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May 17, 2005

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

Re: Spring/Summer Revision to the Commentary for Chapter 8, Section 8C2.5, of the United States Sentencing Guidelines

Dear Judge Hinojosa:

On behalf of the American Bar Association ("ABA") and its more than 400,000 members throughout the country, please accept this letter as a request for the United States Sentencing Commission ("Commission") to review and amend the Commentary for Chapter 8, Section 8C2.5, of the United States Sentencing Guidelines ("Sentencing Guidelines"), which we believe encourages government-coerced waivers of the attorney-client privilege and work product protections. Although this letter does not address the issue of broad Sentencing Guidelines reform, the ABA has serious concerns regarding recent specific changes to the Commentary for Section 8C2.5. Therefore, we urge the Commission to address and remedy the Commentary on an expedited basis, as part of the Commission's spring/summer revision process.

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.

In February 2005, the ABA House of Delegates met and reexamined 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"). At the conclusion of that process, the ABA adopted new policy recommending that Congress take no immediate legislative action regarding the overall Sentencing Guidelines system, and that it not rush to any judgments regarding the new advisory system, until it is able to ascertain that broad legislation is both necessary and likely to be beneficial.

In the meantime, however, the ABA continues to have serious concerns regarding several narrow amendments to the Sentencing Guidelines that took effect on November 1, 2004. These amendments, which the Commission submitted to Congress on April 30, 2004, apply to that section of the Sentencing Guidelines relating to "organizations"—a broad term that includes corporations, partnerships, unions, non-profit organizations, governments, and other entities. Although the ABA has serious concerns regarding several of these recent amendments, our greatest concern involves a change in the Commentary for Section 8C2.5 that authorizes and encourages the government to require entities to waive their 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 Sentencing Guidelines (the "privilege waiver amendment"). 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 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. 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." But the exception is likely to swallow the rule; prosecutors will make routine requests for waivers and organizations will be forced routinely to grant them.

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 Sentencing 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 because 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 companies and other 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.

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. These concerns were formally brought to the Commission's attention on March 3, 2005, when an informal coalition of nine prominent business, legal, and public policy organizations[1] submitted a joint letter urging the Commission to reverse or modify the privilege waiver amendment. The remarkable political and philosophical diversity of that coalition, with members ranging from the U.S. Chamber of Commerce and the National Association of Manufacturers to the American Civil Liberties Union and the National Association of Criminal Defense Lawyers, shows just how widespread these concerns have become in the business, legal, and public policy communities.

The ABA shares these concerns and believes that the new privilege waiver amendment is counterproductive and will undermine, rather than enhance, compliance with the law as well as the many other societal benefits that are advanced by the confidential attorney-client relationship. Because of the serious and immediate nature of this harm, we urge the Commission to address and remedy the privilege waiver amendment on an expedited basis as part of the Commission's spring/summer commentary revision process. In particular, we urge the Commission to revise Section 8C2.5 by deleting the phrase "unless such waiver is necessary in order to provide timely and thorough disclosure of all pertinent information known to the organization," or by modifying that section to state affirmatively that waiver of the attorney-client privilege and work product protection should not be a factor in determining whether a sentencing reduction is warranted for cooperation with the government.

[1] The signatories to the March 3, 2005 letter to the Commission were the American Chemistry Council, American Civil Liberties Union, Association of Corporate Counsel, Business Civil Liberties, Inc., Business Roundtable, Frontiers of Freedom, National Association of Manufacturers, U.S. Chamber of Commerce, and Washington Legal Foundation.

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 legislative counsel for business law issues, Larson Frisby, at (202) 662-1098.

Sincerely,

Robert D. Evans

Robert D. Evans

cc: Members of the U.S. Sentencing Commission
Charles R. Tetzlaff, General Counsel, U.S. Sentencing Commission
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