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Chair Diana E. Murphy and
Members of The United States Sentencing Commission
Thurgood Marshall Judiciary Building
1 Columbus Circle NE
Washington DC 20002

November 2, 2001

Dear Chair Murphy and Commissioners:

I am writing in response to the September 19, 2001 Federal Register request for comment ("RFC") on the appointment of an organizational guidelines advisory group. The RFC states that comment is welcomed in three areas: 1) the scope, duration and composition of the group; 2) the merit of suggestions in letters submitted to date; and 3) any other issues related to the improvement of Chapter Eight. I will address my comments to these three areas.

1) The Scope, Duration and Composition of the Advisory Group

Chapter Eight contains much important detail, but I believe the portions of Chapter Eight that have had the greatest impact, generate the most public concern and therefore should be the advisory group's primary focus – at least initially – are the portions relating to the credit for corporate compliance programs. This includes the definition of "an effective program to prevent and detect violations of law" found at USSG §8A1.2, comment. (n.3(k)).

The implications of the guidelines' credit for compliance programs is difficult to overstate. Most major corporations operating in the U.S. today have been spurred by the guidelines' credit for compliance programs into establishing such programs, and virtually all of these companies have been guided by the guidelines' definition of "an effective program" in designing their programs. In addition, major cases and enforcement policies that have an impact on corporate behavior have drawn heavily on the guidelines' approach. Finally, newly proposed ISO standards for compliance programs that are working their way through the international approval process are based on the guidelines' definition of an effective program.

I therefore believe it is important that the Commission recognize, in weighing the scope of an advisory group (as well as the group's duration and purpose), that while the number of "cases" applying Chapter Eight or its credit for compliance programs is relatively low, the impact of the guidelines' pro-compliance policy – especially on our business organizations and, as a result, on the everyday lives of literally millions of employees – is extensive. I have worked with scores of companies over the last five years and have seen this impact first-hand. I would add finally, that the cost of failing to meet the guidelines' compliance standards is also very significant, with criminal fines now reaching into the hundreds of millions of dollars. In short, the guidelines' compliance standards and credit are exceedingly important and should therefore be, in my view, the starting point for the advisory group's work.

With respect to the question of what issues the advisory group should focus on, I would respectfully urge that the group address issues that go beyond potential amendments to the definition of an effective program. As partially summarized in the attached article, J. Murphy & W. Swenson, *A Call to Action – Creating a Voice (and Ears) for the Compliance and Ethics Field*, Prevention of Corporate Liability (July 2001) (see "The Need" section beginning on the first page of the article), the current legal and enforcement environment in which the guidelines must operate is, in many ways, inimical to the goals of Chapter Eight's policy of promoting effective compliance programs.

In other words, aspects of the legal and enforcement environment make it much more difficult for organizations to operate the kind of compliance programs the guidelines intend to encourage. As the article discusses, issues have arisen as a consequence of decisions by the National Relations Board, the Federal Trade Commission and certain court decisions. In addition, existing penalty schemes such as the treble damage provisions of the False Claims Act can be – and I believe are – applied in ways that undercut the guidelines' credit for compliance programs.

Accordingly, I would urge that the advisory group inventory these issues and present proposals to the Commission on how these issues might be addressed – either through 1) dialogue with other agencies or 2) legislation, aimed at coordinating and bringing greater rationality to the current inconsistencies. In my view, and I believe the view of most experts in the field, this is where the larger, more significant issues reside – not so much, in other words, in the guidelines themselves.

The suggestion that the advisory group examine the broader legal and enforcement environment in which the guidelines' compliance provisions operate is directly supported by the Commission's enabling statute. As the Commission recognizes, its enabling statute contemplates that the Commission will evaluate the effectiveness of sentencing policies on an ongoing basis and improve them where possible. See, e.g., 28 U.S.C. §§991(b)(1)(A) and (C), (b)(2), 994(o).

