



WHITTIER LAW SCHOOL

3333 Harbor Boulevard
Costa Mesa, CA 92626-1501

Tel. 714.444.4141

November 1, 2001

Michael Courlander
Public Affairs Officer
United States Sentencing Commission
One Columbus Circle, NE,
Suite 2-500, South Lobby
Washington, DC 20002-8002

Dear Mr. Courlander,

I am writing in response to the Sentencing Commission's request for public comments on the advisability of forming an ad hoc advisory group concerning the organizational sentencing guidelines. I believe that such an advisory group could perform several valuable functions at this time and I am happy to support its formation.

The initial section of this letter details my thoughts on recent developments in the fields of organizational sentencing and law compliance that make this a particularly favorable time for the formation of the advisory group. This section reviews the changes in these fields which give rise to needs for studies by the advisory group. It also offers a few suggestions about the types of studies that the advisory group might wish to pursue. The last portion of this letter contains comments regarding the possible composition of the advisory group and the ways that its work might be structured.

Developments Supporting the Need for an Advisory Group

Accumulated History of Sentencing Evaluations

The accumulated history of sentencing evaluations under the organizational guidelines to date makes possible several types of studies of organizational crime and sentencing. An initial round of studies might address the types of organizational offenses that are most frequently sentenced and the types of organizational defendants convicted of those crimes. A variety of further studies might examine the most commonly applied bases for sentencing enhancements and the grounds for criminal history adjustments. These studies might also explore cases where grounds for sentencing adjustments are asserted, but rejected by probation officers and sentencing courts to determine if these rejections seem sound and if the sentencing guidelines need

to provide more guidance in similar cases.

These types of studies will be valuable in that they will provide a picture of recent patterns in organizational convictions and sentencing that may not have been taken into account when the original organizational sentencing guidelines were issued. At the time the organizational sentencing guidelines were adopted, the Sentencing Commission had a very limited history of organizational prosecutions to look to for guidance as to the types of offenses and offender characteristics that would fall within the guidelines. The emergence of the guidelines has changed this, resulting in a much more substantial number of organizational prosecutions and sentences. This new body of experience deserves further analysis as a basis for informed debate about organizational crime and sentencing.

Evaluations of past sentencing may be capable of identifying patterns of misconduct in corporate offenses that have previously been overlooked. These studies may also identify features of past offenses that have been improperly emphasized in recommended corporate sentences or sentencing guidelines criteria that have been applied incorrectly or unevenly.

The results of these studies could be very valuable, not only to the Commission, but also to members of the business community and others who are interested in preventing organizational crimes. The Commission will be able to use these studies to determine how the present organizational guidelines are working, whether more or less attention is needed to the various sentencing criteria presently reflected in the guidelines, and whether new criteria should be addressed in the guidelines. Organizational managers who are concerned with efficiently and effectively applying resources to crime prevention will gain from a better understanding of the types of organizational offenses that are particularly prevalent and the features of those offenses that typically lead to particularly severe penalties. Scholars in business schools who are concerned with law compliance management techniques can use greater insights into present organizational crime patterns to offer better analyses of the sources of organizational offenses and the types of management measures that can prevent the same sources from resulting in further offenses. Legal academics can use the same studies to analyze and suggest improvements for standards encouraging corporations and other organizations to take preventive measures towards criminal misconduct.

Lessons from New Types of Sentences

Another type of valuable study that the advisory group might perform concerns the experience of sentencing courts in applying several of the innovative forms of organizational sentences that were authorized in the organizational guidelines. Organizational probation, in particular, is deserving of special attention in this regard in that it has been seen by several courts as a highly useful tool in ensuring that sources of misconduct are fully understood by offenders and that corresponding organizational changes are implemented and maintained.

For example, the corporate probation sentence imposed on the Consolidated Edison Company of New York (Con Edison) in 1995 following a serious environmental offense would be a valuable target for a detailed study. This sentence entailed the appointment of a probation monitor who was given extensive powers to oversee Con Edison's environmental law compliance practices during the company's three-year probation period. The monitor conducted a number of reviews of those practices, revealing and helping the company to reform a variety of compliance problems far removed from the asbestos handling and discharge reporting practices that were the source of its offense. For further information about the Con Edison probation sentence and its impact on the company, see Gruner, *How Compliance Programs Fail: Lessons from the Con Edison Probation Sentence*, in *Advanced Corporate Compliance Workshop Program Materials* 171 (PLI 2000).

