without regard to whether or not any changes in the defendant's circumstances could have been anticipated by the court at the time of sentencing.

Background: The Commission is directed by 28 U.S.C. § 994(t) to "describe what should be considered extraordinary and compelling reasons for sentence reduction under 18 U.S.C. § 3582(c)(1)(A)(i), including the criteria to be applied and a list of specific examples." This section provides that "rehabilitation of the defendant alone shall not be considered an extraordinary and compelling reason." This policy statement implements 28 U.S.C. § 994(t).

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March 30, 2006

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

Re: ***Firearms Trafficking*:**

Dear Judge Hinojosa:

This supplements our comments on the firearms amendments. We believe our proposed definition of firearms trafficking best meets the Commission's concerns as to overbreadth. It enhances the punishment for those who are true firearms traffickers: those who deal in firearms repetitively either as a livelihood or to further criminal activity. This fulfils the Commission's narrowing intent.

Our definition, which tracks congressional language, *see* 18 U.S.C. § 921(a)(21)(A-F) & (a)(22), addresses the questions posed by the Commission at the public hearing on March 15. The proposal covers the culpable trafficker and avoids the aberrant actor; it captures the "urban" problem (urban violence) while recognizing occasional rural circumstances. Our proposal reads:

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(2) has as his predominant objective in doing so (i) livelihood and profit, or (ii) criminal purposes or terrorism, and

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

This application note assures that the trafficking enhancement captures the criminals DOJ desires to punish. As DOJ explained in its written testimony: "Firearms traffickers are persons who violate existing laws and deliberately circumvent the background-check and record-keeping requirements of legal commerce in order to supply firearms to convicted firearms, drug dealers, gang members, and other prohibited persons." Hertling Testimony, p. 3. Not only does our proposal fully capture what DOJ has asked the Commission to target, it does so without sweeping in individuals who are not traffickers who DOJ expressly disavowed as deserving enhanced sentences, id.at p. 8, and moreover, does so without relying on the confusing "patchwork quilt" of 20,000 gun laws.

To cure that overbreadth, DOJ proposed a definition that would require transfer of two or more firearms as part of an "unlawful scheme" and that the defendant knew, had reason to believe or was willfully blind to the fact that the firearms were being distributed to a person whose possession or receipt would be unlawful or who intended to use or dispose of the firearm unlawfully. Hertling Testimony, p. 9.

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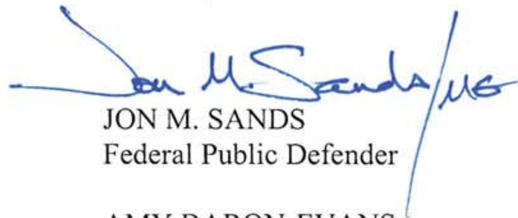
Thank you for considering our comments, and please let us know if we can assist the Commission further.

Sincerely,



JON M. SANDS
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cc: Michael Courlander
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March 17, 2006

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

RE: The Attorney-Client Privilege and Work Product Doctrine

Members of the U.S. Sentencing Commission:

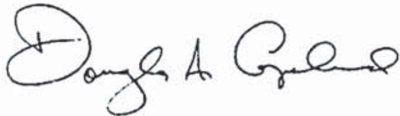
I write as President of The Missouri Bar to urge the revision of Section 8C2.5 of the Federal Sentencing Guidelines which authorizes and encourages the government to seek waiver of the attorney-client privilege and work product doctrine as a condition for cooperation.

The attorney-client privilege and work product doctrine have long been an essential part of our justice system in America. If clients cannot freely and openly communicate with their lawyers at each juncture in complete confidence, the opportunity to present a full and complete defense is compromised. The erosion of this privilege could result in a defense attorney potentially testifying against his client. Lawyers may well be obligated to advise clients at their first meeting of the potential waiver of the attorney-client privilege and the potential that a lawyer may be obligated to testify regarding matters disclosed to their attorney. Such a possibility is repugnant to the American system of justice which has always revered and protected the right of individuals to freely and openly discuss with their lawyer their conduct without fear of that information being used against them. This privilege also permits clients to seek out and obtain guidance in how to conform conduct to the law. It facilitates self-investigation into past conduct, and identifies shortcomings and remedy problems to the benefit of everyone.

Thank you very much for considering the perspective of The Missouri Bar regarding this matter. The attorney-client privilege and work product doctrine are essential to the adequate

representation of clients. Any compromise of this important principle in the American justice system erodes the independence each American is entitled to in our free society.

Sincerely,



Douglas A. Copeland
President

DAC:dg

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March 23, 2006

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

Re: Request for Public Comment — Chapter 8 Organizational Guidelines, Section 8C2.5, Waiver of Attorney-Client Privilege

Dear Sir/Madam:

On behalf of the Boston Bar Association ("BBA") and its nearly 10,000 members, we are writing to respond to the Commission's request for public comment on whether and in what manner the privilege waiver language in Application Note 12 of the Commentary to Section 8C2.5 of the U.S. Sentencing Guidelines ("Note 12") should be deleted or amended. *See* 71 Fed. Reg. 4782-4804 (Jan. 27, 2006). In particular, we would like to express our strong support for preserving the attorney-client privilege and work product doctrine and our concerns regarding federal governmental policies and practices regarding waiver that threaten to erode these fundamental protections. We urge the Commission to amend Note 12 to state affirmatively that waiver of attorney-client and work product protections should not be a factor in determining whether to reduce a sentence based upon cooperation with the government.

Comments Explaining Why Note 12 Should Be Amended

We understand that several other organizations—ranging from the American Bar Association to the U.S. Chamber of Commerce to the American Civil Liberties Union—plan to submit separate comment letters to the Commission urging it to modify Note 12. Because of the serious and immediate nature of the harm being done, we want independently to urge the Commission to consider the following comments:

1. **Amendment will help curb prosecutors' trend toward requesting waiver too often.** Although most information about government privilege waivers is anecdotal, a 2002 Commission survey of U.S. Attorney's offices seeking to quantify waiver requests revealed that the U.S. Attorney's Office for the District of Massachusetts was one of the offices most likely to request waivers. That U.S. Attorney's Office responded to the survey by reporting that the office's reason for demanding waivers was "to determine whether individuals who had asserted

advice of counsel defenses were validly claiming the defenses so that appropriate charging decisions could be made on those individuals." But the prosecutors were also able to affirmatively use privileged material by obtaining waivers and then examining corporate employees' statements in that material to supply a critical element, such as intent, that they might otherwise not have been able to prove. The District's court docket confirms that most of the recent plea agreements entered by companies in the District required the companies to waive the privileges.

2. **Amendment is vital to preserving the attorney-client privilege between companies and their lawyers.** Lawyers play an important role in helping companies and their officials understand and comply with complex laws and act in the entity's best interests. To fulfill this function, lawyers need the trust and confidence of the board, management, and line employees so they can obtain all relevant information necessary to represent the entity effectively, to ensure compliance with the law, and to remedy quickly any noncompliance. By encouraging demands for waiver of the attorney-client privilege and the work product doctrine, the existing language discourages personnel within companies from consulting with their lawyers, thereby impeding the lawyers' ability to effectively counsel compliance with the law. This, in turn, harms not only the company, but also investors and society.

3. **Amendment is vital to ensuring that internal compliance programs can succeed.** Instead of aiding in the prosecution of corporate criminals, the existing language frustrates detection of corporate misconduct by discouraging individuals with knowledge from speaking candidly and confidentially with in-house or outside lawyers conducting internal investigations. These individuals' uncertainty as to whether attorney-client and work product protections will be respected makes it more difficult for companies to detect and remedy wrongdoing early, which, in turn, undercuts rather than promotes good compliance practices.

4. **Amendment will help ensure that lawyers are not "chilled" in how they advise or conduct their work in connection with litigation.** When a corporate client becomes the focus of an investigation, most in-house or outside lawyers' first step is to collect documents, interview witnesses, and evaluate facts. Typically, lawyers take this step not in the abstract, but to formulate and assess potential defenses. The existing language requires, however, that lawyers undertake internal investigations knowing that there is a significant prospect that the government may ultimately seek a waiver from the company. Thus, the existing language induces lawyers to proceed as if they may someday need to testify about communications to clients concerning the investigation, thereby "chilling" the lawyers from the outset in how they give advice, conduct their work, and memorialize their findings.

5. **Amendment will help protect employees from being unfairly harmed.** The existing language places employees of a company or other organization in a very difficult position when their employers ask them to cooperate in an investigation.

The employees can cooperate and risk that the company or organization will disclose statements made to its lawyers to the government 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 individual legal right against self-incrimination.

6. **Amendment will help prevent the establishment of an uneven playing field in "follow-on" civil litigation.** In nearly all jurisdictions, waiver of attorney-client or work product protections in one case also waives those privileges in subsequent civil cases. By encouraging prosecutors to insist that companies and other organizations waive their privileges during government investigations, the existing language thus enables plaintiffs' lawyers to obtain sensitive, and often confidential, information that can be used against the entities in class action, derivative, and similar suits. This creates an uneven playing field in which plaintiffs' lawyers can freely and privately explore the strengths and weaknesses of their positions, while improving their positions using corporate defendants' consultations with counsel, analysis, and work product. As Justice Jackson wrote in *Hickman* v. *Taylor,* "[d]iscovery was hardly intended to enable a learned profession to perform its functions ... on wits borrowed from the adversary."

7. **Amendment will prevent prosecutors from timing their waiver request to maximize its detrimental impact on the case.** Under prosecutorial pressure, a company or other organization may prematurely decide to waive the attorney-client privilege and the work product doctrine. The timing of such a decision may unfairly deprive the entity of legal advice based on counsel's full development of the facts and an evaluation of the strengths and weaknesses of the government's case.

8. **Amendment will help ensure that corporate image concerns do not dictate the scope of the attorney-client privilege and the work product doctrine.** The First Circuit has offered strong, principled support for the attorney-client privilege, holding that "[b]y safeguarding communications between client and lawyer, the privilege encourages full and free discussion, better enabling the client to conform his conduct to the dictates of the law and to present claims and defenses if litigation ensues." Yet, the existing language often forces companies facing criminal investigation today to abandon such principles for practical calculations of the costs and benefits of being labeled as "uncooperative" in combating corporate crime, even if the charge is unfounded. As a result, non-lawyers' business concerns about corporate image, stock price, and credit worthiness are defining the contours of what should be principle-driven fundamental rights. Such concerns also will make companies reluctant to speak publicly about their waiver experiences, thereby preventing other companies from making fully informed decisions in response to waiver requests.

9. **Amendment will help safeguard the attorney-client privilege and the work product doctrine against being sacrificed solely to make prosecutors' job easier.** The Justice Department's policy, as established in 1999, makes clear that

there is no pretense that prosecutors should sacrifice the values underlying the privileges to make the prosecution's job easier: "Such waivers permit the government to obtain statements of possible witnesses, subjects, and targets, without having to negotiate individual cooperation or immunity agreements." The clear alternative is to conduct a factual investigation by taking statements and obtaining documents from a corporation and its employers, without insisting on also obtaining attorney work product and privileged statements made to counsel. Because data from recent national surveys show that prosecutors are not pursuing this alternative course of action, the Guidelines must force them to do so.

10. **The 2004 amendment conflicts with longstanding government policy.** For decades, the U.S. Attorney's Manual has required that all reasonable attempts be made to obtain information from other sources and only when these efforts have failed may a prosecutor serve a subpoena on an attorney for testimony or documents, and then only after approval of the Assistant Attorney General in charge of the Criminal Division. This squarely conflicts with the Guidelines' policy of authorizing and encouraging prosecutors to make sentencing recommendations for corporations based on whether they cooperated in a "timely," "thorough," and complete manner (i.e. waived their privileges and "disclos[ed]... all pertinent information known by the organization").

11. **The Supreme Court's recent decision in *United States v. Booker/Fanfan* did not alleviate the problems caused by the 2004 amendment.** Although the Supreme Court struck down as unconstitutional those provisions of the 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 determining sentences. Thus, the existing language is likely to continue to cause adverse consequences until it is modified.

Proposed Amendment To Note 12

For the above-identified reasons, we recommend that the Commission (1) add language to Note 12 clarifying that cooperation only requires the disclosure of "all pertinent <u>non-privileged</u> information known to the organization," (2) delete the existing language stating "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 Note outlined below. If this recommendation were adopted, Note 12 would read as follows:[1]

> 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

[1] 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.

organization is officially notified of a criminal investigation. To be thorough, the cooperation should include the disclosure of all pertinent non-privileged information known by the organization. A prime test of whether the organization has disclosed all pertinent non-privileged information is whether the information is sufficient for law enforcement personnel to identify the nature and extent of the offense and the individual(s) responsible for the criminal conduct. However, the cooperation to be measured is the cooperation of the organization itself, not the cooperation of individuals within the organization. If, because of the lack of cooperation of particular individual(s), neither the organization nor law enforcement personnel are able to identify the culpable individual(s) within the organization despite the organization's efforts to cooperate fully, the organization may still be given credit for full cooperation. *Waiver of attorney-client privilege and of work product protections is not* a factor in determining whether ~~*a prerequisite to*~~ *a reduction in culpability score under subdivisions (1) and (2) of subsection (g)* is warranted~~*unless such waiver is necessary in order to provide timely and thorough disclosure of all pertinent information known to the organization*~~.

Thank you for your consideration of our comments. If you would like more information regarding the BBA's position on this issue, please contact our Director of Governmental Relations, Deborah Gibbs, at (617) 778-1942.

Very truly yours,

Edward P. Leibensperger
President

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March 30, 2006

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

Re: ***Firearms Trafficking***:

Dear Judge Hinojosa:

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Thank you for considering our comments, and please let us know if we can assist the Commission further.

Sincerely,

JON M. SANDS
Federal Public Defender

AMY BARON-EVANS
Sentencing Resource Counsel

ANNE BLANCHARD
Sentencing Resource Counsel

cc: Michael Courlander
Hon. Ruben Castillo
Hon. William K. Sessions III
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March 30, 2006

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Washington, DC 20002-8002

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Federal Public Defender

AMY BARON-EVANS
Sentencing Resource Counsel

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Alan Dorrhofer, Staff Attorney
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UNITED STATES DISTRICT COURT
NORTHERN DISTRICT OF GEORGIA
2167 UNITED STATES COURTHOUSE
75 SPRING STREET, S.W.
ATLANTA, GEORGIA 30303-3309

CHAMBERS OF
JULIE E. CARNES
JUDGE

March 30, 2006

Via Federal Express

The Honorable Ricardo H. Hinojosa
Chair, Sentencing Commission
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Dear Judge Hinojosa and Members of the
United States Sentencing Commission:

I am writing to indicate my respectful disagreement with parts of the proposed amendments to the Immigration guidelines. I apologize for missing the March 28th deadline. I had mistakenly thought that March 31st was the deadline, and learned of my error when I reviewed the web site last night. I hope you will be willing to consider my concerns and

observations, notwithstanding that this letter missed your deadline by a few days. Further, I wish to emphasize that I make these remarks in my individual capacity as an interested federal district judge, and not as a representative of any group.

I. § 2L1.2(b)(1) Enhancements Based on Prior Convictions

My strongest concerns relate to the proposed amendments to § 2L1.2, which addresses the offense of illegal reentry by an alien who had previously been deported. Section 2L1.2 provides for a base offense level of 8, and then enhances that level based on the seriousness of the criminal conviction that preceded or led to the alien's deportation. The proposed amendment would, as a practical matter, substantially reduce the sentences of those deported illegal aliens who have committed the most serious offenses and, who, by their reentry into this country in violation of a clear command not to do so, evidence their continuing disdain for our law and pose the greatest continuing threat to the American communities in which they reside. Respectfully, I cannot understand why such a result would be considered to be a good development.

Specifically, the present Guideline awards a 16-level enhancement for a deported alien who had incurred a felony conviction for one of seven serious, enumerated offenses.[1] Thus, for example, an alien who has

[1] These offenses are a crime of violence, a firearms offense, a child pornography offense, a national security or terrorism offense, a human trafficking offense, an alien smuggling offense, and a drug trafficking offense for which the defendant received at least a 13-month sentence. § 2L1.2(b)(1)(A).

stolen back into this country after being deported, and after having sustained a conviction for rape, or child molestation, or robbery, or attempted murder, or aggravated assault, or a terrorism offense, in his previous sojourn here, will receive a total offense level of 24 (8+16) and, postulating a 3-level reduction for acceptance of responsibility (for a final offense level of 21), and a Criminal History Category II, the sentencing range would now be 41-51 months.

The proposed amendments, however, would not necessarily confer on such a defendant the above 16-level enhancement. Rather, unless the alien defendant had actually received at least a 13-month sentence [Option 1] or a 2-year sentence [Option 2] for one of his prior convictions, the 16-level enhancement would not apply. Instead, the defendant would receive only an 8 or a 12-level enhancement, depending on the iteration adopted. The theory, apparently, is that by insisting that at least a 13-month [2-year] sentence had been previously imposed for one of the defendant's prior crimes, the Guidelines insure that the prior crime was actually a serious offense.

Unfortunately, as anyone who has dealt with overburdened state criminal justice systems knows, the latter rarely impose sentences on illegal aliens that reflect the seriousness of the crimes committed. In my experience, those systems are revolving doors, and the defendant often receives a short, time-served sentence, no matter how serious and repeated are his crimes. In fairness, many local governments have been beleaguered by many forces, including the huge numbers of illegal aliens

in their communities and the corresponding strain on the budgets of public health services, schools, and law enforcement that this influx has caused. Perhaps, these local entities have concluded that it is the job of the federal government to remove people who are here illegally and that the locals should not have to expend their scarce resources housing criminal aliens in state-supported jails. Whatever the reason, and with no intention to cast blame, the fact is that the sentence imposed on such an alien is rarely going to be a reliable proxy for the seriousness of the crime or the danger that the alien's continued presence in the country poses.[2]

In addition, the premise reflected in the proposed amendment is rather counterintuitive: an alien who was fortunate enough to receive a light sentence for his assault, robbery, or child molestation conviction continues to be able to utilize that generosity in perpetuity to receive more lenient treatment for future crimes.[3]

Although it appears that a desire to lower sentences for illegally reentering aliens is the primary impetus behind the proposed amendment,

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[2] In the many prosecutions before me of defendants for illegal reentry, the defendant has typically been discovered in a local jail, having been arrested for committing another crime since his illegal reentry. Indeed, while I may have had some cases that do not meet this general rule, I cannot specifically recall them.

