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Proposed Changes to Sentencing Guidelines for Corporate Defendants – Chapter 8

STATEMENT OF THE ASSOCIATION OF CORPORATE COUNSEL (ACC)

(formerly the American Corporate Counsel Association)

BEFORE THE UNITED STATES SENTENCING COMMISSION

Testimony presented by Linda Madrid*
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* Ms. Madrid appears on behalf of ACC and is not speaking on behalf of her employer.

Good morning Judge Castillo, Judge Sessions, Mr. Steer, Judge Hinojosa, Mr. Horowitz, and Professor O'Neill, and thank you for the invitation to present comments to the United States Sentencing Commission today. I am Linda Madrid, and I serve as Managing Director, General Counsel and Corporate Secretary for CarrAmerica Realty Corporation, a provider of quality office space in national growth markets and a REIT which is publicly traded on the New York Stock Exchange.

I am pleased to appear today on behalf of the nearly 16,000 members of the Association of Corporate Counsel (ACC) (formerly known as the American Corporate Counsel Association) and the more than 7,000 private organizational entities they represent in over 47 countries. The comments I offer today are those of ACC and do not necessarily reflect the views or positions of my employer, CarrAmerica Realty Corporation. My oral testimony highlights the subjects raised in our previously submitted comment letter, and specifically focuses – as requested by our assignment to this panel – on issues of the attorney-client privilege and its treatment and protection under the Sentencing Guidelines.

Because outside counsel are not eligible for membership in the Association of Corporate Counsel, we can remain focused solely on the roles and responsibilities of in-house practice, and thus understand the issues and concerns facing in-house counsel better than any other organization. As you know, in-house counsel are key players in the development, promotion, maintenance, and enforcement, as well as even the

defense of in-house compliance efforts of corporations. Working with senior executives and line managers alike, in-house lawyers are both pioneers and daily laborers in the company's compliance initiatives. Much of the impact of this Commission's work in developing compliance standards is directly borne by in-house lawyers: therefore, their thoughts and responses to the Commission's original guidelines, and most particularly to these proposed amendments, can provide practical instruction to your efforts.

I would like to address two points from our written submission in greater detail for you here today.

First, our concerns regarding the issue of expanding the guidelines application to criminalize all violations of law. To sanction companies with criminal penalties for regulatory or administrative violations which are not criminal by definition is wrong. This is especially true if you consider that the vast majority of companies subject to the criminal penalties imposed by the Guidelines are likely to be accused of non-criminal behaviors.

It is a common error to presume that the "average" company subject to these guidelines has a large legal department and numerous complex compliance programs in place. On the contrary, most companies by definition are not members of the Fortune 500, and do not work in what we would term "highly regulated industries," from which the risks of doing business mandate the development and maintenance of an extensive system of sophisticated compliance programs. Most companies do not manufacture highly toxic substances or space shuttles, nor do they provide sophisticated commercial banking services or run emergency rooms in hospitals. Indeed, the legal needs of most companies are not so complex or high risk.

Many companies, however, do have in-house counsel who are working hard, side by side with their clients, to provide sound legal advice and practical and preventive daily applications which can help companies do their business in line with all legal requirements. Such businesses develop simple – yet effective -- compliance systems designed to address only one or two major core business needs. And when they find themselves on the wrong end of a prosecution for a violation of law, it is most likely to be one associated with a violation of administrative or regulatory procedure which is not categorized as a criminal violation.

The proposed amendments and their expansion of criminal treatment to non-criminal actions presume that companies subject to the Guidelines' application are anticipating and preparing for compliance in a much larger way than is reasonable to assume from the size and scope of the average company's operations.

To sanction companies with criminal penalties for regulatory or administrative violations which are not criminal by definition is wrong, regardless of the size or industry of the company. But it is especially unfair to do so when the majority of companies subject to these rules are not likely to have in place the kinds of sophisticated compliance programs to deal with regulatory infractions that the guidelines require in order to receive credit for good faith efforts at compliance and thus avoid the brunt of criminal penalties and punishments.

We request that the Commission reject the expansion of the coverage of the guidelines to include in their application those offenses which are not criminal violations.