Because they promise to be valuable tools for reforming convicted organizations that may otherwise tend to return to "business as usual" following offenses, organizational probation sentences like that in the Con Edison case may warrant greater attention by federal courts. The circumstances justifying the imposition of sentences like that imposed on Con Edison and the proper scope of probation monitoring and oversight under these sentences would be valuable topics for study by the advisory group.

Development of Increasingly Sophisticated Standards in Other Legal Areas

A further reason that studies of organizational sentencing standards by the advisory group are timely is that other governmental bodies have recently developed a series of sophisticated standards for evaluating compliance programs that may serve as valuable models for changes or extensions of the compliance program standards presently included in the organizational sentencing guidelines.

At least four independently developed sets of standards will provide guidance to the advisory group in this regard:

- 1) Tests for identifying responsible compliance programs in corporate prosecution guidelines developed by the Department of Justice, *see* U.S. Department of Justice, *Guidance on Prosecutions of Corporations* (June 16, 1999) (memorandum from Eric H. Holder, Jr., Deputy Attorney General, to Heads of Department Components and All United States Attorneys);
- 2) Standards for compliance programs in the health care industry developed by the Office of Inspector General, Department of Health and Human Services, Department of Health and Human Services, *see, e.g.*, 65 Fed. Reg. 14289 (March 16, 2000) (compliance program guidelines for nursing

facilities); 63 Fed. Reg. 45076 (August 24, 1998)(compliance program guidelines for clinical laboratories); 63 Fed. Reg. 8987 (February 23, 1998)(compliance program guidelines for hospitals).

- 3) Definitions of a "compliance management system" and an "environmental audit" articulated by the Environmental Protection Agency, *see* Environmental Protection Agency, Incentives for Self-Policing: Discovery, Disclosure, Correction and Prevention, 65 Fed. Reg. 19618-01 (April 11, 2000); and
- 4) Criteria for assessing an organization's good faith efforts to comply with equal opportunity laws as articulated in a series of recent federal court decisions dealing with sexual harassment liability, *see, e.g.*, Romano v. U-Haul International, 233 F.3d 655 (1st Cir. 2000); Passantino v. Johnson & Johnson, 212 F.3d 493 (9th Cir. 2000); Lowery v. Circuit City Stores, Inc., 206 F.3d 431 (4th Cir. 2000); Jaudon v. Elder Health, Inc., 2000 WL 1918691 (D. Maryland 2000).

Each of these standards addresses the features of effective organizational programs for monitoring, detecting, disclosing and preventing offenses or other misconduct. By carefully studying the strengths of these standards issued since the emergence of the organizational sentencing guidelines, the advisory committee can capitalize on the efforts and expertise of the originators of these various standards.

Based on studies of these other governmental standards, the advisory group may produce an enhanced set of guideline commentaries describing new standards for identifying an effective compliance program. These new commentaries may be improvements over the present standards in several respects.

First, by capturing more of the relevant features of compliance programs that distinguish effective programs from less successful ones, these improved standards may be more thorough in scaling the size of corporate penalties to the quality of law compliance efforts.

Second, by adding more detailed grounds for evaluating the quality of compliance programs, the new standards may produce more consistent evaluations of this quality by courts, probation officers, prosecutors, attorneys and corporate managers.

Finally, new standards modeled after these other governmental standards will help to ensure that compliance program evaluations under the guidelines are conducted consistently with evaluations of the same compliance programs under other governmental criteria.

Successes Of Related Government Policies

In addition to the above standards for evaluating compliance programs, a number of other recently developed governmental standards and policies may provide useful guidance for the advisory group. In particular, the exceptionally important success of the corporate amnesty standards now observed by the Antitrust Division of the Department of Justice suggest possible two lines of study for the advisory group.

First, the success of these standards in generating revelations of corporate misconduct and making possible prosecutions of non-cooperating parties suggests that similar standards calling for the complete avoidance of penalties by certain self-reporting companies may be valuable additions to the organizational sentencing guidelines.

Second, the specific criteria used in the Antitrust Division's amnesty standards for identifying corporate self-reporting meriting amnesty may serve as a useful model for expanded standards in the organizational sentencing guidelines identifying post-offense self-reporting and cooperation that merits sentence reductions.

