

Coalition For Ethics And Compliance Initiatives

November 6, 2001

Chair Diana E. Murphy and
Members of the United States Sentencing Commission
Thurgood Marshall Judiciary Building
1 Columbus Circle NE, Suite 2-500
South Lobby
Washington, DC 20002

Dear Chair Murphy and Commissioners:

I am writing on behalf of the Coalition for Ethics and Compliance Initiatives (CECI) in response to the Commission's September 19, 2001 request for comment regarding issues related to the organizational guidelines. I will address, in particular, the Commission's request for comment on the scope, duration and membership of any advisory group appointed to review the organizational guidelines and develop proposals on these guidelines for the Commission's consideration.

As noted in our May 30, 2001 letter to the Chair, CECI is a voluntary association of interested individuals and organizations dedicated to the implementation of more effective ethics and compliance programs in organizations. We aim to accomplish this mission by, among other means, facilitating communication among policy makers and members of the ethics and compliance community about significant issues of mutual interest and concern.

The organizational guidelines are unquestionably such an issue, and we are heartened by the Commission's request for comment in this area. In our view, the Commission would most benefit from an advisory group with the broadest possible scope, sufficient time to conduct a comprehensive and deliberate review, and membership that includes experienced ethics and compliance practitioners, as well as lawyers and scholars who have studied and helped apply the organizational guidelines.

As the Commission notes in its request for comment, the organizational guidelines have had an enormous influence on the development, shape and scope of ethics and compliance programs in many organizations. The impact has been the greatest from those portions of the organizational guidelines which detail the credit organizational defendants can receive for corporate compliance programs, as well as related provisions regarding cooperation with the authorities and voluntary disclosure of wrongdoing. As the Commission also recognizes, the impact of these provisions goes well beyond the relatively limited number of organizational sentencing cases that come before the courts each year.

These areas should be a focus of any advisory group review. Now is an appropriate time, 10 years after the organizational guidelines were implemented, to carefully review their application

and impact on organizational ethics and compliance programs and make recommendations for improvement. An advisory group is an excellent vehicle for undertaking this review and providing the Commission with the most thoughtful and comprehensive information and recommendations.

At the same time, perhaps in part because of the limited opportunities for the courts to interpret the organizational guidelines, there have been a substantial number of relevant legal and regulatory developments outside of the sentencing context. These include regulatory compliance guidance issued by federal agencies, voluntary disclosure programs, state and federal cases interpreting the compliance responsibilities of corporate boards of directors, False Claims Act cases, corporate integrity agreements and consent decrees. Also relevant are United States Department of Justice standards for the prosecution of organizations, self-audit and source privilege issues and recent United States Supreme Court civil cases in the areas of sexual harassment and punitive damages, as well as other litigation and enforcement activity.

We believe the advisory group should, consistent with the Commission's legal authority, have the ability and opportunity to review these related legal and regulatory developments. This is because these initiatives often interpret, enforce, apply, augment, support or even conflict with the principles, objectives and provisions of the organizational guidelines. In many cases, policymakers have moved beyond the Commission's elements in prescribing what it takes to establish and maintain an "effective" compliance program. In other cases, these efforts may offer helpful suggestions for improvements in the guidelines themselves, especially as regards the compliance program elements. A careful study of them is indispensable to any consideration of the success of the organizational guidelines, as now applied, at meeting the Commission's goal of defining "an effective program to prevent and detect violations of law" [see USSG §8A1.2, comment. (n.3 (k))].

For these and other reasons, we are convinced that an advisory group should be given sufficient time to conduct a careful, thoughtful and extensive review of the broad impact of the organizational guidelines and these related issues. By focusing exclusively on the organizational guidelines and taking the time to study the wide range of complex issues related to their application, the advisory group can best help lay the groundwork for any future efforts by the Commission to promote additional innovation and effectiveness in organizational ethics and compliance programs.

Finally, this advisory group should include ethics and compliance officers and other experts on organizational ethics and compliance, in addition to members of the bar who represent corporations in criminal matters. Ethics and compliance officers can describe the day-to-day impact in their organizations of the organizational guidelines and, especially, the practical value and application of the guidelines' elements of an effective compliance program. They can address the strengths and any weaknesses of the organizational guidelines as both written and applied. These experts can also detail the impact (both positive and negative) of the other legal

and regulatory developments discussed above on the ability of their organizations to meet the standards of corporate "good citizenship" contemplated by the Commission.

