
PUBLIC COMMENT

And Summaries of Responses to Request for Public Comment

(Federal Register, Vol. 66, No. 182, Sept. 19, 2001)



United States Sentencing Commission

November 2001

PRACTITIONERS' ADVISORY GROUP
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November 5, 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: Organizational Sentencing Guidelines Ad Hoc Advisory Group

Dear Judge Murphy:

The Practitioners' Advisory Group (the "PAG") to the United States Sentencing Commission submits this letter in response to the Commission's September 19 notice (66 Fed. Reg. 48306) for advice on the make-up and objectives of an ad hoc advisory group that the Commission is considering appointing to review the Organizational Sentencing Guidelines ("OSG"). As set forth below, the PAG supports the formation of such a group, which should have a well-defined mission and a broad-based membership.

At the outset, the PAG regards the OSG as a success for which the Commission deserves great credit. Viewed from the perspective of their tenth anniversary, the OSG began a nationwide, corporate compliance movement by combining an appeal to corporate self-interest - compliance programs - with the best good corporate citizenship instincts of American corporations.

The ten year mark in the life of the OSG is an appropriate time to ask what changes, if any, are needed, and an ad hoc advisory group could serve a useful purpose in suggesting improvements to the OSG. Such a group will best achieve its purpose if its membership includes as many perspectives as feasible. Among the possible members, therefore, are corporate compliance officers and/or in house legal counsel who are responsible for their company's compliance programs, prosecutors responsible for the Department of Justice's white collar corporate prosecution policy, defense attorneys who conduct internal investigations and/or represent companies in grand jury investigations, compliance and ethics specialists, both from academia and the private sector, and senior executives of both large and small companies.

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As to the small company representation, in certain respects the OSG - particularly the seven criteria for an effective compliance program - were written more for large companies than small ones. Small companies attempting to comply with the seven compliance criteria often complain that they lack resources and expertise to develop and implement effective compliance programs and therefore allowing their views to be expressed within the ad hoc advisory group's deliberations would be invaluable.

Overall, the private sector members should reflect or have experience with a variety of industries since the perspective on compliance of, for example, the health care industry may differ from that of the defense industry. The ad hoc advisory group should have a term of not more than two years, which is sufficient to analyze, discuss and formulate recommendations while setting a deadline for completion of the group's work.

The mission of the ad hoc advisory group should be neither too broad nor too narrow. As the well-known but generally apt saying goes, "if it ain't broke, don't fix it." After ten years, corporate America has generally become comfortable with the OSG and radical changes might create confusion. In particular, we are skeptical that the OSG needs major rewriting, for example, to accommodate a sentencing scheme based on so called integrity based compliance in which a company's ethical culture is evaluated, along with its compliance programs, in considering the appropriate corporate sentence. We fully agree with integrity based compliance advocates that the success of a company's corporate compliance program is directly proportional to the commitment of its leadership to promoting an ethical company culture in which ethics is regarded as important a business objective as the company's earnings per share or annual revenue growth. But we question whether it is possible to establish objective, uniformly applicable criminal sentencing bench marks for measuring a company's ethical culture that improve on the existing seven criteria for a compliance program that identify *objective* compliance activities - such as use of auditing and monitoring systems or hotlines - and generally do not depend on inherently subjective evaluations of a company's ethical culture. The ad hoc advisory group could usefully function as a think tank to examine ideas such as integrity based compliance, and conceivably the OSG commentary might refer to, and emphasize, the importance of an ethical culture to achieving the "due diligence" required of an effective compliance program, but the group should be cautious in advocating the replacement of the seven criteria with a substantially different scheme.

Rather, a principal focus of the ad hoc group advisory group should be to review the seven criteria for an effective compliance program for improvement and/or clarification and evaluate whether the fine ranges and culpability score values need adjustment in light of the past ten years experience with corporate sentences under the OSG. As one example, the ad hoc advisory group

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might consider whether the OSG should explicitly require companies to engage in ongoing efforts to audit and test compliance procedures to ensure that a compliance program is as effective in practice as it is on paper.

As another example, one of the criteria for an effective compliance program, that the company should not "delegate substantial discretionary authority to individuals with a propensity to engage in criminal activity," §8A1.2, Application Note 3 (k) (3), causes significant confusion. The ad hoc advisory group might consider just how a company can determine that a person has a "propensity" to engage in criminal activity and perhaps address whether this criteria should explicitly state whether or not due diligence obligates the company to institute background checks of all significant decision makers before they are hired.

Among the culpability score issues that might be considered by the ad hoc advisory group is clarification of what constitutes cooperation by a corporation that qualifies it for either a three point or two point reduction in culpability score pursuant to §8C2.5 (g) (1) or (2). These provisions require that the company, to qualify for the reduction, among other things, must have "fully cooperated in the investigation." In June 1999, the Department of Justice promulgated a guidance memorandum to federal prosecutors titled "Federal Prosecution of Corporations," which among matters, suggested that a company might not be considered by federal prosecutors to have fully cooperated unless its disclosure included, if necessary, "a waiver of the attorney-client and work product protections, both with respect to its internal investigation and with respect to communications between specific officers, directors, and employees and counsel." *Id.* at 7.

The guidance memorandum, which did not address cooperation pursuant §8C2.5 (g) (1) or (2), provoked significant comment and controversy. The ad hoc advisory group might consider whether §8C2.5 (g) can usefully be clarified to make clear whether or not a privilege waiver is a necessary prerequisite to a culpability score reduction based on cooperation.

In addition to our thoughts regarding the mission of the advisory group, we would nominate Gregory Wallance for participation in the group. Mr. Wallance who is a litigation partner at Kaye Scholer LLP in New York. Mr. Wallace is a former Assistant United States Attorney in the Eastern District of New York, where he prosecuted white collar criminal cases. His practice concentrates on internal investigations, corporate compliance and white collar criminal representation. He was instrumental in helping to start and co-chaired for the past several years, the Practising Law Institute's multi-city Seminar on Corporate Compliance. Mr. Wallance has written and lectured widely on the Organizational Sentencing Guidelines. Although Mr. Wallance is a member of the

Honorable Diana E. Murphy, Chair

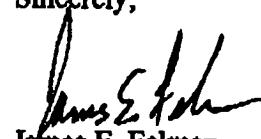
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Practitioners' Advisory Group, hopefully this would not disqualify him from consideration for the organizational group.

In sum, we support the creation of an ad hoc advisory group to review the OSG and their application in the past ten years to corporate offenses and, whether appropriate and feasible, recommend improvements to the commission.

Sincerely,



James E. Felman
Barry Boss

JEF/1h

Coalition For Ethics And Compliance Initiatives

November 6, 2001

Chair Diana E. Murphy and
Members of the United States Sentencing Commission
Thurgood Marshall Judiciary Building
1 Columbus Circle NE, Suite 2-500
South Lobby
Washington, DC 20002

Dear Chair Murphy and Commissioners:

I am writing on behalf of the Coalition for Ethics and Compliance Initiatives (CECI) in response to the Commission's September 19, 2001 request for comment regarding issues related to the organizational guidelines. I will address, in particular, the Commission's request for comment on the scope, duration and membership of any advisory group appointed to review the organizational guidelines and develop proposals on these guidelines for the Commission's consideration.

As noted in our May 30, 2001 letter to the Chair, CECI is a voluntary association of interested individuals and organizations dedicated to the implementation of more effective ethics and compliance programs in organizations. We aim to accomplish this mission by, among other means, facilitating communication among policy makers and members of the ethics and compliance community about significant issues of mutual interest and concern.

The organizational guidelines are unquestionably such an issue, and we are heartened by the Commission's request for comment in this area. In our view, the Commission would most benefit from an advisory group with the broadest possible scope, sufficient time to conduct a comprehensive and deliberate review, and membership that includes experienced ethics and compliance practitioners, as well as lawyers and scholars who have studied and helped apply the organizational guidelines.

As the Commission notes in its request for comment, the organizational guidelines have had an enormous influence on the development, shape and scope of ethics and compliance programs in many organizations. The impact has been the greatest from those portions of the organizational guidelines which detail the credit organizational defendants can receive for corporate compliance programs, as well as related provisions regarding cooperation with the authorities and voluntary disclosure of wrongdoing. As the Commission also recognizes, the impact of these provisions goes well beyond the relatively limited number of organizational sentencing cases that come before the courts each year.

These areas should be a focus of any advisory group review. Now is an appropriate time, 10 years after the organizational guidelines were implemented, to carefully review their application

and impact on organizational ethics and compliance programs and make recommendations for improvement. An advisory group is an excellent vehicle for undertaking this review and providing the Commission with the most thoughtful and comprehensive information and recommendations.

At the same time, perhaps in part because of the limited opportunities for the courts to interpret the organizational guidelines, there have been a substantial number of relevant legal and regulatory developments outside of the sentencing context. These include regulatory compliance guidance issued by federal agencies, voluntary disclosure programs, state and federal cases interpreting the compliance responsibilities of corporate boards of directors, False Claims Act cases, corporate integrity agreements and consent decrees. Also relevant are United States Department of Justice standards for the prosecution of organizations, self-audit and source privilege issues and recent United States Supreme Court civil cases in the areas of sexual harassment and punitive damages, as well as other litigation and enforcement activity.

We believe the advisory group should, consistent with the Commission's legal authority, have the ability and opportunity to review these related legal and regulatory developments. This is because these initiatives often interpret, enforce, apply, augment, support or even conflict with the principles, objectives and provisions of the organizational guidelines. In many cases, policymakers have moved beyond the Commission's elements in prescribing what it takes to establish and maintain an "effective" compliance program. In other cases, these efforts may offer helpful suggestions for improvements in the guidelines themselves, especially as regards the compliance program elements. A careful study of them is indispensable to any consideration of the success of the organizational guidelines, as now applied, at meeting the Commission's goal of defining "an effective program to prevent and detect violations of law" [see USSG §8A1.2, comment. (n.3 (k))].

For these and other reasons, we are convinced that an advisory group should be given sufficient time to conduct a careful, thoughtful and extensive review of the broad impact of the organizational guidelines and these related issues. By focusing exclusively on the organizational guidelines and taking the time to study the wide range of complex issues related to their application, the advisory group can best help lay the groundwork for any future efforts by the Commission to promote additional innovation and effectiveness in organizational ethics and compliance programs.

Finally, this advisory group should include ethics and compliance officers and other experts on organizational ethics and compliance, in addition to members of the bar who represent corporations in criminal matters. Ethics and compliance officers can describe the day-to-day impact in their organizations of the organizational guidelines and, especially, the practical value and application of the guidelines' elements of an effective compliance program. They can address the strengths and any weaknesses of the organizational guidelines as both written and applied. These experts can also detail the impact (both positive and negative) of the other legal

and regulatory developments discussed above on the ability of their organizations to meet the standards of corporate "good citizenship" contemplated by the Commission.

CECI would welcome the challenge of participating in this advisory group process. Members of CECI's Oversight Committee and its sponsors include compliance, ethics and ombuds professionals from a wide variety of companies and industries; corporations and professional organizations with vast experience at evaluating and applying the organizational guidelines; scholars in the field of business ethics and corporate compliance who have studied the effectiveness of the guidelines and specific provisions of them; legal experts and counsel who have helped organizations effectively implement compliance programs; and representatives of the Ethics Resource Center, the Ethics Resource Center's Fellows Program and the Ethics Officer Association. As you know, the Ethics Officer Association and the Sentencing Commission have conducted regional symposiums on the organizational guidelines. In addition, the Ethics Resource Center's Fellows Program has recently initiated an effort to bring researchers and practitioners together to study the impact of the organizational guidelines and offer recommendations for future initiatives, including possible changes to the guidelines.

The mission, objectives and membership of CECI, and our ability to assist the Commission, are explained in more detail in the May 30th letter (which is attached). The individuals and organizations within CECI bring diverse perspectives and a wide range of invaluable experiences, from organizations of varying size, industries, cultures, and complexity, to any consideration of the operation and impact of the organizational guidelines.

Thank you on behalf of CECI for the Commission's consideration of an advisory group to review the organizational guidelines. We firmly believe that an in-depth review of the organizational guidelines and related law and policy developments would best serve to advance the Commission's objectives. CECI and its members have a great interest in the proposed advisory group, and we stand ready to contribute to it.

Sincerely,



Jay Cohen
Vice President of Compliance, Oxford Health Plans
Chair, Oversight Committee
Coalition for Ethics and Compliance Initiatives
Tel. (203) 459-7773

Coalition For Ethics And Compliance Initiatives

May 30, 2001

The Honorable Diana Murphy
Chair
United States Sentencing Commission
Thurgood Marshall Judiciary Building
1 Columbus Circle NE, Suite 2-500
South Lobby
Washington DC 20002

Dear Judge Murphy:

As chair, I am writing on behalf of the Oversight Committee of a voluntary association called the Coalition for Ethics and Compliance Initiatives (CECI). CECI is exploring ways to improve the climate for effective compliance and ethics programs through a greater dialogue with policy makers. We understand that Win Swenson recently met with you in Washington and had an opportunity to briefly discuss our work.

Based on public statements you and other Commissioners have made (and on your discussions with Mr. Swenson), we understand that the Commission is evaluating whether to undertake a review of the organizational sentencing guidelines — more specifically, portions of the organizational sentencing guidelines that deal with effective ethics/compliance programs. CECI has not, at this point, adopted a position on any particular outcomes we would like such a review to achieve. However, we agree that a review of the guidelines' impact, and possibly of the Commission's role in promoting the policy goals of the guidelines, would be well received by the ethics and compliance community.

Over the last decade, the organizational sentencing guidelines have had — and continue to have — an enormous influence on many organizations, providing an unprecedented catalyst for the development of comprehensive compliance programs. They have also helped shape enforcement policies outside of the Federal criminal sentencing context in critical ways.

Despite the guidelines' decade of impact, some of us affiliated with the CECI initiative, and others in the compliance and business ethics fields, have noted areas where the guidelines may not be entirely achieving their desired ends. Accordingly, a gradual look at possible reforms to improve the guidelines' performance (including ways to improve the interplay between the guidelines and laws and policies outside the Commission's immediate jurisdiction) would, in our view, be justified from a public policy perspective.

Our purpose in sending you this letter is to identify CECI as a potential resource to the Commission should it undertake a review of the organizational sentencing guidelines' impact on compliance/ethics programs. Specifically, we understand that the Commission's Deputy General Counsel, Paula Desio, has suggested convening an external advisory group – modeled on the existing Practitioners' Advisory Group but focusing exclusively on the organizational sentencing guidelines – to provide the Commission with useful input. We agree that forming a group of this kind makes a great deal of sense. It would allow for a gradual and careful evaluation of relevant issues, an approach that may fit best with the Commission's otherwise busy schedule and certainly would respect the complexities of this important topic. We also believe that CECI is ideally suited to directly support this kind of effort.

To explain why we believe CECI would be a natural fit for comprising an Organizational Practitioners Advisory Group (hereafter "OPAG"), additional background is undoubtedly useful. By some measures, CECI is still in a formative stage. However, our initial funding has come from organizations that have wanted to determine the feasibility of becoming involved in precisely the kind of initiative that OPAG would represent.

Specifically, CECI was formed to determine whether an ongoing organization (i.e., a permanent CECI) could be established to provide a "voice" for the compliance/ethics profession in policymaking settings (like OPAG) – a voice that has not previously existed across industries in any coordinated way. The catalyst for creating CECI came about when a group of compliance/ethics experts – working under the auspices of the Ethics Resource Center's Fellows Program – developed four model legislative proposals, each aimed at improving the legal environment for effective compliance/ethics programs. (For example, one proposal would provide "source protection" so that employees can feel comfortable reporting sensitive ethics/compliance concerns without fear of personal disclosure.)

The proposals were discussed within the ethics/compliance community, and this process led to two realizations. The first was that other potentially important issues that have an impact on the ethics/compliance field also deserve attention. The second was that no organization currently exists to discuss these issues with policymakers on behalf of the ethics/compliance field.

During the past three months, CECI has been studying the feasibility of becoming a permanent, non-profit entity. Our initial work focuses on identifying an appropriate governance structure, building a broad and representative membership, and securing sufficient resources. Based on our efforts to date, we are confident that if asked to take on the role of Organizational Practitioners Advisory Group, CECI would be able to carry out this function fully and effectively.

As might be surmised from the foregoing description of our history, CECI's mission, membership and transition staff fit extremely well with the OPAG concept.

CECI's official mission is:

To foster the implementation of more effective ethics and compliance programs by:

1. Educating and communicating with policy makers, legislators, government agencies and others who influence public policy,
2. Providing timely information and analysis to ethics and compliance practitioners and their organizations,
3. Serving as a voice and resource to ensure that the ethics and compliance communities are heard in the formulation of public policy, and
4. Identifying and advocating for relevant public and organizational policy issues of interest to our members.

CECI's Oversight Committee is diverse and reflects perspectives that we believe would be helpful to the Commission in assessing the organizational guidelines' operation and impact.

Members of the Committee are:

- Compliance, ethics and ombuds executives from major business entities (Lockheed Martin, Oxford Health Plans, and United Technologies);
- The Executive Director of the Ethics Officer Association (the largest association of cross-industry compliance and ethics professionals (approximately 720 members));
- The President of the Ethics Resource Center (a nonprofit organization dedicated to promoting private and public sector ethics, and an advisor to leading businesses on ethics matters); and
- A scholar in the field of business ethics and corporate compliance (Xavier University) who served as a Supreme Court Judicial Fellow at the Sentencing Commission from 1998 -99.

Sponsors of CECI's efforts to date also include:

- Well known companies active in the compliance/ethics field (General Motors, PricewaterhouseCoopers and Weyerhaeuser)
- The Ethics Resource Center Fellows Program (a select group of corporate, government, nonprofit and education leaders who work to identify, examine and further understand critical business ethics challenges through research and other projects; currently chaired by the Honorable Steven Potts, former Director of the Office of Government Ethics under both the first Bush Administration and then, following reappointment, the Clinton Administration; Paula Desio has served as the Commission's representative to the Fellows Program since 1998); and
- The Center for Business Ethics at Bentley College (a nonprofit center which promotes ethical business conduct in contemporary society).

CECI activities are currently facilitated by two transition coordinators with uniquely relevant credentials, as well. Win Swenson served the Commission as Deputy General Counsel from 1990 to 1996 and, as you know, headed up the staff group that developed the organizational sentencing guidelines under the Commission's direction in 1991. He therefore contributes a strong knowledge of the guidelines' original policy objectives, and of institutional matters that would be critical to assessing the guidelines' operation and impact (e.g., technical aspects of the guidelines' system as a whole; the Commission's enabling statute and that statute's legislative history, the Commission's historical dealings with Congress and other governmental entities).

Our other transition coordinator is Joseph E. Murphy. Mr. Murphy has been a practitioner in the compliance field for twenty-five years and is widely recognized as one of the country's leading experts on corporate compliance. In 1994, he was a member of an advisory group that guided the development of the Commission's three national surveys on corporate compliance. In 1995, he was a speaker at the Commission's seminal symposium on corporate crime where, among other topics, he discussed the impact of the current legal environment on effective corporate compliance. He also has international experience in this area, including reviewing and commenting on the Australian standards on compliance programs (AS 3806).

CECI's Oversight Committee would be delighted to meet with you, other Commissioners and/or Commission staff to develop a plan for constituting the Organizational Practitioners Advisory Group at your earliest convenience.

We should note that CECI is a cross-industry coalition. Thus, those associated with CECI already comprise a broadly representative group (and we expect representation to continue to grow). Consistent with this, part of our role would be to develop, with your approval, bridges to others with an interest in this topic, including my colleagues in

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health care compliance. CECI's mission dovetails with the notion of providing a cross-industry umbrella for sharing points of views on compliance and ethics related policies.

