

SIDLEY AUSTIN BROWN & WOOD
A PARTNERSHIP INCLUDING PROFESSIONAL CORPORATIONS

CHICAGO
DALLAS
LOS ANGELES
NEW YORK
SAN FRANCISCO
SEATTLE

1501 K STREET, N.W.
WASHINGTON, D.C. 20005
TELEPHONE 202 736 8000
FACSIMILE 202 736 8711
www.sidley.com
FOUNDED 1866

BEIJING
HONG KONG
LONDON
SHANGHAI
SINGAPORE
TOKYO

WRITER'S DIRECT NUMBER
(202) 736-8111

WRITER'S E-MAIL ADDRESS
dbuente@sidley.com

November 6, 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: Request for comment on forming an ad hoc advisory group on the Organizational Sentencing Guidelines, 66 Fed. Reg. 48306 (September 19, 2001)

Dear Judge Murphy:

On behalf of the American Chemistry Council ("Council") and the General Electric Company ("GE"), we appreciate the opportunity to respond to the United States Sentencing Commission's request for comments on the possible formation of an "ad hoc advisory group" on Chapter Eight ("Sentencing of Organizations") of the U.S. Sentencing Guidelines ("*Organizational Guidelines*").

The Council represents the leading companies (including GE) engaged in the business of chemistry. Council members apply the science of chemistry to make innovative products and services that make our lives better, healthier and safer. The Council is committed to improved environmental, health and safety performance through Responsible Care[®], common sense advocacy designed to address major public policy issues, and extensive health and environmental research and product testing. The business of chemistry is a \$460 billion-a-year enterprise and a key element of our nation's economy. It is the nation's #1 exporting sector, accounting for 10 cents out of every dollar in U.S. exports. Chemistry companies invest more in research and development than any other industry.

Honorable Diana E. Murphy

November 6, 2001

Page 2

I. The Organizational Sentencing Guidelines Have Been Effective in Fostering the Implementation of Programs to Prevent and Detect Violations of Law and Do Not Need to be Revised

As the Commission noted in the Federal Register notice, the “organizational guidelines have had a tremendous impact on the implementation of compliance and business ethics programs over the past ten years.” 66 Fed. Reg. at 48307. In fact, we are unaware of evidence in the docket created for this matter, Congressional testimony, or judicial opinions, that indicates that there are any deficiencies in the *Organizational Guidelines* that need to be corrected. There is also nothing in the docket from Congress, the Judiciary or the Executive Branch criticizing the *Organizational Guidelines*. The letters that the Commission refers to in the Federal Register notice do not identify any deficiencies in the *Organizational Guidelines*, or any difficulties that courts or organizations have had in implementing them. Absent any such evidence that there is a problem to be solved, we do not see a reason for convening an ad hoc committee to consider proposals to revise the *Organizational Guidelines*. Material changes to the *Organizational Guidelines* should only be considered after a showing that the *Organizational Guidelines* are flawed or defective. To the extent that the docket materials do raise issues for consideration, they appear to be outside of the Commission’s charter and beyond the sentencing power of the Federal courts.

Not only is there no evidence that the *Organizational Guidelines* are flawed, the evidence is to the contrary. It is a testament to the importance of the *Organizational Guidelines* that, beyond their direct role as guidance for sentencing, they have also encouraged organizations to implement compliance programs. Since the *Organizational Guidelines* were published, numerous organizations have upgraded their compliance programs to be consistent with the *Organizational Guidelines’* criteria. The letters in the docket illustrate the extent to which some of those compliance programs have now independently advanced to encompass broader issues of ethics. This does not mean, however, that those efforts should now be mapped back onto the *Organizational Guidelines* themselves, in the hope that the *Organizational Guidelines* will have the effect of spreading those ethical programs more widely. This is particularly because the most direct consequence of amending the *Organizational Guidelines* as the letters recommend would be to punish more severely organizations with effective compliance systems but that do not include broader ethics or integrity programs.

