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Defending Liberty
Pursuing Justice

February 5, 2007

The Honorable Christopher Cox
Chairman
Securities and Exchange Commission
100 F Street, N.E.
Washington, D.C. 20549

Re: Proposal for Revising the Commission's Policy Regarding Requesting Waiver of Attorney-Client Privilege, Work Product, and Employee Legal Protections

Dear Chairman Cox:

On behalf of the American Bar Association and its more than 410,000 members, I write to enlist your help and support in preserving companies' attorney-client privilege, work product, and employee legal rights by establishing certain new Commission policies and practices that would protect these fundamental principles. Towards that end, we urge you to consider modifying the Commission's policy as outlined in the 2001 "Seaboard Report"[1] to prevent the practice of requiring companies and other organizations to waive their attorney-client and work product protections or to take certain punitive actions against their employees as a condition for receiving cooperation credit during investigations. Enclosed is specific proposed language that we believe would accomplish this goal without impairing the Commission's ability to gather the information it needs to enforce federal securities laws.

As you know, the attorney-client privilege enables both individual and organizational clients to communicate with their lawyers in confidence, and it encourages clients to seek out and obtain guidance in how to conform their conduct to the law. The privilege facilitates self-investigation into past conduct to identify shortcomings and remedy problems, to the benefit of corporate institutions, the investing community and society-at-large. The work product doctrine underpins our adversarial justice system and allows attorneys to prepare for litigation without fear that their work product and mental impressions will be revealed to adversaries.

[1] The Commission's Seaboard Report, formally known as the "Report of Investigation Pursuant to Section 21(a) of the Securities Exchange Act of 1934 and Commission Statement on the Relationship of Cooperation to Agency Enforcement Decisions," was issued on October 23, 2001 as Releases 44969 and 1470. A copy of the Seaboard Report is available on the Commission's website at http://www.sec.gov/litigation/investreport/34-44969.htm.

The ABA strongly supports the preservation of the attorney-client privilege and work product doctrine and opposes governmental policies, practices and procedures that have the effect of eroding the privilege or doctrine. In addition, the ABA believes that it is equally important to protect employees' constitutional and other legal rights—including the right to effective counsel and the right against self-incrimination—when a company or other organization is under investigation. Unfortunately, the Commission's Seaboard Report contains language that could contribute to the erosion of these legal protections.

In the Seaboard Report, the Commission set forth the criteria that it will consider in determining whether, and to what extent, companies and other organizations should be granted credit for seeking out, self-reporting, and rectifying illegal conduct and otherwise cooperating with the Commission staff as the Commission decides whether and how to take enforcement action. The Report lists a total of thirteen separate criteria, many of which include multiple sub-factors.

Although many of these criteria outlined in the Seaboard Report are reasonable and appropriate, the ABA has serious concerns regarding the overly broad factors outlined in criteria no. 11—and the related footnote 3—to the extent that they encourage companies to waive their attorney-client privilege, work product, and other legal protections as a sign of full cooperation.[2] In addition, the ABA is concerned that the last sentence in criteria no. 11—which encourages companies to "make all reasonable efforts to secure" their employees' cooperation with Commission staff during investigations—could result in the erosion of employees' constitutional and other legal rights to the extent that companies are asked to not advance the employees' legal fees or to terminate employees unless they agree to waive their Fifth Amendment rights against self-incrimination.[3] These provisions in the Seaboard Report are similar in many ways to, and raise many of the same concerns as, the cooperation standards adopted in recent years by the Department of Justice.[4]

The ABA is concerned that the Commission's privilege waiver and employee rights policies set forth in the Seaboard Report, like the similar policies adopted by the Justice Department, have led to a number of profoundly negative consequences.

First, the ABA believes that the Commission's Seaboard Report has led to the routine compelled waiver of attorney-client privilege and work product protections. Although the Seaboard Report does not explicitly state that waiver is required in every situation, the policy has led many Commission staff, directly or indirectly, to pressure companies to waive their privileges on a regular basis as a condition for receiving cooperation credit during investigations. From a practical standpoint, companies have no choice but to waive when encouraged or requested to do so because the risk of being labeled as "uncooperative" will have a profound effect not just on the Commission's

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[2] *See Seaboard Report* at paragraph 8, criteria no. 11, and footnote 3.