CECI would welcome the challenge of participating in this advisory group process. Members of CECI's Oversight Committee and its sponsors include compliance, ethics and ombuds professionals from a wide variety of companies and industries; corporations and professional organizations with vast experience at evaluating and applying the organizational guidelines; scholars in the field of business ethics and corporate compliance who have studied the effectiveness of the guidelines and specific provisions of them; legal experts and counsel who have helped organizations effectively implement compliance programs; and representatives of the Ethics Resource Center, the Ethics Resource Center's Fellows Program and the Ethics Officer Association. As you know, the Ethics Officer Association and the Sentencing Commission have conducted regional symposiums on the organizational guidelines. In addition, the Ethics Resource Center's Fellows Program has recently initiated an effort to bring researchers and practitioners together to study the impact of the organizational guidelines and offer recommendations for future initiatives, including possible changes to the guidelines.

The mission, objectives and membership of CECI, and our ability to assist the Commission, are explained in more detail in the May 30th letter (which is attached). The individuals and organizations within CECI bring diverse perspectives and a wide range of invaluable experiences, from organizations of varying size, industries, cultures, and complexity, to any consideration of the operation and impact of the organizational guidelines.

Thank you on behalf of CECI for the Commission's consideration of an advisory group to review the organizational guidelines. We firmly believe that an in-depth review of the organizational guidelines and related law and policy developments would best serve to advance the Commission's objectives. CECI and its members have a great interest in the proposed advisory group, and we stand ready to contribute to it.

Sincerely,



Jay Cohen
Vice President of Compliance, Oxford Health Plans
Chair, Oversight Committee
Coalition for Ethics and Compliance Initiatives
Tel. (203) 459-7773

Coalition For Ethics And Compliance Initiatives

May 30, 2001

The Honorable Diana Murphy
Chair
United States Sentencing Commission
Thurgood Marshall Judiciary Building
1 Columbus Circle NE, Suite 2-500
South Lobby
Washington DC 20002

Dear Judge Murphy:

As chair, I am writing on behalf of the Oversight Committee of a voluntary association called the Coalition for Ethics and Compliance Initiatives (CECI). CECI is exploring ways to improve the climate for effective compliance and ethics programs through a greater dialogue with policy makers. We understand that Win Swenson recently met with you in Washington and had an opportunity to briefly discuss our work.

Based on public statements you and other Commissioners have made (and on your discussions with Mr. Swenson), we understand that the Commission is evaluating whether to undertake a review of the organizational sentencing guidelines — more specifically, portions of the organizational sentencing guidelines that deal with effective ethics/compliance programs. CECI has not, at this point, adopted a position on any particular outcomes we would like such a review to achieve. However, we agree that a review of the guidelines' impact, and possibly of the Commission's role in promoting the policy goals of the guidelines, would be well received by the ethics and compliance community.

Over the last decade, the organizational sentencing guidelines have had — and continue to have — an enormous influence on many organizations, providing an unprecedented catalyst for the development of comprehensive compliance programs. They have also helped shape enforcement policies outside of the Federal criminal sentencing context in critical ways.

Despite the guidelines' decade of impact, some of us affiliated with the CECI initiative, and others in the compliance and business ethics fields, have noted areas where the guidelines may not be entirely achieving their desired ends. Accordingly, a gradual look at possible reforms to improve the guidelines' performance (including ways to improve the interplay between the guidelines and laws and policies outside the Commission's immediate jurisdiction) would, in our view, be justified from a public policy perspective.

Our purpose in sending you this letter is to identify CECI as a potential resource to the Commission should it undertake a review of the organizational sentencing guidelines' impact on compliance/ethics programs. Specifically, we understand that the Commission's Deputy General Counsel, Paula Desio, has suggested convening an external advisory group – modeled on the existing Practitioners' Advisory Group but focusing exclusively on the organizational sentencing guidelines – to provide the Commission with useful input. We agree that forming a group of this kind makes a great deal of sense. It would allow for a gradual and careful evaluation of relevant issues, an approach that may fit best with the Commission's otherwise busy schedule and certainly would respect the complexities of this important topic. We also believe that CECI is ideally suited to directly support this kind of effort.

To explain why we believe CECI would be a natural fit for comprising an Organizational Practitioners Advisory Group (hereafter "OPAG"), additional background is undoubtedly useful. By some measures, CECI is still in a formative stage. However, our initial funding has come from organizations that have wanted to determine the feasibility of becoming involved in precisely the kind of initiative that OPAG would represent.

Specifically, CECI was formed to determine whether an ongoing organization (i.e., a permanent CECI) could be established to provide a "voice" for the compliance/ethics profession in policymaking settings (like OPAG) – a voice that has not previously existed across industries in any coordinated way. The catalyst for creating CECI came about when a group of compliance/ethics experts – working under the auspices of the Ethics Resource Center's Fellows Program – developed four model legislative proposals, each aimed at improving the legal environment for effective compliance/ethics programs. (For example, one proposal would provide "source protection" so that employees can feel comfortable reporting sensitive ethics/compliance concerns without fear of personal disclosure.)