[3] I recognize that the criminal history sections operate on this premise as well, but, for a variety of reasons, the criminal history provisions are not truly analogous to the enhancement provision in 2L1.2. For example, an underrepresentation of criminal history in the criminal history calculation will have much less impact on the resulting sentence than will an undercalculation of prior convictions in 2L1.2, because the enhancement for prior convictions is what powers that guideline.

the synopsis accompanying the proposal suggest another reason to abandon the "categorical approach." Specifically, the synopsis indicates that the "categorical analysis" "is often complicated by lack of documentation, competing case law decisions, and the volume of cases." I don't really understand what this sentence means, as I do not believe our district has experienced any problems applying the guideline. While we are not a border state, we have had a goodly number of these cases.

If there are competing case law decisions, the Commission should settle those conflicts. If there is a lack of documentation, that lack will exist no matter what methodology is used. Moreover, an absence of documentation supporting the enhancement will mean that the defendant will not receive the enhancement anyway. If there is a high volume of cases, there will still be a high volume of cases after the amendment is passed. In short, the explanation does not seem sufficient to me to warrant making the change.

Likewise, the Interim Staff Report indicates that there is some support for lowering the immigration guidelines because some border districts have "fast-track" programs that allow the imposition of substantially lower sentences to pleading defendants, and other districts do not have these sanctioned programs. I do not see this phenomenon as warranting a reduction of what should otherwise be an appropriate guidelines sentence, however. Admittedly, I am not totally clear on the thinking behind "fast-track" programs. If one has a lot of a particular kind of crime in a geographic area, lowering the sentence for that

offense will not likely reduce its incidence. To the contrary, criminals can rationally be expected to flock to places where the sentences are lower. Presumably, the basis for these programs is not principled, however, but pragmatic: there are so many immigration cases, and the border districts have been so inadequately supported and staffed, that they need some carrot to encourage the hundreds of illegal reentrants who appear before them to quickly dispose of their cases.

Yet, to work, that principle means that the border districts have to have some differential between the sentences that they impose under a fast-track plan and the sentences that would otherwise be imposed if the defendant went to trial. If the Guidelines sentencing ranges are lowered across the board, then necessarily the fast-track districts will have to further lower the sentences that they impose on their alien defendants, to make a guilty plea worthwhile for the defendant, until one reaches a point where the crime of reentry, itself, has been effectively decriminalized. In short, if, on a national level, everyone tries to emulate the border districts, it will be a race for the bottom, in terms of sentencing ranges.[4]

II. Making a Distinction Between a Probationary Sentence and Other Sentences, for Purposes of an Enhancement

Whatever the Commission decides to do regarding the "categorical approach" versus this new proposed approach, I implore you not to make

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[4] In the Northern District of Georgia, we do not need such an incentive. In thirteen years on the bench, I have only had one defendant go to trial on an illegal reentry charge. Everyone else pled guilty.

a distinction between a probationary sentence and other sentences, for purposes of pegging the level of an enhancement, because such a distinction is nonsensical. That is, under the proposed iterations, a reentering alien who had previously gotten a 10-day time served sentence for an assault would get a 12-level bump as a result of this conviction. Yet, if this same defendant had happened to see a judge immediately upon his arrest, and had instead gotten a probationary sentence (which, going forward, is effectively what a time-served sentence is), that defendant would receive only an 8-level bump. That a sentence is a probationary sentence versus a sentence for a relatively short term tells one nothing about the severity of the underlying offense. As Peter Hoffman, the principal drafter on the Commission in its early days, used to say, you might as well base the enhancement on the defendant's weight or his zodiac sign.

Moreover, to the extent one is concerned about the administrative burdens on sentencing judges, this suggestion would be very burdensome. Defendants would forever litigate this matter and, if document scarcity is a true problem, it would create a real problem in resolving this factor.

III. Suggestion

My suggestion is that the Commission defer doing anything radical this year in terms of changing the enhancements for illegal reentry. Before proceeding on the new approach for enhancements set out in the proposed amendments, I think that it would be useful to run the data to

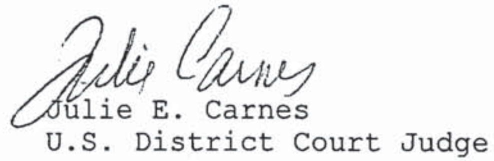
see how much sentences would be shortened under the Guidelines. Moreover, Congress may well be enacting new immigration laws this year, and waiting until the dust settles might be prudent. However much reasonable minds might differ about the wisdom of this change, from a policy point of view, there can be little disagreement that it would not be helpful for there to be a perception that the Commission is lowering sentences for the most dangerous reentering illegal aliens.

It may well be that the guideline, as written, sometimes sweeps too broadly. Likely, there are cases where there is an isolated 20-year old conviction or other substantially mitigating circumstances as to the facts underlying the conviction. If that is so, I believe that the Commission should collect those anecdotes and see if it can determine a way to carve out those situations, either through departure language or language in the guideline, itself. Yet, throwing out the enhancement, itself, seems to me to be too broad-brushed a way to handle a factor that could suggest great dangerousness on the part of many defendants. Further, it seems to me that the Commission should consider creating an enhancement based on repeated reentries. Many of my defendants have had two or more reentry convictions. Such conduct suggests a dogged determination to violate the law and should be accounted for by the Guidelines.

Thank you for considering my comments. I offer them in a constructive spirit. You have an enormous responsibility in these post-*Booker* days and are an institution that all look to in the upcoming

debates. I greatly respect the work, time, and thought that you all bring to the task. Please let me know if I can ever be of service.

Sincerely,



Julie E. Carnes
U.S. District Court Judge

JEC/ghh

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March 28, 2006

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

Re: <u>2006 Proposed Amendments to the Sentencing Guidelines: Sentence Reduction Motions under 18 U.S.C. § 3582(c)(1)(A)(i)</u>

Dear Judge Hinojosa:

On behalf of the American Bar Association (ABA) and its over 400,000 members, I write to amplify our March 15 testimony on policy for sentence reduction in cases presenting "extraordinary and compelling reasons" pursuant to 18 U.S.C. § 3582(c)(1)(A)(i).[1] In our testimony we noted that the Commission's proposed guidelines amendments on this subject did not contain "the criteria to be applied and a list of specific examples," as contemplated by 28 U.S.C. § 994(t). Following our testimony, Judge Castillo invited us to submit specific language for the Commission's consideration, and we are pleased to do so.[2]

As noted in our March 15 testimony, the ABA strongly supports the adoption of sentence reduction mechanisms within the context of a determinate sentencing system, to respond to those extraordinary changes in a prisoner's situation that arise from time to time after a sentence has become final. In February 2003, the ABA House of Delegates adopted a policy recommendation urging jurisdictions to

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[1] In addition to this comment letter, the ABA is submitting a second, separate statement on the issue of "Chapter Eight – Privilege Waiver" in response to the Commission's request for comments pursuant to the Notice of Proposed Amendments, Request for Public Comment, and Notice of Public Hearings for the amendment cycle ending May 1, 2006, published at 71 Fed. Reg. 4782-4804 (January 27, 2006).

[2] The ABA has taken no position on the sentence reduction authority applicable to "three strikes" cases in subsection (ii) of § 3582(c)(1)(A). While our proposed policy statement includes a provision referring to subsection (ii) cases, this provision is copied verbatim from the Commission's proposed policy statement. We assume that any expansion of the authority in subsection (ii) to non-three-strikes cases, as suggested by the Commission in its request for comment, would necessarily have to rely on some statutory ground other than subsection (ii) itself.

"develop criteria for reducing or modifying a term of imprisonment in extraordinary and compelling circumstances, provided that a prisoner does not present a substantial danger to the community." The report accompanying the recommendation noted that "the absence of an accessible mechanism for making mid-course corrections in exceptional cases is a flaw in many determinate sentencing schemes that may result in great hardship and injustice, and that "[e]xecutive clemency, the historic remedy of last resort for cases of extraordinary need or desert, cannot be relied upon in the current political climate." In 2004, in response to a recommendation of the ABA Justice Kennedy Commission, the ABA House urged jurisdictions to establish standards for reduction of sentence "in exceptional circumstances, both medical and non-medical, arising after imposition of sentence, including but not limited to old age, disability, changes in the law, exigent family circumstances, heroic acts, or extraordinary suffering." It also urged the Department of Justice to make greater use of the federal sentence reduction authority in Section 3582(c)(1)(A)(i), and asked this Commission to "promulgate policy guidance for sentencing courts and the Bureau of Prisons in considering petitions for sentence reduction, which will incorporate a broad range of medical and non-medical circumstances."

Section 3582(c)(1)(A)(i), enacted as part of the original 1984 Sentencing Reform Act, contains a potentially open-ended safety valve authority whereby a court may at any time, upon motion of the Bureau of Prisons ("BOP"), reduce a prisoner's sentence to accomplish his or her immediate release from confinement. The only apparent limitation on the court's authority under this provision, once its jurisdiction has been established by a BOP motion, is that it must find that "extraordinary and compelling reasons" justify such a reduction. As part of its policy-making responsibility under the 1984 Act, the Commission is directed to promulgate general policy for sentence reduction motions under § 3582(c)(1)(A), if in its judgment this would "further the purposes set forth in § 3553(a)(2)." *See* 28 U.S.C. §§ 994(a)(2)(C), 994(t). In promulgating any such policy, the Commission is directed by § 994(t) to "describe what should be considered extraordinary and compelling reasons for sentence reduction, including the criteria to be applied and a list of specific examples." The only normative limitation imposed on the Commission by § 994(t) is that "Rehabilitation of the defendant alone shall not be considered an extraordinary and compelling reason."

The Commission's proposal to implement the directive in § 994(t) consists of a new policy statement at USSG § 1B1.13. The proposed policy reiterates the statutory bases for reduction of sentence under § 3582(c)(1)(A)(i), including the limitation in § 994(t) on consideration of rehabilitation as grounds for sentence reduction. However, it does not include "the criteria to be applied and a list of specific examples" that are required by § 994(t). Instead, the Commission appears to propose that courts considering sentence reduction motions should defer to the judgment of the Bureau of Prisons on a case-by-case basis: "A determination by the Director of the Bureau of Prisons that a particular case warrants a reduction for extraordinary and compelling reasons shall be considered as such for purposes of section (1)(A)." We find this approach problematic because it fails to satisfy the mandate of § 994(t) that the Commission should establish general policy guidance for sentence reduction under § 3582(c)(1)(A)(i) and because it contemplates

that any policy for implementation of § 3582(c)(1)(A)(i) would emerge only in a case-by-case process controlled by the Bureau of Prisons, and not in a general rule-making by the Commission.

We believe the text of § 994(t) requires the Commission to develop general policy on the criteria for sentence reduction under § 3582(c)(1)(A)(i), rather than to defer to case-by-case decision-making by the BOP. We also believe that a sentencing court must make an independent determination as to whether sentence reduction is warranted in a particular case.

To assist the Commission in carrying out the mandate of § 994(t), and in response to Judge Castillo's invitation, we have drafted language for a policy statement that describes specific criteria for determining when a prisoner's situation warrants sentence reduction under § 3582(c)(1)(A)(i), and gives specific examples of situations where these criteria might apply. Our proposed policy statement would also make several other changes in the language of the Commission's proposal, as discussed in our March 15 testimony: it would make clear that the court in considering sentence reduction should concern itself only with a defendant's present dangerousness, and that the court could properly rely on several factors in combination as justification for sentence reduction.

We propose three criteria for determining when "extraordinary and compelling reasons" justify release: 1) where the defendant's circumstances are so changed since the sentence was imposed that it would be inequitable to continue the defendant's confinement, without regard to whether or not any changes in the defendant's circumstances could have been anticipated by the court at the time of sentencing; 2) where information unavailable to the court at the time of sentencing becomes available and is so significant that it would be inequitable to continue the defendant's confinement; or 3) where the court was prohibited at the time of sentencing from taking into account certain considerations relating to the defendant's offense or circumstances; the law has subsequently been changed to permit the court to take those considerations into account; and the change in the law has not been made generally retroactive so as to fall under 18 U.S.C. § 3582(c)(2).

We then propose, as part of an application note, eight specific examples of extraordinary and compelling reasons, all of which find support in the legislative history of the 1984 Act, in past administrative practice under this statute, and in the history of and practice under its old law predecessor, 19 U.S.C. § 4205(g). These reasons are: 1) where the defendant is suffering from a terminal illness; 2) where the defendant is suffering from a permanent physical or mental disability or chronic illness that significantly diminishes the prisoner's ability to function within the environment of a correctional facility; 3) where the defendant is experiencing deteriorating physical or mental health as a consequence of the aging process; 4) where the defendant has provided significant assistance to any government entity that was not or could not have been taken into account by the court in imposing the sentence; 5) where the defendant would have received a significantly lower sentence under a subsequent change in applicable law that has not been made retroactive; 6) where the defendant received a significantly higher

sentence than similarly situated codefendants because of factors beyond the control of the sentencing court; 7) where the defendant has experienced an extraordinary and compelling change in family circumstances, such as the death or incapacitation of family members capable of caring for the defendant's minor children; or 8) where the defendant's rehabilitation while in prison has been extraordinary. We propose further that neither changes in the law nor rehabilitation should, by themselves, be sufficient to justify sentence reduction.

We appreciate the opportunity to provide these comments, and hope that they will be helpful.

Respectfully submitted,

Robert D. Evans

Draft 3/25/06

American Bar Association

Proposed Policy Statement

§ 1B1.13 Reduction in Term of Imprisonment Upon Motion of Director of the Bureau of Prisons (Policy Statement)

(a) Upon motion of the Director of the Bureau of Prisons under 18 U.S.C. § 3582(c)(1)(A), the court may reduce a term of imprisonment if, after considering the factors set forth in 18 U.S.C. § 3553(a), the court determines that –

(1) either –

(A) extraordinary and compelling reasons warrant such a reduction; or

(B) the defendant (i) is at least 70 years old, and (ii) has served 30 years in prison on a sentence imposed under 18 U.S.C. § 3559(e) for the offense or offenses for which the defendant is imprisoned;

(2) the Director of the Bureau of Prisons has determined that the defendant is not a present danger to the safety of any other person or to the community pursuant to 18 U.S.C. § 3142(g)(4); and

(3) the reduction is consistent with this policy statement and the purposes of sentencing set forth in 18 U.S.C. § 3553(a).

(b) "Extraordinary and compelling reasons" may be found where

(1) the defendant's circumstances are so changed since the sentence was imposed that it would be inequitable to continue the defendant's confinement; or

(2) information unavailable to the court at the time of sentencing becomes available and is so significant that it would be inequitable to continue the defendant's confinement, or

(3) the court was prohibited at the time of sentencing from taking into account certain considerations relating to the defendant's offense or circumstances; the law has subsequently been changed to permit the court to take those considerations into account; and, the change in the law has not been made generally retroactive so as to fall under 18 U.S.C. § 3582(c)(2).

Commentary

Application Note:

Application of subdivisions (a)(1)(A) and (b):

1) The term "extraordinary and compelling reasons" includes, for example, that –

(a) the defendant is suffering from a terminal illness;

(b) the defendant is suffering from a permanent physical or mental disability or chronic illness that significantly diminishes the prisoner's ability to function within the environment of a correctional facility;

(c) the defendant is experiencing deteriorating physical or mental health as a consequence of the aging process;

(d) the defendant has provided significant assistance to any government entity that was not or could not have been taken into account by the court in imposing the sentence;

(e) the defendant would have received a significantly lower sentence under a subsequent change in applicable law that has not been made retroactive;

(f) the defendant received a significantly higher sentence than similarly situated codefendants because of factors beyond the control of the sentencing court;

(g) the defendant has experienced an extraordinary and compelling change in family circumstances, such as the death or incapacitation of family members capable of caring for the defendant's minor children; or

(h) the defendant's rehabilitation while in prison has been extraordinary.

2) "Extraordinary and compelling reasons" may consist of a single reason, or it may consist of several reasons, each of which standing alone would not be considered extraordinary and compelling, but that together justify sentence reduction; *provided that* neither a change in the law alone, nor rehabilitation of the defendant alone, shall constitute "extraordinary and compelling reasons" warranting sentence reduction pursuant to this section.

3) "Extraordinary and compelling reasons" may warrant sentence reduction

without regard to whether or not any changes in the defendant's circumstances could have been anticipated by the court at the time of sentencing.

Background: The Commission is directed by 28 U.S.C. § 994(t) to "describe what should be considered extraordinary and compelling reasons for sentence reduction under 18 U.S.C. § 3582(c)(1)(A)(i), including the criteria to be applied and a list of specific examples." This section provides that "rehabilitation of the defendant alone shall not be considered an extraordinary and compelling reason." This policy statement implements 28 U.S.C. § 994(t).

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March 28, 2006

United States Sentencing Commission
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Washington, D.C. 20002-8002
Attention: Public Affairs—Priorities Comment

Re: Comments on the Issue of "Chapter Eight – Privilege Waiver"

Dear Sir/Madam:

On behalf of the American Bar Association (ABA) and its more than 400,000 members, I write in response to the Commission's Notice of Proposed Amendments, Request for Public Comment, and Notice of Public Hearings for the amendment cycle ending May 1, 2006.[1] In particular, we would like to express our views regarding Final Priority (6), described in the Notice as the "review, and possible amendment" of the language regarding waiver of attorney-client privilege and work product protections contained in the Commentary in Section 8C2.5 of the Federal Sentencing Guidelines.[2] We urge the Commission to amend this language to clarify that waiver of attorney-client privilege and work product protections should not be a factor in determining whether a sentencing reduction is warranted for cooperation with the government.