II. The Organizational Guidelines Should Continue To Focus On Criminal Conduct

The principal purpose of the Commission is to promulgate “detailed guidelines prescribing the appropriate sentences for offenders convicted of federal crimes.” U.S. Sentencing Commission, Guidelines Manual, Ch. 1 Pt. A p. 1 (November 2000). The purpose of the *Organizational Guidelines* is to “further the basic purposes of criminal punishment: deterrence, incapacitation, just punishment, and rehabilitation.” *Id.* In particular, the *Organizational Guidelines* are “designed so that the sanctions imposed upon organizations and their agents, taken together, will

Honorable Diana E. Murphy
November 6, 2001
Page 3

provide just punishment, adequate deterrence, and incentives for organizations to maintain internal mechanisms for preventing, detecting, and reporting criminal conduct.” USSG Ch.8 intro. comment. Therefore, the function of the *Organizational Guidelines* is to address the specific issue of criminal noncompliance with legal requirements and not to expand into general issues of corporate social responsibility or ethics that are not directly regulated by criminal law.

Some of the suggestions raised in the letters submitted to the Commission and referred to in the Federal Register notice would have the Commission expand its charter beyond its authority to address violations of criminal law. For example, requiring an “integrity and ethics based system,” however admirable, is not specifically related to preventing, detecting or reporting criminal conduct. Some commenters are beginning to refer to “ethics and compliance programs” as if the two concepts are interchangeable or identical. However, they are not. Criminal conduct is defined in countless federal statutes. Individuals and organizations are convicted and sentenced because of specific violations of specific statutory provisions, not because they may in some manner be unethical or lack integrity. The focus of the Commission should remain on systems that assure compliance with legal requirements, not ethics programs which focus on important questions in a wider domain. This is particularly true when, unlike the defined realm of criminal offenses, there is no agreed-upon set of ethical criteria against which organizations can be measured.

The letter to the Commission with the most specific suggestions urges that the *Organizational Guidelines* be revised to “move this world from ‘obeying the law because I have to’ to ‘doing what is right because I want to.’”¹ This letter also asks that the Commission “require that violations of ethical standards carry penalties similar to the violation of regulatory standards.” The suggestion that the Commission impose punishments for “violations of ethical standards” appears to imply that the Commission has the authority to punish for acts which have not violated the law. If that is what is meant, the author is asking the Commission to go beyond its mandate and do what only Congress can do. Issues raised by other commenters also go beyond the legal authority of the Commission, such as evaluating the impact of “qui tam” legislation on compliance assurance systems.

The *Organizational Guidelines* are used by courts to sentence those convicted of crimes. Therefore, proposed changes to the *Organizational Guidelines* should always be assessed in terms of how they would be used in the sentencing context. However, almost all of the comments submitted to the Commission thus far treat the *Organizational Guidelines* as a guidance manual or educational tool on how to implement effective compliance systems and do not discuss how these changes would be implemented in the sentencing context. For example, drawing upon some of the suggestions in the letters referred to by the Commission, should an organization’s criminal sentence be adjusted if it:

¹ February 21, 2001 letter from Alliance for Health Care Integrity to Judge Diana E. Murphy, Chair, U.S. Sentencing Commission.

Honorable Diana E. Murphy

November 6, 2001

Page 4

- has a compliance assurance system that focuses on preventing, detecting and correcting criminal conduct, but does not address “ethics” generally;
- has a compliance officer, but does not have an “ethics officer” who does not have “at least three university level, full – term courses in ethics;” or
- has a system for confidential internal reporting of potential or actual misconduct (e.g., a 1-800 “hotline”), but does not have a “neutral ombudsman?”

In each case, we believe the answer is “no.” The current *Organizational Guidelines* properly focus on effective systems directed at preventing criminal behavior. Encouraging organizations to create an “ethics infrastructure” that goes beyond compliance with criminal law may be a laudable goal. However, the presence or absence of such an ethical infrastructure should not have consequences in the very serious context of sentencing those convicted of crimes.

There is no evidence that organizations need more government incentives through directions on criminal sentencing in order to implement compliance assurance programs. The threat of increased criminal penalties should not be used to “encourage” organizations to upgrade their compliance assurance systems into “ethics programs.” The *Organizational Guidelines* have considerable consequences in criminal sentencing. Therefore, it is appropriate that they set out general principles and be free of unnecessary detail so that they are adaptable to a wide range of organizations. They should also avoid vague aspirational directions that are not directly related to detecting and preventing crime.

III. There Is Already Sufficient Guidance On How To Implement Effective Compliance Assurance Systems

There is no apparent need to expand on the existing provisions on compliance assurance systems contained in the *Organizational Guidelines*. Chapter 8, comment 3(k) properly sets forth the minimum steps that any organization must take to have an “effective program to prevent and detect violations of law.” Such criteria should be applicable to all organizations, public or private, large or small, in all industrial and service sectors. Given the diversity of organizations and subject matter covered by compliance programs, the Commission should not attempt to prescribe additional criteria for compliance programs which are not at the same level of general applicability as the current *Organizational Guidelines*.