[3] The final sentence of criteria no. 11 asks "Did the company ask its employees to cooperate with our staff and make all reasonable efforts to secure such cooperation." *See id.*

[4] The Justice Department's cooperation standards—outlined in the 1999 "Holder Memorandum," 2003 "Thompson Memorandum," and 2006 "McNulty Memorandum"— encourage prosecutors to require companies to waive attorney-client privilege and work product protections in many cases in return for receiving cooperation credit during investigations. The Justice Department standards also encourage prosecutors to require companies to take certain punitive actions against their employees in many cases—such as not sharing information with them, terminating them, or in certain "rare" cases, not paying their attorneys fees—in return for such credit. Copies of these and other related materials are available at http://www.abanet.org/poladv/priorities/privilegewaiver/acprivilege.html.

enforcement action decisions, but on a company's public disclosure obligations, stock price, image and credit worthiness. This growing "culture of waiver"—and the prominent role that the Commission's policy has played in contributing to this trend—was confirmed by a recent survey of over 1,200 corporate counsel conducted by the Association of Corporate Counsel, National Association of Criminal Defense Lawyers, and the ABA.[5]

The ABA also is concerned that the Commission's waiver policy, like the similar policies adopted by the Justice Department, has weakened the attorney-client privilege and work product doctrine and undermined companies' internal compliance programs. By making the privilege and the doctrine uncertain in the corporate context, the Commission's policy discourages entities both from consulting with their lawyers—thereby impeding the lawyers' ability to effectively counsel compliance with the law—and conducting internal investigations designed to quickly detect and remedy misconduct. The ABA believes that federal officials can obtain the information they most frequently seek and need from a cooperating organization without resorting to requests for waiver of the privilege or doctrine. For all these reasons, the ABA believes that the Commission's waiver policy undermines, rather than enhances, compliance with the law.

The ABA and a broad and diverse coalition of business and legal groups—ranging from the U.S. Chamber of Commerce to the American Civil Liberties Union—previously expressed similar concerns regarding the privilege waiver policies adopted by the Justice Department and the U.S. Sentencing Commission.[6] In addition, a prominent group of former senior Justice Department officials—including three former Attorneys General from both parties—submitted similar comments to both federal agencies.[7]

Many Congressional leaders also have raised concerns over the Justice Department's privilege waiver and employee related policies. During a House Judiciary subcommittee hearing on March 7, 2006, almost all subcommittee members from both parties expressed serious concerns regarding the Department's waiver policy and urged Associate Attorney General Robert McCallum and the Department to modify the policy. Subsequently, during a Senate Judiciary Committee hearing on September 12, 2006, both Chairman Arlen Specter (R-PA) and Ranking Member Patrick Leahy (D-VT) expressed serious concerns regarding the privilege waiver and employee related provisions of the Department's Thompson Memorandum and urged Deputy Attorney General Paul McNulty and the Department to change these policies. When the Department declined to do so, Sen. Specter introduced legislation on December 7, 2006, S. 30, which would bar the Justice Department and all other federal agencies from engaging in this conduct.

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[5] According to the survey, almost 75% of the 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. Corporate counsel also indicated that when government officials give a reason for requesting privilege waiver, the policies adopted by the SEC and the Justice Department were among the reasons most frequently cited. The detailed survey results are available at http://www.acca.com/Surveys/attyclient2.pdf.

[6] While the Department's privilege waiver policy was established by the Holder and Thompson Memoranda, the problem of coerced waiver was further exacerbated in November 2004 when the Sentencing Commission added language to the Commentary to Section 8C2.5 of the Federal Sentencing Guidelines that, like the Department's policy, authorized and encouraged prosecutors to seek privilege waiver as a condition for cooperation credit.

[7] The statements issued by the ABA, the coalition and the former officials and other useful resources on the topic of privilege waiver are available at http://www.abanet.org/poladv/priorities/privilegewaiver/acprivilege.html and on the website of the ABA Task Force on Attorney-Client Privilege at http://www.abanet.org/buslaw/attorneyclient/.

After considering the concerns raised by the ABA, the coalition, former Justice Department officials, congressional leaders, and others, as well as the results of the corporate counsel survey referenced above, the Sentencing Commission voted unanimously on April 5, 2006 to remove the privilege waiver language from the Sentencing Guidelines, and that change became effective last November. In addition, Deputy Attorney General McNulty issued new cooperation standards on December 12, 2006 to replace the Holder and Thompson Memoranda. Because the so-called "McNulty Memorandum" continues to allow prosecutors to request companies to waive the privilege and take punitive actions against employees in many cases, Sen. Specter reintroduced his legislation in early January as S. 186, and that measure currently is pending in the Senate Judiciary Committee.