The proposals were discussed within the ethics/compliance community, and this process led to two realizations. The first was that other potentially important issues that have an impact on the ethics/compliance field also deserve attention. The second was that no organization currently exists to discuss these issues with policymakers on behalf of the ethics/compliance field.

During the past three months, CECI has been studying the feasibility of becoming a permanent, non-profit entity. Our initial work focuses on identifying an appropriate governance structure, building a broad and representative membership, and securing sufficient resources. Based on our efforts to date, we are confident that if asked to take on the role of Organizational Practitioners Advisory Group, CECI would be able to carry out this function fully and effectively.

As might be surmised from the foregoing description of our history, CECI's mission, membership and transition staff fit extremely well with the OPAG concept.

CECI's official mission is:

To foster the implementation of more effective ethics and compliance programs by:

1. Educating and communicating with policy makers, legislators, government agencies and others who influence public policy,
2. Providing timely information and analysis to ethics and compliance practitioners and their organizations,
3. Serving as a voice and resource to ensure that the ethics and compliance communities are heard in the formulation of public policy, and
4. Identifying and advocating for relevant public and organizational policy issues of interest to our members.

CECI's Oversight Committee is diverse and reflects perspectives that we believe would be helpful to the Commission in assessing the organizational guidelines' operation and impact.

Members of the Committee are:

- Compliance, ethics and ombuds executives from major business entities (Lockheed Martin, Oxford Health Plans, and United Technologies);
- The Executive Director of the Ethics Officer Association (the largest association of cross-industry compliance and ethics professionals (approximately 720 members));
- The President of the Ethics Resource Center (a nonprofit organization dedicated to promoting private and public sector ethics, and an advisor to leading businesses on ethics matters); and
- A scholar in the field of business ethics and corporate compliance (Xavier University) who served as a Supreme Court Judicial Fellow at the Sentencing Commission from 1998 -99.

Sponsors of CECI's efforts to date also include:

- Well known companies active in the compliance/ethics field (General Motors, PricewaterhouseCoopers and Weyerhaeuser)
- The Ethics Resource Center Fellows Program (a select group of corporate, government, nonprofit and education leaders who work to identify, examine and further understand critical business ethics challenges through research and other projects; currently chaired by the Honorable Steven Potts, former Director of the Office of Government Ethics under both the first Bush Administration and then, following reappointment, the Clinton Administration; Paula Desio has served as the Commission's representative to the Fellows Program since 1998); and
- The Center for Business Ethics at Bentley College (a nonprofit center which promotes ethical business conduct in contemporary society).

CECI activities are currently facilitated by two transition coordinators with uniquely relevant credentials, as well. Win Swenson served the Commission as Deputy General Counsel from 1990 to 1996 and, as you know, headed up the staff group that developed the organizational sentencing guidelines under the Commission's direction in 1991. He therefore contributes a strong knowledge of the guidelines' original policy objectives, and of institutional matters that would be critical to assessing the guidelines' operation and impact (e.g., technical aspects of the guidelines' system as a whole; the Commission's enabling statute and that statute's legislative history, the Commission's historical dealings with Congress and other governmental entities).

Our other transition coordinator is Joseph E. Murphy. Mr. Murphy has been a practitioner in the compliance field for twenty-five years and is widely recognized as one of the country's leading experts on corporate compliance. In 1994, he was a member of an advisory group that guided the development of the Commission's three national surveys on corporate compliance. In 1995, he was a speaker at the Commission's seminal symposium on corporate crime where, among other topics, he discussed the impact of the current legal environment on effective corporate compliance. He also has international experience in this area, including reviewing and commenting on the Australian standards on compliance programs (AS 3806).

CECI's Oversight Committee would be delighted to meet with you, other Commissioners and/or Commission staff to develop a plan for constituting the Organizational Practitioners Advisory Group at your earliest convenience.

We should note that CECI is a cross-industry coalition. Thus, those associated with CECI already comprise a broadly representative group (and we expect representation to continue to grow). Consistent with this, part of our role would be to develop, with your approval, bridges to others with an interest in this topic, including my colleagues in

May 30, 2001

Page 5

health care compliance. CECI's mission dovetails with the notion of providing a cross-industry umbrella for sharing points of views on compliance and ethics related policies.

Thank you for taking the time to review this letter. We very much look forward to working with the Commission in whatever capacity you deem most advantageous on this important public policy matter. Please feel free to contact me by telephone at (203) 459-7773. You may also contact either of our coordinators, Win Swenson and Joe Murphy, at (301) 270-3555 and (609) 429-5355, respectively.

Sincerely,



Jay Cohen
Vice President Oxford Health Plans
Chair, Oversight Committee
Coalition for Ethics and Compliance initiatives

Cc: Timothy B. McGrath
Staff Director