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November 6, 2001

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

ATTENTION: PUBLIC AFFAIRS

Dear Commission Members:

I submit this letter on behalf of Lisa A. Kuca and myself, in response to the Commission's request for comments regarding the establishment of an advisory group on the organizational sentencing guidelines. The Commission has requested comments regarding the composition, scope and operation of such a group.

By way of introduction, I am a partner in Vorys, Sater's White Collar Defense Group and concentrate my practice on corporate compliance matters and white collar criminal defense. Lisa is the Director of Corporate Compliance for H & K Investigative Solutions LLC, which is a subsidiary of Holland & Knight LLP, and devotes her practice exclusively to the creation and implementation of corporate compliance programs. I was formerly an Assistant U.S. Attorney for the Southern District of Florida, and Lisa was formerly a U.S. Probation Officer in the same district. We are both members of the Practitioners Advisory Group.

Lisa and I have both worked extensively with the organizational guidelines. In addition to practicing in the area, we have together written on the subject, and participated in CLE panel discussions of compliance issues with Commission members and industry representatives. Most recently, in August of this year, we participated with Judge Castillo in a program entitled "Corporate Compliance Programs: A Pound of Prevention" at the ABA Annual Meeting in

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Chicago. Earlier in the year, we participated with Commissioner Steer in a similar program at the ABA National Institute on White Collar Crime in San Francisco.

It is based on this experience that we offer the following thoughts:

Need for Greater Guidance

We strongly support the establishment of the proposed advisory group, but for reasons discussed later in this letter, suggest that its purview be limited to the criteria for an effective compliance program (U.S.S.G. § 8K1.2, Application Note 3.(k)). Our experience in working with corporations to establish "effective program[s] to prevent and detect violations of the law" teaches that the organizational guidelines provide insufficient guidance regarding precisely what constitutes such a program. We have found virtual unanimity that more help is needed.

Revising this portion of the guidelines requires a delicate balance, because too much detail could easily be worse than too little. In this area, one size truly does not fit all. Furthermore, the Commission's authority in this area is somewhat limited. The Commission is in the business of establishing sentencing guidelines, and not prescribing detailed rules for corporate governance. Its challenge – and a challenge for any advisory group – is to reconcile these limitations with the public's exaggerated view of the Commission's role as the arbiter of the federal sentencing process.

Purview

As noted above, we suggest a discrete focus on compliance programs and related issues. A broad focus on the entirety of Chapter 8 is too ambitious. We note that the areas covered by Chapter 8 include, to cite just a few, diverse examples, potential departures for threats to national security (§8C4.3), the environment (§8C4.4) and the market (§8C4.5), as well as detailed rules for calculating organizational sentences. To consider this multiplicity of areas would require either a group comprised entirely of generalists, or a group so large as to be at least cumbersome.

Moreover – and perhaps most important – **corporate compliance is qualitatively different from other areas covered by the guidelines, in that its focus is more on corporate governance than punishment.** This important difference warrants separate and detailed consideration of whether and how the seven elements of a compliance program should be amended.

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Composition

We suggest a smaller "executive" group – with possibly ten to twelve members – that would work closely with the Commission and its staff. The executive group could then form a liaison relationship with a larger advisory group, and possibly with other interested groups as well. This arrangement would facilitate consideration of a large number of proposals, while enabling the executive group and Commission staff to present only the best proposals for consideration by the Commission itself.

The executive group should include individuals with experience in corporate compliance and corporate governance issues. The emphasis in selecting group members should be on skill sets. Relevant skills may be possessed by, among others, in house and outside corporate counsel, compliance officers, compliance educators, risk managers, auditors and internal investigators.

There are important reasons for our emphasis on sophistication in corporate governance and compliance skills, rather than law enforcement experience. First, as noted above, the compliance guidelines uniquely involve corporate governance more than punishment. Additionally, it is imperative that the Commission focus on the sorts of programs that can actually be implemented without unfairly burdening industry and commerce, and without unreasonable cost. We are mindful that the views of the law enforcement community must also be considered, but believe there are sufficient other opportunities for those views to be presented.

