



October 19, 2001

Hon. Diana E. Murphy, Chair
United States Sentencing Commission
One Columbus Circle, NE, Suite 2-500
Washington, DC 20002-8002

Re: Issues related to the Organizational Guidelines
Federal Register Notice 9/19/01

Dear Judge Murphy:

Please accept these comments in response to the Notice published in the Federal Register on September 19, 2001, requesting comments on the scope, potential membership and possible formation of an ad hoc advisory group on the organizational sentencing guidelines to consider any viable methods to improve the operation of these guidelines.

Possible formation of an ad hoc advisory group.

Forming an ad hoc advisory group to review the organizational sentencing guidelines after ten years of application is an excellent idea. During the last ten years, the organizational sentencing guidelines have dramatically impacted the way that business is conducted in America. Speaking for the health care industry – one of the most highly regulated industries in the world – I can say that no law has had a greater impact on this industry since the creation of the Medicare program in the 1960s. I feel certain the same is true for other industries as well. Ad hoc advisory groups assisted the Commission in developing the guidelines and would provide valuable insight to the Commission in reviewing them for viable opportunities for improvement after ten years of experience.

An ad hoc advisory group will provide a forum for the Commission to openly discuss with representatives of industry and government the benefits and burdens as well as the workable and difficult provisions of the guidelines and to evaluate the effect of any potential changes to the guidelines. The views of industry representatives in an organized forum are likely to be more balanced than those of advocates for organizational defendants facing sentencing under the guidelines. Organizations all too



often do not worry about the guidelines until they face sentencing. The comments submitted to the Commission under such circumstances are not likely to be as constructive as those made in a dispassionate ad hoc advisory group.

Scope of review.

The original organizational sentencing guidelines listed the seven components of an effective corporate compliance program in such general terms that each industry has been able to apply the seven components to its own unique industry practices. Based on the framework of the sentencing guidelines, the Office of Inspector General of the Department of Health and Human Services has issued ten final sets of guidelines for:

- hospitals
- clinical laboratories
- home health agencies
- voluntary disclosures of health care fraud
- third-party billing companies
- the durable medical equipment, prosthesis and orthotics supply industry
- hospices
- Medicare +Choice Organizations
- nursing facilities, and
- individual and small group practices.

Guidelines for the pharmaceutical industry are currently under development. More will surely follow.

With this many supplemental guidelines being released in only three years for just one industry, the Commission should exercise caution in responding to the many requests that the sentencing guidelines themselves be more specific. While everyone has a desire for certainty, this is not an area where one size fits all. The guidelines should remain a flexible and general framework for measuring corporate culture.

Nevertheless, there are questions or ideas about the guidelines that merit review and discussion. Certainly, extending the guidelines to cover ethical business practices is clearly the next step. Strict compliance with legal requirements is not sufficient to deter criminal behavior if an organization can find creative ways to circumvent the limitations imposed by the law. While such conduct may not be actionable under the law, it should be weighted in the sentencing guidelines. Many corporations have expanded their private compliance programs to include ethical business practices. However, this can place them at a disadvantage when their sole competitor is using every legal loophole.

Likewise, the Commission should consider the impact of sanctions on tax-exempt organizations. Since creation of the Medicare program, the federal government has become the nation's largest payor for health care services. Because hospitals were

paid under a "cost plus" reimbursement basis for nearly four decades, the Medicare program resulted in huge infusions of capital into the health care industry, creating the world's most advanced health care system. However, with the prosperity came the conversion of the hospital industry from a primarily non-profit, charitable industry to an increasingly publicly traded for-profit business. Tax-exempt and for-profit hospitals follow the same laws. Theoretically, the penalties for violating those laws should be the same. The guidelines currently make no distinction between the two.

The primary fiduciary duty of directors of a shareholder-owned corporation is to increase dividends and/or share value. The personal liability of directors for assuring corporate legal compliance established in *In re Caremark*¹ is one function of that primary duty. Conducting business lawfully reduces the risk of fines, penalties and negative publicity. By contrast, the primary fiduciary duty of directors of a tax-exempt organization is to provide designated services to the community. When large fines are assessed against a shareholder-owned entity, the dividends and/or stock values fall. When large fines are assessed against a non-profit entity, the funds available to provide services to the community decrease. Likewise, the personal reputations of shareholders are not damaged when a for-profit corporate entity is fined, but the personal reputations of non-profit trustees are often impacted when the reputation of the facility they govern is diminished by criminal sanctions. This is fact, not theory, and it is something the Commission should consider when evaluating the guidelines for areas of potential improvement.

