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United States Sentencing Commission
One Columbus Circle, N.E.
Suite 2-500, South Lobby
Washington, D.C. 20002-8002
Attention: Public Affairs

Re: Request for Public Comment — Chapter 8 Organizational Guidelines, Section 8C2.5, Waiver of Attorney-Client Privilege

Dear Sir/Madam:

On behalf of the Boston Bar Association ("BBA") and its nearly 10,000 members, we are writing to respond to the Commission's request for public comment on whether and in what manner the privilege waiver language in Application Note 12 of the Commentary to Section 8C2.5 of the U.S. Sentencing Guidelines ("Note 12") should be deleted or amended. *See* 71 Fed. Reg. 4782-4804 (Jan. 27, 2006). In particular, we would like to express our strong support for preserving the attorney-client privilege and work product doctrine and our concerns regarding federal governmental policies and practices regarding waiver that threaten to erode these fundamental protections. We urge the Commission to amend Note 12 to state affirmatively that waiver of attorney-client and work product protections should not be a factor in determining whether to reduce a sentence based upon cooperation with the government.

Comments Explaining Why Note 12 Should Be Amended

We understand that several other organizations—ranging from the American Bar Association to the U.S. Chamber of Commerce to the American Civil Liberties Union—plan to submit separate comment letters to the Commission urging it to modify Note 12. Because of the serious and immediate nature of the harm being done, we want independently to urge the Commission to consider the following comments:

1. **Amendment will help curb prosecutors' trend toward requesting waiver too often.** Although most information about government privilege waivers is anecdotal, a 2002 Commission survey of U.S. Attorney's offices seeking to quantify waiver requests revealed that the U.S. Attorney's Office for the District of Massachusetts was one of the offices most likely to request waivers. That U.S. Attorney's Office responded to the survey by reporting that the office's reason for demanding waivers was "to determine whether individuals who had asserted

advice of counsel defenses were validly claiming the defenses so that appropriate charging decisions could be made on those individuals." But the prosecutors were also able to affirmatively use privileged material by obtaining waivers and then examining corporate employees' statements in that material to supply a critical element, such as intent, that they might otherwise not have been able to prove. The District's court docket confirms that most of the recent plea agreements entered by companies in the District required the companies to waive the privileges.

2. **Amendment is vital to preserving the attorney-client privilege between companies and their lawyers.** Lawyers play an important role in helping companies and their officials understand and comply with complex laws and act in the entity's best interests. To fulfill this function, lawyers need the trust and confidence of the board, management, and line employees so they can obtain all relevant information necessary to represent the entity effectively, to ensure compliance with the law, and to remedy quickly any noncompliance. By encouraging demands for waiver of the attorney-client privilege and the work product doctrine, the existing language discourages personnel within companies from consulting with their lawyers, thereby impeding the lawyers' ability to effectively counsel compliance with the law. This, in turn, harms not only the company, but also investors and society.

3. **Amendment is vital to ensuring that internal compliance programs can succeed.** Instead of aiding in the prosecution of corporate criminals, the existing language frustrates detection of corporate misconduct by discouraging individuals with knowledge from speaking candidly and confidentially with in-house or outside lawyers conducting internal investigations. These individuals' uncertainty as to whether attorney-client and work product protections will be respected makes it more difficult for companies to detect and remedy wrongdoing early, which, in turn, undercuts rather than promotes good compliance practices.

4. **Amendment will help ensure that lawyers are not "chilled" in how they advise or conduct their work in connection with litigation.** When a corporate client becomes the focus of an investigation, most in-house or outside lawyers' first step is to collect documents, interview witnesses, and evaluate facts. Typically, lawyers take this step not in the abstract, but to formulate and assess potential defenses. The existing language requires, however, that lawyers undertake internal investigations knowing that there is a significant prospect that the government may ultimately seek a waiver from the company. Thus, the existing language induces lawyers to proceed as if they may someday need to testify about communications to clients concerning the investigation, thereby "chilling" the lawyers from the outset in how they give advice, conduct their work, and memorialize their findings.

5. **Amendment will help protect employees from being unfairly harmed.** The existing language places employees of a company or other organization in a very difficult position when their employers ask them to cooperate in an investigation.

The employees can cooperate and risk that the company or organization will disclose statements made to its lawyers to the government 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 individual legal right against self-incrimination.

6. **Amendment will help prevent the establishment of an uneven playing field in "follow-on" civil litigation.** In nearly all jurisdictions, waiver of attorney-client or work product protections in one case also waives those privileges in subsequent civil cases. By encouraging prosecutors to insist that companies and other organizations waive their privileges during government investigations, the existing language thus enables plaintiffs' lawyers to obtain sensitive, and often confidential, information that can be used against the entities in class action, derivative, and similar suits. This creates an uneven playing field in which plaintiffs' lawyers can freely and privately explore the strengths and weaknesses of their positions, while improving their positions using corporate defendants' consultations with counsel, analysis, and work product. As Justice Jackson wrote in *Hickman* v. *Taylor,* "[d]iscovery was hardly intended to enable a learned profession to perform its functions ... on wits borrowed from the adversary."