The ABA has long supported the use of sentencing guidelines as an important part of our criminal justice system. In particular, our established ABA policy, which is reflected in the Criminal Justice Standards on Sentencing (3d ed.), supports an individualized sentencing system that guides, yet encourages, judicial discretion while advancing the goals of parity, certainty and proportionality in sentencing. Such a system need not, and should not, inhibit judges' ability to exercise their informed discretion in particular cases to ensure satisfaction of these goals.

In February 2005, the ABA House of Delegates met and reexamined the overall Sentencing Guidelines system in light of the recent Supreme Court decision in *United States v. Booker* and *United States v. Fanfan* (the "*Booker/Fanfan* decision"). At the conclusion of that process, the ABA adopted a new policy recommending that Congress

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[1] 71 Fed. Reg. 4782-4804 (January 27, 2006)

[2] In addition to this comment letter on the issue of "Chapter Eight – Privilege Waiver," the ABA is also filing separate comments with the Commission today on the specific issue of "Sentence Reduction Motions under 18 U.S.C. § 3582(c)(1)(A)(i)."

take no immediate legislative action regarding the overall Sentencing Guidelines system, and that it not rush to any judgments regarding the new advisory system, until it is able to ascertain that broad legislation is both necessary and likely to be beneficial.

Although the ABA opposes broad changes to the Sentencing Guidelines at this time, we continue to have serious concerns regarding certain narrow amendments to the Guidelines that took effect on November 1, 2004. These amendments, which the Commission submitted to Congress on April 30, 2004, apply to that section of the Guidelines relating to "organizations"—a broad term that includes corporations, partnerships, unions, non-profit organizations, governments, and other entities. While the ABA has serious concerns regarding several of these recent amendments, most alarming is the amendment that added the following new language to the Commentary for Section 8C2.5 of the Guidelines:

> Waiver of attorney-client privilege and of work product protections is not a prerequisite to a reduction in culpability score [for cooperation with the government]...unless such waiver is necessary in order to provide timely and thorough disclosure of all pertinent information known to the organization.[3]

Before the adoption of this privilege waiver amendment, the Commentary was silent on the issue of privilege and contained no suggestion that such a waiver would ever be a factor in charging or sentencing decisions. This was true, even though the Department of Justice—acting in accordance with the 1999 "Holder Memorandum" and 2003 "Thompson Memorandum"[4]—was increasingly requesting that companies and other organizations waive their privileges as a condition for certifying their cooperation during investigations.

[3] In August 2004, the ABA adopted a resolution supporting five specific changes to the then-proposed amendments to the Federal Sentencing Guidelines for Organizations, including amending the Commentary to Section 8C2.5 to state affirmatively that waiver of attorney-client and work product protections "should not be a factor in determining whether a sentencing reduction is warranted for cooperation with the government." Subsequently, on August 9, 2005, the ABA adopted a resolution, sponsored by the ABA Task Force on Attorney-Client Privilege, supporting the preservation of the attorney-client privilege and work product doctrine, opposing governmental actions that erode these protections, and opposing the routine practice by government officials of seeking the waiver of these protections through the granting or denial of any benefit or advantage. Both ABA resolutions, and detailed background reports discussing the history and importance of the attorney-client privilege and work product doctrine and recent governmental assaults on these protections, are available at http://www.abanet.org/poladv/acprivilege.htm. In addition, other useful materials regarding privilege waiver are available on the website of the ABA Task Force on Attorney-Client Privilege at http://www.abanet.org/buslaw/attorneyclient/.

[4] The Justice Department's privilege waiver policy originated with the adoption of a 1999 memorandum by then-Deputy Attorney General Eric Holder, also known as the "Holder Memorandum," that encouraged federal prosecutors to request that companies waive their privileges as a condition for receiving cooperation credit during investigations. The Department's waiver policy was expanded in a January 2003 memorandum written by then-Deputy Attorney General Larry Thompson, also known as the "Thompson Memorandum." Subsequently, then-Acting Deputy Attorney General Robert McCallum sent a memorandum to all U.S. Attorneys and Department Heads in October 2005 instructing each of them to adopt "a written waiver review process for your district or component," although the directive—also known as the "McCallum Memorandum"—does not establish any minimum standards for, or require national uniformity regarding, privilege waiver demands by prosecutors. The Thompson and McCallum Memoranda are available online at http://www.usdoj.gov/dag/cftf/business_organizations.pdf and http://www.abanet.org/poladv/mccallummemo212005.pdf, respectively.

Since the adoption of the privilege waiver amendment to the Sentencing Guidelines in 2004, the ABA has been working in close cooperation with a broad and diverse coalition of legal and business groups—ranging from the U.S. Chamber of Commerce to the American Civil Liberties Union—in an effort to persuade the Commission to reconsider, and perhaps modify, the waiver provision. Towards that end, the coalition sent a letter to the Commission expressing its concerns over the privilege waiver amendment on March 3, 2005 and the ABA sent a similar letter on May 17, 2005.

In June 2005, the Sentencing Commission issued its "Notice of Proposed Priorities and Request for Public Comment" for the amendment cycle ending May 1, 2006 in which it stated its tentative plans to reconsider the 2004 privilege waiver amendment to the Federal Sentencing Guidelines during its 2005-2006 amendment cycle. In response, the ABA, the informal coalition, and a prominent group of nine former senior Justice Department officials[5]—including three former Attorneys General—and Rep. Dan Lungren (R-CA) submitted separate comment letters to the Sentencing Commission on August 15, 2005 urging it to reverse the 2004 privilege waiver amendment and add language to the Guidelines stating that waiver should not be a factor in determining cooperation.[6] Later that month, the Commission issued its "Notice of Final Priorities" for the amendment cycle ending May 1, 2006 in which it stated its intent to formally reconsider the 2004 privilege waiver amendment to the Federal Sentencing Guidelines.

On November 15, 2005, the ABA, several organizations from the coalition, and former Attorney General Dick Thornburgh testified before the Sentencing Commission on the subject of privilege waiver.[7] In response to questions from several Commissioners regarding the frequency with which governmental entities have been requesting that businesses waive their privileges as a condition for cooperation credit, as well as the effects of these waiver requests, the coalition and the ABA subsequently undertook a detailed survey of in-house and outside corporate counsel, and the results were presented to the Commission in early March 2006.[8] Several representatives of the coalition also testified before the Commission on March 15, 2006 regarding the results of the new survey.

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[5] The August 15, 2005 comment letter signed by the nine former senior Justice Department officials—including three former Attorneys General, one former Acting Attorney General, two former Deputy Attorneys General, and three former Solicitors General—is available at http://www.abanet.org/poladv/acpriv_formerdojofficialstletter8-15-05.pdf.

[6] The signatories to the coalition's August 15, 2005 comment letter to the Commission were the American Chemistry Council, American Civil Liberties Union, Association of Corporate Counsel, Business Civil Liberties, Inc., Business Roundtable, the Financial Services Roundtable, Frontiers of Freedom, National Association of Criminal Defense Lawyers, National Association of Manufacturers, National Defense Industrial Association, Retail Industry Leaders Association, U.S. Chamber of Commerce, and Washington Legal Foundation. In addition, the ABA, which is not a formal member of the coalition but has worked in close cooperation with that entity, also submitted similar comments to the Commission on August 15, 2005. Links to the ABA, coalition and other August 15, 2005 comment letters and most other privilege waiver materials referenced in this letter are available at http://www.abanet.org/poladv/acprivilege.htm.

[7] The November 15, 2005 testimony of the American Bar Association, American Chemistry Council, American Civil Liberties Union, Association of Corporate Counsel, National Association of Criminal Defense Lawyers, National Association of Manufacturers, U.S. Chamber of Commerce, and former Attorney General Dick Thornburgh are available at http://www.ussc.gov/AGENDAS/agd11_05.htm.

[8] The detailed results of the new March 2006 surveys of in-house and outside corporate counsel are available online at http://www.acca.com/Surveys/attyclient2.pdf. The new March 2006 surveys expanded upon the coalition's previous surveys of in-house and outside counsel that were completed in April 2005. Executive summaries of the April 2005 surveys are available at www.acca.com/Surveys/attyclient.pdf and www.nacdl.org/public.nsf/Legislation/Overcriminalization002/$FILE/AC_Survey.pdf, respectively.

Meanwhile, the Commission issued its Notice of Proposed Amendments, Request for Public Comment, and Notice of Public Hearings on January 27, 2006. One of the issues on which the Commission sought public comment was the issue of "Chapter Eight – Privilege Waiver." In particular, the Commission sought additional comment on the following specific issues:

> (1) whether this commentary language [in Application Note 12 of Section 8C2.5 of the Guidelines] is having unintended consequences; (2) if so, how specifically has it adversely affected the application of the sentencing guidelines and the administration of justice; (3) whether this commentary language should be deleted or amended; and (4) if it should be amended, in what manner.[9]

Unintended Consequences of the Privilege Waiver Amendment

In response to the first two issues posed by the Commission, the ABA believes that the 2004 privilege waiver amendment to the Sentencing Guidelines has helped cause a variety of profoundly negative, if unintended, consequences.

The ABA believes that as a result of the privilege waiver amendment and related Justice Department policies and practices, companies have been forced to waive their attorney-client and work product protections in most cases. The problem of coerced waiver that began with the 1999 Holder Memorandum and the 2003 Thompson Memorandum was exacerbated when the Commission added the new privilege waiver language to the Section 8C2.5 Commentary in 2004. While the new language begins by stating a general rule that a waiver is "not a prerequisite" for a reduction in the culpability score—and leniency—under the Guidelines, that statement is followed by a very broad and subjective exception for situations where prosecutors contend that waiver "is necessary in order to provide timely and thorough disclosure of all pertinent information known to the organization." Without some meaningful oversight over what waivers prosecutors may deem to be "necessary," this exception essentially swallows the rule. Prior to the change, the Commentary was silent on the issue and contained no suggestion that such a waiver would ever be required.

Now that this amendment has become effective, the Justice Department is even more likely than it was before to require companies to waive their privileges in almost all cases. Adding to our concern is that the Justice Department, as well as other enforcement agencies, is viewing the lack of congressional disapproval of this amendment as congressional ratification of the Department's policy of routinely requiring privilege waiver. From a practical standpoint, companies increasingly have no choice but to waive these privileges whenever the government demands it, as the government's threat to label them as "uncooperative" in combating corporate crime will have a profound effect on their public image, stock price, and standing in the marketplace.

Substantial new evidence confirms that the privilege waiver amendment, combined with the Justice Department's waiver policies, has resulted in the routine compelled waiver of attorney-client and work product protections. According to the new survey of over 1,200 in-house and outside corporate

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

counsel that was completed by the coalition and the ABA in March 2006, almost 75% of corporate counsel respondents believe that a "culture of waiver" has evolved in which governmental agencies believe that it is reasonable and appropriate for them to expect a company under investigation to broadly waive attorney-client or work product protections. In addition, 52% of in-house respondents and 59% of outside respondents have indicated that there has been a marked increase in waiver requests as a condition of cooperation in recent years. Corporate counsel respondents also indicated that when prosecutors give a reason for requesting privilege waiver, the Sentencing Guidelines rank second only to the Justice Department's waiver policies among the reasons most frequently cited.

The ABA is concerned that that the 2004 privilege waiver amendment to the Guidelines and the related Justice Department waiver policies—which together have resulted in routine government requests for waiver of attorney-client and work product protections—will continue to unfairly harm companies, associations, unions and other entities in a number of ways. First and foremost, the 2004 privilege waiver has helped to seriously weaken the confidential attorney-client relationship between companies and their lawyers, resulting in great harm both to companies and the investing public. Lawyers for companies and other organizations play a key role in helping these entities and their officials to comply with the law and to act in the entity's best interests. To fulfill this role, lawyers must enjoy the trust and confidence of the managers and the board and must be provided with all relevant information necessary to properly represent the entity. By authorizing and encouraging routine government demands for waiver of attorney-client and work product protections, the privilege waiver amendment discourages personnel within companies and other organizations from consulting with their lawyers. This, in turn, seriously impedes the lawyers' ability to effectively counsel compliance with the law, thereby harming not only companies, but the investing public as well.

Second, while the privilege waiver amendment—like the Justice Department's waiver policies—was intended to aid government prosecution of corporate criminals, it has actually made detection of corporate misconduct more difficult by helping to undermine companies' internal compliance programs and procedures. These compliance mechanisms, which often include internal investigations conducted by the company's in-house or outside lawyers, are one of the most effective tools for detecting and flushing out malfeasance. Indeed, Congress recognized the value of these compliance tools when it enacted the Sarbanes-Oxley Act. Unfortunately, because the effectiveness of these internal mechanisms depends in large part on the ability of the individuals with knowledge to speak candidly and confidentially with the lawyer conducting the investigation, any uncertainty as to whether attorney-client and work product protections will be honored makes it more difficult for companies to detect and remedy wrongdoing early. Therefore, by further encouraging prosecutors to seek waiver on a routine basis, the privilege waiver amendment undermines, rather than promotes, good corporate compliance practices.

Third, the privilege waiver amendment unfairly harms employees by infringing on their individual rights. By fostering a system of routine waiver, the 2004 privilege waiver amendment and the other related governmental policies place the employees of a company or other organization in a very difficult position when their employers ask them to cooperate in an investigation. They can cooperate and risk that statements made to the company's or organization's lawyers will be turned over to the government by the entity or they can decline to cooperate and risk their employment. It is

fundamentally unfair to force employees to choose between keeping their jobs and preserving their legal rights.

In recent months, many others—including the coalition of business and legal groups and the former senior Justice Department officials referenced above—have expressed similar concerns regarding the unintended consequences of the 2004 privilege waiver amendment to the Sentencing Guidelines. The ABA shares these concerns and believes that the privilege waiver amendment is counterproductive and undermines, rather than enhances, compliance with the law as well as the many other societal benefits that are advanced by the confidential attorney-client relationship.

Congressional Oversight of Governmental Waiver Policies

On March 7, 2006, the House Judiciary Subcommittee on Crime, Terrorism, and Homeland Security held an oversight hearing on the subject of government-coerced waiver policies. The hearing, titled "White Collar Enforcement (Part 1): Attorney-Client Privilege and Corporate Waivers," included a number of prominent witnesses, including Associate Attorney General Robert McCallum, former Attorney General Dick Thornburgh, U.S. Chamber of Commerce President Thomas Donohue, and William Sullivan, Jr. of the law firm of Winston & Strawn.[10] With the exception of Mr. McCallum, all of the other witnesses expressed serious concerns regarding the growing trend of government-coerced privilege waiver and identified the Justice Department's waiver policies and the 2004 privilege waiver amendment as major contributing factors causing the erosion of the privilege.

During the hearing, the Chairman of the Subcommittee, Rep. Howard Coble (R-NC), expressed his strong support for the attorney-client privilege and his concerns regarding routine prosecutor demands for waiver during investigations. In addition, after acknowledging that prosecutors "must be zealous and vigorous in their efforts to bring corporate actors to justice," Chairman Coble said that "there is no excuse for prosecutors to require privilege waivers as a routine matter." In addition, Chairman Coble vowed that his subcommittee would "examine the important issue with a keen eye to determine whether Federal prosecutors are routinely requiring cooperating corporations to waive such privilege." After noting that the Sentencing Commission is now reexamining the privilege waiver issue as part of the current amendment cycle, he concluded that "while the guidelines do not explicitly mandate a waiver of privileges for the full benefit of cooperation, in practical terms we have to make sure that they do not operate to impose a requirement..."

Later in the hearing, similar concerns regarding government-coerced waiver were also raised by Rep. Dan Lungren (R-CA), who previously served as California Attorney General. During the question and answer period, Rep. Lungren reiterated his longstanding opposition to the 2004 privilege waiver amendment to the Sentencing Guidelines as explained in his August 15, 2005 letter to the Commission, and he said that he had a "huge concern" with the 2004 amendment to the extent that it "require[d] entities to waive the attorney-client privilege and work product protections as a condition of showing cooperation." In addition, Rep. Lungren criticized the 1999 Holder Memorandum, the

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[10] The written testimony of each of the witnesses who appeared at the March 7, 2006 hearing and the letter submitted by the ABA to the Subcommittee regarding the hearing are available at http://www.abanet.org/poladv/testimony306.pdf.

2003 Thompson Memorandum, and the 2004 privilege waiver amendment as together constituting a "creeping intrusion" on the attorney-client privilege.

Rep. William Delahunt (D-MA), himself a former long-time prosecutor, expressed similar misgivings at the hearing regarding government-coerced waiver in general and both the Justice Department's waiver policy and the 2004 privilege waiver amendment to the Sentencing Guidelines in particular. At the conclusion of the hearing, Rep. Delahunt summed up the serious concerns that all the Subcommittee members had previously expressed regarding governmental privilege waiver policies, and he respectfully asked Associate Attorney General McCallum to convey those concerns to the Justice Department in order to avoid having to face bipartisan legislation designed to resolve the issue.

The concerns that the members of the House Judiciary Subcommittee expressed during the March 7 hearing are consistent with those previously expressed to the ABA and the coalition on November 16, 2005 by Sen. Arlen Specter (R-PA), Chairman of the Senate Judiciary Committee, and Rep. James Sensenbrenner (R-WI), Chairman of the House Judiciary Committee.[11]

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

In order to reverse the negative consequences that have resulted from the 2004 privilege waiver amendment to the Guidelines and help prevent further erosion of the attorney-client privilege, we urge the Commission to amend the applicable language in the Commentary to Section 8C2.5 of the Guidelines to clarify that waiver of attorney-client privilege and work product protections should not be a factor in determining whether a sentencing reduction under the Guidelines is warranted. To accomplish this, we recommend that the Commission (1) add language to the Commentary clarifying that cooperation only requires the disclosure of "all pertinent non-privileged information known by the organization", (2) delete the existing Commentary language "unless such waiver is necessary in order to provide timely and thorough disclosure of all pertinent information known to the organization", and (3) make the other minor wording changes in the Commentary outlined below.

