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ABA President Urges SEC to Revise Securities Law Enforcement Policies on Attorney-Client Privilege

WASHINGTON, D.C., Feb. 16, 2007 -- American Bar Association President Karen J. Mathis has urged the U.S. Securities and Exchange Commission to revise its securities law enforcement policies that pressure corporate clients to waive attorney-client privilege, work product protections and legal protections for employees during investigations.

Mathis compared SEC policies contained in the so-called Seaboard Report with similar policies outlined in the Department of Justice's 2003 Thompson Memorandum, saying both "have led to a number of profoundly negative consequences." The Seaboard Report was issued by the SEC in 2001 as a statement of the criteria that the commission would consider in determining whether, and to what extent, companies under investigation should be granted credit for cooperating with commission staff as the agency decides whether and how to take enforcement action. Mathis proposed specific amendments to the SEC policies in a Feb. 5 letter to Commission Chairman Christopher Cox.

Although the report does not explicitly require companies under investigation to waive legal rights in every situation, the policy has led many SEC staff to regularly pressure companies to waive their privileges during investigations.

"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 enforcement action decisions, but on a company's public disclosure obligations, stock price, image and credit worthiness," said Mathis.

The policy also has undermined corporate internal legal compliance programs, by discouraging company leaders from seeking legal guidance from their lawyers and from conducting internal investigations designed to quickly detect and remedy misconduct, she said. The Seaboard Report,

like the Justice Department policy, also erodes employees' constitutional and other legal rights by pressuring companies to refuse to pay their legal fees or to terminate them unless they agree to waive their Fifth Amendment right against self-incrimination, she said.

Mathis noted the U.S. Sentencing Commission reversed similar privilege waiver policies in April 2006. She also pointed out that Deputy Attorney General Paul McNulty issued new Justice Department cooperation standards in December 2006 in response to the concerns of the ABA and a diverse coalition of other organizations, ranging from the U.S. Chamber of Commerce to the American Civil Liberties Union, and a prominent group of former senior officials of the Department itself.

Because the new Justice Department policies continue to allow prosecutors to request waiver and to take punitive actions against corporate employees in many cases, Sen. Arlen Specter (R-PA) in January reintroduced legislation he initially introduced last year as the Attorney-Client Privilege Protection Act of 2006. The new bill, S. 186, would bar all federal agencies from pressuring companies to waive their attorney-client privilege or work product protections, or to reduce employee legal rights in return for receiving cooperation credit, while preserving the government's ability to obtain the factual information from companies that it needs to enforce the law.

Mathis' letter and draft revisions to the Seaboard Report are available at http://www.abanet.org/poladv/letters/attyclient/2007feb05_privwaivsec_1.pdf.

With more than 413,000 members, the American Bar Association is the largest voluntary professional membership organization in the world. As the national voice of the legal profession, the ABA works to improve the administration of justice, promotes programs that assist lawyers and judges in their work, accredits law schools, provides continuing legal education, and works to build public understanding around the world of the importance of the rule of law in a democratic society.