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February 9, 2005

The Honorable Howard Coble
Chairman
Subcommittee on Crime, Terrorism and Homeland Security
Committee on the Judiciary
U. S. House of Representatives
Washington, D.C. 20515

Re: Hearing on "The Implications of the Booker/Fanfan Decisions for the
Federal Sentencing Guidelines," Scheduled for February 10, 2005

Dear Mr. Chairman:

On behalf of the American Bar Association ("ABA"), I write to express our views concerning the subject of tomorrow's Subcommittee hearing, "The Implications of the Booker/Fanfan Decisions for the Federal Sentencing Guidelines." Although this letter does not address the broader issue of Guidelines reform, we would like to express our concerns regarding a narrow provision, added to the Guidelines last November, that will require companies, associations, and other entities to routinely waive their attorney-client and work product protections as a condition for cooperation with the government. We ask that this letter be included in the official record of the Subcommittee's February 10, 2005 hearing.

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.

Next week, the ABA House of Delegates will be examining 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"), and at the conclusion of that process, the ABA may adopt new recommendations regarding the overall sentencing system. We will provide you with a copy of any new policy once it is adopted.

In the meantime, the ABA continues to have serious concerns regarding several amendments to the Federal Sentencing Guidelines that took effect on November 1, 2004. These amendments, which U.S. Sentencing 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. These organizational guidelines provide the standard by which the criminal penalties for corporate wrongdoing are measured, and they are designed to create incentives for good corporate behavior while increasing penalties for corporations that lack mechanisms for discouraging and detecting employee wrongdoing. Although the ABA has serious concerns regarding several of these recent amendments, most alarming is a change in the Commentary for Section 8C2.5 that authorizes the government to require entities to waive the 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 guidelines. Prior to the change, the Commentary was silent on the issue and contained no suggestion that such a waiver would ever be required.

The ABA believes that the new privilege waiver amendment, though perhaps well intentioned, will have a number of negative unintended consequences, including the likelihood that companies and other organizations will be forced to waive their attorney-client and work product protections on a routine basis. While 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,” the exception is likely to swallow the rule. Now that this amendment has become effective, the Justice Department—which has followed a general policy of requiring companies to waive privileges as a sign of cooperation since the 1999 “Holder Memorandum” and the 2003 “Thompson Memorandum”—is likely to pressure 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 congressional ratification of the Department’s policy of routinely requiring privilege waiver. From a practical standpoint, companies will 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 credit worthiness.

We believe that this recent amendment will seriously weaken 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 the managers and the board and must be provided with all relevant information necessary to properly represent the entity. By requiring routine waiver of the attorney-client and work product privileges, the amendment will discourage entities from consulting with their lawyers, thereby impeding the lawyers’ ability to effectively counsel compliance with the law. This will harm not only companies, but the investing public as well.

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In addition, while the privilege waiver amendment was intended to aid government prosecution of corporate criminals, it is likely 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 tools for detecting and flushing out malfeasance. 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 attempt to require routine waiver of the attorney-client and work product privileges will seriously undermine a system that has worked well.

The ABA also believes that the new privilege waiver amendment will unfairly harm employees. Under the amendment, employees of a company or other organization will be placed 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 by the organization 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.

Over the past several months, many other organizations have expressed similar concerns regarding the new privilege waiver amendment to the Sentencing Guidelines, including the U.S. Chamber of Commerce and the Business Roundtable. In addition, a number of legal organizations have voiced concerns as well, including the Association of Corporate Counsel, the National Association of Criminal Defense Lawyers, and the American Civil Liberties Union.

In sum, the ABA believes that the new privilege waiver amendment is counterproductive and is likely to harm, rather than enhance, compliance with the law. Accordingly, as this Subcommittee and Congress examine the overall Sentencing Guidelines system in the wake of the *Booker/Fanfan* decision, we urge you to address and remedy the problems created by the privilege waiver amendment as soon as possible.

Thank you for considering the views of the ABA. If you would like more information regarding the ABA's positions on these issues, please contact our senior legislative counsel for criminal justice issues, Kevin Driscoll, at (202) 662-1766 or our legislative counsel for business law issues, Larson Frisby, at (202) 662-1098.

Sincerely,



Robert D. Evans

cc: All members of the Subcommittee on Crime, Terrorism and Homeland Security