If our recommendations were adopted, the relevant portion of the Commentary would read as follows[12]:

> "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

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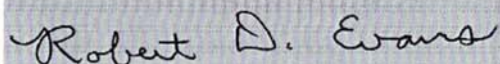
[11] On November 16, 2005, Sen. Specter and Rep. Sensenbrenner spoke at a legal conference dealing with the erosion of the attorney-client privilege that was sponsored by the U.S. Chamber of Commerce, the ABA, the Association of Corporate Counsel, the National Association of Criminal Defense Lawyers, and the American Civil Liberties Union. A transcript of Sen. Specter's comments on the privilege waiver issue, as well as the full text of Rep. Sensenbrenner's prepared remarks, are available online at http://www.abanet.org/poladv/acpriv_transcriptofsenspecter11-16-05.pdf and http://www.abanet.org/poladv/acprivsensenbrenner11-16-05.pdf, respectively.

[12] Note: The Commission's November 1, 2004 amendments on the privilege waiver issue are shown in italics. Our suggested additions are underscored and our suggested deletions are noted by strikethroughs.

> by the organization. A prime test of whether the organization has disclosed all pertinent non-privileged information is whether the information is sufficient for law enforcement personnel to identify the nature and extent of the offense and the individual(s) responsible for the criminal conduct. However, the cooperation to be measured is the cooperation of the organization itself, not the cooperation of individuals within the organization. If, because of the lack of cooperation of particular individual(s), neither the organization nor law enforcement personnel are able to identify the culpable individual(s) within the organization despite the organization's efforts to cooperate fully, the organization may still be given credit for full cooperation. *Waiver of attorney-client privilege and of work product protections is not* a factor in determining whether ~~*a prerequisite to*~~ *a reduction in culpability score under subdivisions (1) and (2) of subsection (g)* is warranted. ~~*unless such waiver is necessary in order to provide timely and thorough disclosure of all pertinent information known to the organization.*~~."

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

Sincerely,



Robert D. Evans

cc: Members of the U.S. Sentencing Commission
Charles R. Tetzlaff, General Counsel, U.S. Sentencing Commission
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Amy L. Schreiber, Assistant General Counsel, U.S. Sentencing Commission

U.S. Department of Justice

Criminal Division

Office of the Assistant Attorney General *Washington, DC 20530-0001*

March 28, 2006

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

Dear Judge Hinojosa:

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

IMMIGRATION

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

Amendments to Section 2L1.1

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

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

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

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

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

Passport Fraud

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

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

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

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

Amendments to Section 2L1.2

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

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

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

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

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

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

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

Federal Defenders' Proposal

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

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

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

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

Issues for Comment

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

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

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

FIREARMS TRAFFICKING

Definition of Firearms Trafficking

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

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

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

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

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

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

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

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

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

Proposed Firearms Trafficking Enhancements

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

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

Stolen and Altered or Obliterated Serial Numbers

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

Enhancement for Use of High-Capacity Semiautomatic Firearms

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

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

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

"Lesser Harms"

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

"In Connection With"

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

Clarification of "Brandishing" and "Otherwise Used"

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

ATTORNEY-CLIENT PRIVILEGE

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

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

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

POLICY STATEMENT ON REDUCTION IN SENTENCE

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

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

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

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

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

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

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

Sincerely,

Michael J. Elston
Senior Counsel to the Assistant Attorney General

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U.S. Department of Justice

Criminal Division

Office of the Assistant Attorney General *Washington, DC 20530-0001*

March 28, 2006

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

Dear Judge Hinojosa:

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

IMMIGRATION

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

Amendments to Section 2L1.1

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

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

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

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

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

Passport Fraud

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

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

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

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

Amendments to Section 2L1.2

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

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

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

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

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

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

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

Federal Defenders' Proposal

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

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

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

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

Issues for Comment

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

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

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

FIREARMS TRAFFICKING

Definition of Firearms Trafficking

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

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

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

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

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

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

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

Proposed Firearms Trafficking Enhancements

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

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

Stolen and Altered or Obliterated Serial Numbers

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

Enhancement for Use of High-Capacity Semiautomatic Firearms

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

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

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

"Lesser Harms"

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

"In Connection With"

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

Clarification of "Brandishing" and "Otherwise Used"

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

ATTORNEY-CLIENT PRIVILEGE

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

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

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

POLICY STATEMENT ON REDUCTION IN SENTENCE

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

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

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

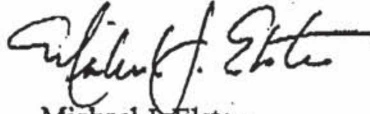
Proposed Section 1B1.13(1)(A) changes the statutory language from "extraordinary and compelling reasons," to "extraordinary and compelling reason." It is not clear why this was changed from plural to singular, and it may be a typographical error. However, this could be a potential source of confusion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

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

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

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

Sincerely,



Michael J. Elston
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March 28, 2006

SENT BY EMAIL

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

Re: Written Public Comment
Chapter Eight - Privilege Waiver

Dear Commission:

Waiver of the attorney-client privilege and work product protections in hopes of reducing a culpability score encourages defendant organizations to completely destroy the relationship between the attorney and client, a relationship that exists solely for the benefit of the client. Commentary language that states "... unless such waiver is necessary in order to provide timely and thorough disclosure of all pertinent information known to the organization" allows privileges that should be stringently guarded for the proper administration of justice in our legal system to be at risk of waiver.

Additionally, such language effectively operates to encourage the defendant organization to produce privileged documents that may or may not demonstrate criminal actions without requiring a showing that the organization actually engaged in or planned to engage in criminal or fraudulent behavior. The attorney-client privilege belonging to the organization and the work product protections belonging to both the organization and the attorney are effectively wiped out, leaving both to defend their confidential relationship. Thus, the completion of an internal investigation as a component of appropriate remedial action, instead of showing the organization's responsible behavior, incriminates the organization and the attorney.

In our last Priorities Comment submitted on August 14, 2005, we recommended the following revisions to the Commentary since it pits employees against management, law enforcement against corporations and in-house/outside counsel against the officers of the organization they represent:

Amendment to the end of Commentary 12 as follows:

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

We continue to recommend this language because it truly reflects the goals and incentives for organizations to maintain an effective compliance program. It also effectively safeguards the attorney and client relationship for the benefit of the organization in the event of prosecution and/or in anticipation of litigation.

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

Sincerely,

/s/

L.A. Wright
Legal Criminalist/Consulting Expert

/law

March 27, 2006

VIA ELECTRONIC FILING

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

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

Dear Commissioners and Staff:

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

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

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

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

While we did not wish to argue the issue further at the hearing and while we certainly do not dispute what Mr. McCallum told the Commission on March 15 during its first panel of speakers (namely, that the Department would object to any changes in the language), we think it important for the Commission to know what it is that Mr. McCallum actually did say to the Congress on March 7, since the Members who were pressing him on waiver issues eased off their questioning on the Sentencing Guidelines language after he made the following statement. (And Representative Lundgren was not the only Member who mentioned concern about the Sentencing Guidelines' privilege waiver language – see our March 28 submission for more quotes from other Members of the House.) Members of Congress who were present at this hearing and who oversee the work of this Commission may have reason to believe that the privilege waiver language will not be a continuing issue of contention as a result of Mr. McCallum's statements.

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

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

> Mr. Lundgren: ... And here you have a situation where you want a corporation to follow the law, I presume. And you would want the corporation to listen to good counsel, I would think. And here we have got a rule that seems to me to work in the opposite direction.
>
> And I think that that weighs heavy on me and other members here on this panel. And so I would ask, don't you see the creeping intrusion here? I mean, first you have the first memorandum. Now we have the second memorandum, which is a little tighter and a little tougher. And then, following that, you have the Sentencing Commission saying, well, that is a bad idea. As a matter of fact, we are going to have that as evidence of cooperation, and the lack of it as evidence of lack of cooperation.
>
> What is a corporate counsel to do under those circumstances?
>
> Mr. McCallum: Well, there are a series of questions there, Mr. Lundgren. Number one, with respect to the Sentencing Commission, the Department's position has been we would be comfortable with the Sentencing Commission going back to where it was before that amendment.

> Mr. Lungren: Well, is that your position? Is that the administration's position?
>
> Mr. McCallum: I believe that that is the Department of Justice's review –
>
> Mr. Lungren: That is what I mean.
>
> Mr. McCallum: -- underway at this particular time. I do not know whether that has been absolutely finalized. But my review of that is that there would not necessarily be an objection to going back to the way it was before, where it was not addressed.

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

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

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COALITION MEMBERS:

AMERICAN CHEMISTRY COUNCIL
AMERICAN CIVIL LIBERTIES UNION
ASSOCIATION OF CORPORATE COUNSEL
BUSINESS CIVIL LIBERTIES, INC.
BUSINESS ROUNDTABLE
THE FINANCIAL SERVICES ROUNDTABLE
FRONTIERS OF FREEDOM
NATIONAL ASSOCIATION OF CRIMINAL DEFENSE LAWYERS
NATIONAL ASSOCIATION OF MANUFACTURERS
NATIONAL DEFENSE INDUSTRIAL ASSOCIATION

RETAIL INDUSTRY LEADERS ASSOCIATION
THE U.S. CHAMBER OF COMMERCE
WASHINGTON LEGAL FOUNDATION

CUA

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March 28, 2006

Via Electronic Filing
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Thurgood Marshall Building
One Columbus Circle, N.E., Suite 2-500
Washington, D.C. 20002-0082

Re: Comments on the Waiver Language of Application Note 12 of the Commentary to Section 8C2.5(g) of the *Organizational Guidelines*

Dear Judge Hinojosa and Members of the Commission:

We thank the Commission for taking time to review the November 2004 amendment to the Commentary to Section 8C2.5(g) of the *Organizational Guidelines* and for inviting public comment on this language. All members of the legal profession, including law faculties and students, have a great deal at stake with respect to measures pertaining to the attorney-client privilege. We recognize that the government has legitimate reasons to request information to ensure that corporations and other organizations comply with the law, and we understand that prosecutors must leverage resources to address the widespread improprieties that have occurred in recent years. However, exerting virtually irresistible pressure on entities to relinquish attorney-client and work product protections is unfair to both organizations and their human constituents. Because the waiver language of Application Note 12 invites this practice,[1] we urge the

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[1] This is particularly evident when the waiver language of Application Note 12 of the Commentary to § 8C2.5(g) is read in conjunction with relevant Department of Justice (DOJ) policies. *See* Memorandum from Deputy Attorney General Larry D. Thompson to Heads of Department Components, United States Attorneys, on Principles of Federal Prosecution of Business Organizations (Jan. 20, 2003), *available at* http://www.usdoj.gov/usao/eousa/foia_reading_room/usam/title9/crm00161.htm. *See* U.S. Department of Justice, *Federal Prosecution of Business Organizations*, in Criminal Resource Manual No. 162 (2003) (incorporating Thompson Memorandum), *available at* http://www.usdoj.gov/usao/eousa/foia_reading_room/usam/title9/crm00162.htm. *See also* Memorandum from Eric H. Holder, Jr., Deputy Attorney General, to All Component Heads and United States Attorneys, on Bringing Criminal Charges Against Corporations (June 16, 1999) (predecessor of Thompson Memorandum), *available at* http://www.usdoj.gov/criminal/fraud/policy/Chargingcorps.html, and Memorandum from Robert D. McCallum, Jr., Acting Deputy Attorney General, to Heads of Department Components, United States Attorneys, on Waiver of Corporate Attorney-Client Privilege and Work Product Protection, (Oct. 21, 2005) (instructing United States Attorneys Offices to develop written waiver reviews processes), *available at* http://www.usdoj.gov/usao/eousa/foia_reading_room/usam/title9/crm00163.htm.

Commission to amend this portion of the Commentary.[2] In its place we propose a specific provision stating that waiver of attorney-client and work product protections should not be a factor in determining an entity's "cooperation," except in those rare instances in which the government demonstrates that the entity has inappropriately invoked these safeguards to shield specific, otherwise unprivileged, factual material.

In addition to the compelling arguments offered by the American Bar Association and others who previously have commented on the adverse impact of the November 2004 amendment of Application Note 12, we request the Commission to consider three specific points in support of our proposal: (1) As currently written, the waiver language invites unfair prosecutorial tactics inconsistent with the special responsibilities of government lawyers to seek justice under law; (2) it threatens to compromise constitutional rights of corporate constituents, particularly individuals who participate in corporate internal investigations; and (3) it undermines the legitimacy of our adversarial system.

I. THE CURRENT WAIVER LANGUAGE INVITES UNFAIR CONDUCT AT ODDS WITH THE SPECIAL RESPONSIBILITY OF GOVERNMENT COUNSEL TO SEEK JUSTICE

By empowering prosecutors to label an entity "uncooperative" for refusing to waive attorney-client and work product protections, the waiver language of Application Note 12 allows government lawyers to require corporations and other entities to do what the government itself would not do – relinquish safeguards critical to our adversarial system. At a very early point in their legal education students discover that zeal in representing clients is both a professional virtue and an ethical obligation. They learn that diligence is critical to good lawyering and that a careful lawyer searches out all potentially significant information. While, as noted below, government attorneys have a special obligation to work for justice, it is unrealistic to expect the dedicated, conscientious lawyers who represent the United States to refrain from seeking all material available to them within the bounds of ethics and the law. As currently written, the waiver language of Application Note 12 provides prosecutors with a means of pressuring corporations and other entities to jettison attorney-client and work product protections, thereby affording the government essentially unfettered access to the confidential communications of "cooperating" entities. Consequently, this language unfairly and unnecessarily encourages prosecutorial conduct that undermines attorney-client and work product protections. As recent incidents have shown, overly aggressive prosecutorial tactics can have disastrous consequences. *See, e.g., Editorial,*

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[2] In expressing this view, we join with the American Bar Association, the Coalition to Preserve the Attorney-Client Privilege, former senior DOJ officials, and others who have requested the Commission to delete or revise Application Note 12 on various prior occasions.

Another Blown Case?, The Washington Post at A14 (Mar. 20, 2006) (discussing troubled prosecutions of alleged terrorists). At a minimum, in the corporate context coerced waivers are likely to chill the full and frank attorney-client communications essential to achieving justice in an adversarial system.

Government attorneys, no less than lawyers in private practice, rely on the protections of the attorney-client privilege and the work product doctrine in representing their client and its constituents. Permitting prosecutors unilaterally to coerce entities to abandon these important protections unfairly tilts the balance against organizational defendants and forces corporate constituents into the proverbial space between a rock and a hard place. If an entity's constituents avoid requesting legal advice, the corporation may violate the law or fail to correct an existing problem. If they do seek out the organization's lawyers, at some point everything they say in connection with a problem may end up in the hands of prosecutors. Forcing defendant entities and their constituents into these binds is inconsistent with the obligation of government attorneys first and foremost to seek justice.

While all members of the bar have a duty to uphold justice, this responsibility is especially important for those who represent the federal government. In *Berger v. United States*, 295 U.S. 78 (1935), *overruled on other grounds, Stirone v. United States*, 361 U.S. 212 (1960), the United States Supreme Court recognized the special obligation of government attorneys to ensure that justice is done, particularly in criminal proceedings. In the Court's words:

> The United States Attorney is the representative not of an ordinary party to a controversy, but of a sovereignty whose obligation to govern impartially is as compelling as its obligation to govern at all; and whose interest, therefore, in a criminal prosecution is not that it shall win a case, but that justice shall be done. As such, he is in a peculiar and very definite sense the servant of the law, the twofold aim of which is that guilt shall not escape or innocence suffer. He may prosecute with earnestness and vigor – indeed, he should do so. But, while he may strike hard blows, he is not at liberty to strike foul ones. It is as much his duty to refrain from improper methods calculated to produce a wrongful conviction as it is to use every legitimate means to bring about a just one. *Id.* at 88.

The Supreme Court clearly affirmed the vitality of corporate attorney-client privilege and work product protections in *Upjohn Co. v. United States,* 449 U.S. 383 (1981). Any measure that entitles law enforcement personnel to impose a high cost on the exercise of these protections threatens to strike the very kind of foul blow the Court condemned in *Berger.* We urge the Commission to amend the waiver language of Application Note 12 because we believe that it invites this kind of prosecutorial overreaching.

II. EMPOWERING PROSECUTORS TO PRESSURE ENTITIES TO WAIVE ATTORNEY-CLIENT AND WORK PRODUCT PROTECTIONS THREATENS TO COMPROMISE IMPORTANT INDIVIDUAL RIGHTS

In a pivotal scene in Arthur Miller's classic play *The Crucible*, the judge presiding over the Salem witchcraft trials declares: "The pure in heart need no lawyers." Arthur Miller, *The Crucible* at 93 (New York: Penguin Books 1973). Even so, when protagonist John Proctor rises to present evidence on behalf of his wife and others accused of witchcraft, Reverend Hale begs the court, "In God's name, sir, stop here; send him home and let him come again with a lawyer." *Id.* at 99. The judge, however, refuses to suspend the proceedings to allow Proctor to obtain counsel. Ultimately, the accused and Proctor himself are found guilty of working for the devil and sentenced to death. Nearly three hundred years after the Salem witchcraft trials, few Americans would be so foolish as to believe that even the purest among us have no need for lawyers. As a society, we hold the right to counsel in such high regard that we have incorporated it into our Constitution, and we require law enforcement authorities to inform individuals taken into custody of this safeguard. The right, however, has little meaning if clients cannot count on the confidentiality of their communications with counsel.