Thank you for taking the time to review this letter. We very much look forward to working with the Commission in whatever capacity you deem most advantageous on this important public policy matter. Please feel free to contact me by telephone at (203) 459-7773. You may also contact either of our coordinators, Win Swenson and Joe Murphy, at (301) 270-3555 and (609) 429-5355, respectively.

Sincerely,



Jay Cohen
Vice President Oxford Health Plans
Chair, Oversight Committee
Coalition for Ethics and Compliance initiatives

Cc: Timothy B. McGrath
Staff Director



U.S. Department of Justice

Antitrust Division

Main Justice Building
950 Pennsylvania Avenue, NW
Washington, DC 20530-0001

November 6, 2001

Re: Federal Register Notice 9/19/01
on "Issues Related to Organizational Guidelines"

Public Affairs Office
United States Sentencing Commission
One Columbus Circle, NE
(Suite 2-500 South Lobby)
Washington, DC 20002-8002

Dear Sentencing Commission:

This letter is in reply to your request for comments on "Issues Related to Organizational Guidelines" that appeared in the *Federal Register* on 9/19/01. Since I just last week learned of this request (from Mark Allenbaugh), I will unfortunately be able to offer you little in the way of substantive remarks by today, the last day of your official comment period. Yet this is an important topic, so I want to offer a few remarks and to thank you for calling this initiative to my attention. (Note that this does not reflect any official views of the Justice Department).

Your *Federal Register* notice indicates that the Commission's organizational guidelines have had a "tremendous impact on the implementation of compliance and business ethics programs over the past years." Indeed, people with a variety of perspectives will be interested in the future of these programs.

My perspective is that of an economist whose past research has focused on corporate compliance and, indeed, on the effect of the Federal Sentencing Guidelines for Organizations.

From that perspective, my suggestion is that you include within the scope of your advisory group's activities careful consideration of how the Guidelines' treatment of compliance programs – and, indeed, the presence of these programs – actually affects the incentives of individuals within corporations to comply. The incentive for corporate actors to comply has many sources, as an extensive economics literature on this subject recognizes. For a critical evaluation of this issue that usefully highlights some of the questions the advisory group might beneficially address, please see the 1999 article by William S. Laufer, "Corporate Liability, Risk Shifting, and the Paradox of Compliance," 52 *Vanderbilt Law Review* 1343.

I would be happy to discuss with your staff (with more advance notice) other sources that they may find helpful in developing an agenda for its advisory group, which appears to be an important and useful initiative for the Commission to pursue.

Best regards,

Cindy R. Alexander, PhD

Kenneth W. Johnson
Ethics and Policy Integration
103 G Street SW, Suite 720
Post Office Box 28277
Washington, DC 20038-8277
(202) 479-4892

November 6, 2001

DELIVERED BY FACSIMILE

United States Sentencing Commission
One Columbus Circle, N.E.
Suite 2-500, South Lobby
Washington DC 20002-8002
Attn: Public Affairs

Subj: Response to USSC Federal Register Notice 9/19/01

Dear Sir or Madam:

I would like to take this opportunity to offer my encouragement and support for the United States Sentencing Commission to undertake a review of the Federal Sentencing Guidelines for Organizations (FSGO) as set forth in its Federal Register Notice 9/19/01. Rather than set forth another list of specific issues that the Commission might consider in its review, suffice to say that I endorse the specific issues raised in the letters before the Commission, specifically those of the Ethics Resource Center, the Coalition for Ethics and Compliance Initiatives, and Mr. Charles Howard.

The commission is well aware that it has created the *de facto* framework for what defines the minimum requirements for an effective compliance program in the ethics and compliance "industry." As such, the USSC's "Effective Program" elements [USSG §8A1.2, comment, (n 2(k))] provide a structure for discussing both organizational ethics and compliance issues. This structure is widely followed by governmental agencies, organizations and consultants in designing, implementing, enforcing, and assessing ethics and compliance programs.

While they provide the essential core of a developing framework for organizational ethics that addresses organizational behavior beyond compliance, the Commission Chair, Judge Diana Murphy, and others have recognized that more than the minimum framework is required for a compliance program to be truly effective. In our industry, truly effective programs are coming to be referred to as "ethics and compliance programs." But beyond the more robust framework that the letters referred to above suggest that the Commission consider, there are two aspects that an ad hoc advisory group might assist the Commission in understanding and addressing: the applicability of the provisions to Native American Tribal Government and the practical aspects of designing and implementing effective ethics and compliance programs for the micro/small to medium enterprise and the Native American Tribal Governments as well.

United States Sentencing Commission
6 November 2001

If it is the intent of the Commission that the FSGO apply to Native American Tribal Governments, it might be wise to engage them in considering if there are not unique matters to consider as it sets forth its minimum requirements. As one who has had experience working with tribal governments and who sees the advantages of having effective ethics and compliance programs on a model that reflects the dynamics of today's tribes, I would welcome specific language addressing the tribes.

Another area of concern to those who care deeply about the public policy implications of effective ethics and compliance programs are the challenges to micro/small to medium enterprises in designing and implementing such programs. The experience and lessons learned to date have been largely confined to the larger or even largest organizations. However, a significant number of the enterprises that have problems before either the Federal Courts or Federal Agencies, such as the Department of Defense or Health and Human Services, are smaller enterprises.

In my view, an ad hoc advisory group to the Commission should have membership reflecting the two groups and their bodies of challenges and concerns. I would welcome the opportunity to serve as a member of the ad hoc advisory group as a voice for those two groups. I do not hold myself out as an expert on the challenges and concerns of the Native American Tribes. I think few would do so boldly, but as a tribal member (Cherokee) and one who has written on tribal governance as early as my law review days, I am intensely interested in them and would work to engage voices that are truly representative. I do feel that I can speak for the small to medium enterprise having been a small businessman and represented small businesses earlier in life. Moreover, as part of a program I am in the midst of developing, I will begin hosting within the month an international e-conference addressing these issues as the first step in developing an effective guide for the micro/small to medium enterprise to design and implement a truly effective ethics and compliance program to meet its needs within its organizational context and organizational culture.

I will be pleased to make more information available to you upon request, but I bring a wealth of experience to such a group. In addition to being a lawyer who had largely small business clients in the 1980s, I have consulted in the ethics and compliance industry since 1993, was a principal proponent of the Coalition for Ethics and Compliance Initiatives by calling and arranging for its formative meetings in 2000, and have been an Ethics Resource Center Senior Fellow since its inception in 1997.

In sum, I wholeheartedly support such a review and pledge to support the Commission in its endeavors. Moreover, I see special value in the Commission staff's fostering a dialogue with industry and government regulators regarding the design, implementation, enforcement, and assessment of an effective program in order to lay a solid foundation for the Commission's review. In this regard, I believe that I offer unique value in working with the Commission in soliciting other experiences and learning.

United States Sentencing Commission
6 November 2001

Please do not hesitate to contact me if I can offer any other support for this important endeavor.

Sincerely,

A handwritten signature in black ink, appearing to read 'Ken Johnson', with a long horizontal flourish extending to the right.

KENNETH W. JOHNSON
Director, EPIC

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Advisor, W. Michael Hoffman
Center for Business Ethics
Bentley College

November 6, 2001

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

To Whom It May Concern:

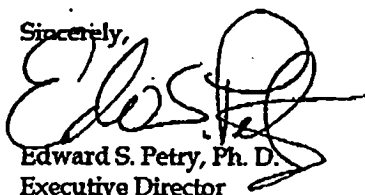
The following is in response to the request for comment on the possible formation of an ad hoc advisory group on the Organizational Sentencing Guidelines.

On this the tenth anniversary of the Organizational Guidelines, it is clear that they have had a major impact in promoting ethical and law-abiding conduct within corporations. One measure of this impact has been the growth of the Ethics Officer Association (EOA). The EOA was founded in 1992 - several months after the guidelines went into effect. It is the peer-to-peer, non-consulting association for managers of ethics and compliance programs. At its founding the EOA had only 12 members. Today, it has over 770 members, including more than one-half of the Fortune 100.

The impact of the Organizational Guidelines can also be seen in the attendance at a series of forums cosponsored by the U.S. Sentencing Commission and the EOA. The forums were designed to discuss the Guidelines, their impact, and suggestions to improve the implementation of corporate programs in response to the Guidelines. They have been held in Atlanta, Boston, Chicago, Columbus, New York, and San Francisco and have drawn over 500 attendees including ethics and compliance officers, senior executives, and representatives from the prosecutorial community.

The EOA has been, and can continue to be, a principal link between the Commission and those with the responsibility to develop and oversee ethics and compliance programs. It can also continue to serve as a forum for the exchange of information and best practices and provide opportunities for discussion among diverse parties. We welcome the opportunity to continue to serve in this capacity, to participate in the ad hoc advisory group on the Organizational Sentencing Guidelines and/or to assist the Commission in other appropriate ways.

Sincerely,



Edward S. Petry, Ph. D.
Executive Director

Alliance for Health Care Integrity

A Health Care Industry Initiative to
Integrate Compliance, Ethics, and Corporate Responsibility

November 1, 2001

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*Joint Commission on
Accreditation of Healthcare Organizations*

David C. Smith, PhD
Council for Ethics in Economics

Matthew Wynia, MD, MPH
*Institute for Ethics
American Medical Association*

Affiliations listed for identification purposes

Executive Director

Robert Olson, PhD, MPH

U.S. Sentencing Commission
One Columbus Circle, NE, Suite 2-500, South Lobby
Washington DC 20002-8002
ATTN: Public Affairs

SUBJECT: Federal Register Notice 9/19/01: BAC2210-40/2211-01

We're delighted that the Sentencing Commission is taking this 10th anniversary of the publication of the *Guidelines Manual* to address their impact on industry and consider possible improvements to them. As we suggested in our February 21, 2001 letter to the Sentencing Commission (please see enclosed letter), although their impact has been significant, there is still room to improve them—and enhance their impact—by broadening compliance-based systems to include integrity-driven ones.

It seems us that the ad hoc advisory group alluded to in the notice is the perfect vehicle to open a dialogue on these important issues. We would recommend the following organizational guidelines for this group:

- **Scope.** The advisory group should be charged with addressing industry-wide issues, such as the efficiency and effectiveness of existing compliance-based and/or ethics-based systems in preventing violations of statute and regulation; best practices in organizing, implementing, and evaluating such systems within individual corporations and across the industry; background and training of staff; and policies related to investigation and enforcement of legal and ethical violations.
- **Duration.** Because the scope of work for the advisory group is large (and will undoubtedly meet with some resistance and ownership struggles), the duration should be proportionate to the challenges it will face. We recommend at least one year though two or three years would probably be more realistic. Full meetings should occur quarterly with committee meetings and conference calls once or twice a quarter. Furthermore, the expectations of the Sentencing Commission for the advisory group, as well as the deadline for it to complete its work, should be clear from the start, perhaps negotiated by a steering committee comprised of Sentencing Commission staff and initial advisory group appointees.
- **Focus:** The focus of the ad hoc advisory group should be the consideration of strategies to enhance the efficiency and effectiveness of the current, largely compliance-based organizational guidelines.

Membership: The membership of the ad hoc advisory group should include, we believe, the following stakeholders:

- Industry representatives (a good mix of corporate officers [CEOs, ethics officers, compliance officers], management and supervisors, and line staff)
- Scholars (not only in general and industry-specific business/organizational compliance and ethics but also in organizational/management theory and behavioral research)
- Experts in compliance and business ethics, both general and industry-specific, particularly in strategies for integrating and institutionalizing related programs, as well as in development of standards and metrics for evaluating their impact.
- Representative from governmental and quasi-governmental bodies (Offices of Inspector General and Department of Justice, as well as particular departments, commissions, or boards charged with developing and/or enforcing regulations, such as HHS, FTC, SEC, FASB, and so on)
- Other groups as appropriate, such as professional and trade associations, consumer groups, and so on.

Because the Alliance for Health Care Integrity is dedicated to integrating compliance, ethics, and corporate responsibility (please see the enclosed prospectus), we would welcome an opportunity to participate on the ad hoc advisory group. While our mission is industry-specific, we believe the principles that drive our enterprise and the broad-based network that we have assembled are industry-wide in their application.

We wish you all the best in this bold initiative. If you would like to contact us, please call me at (714) 77-6400.

Sincerely,



Robert Olson, PhD, MPH
Executive Director

Alliance for Health Care Integrity

A Health Care Industry Initiative (HCII)
on Organizational Ethics and Business Integrity

February 21, 2001

Board of Directors (to date)

Mark Aulisio, PhD
Center for Biomedical Ethics
Case Western Reserve University

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Joint Commission on
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Institute for Ethics
American Medical Association

Affiliations listed for identification purposes

Staff

Robert Olson, PhD, MPH
Executive Director

Judge Diana E. Murphy, Chair
United States Sentencing Commission
One Columbus Circle, NE
Washington, DC 20002-8002

Dear Commissioner Murphy,

On this 10th anniversary of the publication of the *Guidelines Manual*, we'd like to congratulate you for the impact they have had, in particular, on the health care industry.

More than any other public or private initiative, the Guidelines have motivated stakeholders in the health care industry to take seriously the importance of compliance with federal statutes and regulations, especially those related to the prevention of fraud, waste, and abuse. In particular, the seven steps outlined in Chapter Eight to meet due diligence requirements have resulted in the creation of compliance programs—and related trade and professional associations, as well as a burgeoning consultancy sector—in the majority of health care organizations.

Yet it has been difficult to document the success of these compliance programs—even those meeting all the steps required for due diligence—in preventing fraud, waste, and abuse in the industry. The Big 5 professional services firms and regulatory agencies that have studied compliance programs have learned that very few health care organizations (HCOs) attempt to measure whether their compliance programs really reduce fraud, waste, and abuse. As one recent report stated: "Is compliance having an effect impact on organizations? The answer is: It's too early to tell."¹ According to scholarly research, however, it's not too early to tell if the health care industry is like other industries in the corporate world: compliance programs, costly both to oversee and to implement, have little or no measurable impact in preventing fraud, waste, and abuse.

Indeed, according to scholarly research, only compliance programs that have been integrated into integrity-based programs begin to show demonstrably positive results. The classic

¹ Deloitte&Touche, "Compliance Hard to Measure—Study, *Modern Healthcare* December 18, 2000.

theoretical work in this area was done by Lynn Paine at Harvard Business School. In her contrast of compliance-based and integrity-based programs, she concludes that integrity-based programs—that is, programs focused on organizational ethics—in corporations will succeed, while compliance-based programs, because of their narrow focus and emphasis on external standards, will contribute little to preventing violations of federal and state regulations, as well as the public good (and may, in fact, be counter-productive).²

Recent research, based on Paine's theoretical frame, has provided empirical support to her conclusions. For example, Treviño et al conclude that a "values-based cultural approach to ethics/compliance management works best."³ That is, their data indicates that compliance programs situated in the broader context of organizational integrity are significantly more effective than either stand-alone compliance programs or ethics programs. Our own market research confirms this conclusion: many of the compliance officers we spoke to, as well as staff in regulatory agencies, indicated that compliance simply does not go far enough. They asserted that, in the end, it is the *ethos* of the organization—the way it does business—that determines whether compliance initiatives are effective or not.

It turns out, then, that both compliance and integrity are necessary, *as long as* the focus of compliance-based programs is set within the broader, more systemic and long-term perspective of an integrity-based program. Integrity-based programs that emphasize organizational ethics and business integrity leverage the impact of compliance-based programs, resulting in significant reductions in fraud, waste, and abuse. Therefore, it is the shared values and purpose of the organization—the organization's ethic—that drive compliance.⁴

Our organization, an alliance of major stakeholders in the health care industry, drawing upon both the Defense Industry Initiative and public health models, with a vision of "responsible self-regulation," urges you to consider revising the influential guidelines you published ten years ago in light of the research related to compliance-based and integrity-based programs. In particular, we urge you to:

- Require that compliance be a component of a broader, integrity-based ethics program that emphasizes organizational ethics and business integrity.
- Require that the ethics officers in such programs have at least three university-level, full-term courses in ethics.
- Require that employee training uses whole system change technologies, involving cross-level and cross-function grouping of all employees, including executive management and board members.

² Lynn Sharp Paine, "Managing for Organizational Integrity," *Harvard Business Review* (March-April 1994) 106-117.

³ Linda Klebe Treviño, Gary Weaver, David Gibson, Barbara Ley Toffler, "Managing Ethics and Legal Compliance: What Works and What Hurts," *California Management Review* 41:2 (Winter 1999) 149.

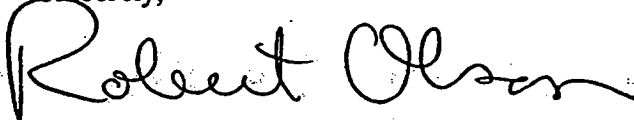
⁴ As Porras and Collins point out in *Built to Last* (New York: HarperBusiness, 1994), they also drive the profitability and sustainability of the organization—good reason enough to pay attention to organizational ethics.

- Require that the standards for organizational ethics and business integrity have an industry-wide basis.
- Require that corporations evaluate both the impact (changes in knowledge, attitude/values, and behavior) and outcomes (reduction of fraud, waste, and abuse) of their integrated compliance-ethics programs annually—and compare their results to industry-specific benchmarks.
- Require that violations of ethical standards carry penalties similar to the violation of regulatory standards.

We applaud the guidelines the Commission developed ten years ago. They have revolutionized the corporate world. Now we ask the Commission to take the next step: move this world from “obeying the law because I have to” to “doing what is right because I want to.” It’s the difference—a profound one—between compliance and integrity.

If you should decide to enhance the 1991 guidelines, and there is anything we can do to assist you in this undertaking, please contact me at (714) 307-6400.

Sincerely,

A handwritten signature in dark ink, reading "Robert Olson". The signature is fluid and cursive, with the first name "Robert" and last name "Olson" clearly distinguishable.

Robert Olson, PhD, MPH
Executive Director

Alliance for Health Care Integrity

A Health Care Industry Initiative to
Integrate Compliance, Ethics, and Corporate Responsibility

Board of Directors (to date)

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Executive Director

Robert Olson, PhD, MPH

Mission

To assure the health care industry's commitment to integrity through an alliance of all major stakeholders that *designs, delivers, verifies, and certifies* its own model standards and metrics for compliance, ethics, and corporate responsibility.

Goals

- To prevent fraud and abuse by managing their root causes
- To reduce regulatory pressure by a demonstrated commitment to core values *and* by the targeting of inspection and enforcement activities
- To decrease business costs by integrating—and leveraging—compliance, ethics, and corporate responsibility initiatives into a unified program that is both more effective and more efficient
- To enhance business performance by building trust and reciprocity between the industry and its stakeholders through redesigning the process of *responsible self-assessment and regulation*.

Plan of Action

- Convene a summit of *independent, nonpartisan, and impartial* alliance of public and private stakeholders—professional, trade, consumer, regulatory, advocacy, payer, employer, accrediting, provider, union, shareholder, governmental, employer, academic, and ethics organizations—from across the industry.
- Develop model
 - ✓ *standards for integrity and ethical principles* that integrate compliance, ethics (research, clinical, and organizational), and corporate responsibility by aligning the core values that drive best-of-class integrity programs
 - ✓ *performance metrics by industry sector and function* that translate standards into specific and measurable process, impact and outcome objectives
 - ✓ *institutionalization strategies* that employ breakthrough, whole system change technologies to promote consensus and ownership of standards
 - ✓ *audit and assurance tools* that measure the breadth and depth of organizational commitment to standards through surveys, interviews, focus groups, document review, and observational techniques.
 - ✓ *certification program* for the health care industry
- Enroll signatories
- Retain an independent auditing firm to verify commitment to standards on an annual basis.