However, the Commission's authority goes beyond merely amending the guidelines themselves to improve their effectiveness. Congress was aware that the guidelines would not be able to function in a policy "stovepipe" – it knew that other agencies and laws

could affect the guidelines' effectiveness. Not wishing the Commission to ignore such effects, Congress empowered the Commission to:

- "[A]ssist and serv[e] in a consulting capacity to Federal courts, departments, and agencies in the development, maintenance and coordination of sound sentencing practices;" and
- "[M]ake recommendations to Congress concerning modification or enactment of statutes relating to sentencing, penal and correctional matters that the Commission finds necessary and advisable to carry out an effective ... and rational sentencing policy."

28 U.S.C. §995(12)(B) and (20), respectively. These powers precisely coincide with the twin needs in this area – to advise and consult with other agencies and to weigh possible statutory changes as a way of strengthening the Chapter Eight's core policies.

The need for the Commission to use its §995(12)(B) and (20) powers for the purposes described was forcefully recommended six years ago at the Commission's 1995 symposium, "Corporate Crime in America – Strengthening the 'Good Citizen' Corporation". There, Senator Edward M. Kennedy, an original sponsor of the Sentencing Reform Act of 1984, stated:

Government officials also have a duty to reduce red tape and coordinate multiple overlapping enforcement tools While the notion of coordinating these sanctions is not new, the guidelines make coordination all the more imperative. In effect, the guidelines make a basic promise to companies: "Act as good citizens and your penalty exposure will be reduced." But the promise is false if companies face non-guideline penalties that take no account of these "good citizenship" efforts. I am pleased that tomorrow's proceedings will consider these important coordination issues.

Symposium Proceedings at 120.

As Senator Kennedy noted, a panel the next day did discuss coordination issues at length. See *Carrots and Sticks Amid Overlapping Enforcement Schemes and Policies: Finding Government's Message*, Symposium Proceedings at 265. A principal presenter on this panel was William B. Lytton (*The Case for Greater Governmental Coordination: Civil Sanctions and Third Party Actions*, Symposium Proceedings), who was recently elected Chair of the American Corporate Counsel Association.

An entirely separate second panel dealt with another critically important coordination issue – the fact that compliance activities can be used against an organization in non-sentencing contexts. See *Privilege Update: When Should Compliance Practices be Protected from Disclosure?*, Symposium Proceedings at 349.

Although 1) Congress has specifically empowered the Commission to discuss coordination issues with other agencies and identify areas where statutory changes could be constructive, and 2) important voices have for some time urged the Commission to use these powers, I certainly think expectations for the Commission's role in this area must be tempered and realistic. In my view, it is not the Commission's responsibility to actually effect any needed changes in the broader legal and enforcement environment. Rather, I believe the Commission's §995(12)(B) and (20) authorities imply a responsibility to see that relevant issues are identified and, to the extent possible, fairly considered by other policymakers.

With respect to the advisory group's membership, I think that it is essential that the group consist of a broadly representative cross-section of recognized experts in the field. This is not an area where academic study is particularly called for. There is a substantial reservoir of practical experience to draw from and there are known experts who have had a prominent role in representing the compliance/ethics field and can tap into this experience.

If the advisory group is comprised of recognized experts in the ethics/compliance field, the advisory group will be able to assist the Commission on both the "issue identification" and "dialogue with other agencies/Congress" fronts. Experts who are recognized in, and connected to, the ethics/compliance field will be able to identify true needs by "vetting" issues within the broad spectrum of compliance/ethics practitioners. In my view, this vetting process is critically important, as discussed in the next section of this letter, if the Commission's examination of Chapter Eight is to prove successful.

With respect to promoting a dialogue with other interested policymakers, the advisory group can again be helpful if it has the necessary experiential stature. Many prominent organizations have mature compliance/ethics programs. Those who have substantial experience either working with these companies in an advisory capacity or running such programs directly can cogently inform discussions with policymakers in forums that the Commission could facilitate or create. This would allow a full consideration of relevant issues by policymakers but not, as would be appropriate, a guarantee of any particular results.

One particular way to ensure that the advisory group has a substantial linkage to the compliance/ethics field would be to select one or members from those affiliated with the newly formed Coalition for Ethics and Compliance Initiatives (CECI). I played an early role in helping this group become organized (a role that has now ended in a formal sense) and I understand that Jay Cohen, the current Chair of the CECI Oversight Committee is submitting comment directly on CECI's behalf.