The function of the larger group would be to promote consideration of the needs of a broad range of parties affected by the sentencing guidelines, including the law enforcement community. Such a group should also include representatives of large and small companies, heavily and less regulated industries, manufacturing, retail, service and other kinds of businesses. The Commission may also wish to streamline the process by having the executive group liaison with other existing groups, such as the Ethics Officers Association, the Department of Justice and various industry groups, rather than forming a separate, larger advisory group.

Executive Group Operation

The goal must be to form a group that can work for the Commission rather than burden it with unworkable proposals. The group must strive to accommodate a variety of conflicting interests, including the need for effective self-regulation versus avoiding exorbitant cost. Its imperative should be to assist

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the Commission's review of experience in the field, and to recommend the narrowest revisions necessary to achieve the desired result.

To function effectively, the executive group should have a clear mission statement, either created by the Commission or subject to Commission approval. It should coordinate with the larger group or groups for the purpose of data gathering and formulating recommendations. As noted above, this should include consultation with representatives of organizations that may be affected by the compliance guidelines.

The group should review existing compliance programs to identify so-called "best practices." This should include programs established to satisfy the guidelines, court-ordered programs, corporate integrity agreements, consent decrees and programs established pursuant to administrative regulations, such as environmental and health care programs. The group should also study reported cases and other authorities on the subject.

Group members should endeavor to achieve consensus independently, before seeking involvement of the Commission staff. In this way, the group can minimize the burden on the staff, while still having the benefit of the staff's views before approaching the Commission itself. Our hope is that through this process, such an advisory group will present the Commission with workable proposals that balance the legitimate concerns of all interested parties.

Lisa and I would, of course, be pleased to do anything possible to assist the Commission with this project, and believe that we can make a substantial contribution to it. We bring to the table significant "hands-on" experience working with corporate counsel, compliance officers, auditors and other corporate officials to draft and implement compliance programs in a variety of settings, ranging from customs to health care compliance. Additionally, our experiences in law enforcement and with the Practitioners Advisory Group have sensitized us to the kinds of proposals that can, and cannot, be implemented through the sentencing guidelines. (We enclose separate biographical summaries, in case the Commission should want additional information about our backgrounds.)

I can be reached in our Columbus, Ohio office at the following address:

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Lisa can be reached at:

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Thank you for your consideration.

Very truly yours,

A handwritten signature in black ink, appearing to read "D. F. Axelrod", written in a cursive style.

David F. Axelrod

DAVID FREEMAN AXELROD

University of Cincinnati, B.A., 1975

American University Washington College of Law, J.D., 1978

Mr. Axelrod is a partner in our Columbus office where he practices in the areas of corporate compliance, and the representation of corporations and individuals in federal and state criminal cases. He advises public and private corporations in compliance matters, including both specific transactions and the establishment of formal compliance programs, and has been intimately involved in the establishment and implementation of such programs.

Mr. Axelrod has defended cases involving allegations of, among other things, securities fraud, health care fraud, customs violations, defense procurement fraud, tax fraud and money laundering, and claims for civil and criminal forfeiture. Recently, he served as a Special Prosecutor for the State of Ohio in the largest securities fraud case in the history of the state.

Mr. Axelrod is a former Assistant United States Attorney for the Southern District of Florida, and a former Trial Attorney for the Tax Division of the United States Department of Justice. Before joining the Department of Justice, Mr. Axelrod practiced in New York City, where he represented clients in both civil and criminal matters. Immediately following graduation from law school, he served as a law clerk for United States District Judge David S. Porter in Cincinnati, Ohio.

A member of the Practitioners Advisory Group to the United States Sentencing Commission, Mr. Axelrod has testified before the Sentencing Commission, and was a group leader at the Commission's Symposium on Federal Sentencing Policy for Economic Crimes and New Technology Offenses. He is also the immediate past chair of the ABA Tax Section Committee on Civil and Criminal Tax Penalties.