Potential Benefits of Participation

- ❑ Reduced legal *and* ethical exposure
- ❑ Demonstrated “good faith” commitment to compliance *and* ethics
- ❑ Increased morale and sharpened performance
- ❑ Strengthened assurance of a level playing field with competitors
- ❑ Enhanced commitment and ownership that results from *self-assessment and self-regulation*
- ❑ *Increased effectiveness and efficiency of compliance programs* achieved by integrating seamlessly with ethics program
- ❑ Technical assistance from *experts in health care and business ethics*
- ❑ Improved *competitive advantage*
- ❑ More *rigorous tools for evaluating program impact and outcome*
- ❑ Greater *patient trust and heightened public reputation*
- ❑ Lowered transaction costs
- ❑ Leveraged *bargaining power* of industry-wide group with multi-stakeholder support
- ❑ Bolstered evidence of attempt to meet *JCAHO standards on organizational ethics*
- ❑ *Decreased federal and state regulatory pressure.*

For More Information

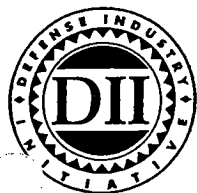
To Be Listed as a Supporter

To Become a Member

To Provide Corporate Sponsorship

For this Ground-Breaking Alliance

Contact Bob Olson at (714) 307-6400



ON BUSINESS ETHICS AND CONDUCT

**DEFENSE
INDUSTRY
INITIATIVE**

Richard J. Bednar, DII Coordinator
Crowell & Moring LLP
1001 Pennsylvania Avenue, NW, Suite 1000
Washington, DC 20004-2595
202/624-2619; 202/628-5116 (Fax)
rbednar@crowell.com

October 30, 2001

United States Sentencing Commission
Attn: Public Affairs
One Columbus Circle, NE
Suite 2-5400, South Lobby
Washington, DC 20002-8002

**Re: Request for Comment on Possible Formation of an
Ad Hoc Group on Organizational Sentencing
Guidelines, 66 Fed. Reg. 48306 (Sep 11, 2001)**

Dear Sir/Madam:

On behalf of the Defense Industry Initiative on Business Ethics and Conduct ("DII"), I am submitting comment on the above-referenced matter. The DII, founded in 1986 as a result of the President's Blue Ribbon Commission on Defense Management (the Packard Commission), is a private organization of about 50 defense contractors who have voluntarily joined together to embrace and practice a high level of business ethics and conduct. A listing of the current DII Signatories is enclosed for your information.

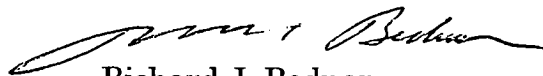
The public announcement of the prospective review of the organizational sentencing guidelines coincides with our own on-going review by our governing body - the Steering Committee - of the principles adopted and practiced over the past 15 years of the DII existence. This review is to assure that those original Principles remain vibrant and appropriate. Even if this review should result in no change, and conclude in the reaffirmation of these original Principles, the review process will have strengthened the commitment of the Signatory companies and will have given a fresh impetus to the faithful practice of those Principles.

The DII has studied the organizational sentencing guidelines over the years, and has noted the harmony of those guidelines with our own Principles and practices. The DII Principles were considered by the Sentencing Commission in its work in developing the organizational sentencing guidelines. We believe the DII would bring an important

United States Sentencing Commission
Attn: Public Affairs
October 30, 2001
Page 2

perspective to the ad hoc Group not available from any other institution. We therefor support the formation of the Group and would welcome the opportunity to serve as a member of it.

Sincerely yours,

A handwritten signature in dark ink, appearing to read "Richard J. Bednar", with a stylized flourish at the end.

Richard J. Bednar
DII Coordinator

Enclosure

1854267

**DEFENSE INDUSTRY INITIATIVE
JULY 2001 DII SIGNATORIES**

Advanced Technical Products, Inc. (Marion Composites Division)
Allfast Fastening Systems Inc.
Alliant Aerospace Company
AT&T -- Government Markets
Bath Iron Works/General Dynamics
BF Goodrich Aerospace/BF Goodrich Aerostructures
The Boeing Company
The CNA Corporation
The CFM International, Inc.
Computer Sciences Corp.
Day & Zimmerman, Inc.
DRS Technologies, Inc.
Dyncorp
Frequency Electronics, Inc.
GE Aircraft Engines
General Dynamics Corp.
Georgia Tech Research Institute
Harris Corporation
Honeywell International
Howmet Castings
IBM Corporation
ITT Defense
Lear Siegler Services, Inc.
L-3 Communications Corporation
Lockheed Martin Corporation
Newport News Shipbuilding
Northrop Grumman Corporation
Parker Hannifin Corp.
Raytheon Company
Rockwell-Collins
SAIC
Sequa Corporation
Southwest Research Institute
Stewart & Stevenson
Teledyne Technologies Incorporated
Textron, Inc.
Thales, Inc.
Thiokol Propulsion
TRW Systems
UNISYS Corporation
United Defense LP
United Space Alliance

United Technologies Corporation
University of Dayton Research Institute
Veridian Corporation
Vought Aircraft Industries, Inc.
Williams International

Total: 47

1824004

Lockheed Martin Corporation
6801 Rockledge Drive, MP 210 Bethesda, MD 20817
Telephone 301-897-6631 Facsimile 301-897-6442
E-mail: nancy.higgins@lmco.com



Nancy McCreedy Higgins
Vice President, Ethics and Business Conduct

November 5, 2001

United States Sentencing Commission
One Columbus Circle NE
Suite 2-500, South Lobby
Washington, DC 20002-8002

Attention: Public Affairs

Re: Request for Comment on Possible Formation of an Ad Hoc Group on Organizational Sentencing Guidelines, 66 Fed. Reg. 48306 (September 11, 2001)

Dear Sir or Madam:

I am writing in response to the above-referenced Request for Comment to encourage the Sentencing Commission to form an ad hoc advisory group to review the organizational sentencing guidelines and to volunteer to serve as a member of such a group.

I have been involved in the development and implementation of corporate ethics and compliance programs for two companies: The Boeing Company and Lockheed Martin Corporation. Both companies were among the original signatories to the Defense Industry Initiative on Business Conduct and Ethics (DII), and thus already had strong self-governance programs at the time the guidelines were promulgated. Nonetheless, these companies and the other DII signatories had to reassess and fine-tune their programs in order to assure compliance with the standards set forth in the organizational sentencing guidelines.

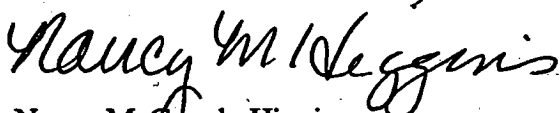
As an attorney in the Boeing law department when the draft guidelines were first published, it was my responsibility to lead a team to assess the Boeing Ethics and Business Conduct program to determine what changes would be needed to meet the due diligence requirements in the guidelines. This assessment project was a wonderful opportunity for the company to re-examine and improve its compliance processes. One of the outcomes of that project was the reorganization of the program to create a single company-wide Office of Ethics and Business Conduct. I left the law department to lead that organization.

In early 2001, I joined Lockheed Martin Corporation as Vice President of Ethics and Business Conduct, with responsibility for the company's Ethics and Business Conduct Program and related compliance activities. I have seen how the organizational sentencing guidelines also had a positive impact at Lockheed Martin. The due diligence requirements for an effective program to detect and prevent violations of the law, as set forth in the guidelines, provide a strong foundation for Lockheed Martin's state-of-the-art ethics and compliance program.

American business has now had 10 years of experience with the organizational guidelines and with corporate compliance programs designed to implement their requirements. These guidelines have had a profound impact on the way these companies do business. Although the DII signatory companies were already committed to formal compliance programs, the sentencing guidelines were the driving force in bringing these programs to the rest of corporate America.

Those of us who have helped organizations to develop programs with these guidelines in mind have had an opportunity to evaluate their strengths and weaknesses. I believe it is time to take a close look at the guidelines to see how they can be improved to be even more effective in preventing criminal behavior and raising the standards of ethical business conduct in the United States. I highly recommend the formation of an ad hoc advisory group to review the guidelines and recommend such improvements. I would also like to convey my availability to serve as a member of such a group.

Very truly yours,


Nancy McCready Higgins

Winthrop M. Swenson
Partner,
Compliance Systems Legal Group

D.C. Area Office
7116 Poplar Avenue
Takoma Park MD 20912
Tel 301 270 3555
Fax 707 922 1836
email wswenson@cslg.com

Chair Diana E. Murphy and
Members of The United States Sentencing Commission
Thurgood Marshall Judiciary Building
1 Columbus Circle NE
Washington DC 20002

November 2, 2001

Dear Chair Murphy and Commissioners:

I am writing in response to the September 19, 2001 Federal Register request for comment ("RFC") on the appointment of an organizational guidelines advisory group. The RFC states that comment is welcomed in three areas: 1) the scope, duration and composition of the group; 2) the merit of suggestions in letters submitted to date; and 3) any other issues related to the improvement of Chapter Eight. I will address my comments to these three areas.

1) The Scope, Duration and Composition of the Advisory Group

Chapter Eight contains much important detail, but I believe the portions of Chapter Eight that have had the greatest impact, generate the most public concern and therefore should be the advisory group's primary focus – at least initially – are the portions relating to the credit for corporate compliance programs. This includes the definition of "an effective program to prevent and detect violations of law" found at USSG §8A1.2, comment. (n.3(k)).

The implications of the guidelines' credit for compliance programs is difficult to overstate. Most major corporations operating in the U.S. today have been spurred by the guidelines' credit for compliance programs into establishing such programs, and virtually all of these companies have been guided by the guidelines' definition of "an effective program" in designing their programs. In addition, major cases and enforcement policies that have an impact on corporate behavior have drawn heavily on the guidelines' approach. Finally, newly proposed ISO standards for compliance programs that are working their way through the international approval process are based on the guidelines' definition of an effective program.

I therefore believe it is important that the Commission recognize, in weighing the scope of an advisory group (as well as the group's duration and purpose), that while the number of "cases" applying Chapter Eight or its credit for compliance programs is relatively low, the impact of the guidelines' pro-compliance policy – especially on our business organizations and, as a result, on the everyday lives of literally millions of employees – is extensive. I have worked with scores of companies over the last five years and have seen this impact first-hand. I would add finally, that the cost of failing to meet the guidelines' compliance standards is also very significant, with criminal fines now reaching into the hundreds of millions of dollars. In short, the guidelines' compliance standards and credit are exceedingly important and should therefore be, in my view, the starting point for the advisory group's work.

With respect to the question of what issues the advisory group should focus on, I would respectfully urge that the group address issues that go beyond potential amendments to the definition of an effective program. As partially summarized in the attached article, J. Murphy & W. Swenson, *A Call to Action – Creating a Voice (and Ears) for the Compliance and Ethics Field*, Prevention of Corporate Liability (July 2001) (see "The Need" section beginning on the first page of the article), the current legal and enforcement environment in which the guidelines must operate is, in many ways, inimical to the goals of Chapter Eight's policy of promoting effective compliance programs.

In other words, aspects of the legal and enforcement environment make it much more difficult for organizations to operate the kind of compliance programs the guidelines intend to encourage. As the article discusses, issues have arisen as a consequence of decisions by the National Relations Board, the Federal Trade Commission and certain court decisions. In addition, existing penalty schemes such as the treble damage provisions of the False Claims Act can be – and I believe are – applied in ways that undercut the guidelines' credit for compliance programs.

Accordingly, I would urge that the advisory group inventory these issues and present proposals to the Commission on how these issues might be addressed – either through 1) dialogue with other agencies or 2) legislation, aimed at coordinating and bringing greater rationality to the current inconsistencies. In my view, and I believe the view of most experts in the field, this is where the larger, more significant issues reside – not so much, in other words, in the guidelines themselves.

The suggestion that the advisory group examine the broader legal and enforcement environment in which the guidelines' compliance provisions operate is directly supported by the Commission's enabling statute. As the Commission recognizes, its enabling statute contemplates that the Commission will evaluate the effectiveness of sentencing policies on an ongoing basis and improve them where possible. See, e.g., 28 U.S.C. §§991(b)(1)(A) and (C), (b)(2), 994(o).

However, the Commission's authority goes beyond merely amending the guidelines themselves to improve their effectiveness. Congress was aware that the guidelines would not be able to function in a policy "stovepipe" – it knew that other agencies and laws

could affect the guidelines' effectiveness. Not wishing the Commission to ignore such effects, Congress empowered the Commission to:

- "[A]ssist and serv[e] in a consulting capacity to Federal courts, departments, and agencies in the development, maintenance and coordination of sound sentencing practices;" and
- "[M]ake recommendations to Congress concerning modification or enactment of statutes relating to sentencing, penal and correctional matters that the Commission finds necessary and advisable to carry out an effective ... and rational sentencing policy."

28 U.S.C. §995(12)(B) and (20), respectively. These powers precisely coincide with the twin needs in this area – to advise and consult with other agencies and to weigh possible statutory changes as a way of strengthening the Chapter Eight's core policies.

The need for the Commission to use its §995(12)(B) and (20) powers for the purposes described was forcefully recommended six years ago at the Commission's 1995 symposium, "Corporate Crime in America – Strengthening the 'Good Citizen' Corporation". There, Senator Edward M. Kennedy, an original sponsor of the Sentencing Reform Act of 1984, stated:

Government officials also have a duty to reduce red tape and coordinate multiple overlapping enforcement tools While the notion of coordinating these sanctions is not new, the guidelines make coordination all the more imperative. In effect, the guidelines make a basic promise to companies: "Act as good citizens and your penalty exposure will be reduced." But the promise is false if companies face non-guideline penalties that take no account of these "good citizenship" efforts. I am pleased that tomorrow's proceedings will consider these important coordination issues.

Symposium Proceedings at 120.

As Senator Kennedy noted, a panel the next day did discuss coordination issues at length. See *Carrots and Sticks Amid Overlapping Enforcement Schemes and Policies: Finding Government's Message*, Symposium Proceedings at 265. A principal presenter on this panel was William B. Lytton (*The Case for Greater Governmental Coordination: Civil Sanctions and Third Party Actions*, Symposium Proceedings), who was recently elected Chair of the American Corporate Counsel Association.

An entirely separate second panel dealt with another critically important coordination issue – the fact that compliance activities can be used against an organization in non-sentencing contexts. See *Privilege Update: When Should Compliance Practices be Protected from Disclosure?*, Symposium Proceedings at 349.

Although 1) Congress has specifically empowered the Commission to discuss coordination issues with other agencies and identify areas where statutory changes could be constructive, and 2) important voices have for some time urged the Commission to use these powers, I certainly think expectations for the Commission's role in this area must be tempered and realistic. In my view, it is not the Commission's responsibility to actually effect any needed changes in the broader legal and enforcement environment. Rather, I believe the Commission's §995(12)(B) and (20) authorities imply a responsibility to see that relevant issues are identified and, to the extent possible, fairly considered by other policymakers.

With respect to the advisory group's membership, I think that it is essential that the group consist of a broadly representative cross-section of recognized experts in the field. This is not an area where academic study is particularly called for. There is a substantial reservoir of practical experience to draw from and there are known experts who have had a prominent role in representing the compliance/ethics field and can tap into this experience.

If the advisory group is comprised of recognized experts in the ethics/compliance field, the advisory group will be able to assist the Commission on both the "issue identification" and "dialogue with other agencies/Congress" fronts. Experts who are recognized in, and connected to, the ethics/compliance field will be able to identify true needs by "vetting" issues within the broad spectrum of compliance/ethics practitioners. In my view, this vetting process is critically important, as discussed in the next section of this letter, if the Commission's examination of Chapter Eight is to prove successful.

With respect to promoting a dialogue with other interested policymakers, the advisory group can again be helpful if it has the necessary experiential stature. Many prominent organizations have mature compliance/ethics programs. Those who have substantial experience either working with these companies in an advisory capacity or running such programs directly can cogently inform discussions with policymakers in forums that the Commission could facilitate or create. This would allow a full consideration of relevant issues by policymakers but not, as would be appropriate, a guarantee of any particular results.

One particular way to ensure that the advisory group has a substantial linkage to the compliance/ethics field would be to select one or members from those affiliated with the newly formed Coalition for Ethics and Compliance Initiatives (CECI). I played an early role in helping this group become organized (a role that has now ended in a formal sense) and I understand that Jay Cohen, the current Chair of the CECI Oversight Committee is submitting comment directly on CECI's behalf.

With respect to the advisory group's duration, I would recommend a timeframe of not less than two years. The issues are complex, the issues need to be vetted among practitioners who are busy professionals, and the Commission has many other important matters on its agenda that, presumably, would limit the time it could devote to the advisory groups' activities.

2) The Merit of Suggestions in Letters Submitted to Date

With one exception, I do not have comments on any of the proposals made to date. Indeed, consistent with the view that proposals such as the ones already submitted need to be fully vetted, I think it is premature to comment on them. At the Ethics Officer Association meeting in Nashville last month, I led a session in which I asked attendees to react to the proposals submitted so far. The attendees' response illustrates my concern over the need for vetting. Almost all the suggestions were viewed as well meaning, but several were viewed as ill-informed.

The one suggestion that I think data and experience do generally support at this point is the need to heighten the importance of auditing and other evaluative techniques in the definition of "an effective" compliance program. The Commission's policy interests here are, in my view, to ensure that only "real" and "effective" programs are credited under USSG §8C2.5(f). Organizations that fail to evaluate the effectiveness of their programs may not have effective programs – providing that only companies that do evaluate their programs can receive culpability score credit helps ensure that credit will only be given where it is due.

Having said this, however, this point immediately raises the coordination issues discussed above. In today's litigation and enforcement environment, information gathered to assess and strengthen a compliance program can be used against a company in non-sentencing contexts. The Commission's possible policy interest here, in other words, conflicts with other laws and practices.

3) Other Issues

The only additional issue I feel compelled to raise relates to the need for the advisory group to be what might be called "technically grounded" in the Commission's practices and statutory framework. It seems to me that the Commission has had varying success with advisory groups and one of the groups that was the least successful was a group convened to help the Commission further consider environmental guidelines for organizational offenses in the early 1990s. This group's members were able and expert, but because they lacked an understanding of the guidelines' structure, the guidelines' amendment process and the parameters of the Commission's enabling statute, I believe their expectations for what the Commission could consider doing were unrealistic. As a consequence, their recommendations were not nearly as useful as they might otherwise have been.

This kind of issue does not arise with the Practitioners Advisory Group because its members are accustomed to the guideline amendment process and used to working with the guidelines themselves. This will not be the case for most experts on compliance/ethics – the kinds of people who, in my view, should comprise the advisory group.

There appear to be two options for dealing with this issue – either having a dedicated staff member assigned to the group, which raises resource questions, or appointing a chief technical advisor among the group's members. I think a staff and/or Commissioner liaison to the advisory group is a good idea in any case, but to ensure that the technical perspective is seen by the group as part of its own process and not an outside perspective, I favor the latter approach.

Let me conclude by saying that I would be pleased to serve in such a capacity drawing on my six years with the Commission, which included both legislative and organizational guidelines responsibilities, or in any other capacity the Commission would find helpful.

I strongly commend the Commission for undertaking the important inquiry raised by the RFC, am grateful for the opportunity to share these views and stand ready to assist however I can.

Sincerely,

A handwritten signature in black ink, appearing to read 'Win Swenson', with a long horizontal flourish extending to the right.

Win Swenson



BNA, INC.

Prevention of Corporate Liability

A Call to Action: Creating a Voice (And Ears) for the Compliance and Ethics Field

BY JOE MURPHY AND
WIN SWENSON

Ten years ago, the Federal Sentencing Guidelines for Organizational Defendants became law, setting off a chain reaction that has helped make compliance and ethics programs a fixture on the American business landscape. The Guidelines created incentives for companies to establish such programs as a way of avoiding harsh penalties in the event of a criminal conviction for employee misconduct.