Many federal agencies have been developing guidance on compliance assurance systems tailored to specific legislative programs. For example, the Department of Health and Human Services (“HHS”) has launched a number of compliance assurance program initiatives, including:

- *Model Compliance Plan for Clinical Laboratories*, 62 Fed. Reg. 9435 (March 3, 1997).

Honorable Diana E. Murphy
November 6, 2001
Page 5

- *Compliance Program Guidance For Medicare+Choice Organizations*, 64 Fed. Reg. 61893 (November 15, 1999).
- *Draft Compliance Program for Individual and Small Group Physician Practices*, 65 Fed. Reg. 36818 (June 12, 2000).

In all, HHS has issued compliance program guidance for nine healthcare industry sectors. 66 Fed. Reg. 31246, 31247, n.3 (June 11, 2001). HHS bases these programs on the Sentencing Guidelines, but tailors them to specific sectors because it "recognizes that there is no 'one size fits all' compliance program." 65 Fed. Reg. at 36819. HHS continues to develop tailored compliance program guidance, recently soliciting comments on compliance programs for the ambulance (65 Fed. Reg. 50204, August 17, 2000) and pharmaceutical industries (66 Fed. Reg. 31246, June 11, 2001).

HHS is not alone in developing detailed guidance. For example:

- The Securities and Exchange Commission recently announced a list of factors, including the existence of internal compliance programs and procedures, that it will take into account in deciding whether to prosecute a matter. *Report of Investigation Pursuant to Section 21(a) of the Securities Exchange Act of 1934 and Commission Statement on the Relationship of Cooperation to Agency Enforcement Decisions*, (SEC, October 23, 2001).
- The U.S. Department of Justice has developed general prosecutorial policies that take into account an organization's compliance assurance systems and has also developed such policies for particular types of crimes. *Federal Prosecution of Corporations* (U.S. DoJ, June 16, 1999); *Factors in Decisions on Criminal Prosecutions for Environmental Violations in the Context of Significant Voluntary Compliance* (U.S. DoJ, July, 1991).
- The U.S. Customs Service has established compliance programs, such as one encouraging those engaged in international trade to implement programs to comply with the so-called "drawback" customs requirements, 19 C.F.R. § 191.191 *et. seq.*, and an "importer compliance monitoring program," 66 Fed. Reg. 38344 (July 23, 2001).
- The Occupational Safety and Health Administration ("OSHA") has devoted considerable resources to compliance programs, issuing sector-specific guidance such as the *Framework for a Comprehensive Health and Safety Program in Nursing Homes* (U.S. Dept. of Labor/OSHA, January 3, 2001).
- Though the *Organizational Guidelines* do not cover environmental crimes, the U.S. Environmental Protection Agency has provided guidance on what constitutes an effective environmental management system aimed at complying with the law. *See, e.g., Compliance – Focused Environmental Management Systems – Enforcement Agreement Guidance* (U.S. EPA, January 2000); *Incentives for Self – Policing, Discovery, Correction and Prevention of Violations*, 65 Fed. Reg. 19618 (April 11, 2000); *Code of Environmental Management Principles for Federal Agencies*, 61 Fed. Reg. 54062 (October 16, 1996).

Honorable Diana E. Murphy
November 6, 2001
Page 6

In some situations, guidance established by federal agencies has extended to enforceable regulations on compliance assurance systems, such as the detailed, systems-oriented, process safety management regulations promulgated by OSHA. 29 C.F.R. § 1910.119.

The private sector has also produced prodigious guidance on designing, evaluating and implementing compliance assurance systems. The past decade has seen an explosion of literature, trade press, conferences, guidance and educational material on not only compliance assurance systems, but also on the more general topic of ethics and integrity programs. This is reflected in the letters that the Commission recently received from organizations such as the Coalition for Ethics and Compliance Initiatives, the Ethics Resource Center and the Alliance for Health Care Integrity.