7. **Amendment will prevent prosecutors from timing their waiver request to maximize its detrimental impact on the case.** Under prosecutorial pressure, a company or other organization may prematurely decide to waive the attorney-client privilege and the work product doctrine. The timing of such a decision may unfairly deprive the entity of legal advice based on counsel's full development of the facts and an evaluation of the strengths and weaknesses of the government's case.

8. **Amendment will help ensure that corporate image concerns do not dictate the scope of the attorney-client privilege and the work product doctrine.** The First Circuit has offered strong, principled support for the attorney-client privilege, holding that "[b]y safeguarding communications between client and lawyer, the privilege encourages full and free discussion, better enabling the client to conform his conduct to the dictates of the law and to present claims and defenses if litigation ensues." Yet, the existing language often forces companies facing criminal investigation today to abandon such principles for practical calculations of the costs and benefits of being labeled as "uncooperative" in combating corporate crime, even if the charge is unfounded. As a result, non-lawyers' business concerns about corporate image, stock price, and credit worthiness are defining the contours of what should be principle-driven fundamental rights. Such concerns also will make companies reluctant to speak publicly about their waiver experiences, thereby preventing other companies from making fully informed decisions in response to waiver requests.

9. **Amendment will help safeguard the attorney-client privilege and the work product doctrine against being sacrificed solely to make prosecutors' job easier.** The Justice Department's policy, as established in 1999, makes clear that

there is no pretense that prosecutors should sacrifice the values underlying the privileges to make the prosecution's job easier: "Such waivers permit the government to obtain statements of possible witnesses, subjects, and targets, without having to negotiate individual cooperation or immunity agreements." The clear alternative is to conduct a factual investigation by taking statements and obtaining documents from a corporation and its employers, without insisting on also obtaining attorney work product and privileged statements made to counsel. Because data from recent national surveys show that prosecutors are not pursuing this alternative course of action, the Guidelines must force them to do so.

10. **The 2004 amendment conflicts with longstanding government policy.** For decades, the U.S. Attorney's Manual has required that all reasonable attempts be made to obtain information from other sources and only when these efforts have failed may a prosecutor serve a subpoena on an attorney for testimony or documents, and then only after approval of the Assistant Attorney General in charge of the Criminal Division. This squarely conflicts with the Guidelines' policy of authorizing and encouraging prosecutors to make sentencing recommendations for corporations based on whether they cooperated in a "timely," "thorough," and complete manner (i.e. waived their privileges and "disclos[ed]... all pertinent information known by the organization").

11. **The Supreme Court's recent decision in *United States v. Booker/Fanfan* did not alleviate the problems caused by the 2004 amendment.** Although the Supreme Court struck down as unconstitutional those provisions of the Guidelines that made them mandatory and binding on the courts, it preserved the overall Guidelines as non-binding standards that the courts must consider when determining sentences. Thus, the existing language is likely to continue to cause adverse consequences until it is modified.

Proposed Amendment To Note 12

For the above-identified reasons, we recommend that the Commission (1) add language to Note 12 clarifying that cooperation only requires the disclosure of "all pertinent non-privileged information known to the organization," (2) delete the existing language stating "unless such waiver is necessary in order to provide timely and thorough disclosure of all pertinent information known to the organization", and (3) make the other minor wording changes in the Note outlined below. If this recommendation were adopted, Note 12 would read as follows:[1]

> 12. To qualify for a reduction under subsection (g)(1) or (g)(2), cooperation must be both timely and thorough. To be timely, the cooperation must begin essentially at the same time as the

[1] The Commission's November 1, 2004 amendments on the privilege waiver issue are shown in italics. Our suggested additions are underscored and our suggested deletions are noted by strikethroughs.

organization is officially notified of a criminal investigation. To be thorough, the cooperation should include the disclosure of all pertinent non-privileged information known by the organization. A prime test of whether the organization has disclosed all pertinent non-privileged information is whether the information is sufficient for law enforcement personnel to identify the nature and extent of the offense and the individual(s) responsible for the criminal conduct. However, the cooperation to be measured is the cooperation of the organization itself, not the cooperation of individuals within the organization. If, because of the lack of cooperation of particular individual(s), neither the organization nor law enforcement personnel are able to identify the culpable individual(s) within the organization despite the organization's efforts to cooperate fully, the organization may still be given credit for full cooperation. *Waiver of attorney-client privilege and of work product protections is not* a factor in determining whether ~~*a prerequisite to*~~ *a reduction in culpability score under subdivisions (1) and (2) of subsection (g)* is warranted ~~*unless such waiver is necessary in order to provide timely and thorough disclosure of all pertinent information known to the organization*~~.

Thank you for your consideration of our comments. If you would like more information regarding the BBA's position on this issue, please contact our Director of Governmental Relations, Deborah Gibbs, at (617) 778-1942.

Very truly yours,

Edward P. Leibensperger

Edward P. Leibensperger
President