

July 7, 2006

The Honorable Walter L. Lukken
Commissioner
Commodity Futures Trading Commission
1155 21st Street, N.W.
Washington, D.C. 20581

Re: Proposal for Revising U.S. Commodity Futures Trading Commission's
Attorney-Client Privilege and Work Product Doctrine Waiver Policy

Dear Walt:

I enjoyed speaking with you and your legal counsel, Trabue Bland, recently and appreciated the opportunity to express the American Bar Association's support for preserving the attorney-client privilege and work product doctrine and our concerns regarding various government policies that tend to erode these fundamental rights. As the Chair of the ABA Task Force on Attorney-Client Privilege, I was very interested to hear the Commission's perspective on this issue as well.

During our discussions, you noted that the Commission adopted an Enforcement Advisory in August 2004 that identifies various factors that the Commission considers in determining the appropriate level of sanctions to impose or approve in enforcement actions, including the willingness of companies to waive their attorney-client privilege and work product protections. In addition, you invited our Task Force to review the Enforcement Advisory and then provide you with our thoughts.

Enclosed for your consideration is specific proposed language prepared by our Task Force that we believe would help preserve attorney-client privilege and work product protections during investigations without impairing the Commission's ability to gather the information it needs to enforce federal laws. Also enclosed is the most recent ABA Fact Sheet, which summarizes our concerns regarding government waiver policies adopted by the Commission and the Justice Department and the reasons why such policies should be modified. We believe that our proposal, if adopted by the Commission, would strike the proper balance between effective law enforcement and the preservation of essential attorney-client and work product protections, and we urge you and the Commission to consider it.

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Thank you again for your consideration, and if you or your staff have any questions or need additional information, please contact me at (404) 527-4650 or Larson Frisby of the ABA Governmental Affairs Office at (202) 662-1098.

Sincerely,

A handwritten signature in black ink that reads "Bill". The letters are cursive and somewhat stylized.

R. William Ide III
Chair, ABA Task Force on Attorney-Client Privilege

enclosures

cc: Trabue Bland
Legal Counsel
Commodity Futures Trading Commission
1155 21st Street, N.W.
Washington, D.C. 20581
(w/enclosures)

**SUGGESTED REVISIONS TO U.S. COMMODITY FUTURES TRADING
COMMISSION POLICY CONCERNING WAIVER OF CORPORATE ATTORNEY-
CLIENT PRIVILEGE AND WORK PRODUCT PROTECTIONS**

**PREPARED BY THE AMERICAN BAR ASSOCIATION TASK FORCE ON
ATTORNEY-CLIENT PRIVILEGE**

JULY 7, 2006

REVISED ENFORCEMENT ADVISORY

Cooperation Factors in Enforcement Division Sanction Recommendations

This Revised Enforcement Advisory amends and supplements the Commission's policy for determining the appropriate level of sanctions to impose or approve in enforcement actions set forth in the August 11, 2004 Enforcement Advisory titled "Cooperation Factors in Enforcement Division Sanction Recommendations" issued by the Commission's Division of Enforcement (the "2004 Enforcement Advisory").

At the beginning of the 2004 Enforcement Advisory, the Division of Enforcement ("Division") sets forth "three broad categories of cooperation, identifies several factors within each category by which cooperation may be measured, and notes several additional issues that lend weight or perspective to the cooperation factors." One of the broad categories of cooperation outlined in the 2004 Enforcement Advisory is the "Quality of the Company's Efforts in Cooperating with the Division and Managing the Aftermath of the Misconduct." *See* 2004 Enforcement Advisory, p. 2, § II. Within that broad category, three of the factors that were identified for the Division to consider in determining which sanctions to recommend relate to the willingness of the company to waive its attorney-client and/or work product protections with regard to (1) internal investigation reports and other corporate documents, (2) employee testimony, and (3) communications between company representatives and counsel. *See* 2004 Enforcement Advisory, pgs. 2-3, § II.3.a.-b. and § II.4.e.

This Revised Enforcement Advisory amends the 2004 Enforcement Advisory by striking the following portions of § II.3.:

"[3. Did the company willingly:]

- a. waive corporate attorney-client and work product protection for internal investigation reports and other corporate documents?
- b. waive corporate attorney-client privilege for employee testimony?"

In addition, this Revised Enforcement Advisory adds a footnote to previous § II.3.c. [re-labeled as § II.3.a.] clarifying that a company's willingness to make its employees available to the Division as witnesses is not inconsistent with other actions that the company may take in recognition of the employees' rights. As amended, previous § II.3.c. [re-labeled as § II.3.a.] directs the Division to consider the following factor in determining cooperation:

- “3. Did the company willingly:
 - a. make witnesses available in a timely manner?¹”

This Revised Advisory also modifies § II.4. of the 2004 Enforcement Advisory in several respects. In particular, this Revised Advisory strikes the following language in § II.4.e.: “relevant communications between officers, directors and employees and counsel.” In addition, this Revised Advisory amends § II.4. by adding the phrase “in a manner that does not result in a waiver of the attorney-client privilege or work product doctrine”. Therefore, as amended, the beginning of § II.4. reads as follows:

- “4. Did the company outline the findings and relevant evidence regarding the misconduct and produce a full and complete report of the internal investigation to the Division in a manner that does not result in a waiver of the attorney-client privilege or work product doctrine, including full disclosure of the:”

This Revised Advisory also amends the 2004 Enforcement Advisory by adding a new § VI., immediately preceding the first paragraph on page 5, which recognizes the importance of attorney-client privilege and work product protections and the adverse consequences that may occur when attorneys or other staff within the Division seek the waiver of these protections. New § VI. states:

“VI. Respect for the Company’s Attorney-Client Privilege and Work Product Protections

“The Commission recognizes that the attorney-client privilege and the work product doctrine are fundamental to the American legal system and the administration of justice. These rights are no less important for an organizational entity than for an individual. The Commission further recognizes that an attorney may be an effective advocate for a client, and best promote the client’s compliance with the law, only when the client is confident that its communications with counsel are protected from unwanted disclosure and when the attorney can prepare for litigation knowing that materials prepared in anticipation of litigation will be protected from disclosure to the client’s adversaries. *See Upjohn Co. v. United States*, 449 U.S. 383, 392-393 (1981). The Commission further recognizes that seeking waiver of the attorney-client privilege or work-product doctrine in the context of an ongoing Commission investigation

¹ Actions by an entity recognizing the rights of such individuals are not inconsistent with this factor.”

may have adverse consequences for the organizational entity. A waiver might impede communications between the entity's counsel and its employees and unfairly prejudice the entity in private civil litigation or parallel administrative or regulatory proceedings and thereby bring unwarranted harm to its innocent public shareholders and employees. Attorneys and other staff of the Division shall not take any action or assert any position that directly or indirectly demands, requests or encourages an organizational entity or its attorneys to waive its attorney-client privilege or the protections of the work product doctrine. Also, in assessing an entity's cooperation, attorneys and other staff of the Division shall not draw any inference from the entity's preservation of its attorney-client privilege and the protections of the work product doctrine. At the same time, the voluntary decision by an organizational entity to waive the attorney-client privilege and the work product doctrine shall not be considered when assessing whether the entity provided effective cooperation."²

² Notwithstanding the general rule set forth herein, attorneys and other staff of the Division may, after obtaining in advance the approval of the Division Director or his/her designee, seek materials otherwise protected from disclosure by the attorney-client privilege or the work product doctrine if the organization asserts, or indicates that it will assert, an advice of counsel defense with respect to the matters under investigation. Moreover, attorneys and other staff of the Division also may seek materials respecting which there is a final judicial determination that the privilege or doctrine does not apply for any reason, such as the crime/fraud exception or a waiver. In circumstances described in this paragraph, the attorneys and other staff of the Division shall limit their requests for disclosure only to those otherwise protected materials reasonably necessary and which are within the scope of the particular exception.

Federal Government Waiver Policies Threaten the Attorney-Client Privilege

In recent years, a number of federal governmental agencies have adopted policies that weaken the attorney-client privilege and the work product doctrine in the corporate context by encouraging prosecutors and other law enforcement officials to routinely pressure companies and other organizations to waive these protections as a condition for receiving cooperation credit during investigations. Two of the most prominent examples of these waiver policies include the Justice Department's policy as stated in the 1999 "Holder Memorandum" and 2003 "Thompson Memorandum" (the "Thompson/Holder Memoranda") and the Commodity Futures Trading Commission's August 2004 Enforcement Advisory titled "Cooperation Factors in Enforcement Division Sanction Recommendations" (the "2004 Enforcement Advisory").

Both the Justice Department's waiver policy as expressed in the Thompson/Holder Memoranda and the Commodity Futures Trading Commission's waiver policy as expressed in the 2004 Enforcement Advisory should be reversed as soon as possible for the following reasons:

- **These government privilege waiver policies have led to routine waiver of attorney-client privilege and work product protections in most cases.** Although the Justice Department's Thompson/Holder Memoranda and the Commission's 2004 Enforcement Advisory state that waiver is not mandatory and should not be required in every situation, these policies have led many prosecutors and other law enforcement officials to routinely pressure companies and other entities to waive their privileges as a condition for receiving cooperation credit during investigations. From a practical standpoint, companies have no choice but to waive when requested to do so, as the government's threat to label them as "uncooperative" will have a profound effect not just on charging, sentencing and other sanction decisions involving the companies, but on each company's public image, stock price, and credit worthiness as well. The growing trend of government-coerced waiver was confirmed by a recent survey of over 1,200 in-house and outside corporate counsel, available online at <http://www.acca.com/Surveys/attyclient2.pdf>.
- **These waiver policies weaken the attorney-client privilege between companies and their lawyers and undermine companies' internal compliance programs, 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 requiring routine waiver of attorney-client privilege and work product protections, these government policies discourage entities from consulting with their lawyers, thereby impeding the lawyers' ability to effectively counsel compliance with the law, and discourage them from conducting internal investigations designed to quickly detect and remedy misconduct. This harms not only companies, but the investing public as well.
- **These waiver policies also unfairly harm employees by infringing on their individual rights.** By fostering a system of routine waiver, these 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 their privileged statements will be turned over to the government or they can decline to cooperate and risk their employment. It is unfair to force employees to choose between keeping their jobs and preserving their legal rights.
- **In addition to the ABA, many other entities also strongly oppose coerced waiver,** including a broad coalition composed of the following organizations: U.S. Chamber of Commerce, Business Roundtable, National Association of Manufacturers, Association of Corporate Counsel, American Chemistry Council, Financial Services Roundtable, National Defense Industrial Association, Retail Industry Leaders Association, American Civil Liberties Union, Frontiers of Freedom, National Association of Criminal Defense Lawyers, and Washington Legal Foundation. More detailed information regarding the concerns that the ABA, the coalition, and others have expressed to policymakers on the privilege waiver issue is available on the ABA Governmental Affairs Office website at <http://www.abanet.org/poladv/acprivilege.htm> and the ABA Task Force on Attorney-Client Privilege website at <http://www.abanet.org/buslaw/attorneyclient/>.