With respect to the advisory group's duration, I would recommend a timeframe of not less than two years. The issues are complex, the issues need to be vetted among practitioners who are busy professionals, and the Commission has many other important matters on its agenda that, presumably, would limit the time it could devote to the advisory groups' activities.

2) The Merit of Suggestions in Letters Submitted to Date

With one exception, I do not have comments on any of the proposals made to date. Indeed, consistent with the view that proposals such as the ones already submitted need to be fully vetted, I think it is premature to comment on them. At the Ethics Officer Association meeting in Nashville last month, I led a session in which I asked attendees to react to the proposals submitted so far. The attendees' response illustrates my concern over the need for vetting. Almost all the suggestions were viewed as well meaning, but several were viewed as ill-informed.

The one suggestion that I think data and experience do generally support at this point is the need to heighten the importance of auditing and other evaluative techniques in the definition of "an effective" compliance program. The Commission's policy interests here are, in my view, to ensure that only "real" and "effective" programs are credited under USSG §8C2.5(f). Organizations that fail to evaluate the effectiveness of their programs may not have effective programs – providing that only companies that do evaluate their programs can receive culpability score credit helps ensure that credit will only be given where it is due.

Having said this, however, this point immediately raises the coordination issues discussed above. In today's litigation and enforcement environment, information gathered to assess and strengthen a compliance program can be used against a company in non-sentencing contexts. The Commission's possible policy interest here, in other words, conflicts with other laws and practices.

3) Other Issues

The only additional issue I feel compelled to raise relates to the need for the advisory group to be what might be called "technically grounded" in the Commission's practices and statutory framework. It seems to me that the Commission has had varying success with advisory groups and one of the groups that was the least successful was a group convened to help the Commission further consider environmental guidelines for organizational offenses in the early 1990s. This group's members were able and expert, but because they lacked an understanding of the guidelines' structure, the guidelines' amendment process and the parameters of the Commission's enabling statute, I believe their expectations for what the Commission could consider doing were unrealistic. As a consequence, their recommendations were not nearly as useful as they might otherwise have been.

This kind of issue does not arise with the Practitioners Advisory Group because its members are accustomed to the guideline amendment process and used to working with the guidelines themselves. This will not be the case for most experts on compliance/ethics – the kinds of people who, in my view, should comprise the advisory group.

There appear to be two options for dealing with this issue – either having a dedicated staff member assigned to the group, which raises resource questions, or appointing a chief technical advisor among the group's members. I think a staff and/or Commissioner liaison to the advisory group is a good idea in any case, but to ensure that the technical perspective is seen by the group as part of its own process and not an outside perspective, I favor the latter approach.

Let me conclude by saying that I would be pleased to serve in such a capacity drawing on my six years with the Commission, which included both legislative and organizational guidelines responsibilities, or in any other capacity the Commission would find helpful.

I strongly commend the Commission for undertaking the important inquiry raised by the RFC, am grateful for the opportunity to share these views and stand ready to assist however I can.

Sincerely,

A handwritten signature in black ink, appearing to read 'Win Swenson', with a long horizontal flourish extending to the right.

Win Swenson



BNA, INC.

Prevention of Corporate Liability

A Call to Action: Creating a Voice (And Ears) for the Compliance and Ethics Field

BY JOE MURPHY AND
WIN SWENSON

Ten years ago, the Federal Sentencing Guidelines for Organizational Defendants became law, setting off a chain reaction that has helped make compliance and ethics programs a fixture on the American business landscape. The Guidelines created incentives for companies to establish such programs as a way of avoiding harsh penalties in the event of a criminal conviction for employee misconduct.

But they did much more than this—they catalyzed a transformation in the way that government and courts look at corporate responsibility for employee misdeeds. Under a range of pronouncements—from the Department of Justice's policy for charging corporations, to agency guidance and case law sorting out liability in the area of equal employment opportunity, to the standards of director and officer liability implied by the *Caremark* decision—a consensus has formed: The existence and strength of a company's compliance or ethics program should count when a company's responsibility for employee misconduct is being assessed.