But they did much more than this—they catalyzed a transformation in the way that government and courts look at corporate responsibility for employee misdeeds. Under a range of pronouncements—from the Department of Justice's policy for charging corporations, to agency guidance and case law sorting out liability in the area of equal employment opportunity, to the standards of director and officer liability implied by the *Caremark* decision—a consensus has formed: The existence and strength of a company's compliance or ethics program should count when a company's responsibility for employee misconduct is being assessed.

This new perspective is welcome. It puts greater control of a company's potential liability in its own hands. And companies have responded. Today, more companies than ever have meaningful compliance/ethics programs. The Ethics Officer Association (EOA)—which did not even exist in 1991 when the Guidelines were promulgated—now has over 700 energetic members who regularly

gather to share and advance best practices.

But as the Guidelines' tenth anniversary nears, the compliance/ethics world is far from idyllic. The fact is, companies today must operate their compliance/ethics programs in a legal environment that is often hostile to the very practices that make these programs work best. Compounding the problem, policymakers regularly weigh proposals that can unnecessarily undermine the jobs of compliance and ethics officers—not because policymakers want to make these professionals' jobs harder, but because they often have little idea what compliance and ethics officers do.

And no wonder. While most professional groups have an association that can speak to a broad range of policymakers (legislatures, cross-industry regulatory groups, even courts) on their behalf, compliance/ethics officers have no such organizational voice. Perversely, as the government's policies have increasingly emphasized the need for corporate compliance and ethics, compliance and ethics officers have often had to swim hard against a legal current that is indifferent or even hostile to these same policies.

Organizations such as EOA and the industry-specific Health Care Compliance Association perform immensely valuable functions. But their missions do not include a mandate to systematically interact with the full range of policymakers to resolve issues on behalf of the compliance/ethics profession—let alone across industries. Up to now, no one has been

doing this for the ethics/compliance field.

Now, however, with seed money from leading compliance-oriented companies and not-for-profits (such as EOA, the Ethics Resource Center, the Center for Business Ethics, and the Ethics Resource Center's Fellows Program), an effort is underway to explore how and whether a permanent organization along these lines might be built—to be a voice (and ears) for compliance and ethics professionals, to help ensure that the legal environment supports effective programs.

This unprecedented new effort is flying under the banner of the "Coalition for Ethics and Compliance Initiatives" (CECI).

CECI's Mission

The mission of CECI is straightforward—to foster the implementation of more effective ethics and compliance programs by:

- educating and communicating with policymakers, legislators, government agencies, and others who influence public policy,
- providing timely information and analysis to ethics and compliance practitioners and their organizations,
- serving as a voice and resource to ensure that the ethics and compliance communities are heard in the formulation of public policy, and
- identifying and advocating for relevant public and organizational policy issues of interest to CECI's members.

The Need

The need for CECI is powerfully illustrated by examples depicting the troublingly uncertain legal environment in which compliance and ethics programs must operate.

(continued on page 78)

Joe Murphy (jemurphy@cslg.com) and Win Swenson (wswenson@cslg.com) are Transition Coordinators for the Coalition for Ethics and Compliance Initiatives. Murphy is executive vice president of Compliance Systems Legal Group and Swenson is a partner with the firm.

(continued from page 80)

1. *The case of the unlucky stores:* A retail chain, concerned about preventing discrimination, hires an expert to conduct employee training sessions. To make sure employees truly understand the kind of conduct the training seeks to prevent, the instructor has employees describe biased comments they have heard in the stores. In a later discrimination lawsuit brought by employees, a federal judge provides the plaintiffs' lawyers with all the notes of the training course, whereupon the lawyers announce they have found "the smoking gun." In her opinion, the judge cites these very notes as a basis for allowing punitive damages claims. Shortly thereafter, the company settles the case for \$100 million—and the company's lawyers shut down the training.

Message: Addressing a compliance problem by openly recognizing that problem is legally risky.

2. *The case of the unfair labor practice:* A utility company wants its compliance and ethics message to reach all employees. Its program will not be just a paper program with unread materials locked away in a dusty storage room. The company will have every employee, even those doing the most mundane tasks, receive its new code of conduct. An act of a good corporate citizenship? No, an illegal unfair labor practice, according to the National Labor Relations Board. In the Board's view, law abidance and morality were not essential parts of the job at this company; the company had a duty to negotiate the "imposition" of the code with the employees' union.

Message: Think twice about including nonexempt employees in your ethics program.

3. *The case of the self-reporting polluter:* Government environmental agencies told brewers not to worry—their brewing processes did not release harmful pollutants. One brewery, acting as a good corporate citizen, conducted its own tests, however, and determined that pollutants, in fact, were being produced. It reported its findings to state environmental enforcement authorities. The result? State authorities announced they had caught this wrongdoing company and were imposing a \$1 million punitive fine.

Message: Think twice about initiating a proactive compliance review and disclosing issues; your acts of

good corporate citizenship could cost you dearly.

4. *The case of the wronged harasser:* A company receives a confidential hotline call reporting that a manager is flagrantly harassing female employees; the caller is one of these employees and fears for her well-being if her boss finds out. To ensure a full and independent investigation, the company hires an outside law firm to look into the matter. The firm's report, relying in part on confidential information from victims, demonstrates that the manager engaged in harassment and intimidation. The company terminates the manager but the manager sues, successfully recovering lost pay and damages because the company failed to follow the Fair Credit Reporting Act: It did not ask his permission to retain the outside law firm, and it did not disclose to him the report's full content, including the identity of every employee who complained about him.

Message: Diligent investigations, aimed at protecting victims, can come with a price.

Every day compliance and ethics practitioners confront impossible choices. Practices that may promote effective compliance and ethics are simultaneously discouraged by the law.

What makes these stories troubling is that they are not make-believe. The first is the *Lucky Stores* case from a federal district court in California. The second is the AEP case, a decision by the NLRB that was affirmed on appeal. The third story is what happened to Coors brewery in Colorado. The fourth case is based on a legal interpretation of the Fair Credit Reporting Act by the Federal Trade Commission.

Chilling Effective Practices

The crux of the problem goes beyond clearly unfair but sporadic cases, however. Every day compliance and ethics practitioners confront impossible choices. Practices that may promote effective compli-

ance and ethics are simultaneously discouraged by the law. Two examples, among many, illustrate:

■ Studies regularly show that some employees in virtually all organizations are unwilling to report sensitive compliance or ethics issues out of fear—fear that coworkers may disapprove, that a manager may try to retaliate, and so on. Companies can reduce fear by instituting nonretaliation policies, but in the end a promise of confidentiality to reporting employees may be required to get some to overcome their fears and actually report an issue. The problem is, companies that make a promise of confidentiality may be forced to break that promise if litigation arises and third-party discovery is allowed. There is no clearly established legal doctrine that protects against disclosure of an internal whistleblower's identity—no matter how important confidentiality may be to the whistleblower's decision to report—if a private litigant or the government seeks the material in discovery.

■ Practitioners have developed excellent ways to evaluate the effectiveness of compliance and ethics programs, and using these techniques is an important step in developing the best programs. But when companies diligently seek to identify program weaknesses in order to correct them, they create information that a third party may use against them. The *Lucky Stores* case shows only too well that focusing on faults with the goal of self-improvement is risky. It may be possible to protect this type of information under privilege by running it through counsel, but betting on the attorney-client privilege is a risky business. Moreover, keeping a close hold on self-evaluative information, which reliance on the attorney-client privilege requires, diminishes its usefulness. To promote program effectiveness, distribution of this kind of information should be as wide and open as possible, and certainly should go beyond the lawyers.

Positive Impact

It would be wrong, however, to suggest that legal and regulatory decisions always undercut effective compliance and ethics. The truth is, some excellent governmental initiatives have promoted voluntary compliance and ethics initiatives in the United States and even around the world.

The development of the Organizational Sentencing Guidelines took a positive, pro-compliance turn (away from an initial, exclusively punitive focus) when practitioners talked with the U.S. Sentencing Commission about the value of effective programs. Had companies familiar with compliance not undertaken such an active dialogue with the Commission, it is doubtful the result would have been so positive. CECI can create the same kind of dialogue with others in the legal and regulatory arenas.

What Would CECI Do?

CECI's mission statement sets the stage for its activities.

1. Educating and communicating with policymakers, legislators, government agencies and others who influence public policy.

We have witnessed too many instances where it appeared that those in government were simply unaware of the existence and role of company compliance and ethics efforts. Whether it is an agency issuing interpretations or congressional committees considering new legislative proposals, the potential impact on voluntary compliance and ethics programs too often is not fully understood.

CECI will bring together the compliance and ethics community first to monitor issues and then to bring them to the attention of government actors. We will be there to explain that voluntary compliance and ethics efforts are valuable, and how government and the litigation system affect these initiatives. We will aim our educational efforts at Congress, enforcement and regulatory agencies, the executive branch, and the states.

We will also communicate this message in any other appropriate forum that will help mold public policy. This includes academia, the press, the bar, and other organizations and associations.

2. Providing timely information and analysis to ethics and compliance practitioners and their organizations.

Many in the compliance and ethics field are unaware of the surprisingly long list of risks to their programs (and to themselves) created by the legal system. See Murphy, *Examining the Legal and Business Risks of Compliance Programs*, 13 ETHIKOS 1 (Jan/Feb 2000). Moreover, busy practitioners find it hard to keep up with new developments that could add even more risk to their current compliance

and ethics efforts, especially in areas outside their expertise.

There is also a need to act quickly in the governmental and litigation environments. If an agency is conducting rulemaking, a congressional committee is marking up legislation, or a court has a key case on appeal, there is little time to organize positions on an ad hoc basis. In the compliance and ethics context, there is often not even an awareness that these things are happening.

CECI will provide this information-gathering and dissemination function—what we refer to as a “Paul Revere function.” Whether it is a court considering the application of *Caremark*, an agency's enforcement document requiring that companies waive any privileges relating to internal investigations, or a legislative proposal to penalize companies for “invading” employees' privacy (when another agency expects them to be monitoring employee communications for harassing conduct), CECI can spread the word.

Compliance and ethics

professionals have a powerful story to tell, one that should resonate with policymakers.

3. Serving as a voice and resource to ensure that the ethics and compliance communities are heard in the formulation of public policy.

When agency and congressional staffs are considering new initiatives, where do they turn for input and fact-finding? If they know of a readily accessible source, it is easy for them to make that contact. We need to make sure they know there is a resource on compliance and ethics issues.

CECI will seek to play a constructive, consultative role with the Sentencing Commission if, as expected, the Commission begins its review of the Organizational Sentencing Guidelines. We expect to play a similar role with other agencies too. Among its other initiatives, CECI can hold roundtable, interactive sessions with policymakers so that they can see and hear what voluntary compliance is about.

4. Identifying and advocating for relevant public and organizational policy issues of interest to our members.

Compliance and ethics practitioners need to do more than be a passive resource, however. CECI can also monitor agencies, legislatures, and courts for proceedings that would affect compliance and ethics efforts. At the direction of our membership, we will act as advocates in each of these forums, to work to prevent creation of new risks for compliance and ethics, and to support and propose initiatives that promote compliance and ethics programs. In advancing the perspectives of compliance/ethics professionals, we will reach out to the many functions in organizations that play a role and have an interest in these issues, including legal departments, HR functions, and internal audit.

CECI will accomplish these goals by, for example:

- filing amicus briefs in litigation;
- conducting workshops for agency staff members;
- proposing legislation to address specific impediments to effective compliance;
- proposing agency solutions, such as rules or agency policies;
- serving as a resource for company counsel in dealing with an agency;
- helping develop executive branch policies to guide all agencies; and
- writing in influential journals in the field.

Getting Off the Sidelines

The truth is, compliance and ethics professionals have a powerful story to tell, one that should resonate with policymakers. Theirs is not a narrow, “me first” goal—it is everyone's goal: promoting ethics and law-abidance in our country's institutions.

The effort has begun. Prominent organizations have launched the first, exploratory phase of CECI. But for CECI to fully achieve its enormous potential, you who practice in the compliance and ethics field need to resist the otherwise admirable tendency to be modest. We all need to get off the sidelines and let our stories be told. CECI will be as powerful as its members.

Organizations and individuals interested in learning more about supporting CECI's mission should contact the authors at the e-mail addresses in the biographical material above.



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.)*

Hon. Diana E. Murphy, Chair
United States Sentencing Commission
October 19, 2001
Page 5

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.
912-692-5291

IBJ WHITEHALL · FINANCIAL GROUP

Keith T. Darcy *Executive Vice President*
IBJ WHITEHALL BANK & TRUST COMPANY



October 23, 2001

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

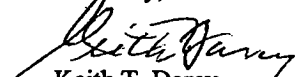
Dear Sir/Madam:

I am writing in response to the Federal Register Notice dated 9/19/01 (BAC2210-40/2211-01) regarding the possible formation of an ad hoc advisory group on organizational guidelines. Since its inception the Organizational Guidelines have generally stimulated an effective response from the business community. The formation and rapid development of the Ethics Officer Association, along with increased vigilance in all compliance areas, attest to the effectiveness of these guidelines.

Given that the Commission has received letters for proposed changes regarding Chapter Eight (Sentencing of Organizations), the creation of an ad hoc advisory group is a worthy recommendation. The formation of such a group would be consistent with the Commission's outreach to its various constituencies and its openness to new ideas. The membership of this group should consist of serious-minded legal, ethics and compliance professionals whose respect for the Organizational Guidelines is established. It should represent a cross-section of leaders from business, nonprofit and the academic communities.

I appreciate the opportunity to comment on this notice. For your information, I would welcome the opportunity to be of service to the Commission in this regard.

Sincerely,


Keith T. Darcy



Shell Oil Company
Jerome Adams
One Shell Plaza
P. O. Box 2463
Houston, TX 77252-2463
Phone (713) 241-3678
Fax (713) 241-0520

October 31, 2001

United States Sentencing Commission
One Columbus Circle, N.E.
Suite 2-500, South Lobby
Washington, DC 20002-8002
Attn.: Public Affairs

Re: Improvements to Organizational Guidelines

Shell Oil Company's Ethics and Compliance Office understands that you are considering appointing an advisory committee to develop proposals on the federal sentencing organizational guidelines for your consideration. We recommend that you form such an advisory committee, which would include, among others, representatives from corporate ethics and compliance offices.

If an advisory committee is formed, then we would also recommend that you instruct the committee to use a rigorous process, such as an "after action review" to structure its work. As you probably know, the after action review process is used widely by the United States military and is gaining support among corporations. The after action review process can be summarized in six steps:

1. What was the original intent of the action being reviewed?
2. What exactly happened and why?
3. What have we learned?
4. What do we know now and what actions should we take? The actions would include short-term, mid-term and long-term actions.
5. Take actions identified in 4.
6. Tell others who need to know what was learned.

We think following such a process will allow for better focus for the advisory group and will result in improved guidelines for corporations to use when developing their compliance programs.

Shell would be willing to send a corporate representative to participate in this important work.

Best regards,



Jerome Adams
Corporate Ethics and Compliance Officer

November 1, 2001

United States Sentencing Commission
Attention: Public Affairs
One Columbus Circle, NE
Suite 2-500, South Lobby
Washington, D.C. 2002-8002

Commissioners of the United States Sentencing Commission:

Since the Organizational Sentencing Guidelines were promulgated in 1991, they have had an immense cross-industry impact on corporations. The organizational guidelines have refocused corporate management and Boards on the obligation to prevent violations, while concurrently implementing meaningful incentives and defining actions that corporations should take in managing compliance. The organizational guidelines and decisions such as the *Caremark* case have helped corporate America converge on a commonly understood and accepted standard for compliance management. As a result, many corporations have established high-level compliance and ethics programs to prevent violations and have voluntarily come together in organizations such as the Ethics Officer Association to facilitate the exchange of ideas and information.

Although the organizational guidelines have achieved a great deal in promoting effective compliance management in corporations, I strongly support the proposal that the Commission has put forth to establish an ad hoc advisory group to consider viable methods to improve the operation of the organizational guidelines. If such an advisory group is established, the scope of issues addressed should extend beyond the sentencing of organizations to include discussion on the operation and impact of the Guidelines in the corporate environment. Issues identified by corporate ethics officers could provide insight on how the Commission could move to enhance the effectiveness of the organizational guidelines 1) to promote a more consistent approach to compliance and ethics management between and across industries, and 2) to improve compliance and ethics management in corporations that have established programs.

Commissioners of the United States Sentencing Commission

Page 2

November 1, 2001



If an ad hoc advisory group is established and the scope of work for that group includes the operation and impact of the organizational guidelines in the corporate environment, I recommend that membership of the advisory group include ethics officers and a representative from the Ethics Officer Association or the Coalition for Ethics and Compliance Initiatives. Membership should not be exclusively a legal constituency. Ethics officers have first hand experience in applying the organizational guidelines, especially in terms of criminal conduct, which is the primary aspect of the Commission's emphasis on deterrence in Chapter Eight.

If the Commission decides to form an ad hoc advisory group that includes ethics officers, I would be honored to serve as a member of that advisory group. Attached is information on my qualifications to serve in this capacity.

Thank you for the opportunity to comment on the establishment of an ad hoc advisory group on the Organization Sentencing Guidelines.

Sincerely,

A handwritten signature in black ink, appearing to read "Eric Pressler". The signature is fluid and cursive, with a long, sweeping horizontal line extending to the right.

Eric Pressler
Director, Legal Compliance and Business Ethics
PG&E Corporation
Phone: (415) 973-6607
eric.pressler@pge-corp.com

EP:mb

Enclosure

Eric Pressler - Qualifications for USSC Advisory Group

Ethics Officer Experience: I have served as the Director of Legal Compliance and Business Ethics at PG&E Corporation for more than 5 years. PG&E Corporation is one of the largest utility and energy services companies in the United States, with over 23,000 employees and over \$20 Billion in annual revenues. The PG&E Corporation compliance and ethics program was designed in accordance with the requirements of the Organizational Sentencing Guidelines. I have worked for the Corporation for 22 years.

Ethics Officer Association (EOA): I have been the EOA Sponsoring Partner Representative for PG&E Corporation since 1996. In 2000, I was elected to serve a three-year term as a member of the EOA Board of Directors. I have made numerous presentations at EOA conferences on compliance and ethics topics and will be teaching the session on compliance risk assessment in the EOA course, Managing Ethics in Organizations.

Bay Area Compliance Association (BACA): BACA is a regional organization in the San Francisco Bay Area focused on enhancing compliance management activities for BACA member companies. BACA currently has 20 corporate members and meets bi-monthly. I co-founded this organization in May 2000 with another local EOA member and was elected by the BACA membership as the BACA Chairperson for 2000 and 2001.

USSC Regional Forum: PG&E Corporation co-sponsored and helped organize the USSC Regional Forum in San Francisco in September 1999.

Education: I hold a B.S. in Business and a MBA in Management from the University of California, Berkeley.

Charles L. Howard
Phone: (860) 251-5616
Fax: (860) 251-5699
choward@goodwin.com

October 25, 2001

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

RE: Federal Register Notice of September 19, 2001

Dear Chair Murphy and Commissioners:

I am writing in response to the Commission's Federal Register Notice of September 19, 2001 requesting comment on issues relating to the Organizational Guidelines.

I think that the Commission should appoint an ad hoc advisory group to study possible revisions to the Organizational Guidelines and Commentary. I would suggest that such a group have no more than 15 members and include federal prosecutors and judges, business ethics officers, private practitioners (both criminal defense counsel and counsel experienced in business ethics and related matters), and academicians. Despite the broad scope of Chapter 8 of the Guidelines, I think that this ad hoc advisory group should be asked to concentrate on business ethics and compliance issues. If there are other areas in Chapter 8 of concern to the Commission, another ad hoc group could be appointed with a membership related to those issues. The ethics and compliance ad hoc group should be asked to report back to the Commission within 18 months of its appointment.

