
PUBLIC COMMENT

And Summaries of Responses to Request for Public Comment

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United States Sentencing Commission

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PRACTITIONERS' ADVISORY GROUP
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November 5, 2001

Honorable Diana E. Murphy, Chair
United States Sentencing Commission
One Columbus Circle, N.E.
Suite 2-500, South Lobby
Washington, D.C. 20002-8002

Re: Organizational Sentencing Guidelines Ad Hoc Advisory Group

Dear Judge Murphy:

The Practitioners' Advisory Group (the "PAG") to the United States Sentencing Commission submits this letter in response to the Commission's September 19 notice (66 Fed. Reg. 48306) for advice on the make-up and objectives of an ad hoc advisory group that the Commission is considering appointing to review the Organizational Sentencing Guidelines ("OSG"). As set forth below, the PAG supports the formation of such a group, which should have a well-defined mission and a broad-based membership.

At the outset, the PAG regards the OSG as a success for which the Commission deserves great credit. Viewed from the perspective of their tenth anniversary, the OSG began a nationwide, corporate compliance movement by combining an appeal to corporate self-interest - compliance programs - with the best good corporate citizenship instincts of American corporations.

The ten year mark in the life of the OSG is an appropriate time to ask what changes, if any, are needed, and an ad hoc advisory group could serve a useful purpose in suggesting improvements to the OSG. Such a group will best achieve its purpose if its membership includes as many perspectives as feasible. Among the possible members, therefore, are corporate compliance officers and/or in house legal counsel who are responsible for their company's compliance programs, prosecutors responsible for the Department of Justice's white collar corporate prosecution policy, defense attorneys who conduct internal investigations and/or represent companies in grand jury investigations, compliance and ethics specialists, both from academia and the private sector, and senior executives of both large and small companies.

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As to the small company representation, in certain respects the OSG - particularly the seven criteria for an effective compliance program - were written more for large companies than small ones. Small companies attempting to comply with the seven compliance criteria often complain that they lack resources and expertise to develop and implement effective compliance programs and therefore allowing their views to be expressed within the ad hoc advisory group's deliberations would be invaluable.

Overall, the private sector members should reflect or have experience with a variety of industries since the perspective on compliance of, for example, the health care industry may differ from that of the defense industry. The ad hoc advisory group should have a term of not more than two years, which is sufficient to analyze, discuss and formulate recommendations while setting a deadline for completion of the group's work.

The mission of the ad hoc advisory group should be neither too broad nor too narrow. As the well-known but generally apt saying goes, "if it ain't broke, don't fix it." After ten years, corporate America has generally become comfortable with the OSG and radical changes might create confusion. In particular, we are skeptical that the OSG needs major rewriting, for example, to accommodate a sentencing scheme based on so called integrity based compliance in which a company's ethical culture is evaluated, along with its compliance programs, in considering the appropriate corporate sentence. We fully agree with integrity based compliance advocates that the success of a company's corporate compliance program is directly proportional to the commitment of its leadership to promoting an ethical company culture in which ethics is regarded as important a business objective as the company's earnings per share or annual revenue growth. But we question whether it is possible to establish objective, uniformly applicable criminal sentencing bench marks for measuring a company's ethical culture that improve on the existing seven criteria for a compliance program that identify *objective* compliance activities - such as use of auditing and monitoring systems or hotlines - and generally do not depend on inherently subjective evaluations of a company's ethical culture. The ad hoc advisory group could usefully function as a think tank to examine ideas such as integrity based compliance, and conceivably the OSG commentary might refer to, and emphasize, the importance of an ethical culture to achieving the "due diligence" required of an effective compliance program, but the group should be cautious in advocating the replacement of the seven criteria with a substantially different scheme.

Rather, a principal focus of the ad hoc group advisory group should be to review the seven criteria for an effective compliance program for improvement and/or clarification and evaluate whether the fine ranges and culpability score values need adjustment in light of the past ten years experience with corporate sentences under the OSG. As one example, the ad hoc advisory group

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might consider whether the OSG should explicitly require companies to engage in ongoing efforts to audit and test compliance procedures to ensure that a compliance program is as effective in practice as it is on paper.

As another example, one of the criteria for an effective compliance program, that the company should not "delegate substantial discretionary authority to individuals with a propensity to engage in criminal activity," §8A1.2, Application Note 3 (k) (3), causes significant confusion. The ad hoc advisory group might consider just how a company can determine that a person has a "propensity" to engage in criminal activity and perhaps address whether this criteria should explicitly state whether or not due diligence obligates the company to institute background checks of all significant decision makers before they are hired.

Among the culpability score issues that might be considered by the ad hoc advisory group is clarification of what constitutes cooperation by a corporation that qualifies it for either a three point or two point reduction in culpability score pursuant to §8C2.5 (g) (1) or (2). These provisions require that the company, to qualify for the reduction, among other things, must have "fully cooperated in the investigation." In June 1999, the Department of Justice promulgated a guidance memorandum to federal prosecutors titled "Federal Prosecution of Corporations," which among matters, suggested that a company might not be considered by federal prosecutors to have fully cooperated unless its disclosure included, if necessary, "a waiver of the attorney-client and work product protections, both with respect to its internal investigation and with respect to communications between specific officers, directors, and employees and counsel." *Id.* at 7.

The guidance memorandum, which did not address cooperation pursuant §8C2.5 (g) (1) or (2), provoked significant comment and controversy. The ad hoc advisory group might consider whether §8C2.5 (g) can usefully be clarified to make clear whether or not a privilege waiver is a necessary prerequisite to a culpability score reduction based on cooperation.

In addition to our thoughts regarding the mission of the advisory group, we would nominate Gregory Wallance for participation in the group. Mr. Wallance who is a litigation partner at Kaye Scholer LLP in New York. Mr. Wallace is a former Assistant United States Attorney in the Eastern District of New York, where he prosecuted white collar criminal cases. His practice concentrates on internal investigations, corporate compliance and white collar criminal representation. He was instrumental in helping to start and co-chaired for the past several years, the Practising Law Institute's multi-city Seminar on Corporate Compliance. Mr. Wallance has written and lectured widely on the Organizational Sentencing Guidelines. Although Mr. Wallance is a member of the

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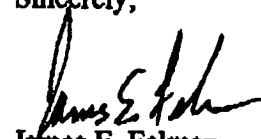
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Practitioners' Advisory Group, hopefully this would not disqualify him from consideration for the organizational group.

In sum, we support the creation of an ad hoc advisory group to review the OSG and their application in the past ten years to corporate offenses and, whether appropriate and feasible, recommend improvements to the commission.

Sincerely,



James E. Felman
Barry Boss

JEF/1h