There is a provision in the organizational sentencing guidelines that permits a downward departure if the members or beneficiaries, other than shareholders, of the organization are direct victims of the offense. This provision cites, as an example, labor unions convicted of embezzling pension funds.² There should be a similar recognition that the members of the community are the beneficiaries of a tax-exempt health care provider and substantial fines against tax-exempt health care providers remove funds from the community that would otherwise be spent to benefit the general public.

Serious consideration should be given to the suggestion that the guidelines be more specific about establishing standards and/or defining what constitutes an "effective" compliance program. The annual statistical reports of the Commission show that very few compliance programs have been found to be effective in preventing criminal conduct. The reason for this should be evaluated to see if the cause is lack of specificity in the guidelines or lack of commitment from the organizational defendants.

¹ *In re Caremark Int'l, Inc.*, 698 A.2d 959 (Del. Ct. Chan. 1996).

² § 8C4.8 Guidelines Manual (November 1, 2001) 42

Finally, the ad hoc advisory group should evaluate the wide spectrum of cases in which Chapter Eight has been applied to see if the early concerns about including environmental cases in the general provisions of Chapter Eight are still merited. It may be that the range of activities to which Chapter Eight has already been applied is greater than the range of potential environmental offenses that originally led to excluding them from Chapter Eight.

Potential Membership of Ad Hoc Advisory Group

The size of an ad hoc advisory group is always a difficult decision. The larger a group becomes, the more difficult it is to coordinate schedules and reach consensus. However, the organizational sentencing guidelines impact the entire spectrum of business in America. Thus, any group considering potential changes to the guidelines should be large enough to represent a cross-section of the business community.

Application of the False Claims Act to health care claims has resulted in a situation where institutions that have traditionally been public charities operate under constant fear of enormous fines and penalties for technical violations of complex regulations that are frequently given retroactive interpretations by their issuing agencies. It is perhaps the only industry where businesses feel the need to seek formal advisory opinions from governmental agencies to continue decades of charitable work.³ Thus, the health care industry is very interested in being represented on any committee or advisory group considering new or revised regulations or guidelines.

Changes in the guidelines, however, will not be limited to the health care industry. Thus, the members of the ad hoc advisory group should represent several of the most highly regulated industries that have a history of being subject to criminal penalties covered by Chapter Eight. If one industry is represented too heavily on the ad hoc advisory group, any recommendations made by the group may not take into consideration the impact of those recommendations on other industries.

Individual organizations are able to maintain anonymity when the ad hoc advisory group is composed of representatives from industry organizations such as the American Hospital Association, American Medical Association, Health Care Compliance Association and the Alliance for Health Care Integrity. However, there is genuine benefit to having the firsthand experience that can be provided by representatives from

³ *OIG Advisory Opinion No. 99-6 (St. Jude's Hospital may continue to waive co-payments and deductibles for pediatric cancer patients.)*

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large and small providers who have either been sentenced under the guidelines or have settled to avoid being sentenced under the guidelines.

The ad hoc advisory group should include representatives from the various federal agencies that administer the guidelines. The key consideration here is experience. There should be people on the ad hoc advisory group who have prepared the sentencing recommendations for organizational defendants and can share their experience in identifying places where they believe the guidelines did not permit allowance for either mitigating or aggravating circumstances.

And of course, district court judges who review the recommendations and impose the sentences must be on the ad hoc advisory group to share their experiences with cases in which they felt the guidelines were too restrictive.

I hope these comments are useful to the Commission and would be delighted to help in any additional capacity.

Sincerely,

A handwritten signature in cursive script that reads "Jane Adams Nangle". The signature is written in black ink and is positioned above the printed name and title.

Jane Adams Nangle
Corporate Compliance Officer
St. Joseph's/Candler Health System, Inc.
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