For a complete description of the Antitrust Division's amnesty program, profiles of the highly important corporate convictions it has generated, and some suggestions concerning how it may be used as a model for broader amnesty arrangements, see Gruner, *Avoiding Fines Through Offense Monitoring, Detection, and Disclosure: The Race for Amnesty*, in *Advanced Corporate Compliance Workshop Program Materials 77* (PLI 2001).

Increased Sophistication in the Business Community Regarding Compliance Techniques

Increased understanding and sophistication among business executives about how to evaluate and operate compliance programs has created a wealth of expertise that can be tapped by the advisory group to produce new standards for evaluating effective compliance programs.

Spurred by the potential rewards for compliance programs articulated in the original organizational sentencing guidelines and other governmental standards, various businesses have given extensive attention to compliance programs in the last decade. Their expertise about both the strengths and weaknesses of various compliance program techniques and features have been shared at numerous business conferences and in numerous published articles. In addition, consultants assisting companies in establishing and maintaining effective compliance programs have developed additional insights into compliance program techniques. Finally, academics in both law and business schools have evaluated a variety of present compliance program techniques and needed changes.

The work of the advisory group can rely upon this significant body of new understanding regarding compliance programs that was not available to the Sentencing Commission when the original organizational sentencing guidelines were promulgated. Put simply, better, more complete guidelines, are possible because, with the benefit of experience, we know more about effective organizational management techniques to prevent and stop offenses. Expanded expertise in the business community and elsewhere about how to construct effective compliance programs and how to identify post-offense conduct meriting sentence reductions, This new expertise can be gathered by the advisory group and applied to the drafting of "second generation" compliance program standards that build on the standards that went before, but which also reflect today's state of the art knowledge about compliance techniques.

Composition and Work of the Advisory Group

In the remainder of this memorandum, I would like to offer a few thoughts on the composition and work of the advisory group. In order to gather and apply the full range of new knowledge that exists about organizational law compliance and related sentencing issues, it would be desirable for the following constituencies to be represented among the members of the advisory group:

- 1) Agency Specialists: Federal agency officials (e.g., EPA or HHS officials) experienced in evaluating compliance programs in civil or criminal enforcement contexts;
- 2) Prosecutors of Organizational Defendants: Prosecutors having developed complex corporate or organizational cases;
- 3) Probation Officers With Organizational Experience: Probation officers who have experience with the special demands of evaluating organizational offenders for sentencing;
- 4) Corporate Compliance Managers: Compliance officers or other corporate managers who are experienced in establishing and maintaining law compliance programs;
- 5) Corporate In-House Counsel: In-house counsel who are experienced in evaluating corporate compliance practices under governing legal standards;
- 6) Corporate Defense Counsel: Corporate defense attorneys experienced in defending compliance efforts;
- 7) Legal Academics: Legal academics with expertise in organizational crime and compliance program standards;

- 8) Business School Academics: Business school analysts concerned with means for operating effective compliance programs; and
- 9) Specialized Consultants: Industry consultants specializing in evaluating and developing business methods for ensuring law compliance.

The work of the advisory group might best be conducted through a combination of public hearings and commissioned studies.

Testimony presented at public hearings could be a quick means to gather a wide range of information for consideration by the advisory group and the Commission itself. In addition, if captured in printed volumes similar to the symposium text on organizational sentencing issued by the Sentencing Commission in 1995, testimony about compliance program "best practices" and failure modes could serve as a valuable resource for the business community regardless of whether guideline changes later emerge from the Commission.

Commissioned studies of focused issues (such as a detailed study of possible patterns in the accumulated history of organizational sentencing by federal courts) might also provide important information for consideration by the advisory group and the Commission. These studies might be completed either within the government or by independent analysts such as law or business school faculty members. The expertise of the advisory group members regarding the nature of outstanding organizational sentencing issues and sources of related information will allow the group to effectively target and assign needed studies to ensure that critical pieces of the organizational sentencing picture are developed.

It has been my pleasure to offer these comments on the potential work and composition of an advisory group to study the organizational sentencing guidelines. If I can provide any further assistance, please do not hesitate to contact me by phone (714-444-4141 ex. 228) or email (rgruner@law.whittier.edu).

Sincerely,

Richard Gruner
Richard Gruner
Professor of Law