisory committee to review in detail the rules governing organizational sentencing. That committee included some of the leading organizational and white collar crime practitioners.

After extensive deliberation, in October 2003, that committee returned an exhaustive 136 page report, which included a full 12 page discussion on the effect of privilege waivers.

The committee fully canvassed the arguments both for and against the use of privilege waivers. Indeed, the committee's final report would be familiar reading for anyone familiar with the debate today.

The committee reviewed the memoranda issued by then-Deputy Attorneys General Holder and Thompson, addressing the consideration given to voluntary disclosures in determining corporate cooperation. The committee recognized that requests for waiver are neither automatic nor mandatory, and that the government's ultimate goal is to secure all information pertinent to alleged corporate wrongdoing, whether or not that requires waiver.

Of particular significance, the committee surveyed the United States Attorney's Offices to determine for itself the rate at which waivers were being requested. The committee concluded that waiver requests occurred at a low rate: "[R]equest for waiver . . . is the exception rather than the rule." Indeed, the Southern District of New York, one of the largest United State Attorney's Offices in the country, reported having requested a waiver in only 4 cases.

Testimony from the defense bar, on the other hand, contended that the possibility of a future waiver of privilege would: (i) chill corporations' incentives to conduct internal investigations; (ii) chill employees' willingness to cooperate with corporate counsel; (iii) and expose the corporation to litigation risk from other civil plaintiffs. These are, of course, the same arguments sounded today.

The ad hoc committee's report is quite clear on one point--who sought the new language. I quote the committee's report – "The U.S. Department of Justice sees no need for mentioning

privilege waivers in the organizational sentencing guidelines." Rather, this demand came from some of the very groups who now oppose it. Again, I quote – "Several members of the defense bar testified that the organizational sentencing guidelines' silence on this issue permits, if not encourages, the practice of requiring waivers. . . ." The absence of such a mention, they argued, "could create a danger that required waivers will become widespread and that organizations will be increasingly disciplined to self-police, self-report, and cooperate. . . ."

As requested by defense counsel, the ad hoc committee recommended language that made clear that waiver is not generally required in order for a corporation to be deemed cooperative, while also noting the possibility of some instances in which voluntary disclosure might be necessary in order to satisfy the requirements of cooperation.

The Commission, upon receipt of this report, extensively amended Section 8. This amendment included language directed to the defense bar's concerns. As you well know, Note 12 to Section 8C2.5 was amended to add the following language:

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

In its explanatory note, the Commission observed "that such waivers will be required on a limited basis," consistent with the government's testimony. This amendment substantially implemented the ad hoc committee's recommendation.

Now, barely two years later, the Commission is asked to perform an about-face. The relevant starting point, therefore, must be the question "What has changed?" The answer, Mr. Chairman, is "nothing that merits reconsideration."

In 2003 and 2004, the committee and the Commission were presented with and considered all of the arguments now raised. The Committee's report makes that clear.

The Thompson and Holder memoranda both pre-dated the ad hoc committee's inquiry. In fact, as regards waivers, the 2003 Thompson memorandum was substantially unchanged from the June 1999 Holder memo. Each made clear that waiver of privilege is not required for a business organization to be deemed cooperative. Rather, waiver is but one factor of many in the cooperation analysis, which in turn is but one factor in the Department's charging decision. This remains the case.

Nor have requests for extensive waivers become commonplace. Indeed, the Department deals routinely with sophisticated corporate counsel who are zealous in their defense, and not at all shy about complaining to the Department about what they perceive as unfair tactics. Yet, the Office of Professional Responsibility has not received a single complaint of a prosecutor improperly demanding waiver.

Even in those instances where it does request a waiver, the Department narrowly tailors its requests. Waiver requests focus first on factual materials – work product such as summaries and raw notes – rather than materials reflecting an attorney's mental processes. Indeed, a corporation may well cooperate simply by directing the government to witnesses its counsel has determined to possess responsive information. Moreover, as the Thompson memorandum states: "Except in unusual circumstances, prosecutors should not seek a wavier with respect to communications and work product related to advice concerning the government's criminal investigation." Thus, under the Thompson memo, waiver is kept to a minimum.

In fact, the only significant change in the Department's practices from those considered in 2003 and 2004 clarifies the restrictions on the circumstances in which waiver may be sought. In an October 2005 memorandum, while Acting Deputy Attorney General, I directed each United States Attorney's Office to develop written guidelines for governing this process. Those guidelines must require the approval of either the United States Attorney or other appropriate supervising attorney before such a request may be made.

The proponents of the proposed amendment rely heavily on a survey distributed to the National Association of Criminal Defense Lawyers and the Association of Corporate Counsel. These, they argue, demonstrate that Federal authorities routinely demand the waiver of core privileged materials. I urge the Committee to study these surveys closely, for, respectfully, they cannot bear the weight put upon them.

