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Before the U.S. Sentencing Commission Public Meeting Regarding
Chapter Eight Waiver of Attorney-Client Privilege & Work Product Protections
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Good afternoon Chairman Hinojosa and members of the Commission, and thank you for the opportunity to appear before you today to discuss the commentary in Chapter Eight regarding waiver of attorney-client privilege and work product protection and its role in determining cooperation. I commend the Commission for reexamining this issue barely one year after that commentary took effect. I know how much time and effort the Commission has invested in its review of Chapter Eight, and I can imagine you may feel some frustration in being implored to reconsider this aspect of those changes. Let me assure you that this is a vitally important question and that you are doing the right thing by asking again what the best answer is.

As you know, I was one of nine former Attorneys General, Deputy Attorneys General and Solicitors General, from both Republican and Democratic administrations, who signed a letter to you this summer urging you to undertake this review. It is never a simple matter to enlist endorsements like this, particularly in the summer, on short notice. And yet it was not difficult at all to secure those nine signatures, because we all feel so strongly about the fundamental role the attorney-client privilege and work product protections play in our system of justice. We feel just as strongly that the recent change in Chapter Eight regarding waiver of those protections threatens to seriously undermine them. Simply put, there is a significant question about whether the attorney-client privilege still exists for organizations. I won't repeat here what we said in our letter about the adverse consequences flowing from that fact. But I will explain why I think the

new Commentary exacerbates an already dismal situation, and what the Commission can do to begin turning things around.

Obviously, you all heard – well, all but Commissioner Howell – conflicting testimony two years ago about how commonly waiver requests are now being made by federal prosecutors. It is admittedly difficult to say with confidence how much more common such requests have become in the last year, as prosecutors are not required to report such requests to the Commission. Indeed, I'm not sure that such reporting would be feasible, given the informality and ambiguity associated with most waiver requests. I know you will hear from another speaker this afternoon about a survey conducted earlier this year of both in-house and outside counsel that is fairly eye-opening in its indication of how far the utility of the privilege has fallen in their view.

But I can provide some perspective from my colleagues at a major law firm, one with a significant white collar criminal defense practice. My partners generally report that they now encounter waiver requests in virtually every organizational criminal case in which they are involved. In their experience, waiver has become a standard expectation of federal prosecutors. Others with whom I've spoken in the white collar defense bar tell me the same thing.

I can offer several reasons why it is reasonable to attribute this state of affairs, at least in part, to the recent change in the Organizational Guidelines. The first is based on the language of the new commentary itself. That language provides that 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."[1] Clearly, any time a lawyer conducts any sort of investigation of a potential crime, that lawyer is bound to

[1] § 8C2.5, comment 12.

acquire some amount of "pertinent" information, almost by definition. And the government is now entitled to have "all" of it. Under these circumstances, a prosecutor may well be disinclined to rest on the assurances of an organization that it had provided him or her with the pertinent facts, unless and until the organization provided "all" such information. The prosecutor may want to make that judgment him or herself, and may insist on getting all pertinent attorney work to ensure that he or she had received "all" pertinent information.

Another reason was expressed succinctly by United States Attorney Mary Beth Buchanan, from my hometown of Pittsburgh, Pennsylvania, in her Wake Forest Law Review article last year, in which she asserted that "the Department's consideration of waiver is based squarely on the definition of cooperation set forth in the Organizational Sentencing Guidelines."[2] Now that federal prosecutors' attitudes and practices regarding waiver have in effect been codified by the Guidelines, prosecutors no doubt feel authorized to maintain them without misgiving, and to pay little heed to protestations from their targets that waiver should not be necessary in a given case.

A third reason is what has quickly become known as the "McCallum memo." In his memorandum of October 21, the Acting Deputy Attorney General confirmed the vitality of the Thompson memo and endorsed the practice of seeking waivers as part of "the prosecutorial discretion necessary . . . to seek timely, complete, and accurate information from business organizations."[3] Importantly, while this memorandum requires Assistant Attorneys General and U.S. Attorneys to establish written waiver

[2] Mary Beth Buchanan, "Organizational Sentencing: Federal Guidelines and the Benefits of Programs to Prevent and Detect Violations of Law," 39 WAKE FOREST L. REV. 587, 589 (Fall 2004).
[3] "Waiver of Corporate Attorney-Client and Work Product Protection," memorandum from Robert D. McCallum, Jr. to Heads of Department Components and U.S. Attorneys (Oct. 21, 2005).

review processes, it does not require any sort of consistency among them. These processes can, it seems, say whatever they like. Given that this memo is clearly a response to the ABA's resolution from this past August expressing opposition to routine waiver requests, the memo strikes a rather defiant tone that can only embolden prosecutors.

As you know, I served as a federal prosecutor for many years, and I supervised other federal prosecutors in my capacities as U.S. Attorney, Assistant Attorney General in charge of the Criminal Division and Attorney General. Throughout those years, requests to organizations we were investigating to hand over privileged information never came to my attention. Clearly, in order to be deemed cooperative, an organization under investigation must provide the government with all relevant factual information in its possession. But in doing so, it should not have to reveal privileged communications or attorney work product. That limitation is necessary to maintain the primacy of these protections in our system of justice. It is a fair limitation on prosecutors, who have extraordinary powers to gather information for themselves. This balance is one I found workable in my years of federal service, and it should be restored.

Accordingly, I would urge the Commission to revise the commentary sentence regarding waiver to provide affirmatively that waiver is not a factor to be considered in assessing cooperation.

A final observation before I conclude. As I noted at the outset, the Commission proceeded very deliberately and thoroughly in reviewing Chapter Eight, creating an Advisory Group, holding lengthy public meetings, and seeking comment at multiple junctures. And yet the waiver portion of the amendments has generated a relative

firestorm of controversy. With all due respect, I think what this demonstrates is that, even with the degree of outreach you conducted, the significance of this provision – indeed, even the fact of its consideration – simply did not penetrate beyond the Beltway and the relatively small community of white collar defense lawyers. It is clear, however, that as the American bar has become aware of this provision, they have risen up, spontaneously, in strong and impassioned defense of the attorney-client privilege and work product protection. This is not something that Washington lobby groups have orchestrated. While it is unfortunate that the message did not travel farther at the time, I hope that you will appreciate this broad and sincere expression of concern for what it is, and will give it due consideration.

Thank you again, and I look forward to your questions.