The growth of interest in compliance assurance systems and ethics programs has not been limited to the United States. For example:

- In 2000, the Organization of Economic Cooperation and Development ("OECD"), to which the U.S. belongs, published its revised *OECD Guidelines for Multinational Organizations*, which establish a "code of conduct" on a range of issues, including labor, bribery, occupational safety and environmental.
- A coalition of private sector and non-governmental organizations has created *Social Accountability 8000*, which applies management systems principles to labor and social issues and is typically implemented in conjunction with accredited third-party auditors to verify conformance.
- The International Labor Organization ("ILO") this year published its *Guidelines on Occupational Health and Safety Management Systems*.
- A number of guidance documents have been developed on implementing systems to identify and meet environmental obligations. These include the International Organization for Standardization's ISO 14001 environmental management systems standard (which has been implemented by over a 1,000 facilities in the U.S. and 30,000 world-wide) and a number of sector-specific guidance documents such as the American Chemistry Council's Responsible Care® program and the American Forest & Paper Association's Sustainable Forestry Initiative.

Multi-national organizations that wish to achieve consistent and acceptable levels of conduct world-wide are looking to these and other documents to assist them implement systems that will be effective in the U.S. and abroad.

This brief review of the landscape on compliance assurance systems reveals that the "user community" does not suffer from an absence of guidance on implementing effective compliance assurance programs. Therefore, there is no "market need" for the Commission to provide even more. Indeed, increasing the level of detail contained in the *Organizational Guidelines* could be counter-productive. More specific guidance on compliance programs has already been devel-

Honorable Diana E. Murphy *

November 6, 2001

Page 7

oped and continues to be refined in public and private fora more tailored to the needs and interests of specific areas of regulation. Adding detail to the *Organizational Guidelines* could create conflicts with these other efforts, particularly for multi-national organizations that are developing comprehensive world-wide compliance assurance systems.

Increasing the requirements of the *Organizational Guidelines* might also disadvantage the small and medium-sized organizations that constitute the vast majority of U.S. businesses. The current *Organizational Guidelines* offer the flexibility needed to allow organizations of all sizes and types to implement effective compliance programs. This is not a theoretical concern. The Commission's own statistics reveal that in fiscal year 2000, approximately 87% of organizations sentenced under Chapter 8 employed fewer than 200 persons, a figure that was 94% in fiscal year 1999. *Sourcebook of Federal Sentencing Statistics*, Table 54 (U.S. Sentencing Commission 1999 and 2000). In fiscal year 2000, approximately 65% of the sentenced organizations employed fewer than 50 individuals, a value that was almost 80% in fiscal year 1999. *Id.* Narrowing the description of what is acceptable and increasing the number of requirements may create a model that simply cannot be practically implemented by most small and medium-sized organizations. For example, most organizations are not likely to have the resources to have an "ethics officer," a "compliance officer," and a "neutral ombudsman." The "best practices" of the most sophisticated companies should not become the model for what all organizations, no matter how small or limited in resources, must do to avoid serious consequences in the criminal justice system.

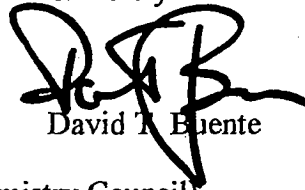
IV. The Scope, Membership and Goals Of Any Ad Hoc Group Should Be Carefully Defined

If the Commission decides to create an ad hoc advisory group, the American Chemistry Council is interested in participating. It will be important that the membership of such a group be carefully developed to cover a wide range of users. It will be particularly important to include those with practical experience implementing systems in a wide range of organizations, particularly small and medium-sized organizations and other organizations that may have limited resources. It will be very important that the advisory group not become a "best practices" effort or one oriented toward furthering professional interests. The "leading edge" organizations that have already implemented "best practices" do not need changes to the *Organizational Guidelines* to continue down that path. On the other hand, organizations with fewer resources should be implementing effective compliance assurance systems based on the principles in the existing *Organizational Guidelines*, but should not be potentially subject to increased criminal penalties if they cannot attain a "best practices" level. Indeed, "raising the bar" might have the undesirable effect of discouraging many organizations from implementing effective compliance assurance systems.

Honorable Diana E. Murphy
November 6, 2001
Page 8

Thank you again for this opportunity to comment on the *Organizational Guidelines*. We look forward to continuing to work with the Commission on these issues. If you have any questions about these comments, you may contact me at 202-736-8111.

Sincerely

A handwritten signature in black ink, appearing to read 'David T. Buente', with a stylized flourish at the end.

David T. Buente

cc: James W. Conrad, Jr. (American Chemistry Council)
Larry Boggs (General Electric Company)