Mr. Axelrod has frequently served on the faculties of the American Bar Association National Institutes on Criminal Tax, White Collar Crime and Asset Forfeitures, and regularly speaks at other CLE programs. As an Assistant United States Attorney, he trained prosecutors from around the country in various aspects of the investigation and prosecution of financial cases. He is the author of many published articles on topics related to his practice, and is listed in *Who's Who in American Law*.

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Mr. Axelrod is admitted to practice before the courts of Ohio, New York and New Jersey, as well as many federal trial and appeals courts.

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Lisa A. Kuca is the Director of Corporate Compliance for H&K Investigative Solutions LLC. She is responsible for the design and implementation of the firm's comprehensive system of compliance solutions, called "Compliance Management Systems." Compliance Management Systems assists organizations with the development of a corporate compliance programs that will satisfy the Federal Sentencing Guidelines through an integrated approach of traditional legal, training and investigative services. She is responsible for the development of compliance programs, compliance software and web-based compliance solutions. Additionally, she coordinates and manages compliance-related audits, reviews and internal investigations. Due to her extensive experience with the Federal Sentencing Guidelines, she also assists white-collar defense lawyers with criminal sentencing matters.

Prior to joining H&K Investigative Solutions, Ms. Kuca was a Manager in Ernst & Young's Litigation Advisory Services, where she specialized in the development and implementation of corporate compliance programs. She also conducted traditional litigation support services, including internal investigations. Before joining Ernst & Young, she was a United States Probation Officer in the Southern District of Florida for nearly a decade. As a probation officer, she acquired comprehensive knowledge of the Federal Sentencing Guidelines, which impose stringent corporate compliance requirements that apply to every industry. Ms. Kuca has applied the Federal Sentencing Guidelines in over 400 cases, including complex cases involving bank, securities and tax fraud.

After leaving the Probation Office, Ms. Kuca was the President of Sentencing Specialists, Inc., a firm offering consulting services on the Federal Sentencing Guidelines to white collar defense attorneys. With Sentencing Specialists, Ms. Kuca consulted with white collar defense attorneys on federal sentencing and post-conviction matters. She provided services including analyzing the application of the Federal Sentencing Guidelines to specific cases, reviewing pre-sentence investigation reports and drafting objections to them, preparing sentencing memoranda, identifying mitigating circumstances and arguing in favor of leniency, preparing and analyzing defendants' financial histories for presentation to federal courts, and preparing clients for interviews by probation officers.

Ms. Kuca has been involved in many kinds of fraud cases, including health care, securities, insurance, bank, government procurement and tax fraud. She has also participated in cases involving antitrust and environmental offenses, as well as money laundering and public corruption. Additionally, she has experience with criminal violations of the customs and labor laws.

Ms. Kuca served on the faculties of the American Bar Association's 2000 and 2001 National Institutes on White Collar Crime, participated in programs dealing with corporate compliance, and co-authored a related article about the Organizational Guidelines. She has also served as a faculty member for other ABA programs regarding the Federal Sentencing Guidelines and post-conviction matters, including the 1997 National Institute on White Collar Crime.

Ms. Kuca's published articles include:

"The Sentencing Guidelines for Organizations: Writing on a Clean Slate" (co-author), *White Collar Crime 2000*, a publication of the American Bar Association Center for Continuing Legal Education and the Criminal Justice Section, March 2000 (updated and republished, March 2001).

A three-part series entitled, "Criminal Law in the Boardroom" (co-author), published in *Corporate Counsel* magazine, September, October and November, 2000.

"White Collar Offenders' Most Frequently Asked Questions [Or, 'You Can't Win Them All']" (co-author), *White Collar Crime 1997*, a publication of the American Bar Association Center for Continuing Legal Education and the Criminal Justice Section, March 1997 (republished in *The Champion*, National Association of Criminal Defense Attorneys, April 1998).

Ms. Kuca is an associate member of the National Association of Criminal Defense Attorneys and the American Bar Association.

Ms. Kuca received a bachelor's in sociology from Villanova University in 1987. She also has a concentration and certificate in criminal justice. She is the recipient of the 1987 U.S. Achievement Academy Leadership Award.

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