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December 2, 2005

VIA ELECTRONIC MAIL

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

Re: Priority Issue for 2005-2006 Amendment Cycle Regarding Waiver of
the Attorney-Client Privilege and Work Product Protections

Dear Judge Hinojosa:

On behalf of the American Bar Association (ABA) and its more than 400,000 members, thank you very much for inviting us to participate in the Commission's November 15, 2005 public meeting concerning proposed amendments to the Commentary language in Section 8C2.5 of the Federal Sentencing Guidelines.

As our representative, Donald Klawiter, explained at the public meeting, the ABA—like the informal coalition¹ of thirteen business and legal organizations with which we have been coordinating our efforts—supports the Commission's decision to reexamine this Commentary language during the 2005-2006 amendment cycle. Specifically, the ABA urges the Commission to modify the applicable language in the Commentary to clarify that waiver of attorney-client privilege and work product protections should not be a factor in determining whether there has been full cooperation with the government.

¹ The informal coalition is comprised of thirteen organizations that signed the August 15, 2005 comment letter to the Commission regarding the 2004 privilege waiver amendment to the Sentencing Guidelines. The individual entities from the coalition that were invited to appear at the November 15, 2005 public meeting were the American Chemistry Council, American Civil Liberties Union, Association of Corporate Counsel, National Association of Criminal Defense Lawyers, National Association of Manufacturers and U.S. Chamber of Commerce. In addition, the ABA, which is not a formal member of the coalition, also appeared at the November 15 event, as did former Attorney General Dick Thornburgh. The ABA's August 15, 2005 comment letter to the Commission is available at http://www.abanet.org/poladv/acpriv_abacletteraug15-05.pdf and the coalition's August 15, 2005 comment letter is available at http://www.abanet.org/poladv/acpriv_coalitionletter8-15.pdf. Links to these and all other documents referenced in today's letter are also available at <http://www.abanet.org/poladv/acprivilege.htm>.

During the November 15 public meeting, several commissioners and an *ex officio* member requested that the ABA and the various coalition representatives provide the Commission with additional information and data regarding the frequency with which governmental agencies have been requesting that companies waive their attorney-client and work product protections during investigations and settlement discussions. In addition, several commissioners asked for data regarding whether the rate of such requests for waiver has increased significantly in recent years. In response to these requests, the ABA and several of the organizations within the coalition—including the Association of Corporate Counsel (ACC) and the National Association of Criminal Defense Lawyers (NACDL)—are preparing new surveys on these issues. Once we have received responses to these surveys and organized the data, we will provide that information to the Commission as soon as possible, hopefully by mid to late December.

In the meantime, we would like to bring to the Commission's attention various concerns about privilege waiver that came to light during the November 16, 2005 conference on this subject at which you spoke. The half-day conference, titled "Erosion of the Attorney-Client Privilege: What Does the Future Hold?" was sponsored by the U.S. Chamber of Commerce, the ABA, the ACC, the NACDL, and the American Civil Liberties Union (ACLU) and was attended by over 100 lawyers and other legal professionals. We very much appreciated your willingness to attend and address the conference, and your remarks contributed significantly to the discourse.

In addition to your speech regarding the Commission's work on the privilege waiver issue, we were honored to hear from two prominent congressional leaders at the November 16 conference: Sen. Arlen Specter (R-PA), Chairman of the Senate Judiciary Committee, and Rep. James Sensenbrenner (R-WI), Chairman of the House Judiciary Committee. As noted in more detail below, both leaders expressed their strong support for the attorney-client privilege and their concerns regarding increasing governmental demands for waiver of the privilege.

In response to a question from an ABA representative regarding the recent amendment to the Commentary for Section 8C2.5 of the Guidelines, Chairman Specter made the following remarks:²

...I don't believe that there ought to be any coerced waiver of the attorney-client privilege. The attorney-client privilege is established for very, very important reasons: to guarantee a free flow of information from the client to the attorney so the attorney knows exactly what's going on and can give the best possible advice...If the Department of Justice wants to prosecute a company, the Department of Justice has the burden of proof beyond a reasonable doubt in a criminal proceeding and let them proceed...But I wouldn't waive my attorney-client privilege if I were you—under any circumstance. Government has the burden of proof. I used to be a district attorney and that's the way it is and the way it should be...

² A transcript of Sen. Specter's full comments at the November 16, 2005 conference regarding the privilege waiver issue is available online at http://www.abanet.org/poladv/acpriv_transcriptofsenspecter11-16-05.pdf.

