

Roger W. Langsdorf
Senior Counsel
Director of Antitrust Compliance

ITT Corporation

Washington Office

1600 M Street, N.W.
Washington, D.C. 20036
Telephone (202) 775-7360

March 21, 1991

The Honorable William W. Wilkins, Jr.
U.S. Sentencing Commission
1331 Pennsylvania Avenue, N.W.
Suite 1400
Washington, D.C. 20004

Dear Judge Wilkins:

Jim Carty has forwarded to me a copy of the staff draft of March 12. I respectfully submit the following comments with respect to this draft:

A. §8C2.3(3) - Mandatory use of gross pecuniary loss to determine base fine amount where it is greater than the amount in the table and gross pecuniary gain.

The March 12 draft sets forth 3 alternative provisions requiring mandatory use of loss where greater than the amount in the table and gross pecuniary gain (provided that use of this method would not unduly complicate or prolong the sentencing process):

1. In all cases if management participated in the offense, etc. ("Alternative I")
2. In all cases. ("Alternative II")
3. In all cases unless the organization's liability involved other than intentional or knowing conduct and management did not participate in the offense, etc. ("Alternative III")

Alternative I is the same as that in the February 28 draft. Alternative II is the same as the October, 1990 proposal (minus Footnote 2) and Alternative 3 is brand new.

With respect to each of these alternatives:

Alternative I is certainly an improvement over Alternative II because it bars mandatory use of the loss standard where management was not implicated. However, it does not solve the many serious problems with mandatory use of the loss standard. Use of this standard should be left to the discretion of the trial judge. But if the Commission elects not to give the judge this discretion, two additional conditions should be attached to the mandatory use of the loss standard: It should be required only if (a) the offense conduct which triggered the organization's criminal liability involved intentional, knowing or reckless criminal conduct and (b) the extent of the gross pecuniary loss was not substantially greater than would have been anticipated by a reasonable person acting under the circumstances in which the individual agent or agents of the organization who committed the offense acted. Note that these two conditions were set forth as alternatives in Footnote 2 at page 9 of the October, 1990 proposal.

Alternative II is simply not a viable alternative since it could unjustifiably subject an organization to astronomical fines resulting from the conduct of a very low level employee acting on his own, contrary to organizational policies.

Alternative III, as presently worded, is a significant weakening of the limited protection offered in Alternative I since it would require use of the loss method if the offense involved knowing or intentional conduct, even if management was not involved. This Alternative would be greatly improved if it were phrased in the disjunctive rather than the conjunctive (i.e. if "or" were used instead of "and"), but this still would not deal with the situation in which losses not reasonably foreseeable occurred. I would suggest that the second proviso to §8C2.3 be amended to read as follows:

"Provided, further, that subsection (a)(3) shall not be used for determination of the base fine if (a) the offense that resulted in the organization's criminal liability involved other than intentional or knowing conduct, (b) management neither participated in, condoned nor was willfully ignorant of the offense, or (c) the extent of the gross pecuniary loss was substantially greater than would have been anticipated by a reasonable person acting under the circumstances in which the individual agent or agents of the organization who committed the offense acted."

The Honorable William W. Wilkins
March 21, 1991
Page Three

B. Requirements for a Compliance Program

For the reasons set forth in my letter of March 11 the last sentence of the first paragraph in definition (h) on page 3 should be amended to read more or less as follows:

"Due diligence ordinarily [generally, usually] requires that the organization has taken the following seven general types of steps to assure compliance with the law:"

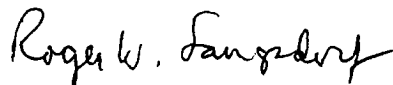
C. \$8C2.4(f) - Credit for Lack of Supervisory Involvement

Two points are awarded:

"If the offense was exclusively committed by a person or persons who did not hold a supervisory position in the organization, management neither condoned nor was willfully ignorant of the offense, and the offense was committed contrary to the established policies of the organization."

Absent a limiting definition this provision would hardly ever apply. What is a supervisory position? It could be read as including every single employee to whom another employee (or perhaps even outside contractor) reports. This would leave a relatively small handful of employees to whom no one happens to report. What was wrong with the February 28 draft which included "any person or persons not within management" in the category of persons whose actions in defiance of management involvement or company policy entitle an organization to credit?

Sincerely,



Roger W. Langsdorf

cc: Members of the Commission