I would like to express my desire to serve on such an advisory group. I practice law with a large Connecticut firm and have a broad civil litigation practice that includes substantial experience in ERISA and intellectual property litigation matters and appeals in a variety of areas. I also have for many years represented public clients such as the City of Hartford and the State of Connecticut in various matters. In addition, for over ten years, I have been independent counsel for organizational ombuds programs, including several at national and international corporations. This experience has given me insight into the operation of corporate ethics programs and the dynamics of

employee reporting and dispute resolution at major organizations. I have been a co-author of booklets published by The Ombudsman Association (TOA) on both the ombudsman confidentiality privilege and on the impact of the Commission's Organizational Guidelines on corporations and how ombuds programs can be of assistance in creating an "effective program to prevent and detect violations of law." As a frequent presenter at annual conferences of The Ombudsmen Association and as an author of articles for the TOA newsletter, I have had many opportunities to become familiar with the role of ombuds programs in a variety of institutions. The TOA is the nation's leading trade association for corporate and organizational ombuds programs, and I believe that I would be able to draw upon the collective experience of its members as well as my own experience in serving on such an ad hoc advisory group.

My experience in representing corporate ombuds offices lead to my being asked to assist in an Ethics Resource Center (ERC) Fellows Program, where I was a contributor and a draftsman of a legislative model contained in the ERC's Resolution and Report: Employee Confidentiality and Non-Retaliating Reporting Systems, dated May 7, 1999. In the course of my representation of corporate ombuds offices and my participation in the ERC Fellows Program, I developed an idea for possible revisions of the Commentary to the Guidelines that I presented in the enclosed letter to Judge Murphy this past April.

While my principal experience is in civil litigation, I have long been familiar with criminal law issues. I began my career as an assistant attorney general in Missouri handling state court criminal appeals. In the course of my practice in Connecticut, I have handled corporate internal investigations in matters involving alleged federal procurement fraud and State Ethics Commission violations. In addition, I have served since 1995 as a Commissioner on the Connecticut Criminal Justice Commission, which is responsible for hiring all state prosecutors in Connecticut. A copy of my resume is attached. If any Commissioners have questions concerning my background or experience, I would be happy to furnish whatever additional information is necessary.

United States Sentencing Commission
October 25, 2001
Page Three

I hope that the Commission appoints an ad hoc advisory group on possible revisions to the business ethics and compliance issues. I would be honored to be appointed to such a group and would devote whatever time is necessary to its work.

Very truly yours,

A handwritten signature in black ink, appearing to read "C. L. Howard", with a stylized flourish at the end.

Charles L. Howard

CLH:trb
Enclosures

CHARLES L. HOWARD

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EDUCATION: University of Virginia School of Law, J.D. (1975)
Princeton University, A.B. (cum laude) (1972)
(Woodrow Wilson School for Public and International Affairs)

EMPLOYMENT: Shipman & Goodwin, Partner (1984-present)
Chair, Litigation Department (1985-2000)
Member, Management Committee (1990-96), (1998-2000)
Chair, Practice Committee (1994-95) and Practice Oversight
Committee (1995-97); Member (1997-98, 1999-present)
Practice areas: General civil litigation in state and federal courts,
with significant experience in appeals; ERISA, municipal, and
intellectual property litigation; and representation of corporate
ombuds.

Associate, Robinson, Robinson & Cole (1977-81)

Assistant Attorney General of Missouri for Attorney General John C.
Danforth (1975-76)

ADMITTED TO BAR: Connecticut, 1977; Missouri, 1975; United States District Courts for
the Western District of Missouri, District of Connecticut, District
of Vermont, and District of Arizona; United States Courts of
Appeals for the Second, Eleventh, and Federal Circuits; United
States Tax Court; United States Supreme Court.

**PROFESSIONAL
ACTIVITIES:**

Present: Commissioner, Connecticut Criminal Justice Commission
(1995 to present); Guest Lecturer on ERISA Litigation, University of
Connecticut School of Law; Trustee appointed pursuant to Practice
Book §2-64 by the Connecticut Superior Court as attorney to protect
clients' interests in connection with disbarment of an attorney;
Lawyers for Children America. **Prior:** Commissioner, Connecticut
Judicial Selection Commission (1992-95); Commissioner,
Connecticut Commission on the Compensation of Elected State
Officials and Judges (1983-91); Chair, Hartford County Bar
Association Ethics Committee; Board of Directors, Connecticut
Association of Municipal Attorneys; Member, Civil Action Victims

Task Force (appointed by General Assembly pursuant to Special Act 87-52); Special Public Defender for pro bono criminal appeals; Connecticut Bar Association Executive Committees: Sections on Administrative Law, Civil Justice, Municipal Law, and Professional Ethics. Speaker: numerous bar association and professional seminars.

Member: American, Connecticut, and The Hartford County Bar Associations; National Health Lawyers' Association; and Defense Research Institute.

COMMUNITY ACTIVITIES:

Present: Board of Trustees of the Connecticut Policy and Economic Council; Local Government Committee, Hartford Downtown Council; Board of Directors, Terry's Plain Homeowners' Association. **Prior:** President, First Church of Christ, Simsbury; Board of Directors, Connecticut World Trade Association (1983-90); Board of Directors, Simsbury Historical Society; Regional Strategy Implementation/Retreat Committee, Greater Hartford Chamber of Commerce; Member, Connecticut District Export Council; Board of Directors, Bushnell Park Foundation; Treasurer, Jim Fleming for State Representative; Board of Directors, Simsbury Public Library (1981-85; elected); Treasurer, Chair of Personnel and Finance Committees, and Member of Stewardship Committee, First Church of Christ, Simsbury; Transportation Committee, Town of Simsbury (1981-87); Member of task forces of the Greater Hartford Chamber of Commerce for the establishment of Connecticut World Trade Association and for study of water resources for the Greater Hartford area; Board of Directors, Spring Grove Cemetery Association; Board of Trustees, Simsbury Land Conservation Trust; and Volunteer Tutor, Fred D. Wish School, Hartford.

HONORS:

Chosen as one of five men from Central Connecticut and Western Massachusetts in 1979 by the Rotary Foundation International to participate in a five-week cultural exchange program in Hokkaido, Japan.

Invited participant on Connecticut-Shandong Trade Mission to China with Governor William O'Neill in 1987.

Martindale-Hubbell rating - AV

PERSONAL:

Born in Alamogordo, New Mexico; April 15, 1950
Married to Joan Wunderlich Howard; two children
Resident of Simsbury, Connecticut, since 1977

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April 3, 2001

The Honorable Diana E. Murphy
Chair
United States Sentencing Commission
Suite 2-500 South Lobby
One Columbus Circle Northeast
Washington, D.C. 20002

Re: Suggestion for Additional Commentary to the Organizational Sentencing Guidelines

Dear Judge Murphy:

I am writing to urge the Commission to amplify the commentary to Section 8A-1.2 of the Organizational Sentencing Guidelines to articulate criteria that would constitute a presumptive "safe harbor" for a "reporting system whereby employees and other agents could report criminal conduct by others within the organization without fear of retribution," as that phrase is currently used in Commentary §3(k)(5).

The premise of my proposal is that ethics officers, alone, cannot create an environment for reporting wrongdoing without fear of retribution. Since ethics officers must investigate and, if necessary, initiate appropriate action on matters brought to their attention, their position has inherent barriers to alleviating employee reluctance to report wrongdoing or fear of retribution. Consequently, organizations must often look for additional ways to reduce fear of retribution and encourage employee reporting of wrongdoing.

For over ten years, I have represented organizational ombuds offices, including several at national and international corporations. During this time, I have repeatedly seen how organizational ombuds offices work cooperatively with and yet separately from business practice or ethics officers for their organizations to facilitate reporting of wrongdoing by employees while reducing the fear of retribution. My clients have found that enabling an employee first to go to a neutral office with an assurance of confidentiality enables many people to feel comfortable enough to later come forward to

April 3, 2001

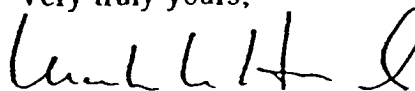
the compliance officer or other official company channels. In many other instances, the ombuds and the employee have found ways of reporting alleged violations while still preserving the confidentiality of the employee's identity. Because these offices attempt to preserve the confidentiality of their communications with reporting employees and are not official reporting channels for the organization (and thus do not "investigate" wrongdoing), they are able to reduce the fear of retribution while fostering reporting of wrongdoing. Indeed, the benefits of such a neutral office, whether called an ombuds office or by some other name, go to the very heart of creating a reporting system that allows wrongdoing to be reported without fear of retribution.

The Commission would provide strong support to organizations that want to comply with the Sentencing Guidelines if it were to identify in further commentary the essential characteristics of a program that presumptively would constitute a "reporting system whereby employees and other agents could report criminal conduct by others within the organization without fear of retribution." Among these characteristics would be the creation of a neutral office within the organization, separate and distinct from the compliance or any formal function, that would encourage and facilitate employee reporting of concerns in the workplace, including violations of law. Such a neutral office must be designed and operated so that it is neutral, independent, and has the ability to assure employees or others within the organization that their communications with the office will remain confidential. Likewise, it would be important both for such an office to have direct access to senior management and compliance officers and for the office to be adequately funded in order to publicize its presence as an alternative channel of communication within the organization.

The initial Commentary in Section 3(k) helped create and standardize the role of organizational ethics officers in a wide variety of organizations. Now that their role is well established, I believe the Commission has the opportunity to address ways that organizations can break down the barriers to reporting. By distilling and articulating the essential characteristics of such a neutral office in a nonexclusive way, the Commission would both promote greater corporate and organizational responsibility for compliance with the law as well as help create more uniform standards.

Thank you for your consideration.

Very truly yours,



Charles L. Howard

CLH:ems

cc: Timothy B. McGrath, Staff Director

Paula J. Desio, Esq., Deputy General Counsel

286536 v.01

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November 6, 2001

United States Sentencing Commission
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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

United States Sentencing Commission

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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United States Sentencing Commission

Lisa can be reached at:

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E-mail: lakuca@hkconsulting.com

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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November 6, 2001

Honorable Diana E. Murphy
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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.

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- 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).

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- *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).

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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-

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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.

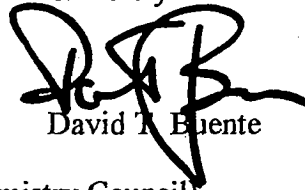
IV. The Scope, Membership and Goals Of Any Ad Hoc Group Should Be Carefully Defined

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
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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, cursive script.

David T. Buente

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



E. Scott Gilbert
Counsel-Litigation and Legal Policy

General Electric Company
3135 Easton Turnpike W3E, Fairfield, CT 06431
203 373-2592 Fax 203 373-2523
Dial Comm: 8*229-2592 Fax 8*229-2523
E-Mail: scott.gilbert@corporate.ge.com

November 6, 2001

By Hand
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: Organizational Guidelines – Ad Hoc Advisory Group

Dear Judge Murphy:

On behalf of the General Electric Company, I write in response to the Commission's request for comment on the proposal to form an "ad hoc advisory group" to consider whether any changes are warranted in the organizational sentencing guidelines.

Over the last ten years, the definition of an "effective program to prevent and detect" violations of law, incorporated into the organizational guidelines, has been an excellent framework to guide organizations in the development of comprehensive compliance programs. The elements are detailed enough to ensure that corporations adopt comprehensive multi – faceted programs and are sufficiently flexible to permit organizations to adapt their processes to different regulatory requirements in the many different countries in which global enterprises typically do business.

We think the current definition has worked well, and there is no need for extensive modification. Indeed, organizations have already invested considerable resources in the existing structure, and we would urge against making major changes in the definition of an effective compliance program without compelling reasons.

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A number of ideas have been submitted to the Commission to modify some elements of the definition of an effective compliance program. We believe it is premature to express a view on particular ideas until they are developed and presented in greater detail. We would be glad, however, to assist any review which is undertaken, and to participate in an advisory group in that connection.

GE has had extensive experience with the implementation of ethics and compliance programs in a wide variety of industries, ranging from financial services (such as insurance, consumer finance, commercial finance, banking) to manufacturing (including products such as power systems, medical systems, lighting products, appliances, and locomotives). We conduct business with government customers – GE was one of the founding members of the Defense Industry Initiative – as well as customers in the private sector. More than 300,000 employees work in over 100 countries around the world.

To offer the Commission a glimpse at how one large company has managed the process of introducing compliance and ethics programs around the world, I am enclosing a copy of our core policy guide *Integrity: The Spirit and the Letter of Our Commitment*, which we publish in 25 languages, as well as an 18-minute video, which introduces our worldwide employees to GE's approach to what we call Integrity.

Thank you for this opportunity to express our views.

Very truly yours

A handwritten signature in black ink, reading "E. Scott Gilbert". The signature is written in a cursive, flowing style with a long horizontal line extending from the end.

Enclosure



Yale Law School

November 6, 2001

United States Sentencing Commission
One Columbus Circle, NE, Suite 2-500
South Lobby
Washington, DC 20002-8002
FAX (202) 502-4699

Attn: Public Affairs

Re: Ad Hoc Advisory Group on Organizational Guidelines

To Whom It May Concern:

I strongly favor both amending the organizational sentencing guidelines as well as proposals for form an ad hoc advisory group. It is critical that a majority of this group be informed but disinterested parties, e.g., academics and scholars; although affected corporations, prosecutors and judges would also be valuable members of the group.

As for the nature of the group, ideally it would be composed of no more than 9-12 persons with staggered terms (so that the group always includes members who have served before). Three year staggered terms (with a third of the group rotating off in any given year) might be advisable (and would be consistent with the protocol of many corporate boards of directors).

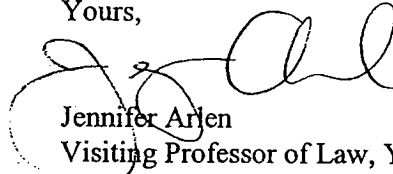
As to the identity of person, I would like to serve on this committee. Additional people who I recommend include:

Reinier Kraakman (Harvard Law School)
Mark Cohen (Owen School of Management, Vanderbilt Law School)
John Coffee (Columbia Law School)
Kate Stith (Yale Law School).
Susan Rose-Ackerman (Yale Law School)

As to the merits of certain suggestions, I am attaching copies of my own work in this area. I am not FAXing the articles along with this letter because that would be too long. I will include them in the hard copy mailing that follows.

it. Thank you for contacting me about this proposal. I look forward to speaking to you about

Yours,

A handwritten signature in black ink, appearing to read 'J. Arlen', written over the printed name.

Jennifer Arlen

Visiting Professor of Law, Yale Law School

Ivadelle and Theodore Johnson Professor of Law and Business, USC Law School

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

Dear Judge Murphy:

Thank you for the opportunity to comment on the proposed ad hoc advisory group regarding the Organizational Sentencing Guidelines. I think this is an excellent idea. I was the Supreme Court Judicial Fellow at the United States Sentencing Commission from August 1998 to August 1999, and I worked with Paula Desio, almost exclusively on Chapter 8 questions. I have written a number of law reviews, business articles and one book focusing on the Organizational Guidelines. I have maintained my relationship with the Commission as a guest speaker at your jointly sponsored regional workshops with the Ethics Officer Association, and yesterday I was named as the first director of Xavier University's Williams College of Business' newly established Ethics Center.

My research and work on Chapter 8 has confirmed the impact they have had on the business world. November 1, 1991 will be remembered as the day that corporate America could truly say "Good Ethics is Good Business". Prior to the Guidelines, there was tremendous pressure at all levels of business to do whatever it took (regardless of law or ethics) to maximize profits. Executives may have been sending this message explicitly or implicitly because the probability of detection was low, and the punishment, even if detected, seemed worth the risk. After the Guidelines were introduced, top executives saw the business value of "values". Of course they still need to maximize profits, but now the message is sent to only use legal and ethical means to accomplish this goal. This corporate commitment to compliance and ethics programs has been clearly demonstrated by the exponential growth in the Ethics Officer Association, a group that did not exist before the 1991, but now has over 750 members.

The ten year anniversary of the Guidelines seems to be an appropriate time to reflect back on the accomplishments, and review possible changes to make them even more useful in the future. An ad hoc advisory committee can help in this regards. Outside practitioners and academics can lend their talent to surface potential issues and suggest possible solutions. I for one, would be honored to help in any capacity that was appropriate.

Please let me know if there is anything I can do in this endeavor.

Sincerely,


Paul E. Fiorelli

Director,
Xavier Center for Business Ethics and Social Responsibility

Owen Graduate School of Management
VANDERBILT UNIVERSITY



NASHVILLE, TENNESSEE 37203

TELEPHONE (615) 322-2534
FAX (615) 343-7177

November 5, 2001

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).

Honorable Diana E. Murphy
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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,



Mark A. Cohen
Associate Professor of Management and
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).

[BETTER COPY REQUESTED]

To: U.S. Sentencing Commission
Fax Number: (202) 502-4699
Attn: Public Affairs.

From: Linda K. Treviño
Professor of Organizational Behavior
Chair, Department of Management and Organization
Cook Fellow in Business Ethics
The Pennsylvania State University
University Park, PA 16802

Re: Issues Related to Formation of an Advisory Group on the Organizational Sentencing Guidelines

Date: October 30, 2001

I have been asked to provide input regarding 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."

Based upon my work in this area for fifteen years, my interaction with ethics and compliance officers in corporations, and my own research, I would encourage the Commission to establish such an advisory group. Many knowledgeable people now have a decade of experience with the guidelines and their effects. Their input would be extremely valuable as the Commission considers any changes. Potential members could include seasoned corporate ethics/compliance officers, legal counsel, consultants, governmental regulatory agency representatives, and academics who have studied ethics/compliance program effectiveness. In addition, representatives from smaller organizations should be included because they tend to address these issues in a different and less formal manner.

My research has found that awareness of the guidelines' existence has clearly influenced the development of formal ethics/compliance programs in organizations. However, the extent to which those programs are values-based and integrated into the organization's daily operations is influenced more by senior executive commitment to ethics than by awareness of the guidelines. Further, ethics/compliance program effectiveness depends less on the formal characteristics of these programs (as guided by the Sentencing Commission Guidelines) and more on informal organizational culture characteristics such as executive and supervisory commitment to ethics, perceived fair treatment by employees, and management follow through when ethics problems are brought to its attention. Therefore, more attention to these informal organizational characteristics should be considered as the Commission considers changes.

Below, I have included a list of my publications that are relevant to ethics/compliance program management and effectiveness.

Articles

Treviño, L.K. & Weaver, G.R. Organizational justice and ethics program follow through: Influences on employees' helpful and harmful behavior. Business Ethics Quarterly, 11 (4): 651-671, 2001.

Weaver, G.R. & Treviño, L.K. The role of human resources in ethics/compliance management: a fairness perspective. Human Resource Management Review, 11: 1-22, 2001.

Treviño, L.K., Hartman, L.P., Brown, M. Moral person and moral manager: How executives develop a reputation for ethical leadership. California Management Review, 42(4): Summer, 2000, 128-142.

Butterfield, K., Treviño, L.K., & Weaver, G.R. Moral awareness in business organizations: Influences of issue-related and social context factors. Human Relations, 53(7): 981-1018, 2000.

Treviño, L.K., Webster, J., & Stein, E. Making connections: Complementary influences on communication media choices, attitudes, and use. Organization Science, 11 (2): 163-182, 2000.

Treviño, L.K. & Weaver, G. The stakeholder research tradition: Converging theorists, not convergent theory. Academy of Management Review, 24 (2): 222-227, 1999.

Weaver, G.R., Treviño, L.K. & Cochran, P. Integrated and decoupled corporate social performance: Management commitments, external pressures, and corporate ethics practices. Academy of Management Journal, 42: 539-552, 1999.