The ABA Task Force on Attorney-Client Privilege and the coalition have prepared suggested revisions to the Commission's Seaboard Report that would preserve fundamental attorney-client privilege, work product, and employee legal protections during investigations while ensuring the Commission's continued ability to obtain the important factual information that it needs to effectively enforce the law.

The Revised Commission Statement enclosed herewith would accomplish these objectives by: (1) preventing Commission staff from seeking privilege waiver during investigations; (2) preserving their ability to request important factual information from companies as a sign of cooperation without implicating broader privilege waiver concerns; (3) clarifying that a waiver of privilege should not be considered when assessing whether the company provided effective cooperation, and (4) recognizing that cooperation credit can be given for providing factual information. The Revised Commission Statement also would clarify that while Commission staff may consider a company's reasonable efforts to secure its employees' cooperation as a factor in determining whether the company has fully cooperated during an investigation, the company should not be asked or expected to punish any employee who chooses to assert his or her legal rights.

We believe that this proposal, if adopted by the Commission, would strike the proper balance between effective law enforcement and the preservation of essential attorney-client privilege, work product, and employee legal protections, and we urge you to consider it.

If you or your staff have any questions or need additional information about this vital issue, please ask your staff to contact Bill Ide, the Chair of the ABA Task Force on Attorney-Client Privilege, at (404) 527-4650 or Larson Frisby of the ABA Governmental Affairs Office at (202) 662-1098.

Thank you for considering the views of the American Bar Association on this subject, which is of such vital importance to our system of justice.

Sincerely,

Karen J. Mathis

enclosure

cc: The Honorable Paul S. Atkins
The Honorable Roel C. Campos
The Honorable Annette L. Nazareth
The Honorable Kathleen L. Casey

Brian Cartwright, General Counsel, Securities and Exchange Commission
Michael J. Halloran, Deputy Chief of Staff and Counselor to the Chairman, Securities and Exchange Commission
Linda Chatman Thomsen, Director, Division of Enforcement, Securities and Exchange Commission

R. William Ide, III, Chair, ABA Task Force on Attorney-Client Privilege
R. Larson Frisby, ABA Governmental Affairs Office

SUGGESTED REVISIONS TO SECURITIES AND EXCHANGE 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

FEBRUARY 5, 2007

REVISED COMMISSION STATEMENT ON THE RELATIONSHIP OF COOPERATION TO AGENCY ENFORCEMENT DECISIONS

This Revised Commission Statement on the Relationship of Cooperation to Agency Enforcement Decisions (the "Revised Commission Statement") amends and supplements the Commission's Report of Investigation Pursuant to Section 21(a) of the Securities Exchange Act of 1934 and Commission Statement on the Relationship of Cooperation to Agency Enforcement Decisions, Releases 44969 and 1470, issued on October 23, 2001 (the "Seaboard Report") that set forth the criteria that the Commission will consider in determining whether, and to what extent, an organization should be granted credit for seeking out, self-reporting and rectifying illegal conduct and otherwise cooperating with the Commission staff as the Commission decides whether and how to take enforcement action.

In the Seaboard Report, the Commission set forth "some of the criteria we will consider in determining whether, and how much, to credit self-policing, self-reporting, remediation, and cooperation—from the extraordinary step of taking no enforcement action to bringing reduced charges, seeking lighter sanctions, or including mitigating language in documents we use to announce and resolve enforcement actions." *See Seaboard Report* at paragraph 8. The Commission then enumerated thirteen separate criteria that it planned to consider in assessing cooperation in future cases.

The eleventh criteria outlined by the Commission in the Seaboard Report identified five sub-factors by which cooperation may be measured as follows:

> 11. Did the company promptly make available to our staff the results of its [internal] review and provide sufficient documentation reflecting its response to the situation? Did the company identify possible violative conduct and evidence with sufficient precision to facilitate prompt enforcement actions against those who violated the law? Did the company produce a thorough and probing written report detailing the findings of its review? Did the company voluntarily disclose information our staff did not directly request and otherwise might not have uncovered? Did the company ask its employees to cooperate with our staff and make all reasonable efforts to secure such cooperation?

See Seaboard Report at paragraph 8, criteria 11.