Similarly, during his speech at the conference, Chairman Sensenbrenner remarked:³

...Prosecutors must be zealous and vigorous in their efforts to bring corporate actors to justice. However, zeal does not equate with ‘coercion’ beyond that which naturally occurs in a criminal prosecution by fair enforcement of our laws. To me, mandating privilege waivers as a specific condition of cooperation in every circumstance crosses the line of fairness. From my standpoint as Chairman of House Judiciary Committee, this issue requires Committee oversight...[which] must focus on two significant issues...[i.e.,] first, whether Federal prosecutors are requiring waivers of attorney-client and work product privileges as a **condition** for receiving a substantial assistance departure, and ultimately whether corporations are rewarded under the federal sentencing guidelines Section 8C2.5(g) for such cooperation...[and second,] whether the Federal Sentencing Guidelines are drafted in such a manner to require, in practice, privilege waivers in order for corporations to secure the full benefits of cooperation...If such waivers are mandated, or required as a **de facto** policy, that will need to change. It is hard for me to imagine a circumstance in which a waiver should be required to receive the full cooperation benefit, but I do not want to prejudge a careful examination and weighing by the Committee of this important issue...

The concerns that Chairmen Specter and Sensenbrenner expressed regarding waiver of the privilege are consistent with those previously expressed by Rep. Dan Lungren (R-CA), a former California Attorney General who now sits on the House Judiciary Committee. In his August 15, 2005 comment letter to the Commission,⁴ Rep. Lungren expressed serious concerns regarding the 2004 privilege waiver amendment to the Sentencing Guidelines and urged the Commission to modify this language as part of the 2005-2006 amendment cycle. In addition, Rep. Lungren also requested “...your thoughts regarding any additional remedies—legislative or otherwise—that could resolve this problem more promptly.”

Consistent with the general views expressed by Chairmen Specter and Sensenbrenner at the November 16 conference regarding privilege waiver and the more specific concerns regarding the privilege waiver amendment to the Sentencing Guidelines previously raised by Rep. Lungren, we believe that waiver of the attorney-client privilege as a condition for—or as credit towards—cooperation with the government is harmful because it undermines our shared goal of protecting the policies that are advanced by the attorney-client relationship. In our view, last year’s privilege waiver amendment to the Guidelines has strengthened the government’s hand in requesting and requiring waiver to the extent that it is seen as legitimizing the practice that both Chairmen Specter and Sensenbrenner have called coercive.

Contrary to one of the comments made at the Commission’s November 15 meeting, the concerns that have been raised regarding the detrimental effects of governmental demands for privilege waiver do not merely represent a disagreement between the Justice Department and “the defense

³ Rep. Sensenbrenner’s full prepared statement from the November 16, 2005 conference is available online at <http://www.abanet.org/poladv/acprivsensenbrenner11-16-05.pdf>.

⁴ Rep. Lungren’s August 15, 2005 comment letter to the Commission is available online at http://www.abanet.org/poladv/acpriv_replungrencommentletter8-15-05.pdf.

bar.” In fact, these concerns have been raised not just by the ABA—which, as the largest and broadest-based legal association in the nation, represents all segments of the organized bar—but also by representatives of the business community, in-house and outside counsel, the country’s most prominent civil liberties organizations, congressional leaders, and perhaps most remarkable, numerous former senior Justice Department officials, including the former Attorneys General, Deputy Attorneys General, and Solicitors General who submitted their joint comments to the Commission on August 15, 2005.⁵

For all these reasons, the ABA urges the U.S. Sentencing Commission to amend the applicable language in the Commentary to clarify that waiver of attorney-client privilege and work product protections should *not* be a factor in determining whether a sentencing reduction under the Guidelines is warranted.⁶ In our view, such an amendment is a necessary step to preserving the confidential attorney-client relationship in the corporate context and all the many public policy benefits that flow from that relationship.

Thank you again for giving us the opportunity to present our views. If you would like more information regarding the ABA’s positions on these issues, please contact our senior legislative counsel for business law issues, Larson Frisby, at (202) 662-1098.

Sincerely,



Robert D. Evans

cc: Members of the U.S. Sentencing Commission
The Honorable Arlen Specter
The Honorable James Sensenbrenner
The Honorable Dan Lungren
Charles R. Tetzlaff, General Counsel, U.S. Sentencing Commission
Paula Desio, Deputy General Counsel, U.S. Sentencing Commission
Amy L. Schreiber, Assistant General Counsel, U.S. Sentencing Commission

⁵ The former Justice Department officials’ August 15, 2005 comment letter to the Commission is available online at http://www.abanet.org/poladv/acpriv_formerdojofficialstletter8-15-05.pdf.

⁶ The actual amendment language recommended by the ABA and the coalition is included in our August 15, 2005 comment letters to the Commission, available at [http://www.abanet.org/poladv/acpriv_abacletteraug15-05\).pdf](http://www.abanet.org/poladv/acpriv_abacletteraug15-05).pdf) and http://www.abanet.org/poladv/acpriv_coalitionletter8-15.pdf, respectively.