Weaver, G.R. & Treviño, L.K. Compliance and values oriented ethics programs: Influences on employees' attitudes and behavior. Business Ethics Quarterly, 9 (2): 325-345, 1999.

Weaver, G., Treviño, L.K., & Cochran, P. Corporate ethics practices in the mid-1990s: An empirical study of the Fortune 1000, Journal of Business Ethics, 18 (3), 283-294, 1999.

Weaver, G.R., Treviño, L.K., & Cochran, P. 1999. Corporate ethics programs as control systems: Influences of executive commitment and environmental factors, Academy of Management Journal, 42(1): 41-57, 1999.

Treviño, L.K., Weaver, G., Gibson, D., & Toffler, B. Managing ethics and legal compliance: What works and what hurts. California Management Review, 41 (2): 131-151, 1999, reprinted in L.P. Hartman. Perspectives in business ethics. 2nd Ed. NY: McGraw-Hill.

Treviño, L.K., Butterfield, K. & McCabe, D. The ethical context in organizations: Influences on employee attitudes and behaviors, Business Ethics Quarterly, 8 (3): 447-476, 1998, reprinted with permission in J.A. Worthley. Organizational Ethics in the Compliance Context. Chicago, Illinois: Health Administration Press, 1999; reprinted with permission in J. Dienhart. The Next Phase of Business Ethics, Elsevier, 2001, pgs. 301-337.

McCabe, D., Treviño, L.K. & Butterfield, K. The influence of collegiate and corporate codes of conduct on ethics-related behavior in the workplace, Business Ethics Quarterly, 6: 441-460, 1996.

Books

Treviño, L.K. & Nelson, K. Managing business ethics: straight talk about how to do it right. 2nd ed. NY: John Wiley & Sons, Inc. 1999.



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



October 19, 2001

ADVISORY BOARD

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Ethics Officer Association

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Former President & CEO
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JEAN C. TEMPEL
Managing Director
First Light Capital

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

To Whom It May Concern:

I am writing to express my support for the formation of an Organizational Guidelines Advisory Group. I was not only made aware of this proposal group by reading the Federal Register, but also from talking to a number of people, including Paula Desio of the U.S. Sentencing Commission. I briefly served on an advisory group of the USSC as it related to the Sentencing Guidelines. My role then was to bring out the importance of ethics to compliance in the communication and enforcement of the Guidelines. This advisory group was rather short-lived, and I see this proposal as a rebirth of such a group almost a decade later.

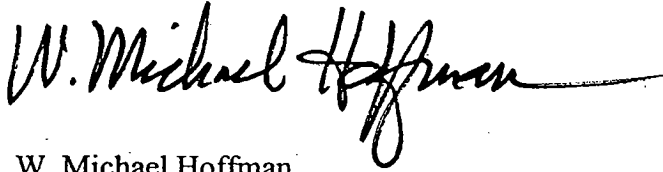
In reading the Prevention of Corporate Liability (Vol. 9, No. 9, October 15, 2001), I agree with the suggestions that have already been sent for improving the Guidelines, especially the effort to view compliance as an element of a broader integrity-based ethics program, and an effort to promote programs that reward ethical behavior. There is no doubt that the Sentencing Guidelines have played a major role in furthering the business ethics and compliance movement in corporate America and are playing a role in influencing similar efforts in other countries around the world. The USSC should be and is praised for these efforts, and the formation of a follow-up advisory group to strengthen the Guidelines should be seen as timely and important.

I would be pleased to serve on such a group if you think I could contribute. I have a lot of relationships in the business ethics academic community both here and abroad, and I have been working with corporations and other organizations in the area of business ethics for many years. Attached is my resume for your review.

Some of the largely academic associations, such as SBE, APPE, ISBEE, etc., could be very helpful and should be included as a source of ideas and support. I am also contacted by the media frequently, which could be helpful to the efforts of an advisory group, and I work with numerous laws firms in an expert witness/consulting capacity, which is another source of useful information with regard to what corporations are doing, or as is more often the case, not doing. I also serve as the Advisor to the Board of the Ethics Officer Association, an association which I helped to establish and served as the Executive Director of for its first five years.

I was encouraged to write to you with my offer to serve on this proposed advisory group by Paula Desio; however, whether I serve on the committee or not, I will be pleased to help the effort in whatever way I can.

Sincerely,

A handwritten signature in black ink that reads "W. Michael Hoffman". The signature is written in a cursive style with a long horizontal line extending from the end of the name.

W. Michael Hoffman
Executive Director



PROFESSIONAL RESUME

BIOGRAPHICAL SUMMARY

W. Michael Hoffman, Ph.D.

W. Michael Hoffman is the founding Executive Director of the Center for Business Ethics at Bentley College in Waltham, Massachusetts, a 25 year-old research and consulting institute and an educational forum for the exchange of ideas and information in business ethics.

Dr. Hoffman received his Ph.D. in Philosophy at the University of Massachusetts at Amherst in 1972. He is a Professor of Philosophy and was Chair of the Department of Philosophy for 17 years at Bentley. Dr. Hoffman has authored or edited 16 books, including Business Ethics: Readings and Cases in Corporate Morality (now in its 4th edition), The Ethical Edge: Tales of Organizations that Have Faced Moral Crises (1995), and Ethics Matters: How to Implement Values-Driven Management (2000). He also has published over 60 articles.

Dr. Hoffman has consulted on business ethics for universities, government agencies, and corporations, including The Ayco Company, Bath Iron Works, Cablevision Systems, CBS, Congress' Office of Technology Assessment, Coopers & Lybrand (now PricewaterhouseCoopers), Exelon Corporation, Fidelity Investments, GTE, General Electric, Glaxo (now Glaxo SmithKline), Hill and Knowlton, Junior Achievement, Johnson & Johnson, KPMG Peat Marwick, Long Island Lighting Company (now KeySpan Energy), Massachusetts Bay Transportation Authority, Niagara Mohawk Power Corporation, Northeast Utilities System, Northrop (now Northrop Grumman), NYNEX (now Verizon), Orange and Rockland Utilities, and TRW Systems. He has been a National Endowment for the Humanities Fellow and Consultant, a lecturer at universities and conferences around the world, and an expert witness on business ethics in numerous legal cases. He is on the board of editors of many business ethics journals, was a founding member and President of the Society for Business Ethics, and served on the advisory board of the U.S. Sentencing Commission. He was the founding Executive Director (1991-1995) and later a member of the Board of Directors (1995 - 1997) of the Ethics Officer Association; he is presently the Association's Advisor to the Board. He has been quoted extensively on business ethics in newspapers and magazines, including the Boston Globe, Business Week, Industry Standard, Los Angeles Times, New York Times, USA Today, U.S. News and World Report, Wall Street Journal, and Washington Post and is interviewed frequently for television and radio programs around the country.

Dr. Hoffman resides in West Newton, Massachusetts with his wife, Bliss Read Hoffman.



School of Law

P.O. Box 8795
Williamsburg, Virginia 23187-8795
(757) 221-3800 ♦ Fax (757) 221-3261

October 30, 2001

United States Sentencing Commission
One Columbus Circle, N.E.
Suite 2-500
South Lobby
Washington, D.C. 200062-8002

Attention: Public Affairs

VIA FAX : (202) 502-4699

re: Federal Register notice
September 19, 2001
Request for Comment

Ladies and Gentlemen:

You have asked for comment on the desirability of creating an ad hoc advisory group on the subject of the Organizational Sentencing Guidelines.

It certainly makes sense to revisit the Organizational Guidelines in light of extensive experience with legal compliance programs – both successful and unsuccessful – since the Guidelines were adopted in 1991. It also makes sense to consider the academic, practitioner, and expert commentary that has emerged from this experience. Most of all, it makes sense for the academics, practitioners, and experts who have a strong interest in and experience with the Sentencing Guidelines to have regular and sustained – yet informal – contact with the Sentencing Commission staff. This kind of ongoing exchange has certainly proven to be useful at the Securities and Exchange Commission. Dialog of this sort makes all parties more aware of the problems involved in administering the Guidelines as written, can accelerate the transmission of useful information, and can dispense quickly with ideas that have no practical utility.

Page 2 of 2

Scope, Duration and Membership

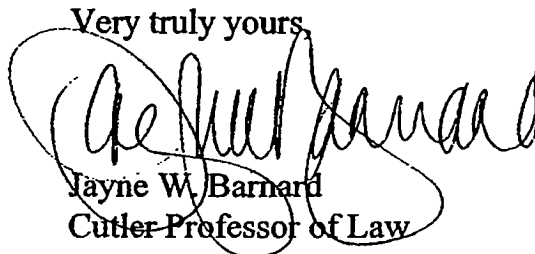
I would think that any advisory committee should be encouraged (subject to some agenda control) to provide comment on any aspect of the Organizational Sentencing Guidelines. The committee should function for a minimum of three years. Membership should be by invitation, with an opportunity to expand the group as expertise and interest manifest themselves. The advisory committee should be kept to a workable size (25 participants?), with the understanding that non-members with specific expertise should be invited to participate in the advisory committee's discussions. Certainly, the committee should include representatives of the Justice Department and the corporate defense bar, as well as those who make their living in the "compliance business."

Specific Agenda Items

I have my doubts about extending the protections of the existing Guidelines to include programs aimed generally at "ethical" behavior. A lot of these programs are self-congratulatory without having any real impact or substance.

I think a serious discussion of a "safe harbor" provision is in order — the practices of various divisions of the Justice Department on this issue appear to be all over the place.

Very truly yours,



Jayne W. Barnard
Cutler Professor of Law

From: K&G <TestingGK@netscape.net>
To: <pubaffairs@ussc.gov>
Date: Mon, Nov 5, 2001 4:39 AM
Subject: comments due by nov. 6 on ad hoc adv. group for sent. guidelines (sept. 19 fed. register)

KINDLY PASS ON THESE COMMENTS TO THE COMMISSION AS GENERAL INPUT BUT ALSO AS COMMENTS FOR THE PROPOSED AD HOC ADVISORY COMMITTEE

MESSAGE: GO FOR HIGH IMPACT CHANGES, NOT MINOR TWEAKS. HERE ARE THREE:

1. REQUIRE COMPANIES TO HAVE A S E P A R A T E A N D I N D E P E N D E N T SENIOR LEVEL COMPLIANCE FUNCTION. MANY COMPANIES HAVE RESPONDED TO THE COMPLIANCE IMPERATIVE BY JUST RE-NAMING THE POSITION OF AN EXISTING LAWYER IN THE LEGAL DEPARTMENT. THIS IS COSMETIC. IT'S NOT MORE "LAWYERING" THAT BRINGS COMPLIANCE RESULTS, IT IS A RECOGNIZED LEADERSHIP AND OPERATIONAL FUNCTION THAT CAN THINK AND ACT INDEPENDENTLY, IMPACT MANAGEMENT, AND USE MANY TYPES OF TOOLS (NOT JUST LEGAL TOOLS) TO IMPLEMENT AND MEASURE.

2. RECOMMEND THAT COMPANIES CHANGE THEIR BOARD COMMITTEES FROM "AUDIT COMMITTEES" TO "AUDIT AND COMPLIANCE COMMITTEE". OR EVEN BETTER PRACTICE, TO HAVE A SEPARATE "COMPLIANCE COMMITTEE". THIS ALLOWS FOCUS ON FUTURE AND PREVENTION, NOT JUST LOOKING AT THE PAST, WHICH IS WHAT AUDITORS/AUDIT COMMITTEES BEST DO.

3. RECOMMEND THAT COMPLIANCE FUNCTIONS GO BEYOND JUST SIMPLY AIMING FOR TECHNICAL REGULATORY COMPLIANCE. IT SHOULD INCLUDE PROMOTING GOOD CONDUCT BEYOND THE LAW. HOWEVER, DO NOT RECOMMEND THAT IT BE CALLED "ETHICS" AS THIS TURNS OFF MANAGEMENT.

THANK YOU VERY MUCH.

GK Testng

Your favorite stores, helpful shopping tools and great gift ideas. Experience the convenience of buying online with Shop@Netscape! <http://shopnow.netscape.com/>

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**United States Sentencing Commission
One Columbus Circle, NE
Suite 2-500, South Lobby
Washington, DC 20002-8002**

**Sentencing Guidelines for United States Courts
66 FR 128 (July 3, 2001)**

Included are comments and suggestions concerning the request for response; I am pleased to be able to provide these comments, but concerned that the possible lack of regard for the Indian Community and those who face Federal Sentencing, regulations will go unchanged and more of our people will be lost to this system.

For centuries Native Americans have been treated as second-class citizens, considered illegal aliens in their own country. This is especially so in the legal arena, more impacting to those who reside on Indian Reservations facing the most sever sentencing guidelines in the nation.

In New Mexico as in most Southwestern States, the location of the offence could mean probation to a lengthy prison sentence, for the same offence. This depends on "Which Side of the Fence" the offence occurs, State verses Federal, Tribal or Federal. Severe sentences are levied to those who are on Federally Impacted Lands, more so for those who reside on Indian Reservations, no variances are given to those who lack a criminal background. They are treated the same as those who have no regard for the law and are habitual offenders.

Native Americans in Indian Country do not appear to have the same rights as those in other parts of the country or those who are from other ethnic origin. This creates a rebellious atmosphere against authority. Included into this equation is the fact that when an incident occurs, no matter the severity of the situation, the individual will more than likely be tried in the Local Tribal System, if a sentence is levied, the term is served out in Tribal Jail, once the sentence is served, the Federal System has the option to charge the individual for the same charges that they had served in the Tribal System. This in the legal community is called "Double Jeopardy", and should not happen in any case, Federal, State or Tribal.

Individuals sentenced in the State's legal system are almost assured parole for their **FIRST OFFENCE**, in the Federal System they are **GAURANTEED THE MAXIMUM PENALTY BY LAW**. This system almost assure those who enter the "SYSTEM" will be released to further their criminal life, as been taught to them "TN THE SYSTEM". This does not provide those "FIRST TIME OFFENDERS" the chance to rehabilitate through probation and a **SECOND CHANCE**, as most States allow.

Economically, the Federal System places a lot of burden on the taxpayers of the Nation. In Indian Country unemployment on most reservations exceeds 70% of the local

population, many do not pay taxes, and receive some sort of assistance income. The question would be; Wouldn't we rather have them incarcerated or rehabilitated and placed into a productive environment? Many who return from Federal Prison return to the reservation, cannot find employment and in the end become a burden to the taxpayer.

On Indian Reservations there appears to be a lack of respect for local Law Enforcement this in most cases is brought on by the lack of the local Law Enforcements effective approach with the local drug trade. Here on the Zuni Reservation drug dealers go on untouched, but those who retaliate against them are punished in the Federal System, these drug dealers have in recent cases provoked altercations with individuals, and when confronted in retaliation the their aggression the drug dealers run to the Local Law to seek and gain support. Those who are defending themselves are sentenced in the Federal System, while those who cause the most harm to the people (The Drug Dealers) are left to continue their trade.

Granted, habitual and first offenders who commit murder should be sentenced to hard time, included in that company should be the drug dealers. Leniency to those who have committed their first offence protecting themselves. The current system does not allow for rehabilitation for First Offenders, only the knowledge of a lengthy prison term.

Have you heard of Young Indian Youth awaiting sentencing for a crime committed on an Indian Reservation, hanging themselves so they wouldn't have to go through the seemingly harsh process? This is all too common in Indian Country; the Federal System is just another example of the System, "STACKING THE DECK" for those who would find survival easier if the system was structured differently.

The Federal System needs to be overhauled and comparable to the States Sentencing Procedures, this will correct a disparity that singles out a race of people.

When the ad hoc advisory group is assembled, please include or promote certain involvement of those who have challenged the system trying to gain a lesser penalty for those who have had no previous criminal activity. Formulate sentencing following the States Guidelines where the crime is committed.

Thank You,
Ernest Mackel
(505) 782-4569
PO Box 338
Ramah, New Mexico
87321

Washburn, Kevin

From: Washburn, Kevin
Sent: Wednesday, October 24, 2001 2:03 PM
To: John P. Elwood (E-mail)
Subject: Ad Hoc Advisory Group on Native American Issues under the USSG

John, as a member of the Chickasaw Nation of Oklahoma, I have a strong interest in issues related to justice and public safety in Indian communities. As a former federal prosecutor handling Indian country prosecutions in New Mexico, I have more than a passing familiarity with the sections of the sentencing guidelines that most often are involved in sentencing Native Americans. I would be delighted to have an opportunity to offer my own thoughts and suggestions to any committee considering proposed changes related to the sentencing of Native Americans under the guidelines.

I am attaching my resume for consideration. If there is anything else that I should be doing or if you prefer a hard copy of this resume, please let me know. Best wishes. Kevin Washburn, (202) 632-0040



KXW resume.doc

KEVIN K. WASHBURN

*1276 North Wayne Street, Apt. 1200, Arlington, Virginia 22201 email: kevinwashburn@hotmail.com
703.465.4731 (home) 202.632.0040 (office)*

EXPERIENCE**GENERAL COUNSEL, NATIONAL INDIAN GAMING COMMISSION, Jan. 2000 to present.**

Provide legal advice to Chairman and Associate Commissioners of the independent federal regulatory agency responsible for regulating Indian gaming, a \$10 billion industry existing in 28 states. Supervise seven lawyers and several support personnel. Develop enforcement policy, strategy and regulatory initiatives. Advise the Commission on enforcement actions, administrative and judicial litigation, Congressional testimony and administrative rulemaking. Coordinate with Department of Justice on civil litigation and with various law enforcement agencies on criminal investigations involving gaming.

ASSISTANT UNITED STATES ATTORNEY, Albuquerque, N.M., Nov. 1997 - Jan. 2000.

Prosecuted violent criminals, primarily for crimes arising under the Indian country jurisdictional statutes. Handled all aspects of prosecutions, including supervising investigations by the FBI, BIA, ATF and other law enforcement agencies, seeking indictments before federal grand juries, arraignments, preliminary hearings and detention hearings, and jury trials and appeals before the federal courts.

TRIAL ATTORNEY, UNITED STATES DEPARTMENT OF JUSTICE, Washington, D.C. 1994-1997.

Appointed through the Attorney General's Honors Program to the Environment and Natural Resources Division - Indian Resources Section. Litigated affirmative cases on behalf of the United States in its role as trustee for Indian tribes. Defended programs of the Department of the Interior and the Environmental Protection Agency in actions by states and other non-Indian parties.

LAW CLERK, JUDGE WILLIAM C. CANBY, JR., U.S. Court of Appeals for the Ninth Circuit, 1993-94.**EDUCATION****YALE LAW SCHOOL, J.D. 1993.**

Editor-in-Chief, *Yale Journal on Regulation*; Arnold & Porter Scholar.

WASHINGTON UNIVERSITY (ST. LOUIS) SCHOOL OF LAW, 1990-1991.

Gustavus A. Buder Scholar; American Jurisprudence Awards: Torts, Civil Procedure.

UNIVERSITY OF NEW MEXICO, Summer 1990.

Pre-Law Summer Institute for Indians, American Indian Law Center: Outstanding Student, Indian law.

UNIVERSITY OF OKLAHOMA, B.A. (Economics) with Honors 1989.**AWARDS AND PERSONAL INFORMATION****Special Commendations for Outstanding Service:**

United States Department of Justice, April 8, 1997.

United States Department of Justice, May 7, 1998, for successfully litigating *Montana v. EPA*, 941 F. Supp. 945 (D. Mont. 1996) and 137 F.3d 1135 (9th Cir. 1998).

Award for Sustained Superior Performance, United States Attorneys Office, September 13, 1999.

Member, **CHICKASAW NATION OF OKLAHOMA**, a Federally Recognized Indian Tribe.



