August 15, 2005

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

Re: Sentencing Guidelines Commentary Involving Waiver of Attorney-Client Privilege and Work Product Doctrine -- Comments on Notice of Proposed Priorities

Dear Judge Hinojosa:

As a member of the House Judiciary Committee and its Subcommittee on Crime, Terrorism and Homeland Security, I have been following with great interest the debate over the recent amendment to the Commentary to Section 8C2.5 of the Federal Sentencing Guidelines, which I believe threatens to erode the long-standing attorney-client and work product protections afforded under our system of justice. As one who played an active role in the adoption of the Sentencing Guidelines statute, this causes me great concern. Although I am pleased that the Commission has announced plans to reconsider this issue during its regular 2005-2006 amendment cycle—and urge the Commission to follow through on this process—I remain concerned that the amendment process does not provide a more timely remedy for the problem. Therefore, I would appreciate hearing your thoughts about possible ways to address this problem more urgently.

As you know, on April 30, 2004, the Commission submitted to Congress a number of amendments to Chapter 8 of the Sentencing Guidelines relating to "organizations"—a broad term that includes corporations, partnerships, unions, non-profit organizations, governments, and other entities—which became effective on November 1, 2004. One of these amendments involved a change in the Commentary to Section 8C2.5 that authorizes and encourages the government to require entities to waive their attorney-client and work product protections as a condition of showing cooperation with the government during investigations. Prior to the adoption of this privilege waiver amendment, the Sentencing Guidelines were silent on the privilege issue and contained no suggestion that such a waiver would ever be required.

Although the Justice Department has followed a general internal policy—with the adoption of the 1999 "Holder Memorandum" and the 2003 "Thompson Memorandum"—of requiring companies to waive privileges in certain cases as a sign of cooperation, I am concerned that the privilege waiver amendment might erroneously be seen as Congressional ratification of this policy, resulting in even more routine demands for waiver. I am informed that, in practice, companies are finding that they have no choice but to waive these privileges whenever the government demands it, as the threat to label them as "uncooperative" in combating corporate crime simply poses too great a risk of indictment and further adverse consequences in the course of prosecution. Such an

unbalanced dynamic simply goes too far. Even if the charge is unfounded, an allegation of "noncooperation" can have such a profound effect on a company's public image, stock price and credit worthiness that companies generally yield to waiver demands.

As both a former California Attorney General and a current Member of Congress, I appreciate and support the Commission's ongoing efforts to amend and strengthen the Sentencing Guidelines in order to reduce corporate crime. Creating incentives to increase the practice of corporate ethics and legal compliance is imperative. Unfortunately, I believe the privilege waiver amendment is likely to undermine rather than strengthen compliance with the law in several ways.

First of all, the privilege waiver amendment seriously weakens the attorney-client privilege between companies and their lawyers and undermines their internal corporate compliance programs, resulting in great harm to the public. Lawyers can play a key role in helping companies and other organizations to understand and comply with complex laws, but to fulfill this role, lawyers must enjoy the trust and confidence of the entity's leaders and must be provided with all relevant information necessary to represent the entity effectively, ensure compliance with the law, and quickly remedy any violations. By authorizing the government to demand waiver of attorney-client and work product protections *on a routine basis*, the amendment discourages entities from consulting with their lawyers. This, in turn, impedes the lawyers' ability to effectively counsel compliance with the law and discourages them from conducting internal investigations designed to quickly detect and remedy misconduct. As a result, companies and the investing public will be harmed.

I am also concerned that the privilege waiver amendment will encourage excessive civil litigation. In California and most other jurisdictions in the nation, waiver of attorney-client or work product protections in one case waives the protections for all future cases, including subsequent civil litigation matters. Thus, forcing companies and other entities to routinely waive their privileges during criminal investigations results in the waiver of those privileges in subsequent civil litigation as well. As a result, companies are unfairly forced to choose between waiving their privileges, thereby placing their employees and shareholders at an increased risk of costly civil litigation, or retaining their privileges and then facing the wrath of government prosecutors.

For these reasons, I believe that the recent privilege waiver amendment to the Sentencing Guidelines is likely to undermine, rather than strengthen, compliance with the law. In addition, I believe that it will undermine the many other societal benefits that arise from the essential role that the confidential attorney-client relationship plays in our adversarial system of justice. My concerns are also shared by many former senior Justice Department officials—including former Attorneys General Ed Meese and Dick Thornburgh, former Deputy Attorneys General George Terwilliger and Carol Dinkins, former Solicitors General Ted Olson, Seth Waxman and Ken Starr, and many others—who I understand are preparing to submit their own joint letter to the Commission in the near future. Therefore, I urge the Commission to follow through on its initial plan to address and remedy the privilege waiver issue as part of the 2005-2006 amendment cycle.

The new amendment should state affirmatively that waiver of attorney-client and work product protections should not be a mandatory factor for determining whether a sentencing reduction is warranted for cooperation with the government during investigations.

While I believe that such an amendment is appropriate and desirable, it is my understanding that changes made during the upcoming 2005-2006 amendment cycle will not become effective until November 1, 2006. Because the current privilege waiver language in the Commentary to the Guidelines will continue to cause the problems described above until it is removed, I would appreciate your thoughts regarding any additional remedies—legislative or otherwise—that could resolve this problem more promptly.

Thank you for your consideration, and I look forward to hearing from you at your earliest convenience.

Sincerely,

Daniel E. Lungren
Member of Congress

cc: United States Sentencing Commission
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Attention: Public Affairs—Priorities Comment

Members of the U.S. Sentencing Commission

The Honorable F. James Sensenbrenner, Jr.
Chairman, House Judiciary Committee

The Honorable John Conyers, Jr.
Ranking Member, House Judiciary Committee