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February 17, 2006

Senator Arlen Specter, Chairman
United States Senate Judiciary Committee
SH-711 Hart Senate Office Building
Washington, DC 20510-3802

Re: Amendments to Conference Report on Patriot Act Reauthorization

Dear Senator Specter:

I am writing on behalf of the New York City Bar Association to express our continuing concern that the Conference Report on the proposed Patriot Act reauthorization bill fails to ameliorate the most serious threats to civil liberties in the original Patriot Act. As we explain, those concerns are not adequately addressed by the compromise amendments to the Conference Report.

The Association previously expressed its concerns in its letters of September 21, 2005 and December 5, 2005. In our December 5 letter we expressed disappointment that many of the concerns expressed in our September 21 letter were not addressed in the Conference Report and focused by way of example on the defects of two of the most egregious threats posed by the Patriot Act to civil liberties – the "business records" provisions of Section 215 of the Patriot Act and the National Security Letters provisions of Section 505 of the Act. A copy of our December 5 letter is attached. In this letter, we address the compromise amendments to the Conference Report, which, with one exception, not only fail to remedy the defects of Sections 215 and 505, but actually exacerbate our concerns.

Section 215

In our December 5 letter we noted, among other things, the threat to civil liberties posed by the provisions of Section 215 prohibiting recipients of Section 215 orders from disclosing the receipt of such orders to any person other than to an attorney "to seek legal advice with respect to production of things." None of the concerns raised in our

December 5 letter are addressed by the compromise amendments, which actually make things worse.

While the compromise amendments provide for judicial review of non-disclosure orders, the contemplated review is not only inadequate but largely illusory.

First, it appears that the non-disclosure order applies automatically with the issuance of the 215 order and imposes a burden on the recipient to challenge the disclosure restriction, but this can be done only after one year has elapsed. The one-year restriction on disclosure without prior judicial review and the burden imposed on the recipient are significant departures from the well-established rule imposing the burden on the government to establish that the restriction on speech is narrowly tailored to serve a compelling interest.

Second, by restricting challenges to nondisclosure orders until after one year from the imposition of the order, the compromise amendment makes the non-disclosure provision worse because it would foreclose the kinds of immediate challenges to non-disclosure that have been filed in two pending cases challenging National Security Letters ("NSL").

Third, the compromise amendments provide that the judge cannot vacate the non-disclosure order unless he finds "no reason" to believe that disclosure may endanger national security, interfere with a criminal, counterterrorism or counterintelligence investigation, interfere with diplomatic relations, or endanger life or physical safety of any person. This extraordinarily deferential standard of review nullifies the "strict scrutiny" standard applicable to restrictions on prior restraints of speech and which has already been applied by district courts in challenges to non-disclosure orders under the NSL provisions.

Fourth, the compromise requires the judge reviewing the challenge to a nondisclosure order to treat as *conclusive* the government's certification that disclosure would endanger national security or diplomatic relations unless the judge finds that the government's certification is in bad faith. This effectively renders the court review illusory and a rubber stamp of the government's opposition to disclosure.

Finally, while permitting disclosure to an attorney the provision permits the FBI Director to require disclosure of the identity of the persons to whom disclosure is made, presumably including attorneys. This requirement could chill the recipient's willingness to consult an attorney. The failure to exclude attorneys from this requirement may be an oversight, as the comparable provisions of Section 505, under the compromise amendments, would not require identification of attorneys from whom advice is sought.

The compromise amendments do not even purport to address any of the other significant problems with Section 215 addressed in our December 5 letter.

Section 505

The compromise would marginally improve Section 505 by allowing NSL

recipients to consult attorneys without notifying the FBI. The compromise amendments, however, do not address any of the other very significant problems with this section that we addressed in our December 5 letter. As in the case of Section 215, it provides no meaningful vehicle for challenging the non-disclosure provisions of Section 505.

Accordingly, for the reasons discussed here and in our December 5 letter, the Association urges that the bill reported by the Conference Committee be rejected.

Sincerely,

Bettina B. Plevan

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cc: Senator Patrick Leahy, Ranking Member
Senator Orrin G. Hatch
Senator Charles E. Grassley
Senator Jon Kyl
Senator Mike DeWine
Senator Jeff Sessions
Senator Lindsey Graham
Senator John Cornyn
Senator Sam Brownback
Senator Tom Coburn
Senator Edward M. Kennedy
Senator Joseph R. Biden Jr.
Senator Herbert Kohl
Senator Dianne Feinstein
Senator Russ Feingold
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