Coerced waivers of the corporate attorney-client privilege have far-reaching impacts for individuals. In an internal corporate investigation, for example, an employee has no right to counsel, and refusal to answer questions posed by investigators may result in termination. Consequently, employees face intense pressure to talk with internal investigators, even though they may inadvertently lose the protection of the Fifth Amendment when they do so. *See* Sarah Helene Duggin, *Internal Corporate Investigations: Legal Ethics, Professionalism and the Employee Interview*, 2003 Col. Bus. L. Rev. 859, 907-09; David M. Zornow and Keith D. Krakaur, *On the Brink of a Brave New World: The Death of Privilege in Corporate Criminal Investigations*, 37 Am. Crim. L. Rev. 147, 157-58 (2000). *See generally* Joseph F. Coyne and Charles F. Barker, *Employees' Rights and Duties During an Internal Investigation*, in Internal Corporate Investigations at 169, 173 (Brad D. Brian, et al. eds., 2d ed. 2002).

For many years, although ethical investigators ordinarily informed interviewees that they represented the entity and that the entity could choose to disclose any information provided by the employee, corporate waivers of attorney-client and work product protections were rare. *See* Zornow and Krakaur, *supra,* at 153. In the current environment, however, disclosure is much more likely. By making waiver of attorney-client and work product protections a *quid pro quo* for recognition of corporate "cooperation," prosecutors can pressure entities to surrender these safeguards, thereby accomplishing indirectly what they could not do directly. When an organization discloses the fruits of an internal investigation to the government, prosecutors benefit from both the loyalty employees have to their employers and the threat that employees who refuse to participate in an investigation will lose their jobs. *See* Kathryn W. Tate, *Lawyer Ethics and the Corporate Employee: Is the Employee Owed More Protection Than the Model Rules Provide?*,

23 Ind. L. Rev. 1, 11-13 (1990); Duggin, *supra* at 907-12. As many of those who oppose the practice have recognized, in conditioning recognition of corporate cooperation on attorney-client privilege and work product waivers, the government effectively "deputizes" corporate counsel to exploit the loyalty and fear of employees and then turn over the fruits of this labor to law enforcement personnel. N. Richard Janis, *Deputizing Company Counsel as Agents of the Federal Government: How Our Adversary System of Justice Is Being Destroyed*, 19 Wash. Lawyer No. 7, 32, 36 (Mar. 2005); Zornow and Krakaur, *supra*, at 156-57.

The metamorphosis of corporate counsel into government agents is particularly dangerous for those employees who are least legally sophisticated and therefore unlikely to realize that responding to questions from corporate attorneys conducting an internal investigation may waive constitutional protections. *See, e.g.*, Tate, *supra,* at 5, 68; Duggin, *supra*, at 910. Ironically, even employees who regularly deal with corporate attorneys may be at risk because longstanding personal relationships may blind them to the ethical obligation of corporate counsel to represent the interests of the entity over all others. *See, e.g.*, *id.* at 910-11 (even savvy managers may respond on the basis of personal connections rather than consideration of attorney obligations); Geoffrey Hazard and William Hodes, *The Law of Lawyering* § 17.13, at 17-53 (2003) (corporate officials "may incorrectly assume that the entity lawyer is also 'their' lawyer"). The Commentary to the *Organizational Sentencing Guidelines* should not invite prosecutors to take unfair advantage of such circumstances.

III. ROUTINE PRESSURE ON ENTITIES TO WAIVE THE ATTORNEY-CLIENT PRIVILEGE UNDERMINES THE LEGITIMACY OF OUR ADVERSARIAL SYSTEM

Our adversarial system rests on the notion that truth can be distilled and justice meted out in the structured battle that takes place in the courtroom – or in the preliminary encounters that so often lead parties to resolve their differences prior to trial. Lawyers keep faith with their clients by holding the matters they share in confidence. While ethical rules forbid lawyers to assist clients in ongoing illegal activity, as a society we have come to rely on the understanding that a client can disclose almost anything to his or her lawyer knowing that such a confidence will remain inviolate. Under Model Rule 1.13 and its analogues, a lawyer who represents an organization owes allegiance to the entity rather than to any of its constituents. However, while a lawyer's ultimate duty is to the entity itself, the core relationships exist with living, breathing human beings. Constituents must have at least some level of trust that communications with corporate counsel are likely to remain confidential, or they will neither seek legal advice on behalf of the entity nor share confidences pertaining to its business.

When a corporate agent acts against the interests of an entity, corporate counsel have a duty to report the transgression – to the entity's highest authority if necessary – and to advise the entity to correct any corporate legal violations resulting from the agent's misconduct. On occasion, corporate decision makers may determine that they should or must disclose the matter to

government authorities and, in so doing, reveal otherwise privileged information. It is unjust, however, to refashion our legal system – formally or informally – to give prosecutors an unconstrained right to coerce such disclosures. Unfortunately, this is one of the unintended consequences of the waiver language of Application Note 12. This language, like any government measure that weakens the safeguards that keep the power of the state in balance, undermines the basic legitimacy of our adversarial system.

As law teachers, one of our most important tasks is to help our students understand that justice is not simply an abstract concept, but the concrete goal of our adversarial system. Achieving justice in an adversarial framework requires lawyers to represent their clients zealously within the bounds of law and professional ethics. The ability to hold client confidences inviolate in the absence of deliberate attempts to implicate counsel in illegal conduct is critical to the accomplishment of this objective. As the Supreme Court noted in *Upjohn,* "if the purpose of the attorney-client privilege is to be served, the attorney and client must be able to predict with some certainty whether particular discussions will be protected." 449 U.S. at 393. Similarly, where work product protections are uncertain, '"much of what is now put down in writing [will] remain unwritten. . . [and] "'[i]nefficiency, unfairness and sharp practices [will] inevitably develop in the giving of legal advice and in the preparation of cases for trial.'" *Id.* at 398 (quoting *Hickman v. Taylor,* 329 U.S. 495, 511 (1947)). Ultimately, '"[t]he effect on the legal profession [will] be demoralizing. And the interests of the clients and the cause of justice [will] be poorly served.'" *Id.* (quoting 329 U.S. at 511). By empowering prosecutors to deprive corporate decision makers of a real choice whether or not to relinquish attorney-client and work product protections, the waiver language of Application Note 12 inappropriately and unwisely tilts the scales in favor of securing convictions rather than attaining justice.

IV. PROPOSED REVISION OF APPLICATION NOTE 12

In its current form, the waiver language of Application Note 12 sweeps far too broadly. Accordingly, we urge the Commission to amend it. We respectfully propose the following revision:

> Waiver of attorney-client privilege and of work product protections is not a prerequisite to a reduction in culpability score under subdivisions (1) and (2) of subsection (g) unless ~~such waiver is necessary in order to provide timely and thorough disclosure of all pertinent information known to the organization~~ *the government demonstrates with particularity that a defendant has inappropriately attempted to shield specific factual material under a claim of privilege or work product protection and that reasonable efforts to obtain knowledge through alternative means have proved unavailing.*

The working premise of the adversary system is that each side builds its own case. As Justice Jackson wrote in his famous concurrence in *Hickman v. Taylor*, members of a learned profession should not be permitted to perform their functions "on wits borrowed from the adversary." 329 U.S. at 516. The above language safeguards the attorney-client privilege and, unlike the current formulation, strikes a balance between giving prosecutors unconstrained discretion to decide when a waiver is "necessary" and affording entity lawyers *carte blanche* to invoke protections.

In sum, our adversarial system of justice cannot operate fairly without safeguards designed to keep the playing field level. Providing prosecutors with leverage to coerce organizations to surrender attorney-client and work product protections under the guise of facilitating "cooperation" upsets the critical balance. When these protections lose their vitality, justice is unlikely to be done. We therefore respectfully request the Commission to amend the waiver language of Application Note 12 to the Commentary to Section 8C2.5(g) of the Organizational Sentencing Guidelines.

Respectfully submitted,

Sarah Helene Duggin
Associate Professor of Law

Stephen M. Goldman
Distinguished Lecturer in Law

Robert A. Destro
Professor of Law

Lisa G. Lerman
Professor of Law

Marin Scordato
Associate Professor of Law

Members of other law faculties joining in these comments:

David Cummins
Professor of Law Emeritus
Texas Tech University School of Law

Susan Saab Fortney
George H. Mahon Professor of Law
Texas Tech University School of Law

Nickolas J. Kyser
Associate Professor of Law
University of Detroit Mercy
School of Law

Jerry E. Norton
Professor of Law
Loyola University of Chicago School of Law

cc: Pamela O. Barron, Deputy General Counsel, U.S. Sentencing Commission
Paula J. Desio, Deputy General Counsel, U.S. Sentencing Commission
Amy L. Schreiber, Assistant General Counsel, U.S. Sentencing Commission
Michael S. Greco, President, American Bar Association
William Ide, Chair, ABA Presidential Task Force on the Attorney-Client Privilege
Members of the ABA Presidential Task Force on the Attorney-Client Privilege
Members of the Coalition to Preserve the Attorney-Client Privilege

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March 28, 2006

VIA E-MAIL TO pubaffairs@ussc.gov
United States Sentencing Commission
One Columbus Circle, N.E.
Suite 2-500
Washington, D.C. 20002-8002
Attention: Public Affairs

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

Dear Sir or Madam:

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

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

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

Yours truly,

Stephen E. Klausner

STEPHEN E. KLAUSNER
President

Enclosure

SEK/jpc

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

AMERICAN BAR ASSOCIATION

GOVERNMENTAL AFFAIRS OFFICE • 740 FIFTEENTH STREET, NW • WASHINGTON, DC 20005-1022 • (202) 662-1760

STATEMENT OF

DONALD C. KLAWITER

CHAIR OF THE ABA ANTITRUST LAW SECTION

on behalf of

THE AMERICAN BAR ASSOCIATION

appearing before the

UNITED STATES SENTENCING COMMISSION

concerning

PROPOSED AMENDMENT OF COMMENTARY IN SECTION 8C2.5 OF THE

FEDERAL SENTENCING GUIDELINES

REGARDING WAIVER OF ATTORNEY-CLIENT PRIVILEGE

AND WORK PRODUCT DOCTRINE

NOVEMBER 15, 2005

Mr. Chairman and Members of the Commission:

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

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

On August 15, 2005, the ABA filed a formal comment letter[2] with the Commission in response to its Notice of Proposed Priorities for the amendment cycle ending May 1, 2006.[3] In that comment letter, the ABA urged the Commission to retain its tentative policy priority number (5), described in the Notice as a "review, and possible amendment, of commentary in Chapter Eight (Organizations) regarding waiver of the attorney-client privilege and work product protections." The ABA also urged the Commission, at the end of its review, to amend the applicable language in the Commentary to clarify that waiver of attorney-client privilege and work product protections

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[1] *See* the United States Sentencing Commission's Notice of Final Priorities for the 2005-2006 amendment cycle, policy priority number (6), 70 Fed. Reg. 51398 (August 30, 2005).
[2] The ABA's August 15 comment letter to the Commission is available at: http://www.abanet.org/buslaw/attorneyclient/materials/049/049.pdf.
[3] 70 Fed. Reg. 37145 (June 28, 2005).

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

The ABA has long supported the use of the Sentencing Guidelines as an important part of our criminal justice system. In particular, our established ABA policy, which is reflected in the Criminal Justice Standards on Sentencing (3d ed.), supports an individualized sentencing system that guides, yet encourages, judicial discretion while advancing the goals of parity, certainty and proportionality in sentencing. Such a system need not, and should not, inhibit judges' ability to exercise their informed discretion in particular cases to ensure satisfaction of these goals.

In February 2005, the ABA House of Delegates met and reexamined the overall Sentencing Guidelines system in light of the recent Supreme Court decision in *United States v. Booker* and *United States v. Fanfan*. At the conclusion of that process, the ABA adopted a new policy recommending that Congress take no immediate legislative action regarding the overall Sentencing Guidelines system, and that it not rush to any judgments regarding the new advisory system until it is able to ascertain that broad legislation is both necessary and likely to be beneficial.

Although the ABA opposes broad changes to the Federal Sentencing Guidelines at the present time, we have serious concerns regarding several specific amendments to the Sentencing Guidelines that took effect on November 1, 2004. These amendments, which the Commission submitted to Congress on April 30, 2004, apply to that section of the Sentencing Guidelines relating to "organizations"—a broad term that includes corporations, partnerships, unions, non-profit organizations, governments, and other entities. While the ABA has serious concerns regarding

several of these recent amendments[4], our greatest concern involves a change in the Commentary to Section 8C2.5 that authorizes and encourages the government to require entities to waive their attorney-client and work product protections in order to show "thorough" cooperation with the government and thereby qualify for a reduction in the culpability score—and a more lenient sentence—under the Sentencing Guidelines (the "privilege waiver amendment"). Prior to the change, the Commentary was silent on the issue and contained no suggestion that such a waiver would ever be required.

Since the adoption of the privilege waiver amendment to the Sentencing Guidelines, the ABA—working with a large and diverse group of business and legal organizations from across the political spectrum—has evaluated the substantive and practical impact that ever-increasing demands for privilege waiver have had on the business and legal communities. For example, the National Association of Criminal Defense Lawyers and the Association of Corporate Counsel each recently conducted surveys[5] of in-house and outside counsel to determine the extent to which attorney-client and work product protections have been eroded in the corporate context. In addition, the American Bar Association's Task Force on Attorney-Client Privilege is examining various issues involving erosion of attorney-client and work product protections, including the privilege waiver amendment, and has held several public hearings on these subjects[6]. As a result, the ABA has concluded that the

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[4] In August 2004, the ABA House of Delegates adopted a resolution supporting five specific changes to the then-proposed amendments to the Federal Sentencing Guidelines for Organizations, including amending the Commentary to Section 8C2.5 to state affirmatively that waiver of attorney-client and work product protections "should not be a factor in determining whether a sentencing reduction is warranted for cooperation with the government." Subsequently, on August 9, 2005, the ABA adopted a resolution, sponsored by the ABA Task Force on Attorney-Client Privilege, supporting the preservation of the attorney-client privilege and work product doctrine, opposing governmental actions that erode these protections, and opposing the routine practice by government officials of seeking the waiver of these protections through the granting or denial of any benefit or advantage. Both ABA resolutions, and the related background reports, are available at http://www.abanet.org/poladv/acprivilege.htm.

[5] Executive summaries of these surveys are available online at www.nacdl.org/public.nsf/Legislation/Overcriminalization002/$FILE/AC_Survey.pdf and www.acca.com/Surveys/attyclient.pdf, respectively.

[6] Materials relating to the work of the ABA Task Force on Attorney-Client Privilege are available on its website at www.abanet.org/buslaw/attorneyclient/.

new privilege waiver amendment, though undoubtedly well intentioned, will bring about a number of profoundly negative consequences.

First, the ABA believes that as a result of the privilege waiver amendment, companies and other organizations will be required to waive their attorney-client and work product protections on a routine basis. The Commentary to Section 8C2.5 states that "waiver of attorney-client privilege and of work product protections is not a prerequisite to a reduction in culpability score [for cooperation with the government]...unless such waiver is necessary in order to provide timely and thorough disclosure of all pertinent information known to the organization." But the exception is likely to swallow the rule. Prosecutors will make routine requests for waivers, and organizations will be forced routinely to grant them, because, among other things, there is no obvious mechanism for challenging the government's assertion that waiver is "necessary."

The Justice Department has followed a general policy of requiring companies to waive privileges in many cases as a sign of cooperation since the 1999 "Holder Memorandum" and the 2003 "Thompson Memorandum." Anecdotal evidence abounds where companies have been asked to turn over internal investigation reports and waive both attorney-client privilege and work product protection in cooperating with the government, even though "on the record" examples, by the very nature of the process, are hard to come by. Companies are reluctant to speak publicly about their experiences for good reason. They deal with the agencies that regulate them on a routine basis, and it is generally in a company's best interest to stay on good terms with those agencies. Companies also guard their public image and are reticent to reveal unnecessarily the existence or details of governmental investigations into their conduct. Where companies *can* come forward with their experiences, the routine nature of the government's practice is clear. For example, we recently learned that some fifty general counsel met with Paul McNulty of the Justice Department regarding

abuses of the privilege. The former General Counsel of a now defunct steel company was one of them, and his story follows.

When Bethlehem Steel was still in existence, a disgruntled former employee told authorities that the company was burying toxic waste at one of its sites in Texas. Fifty federal agents arrived at the company with a search warrant and backhoes and started digging up the yard. No buried drums were ever found, but, in the course of the search, the investigators found evidence of garden variety environmental violations that, in most circumstances, likely would have been pursued as civil violations. Perhaps understandably, the Justice Department did not want to drop the matter altogether, and decided to pursue a criminal investigation.

At their very first meeting with the General Counsel, the Justice Department demanded the privileged internal report prepared by outside counsel and sought cooperation from the company in pursuing charges against individual employees. No middle ground alternative was entertained. Firmly believing that no knowing or intentional violation had occurred, the General Counsel declined the request, and the company prepared its defenses. In the end, the Justice Department did not charge a single individual; the company negotiated a plea and paid a fine.

The Bethlehem Steel example demonstrates that the Justice Department prosecutors—operating under an increasingly expansive interpretation of the Holder and Thompson Memoranda—will seek internal investigation reports and privilege waivers even in cases that arguably never should have been prosecuted. Now that the privilege waiver amendment to the Sentencing Guidelines has become effective, there may be no limit on the Justice Department's ability to put pressure on companies to waive their privileges in almost all cases. Our concern is that the Justice Department, as well as other enforcement agencies, will contend that this change in the Commentary to the Guidelines provides Commission and Congressional ratification of the Department's policy of routinely requiring privilege waivers. From a practical standpoint,

companies will have no choice but to waive these privileges whenever the government demands it, because the government's threat to label them as "uncooperative" in combating corporate crime would profoundly threaten their public image, stock price, and credit worthiness.

Second, the ABA believes that the privilege waiver amendment seriously weakens the attorney-client privilege between companies and their lawyers, resulting in great harm both to companies and the investing public. Lawyers for companies and other organizations play a key role in helping these entities and their officials to comply with the law and to act in the entity's best interests. To fulfill this role, lawyers must enjoy the trust and confidence of managers, boards and other key personnel of the entity and must be provided with all relevant information necessary to properly represent the entity. By encouraging routine government demands for waiver of attorney-client and work product protections, the amendment discourages personnel within companies and other organizations from consulting—or being completely candid—with their lawyers. This, in turn, seriously impedes the lawyers' ability to counsel compliance with the law effectively.

