

HEALTH LAW

Update

NEWS FOR THE CLIENTS AND FRIENDS OF BASS, BERRY & SIMS PLC

United States Sentencing Commission Proposes to Retract Privilege Waiver as a Sentencing Factor

May 16, 2006

On May 1, 2006, the United States Sentencing Commission made its submission to Congress of proposed amendments to the United States Sentencing Guidelines. In connection with the sentencing of organizations, the Commission reversed its position on the consideration of waivers of the attorney-client privilege and the attorney work product protection as a sentencing factor. Specifically, the Commission proposed to remove the “waiver” sentence of Application Note 12 to § 8C2.5(g), which currently provides: “Waiver of attorney-client privilege and of work product protections is not a prerequisite to a reduction in culpability score under subdivisions (1) and (2) of subsection (g) unless such waiver is necessary in order to provide timely and thorough disclosure of all pertinent information known to the organization.”

Since the guidelines for sentencing corporations and other business formations first became effective in November 1991, an organization could receive a sentence reduction for self-reporting, cooperation, and acceptance of responsibility, and this Application Note 12, of which the “waiver” sentence later became a part, explained the conditions under which such a reduction would apply: 1) Cooperation must be both timely and thorough, with timeliness described as beginning “essentially at the same time as the organization is officially notified of a criminal investigation;” and 2) The thoroughness requirement would be satisfied by “the disclosure of all pertinent information known by the organization.”

The contours of what an organization must do in order to receive these sentence reductions changed dramatically in 2004 when the “waiver” sentence was added to the end of Application Note 12. The response of the defense bar and corporate counsel was vociferous and uniformly negative. The American Bar Association, the Association of Corporate Counsel and the National Association of Criminal Defense Counsel, among many others, took strong public positions that this waiver amendment was being used by federal prosecutors, in conjunction with Department of Justice policies, to create a “climate of waiver” in which waivers of these important privileges were expected, if not implicitly demanded, in nearly every case where the company’s lawyers had conducted an internal investigation of the criminal conduct in question.

Following hearings and several rounds of public comment, the Commission has now proposed to strike the entire text of the “waiver” sentence. As its reason for the amendment, the Commission stated to Congress as part of the May 1 amendment package that the sentence at issue “could be misinterpreted to

encourage waivers.” Due to a unique provision of the Sentencing Reform Act, if Congress fails to act on the proposed amendment, it will become effective on November 1 of this year and the Application Note text will revert to its original 1991 text.

The significance of the Sentencing Guidelines on sentences imposed by federal courts was recently emphasized by the Commission in a study it released on March 14, 2006, concerning the impact of the Supreme Court’s 2005 decision in *United States v. Booker*. The Commission found that the federal circuit courts have uniformly agreed that post-Booker sentences must begin with a sentencing guideline calculation, and that six of those federal courts have determined that a sentence imposed within the guideline range is presumptively reasonable.

Please feel free to call any of the attorneys in our Healthcare Practice Area if you have any questions regarding this or any other matter.

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