SCHOOL OF LAW FACULTY

Mail #TMH 444 Telephone: 651-962-4920
1000 LaSalle Avenue Facsimile: 651-962-4915
Minneapolis, MN 55403-2005

November 5, 2001

Honorable Judge Diana E. Murphy
United States Court of Appeals
for the Eighth Circuit
300 South 4th Street
11E
Minneapolis, MN 55415-2219

Via Facsimile: 202-502-4699
Attention: Frances Cook

Dear Judge Murphy:

I am an Assistant Professor of Law at the University of St. Thomas School of Law. I teach in the lawyering skills program. Before coming to UST, I worked as a Federal Public Defender for 10 years. I understand that the sentencing commission may be establishing an ad hoc committee to study the impact of the federal sentencing guidelines on Indian country. Having practiced federal criminal defense for the last seven years in Arizona, I am very interested in this topic. I am writing to volunteer any assistance I can provide to such a committee. If there is anything I can do to assist with this study, please let me know.

Sincerely,

A handwritten signature in black ink, appearing to read "C. Rumann".

Celia Rumann

VIKEN, VIKEN, PECHOTA, LEACH & DEWELL, LLP

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Sherril J. Holechek

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Tel: (605) 341-4400

October 23, 2001

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

Dear Judge Murphy:

I received your letter of October 16, 2001. I think that an ad hoc advisory group is an excellent idea. I hope that if such a group is formed, it will include Indian people who are familiar with not only traditional forms of justice but also with existing formal tribal court systems already in place. Tribal justice systems need to be a part of the federal law enforcement effort in Indian Country, not separate and largely to be ignored by the federal courts and federal prosecutors.

Sincerely,

VIKEN, VIKEN, PECHOTA, LEACH & DEWELL, LLP



Terry L. Pechota

TLP/mc



Forest County Potawatomi Community
P.O. Box 340, Crandon, Wisconsin 54520

05 November 2001

United States Sentencing Commission
ATTN: PUBLIC AFFAIRS
One Columbus Circle, NE Suite 2-500
South Lobby
Washington, DC 20002-8002

VIA United States Mail and
FACSIMILE 202/502-4699

RE: Native Americans in Indian Country

Dear Sir or Madam:

The Forest County Potawatomi Community has reviewed the Federal Register for Wednesday, September 19, 2001 regarding the Notice of the United States Sentencing Commission. The Forest County Potawatomi Community supports the formation of an ad hoc advisory group on issues related to the impact of the sentencing guidelines on Native Americans in Indian Country. While Wisconsin is a P.L. 280 state, the Forest County Potawatomi Community is well aware of the issues faced by Native Americans in sentencing before Federal authorities.

Our Native American brothers and sisters are incarcerated in Federal facilities at disproportionate rates to the Anglo population; this includes death row. Native Americans tend to face more harsh penalties when being sentenced in Indian Country. State courts have greater flexibility in fashioning appropriate sentences. In the Federal system, Native Americans serve longer sentences than non-minorities.

While the Tribe supports the formation of an ad hoc committee as an initial step, it is suggested that the Sentencing Commission take steps to establish a more permanent, formal group that has some authority and continuing review responsibility over any implemented changes. It is suggested that membership terms be at least three to four years. The membership could be comprised of tribal members that have an expertise in matters of sentencing and the impact of Federal sentencing guidelines on Tribal communities, scholars who have studied the rates of incarceration of Native Americans, and representatives from appropriate civil rights organizations as well as Department of Justice prosecutors and Federal Judges. The group must have a clear charge of their scope of authority—which should be broad. It must also be clear that the advisory group will actually play a valid role in tempering the Federal justice system. There must be a commitment to change by the Sentencing Commission.

Sincerely,

Harold Gus Frank
Chairman

COPY: Executive Council
File

**FEDERAL PUBLIC DEFENDER
DISTRICT OF NEW MEXICO**

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November 6, 2001

The Honorable Diana E. Murphy, Chair
United States Sentencing Commission
One Columbus Circle, NE, Suite 2-500
Washington, D.C. 20002-8002

Re: Ad Hoc Advisory Group Concerning Native Americans in Indian Country

Dear Judge Murphy:

The United States Sentencing Commission has proposed forming an Ad Hoc Advisory Group on issues related to the impact of the Federal Sentencing Guidelines on Native Americans in Indian Country. The Federal Public and Community Defenders, joined by the Practitioners' Advisory Group, would support forming a broad based Ad Hoc Advisory Group that could give voice to the concerns of Native Americans and constructive guidance to the Sentencing Commission. Those of us who have worked with many Native American tribes have heard the universal concerns and frustrations that are reflected in the March 2000 report of the South Dakota Advisory Committee to the United States Commission on civil rights: *Native Americans in South Dakota: An Erosion of Competence in the Justice System*.¹

Concerns over the appropriateness of the sentencing guidelines for Native American defendants in Indian Country cases are being raised by members of the federal judiciary. In a recent article, Judge Charles B. Kornmann, U.S. District Judge, District of South Dakota, recognizes a sentiment among federal judges that the sentencing guidelines are unfair to Native Americans. Kornmann, *Injustices: Applying the Sentencing Guidelines and Other Federal Mandates in Indian Country*, 13 Fed.Sent.R 71 (2001). "Too often [sentencing judges are] required to impose sentences based on injustice rather than justice, and this bothers us greatly." *Id.* We have heard similar concerns, although less bluntly spoken, from judges in the Southwest and Northwest, who have significant Native American case loads. In his article, Judge Kornmann sets forth several proposed departures that he believes would taken into account the realities of the reservation.

¹The Federal Public and Community Defenders and the Practitioner' Advisory Group strongly recommended to the Sentencing Commission to seek Native American input before passing amendments to the sex abuse guidelines, where historically Native Americans have represented approximately 70% of defendants sentenced under U.S.S.G. § 2A3.1, § 2A3.2 and § 2A3.4.

The Honorable Diana E. Murphy, Chair
United States Sentencing Commission
November 6, 2001
Page 2

It is clear that the reservations are home to the highest crime rate of any community. While the last of 1990's saw an economic boom and the concomitant reduction of violent and other crimes throughout the country, the reservations were left out of both. According to 1999 statistics from the Census Bureau and the Bureau of Indian Affairs, out of the 1.4 million of Native Americans that live on or near reservations, 19% are homeless and 59% live in sub-standard housing. 20% of Native American households on the reservations do not have full access to plumbing. 38% of Native American children age 6-11 live in poverty, in comparison with 18% for U.S. children nationwide. Only 63% of Native Americans are high school graduates. The unfortunate permanency of poverty on the reservation has also led to consistency in the crime rate. In 1998, 110 Native Americans out of 1,000 were victims of a crime of violence in comparison with 43 per 1,000 blacks, 38 per 1,000 whites and 22 per 1,000 Asians.

Long periods of incarceration have little effect on Native American crime. The roots of Native American crime can be found in the destruction of their culture, extreme poverty and the lack of economic opportunity, and a very understandable high rate of depression. This has led to significant substance abuse problems, teenage pregnancies and an alarmingly high suicide rate among Native American populations. These factors make Native American cases unique in the federal justice system.

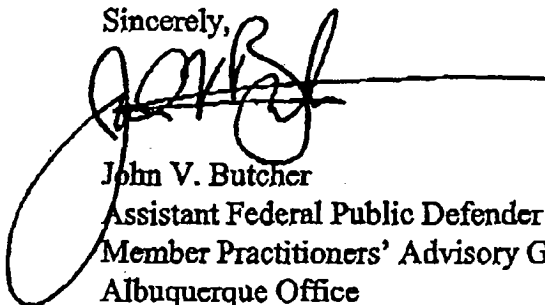
The Sentencing Commission should seek broad based input in forming its committee. The Federal Public and Community Defenders and C.J.A. Panel attorneys represent the majority of Native Americans who are charged with crimes in Indian Country. Thus, we believe the defense community can provide useful input to the committee and the Commission. We also respectfully suggest that the Commission should seek the involvement of the National Congress of American Indians, which is based in Washington, D.C. The National Congress of American Indians is the largest association of tribes and has members throughout the country. In addition, we believe the Commission should also extend invitations to the Honorable Robert Yazzie, Chief Judge of the Navajo Supreme Court, and Dr. Dewey J. Ertz, of South Dakota. Dr. Ertz, a Native American, has vast experience concerning reservation crime and effective treatment of offenders. These individuals can add unique perspectives on the causes of crime on the reservation.

The scope of the Ad Hoc Committee should include possible amendments or downward departures concerning Indian Reservation cases. This would be consistent with concerns raised to the Commission prior to the promulgation of the sentencing guidelines. See, Tova Indritz, Testimony before U.S. Sentencing Commission, Denver, CO (Nov. 5, 1986); Letter from Fredric F. Kay, Federal Public Defender, Dist. of Arizona, to the Hon. William W. Wilkins, Chair, U.S.S.C. (Aug. 9, 1989); Jon M. Sands, Departure Reform and Indian Crimes: Reading the Commission's Staff Paper With "Reservations", 9 FED. SENT. R. 144, 145 (1996).

The Honorable Diana E. Murphy, Chair
United States Sentencing Commission
November 6, 2001
Page 3

The Federal Public and Community Defenders and the Practitioners' Advisory Group are willing to work with the Commission in forming an Ad Hoc Advisory Group on issues related to the impact of the Federal Sentencing Guidelines on Native Americans in Indian Country. Please let us know if we can provide further assistance.

Sincerely,

A handwritten signature in black ink, appearing to read "J. Butcher", is written over a horizontal line. The signature is stylized with a large loop at the end.

John V. Butcher
Assistant Federal Public Defender
Member Practitioners' Advisory Group
Albuquerque Office

JVB:srf

cc: Vice Chair John Steer
Tim McGrath
Jon Sands
Barry Boss
James Felman

**U.S. Department of Justice****United States Attorney
District of New Mexico****Post Office Box 607
Albuquerque, New Mexico 87103****505/346-7274
505/346-7224
FAX 505/346-7296****November 6, 2001**

**Ms. Theresa H. Cooney
Assistant General Counsel
Office of General Counsel
United States Sentencing Commission
One Columbus Circle, NE, Suite 2-500, South Lobby
Washington, DC 20002-8002**

**Via facsimile (202-502-4788)
To be followed by United States mail**

RE: Impact of the Sentencing Guidelines on Native Americans in Indian Country

Dear Ms. Cooney:

In response to your inquiry for comment regarding an *ad hoc* committee to consider the above-referenced subject, please forward the enclosed suggestions to the appropriate person for review.

We recommend that the scope of an *ad hoc* committee include a statistical review of sentences served by Native Americans in federal prison, in comparison to sentencing in state courts for similar offenses. The scope of any such committee should go beyond the alleged discrepancy in state and federal sentencing, as many factors will need to be considered. For example, there should be some consideration of a defendant's criminal history (tribal and state offenses), as that factor will cause a sentence for the same type of offense to vary among defendants. Additionally, an *ad hoc* committee should consider recidivism rates, as differences in those statistics are important policy considerations regarding appropriate lengths of state and federal sentences. Funding resources and limitations within the respective prison systems should also be considered.

Further, recent statistics from the U.S. Department of Justice, Bureau of Justice Statistics show that violent crime is increasing in Indian Country and decreasing elsewhere; therefore, the 1993-1998 Violent Victimization and Race data released in March 2001 should be part of any study regarding the impact of the Sentencing Guidelines on Native Americans, as overall crime rates will, in all likelihood, have some relation to appropriate lengths of sentences.

A comparison of felony and misdemeanor conduct should also be considered, in light of the jurisdictional limits that exist for crimes in Indian Country. It would also be worthwhile to consider areas of criminal law where state sentences are known to be higher than federal sentences resulting from similar conduct in Indian Country (*i.e.*, drunk driving offenses). An *ad hoc* committee would also need to examine federal sentences that result from factors that are wholly unrelated to Indian Country (*i.e.*, firearm and narcotic offenses result in longer federal sentencing than a similar state offense would yield, but those sentences have no relationship to whether the crime occurred in Indian Country).

November 6, 2001

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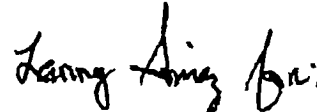
As to duration, it is likely that at least six months would be required to gather necessary statistics and reach conclusions about how the statistics relate to the impact of the Sentencing Guidelines in Indian Country.

Finally, we recommend that any *ad hoc* group membership include federal prosecutors from non-PL-280 states, *i.e.*, federal districts that prosecute a majority of violent crimes arising in Indian Country. We would specifically request that the committee include a representative from the District of New Mexico. Prosecutors from federal districts that are part of states with authority under PL-280 should also be included, as comparisons between those types of districts will be valuable. Members of the Attorney General's Native American Issues Subcommittee ("NAIS") should also be included.

The composition of the group should also include representation from victim/witness advocates, as victims' perspective on federal sentencing for Indian Country crime is essential. A probation officer would also be helpful on the committee. It would be imperative to include law enforcement from tribal, state and federal agencies, as well as a member from a tribal judiciary.

We would be happy to provide particular names for recommendation on the group membership at an appropriate time. If you have any questions, please feel free to call me.

Sincerely,



DAVID C. IGLESIAS
United States Attorney

W:\Agenda\2001\11\06\11060101.doc

UNITED STATES DISTRICT COURT
DISTRICT OF SOUTH DAKOTA
400 South Phillips Avenue
Sioux Falls, South Dakota 57104-6851
605-330-4505

LAWRENCE L. PIERSON
Chief Judge

November 5, 2001

The Honorable Diana E. Murphy
Chair
United States Sentencing Commission
One Columbus Circle, N.E.
Suite 2-500, South Lobby
Washington, DC 20002-8002

Re: United States Sentencing Commission

Dear Judge Murphy:

This letter is in response to the notice published in the Federal Register on September 19, 2001.

I believe a Native American Advisory Group would be most desirable. The June, 2001 hearing held in Rapid City, South Dakota, showed the need for such an Advisory Group. The Advisory Group is needed not only for the Native Americans on South Dakota's nine reservations, but also for other Districts that have a significant Native American population. As you know, because of federal law, Native Americans are subject to federal prosecution and the sentencing guidelines to a far greater extent than any other portion of our population. Many Native Americans are prosecuted in Federal Court for offenses which would be the subject of State Court prosecution if they were not Native Americans.

The Advisory Group, if it is created, should be broad based, with representation from interested persons in a number of affected federal jurisdictions. The members should have the time and the interest to identify problems and suggest solutions within the framework of the Guidelines.

Some members might have government or private employers who could pay the expense of their employee attending advisory board meetings. Other members, based upon need, would need to have a mechanism to cover their expenses.

I do hope that an advisory board is created. In those few jurisdictions where there is a significant Native American population of juveniles and adults, trial courts have neither the jurisdiction, resources, nor training to handle any significant offense conduct. The application of federal criminal law on those reservations is intense with sentencing problems that do not generally or, in some instances, ever, arise in other federal

The Honorable Diana E. Murphy
November 5, 2001
Page 2

jurisdictions. An example of the degree of impact of federal criminal law on the South Dakota reservations is set forth on pages 4, 5 and 7 of *The Third Branch*, October 2001.

An advisory group to identify problems and suggest solutions for sentencing problems peculiar to Native Americans is most desirable. The trust relationship the United States has recognized it has with Native American people likewise suggests that an advisory group is desirable.

Sincerely yours,



LAWRENCE L. PIERSOL

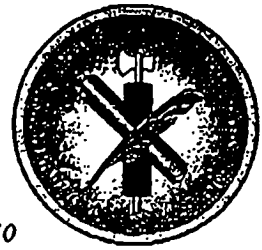
Chief Judge

LLP:jh

cc: The Honorable Roger L. Wollman
Chief Judge
United States Court of Appeals for the Eighth Circuit
400 South Phillips Avenue, Suite 315
Sioux Falls, SD 57104

THE THIRD BRANCH

Newsletter
of the
Federal
Courts

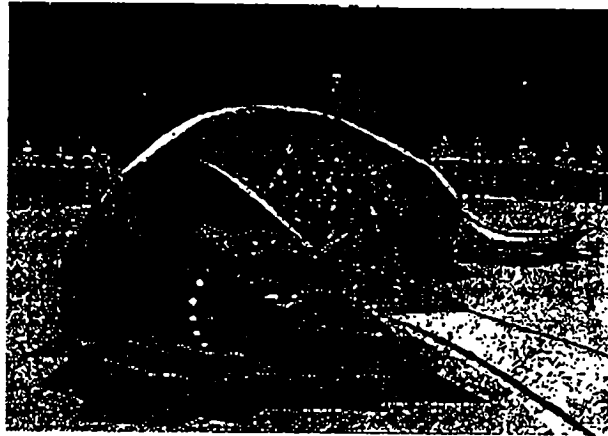


Vol. 33
Number 10
October 2001

Judiciary Looks To Security Following Attacks

A week after the September 11 terrorist bombings in New York City and Washington, Administrative Office Director Leonidas Ralph Mecham presented the security needs of the federal Judiciary to House members. Sally Rider, Administrative Assistant to the Chief Justice, appeared for the Supreme Court. The special briefing was convened by Congressman Frank Wolf (R-VA), chair of the House Appropriations Subcommittee on Commerce, Justice, State, the Judiciary and Related Agencies, with José B. Serrano (D-NY), the subcommittee's ranking minority member.

Following the attacks, the U.S. Marshals Service (USMS), which provides protective services to judges and the courts, went on heightened alert. Court facilities throughout Manhattan were closed, but reopened for business by the end of the following week, although phone service and public access to the area continue to be disrupted. It was expected that the heightened security alert would continue throughout the Judiciary for the



long-term, especially as the war on terrorism evolves into trials and other court proceedings.

With this in mind, Mecham told the subcommittee, "We believe very strongly that the Department of Justice needs additional deputy U.S. Marshals for protection of the judicial process and to provide overall security coordination for the courts." The Judiciary fears that U.S. Marshals may be diverted to bolster security at airports, to work on investigations, and to fly on civilian aircraft, which would stretch their already limited numbers to cover the needs of the federal courts.

Even before the terrorist attacks, the Judiciary had been in the process

See Security on page 2

Continuing Resolutions Keep Government Running

They nearly have become a sign of fall. As the leaves turn, the continuing resolutions emerge. Congress passed and the President signed the first continuing resolution at the end of September to keep government running as the fiscal year began October 1 without Presidential signatures on any of the 13 appropriations bills. The House and Senate passed H.J. Res. 65, and the President signed on September 28 the first CR making federal funds available through October 15, 2001. A second CR extended that deadline. Meanwhile, 35 percent of the projected fiscal year 2002 funding was dispersed to the courts to continue operations in the new fiscal year.

The House and Senate passed separate bills making appropriations for the Departments of Commerce, Justice, and State, the Judiciary, and related agencies for the fiscal year ending September 30, 2002. The Judiciary requested a \$4.8 billion appropriation for fiscal year 2002. However, the House approved \$4.6 billion for the Judiciary, and the Senate approved just \$4.4 billion. In response to the September 11 terrorist attack, the Senate version now contains funds "to

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Where Are the Needed Judgeships?	pg. 6

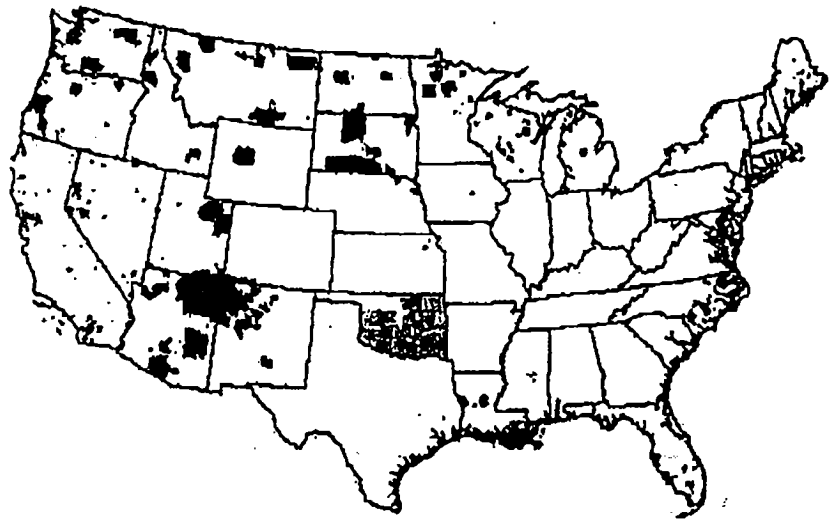
Courts Try New And Tribal Ways In Indian Territory

Assault, sexual abuse, arson, burglary—these are typically offenses heard in state courts—except when the federal government has jurisdiction. That jurisdiction, and the authority of the federal courts, extends to national parks and other federal property, but it is in the 275 locations in the U.S. that are federally administered as Indian reservations where an expanding workload is accompanied by particularly unique challenges.