This new perspective is welcome. It puts greater control of a company's potential liability in its own hands. And companies have responded. Today, more companies than ever have meaningful compliance/ethics programs. The Ethics Officer Association (EOA)—which did not even exist in 1991 when the Guidelines were promulgated—now has over 700 energetic members who regularly

gather to share and advance best practices.

But as the Guidelines' tenth anniversary nears, the compliance/ethics world is far from idyllic. The fact is, companies today must operate their compliance/ethics programs in a legal environment that is often hostile to the very practices that make these programs work best. Compounding the problem, policymakers regularly weigh proposals that can unnecessarily undermine the jobs of compliance and ethics officers—not because policymakers want to make these professionals' jobs harder, but because they often have little idea what compliance and ethics officers do.

And no wonder. While most professional groups have an association that can speak to a broad range of policymakers (legislatures, cross-industry regulatory groups, even courts) on their behalf, compliance/ethics officers have no such organizational voice. Perversely, as the government's policies have increasingly emphasized the need for corporate compliance and ethics, compliance and ethics officers have often had to swim hard against a legal current that is indifferent or even hostile to these same policies.

Organizations such as EOA and the industry-specific Health Care Compliance Association perform immensely valuable functions. But their missions do not include a mandate to systematically interact with the full range of policymakers to resolve issues on behalf of the compliance/ethics profession—let alone across industries. Up to now, no one has been

doing this for the ethics/compliance field.

Now, however, with seed money from leading compliance-oriented companies and not-for-profits (such as EOA, the Ethics Resource Center, the Center for Business Ethics, and the Ethics Resource Center's Fellows Program), an effort is underway to explore how and whether a permanent organization along these lines might be built—to be a voice (and ears) for compliance and ethics professionals, to help ensure that the legal environment supports effective programs.

This unprecedented new effort is flying under the banner of the "Coalition for Ethics and Compliance Initiatives" (CECI).

CECI's Mission

The mission of CECI is straightforward—to foster the implementation of more effective ethics and compliance programs by:

- educating and communicating with policymakers, legislators, government agencies, and others who influence public policy,
- providing timely information and analysis to ethics and compliance practitioners and their organizations,
- serving as a voice and resource to ensure that the ethics and compliance communities are heard in the formulation of public policy, and
- identifying and advocating for relevant public and organizational policy issues of interest to CECI's members.

The Need

The need for CECI is powerfully illustrated by examples depicting the troublingly uncertain legal environment in which compliance and ethics programs must operate.

(continued on page 78)

Joe Murphy (jemurphy@cslg.com) and Win Swenson (wswenson@cslg.com) are Transition Coordinators for the Coalition for Ethics and Compliance Initiatives. Murphy is executive vice president of Compliance Systems Legal Group and Swenson is a partner with the firm.

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1. *The case of the unlucky stores:* A retail chain, concerned about preventing discrimination, hires an expert to conduct employee training sessions. To make sure employees truly understand the kind of conduct the training seeks to prevent, the instructor has employees describe biased comments they have heard in the stores. In a later discrimination lawsuit brought by employees, a federal judge provides the plaintiffs' lawyers with all the notes of the training course, whereupon the lawyers announce they have found "the smoking gun." In her opinion, the judge cites these very notes as a basis for allowing punitive damages claims. Shortly thereafter, the company settles the case for \$100 million—and the company's lawyers shut down the training.

Message: Addressing a compliance problem by openly recognizing that problem is legally risky.

2. *The case of the unfair labor practice:* A utility company wants its compliance and ethics message to reach all employees. Its program will not be just a paper program with unread materials locked away in a dusty storage room. The company will have every employee, even those doing the most mundane tasks, receive its new code of conduct. An act of a good corporate citizenship? No, an illegal unfair labor practice, according to the National Labor Relations Board. In the Board's view, law abidance and morality were not essential parts of the job at this company; the company had a duty to negotiate the "imposition" of the code with the employees' union.

Message: Think twice about including nonexempt employees in your ethics program.