As is admitted, the surveys lack scientific or statistical significance. Indeed, each distribution generated a low, and possibly self-selective, response set. Many questions are too general and lack sufficient context to be helpful. For instance, the conclusion that 96 percent of corporate counsel agree that the attorney client and work product privileges "serve an important purpose in facilitating their work" is remarkable only for the dissenting 4 percent.

I did think it interesting, however, that when asked whether, post-Enron, their client had "personally experienced an erosion in protections offered by privilege/work product," fully 70 percent of corporate counsel responded "no." This hardly squares with the dire picture painted by the survey's proponents.

These surveys compare poorly with the ad hoc committee's own inquiry in 2004, when it found that waiver requests are the exception, not the rule. The fact is that the government's

approach has not changed since 2004. No party has submitted credible evidence to the contrary.

Also unchanged since 2004 is the need for corporate cooperation. From July 2002 through December 2005, the Department secured more than 900 corporate fraud convictions, including 85 presidents, 82 CEOs, 40 CFOs, 14 COOs, 17 corporate counsel or attorneys, and 98 vice-presidents. Many of these cases involved highly complex corporate scandals, which would have been difficult to prosecute in a timely and efficient manner without corporate cooperation, including in some instances the waiver of privileges. Absent cooperation, some of these crooks would have gone free, further undermining the public trust in our markets, and in our business institutions.

Section 8 of the guidelines is intended to promote greater compliance, self-examination, and cooperation with law enforcement. Consideration of a corporation's voluntarily sharing privileged material is a key part of that regime. Corporations willing to cooperate, by sharing privileged materials if necessary, should get credit for doing so, just as individual defendants willing to cooperate with the government may be given a break. Therefore, we urge you to leave in place the guidelines commentary.

Moving to the requests that you amend the commentary, it is instructive to note precisely what the Commission is being asked to do. The commentary today recognizes that waiver is not necessary for cooperation, except in certain circumstances. The proposed amendments would provide that non-disclosure may never be considered in determining whether a corporation has been cooperative. Hence, a corporation could claim full credit for cooperation with an investigation – a fact it would no doubt tout in the press – while hiding proof certain of its guilt.

The ad hoc committee in 2004 cited then-United States Attorney James Comey's

testimony on this point, noting that "a prohibition on requests for waiver would not serve the public interest in pursuing wrongdoing because it would allow organizations to raise the organizational standing sentencing guidelines as a shield when prosecutors believe they are not doing enough to cooperate."

Such conduct would undermine, rather than further, the Commission's efforts to develop greater transparency and ethical conduct by corporate management, and would further undermine the public's trust in our markets and business leaders.

Chairman Hinojosa, members of the Commission, I submit respectfully that this must not be the law.

In addition to the commentary itself, the thinly veiled target of this criticism is the Department's own charging practice. Several witnesses asserted that the 2004 commentary legislatively sanctioned the Department's practices regarding waiver requests. Of course, it did no such thing: the Commission's sentencing guidelines and the Department's charging decisions are unrelated. However, the hope, no doubt, is that by repudiating the 2004 amendment, the Commission will be understood as repudiating the Department's approach. Yet the arguments raised before, and repeated today, provide no basis for such a change.

The Commission has heard from several substantial organizations and individuals urging change. Indeed, many of the individuals who have appeared before, or have written to, the Commission are friends and former colleagues of mine. Their arguments have, by and large, been previously considered by the Commission. However, let me address them briefly.

It has been asserted first and foremost that the commentary text supports a culture in which waivers are mandatory and routinely required. This claim is, however, inconsistent with

the Department's rules and experience, and is largely unsupported.

The commentary makes clear that waiver requests are the exception and not the rule: waiver is not a prerequisite for cooperation, except where necessary to provide timely and thorough disclosure of all pertinent information. This is consistent with the Department's practice. As the Thompson memo states, "the Department does not . . . consider waiver . . . an absolute requirement"; rather it constitutes only "one factor in evaluating the corporation's cooperation."

The McCallum memo reinforces this selectivity by permitting waivers only pursuant to written guidelines requiring supervisory approval. In the Department's experience waivers are not routinely requested.

I have already addressed the surveys submitted to the Commission. In addition to these, some commentators have proffered to the Commission anecdotal assertions that the government routinely seeks waivers. These, unfortunately, lack the level of specificity necessary to be of use.

Indeed, the testimony submitted to the Commission in November contains but a single specific example of a Department attorney requesting a waiver. And in that instance, far from being cowed into a waiver, the company apparently declined the request.