At the end of criteria no. 11 outlined in the Seaboard Report, the Commission added a footnote encouraging companies to waive their attorney-client privilege, work product, and other legal protections under certain circumstances in return for cooperation credit. The relevant portion of that footnote stated as follows:

> "In some cases, the desire to provide information to the Commission staff may cause companies to consider choosing not to assert the attorney-client privilege, the work product protection and other privileges, protections and exemptions with respect to the Commission. The Commission recognizes that these privileges, protections and exemptions serve important social interests. In this regard, the Commission does not view a company's waiver of a privilege as an end in itself, but only as a means (where necessary) to provide relevant and sometimes critical information to the Commission staff…"

See Id. at footnote 3.

The Revised Commission Statement amends paragraph 8, criteria no. 11 of the Seaboard Report by qualifying each of the five questions with the phrase "provided, however, that a company shall not be required to take any of the forgoing actions to the extent that it would result in a waiver of the attorney-client privilege or work product doctrine." The Revised Commission Statement also deletes previous footnote 3 from the Seaboard Report, and adds a new paragraph and related footnote immediately following criteria no. 11 that recognizes the importance of attorney-client privilege and work product protections and the adverse consequences that may occur when Commission staff seek the waiver of these protections. The Revised Commission Statement also adds a new footnote to criteria no. 11, item (e), clarifying that while Commission staff may consider whether a company has made reasonable efforts to secure its employees' cooperation during an investigation in determining the company's degree of cooperation, the company will not be asked or expected to take punitive actions against employees who choose to assert their legal rights.

As amended, criteria no. 11 reads as follows (with additions underlined and deletions struck through):

> "11. Did the company (a) promptly make available to our staff the results of its review and provide sufficient documentation reflecting its response to the situation;~~? Did the company~~ (b) identify possible violative conduct and evidence with sufficient precision to facilitate prompt enforcement actions against those who violated the law;~~? Did the company~~ (c) produce a thorough and probing written report detailing the findings of its review;~~? Did the company~~ (d) voluntarily disclose information our staff did not directly request and otherwise might not have uncovered;~~? Did the company~~ and/or (e) ask its employees to cooperate with our staff and make all reasonable efforts to secure such cooperation[3], provided, however,

[3] Although Commission staff may consider whether a company has asked its employees to cooperate with Commission staff and/or whether the company has made reasonable efforts to secure such cooperation as factors in determining the company's degree of cooperation, a company should not be asked or expected to take any of the following punitive actions against employees in return for cooperation credit: (1) terminating or otherwise sanctioning an employee who exercised his or her Fifth Amendment rights against self-incrimination in response to a government request for an interview, testimony, or other information; (2) declining to provide counsel to an employee or pay for such counsel; (3) declining to enter into or ceasing to operate under a joint defense, information sharing and common interest agreement

(footnote continued on next page)

that a company shall not be required to take any of the forgoing actions to the extent that it would result in a waiver of the attorney-client privilege or work product doctrine?"

In addition, this Revised Commission Statement adds the following new paragraph immediately following revised criteria no. 11 and new footnote 4, as follows:

"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 may have adverse consequences for the company. A waiver might impede communications between the company'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 shareholders and employees. Commission staff shall not take any action or assert any position that directly or indirectly demands, requests or encourages a company or its attorneys to waive its attorney-client privilege or the protections of the work product doctrine. Also, in assessing a company's cooperation, Commission staff shall not draw any inference from the company's preservation of its attorney-client privilege and the protections of the work product doctrine. At the same time, the voluntary decision by a company to waive the attorney-client privilege and/or the work product doctrine shall not be considered when assessing whether the company provided effective cooperation. The Commission may consider, however, in assessing whether a company has provided effective cooperation, the degree to which the company has provided factual information to the Commission staff in a manner, to be worked out by the company and the Commission staff, that preserves the protections of the attorney-client privilege and work product doctrine to the extent possible.[4]"

(footnote continued from previous page)

with an employee or other represented party with whom the company believes it has a common interest in defending against the investigation; or (4) declining to share its records or other historical information relating to the matter under investigation with an employee.

[4] Notwithstanding the general rule set forth herein, Commission staff may, after obtaining in advance the approval of the Director of Enforcement or his/her designee, seek materials otherwise protected from disclosure by the attorney-client privilege or the work product doctrine if the company asserts, or indicates that it will assert an advice of counsel defense with respect to the matters under investigation. Moreover, Commission staff 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, Commission staff shall limit their requests for disclosure only to those otherwise protected materials reasonably necessary and which are within the scope of the particular exception.