Second, we are concerned about the original Guidelines' and the proposed amendments' treatment of the attorney-client privilege as afforded to corporate

criminal defendants. We appreciate that the Advisory Group carefully addressed the concerns that many have voiced since the original passage of the Guidelines in 1991. The Advisory Group acknowledges that corporate clients – just like individual clients who are criminally charged – consult lawyers in part because the confidentiality of the relationship allows the client to present difficult issues for consideration without worry that the request for counseling will be used against them. And the proposed draft suggests that waiver of the privilege should not be required in order for a company to earn merit points for cooperation with the government's investigation.

But the proposed amendments fall short of fulfilling their promise to rectify the incorrect standard currently on the books for they allow the government to demand waiver if the *government* believes that waiver is necessary in order to make its case. It's hard to imagine a case in which the prosecutor would not rather make its case from an admission of the defendant or by introduction of potentially damning conversations between the defendant and its lawyer. Since the government will not know what it is that is included in the conversations of a lawyer and targeted client without access to the withheld communications or impressions of the lawyer, of course they will ask for the privilege to be waived hoping to find just that. The idea that the government gets to make the call about whether information they don't know about is needed is a bit hard to understand; if they are trying to verify facts, then they have the ability to investigate and call evidence of all kinds to corroborate their theories without asking for access to client conversations as a means of fishing for information or the work product of in-house lawyers in order to bypass the work.

Furthermore, confidential or privileged information, once out of the bag, cannot be returned to the sanctity of the attorney-client relationship, as has recently been reconfirmed by the California Court of Appeals in the *McKesson* case. Information divulged to the government, even if the government asserts that it wishes to protect it from further dissemination, is now fodder for every plaintiff's counsel, business competitor, and newspaper in the country; as is usually the case when lawyer-client conversations are divulged, these communications will be consumed in highly damaging and often-repeated sound-bites that may be taken entirely out of context or intention.

The benefits of the privilege should be a criminal client's expectation and right. The privilege and attendant work product protections of an attorney's thoughts do not protect facts from being discovered in the course of the government's investigation of a matter, nor do they prevent clients from disclosing in a cooperative manner all relevant information about the client's activities in question. The argument that the government does not have the resources or the responsibility to investigate and make its own decisions about a company's alleged wrongdoing is simply not appropriate. The only information shielded from the government by the privilege or work product doctrines is information that reflects the thoughts and advice of an attorney and her client.

The Commission should give careful consideration of the benefits that the privilege offers society, as well as the client. We all win when clients are encouraged, and not discouraged, to talk to lawyers about what they can, should and must not do. We all benefit when clients consult legal counsel before taking actions that could be unintentionally wrong. It is the privilege that creates the client's comfort in knowing

that seeking out legal counsel is a good and rewarded behavior. When the process of receiving advice, however, is used against a client, it sends a message that the client would have been better off if they had never consulted with counsel at all.

The government is not inappropriately hampered from making its case when the privilege is respected; and yet the client is irrevocably harmed and the trust between a lawyer and client is fundamentally destroyed when the attorney-client privilege becomes nothing more than a bargaining chip for the government to play.

We request that the Commission adopt the reforms suggested by the advisory group to change the guidelines' requirement that the privileged be waived in order for cooperation to be credited, but request that the language of proposals allowing the government to request waiver when they feel they need the information to make their case be removed.

It is the belief of ACC's members' clients, their boards and their stakeholders that we need *more* lawyers in strategic and sensitive meetings, and that we need *more* clients seeking counsel. Removing the privilege from the lawyer-client relationship will do nothing to help ensure compliance and will likely diminish the role of lawyers in ensuring the effective client compliance efforts we all wish to promote.

In-house lawyers need to continue and – indeed, increase – their efforts to work closely with managers to instill compliance values and guarantee sound legal outcomes. If the attorney-client privilege is seconded to the needs of prosecutors, then the attorney-client relationship will have been undermined in a manner which is both

counterproductive to the purpose and intent of this Commission's work, and a disservice to the effective protection of the public and the client.

Thank you. I would be happy to answer any questions you may have about how law departments are working to instill ethical behavior, established and acceptable norms, and preventive compliance programs.