Third, while the privilege waiver amendment was intended in good faith to aid government prosecution of corporate criminals, the ABA believes that its actual effect is to make detection of corporate misconduct more difficult, by undermining companies' internal compliance programs and procedures. These mechanisms, which often include internal investigations conducted by the company's in-house or outside lawyers, are one of the most effective and efficient tools for detecting and flushing out improper conduct. Indeed, Congress recognized the value of these compliance tools when it enacted the Sarbanes-Oxley Act. Because the effectiveness of these internal investigations depends in large part on the ability of the individuals with knowledge to speak candidly and confidentially with the lawyer conducting the investigation, any uncertainty as to whether attorney-client and work product privileges will be honored makes it more difficult for companies to detect and remedy wrongdoing early or even stop improper conduct before it takes

place. Therefore, rather than promoting good compliance practices, the privilege waiver amendment undermines this laudable goal.

Fourth, the ABA believes that the privilege waiver amendment unfairly harms employees. The amendment places the employees of a company or other organization in a very difficult position when their employers ask them to cooperate in an investigation. They can cooperate and run the risk that statements made to the company's or organization's lawyers will be turned over to the government by the entity, or they can decline to cooperate and risk their employment. In the ABA's view, it is fundamentally unfair to force employees to choose between keeping their jobs and preserving their legal rights.

In recent months, many other organizations have expressed similar concerns regarding the privilege waiver amendment to the Sentencing Guidelines. These concerns were formally brought to the Commission's attention on March 3, 2005—and again on August 15, 2005—when an informal coalition of numerous prominent business, legal and public policy organizations[7] submitted joint comment letters urging the Commission to reverse or modify the privilege waiver amendment. The remarkable political and philosophical diversity of that coalition, with members ranging from the U.S. Chamber of Commerce and the National Association of Manufacturers to the American Civil Liberties Union and the National Association of Criminal Defense Lawyers, shows just how widespread these concerns have become in the business, legal and public policy communities.

The ABA shares these concerns and believes that the privilege waiver amendment is

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[7] The signatories to the March 3, 2005 letter to the Commission were the American Chemistry Council, American Civil Liberties Union, Association of Corporate Counsel, Business Civil Liberties, Inc., Business Roundtable, Frontiers of Freedom, National Association of Manufacturers, U.S. Chamber of Commerce, and Washington Legal Foundation. The ABA also expressed similar concerns to the Commission in its separate letter dated May 17, 2005. The coalition's August 15, 2005 comment letter was signed by the same groups that signed the March 3 letter, as well as the Financial Services Roundtable, National Association of Criminal Defense Lawyers, National Defense Industrial Association and Retail Industry Leaders Association. The coalition's August 15, 2005 comment letter is available online at: http://www.abanet.org/buslaw/attorneyclient/materials/047/047.pdf.

counterproductive and undermines, rather than enhances, compliance with the law as well as the many other societal benefits that are advanced by the confidential attorney-client relationship. Because of the serious and immediate nature of this harm, we urge the Commission during its 2005-2006 amendment cycle to modify the applicable language in the Commentary to clarify that the waiver of attorney-client privilege and work product protections should not be a factor in determining whether a sentencing reduction under the Guidelines is warranted for cooperation with the government.

To accomplish this, we recommend that the Commission (1) add language to the Commentary clarifying that cooperation only requires the disclosure of "all pertinent non-privileged information known to the organization", (2) delete the existing Commentary language "unless such waiver is necessary in order to provide timely and thorough disclosure of all pertinent information known to the organization", and (3) make the other minor wording changes in the Commentary outlined below. If the ABA's recommendations were adopted, the relevant portion of the Commentary would read as follows[8]:

> "12. To qualify for a reduction under subsection (g)(1) or (g)(2), cooperation must be both timely and thorough. To be timely, the cooperation must begin essentially at the same time as the organization is officially notified of a criminal investigation. To be thorough, the cooperation should include the disclosure of all pertinent non-privileged information known by the organization. A prime test of whether the organization has disclosed all pertinent non-privileged information is whether the information is sufficient for law enforcement personnel to identify the nature and extent of the offense and the individual(s) responsible for the criminal conduct. However, the cooperation to be measured is the cooperation of the organization itself, not the cooperation of individuals within the organization. If, because of the lack of cooperation of particular individual(s), neither the organization nor law enforcement personnel are able to identify the culpable individual(s) within the organization despite the organization's efforts to cooperate fully, the organization may still be given credit for full cooperation. *Waiver of attorney-client privilege and of work product protections is not* a factor in determining whether ~~*a prerequisite to*~~ *a reduction in culpability score under subdivisions (1) and (2) of subsection (g)* *is warranted* ~~*unless such waiver is necessary in order to provide timely and thorough disclosure of all pertinent information known to the organization*~~."

[8] Note: The Commission's November 1, 2004 amendments on the privilege waiver issue are shown in italics. Our suggested additions are underscored and our suggested deletions are noted by strikethroughs.

We appreciate the opportunity to appear before the Commission and present our views on the important issue of privilege waiver, and we look forward to working with you and your staff on this matter throughout the current amendment cycle.

March 28, 2006

Kenneth R. Meade

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

Re: Comments of the Corporate Environmental Enforcement Council
Chapter Eight Privilege Waiver
United States Sentencing Commission Notice of Proposed Amendments and
Request for Public Comment

Dear Docket Clerk:

On behalf of the Corporate Environmental Enforcement Council ("CEEC"), an organization of 29 major corporations that focuses exclusively on civil and criminal environmental enforcement issues, we appreciate the opportunity to submit these comments to the United States Sentencing Commission ("the Commission") regarding the Commission's proposed amendments to the United States Sentencing Guidelines ("the Guidelines") and request for public comment (71 Fed.Reg. 4782 (Jan. 27, 2006)), and specifically topic B.12, the Chapter Eight Privilege Waiver.

CEEC has worked extensively on all aspects of environmental enforcement, and has previously submitted comments to the Commission and to the Advisory Group on Organizational Guidelines and met with members and staff to address issues of concern, including specifically issues relating to Chapter Eight, the Organizational Sentencing Guidelines. CEEC has also worked on environmental enforcement issues closely with the United States Environmental Protection Agency, the United States Department of Justice, and state environmental agencies and enforcement officials.

CEEC's members have been at the forefront of the development and implementation of innovative environmental management systems and self-assessment by the regulated community over the past decade. CEEC's members have long recognized the substantial benefits that are realized when effective voluntary compliance programs are put in place – benefits including improved environmental performance, reduced risk to human health and the environment, and higher compliance levels.

To that end, while CEEC has supported the inclusion of provisions in the Organizational Guidelines recognizing the importance of such a voluntary program to prevent and detect criminal conduct, we have consistently expressed our concern with respect to provisions that could weaken or undermine the incentives for and effectiveness of such voluntary compliance programs. CEEC is concerned that the sentence that was added to the commentary at §8C2.5(g)

with respect to the waiver of attorney-client privilege and work product protections is such a provision, and we urge the Commission to delete this sentence from the commentary and replace it with a statement that waiver of this privilege and protection is not to be considered in assessing the degree to which a company cooperates in a government investigation.

As set forth in the Federal Register Notice announcing the proposed amendments to the Guidelines and requesting comment on specific issues, the Commission has been asked to reconsider the commentary at §8C2.5(g) that was added as part of the Commission's 2004 amendments to Chapter Eight. The sentence at issue involves the potential decrease in the culpability score if a defendant organization has "self-reported, cooperated with the authorities, and accepted responsibility," and specifically the issue of whether waiver of attorney-client privilege and of work product protections is a prerequisite to such a decrease.

The commentary as amended provides that such waiver is not a prerequisite "unless such waiver is necessary in order to provide timely and thorough disclosure of all pertinent information known to the organization." USSG, §8C2.5(g), comment. (n.12) (Nov. 2005). The issue of whether this language is having or could have "unintended but deleterious effects" has been raised in numerous requests to modify or remove this language that have been submitted to the Commission since the effective date of the amendments, and in testimony offered to the Commission at its public meeting in November, 2005. 71 Fed. Reg. 4803-04. As a result, the Commission is seeking comment on whether the commentary language is having unintended consequences and whether it should be deleted or amended to address these consequences.

As an initial matter, it is our experience that organizations look to Chapter 8, and specifically Section 8B2, for guidance as to what the government believes constitutes an effective compliance program. It is critical to recognize that most companies do not look for this guidance in the context of evaluating potential decreases in the culpability score in an ongoing governmental investigation or prosecution; rather, as companies set up internal compliance programs, including programs involving compliance with environmental laws and regulations, they look to a broad array of sources for information, and Chapter 8 of the Guidelines serves as one of the more important resources. It is also worth noting the stated goal of the Chapter 8B2 guideline: "the requirements set forth in this guideline are intended to achieve reasonable prevention and detection of criminal conduct for which the organization would be vicariously liable." USSG, §8B2.1, comment. (backg'd).

Internal environmental compliance programs are much more sophisticated and developed than they were in 1991, when Chapter 8 was added to the Guidelines. These compliance programs rely in large part on the free flow of information between corporate officials, including corporate counsel, compliance managers, environmental health and safety professionals, and employees whose day to day jobs involve, in some part, compliance with environmental laws. They also include various types of "reporting up" provisions, both formal/written and informal/oral.

It is the experience of CEEC member companies that many of the individuals in the environmental compliance chain are cognizant of the fact that they will, at some point, be reporting directly to legal counsel, whether within the corporation or outside counsel. It has also been a widely held belief that these types of communications fall within the well-established attorney-client relationship, and are protected in the same manner as an individual's communications with his or her lawyer. This is critical, as the free flow of information is the lynchpin of these internal compliance programs.

Conversely, the free flow of communications can be adversely affected if the person communicating the information believes, correctly or incorrectly, that the information will not be protected. While the Commission included language in the Reason for Amendment (Supplement to Appendix C (Amendment 673)) regarding its expectation that the government would require such waivers "on a limited basis," the adverse impact on the free flow of information is felt whether or not that expectation is correct.[1]

From the perspective of a company employee that is reporting on an environmental compliance issue to legal counsel, he or she must assume that the government may require that the company waive the attorney-client privilege and/or work product protection that applies to that communication in the context of a governmental investigation. Further, it is our experience that the employee would also likely believe that a company from whom such a waiver is requested would presumably agree to waive the protections, in its own self-interest. This is especially true as the issue of waiver arises in the context of evaluating whether the company is "cooperating" with an government investigation – refusing a request/demand to waive would almost ensure a negative finding on cooperation.

As a result, while the Commission may expect that the government will not require a waiver as a matter of course, in fact that is exactly what an employee (such as an environmental compliance manager) would expect. In that situation, those who report up the environmental compliance chain may rightly view legal counsel conducting an investigation as simply as a potential conduit for enforcement sensitive material to be channeled to the government. The effect is that such persons may be discouraged from making full disclosure to legal counsel. As a result, the environmental management systems and self-assessment/compliance programs suffer, as the success of those systems depends on full and frank assessment and reporting of environmental compliance issues.

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[1] Although we do not address the issue in these comments, we cite with approval two statements presented to the Commission at its November 15, 2005 Public Meeting: the Statement of Tina S. Van Dam, National Association of Manufacturers, on behalf of The American Chemistry Council, The Association of Corporate Counsel, and The National Association of Manufacturers, and the Statement of Donald C. Klawiter on behalf of the American Bar Association, with respect to surveys conducted by the Association of Corporate Counsel and the National Association of Criminal Defense Lawyers that indicate that in practice the government's practice of seeking or demanding a waiver is not, in fact, limited, and citing to a specific example where Justice Department prosecutors have demanded privileged materials in the context of an environmental investigation.
http://www.ussc.gov/corp/11_15_05/VanDam-ACC-NAM.pdf; http://www.ussc.gov/corp/11_15_05/Klawiter-ABA.pdf.

CEEC submits that this result is unacceptable at all levels. If this language in the Guidelines causes environmental self-assessment/compliance systems to break down due to an unwillingness on the part of employees to engage in full and frank assessment and disclosure, this section of the Guidelines is not only not achieving its intended result (promoting existence of a program that prevents and detects criminal conduct), it is in fact defeating it. Likewise, from a company's perspective the goal of promoting environmental compliance and promptly identifying and correcting noncompliance is defeated if the person responsible for detecting and reporting such noncompliance is disincentivized from doing so for fear that the company could be forced to waive the attorney-client privilege and disclose the information to the government.

CEEC does not believe that the Commission intended this result when it adopted the subject commentary. Despite the lack of intent, we believe that these unintended consequences are occurring, and that the Commission must affirmatively act to address the situation. In order to reverse course, CEEC urges the Commission to delete the commentary at issue and replace it with a statement that waiver of attorney-client privilege and/or work product protection is not to be considered by the government when evaluating whether a company in question is "cooperating" with a government investigation for purposes of Section 8C2.5(g) of the Guidelines.

CEEC appreciates the opportunity to submit these comments to the Commission, and looks forward to continuing to work with the Commission on issues relating to the Guidelines. Please do not hesitate to call me if you have any questions with respect to these comments or would like any additional information.

Sincerely yours,

Kenneth R. Meade
Counsel, Corporate Environmental Enforcement Council

cc: Steve Hellem, Exec. Dir.
Corporate Environmental Enforcement Council

Christine P. Richards
Executive Vice President
General Counsel and Secretary
Member of the Executive Committee

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VIA FEDEX EXPRESS

March 27, 2006

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

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

Dear Sir or Madam:

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

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

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

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

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

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

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

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

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

Sincerely yours,

FedEx Corporation

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March 27, 2006

United States Sentencing Commission
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Suite 2-500
Washington, D.C. 20002-8002

RE: Review and Possible Amendment of
Application Note 12 to Guidelines Section 8C2.5(g)

Dear Chairman Hinojosa and Members of the Commission:

As Chairs of the Federal Criminal Procedure and Attorney-Client Relations Committees of the American College of Trial Lawyers (the "College"), we write on behalf of the College, and with the approval of its Executive Committee, to provide its views on the waiver language contained in the present version of Application Note 12 to Section 8C2.5.[1] We appreciate the Commission's willingness to receive public comment on this important issue.

As currently formulated, the Application Note reads in pertinent part:

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

---

1 The American College of Trial Lawyers, founded in 1950, is an association of the trial bar from the United States and Canada. Fellowship in the College is extended by invitation only, after careful investigation, to those experienced trial lawyers who have mastered the art of advocacy and whose professional careers have been marked by the highest standards of ethical conduct, professionalism, civility and collegiality. There are currently more than 5,500 Fellows who practice throughout the United States and Canada; fellowship is limited to a maximum of 1% of the total lawyer population of any state or province. Fellows are carefully selected from among those who represent plaintiffs and those who represent defendants in civil cases, and those who prosecute and those who defend persons accused of crime. The College is thus able to speak with a balanced voice on important issues affecting the administration of justice. The College strives to improve and elevate the standards of trial practice, the administration of justice and the ethics of the trial profession.

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The College recommends that the Commission amend the Application Note to make clear that waiver of the attorney-client privilege and the work product doctrine (collectively, the "Privilege") should not be taken into account in determining an organization's Culpability Score under §8C2.5. Rather, whether an organization has "fully cooperated in the investigation" for purposes of subsection (g)(1) or (g)(2) should be determined by whether the organization has made timely disclosure of all pertinent *non-privileged* information known to it. The final sentence of the Application Note, as currently written, unfortunately creates an exception that swallows the rule, and also requires sentencing judges to make unnecessarily difficult hindsight determinations about whether a particular defendant organization that has provided all pertinent non-privileged information to the government should also have waived the Privilege.

This recommendation flows directly from the College's long-standing concern that developments in the conduct of federal criminal investigations pose substantial threats to the integrity of the Privilege. In 2002, the College published a report titled "The Erosion of the Attorney-Client Privilege and Work Product Doctrine in Federal Criminal Investigations" (the "2002 Report"), a copy of which is attached to this letter at tab A. The 2002 Report addresses threats to the Privilege beyond the sentencing issue presented here. However, the College believes that the Sentencing Commission has an important role to play in safeguarding the Privilege. As an independent agency in the judicial branch, beholden neither to the institutional interests of the Department of Justice nor to the self-interest of corporations potentially subject to investigation, the Commission is uniquely well-situated to take a stand that will promote the effective administration of justice in the long term by protecting Privilege, thereby protecting the important values it serves.

The 2002 Report sets forth at length the many benefits produced by the Privilege — we will not list all of these benefits separately here, but it is worth emphasizing that, especially for corporate clients trying to navigate today's complex legal and regulatory environment, these benefits are tangible and practical, not simply a matter of high-toned rhetoric. Moreover, by encouraging effective compliance and risk management programs, the Privilege benefits not only the corporate clients but society and the legal system as a whole.

However, as set forth at length in the 2002 Report, routine prosecutorial demands for a privilege waiver in order to show "cooperation" with an investigation create a number of systematic

problems that far outweigh whatever public benefit might be gained by the incremental information made available to the prosecution in a particular case. Pressure on a company to waive the Privilege in order to secure lenient treatment from prosecutors can and does easily build to the point where the decision to waive is effectively coerced. Just as importantly, this pressure leads to a "culture of waiver," which systematically undercuts effective representation of companies by both inside and outside counsel even before a request to waive is made, because a privilege known to be of uncertain durability is in effect no privilege at all. Without a reasonable expectation that the Privilege can be and will be maintained in practice, the free flow of information from client to attorney and of advice from attorney to client, which the privilege aims to promote, will simply not take place with the same degree of effectiveness. In particular:

- Awareness by management that any knowledge gained by their lawyers is at risk of disclosure to the government will tend to dissuade management from investigating potential problems in the first place, undercutting early detection of compliance risks.