3. *The case of the self-reporting polluter:* Government environmental agencies told brewers not to worry—their brewing processes did not release harmful pollutants. One brewery, acting as a good corporate citizen, conducted its own tests, however, and determined that pollutants, in fact, were being produced. It reported its findings to state environmental enforcement authorities. The result? State authorities announced they had caught this wrongdoing company and were imposing a \$1 million punitive fine.

Message: Think twice about initiating a proactive compliance review and disclosing issues; your acts of

good corporate citizenship could cost you dearly.

4. *The case of the wronged harasser:* A company receives a confidential hotline call reporting that a manager is flagrantly harassing female employees; the caller is one of these employees and fears for her well-being if her boss finds out. To ensure a full and independent investigation, the company hires an outside law firm to look into the matter. The firm's report, relying in part on confidential information from victims, demonstrates that the manager engaged in harassment and intimidation. The company terminates the manager but the manager sues, successfully recovering lost pay and damages because the company failed to follow the Fair Credit Reporting Act: It did not ask his permission to retain the outside law firm, and it did not disclose to him the report's full content, including the identity of every employee who complained about him.

Message: Diligent investigations, aimed at protecting victims, can come with a price.

Every day compliance and ethics practitioners confront impossible choices. Practices that may promote effective compliance and ethics are simultaneously discouraged by the law.

What makes these stories troubling is that they are not make-believe. The first is the *Lucky Stores* case from a federal district court in California. The second is the AEP case, a decision by the NLRB that was affirmed on appeal. The third story is what happened to Coors brewery in Colorado. The fourth case is based on a legal interpretation of the Fair Credit Reporting Act by the Federal Trade Commission.

Chilling Effective Practices

The crux of the problem goes beyond clearly unfair but sporadic cases, however. Every day compliance and ethics practitioners confront impossible choices. Practices that may promote effective compli-

ance and ethics are simultaneously discouraged by the law. Two examples, among many, illustrate:

■ Studies regularly show that some employees in virtually all organizations are unwilling to report sensitive compliance or ethics issues out of fear—fear that coworkers may disapprove, that a manager may try to retaliate, and so on. Companies can reduce fear by instituting nonretaliation policies, but in the end a promise of confidentiality to reporting employees may be required to get some to overcome their fears and actually report an issue. The problem is, companies that make a promise of confidentiality may be forced to break that promise if litigation arises and third-party discovery is allowed. There is no clearly established legal doctrine that protects against disclosure of an internal whistleblower's identity—no matter how important confidentiality may be to the whistleblower's decision to report—if a private litigant or the government seeks the material in discovery.

■ Practitioners have developed excellent ways to evaluate the effectiveness of compliance and ethics programs, and using these techniques is an important step in developing the best programs. But when companies diligently seek to identify program weaknesses in order to correct them, they create information that a third party may use against them. The *Lucky Stores* case shows only too well that focusing on faults with the goal of self-improvement is risky. It may be possible to protect this type of information under privilege by running it through counsel, but betting on the attorney-client privilege is a risky business. Moreover, keeping a close hold on self-evaluative information, which reliance on the attorney-client privilege requires, diminishes its usefulness. To promote program effectiveness, distribution of this kind of information should be as wide and open as possible, and certainly should go beyond the lawyers.

Positive Impact

It would be wrong, however, to suggest that legal and regulatory decisions always undercut effective compliance and ethics. The truth is, some excellent governmental initiatives have promoted voluntary compliance and ethics initiatives in the United States and even around the world.

The development of the Organizational Sentencing Guidelines took a positive, pro-compliance turn (away from an initial, exclusively punitive focus) when practitioners talked with the U.S. Sentencing Commission about the value of effective programs. Had companies familiar with compliance not undertaken such an active dialogue with the Commission, it is doubtful the result would have been so positive. CECI can create the same kind of dialogue with others in the legal and regulatory arenas.

What Would CECI Do?

CECI's mission statement sets the stage for its activities.

1. Educating and communicating with policymakers, legislators, government agencies and others who influence public policy.

