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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 Real Estate Investment Trust 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 submitted comment letter, and specifically focuses – as requested by your staff – on issues of the attorney-client privilege and its treatment and protection under the Sentencing Guidelines.

Because outside counsel are not eligible for membershipin 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 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, let me direct your attention to our concerns regarding the issue of requiring the definition of an effective compliance program to cover violations of law beyond criminal conduct. To sanction companies with criminal penalties for non-compliance with regulatory or administrative violations which are not criminal by definition is wrong. And, taking such action is a dangerous move towards eliminating any meaningful gradation of punishment that is consistent and appropriate to the underlying acts. This is especially true if you consider that the majority of companies subject to the criminal penalties imposed by these proposed Guidelines are likely to be accused of non-criminal behaviors, as well, and that it is unlikely that the majority of companies will have full compliance initiatives in place for every such non-criminal violation with which they might be charged.

In addition, while the proposed Guidelines do note that organization size may be a factor to consider in meeting compliance program expectations, the Guidelines are too broad-reaching. The fact is that the vast majority of organizations that will be subject to these Guidelines do not have large legal departments or complex compliance programs in place. The fact is that, by definition, most companies are not members of the Fortune 500. The fact is that most companies are not involved in high-risk business lines that would be considered "highly regulated industries" that mandate the development and maintenance of an extensive system of sophisticated compliance programs.

Quite simply, the fact is that the legal needs of most companies are just not so complex or high risk. Commensurate with size and risk, most businesses have generally developed simple – yet effective -- compliance systems designed to address only one or two major core business needs. In addition, these organizations often have in-house counsel who are working hard, side-by-side with employees, officers, and directors to provide these clients with sound legal advice and practical, often daily, direction that can help ensure the organization meets its legal obligations. To deny any sentencing credit to companies that have not developed sophisticated compliance programs that would cover most ever conceivable violation of law is unfair, and will discourage clients from believing that their hard work to develop risk containment programs around the predictable subjects of concern for their industry counts with this Commission.

Sanctioning companies for regulatory or administrative violations that are not covered by separate and formal compliance initiatives is wrong, especially if the company did make legitimate and effective efforts to prevent problems from arising in the underlying matter, and some kind of errant act by a manager has landed them in trouble. But the Advisory Group's proposal is especially unfair if we acknowledge that 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.

There just is not enough time or money or focus to contemplate training and detailed compliance systems to address every violation of law that an organization could imagine. To admit this fact is not a cop-out by companies who do not want to live up to their responsibilities of good corporate citizenship—it is just a fact of business. We believe that resources and attention of both business organizations as well as prosecutors are better spent on those areas of greatest risk.

We request that the Commission reject any expanded definition of an effective compliance program as necessarily covering violations of law beyond criminal conduct.

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.

As you are aware, 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. However, the proposed amendments fall short of fulfilling their promise to rectify the incorrect standard currently used because the amendment allows 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 circumstance 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 between of a lawyer and the targeted client without access to the withheld communications or impressions of the lawyer, they will, of course, ask for the privilege to be waived hoping to learn of the communications or impressions. 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 gathering information or to the work product of in-house lawyers to bypass further investigation.

Furthermore, the confidential information, once disclosed to a third party, 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 the government's investigation of alleged wrongdoing, 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 persuasive. 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.

We would ask that the Commission give careful consideration to the benefits that the privilege offers society, as well as to the client. Let there be no mistake, we all win when clients are encouraged, not discouraged, to talk to lawyers about what they can, should and must not do. We all benefit when clients have the benefit of legal

counsel before taking actions that could be unintentionally wrong. It is the privilege that creates the comfort in clients to know that seeking legal counsel is a good and rewarded behavior. When the process of receiving advice, however, is used against a client, it sends a message to a clients that he or she would have been better off having never consulted with counsel at all.

Moreover, the government is not unduly hindered from doing its work 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.

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.

Quite simply -- either the privilege exists for corporate defendants or it doesn't. The lawyer's role is either accompanied by the expectation that the client can bring anything to the table of concerns, or the lawyer's role will be identified as the person to exclude from all meetings where anything sensitive, cutting edge, or difficult is being discussed. It is the belief of our clients, our boards and our stakeholders that we need more lawyers in strategic and sensitive meetings, that we need more clients seeking counsel, and that we need more lawyers shaping an aggressive role for themselves in working with their clients to ensure compliance. Removing the privilege from the

lawyer client relationship will likely do no more to help ensure compliance than to remove the lawyer from the client relationships we all wish to promote.

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.