- Indeed, companies may become reluctant to conduct thorough and comprehensive investigations even when alerted to potential wrongdoing, for fear that with inevitable pressure to waive the Privilege their interests will be compromised in subsequent civil litigation.

- Individual employees and officers may view the company's lawyers as adversaries and de facto agents of the government, and for that reason be less willing to provide information.

- Employees and counsel alike will be loathe to commit important matters to writing but instead will tend to communicate orally, as well as by euphemisms and "nods and winks," in order to avoid creating a paper trail that will be turned over to the government.

Corporate counsel and members of the practicing bar have already observed these phenomena, and have observed the situation growing worse rather than better over the last several years, as documented in the recently-published results of a survey conducted by a broad coalition of groups concerned with this issue, which were presented to the Commission in connection with the testimony of Susan Hackett at the March 15, 2006 public hearing and are available at http://www.acca.com/Surveys/attyclient2.pdf. In the aggregate, the

"culture of waiver" risks crippling the ability of counsel and management to work together to prevent wrongful behavior by corporate employees and/or mitigate its consequences.

For these reasons, treating a waiver of the privilege as potentially relevant evidence of cooperation for purposes of determining an organizational defendant's Culpability Score is highly undesirable. While the current wording attempts to suggest that waiver will be relevant only in exceptional cases, we respectfully submit that that is not how it will inevitably work in practice. Under §8C2.5(g), whether the defendant "fully cooperated with the investigation" is an all-or-nothing determination. Cooperation that is deemed after the fact to have been less than "full" will have no positive impact whatsoever on the defendant's Culpability Score. A company setting out at the beginning of an investigation to cooperate fully will find it almost impossible under the current wording to gain sufficient comfort that a decision to maintain, rather than waive, the Privilege will not be held against it for sentencing purposes. It will always be possible in hindsight for the court (perhaps pressed by the prosecutor) to decide that waiver was "necessary in order to provide timely and thorough disclosure of all pertinent information known to the organization" because it would have presumably led to the disclosure of additional information. Indeed, the present wording suggests that waiver will be "necessary" in the ordinary case, unless 100% of the information the organization has learned in a privileged capacity is not "pertinent." Thus, declining to waive the Privilege at the outset of the investigation will raise a very real risk that no credit will be received for otherwise full cooperation, including timely and thorough disclosure of all non-privileged pertinent information known to the organization.

This is not just a problem with the wording of the Application Note as it now reads. In this area, any approach that says, in effect, that waiver is not necessary except under the extremely broad and undefined terms of the current formulation will ensure that the exception swallows the rule. There will always be enough uncertainty at the time the decision to maintain the Privilege or to waive it must be made that the failure to waive will seem unacceptably risky. This also may mean in some instances that the decision to cooperate may appear unacceptably risky. That is, if the company decides that it is not willing to waive but cannot be comfortable that it will derive any benefit from cooperation absent a waiver, it will not have a sufficient incentive to make timely and thorough disclosure to the investigators of the non-privileged information it may know, and may instead wish to take its chances on

the prosecution being unable to make a case without the company's cooperation.

Moreover, deciding in hindsight whether an organization that has provided timely and thorough cooperation in all respects except for a privilege waiver should be deemed to have "fully cooperated" is not a task most sentencing judges will find palatable. It requires speculation as to how much greater a benefit to the investigation might have been provided by a waiver. Indeed, since the issue will only come up when the company has maintained the Privilege, the court will be unable to determine precisely what additional benefit a waiver might have provided unless the company were to waive the Privilege in connection with the sentencing proceeding.

Finally, treating waiver as relevant to full cooperation for sentencing purposes also sends a negative message about the legitimacy of the Privilege and the interests it protects. It is appropriate to treat an organization that cooperates with an investigation more leniently than one that does not cooperate, because cooperation can fairly be said to mitigate culpability. But there is nothing culpable about maintaining the confidentiality of privileged information, and neither the Commission nor individual judges making sentencing determinations should be seen to suggest that there is. For purposes of determining "Culpability Score," an organization that maintains its right to safeguard the Privilege should not be deemed more culpable than one that is willing to succumb to pressure to waive that right.

The most practical way to avoid these problems is to amend the Application Note to make clear that waiver of the Privilege is not required nor even relevant to the determination of whether an organization has "fully cooperated" under §8C2.5(g), and that timely and thorough disclosure of all non-privileged pertinent information is what is required. The College believes that the proposed alternative language submitted to the Commission by the American Bar Association at the Commission's November 15, 2005 meeting would satisfactorily accomplish these goals.

We note that the Commission has requested comments only on the relevance of privilege waiver to determining Culpability Score under §8C2.5(g). A question might arise as to whether, under unusual circumstances outside the "heartland" of the Guidelines, a Privilege waiver might be relevant to an organizational defendant's eligibility for a downward departure from the range of sanctions determined pursuant to

the Guidelines (including the determination of Culpability Score). That, however, is a separate question not presently before the Commission, and we accordingly do not address that issue.

Again, we appreciate the Commission's willingness to consider public comment on this issue, and we hope the College's submission will assist the Commission in its important work of promoting justice under the law.

Respectfully submitted,

Elizabeth K. Ainslie (by WGM)

Elizabeth K. Ainslie
Chair,
Federal Criminal Procedure Committee

William McGuinness

William G. McGuinness
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cc: Michael A. Cooper, Esq. (w/o encl.)
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American College of Trial Lawyers

THE EROSION OF THE ATTORNEY-CLIENT PRIVILEGE AND WORK PRODUCT DOCTRINE IN FEDERAL CRIMINAL INVESTIGATIONS

Approved by the Board of Regents
March, 2002

American College of Trial Lawyers

The American College of Trial Lawyers, founded in 1950, is composed of the best of the trial bar from the United States and Canada. Fellowship in the College is extended by invitation only, after careful investigation, to those experienced trial lawyers who have mastered the art of advocacy and those whose professional careers have been marked by the highest standards of ethical conduct, professionalism, civility and collegiality. Lawyers must have a minimum of 15 years' experience before they can be considered for Fellowship. Membership in the College cannot exceed 1% of the total lawyer population of any state or province. Fellows are carefully selected from among those who represent plaintiffs and those who represent defendants in civil cases; those who prosecute and those who defend persons accused of crime. The College is thus able to speak with a balanced voice on important issues affecting the administration of justice. The College strives to improve and elevate the standards of trial practice, the administration of justice and the ethics of the trial profession.

◆ ◆ ◆

"In this select circle, we find pleasure and charm in the illustrious company of our contemporaries and take the keenest delight in exalting our friendships."

—Hon. Emil Gumpert,
Chancellor-Founder, ACTL

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COMMITTEE ON ATTORNEY-CLIENT RELATIONSHIPS

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THE EROSION OF THE ATTORNEY-CLIENT PRIVILEGE AND WORK PRODUCT DOCTRINE IN FEDERAL CRIMINAL INVESTIGATIONS

SUMMARY

The American College of Trial Lawyers (the "College") expresses its concern in this Report that the attorney-client privilege and work product doctrine are being eroded in federal criminal investigations and prosecutions in a way inimical to the fair administration of justice. We believe that the attorney-client privilege and the work product doctrine are essential to the adversary process and the criminal justice system, and request that the federal government review and modify its policies to ensure that these historic privileges are preserved.

I. INTRODUCTION

Federal prosecutors increasingly rely on counsel for the defense to build the government's case by insisting that the individual or corporate defendant waive the attorney-client privilege and turn over both client-lawyer communications and the work product of the lawyer. This provides prosecutors at the outset of an investigation with information defense counsel has obtained from their client, as well as with defense counsel's factual and legal analysis. In previous years, federal prosecutors were more likely to rely primarily on their own investigation of the facts and seek a waiver of the attorney-client privilege only rarely and then in very limited circumstances.

Today, federal prosecutors are able to obtain waivers of the attorney-client privilege and work product protections both by threatening to prosecute and by seeking more serious charges or sanctions if such cooperation is not provided. After the government has selected the crimes to be charged and obtained a conviction, courts must impose the sentence for that level crime prescribed by the Federal Sentencing Guidelines. As a result, prosecutors are able to exert a great measure of control over both the charging and sentencing process, thus requiring that defense counsel take into account the often harsh effect of the Sentencing Guidelines before responding to a federal prosecutor's request for a waiver of the attorney-client privilege or work product protections.

In seeking a waiver of the attorney-client or work product privilege, the government's demands change the very nature of the criminal justice system as well as the adversary process. These demands, which erode the attorney-client privilege and the work product doctrine, commonly include not only waiver of these protections, but also disclosure of corporate internal investigations by counsel, discouragement of payment by the corporation for counsel for individual employees whom the government prosecutor believes are culpable, and requests that information regarding the nature of the government's investigation not be relayed to other suspects through joint defense agreements. This government approach has been likened to the sound of "a requiem marking the death of privilege in corporate criminal investigations."[1]

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[1] David M. Zornow & Keith D. Krakaur, *On the Brink of a Brave New World: The Death of Privilege in Corporate Criminal Investigations*, 37 AM. CRIM. L. REV. 147, 147 (2000).

Inherent in this approach is that the prosecutor's initial view of the case must be accepted as fact and not be opposed by counsel for the individual or the corporation; to do so is to act at the client's peril. And this approach has recently become more widespread, if not universal, by embodiment in the United States Department of Justice ("Justice Department") standards for the federal prosecution of corporations.[2] Initially circulated as an internal memorandum by then-Deputy Attorney General Eric Holder in June of 1999, these standards are applied to individuals as well as corporations.[3]

The Holder Memo Standards encourage federal prosecutors to seek waivers of the attorney-client and work product privilege. They state that, when weighing whether the corporation has sufficiently cooperated in the investigation phase so as to not be charged with a crime, the prosecutor may consider whether the corporation has identified culprits, turned over its internal investigation and waived the attorney-client and work product protections. The Holder Memo Standards provide:

> In gauging the extent of the corporation's cooperation, the prosecutor may consider the corporation's willingness to identify the culprits within the corporation, including senior executives, to make witnesses available, to disclose the complete results of its internal investigation, and to waive the attorney-client and work product privileges.[4]

The Holder Memo Standards do emphasize that such a waiver is not an absolute requirement, but merely one factor the government should consider in evaluating the corporation's cooperation.[5] For example, the Holder Memo Standards note that:

> This waiver should ordinarily be limited to the factual internal investigation and any contemporaneous advice given to the corporation concerning the conduct at issue. Except in unusual circumstances, prosecutors should not seek a waiver with respect to communications and work product related to advice concerning the government's criminal investigation.[6]

Yet, it is difficult to see or to make this distinction, which is, in any event, left to the sole discretion of the prosecutor.

The Holder Memo Standards also suggest that providing counsel for corporate officers, directors or employees[7] and entering into joint defense agreements may indicate a corporation's

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[2] U.S. Attorneys' Manual, tit. 9, Criminal Resource Manual, art. 162, *Federal Prosecutions of Corporations* (2000), *available at* http://www.usdoj.gov/usao/eousa/foia_reading_room/usam/title9/crm00162.htm, [hereinafter "Criminal Resource Manual"]; *see also* Jonathan D. Polkes & Renee L. Jarusinsky, *Waiver of Corporate Privileges in a Government Investigation: Reaction to the New DOJ Policy*, White Collar Crime 2001 J-31, J-31 to J-33 (ABA 2001).

[3] *See generally* Memorandum from Eric Holder, Jr., Deputy Attorney General, to All Heads of Department Components and U.S. Attorneys (June 16, 1999) (including attachment entitled "Federal Prosecution of Corporations"), *reprinted in* Criminal Resource Manual, arts. 161, 162, *available at* http://www.usdoj.gov/usao/eousa/foia_reading_room/usam/title9/crm00100.htm. The attachment to the Holder Memo will be hereinafter referred to as the "Holder Memo Standards."

[4] Criminal Resource Manual, art. 162, § VI.A.

[5] *Id.* § VI.B.

[6] *Id.* § VI.B n.2.

[7] The Holder Memo Standards do recognize in a footnote that "[s]ome states require corporations to pay the legal fees of officers under investigation prior to a formal determination of their guilt. Obviously, a corporation's compliance with governing law should not be considered a failure to cooperate." *Id.* § VI.B n.3.

lack of cooperation; *i.e.*, the company that engages in these practices is more likely to be indicted than the company that avoids them. Indeed, the Holder Memo Standards provide:

> Another factor to be weighed by the prosecutor is whether the corporation appears to be protecting its culpable employees and agents. Thus, while cases will differ depending on the circumstances, a corporation's promise of support to culpable employees and agents, either through the advancing of attorneys fees, through retaining the employees without sanction for their misconduct, or through providing information to the employees about the government's investigation pursuant to a joint defense agreement, may be considered by the prosecutor in weighing the extent and value of a corporation's cooperation.[8]

In addition to the policies expressed in the Holder Memo Standards, the federal government has further undermined the attorney-client privilege and work product doctrine by increasingly attacking the existence of these protections in *ex parte* proceedings, asserting that the crime-fraud exception vitiates any privilege.[9] In these situations, the defendant or person under investigation has no opportunity to be heard and the government need make only a *prima facie* showing. As a result, courts often adopt the government's view of the available facts and defense counsel may be required to testify against his or her client on short notice if the court finds that the crime-fraud exception applies.

The College is concerned that these government policies undermine and erode the attorney-client privilege and work product doctrine to an alarming extent and change the balance in the adversary system from one in which opposite points of view may be pursued by opposing counsel to a system in which the federal prosecutor's view can be challenged only at great peril, thereby reducing the ability of defense counsel in a criminal investigation to provide effective assistance to his or her client.[10]

II. The Attorney-Client Privilege And The Work Product Doctrine

A. Origin and Purpose of the Attorney-Client Privilege

The Federal Rules of Evidence have adopted the attorney-client privilege as it existed at common law. Rule 501 states that "the privilege of a witness . . . shall be governed by the

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[8] *Id.* § VI.B (footnote omitted).

[9] Under this exception, a client who seeks assistance from counsel for the purpose of committing a crime or fraud is not entitled to the protections of confidentiality. Indeed, "[t]he privilege ends when the client seeks to involve the attorney in wrongdoing." David J. Fried, *Too High A Price for Truth: The Exception to the Attorney-Client Privilege for Contemplated Crimes and Frauds*, 64 N.C. L. Rev. 443, 443-44 (1986) (tracing the history of the exception, discussing its rationale, and reviewing its expansion).

[10] In addition to the concerns expressed in this Report, the College also notes that it recently submitted comments to the Bureau of Prisons, the Attorney General and the Senate Judiciary Committee, regarding the interim rule and amendments to the Code of Federal Regulations that became effective on October 30, 2001, and that authorize the monitoring and recording of communications and meetings between inmates and counsel. *See generally* Letter from Stuart D. Shanor, President, American College of Trial Lawyers, to Rules Unit, Office of General Counsel, Bureau of Prisons, (Dec. 21, 2001) (on file with the College). These comments stated that, despite the College's support of our government's ongoing efforts to eliminate terrorism, the monitoring authorized in the amendments:

> [W]ill have a chilling effect, inhibit the free exchange between defendant and lawyer and is therefore (i) a threat to the effective assistance of counsel at a time when a defendant who is being held for trial has a constitutional right to competent and effective counsel and (ii) an unwarranted intrusion on the attorney-client privilege of both individuals awaiting trial and of unindicted detainees.

The College refers to these comments for a complete statement of the College's views on the monitoring issue.

principles of the common law as they may be interpreted by the courts of the United States in the light of reason and experience."[11] As recognized by Wigmore in his comprehensive and oft-cited work setting forth the history of the attorney-client privilege, this privilege is "the oldest of the privileges for confidential communications."[12]

The earliest reported cases recognizing the privilege date as far back as the early part of the reign of Elizabeth I.[13] The attorney-client privilege is likely not reported prior to this era because the testimony of witnesses and defendants was not a common source of proof at trial and, in general, testimonial compulsion had not been previously authorized.[14]

Although modern federal courts tend to apply the attorney-client privilege narrowly, the elements for establishing the privilege reflect the basic contours of the privilege since its establishment in England. In the seminal case of *United States v. United Shoe Machinery Corp.*, Judge Wyzanski first pronounced that the privilege applies if:

> (1) the asserted holder of the privilege is or sought to become a client; (2) the person to whom the communication was made (a) is a member of the bar of a court, or his subordinate and (b) in connection with this communication is acting as a lawyer; (3) the communication relates to a fact of which the attorney was informed (a) by his client (b) without the presence of strangers (c) for the purpose of securing primarily either (i) an opinion on law or (ii) legal services or (iii) assistance in some legal proceeding, and not (d) for the purpose of committing a crime or tort; and (4) the privilege has been (a) claimed and (b) not waived by the client.[15]

The *United Shoe* rule essentially remains the prevailing law as it relates to the attorney-client privilege when applied by federal courts.[16]

Thus, for centuries in English and American law, the attorney-client privilege has been firmly grounded in the recognition that legal consultation serves the public interest.[17] Federal

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[11] FED. R. EVID. 501; *see also Upjohn Co. v. United States*, 449 U.S. 383, 389 (1981) (citing this rule with approval).

[12] 8 JOHN HENRY WIGMORE, EVIDENCE IN TRIALS AT COMMON LAW § 2290, at 542 (McNaughton Rev. 1961) [hereinafter "WIGMORE"]; *see also Upjohn*, 449 U.S. at 389; WIGMORE, *supra*, at 542 n.1 (citing, for example, *Berd v. Lovelace*, Cary 88, 21 Eng. Rep. 33 (Ch. 1577), and *Dennis v. Codrington*, Cary 143, 21 Eng. Rep. 53 (Ch. 1580)).

[13] WIGMORE, *supra* note 12, § 2290, at 542 n.1 (collecting cases from the late 1500s to the 1600s and indicating that the privilege first appeared as unquestioned in these cases); *see also* 1 CHARLES TILFORD MCCORMICK, MCCORMICK ON EVIDENCE § 87, at 343-44 (John William Strong ed., 5th ed. 1999) [hereinafter "MCCORMICK ON EVIDENCE"].