We have witnessed too many instances where it appeared that those in government were simply unaware of the existence and role of company compliance and ethics efforts. Whether it is an agency issuing interpretations or congressional committees considering new legislative proposals, the potential impact on voluntary compliance and ethics programs too often is not fully understood.

CECI will bring together the compliance and ethics community first to monitor issues and then to bring them to the attention of government actors. We will be there to explain that voluntary compliance and ethics efforts are valuable, and how government and the litigation system affect these initiatives. We will aim our educational efforts at Congress, enforcement and regulatory agencies, the executive branch, and the states.

We will also communicate this message in any other appropriate forum that will help mold public policy. This includes academia, the press, the bar, and other organizations and associations.

2. Providing timely information and analysis to ethics and compliance practitioners and their organizations.

Many in the compliance and ethics field are unaware of the surprisingly long list of risks to their programs (and to themselves) created by the legal system. See Murphy, *Examining the Legal and Business Risks of Compliance Programs*, 13 ETHIKOS 1 (Jan/Feb 2000). Moreover, busy practitioners find it hard to keep up with new developments that could add even more risk to their current compliance

and ethics efforts, especially in areas outside their expertise.

There is also a need to act quickly in the governmental and litigation environments. If an agency is conducting rulemaking, a congressional committee is marking up legislation, or a court has a key case on appeal, there is little time to organize positions on an ad hoc basis. In the compliance and ethics context, there is often not even an awareness that these things are happening.

CECI will provide this information-gathering and dissemination function—what we refer to as a “Paul Revere function.” Whether it is a court considering the application of *Caremark*, an agency's enforcement document requiring that companies waive any privileges relating to internal investigations, or a legislative proposal to penalize companies for “invading” employees' privacy (when another agency expects them to be monitoring employee communications for harassing conduct), CECI can spread the word.

Compliance and ethics

professionals have a powerful story to tell, one that should resonate with policymakers.

3. Serving as a voice and resource to ensure that the ethics and compliance communities are heard in the formulation of public policy.

When agency and congressional staffs are considering new initiatives, where do they turn for input and fact-finding? If they know of a readily accessible source, it is easy for them to make that contact. We need to make sure they know there is a resource on compliance and ethics issues.

CECI will seek to play a constructive, consultative role with the Sentencing Commission if, as expected, the Commission begins its review of the Organizational Sentencing Guidelines. We expect to play a similar role with other agencies too. Among its other initiatives, CECI can hold roundtable, interactive sessions with policymakers so that they can see and hear what voluntary compliance is about.

4. Identifying and advocating for relevant public and organizational policy issues of interest to our members.

Compliance and ethics practitioners need to do more than be a passive resource, however. CECI can also monitor agencies, legislatures, and courts for proceedings that would affect compliance and ethics efforts. At the direction of our membership, we will act as advocates in each of these forums, to work to prevent creation of new risks for compliance and ethics, and to support and propose initiatives that promote compliance and ethics programs. In advancing the perspectives of compliance/ethics professionals, we will reach out to the many functions in organizations that play a role and have an interest in these issues, including legal departments, HR functions, and internal audit.

CECI will accomplish these goals by, for example:

- filing amicus briefs in litigation;
- conducting workshops for agency staff members;
- proposing legislation to address specific impediments to effective compliance;
- proposing agency solutions, such as rules or agency policies;
- serving as a resource for company counsel in dealing with an agency;
- helping develop executive branch policies to guide all agencies; and
- writing in influential journals in the field.

Getting Off the Sidelines

The truth is, compliance and ethics professionals have a powerful story to tell, one that should resonate with policymakers. Theirs is not a narrow, “me first” goal—it is everyone's goal: promoting ethics and law-abidance in our country's institutions.

The effort has begun. Prominent organizations have launched the first, exploratory phase of CECI. But for CECI to fully achieve its enormous potential, you who practice in the compliance and ethics field need to resist the otherwise admirable tendency to be modest. We all need to get off the sidelines and let our stories be told. CECI will be as powerful as its members.

Organizations and individuals interested in learning more about supporting CECI's mission should contact the authors at the e-mail addresses in the biographical material above.