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The Honorable Diana E. Murphy
Chair, U.S. Sentencing Commission
One Columbus Circle, N.E.
Suite 2-500, South Lobby
Washington, DC 20002

Dear Judge Murphy:

I am responding to your September 19, 2001 notice in the Federal Register requesting comments on the advisability of beginning a dialogue on revising the organizational guidelines. By way of background, as a former staff member, I served as a consultant to the Commission during the development of the organizational guidelines. My analysis of past sentencing practice served as a focal point for discussions and ultimately informed the development of the guidelines.¹ I have since studied and published empirical research on the implementation of the guidelines.² My research continues to focus on corporate crime and punishment and the effect of the guidelines on organizations.

In theory, I applaud the effort to revisit the organizational guidelines after 10 years. Moreover, there is potential merit to having a longer-term advisory board continually monitor the organizational guidelines and to develop some expertise and perspective that would assist the Commission in adapting to new issues that ultimately will arise. A well-balanced advisory group should consist of corporate managers, U.S. Attorneys, regulatory agencies, the defense bar, ethics officers, and scholars who study both corporate crime and punishment as well as organizational behavior and economics. Note that my vision of this advisory board differs substantially from what I read in the letters you have received to date. For example, the "Coalition for Ethics and Compliance The Initiatives" (CECI) appears to be a well-organized association of stakeholders interested in corporate ethics. For that matter, Win Swenson would be a natural candidate for membership in such an advisory group, and he would no doubt be a valuable contributor.

¹ See Cohen, "Corporate Crime and Punishment: A Study of Social Harm and Sentencing Practice in the Federal Courts, 1984-1987," 26 American Criminal Law Review 605-660 (1989); Cohen, Ho, Jones, and Schleich, "Organizations as Defendants in Federal Court: A Preliminary Analysis of Prosecutions, Convictions and Sanctions, 1984-1987," 10 Whittier Law Review 103-124 (1988); and Cohen, "Corporate Crime and Punishment: An Update on Sentencing Practice in the Federal Courts, 1988-1990," 71 Boston University Law Review 247-80 (1991).

² See Alexander, Arlen, and Cohen, "Regulating Corporate Criminal Sanctions: Evidence on the Effect of the U.S. Sentencing Guidelines," 42 Journal of Law and Economics 271-300 (1999) and "The Effect of Federal Sentencing Guidelines on Penalties for Public Corporations," 12 Federal Sentencing Reporter 20-6 (1999).

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Having said that, I am concerned that CECI is too narrow a group focusing on ethics and compliance - with a predetermined agenda - to be given the role of organizing and spearheading any such advisory group. The same could be said for some of the other organizations that have written you. These groups should be represented and be a large part of any advisory group - but they should not control it.

Some of the letters you have received suggest that answers are already known and that there is a demonstrated need to tighten the guidelines. I wish it were that simple. For example, one writer urges you to adopt specific recommendations including that compliance programs be of a certain type and "requiring that the ethics officers in such programs have at least three university-level, full-term courses in ethics." Other recommendations are equally detailed and go so far as to require that violations of corporate "ethical standards" be criminalized. Although I have an open mind to all such suggestions, as a researcher and a business school professor, I would caution the Commission not to entertain such notions without careful study by an unbiased, representative advisory group that includes significant representation from rigorous empirical researchers. One of the lessons that was learned early on when drafting the organizational guidelines was that the guidelines do not just affect "offenders" or corporations that are willfully violating the law. Instead, the organizational guidelines have the potential to affect all corporations - including those that otherwise have well functioning compliance programs and whose top managers are good citizens. The guidelines need to be written with this in mind, and with the fact that it is important not to turn the courts and probation officers into corporate managers - except in the most egregious cases. The type of recommendations I read in the letters you have on file appear to want to micro-manage the nature of compliance programs and ultimately tell corporations how to run their businesses. That is a very risky proposition that could ultimately lead to law-abiding corporations losing their competitiveness and, worse yet, unintended consequences that go beyond any potential crime control benefit.

In addition to calling for a broadly representative - and research focused - advisory group, I have a few suggestions in terms of the scope of work of any such advisory group you ultimately decide to convene. First, I would note that the penalty portion of the guidelines fail to cover a substantial number of crimes - including environmental, worker safety, and food and drug violations. Several years ago, I gave a presentation to a working group of the Commission that was tasked with drafting guidelines for environmental crimes.³

³ See for example, Cohen, "Environmental Crime and Punishment: Legal/Economic Theory and Empirical Evidence on Enforcement of Federal Environmental Statutes," 82 Journal of Criminal Law and Criminology 1054-1108 (1992) and Cohen "Environmental Sentencing Guidelines or Environmental Management Guidelines: You Can't Have Your Cake and Eat it Too!" 8 Federal Sentencing Reporter, 225-9 (February 1996).

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Although that working group did issue some draft proposals for discussion purposes, the issue has been on the back burner for quite a few years. It would be appropriate for any new advisory group to consider the crimes not currently covered by the organizational guidelines and to begin the process of filling in those holes if they deem it to be appropriate.

My second recommendation is that any advisory group considers what data the Commission should collect on organizations sanctioned under the guidelines, in order to instruct future proposals for changing them. As a researcher who originally coded and analyzed pre-guideline cases and who has spent considerable time with the Commission data, I have found that basic questions about the impact of the guidelines on corporate sanctions cannot be answered.⁴ This might seem surprising and it is certainly not meant to be a criticism of the Commission or its staff. The primary reason for this deficiency appears to be the switch from a "research" mode in the pre-guideline era to more of a "monitoring" mode in the post-guideline period. Thus, the Commission has collected data on the guideline factors themselves so that it can evaluate how those factors are being applied, and not on a larger set of questions that would assist researchers and policy makers in identifying the strengths and weaknesses of applying the guidelines to actual cases.

I hope these suggestions are taken as constructive as that is their intent. As a researcher, I pride myself on not prejudging the outcome of any new research project I embark upon. As an important governmental institution, I believe the Commission should adopt the same principle and take care in appointing advisory groups that share that same vision.

Please do not hesitate to contact me if I can further elaborate on any of these points or otherwise be of assistance.

Sincerely,



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Director, Vanderbilt Center for Environmental Management Studies

⁴ See Alexander, Arlen, and Cohen, "Evaluating Trends in Corporate Sentencing: How Reliable are the U.S. Sentencing Commission's Data?" 13 Federal Sentencing Reporter 108 (September/October 2000).