The balance of the testimony simply asserts that the government routinely forces corporations to waive privileges, without specific example or context. Absent specificity, such assertions are difficult to evaluate. For example, it is a far different thing to ask a company to waive the work product privilege only to identify employees determined to have responsive information, than it is to demand the wholesale disclosure of core attorney-client privileged materials. The testimony fails to distinguish between the two, preferring to lump all such claims

together.

In our experience, corporations are represented by competent and sophisticated counsel, who can evaluate for themselves the benefits and risks of disclosure. Sometimes they choose to; and sometimes they choose not to.

The second major criticism levied at the Guidelines is that by rewarding companies for waiving a privilege, the commentary undermines the effectiveness of internal corporate compliance programs. Management will either stop them entirely, or at least seriously water them down.

This assertion does not stand up in the face of experience. In our work we have seen neither a reduction in the effectiveness of internal compliance programs, nor an unwillingness to use them. Several reasons suggest why:

Wholly apart from any government investigation, corporate executives owe their shareholders a fiduciary obligation to know what is going on in their company, to investigate, and to fix problems. Most executives take that obligation seriously, and will conduct internal compliance programs.

Moreover, in many instances the internal investigation is undertaken by "new" management into the activities of "old" management. New management has a healthy personal interest in unearthing the sins of its predecessors – to make sure they are credited properly to the discredited former managers. Any delay could blur responsibility as to new management, and also extend the cloud over, and the financial impact to, the company.

In fact, an increased likelihood of disclosure to the government should increase, not

decrease, management's desire to "get it right," which includes seeking careful legal counsel. In the event of scrutiny, it will not help a manager to have never sought legal advice, and to have shirked internal compliance efforts. Indeed, such conduct reflects a pre- rather than post-Enron mentality.

The third oft-sounded criticism is the assertion that an increased likelihood of disclosure to the government will deter employees from seeking out and speaking with corporate counsel. The ABA, for instance, testified to the importance of "the ability of the individuals with knowledge to speak candidly and confidentially with the lawyer conducting the investigation," and argued that "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."

The flaw in this argument, however, is that no such privilege exists. It is hornbook law that corporate counsel does not represent individual employees, even the executives, but rather represents the company. In a conversation between an employee and corporate counsel, the privilege exists between the corporation and its lawyer, not between the individual and the lawyer. The privilege is the corporation's to keep or to waive as best suits its interest, not the employee's. Indeed, competent corporate counsel opens internal investigation interviews specifically by informing the employee of this fact. Whatever additional disincentive to talk the possibility of disclosure adds is marginal at best.

A related criticism claims that the guidelines present employees with a "Hobson's Choice" – speak to corporate counsel and risk disclosure, or risk adverse employment action. The blame here is misplaced, however, for the difficult choice is caused not by the risk of disclosure, but by the employment relationship itself. Employees simply do not have a right to

hide from their employer information pertinent to their employment. A corporation's owners – the shareholders – have every right to expect management to take steps necessary to learn about their company's activities, legal or illegal. And, a corporation has every right to take action against those who engage in criminal activity, or refuse to cooperate with an internal investigation. Thus, even without the threat of disclosure to the government, the Hobson's Choice already exists, but only for those who have something to hide. The blameless employee fears neither talking to counsel, nor disclosure to the government.

A final argument against the use of waivers regards increased civil exposure. The majority rule is that where a corporation waives the privilege as to one party, including the government, the privilege is waived for that subject matter as to all parties. This, corporations fear, exposes them to substantial civil liability risk in the event that they cooperate with the government.

Interestingly, in all the testimony presented to the Commission in November, a total of six sentences were devoted to this subject. Yet, I suspect that it is, in fact, foremost in the mind of corporate counsel.

We are not unmindful of this concern, and in fact several fixes have been proposed. Most significantly, the Rules Committee is considering a federal evidence rule that would specifically exempt disclosures made to law enforcement from waiver.

We at the Department will watch this development with interest, as should you at the Commission. I respectfully suggest in the event that such a rule is adopted much of the opposition heard by the Commission to the current commentary will dissipate.

In conclusion, let me be as clear as I can be. It has been suggested to this Commission

that waiver requests are routine and invasive. As attorneys we are naturally protective of our privileges, and we react viscerally to suggested encroachments thereupon. It is simply not the case, however, that the Department routinely issues broad-based demands for disclosure of attorney-client privileged communications. And, where it does request a waiver, such requests are narrow and focused. This approach predates, and is consistent with, the Commission's guidelines, which reward cooperation, including waivers where they occur. It is consistent with sound prosecutorial practice, that those with information regarding wrongdoing should be given incentives to unburden themselves. This has been and remains voluntary, and should not change.

Accordingly, the Department respectfully recommends that the Commission not revisit language it adopted barely two years ago.

I would be happy to answer any questions you may have.