[14] WIGMORE, *supra* note 12, § 2290, at 542-43 (noting that the privilege "appears to have commended itself at the very outset as a natural exception to the then novel right of testimonial compulsion").

[15] 89 F. Supp. 357, 358-59 (D. Mass. 1950); *see also* John E. Sexton, *A Post-*Upjohn *Consideration of the Corporate Attorney-Client Privilege*, 57 N.Y.U. L. REV. 443, 449 (1982) (indicating that the *United Shoe* court was the first federal court to discuss the corporate attorney-client privilege at length); Zornow & Krakaur, *supra* note 1, at 149 n.9 (indicating that the *United Shoe* rule is one of the most inclusive recitations of the elements of the attorney-client privilege).

[16] *See, e.g.*, *In re Grand Jury Subpoena*, 204 F.3d 516, 520 n.1 (4th Cir. 2000); *Montgomery County v. Microvote Corp.*, 175 F.3d 296, 301 (3d Cir. 1999); *In re Fed. Grand Jury Proceedings 89-10(MIA)*, 938 F.2d 1578, 1581 (11th Cir. 1991); *In re Sealed Case*, 737 F.2d 94, 98-99 (D.C. Cir. 1984); *Diversified Indus., Inc. v. Meredith*, 572 F.2d 596, 601-02 (8th Cir. 1977). The only part of *United Shoe* that has been called into question is the application of the rule to patent matters. *See, e.g.*, *Am. Standard v. Pfizer Inc.*, 828 F.2d 734, 745-46 (Fed. Cir. 1987); *Woods v. N.J. Dep't of Educ.*, 858 F. Supp. 51, 54 (D.N.J. 1993).

[17] *See, e.g.*, WIGMORE, *supra* note 12, § 2291, at 545-49 (quoting decisions from the 1700s and 1800s that expound on the importance of the privilege).

common law in the United States has long embraced this justification,[18] in both a criminal and civil law context. Indeed, the application of the privilege to criminal as well as to civil cases has been largely unquestioned.[19] Moreover, the privilege is generally considered absolute unless waived by the client.[20] As such, today, the "attorney-client privilege may well be the pivotal element of the modern American lawyer's professional functions."[21]

B. Origin and Purpose of the Work Product Doctrine

The work product doctrine, like the attorney-client privilege, derives from common law origins. As a leading commentator has explained:

> The natural jealousy of the lawyer for the privacy of his file, and the courts' desire to protect the effectiveness of the lawyer's work as the manager of litigation, have found expression, not only as we have seen in the evidential privilege for confidential lawyer-client communications, but in rules and practices about the various forms of pretrial discovery. Thus, under the chancery practice of discovery, the adversary was not required to disclose, apart from his own testimony, the evidence which he would use, or the names of the witnesses he would call in support of his own case. The same restriction has often been embodied in, or read into, the statutory discovery systems.[22]

At common law, the privilege was much broader than its modern day analog: a document in the hands of the attorney, even if it did not come into existence as a communication to

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[18] *See, e.g.*, *Hatton v. Robinson*, 31 Mass. (14 Pick.) 416, 422 (1833) ("[S]o numerous and complex are the laws . . . , so important is it that [citizens] should be permitted to avail themselves of the superior skill and learning of those who are sanctioned by the law as its ministers and expounders, . . . that the law has considered it the wisest policy to encourage and sanction this confidence [between client and attorney], by requiring that on such facts the mouth of the attorney shall be for ever sealed."); *see also Upjohn Co. v. United States*, 449 U.S. 383, 389 (1981) (explaining that the privilege encourages "full and frank communication between attorneys and their clients and thereby promote[s] broader public interests in the observance of law and administration of justice" and acknowledging that the "rationale for the privilege has long been recognized by the [Supreme] Court"); *Hunt v. Blackburn*, 128 U.S. 464, 470 (1888) (stating that the privilege is necessary "in the interest and administration of justice").

[19] *See, e.g.*, *Swidler & Berlin v. United States*, 524 U.S. 399, 408-09 (1998) (rejecting any effort to apply the attorney-client privilege differently in criminal cases); *Schwimmer v. United States*, 232 F.2d 855, 863-66 (8th Cir. 1956) (assuming without discussion that the attorney-client privilege applied in a criminal case); *Gunther v. United States*, 230 F.2d 222, 223-24 (D.C. Cir. 1956) (per curiam) (same).

[20] *See, e.g.*, *Westinghouse Elec. Corp. v. Republic of Philippines*, 951 F.2d. 1414, 1429 (3d Cir. 1991) (indicating that the attorney-client privilege affords "absolute protection" and discussing waiver standards).

[21] Geoffrey C. Hazard, Jr., *An Historical Perspective on the Attorney-Client Privilege*, 66 Cal. L. Rev. 1061, 1061 (1978) (stating that the privilege "is considered indispensable to the lawyer's function as advocate on the theory that the advocate can adequately prepare a case only if the client is free to disclose everything," and that a "legal counselor can properly advise the client what to do only if the client is free to make full disclosure").

In fact, the Justice Department itself recognizes the value and usefulness of the attorney-client privilege with respect to its representation of federal employees. In the Justice Department's codified statement of policy, it states that:

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

28 C.F.R. § 50.15(a)(3) (2000).

[22] McCormick's Handbook of the Law of Evidence 201-02 (Edward W. Cleary ed., 2d ed. 1972) (footnotes omitted); *see also In re Grand Jury Proceedings*, 473 F.2d 840, 844 (8th Cir. 1973).

the attorney, would have been exempt from production.[23] The modern work product doctrine is more narrowly tailored and traces back to the Supreme Court's decision of more than half a century ago in *Hickman v. Taylor*.[24] As articulated by the Court, the work product doctrine is distinct from and broader than the attorney-client privilege: "[W]ritten statements, private memoranda and personal recollections prepared or formed by an [attorney] in the course of his legal duties," and with an eye toward litigation, are not discoverable, as "[d]iscovery was hardly intended to enable a learned profession to perform its functions . . . on wits borrowed from the adversary."[25] The work product doctrine, however, unlike the attorney-client privilege, is not absolute, and can be overcome if a party seeking discovery shows that "relevant and non-privileged facts remain hidden in an attorney's file and where production of those facts is essential to the preparation of one's case."[26]

The Court in *Hickman* explained that the doctrine serves both a public and a private purpose. With respect to the former, the work product doctrine directly promotes the adversary system by enabling attorneys to prepare their cases without fear that their work product will be used against their clients.[27] At the same time, it also serves a private purpose by affording an attorney "a certain degree of privacy" so as to discourage "unfairness" and "sharp practices."[28] These same policies remain vital today. The rule first pronounced in *Hickman* has been codified in Federal Rule of Criminal Procedure 16(a)(2), (b)(2) and in Federal Rule of Civil Procedure 26(b)(3).

In contrast to the attorney-client privilege, which may be asserted only by the client, either the attorney or the client usually may invoke the work product doctrine.[29] Courts have recognized that "the interests of attorneys and those of their clients may not always be the same. To the extent that the interests do not conflict, attorneys should be entitled to claim [work product] privilege even if their clients have relinquished their claims."[30] The ability of the lawyer to claim the privilege has been broadly construed by the courts. For example, the Court of Appeals for the District of Columbia has held that a lawyer had the right to assert the privilege for work product materials even where the attorney was consulted in furtherance of the client's fraud, at least to the extent that the lawyer was unaware of the fraud.[31]

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[23] *See* WIGMORE, *supra* note 12, § 2318, at 620-21 & n.3 (collecting extensive list of cases from nineteenth century English courts).

[24] 329 U.S. 495 (1947). In *Hickman*, the Supreme Court dealt with two forms of work product: written statements from witnesses interviewed by defense counsel and the contents of oral interviews with witnesses, some of which had been summarized in memoranda prepared by the defense lawyers. The court reasoned that the protection for the latter category, often referred to as "opinion" product, exceeded that of the former. *Id.* at 512-13.

[25] *Id.* at 510 (Murphy, J.), 516 (Jackson, J., concurring).

[26] *Id.* at 511.

[27] *Id.* at 510-11.

[28] *Id.*

[29] *See, e.g., In re Sealed Case*, 676 F.2d 793, 809 n.56 (D.C. Cir. 1982) (indicating that work product privilege belongs to the lawyer as well as the client); *In re Grand Jury Proceeding (Duffy)*, 473 F.2d 840, 848 (8th Cir. 1973) (allowing an attorney to invoke the doctrine).

[30] *In re Sealed Case*, 676 F.2d at 809 n.56 (citing *In re Grand Jury Proceedings (FMC Corp.)*, 604 F.2d 798, 801 (3d Cir. 1979)). The Supreme Court has identified several interrelated interests that the work product doctrine seeks to protect, ranging from a client's interest in obtaining sound legal advice to the interests attorneys have in protecting their own intellectual product. *Id.* (discussing *Hickman*, 329 U.S. at 511).

[31] *Id.* at 812 & n.75 (citing *FMC Corp.*, 604 F.2d at 801 n.4, 802 n.5).

C. The Joint Defense Privilege

The joint defense privilege, first recognized in *Chahoon v. Commonwealth*,[32] enables multiple parties to share information protected by the attorney-client privilege without waiving the privilege, where the parties "have common interests in defending against a pending or anticipated proceeding."[33] This privilege, however, is not an independent privilege; it is only an extension of the attorney-client privilege and acts as an exception to the general rule that the privilege is waived when privileged information is shared with a third party.[34]

Accordingly, courts have generally recognized that this privilege, also known as the "common interest rule," protects "the confidentiality of communications passing from one party to the attorney for another party where a joint defense effort or strategy has been decided upon and undertaken by the parties and their respective counsel."[35]

D. Balancing the Unavailability of Evidence Against Need for the Privilege

The attorney-client privilege and the work product doctrine frequently operate to deny powerful evidence to the opposition, *i.e.*, the defendant's very own statement of the case against him. Our courts, however, have consistently found that "[t]he systemic benefits of the privilege are commonly understood to outweigh the harm caused by excluding critical evidence."[36] Federal courts have supported the need for these protections on public policy grounds and have repeatedly recognized that the attorney-client privilege advances the administration of justice, as a "'public good transcending the normally predominant principle of utilizing all rational means for ascertaining truth.'"[37] As the Court of Appeals for the Ninth Circuit has stated, "[t]his valuable social service of counseling clients and bringing them into compliance with the law cannot be performed effectively if clients are scared to tell their lawyers what they are doing, for fear that their lawyers will be turned into government informants."[38] In similar terms, the Supreme Court has observed that the work product doctrine serves "the cause of justice" by preventing "[i]nefficiency, unfairness and sharp practices."[39]

Any perceived harm to the fact-finding process attributable to the attorney-client privilege and work product doctrine may be exaggerated because, without these protections, clients

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32 62 Va. (21 Gratt.) 822 (1871).

33 John F. Savarese & Carol Miller, *Protecting Privilege and Dealing Fairly with Employees While Conducting an Internal Investigation*, 1178 PLI/Corp 665, 719 (2000); *see also* Michael J. Chepiga, *Federal Attorney-Client Privilege and Work Product Doctrine*, 653 PLI/Lit 519, 589 (2001); Deborah Stavile Bartel, *Reconceptualizing the Joint Defense Doctrine*, 65 Fordham L. Rev. 871, 871-72 (1996).

34 *See United States v. Schwimmer*, 892 F.2d 237, 243 (2d Cir. 1989); *Waller v. Fin. Corp. of Am.*, 828 F.2d 579, 583 n.7 (9th Cir. 1987).

35 *Schwimmer*, 892 F.2d at 243; *see also United States v. Bicoastal Corp.*, No. 92-CR-261, 1992 WL 693384, at *5 (N.D.N.Y. Sept. 28, 1992) ("[D]efendants with common interests in multi-defendant actions are entitled to share information protected by the attorney-client privilege without danger that the privilege will be waived by disclosure to a third person.").

36 *Swidler & Berlin v. United States*, 524 U.S. 399, 412 (1998) (O'Connor, J., dissenting); *see also Sampson Fire Sales, Inc. v. Oaks*, 201 F.R.D. 351, 356 (M.D. Pa. 2001).

37 *Trammel v. United States*, 445 U.S. 40, 50 (1980) (quoting *Elkins v. United States*, 364 U.S. 206, 234 (1960) (Frankfurter, J., dissenting)); *see also Jaffee v. Redmond*, 518 U.S. 1, 9 (1996).

38 *United States v. Chen*, 99 F.3d 1495, 1500 (9th Cir. 1996).

39 *Hickman v. Taylor*, 329 U.S. 495, 511 (1947); *see also United States v. Noble*, 422 U.S. 225, 236-38 (1975).

may well choose not to disclose sensitive information to their attorneys, and lawyers may not commit their thoughts and analysis to paper in the first instance.[40]

E. The Privilege and Corporations

It is well established that the attorney-client privilege and work product doctrine may be asserted by corporations, as well as by natural persons.[41] The attorney-client privilege protects confidential communications between the attorney and anyone within the corporate structure – directors, officers, as well as middle and lower-level employees – whose duties relate to the issues upon which the attorney is asked to provide legal assistance and who has information that the attorney would need to render adequate legal advice.[42] The Supreme Court has expressly rejected the argument that the privilege should cover only those in the corporate control group (*i.e.,* the directors and officers of the corporation), because such a view ignores the fact that "the privilege exists to protect not only the giving of professional advice to those who can act on it but also the giving of information to the lawyer to enable him to give sound and informed advice."[43]

F. Special Need for the Corporate Attorney-Client and Work Product Privilege

A corporation faced with evidence or allegations of illegal behavior will generally conduct an internal investigation to determine the scope of wrongdoing and the extent of its potential liability. Typically, the corporation will retain outside counsel who will interview employees, prepare notes of interviews, review documents (privileged and otherwise), create a chronology of events, and write client memos. Counsel may also prepare a written report of such an inquiry including conclusions and recommendations, but this is not always the case. To accomplish these tasks, the investigating attorney must induce cooperation from numerous employees who, for various reasons, may not wish to cooperate. In a properly conducted investigation, the employees are informed at the outset that communications with counsel for the corporation are not privileged as to the employee; that is, the company lawyer is not the employee's lawyer, and the corporation is free to disclose such communications without the consent of the employee.[44] Nonetheless, corporate employees and officers are generally more willing to cooperate where they receive a measure of assurance that their conversations with counsel will not be divulged to government investigators or prosecutors.[45] An internal investigation would be far less useful, and its demoralizing effect on employees would be far greater, if the investigator's sole means of inducing cooperation was the threat of discipline or termination of employment, and not the protection of confidentiality.[46]

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[40] *See, e.g., Hickman*, 329 U.S. at 511 (noting that were privileged materials open to the opposition on demand, "much of what is now put down in writing would remain unwritten").

[41] *See Upjohn Co. v. United States*, 449 U.S. 383, 390-95 (1981) (allowing a corporation to invoke the privilege).

[42] *See id.* at 391-92.

[43] *Id.* at 390.

[44] Despite this caution, many employees as a practical matter consider the corporation's lawyers to be their lawyers and are otherwise hesitant for job security reasons not to answer their questions.

[45] Judson W. Starr and Joshua N. Schopf, *Cooperating with the Government's Investigation: The New Dilemma*, SE72 ALI-ABA 353, 360-61 (2000).

[46] *Id.* at 361.

In short, by facilitating internal investigations, the corporate attorney-client privilege and work product doctrine advance the administration of justice by enabling the corporation to gather the information necessary to understand the relevant issues, to receive competent legal advice, to identify culpable employees, to determine its own liability, to change existing or institute new compliance programs, and, finally, to fully cooperate with the government. It is important to note that information and documents may be provided to the government to assist it in conducting its investigation and to others without divulging such specific privileged communications.

III. Review Of The Government Encroachment On The Attorney-Client Privilege And Work Product Doctrine

A. Waiver of the Attorney-Client and Work Product Privilege

When a corporation has learned – whether through receipt of a grand jury subpoena, self-reporting by employees, or internal monitoring under a corporate compliance program – that its employees may have acted illegally and an internal investigation has begun, the corporation generally expects that communications with its lawyers and their investigators and documents produced at their request will be protected by the attorney-client privilege and/or the work product doctrine. Unfortunately, in light of the recent practices and policy statements by the Justice Department, particularly those set forth in the Holder Memo Standards, this assumption is no longer tenable.

The Justice Department's policy, as expressed in the Holder Memo Standards, is to obtain waivers of the corporate attorney-client and work product privilege where, in the government's view, these protections might keep information relevant to a criminal investigation from discovery. Indeed, there is no pretense that the values underlying these privileges are to be sacrificed for any reason other than to make the prosecution's job easier: "Such waivers permit the government to obtain statements of possible witnesses, subjects, and targets, without having to negotiate individual cooperation or immunity agreements."[47] The obvious alternative not widely favored by government prosecutors is to conduct a factual investigation by taking statements and obtaining documents from a corporation and its employers, yet without insisting on also obtaining privileged statements made to counsel and attorney work product. It is not inconsistent with preserving the attorney-client privilege and work product protections for a company to provide information and documents to aid the government, since the privilege goes to the specific communication with the client and not necessarily to the information and documents obtained during the course of an internal investigation.

The Holder Memo Standards, now incorporated into the United States Attorneys' Manual's Criminal Resource Manual, provide a blueprint for maximizing the government's leverage to induce waivers of the corporate attorney-client privilege and work product doctrine. For example, one source of leverage arises from the possibility that the prosecutor may enter into a non-prosecution agreement with a corporate target. The Criminal Resource Manual authorizes prosecutors to offer not to indict a corporation where its "timely cooperation appears to be necessary to the public interest and other means of obtaining the desired cooperation are unavailable or would not be effective."[48] And in determining whether a non-prosecu-

[47] Criminal Resource Manual, art. 162, § VI.B.

[48] *Id.* (internal quotation omitted).