For more than 100 years the federal government has been vested with the responsibility to enforce major crimes on reservations, although this responsibility can be transferred to state governments. Today, 1.2 million American Indians live on or near these reservations, and according to the Department of Justice, American Indians are the victims of violent crimes at more than twice the rate of all U.S. residents. This crime rate has, since 1996, increased the number of American Indians under supervision in the federal probation system by 57 percent. The unique nature of the cases, the large number of juveniles involved, the low standard of living, and the geographic remoteness of much of these areas have prompted judges and probation officers who handle American Indian cases to take a different approach to their work.

Last year, the District of South Dakota had a total of 412 American Indians under supervision. Judge Karen E. Schreier (D. S.D.), who sits in Rapid City, hears cases from the nearby Pine Ridge Reservation. "The caseload from the

Map courtesy of Geographic Data Service Center



American Indian Reservations and Tribal Entities in The United States

reservation," said Schreier, "has significantly increased over 6 or 7 years. We're seeing a more severe level of violence; most of which is alcohol-related. We're also seeing a large number of juveniles. They're usually 16 or 17 years old, but the youngest was 13." Schreier adds that nearly 200 gangs have been identified on the Pine Ridge Reservation, where unemployment reaches nearly 80 percent. Said Schreier, "American Indians are entitled to live in a safe, crime-free environment. So I place a high priority on handling these cases."

Chief Judge Lawrence L. Piersol (D. S. D.) knows the defendants he sees in court are the product of high rates of unemployment and corresponding rates of alcoholism on the reservations. According to statistics compiled by the Bureau of Justice Statistics, American Indian victims reported a drinking offender in 46 percent of all violent victimizations, and about 70 percent of jailed American Indians convicted of violence reported that they had been drinking at the time of the offense. Piersol is especially concerned about the num-

ber of cases involving juveniles, which due to their nature take up a disproportionate amount of the court's time.

The number of sex offenses and juvenile crimes on reservations is a cause for concern throughout the districts. Indian juveniles represented 62 percent of all juveniles arrested in calendar year 1999. Nationwide, American Indians represent 30 percent of all offenders convicted for sex offenses.

"Most probation officers never see juveniles in their careers," said Magdeline E. Jensen, Chief U.S. Probation Officer for the District of Arizona, "but we have more than 80 juveniles, mainly American Indians, under supervision here. We have 22 juveniles serving terms of official detention, of whom 16 had underlying offenses involving crimes of violence ranging from 1st and 2nd degree murder to aggravated assault and kidnapping."

As crime involving violence or child physical or sexual abuse has grown, probation officers and the federal judiciary are looking for ways in which to reach not only of-

senders, but also the communities in which they live.

The Administrative Office Federal Corrections and Supervision Division (FCSD) began developing Indian country initiatives in districts with significant Indian caseloads in 1993. In 1999, FCSD created a special Indian Country Project to improve supervision and treatment services in reservation communities. The FCSD has helped form partnership projects with the Department of Justice and the Bureau of Indian Affairs, and FCSD's Rene Green works closely with probation officers who are looking for solutions to problems. At an FCSD-hosted meeting of federal officials and tribal community members, all agreed that any successful effort to address law-enforcement and correctional treatment issues on Indian reservations must include an understanding of the Indian culture, the economy, and the geography, and that each court must work with the local tribes to establish partnerships.

One such effort is underway in the District of New Mexico, where Anita Chavez, as Supervising U.S. Probation Officer, supervises an office that covers most of the district's Indian country cases. Her district is third in the country for sex offender cases. "We're emphasizing supervision," said Chavez, "including polygraphs and treatment." She acknowledges that the geography makes supervision particularly challenging. On the 16 million acre Navajo reservation, a "surprise" visit to an offender in her territory may mean a four-hour trip from the base office. In response, the district has opened a part-time satellite office, with cooperation with the FBI, in a city closer to the more remote reservation areas. This office will be manned four days a month to give defendants access to probation officers on a regular basis. "We also are working on a half-way house where sex offenders will come as a condi-

tion of release to get the help they need," said Chavez.

Other districts have developed equally innovative solutions. In the District of Arizona, the probation office helped form a Tribal/Federal Sex Offender Management Task Force composed of tribal and federal representatives of probation, victim advocates, law-enforcement and prosecutors, therapists, judges, legislative representatives and a tribal counsel member. The Task Force has helped change tribal law to permit registration and notification of sex offenders, and it has helped increase awareness on the reservation of the incidence of sexual violence.

The District of South Dakota has developed its own sex offender program where therapy is mandatory for offenders. Community service also is mandatory if an offender is not employed or a student. A juvenile facility has been opened on the Pine Ridge Reservation, and now juveniles who were once sent away for placement are supervised on the reservation. The goal is to find continued funding for teachers and therapists, and continue access from tribal elders who can teach offenders about their culture.

Forty to 50 percent of the offenders under supervision in the District of North Dakota are American Indians. As a result, Chief Probation Officer Richard Crawford has aggressively recruited American Indians for his staff who have criminal justice degrees and law enforcement experience, and who are enrolled members of reservation tribes. Four new American Indian staff members came on board within the last year and have proved invaluable in working within their communities. The probation office has made its presence felt on the reservations in other ways. With the support of Chief Judge Rodney Webb, the district is now finalizing the opening

Indians continued from page 5

of offices on three of the reservations in its jurisdiction that once entailed a 70- to 100-mile drive to conduct any business. The fourth reservation is within 12 miles of the central office.

Frank Fleming, Chief U.S. Probation Officer for the District of Montana, says 40 percent of his office's supervision caseload is on Montana's reservations. His probation officers place a high priority on working with the community, and when working with juveniles, interacting with their schools and teachers. Officers specializing in juveniles carry a smaller caseload to make that possible.

Officers also are encouraged to be proactive in helping offenders on probation make a successful tran-

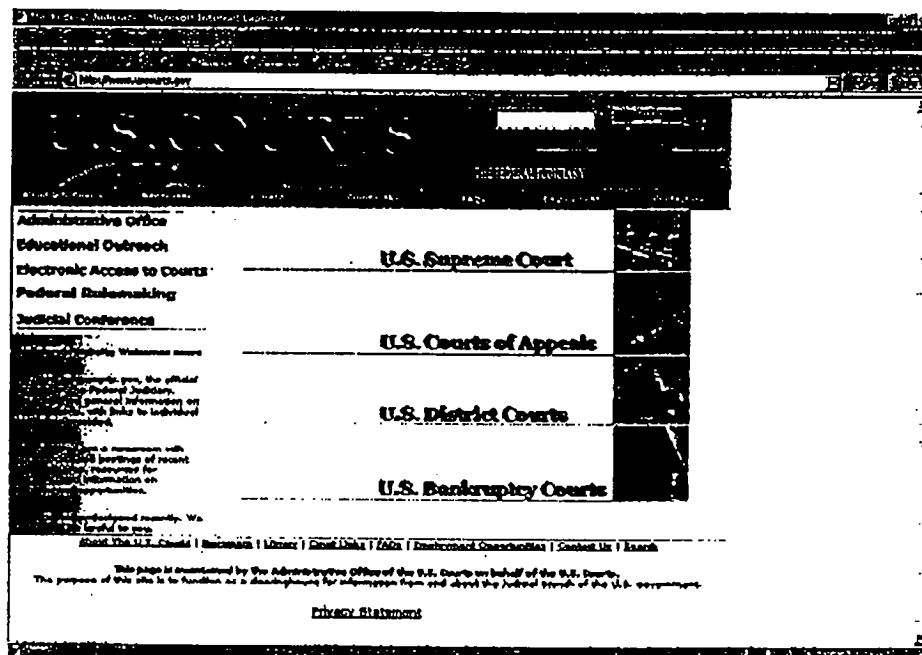
sition into the community. If there's a question of non-compliance with the terms of probation, officers try to work out matters on a local level before heading to court for a revocation hearing. Fleming says that with the support of Chief Judge Donald W. Molloy, he has worked with the Bureau of Prisons to acquire facilities for juvenile offenders from the reservation. "These offenders previously were sent out of state," said Fleming, "and that's not acceptable for a good support system. Now we have a non-secured facility in western Montana, and we're breaking ground for a 30-bed secured juvenile facility near Butte."

For the future, the Judicial Conference Criminal Law Committee may be considering asking Congress to

change the sentencing for juvenile offenders to allow for such options as a combination of incarceration and supervised release, which is not possible now.

Most judges and probation officers agree that the crime problems seen on Indian reservations have their roots in poverty. Fleming may speak for many when he observes that unemployment and alcoholism on reservations combine to present a future with little or no hope for the children. "That's why we emphasize working with the kids," says Fleming, "to show them other ways they can go. If we can't give people hope, especially the kids, if we lose them, we'll never get them back. We're invested in the communities, and it is well worth it." 

Redesign Makes Navigating Judiciary's Website Easier



The official website of the federal Judiciary (<http://www.uscourts.gov/>) has a new look this month. And the redesign is more than just a facelift. Content has been reorganized with users' needs in mind. It's easier to find the most frequently accessed information; current news is posted up front; and, in many cases, pages that were two or more clicks of a mouse away are now accessible directly from the home page. All of which makes the site significantly easier to navigate.

JOE J. MCKAY • ATTORNEY AT LAW

P.O. Box 1803, Browning, MT 59417

Phone/Fax (406) 338-7262



November 1, 2001

U.S. SENTENCING COMMISSION
One Columbus Circle, NE
Suite 20500, South Lobby
Washington, D.C. 20002-8002

RE: Comments on Proposed Ad Hoc
Advisory Group on the Impact of
Federal Sentencing Guidelines on
Native Americans in Indian Country

TO THE UNITED STATES SENTENCING COMMISSION:

Pursuant to the notice published in the Federal Register on Wednesday, September 19, 2001, please consider the following comments on the question of the formation of an Ad Hoc Advisory Group to study the impacts of the Federal Sentencing Guidelines on Native Americans in Indian Country.

The Sentencing Commission has asked for comment on the merits of forming an ad hoc advisory group and for comments on the scope, duration and membership of such a group.

Before turning to my specific comments, by way of background; I am an enrolled member of the Blackfeet Indian Tribe of Montana, and except for time in the military service and to attend university, I am a life-long reservation resident.

I am also a licensed attorney and member of the Montana State Bar Association. I have practiced law since 1983 in the Tribal courts of Montana, the Montana State courts and the Federal District Court of Montana. As a part of my practice, I have handled criminal cases in all three court systems. And, unfortunately, I have a son who made some wrong decisions and as a consequence of those decisions, had proceedings in both the State District Courts of Montana and the Federal District Court of Montana.

I have served as a member of the Blackfeet Tribal Business Council (the governing body of the Blackfeet Nation) and I am currently a contract attorney for the Blackfeet Tribe.

My comments are as follows:

First, as to the merits of forming an ad hoc advisory group on the effects of the Federal Sentencing Guidelines on Native Americans in Indian Country, my response is that the recommendation has great merit and should be undertaken at once.

As the Commission fully understands, the effect of the Federal Sentencing Guidelines on the Court itself is to greatly restrict, indeed almost eliminate, the discretion of the sentencing judge in the Federal system.

At the same time, the sentencing discretion of the judges of most state courts remains relatively intact. The end result in the context of Indian people is that an Indian can commit a crime on the Reservation for which the sentencing guidelines mandates incarceration, while another Indian committing that same crime off the reservation may serve no jail time whatsoever.

Areas where this is particularly true is in drug related crimes. In most instances state court judges have unfettered discretion to fashion a sentence for the particular defendant and crime. In many instances, in drug cases, the state sentence may be centered more around treatment and rehabilitation rather than incarceration. As the Commission considers this decision, many Montana Indians are serving time in the Federal penal system for drug related crimes, while those committing the same crimes in the State generally, are going to treatment and serving probation.

It has been my experience, that many reservation crimes are rooted in poverty and despair. The effect of the Federal Sentencing Guidelines is to further victimize Indian people by mandating jail time, where a state court judge may well take the entire circumstances into consideration and opt for a more rehabilitative sentence.

In a recent particular case, a client of mine is now serving 11 months in Federal prison for being a felon in possession of a firearm. His prior felony was 20 years ago, and in that time he had no violations of his supervised release. I have no doubt that he would not have gone to prison under a state court judge's sentence.

This disparity in sentencing derives solely from the fact that the Indian person is on a federal Indian Reservation. There is no legal basis otherwise for treating Indian people different in sentencing than their white or non-Indian neighbors receive outside the Reservation for similar, and what in some cases, are more serious crimes.

Therefore I believe that the scope of an ad hoc advisory groups' review should be limited only by the nature of the problem. Thus not only should the advisory group look at the impact of the Federal Sentencing guidelines on Indians in Indian Country, it should also look at the consistency of sentencing within the Federal system as between Indians and non-Indians who commit similar crimes. Examining this latter issues will give some insight not only on whether Indians are being treated consistently within the federal system as compared to other ethnicities, it will also give some guidance on whether Indians are being impacted more or less disparately than white people or others in the context of state

court versus federal court sentences.

The Commission should be commended for even considering the formation of an ad hoc advisory group on this issue. Having taken the first step, the Commission should realize that the problem is complex, widespread and has as many mutations as there are states with Indian Country lands and Indian tribes.

With this in mind, I would suggest that the ad hoc advisory group be formed and that it be given 12 to 18 months within which to study the problem, assess the variables and make recommendations to the Sentencing Commission by way of a formal "white paper" report.

With respect to membership on such an ad hoc advisory group, I would recommend that membership be solicited from the following groups:

1. Tribal governments;
2. Indian Attorneys with criminal practice experience in State and Federal Court;
3. Non-Indian Attorneys with criminal practice experience in State and Federal Court;
4. State Court prosecutors in counties or districts which encompass or are adjacent to Indian Country lands;
5. State Court judges with districts which encompass or border Indian Country lands;
6. Federal Court judges with districts encompassing Indian Country lands;
7. State court probation officers who handle counties or districts which encompass or are adjacent to Indian country lands; and,
8. Federal probation officers whose case loads involve significant numbers of Reservation Indians who were convicted of crimes arising out of Reservation based conduct.

In closing, I welcome the opportunity to comment on this very important issue. While it is probably not possible to effect an overhaul of the Federal Sentencing Guidelines, the Commission now has the opportunity to at least study and perhaps correct what I believe to be an injustice to Indian people which is founded in the harsh treatment in the Federal Sentencing Guidelines.

While I do not personally support the Federal Sentencing Guidelines, it is my impression that the discretion was taken from Federal judges to ensure that career

criminals and those with demonstrated, consistent criminal intent could be appropriately punished. Most crimes committed by Reservation Indians and most Indian perpetrators do not fall in those categories. As I indicated, my own experience is that most Reservation crime arises out of the feelings of despair and depression that are born in abject poverty.

There must be a more appropriate way of dealing with this class of perpetrators than is currently allowed by the Federal Sentencing Guidelines. While putting all reservation Indians in federal prisons may be a short term solution to Reservation crime (and indeed, may be preferable to many non-Indians), it has no long term benefits for anyone. Additionally, the costs to the American Society as a whole (including tax payer dollars for incarceration) could be, in my opinion, greatly reduced if a different, more discretionary approach were followed.

Finally, if such an ad hoc advisory group is formed, please consider this as my expression of interest in serving on such a group.

Thank you for taking the time to review my comments and to even consider the issue discussed herein.

Respectfully,

Joe J. McKay

cc: file

Blackfeet Tribal Business Council

ROSEBUD SIOUX TRIBE**October 31, 2001**

United States Sentencing Commission
One Columbus Circle NE Suite 2-500
South Lobby
Washington, DC 20002-8002

Attention: Public Affairs Commission

To improve the operations of the Federal guidelines and to consider all viable methods in the areas that have a significant Native American Indian population. My foremost immediate concerns lie in the following:

CULTURE ISSUE

On cultural issue regarding federal court and sentencing, we cite the *Ex parte Crow Dog* U.S. Supreme Court Case (109 U.S. 566, 1883) and we maintain that position therein today. We cite an excerpt from that case to make a point. "To impose upon them the restraints of an external and unknown code, and to subject them to the responsibilities of civil conduct, according to rules and penalties of which they could have no previous warning; which judges them by a standard made by others and not for them, which takes no account of the conditions which should except them from its extractions, and make no allowance for their inability to understand it. It tries them, not by their peers, nor the law of their land, by superiors of a different race according to the law of a social state of which they have an imperfect conception, and which is opposed to the traditions of their history, to the habits of their lives, to the strongest prejudices of their savage nature; on which measures the red man's revenge by the maxims of the white man's morality."

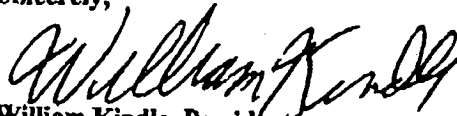
The Major Crimes Act of March 3, 1885 did override the *Ex parte Crow Dog* case, and diminished extensively the culture part of the Native American Indian's capability to maintain control over crimes within their own circles according to Sioux customs.

We maintain our position on the merits of *Ex parte Crow Dog*'s decision especially in the light of the current federal sentencing guidelines imposed on the Native American Indians, and more recently the new laws imposed on them to address federal court impositions and dilemma regarding Indian Reservations.

We believe the culture part of any group of people maintain's control over their own circle in any given circumstances especially where civil conduct may be the issue.

It is difficult to maintain control over a group of people when others impose their standards of rule and laws on such as the Native American Indian reservations here in the state of South Dakota.

Sincerely,


William Kindle, President
Rosebud Sioux Tribe

11 Legion Avenue
Phone: 605-747-2381

P.O. Box 430
Fax: 605-747-2905

Rosebud, SD 57570-0430
E-mail: rsiakota@gwte.net

ROSEBUD SIOUX TRIBE

October 31, 2001

United States Sentencing Commission
One Columbus Circle NE Suite 2-500
South Lobby
Washington, DC 20002-8002

Attention: Public Affairs Commission

To improve the operations of the Federal guidelines and to consider all viable methods in the areas that have a significant Native American Indian population. My foremost immediate concerns lie in the following:

COURT APPOINTED ATTORNEYS

It is our opinion that the court appointed attorneys do not always serve in the best of their clients. Most of the Native American defendants always end up serving time through plea-bargaining, guilty pleas by their court-appointed attorneys. The inexperienced attorneys or the lackadaisical attitude on the part of the attorneys, often mean a long-term incarceration for the clients, usually the Native American Indians in this instance. We feel reservations are targeted for more laws unnecessarily as a federal judge observed, and said (quote) "And if your drinking and driving on the reservation and someone is injured, you get a year on top of what anybody else in the state would receive for a similar crime," (unquote) Rapid City Journal, April 22, 1999, and again said (quote) "For every Saturday night brawl, they prosecute somebody in Federal Court" (unquote) Rapid City Journal, April 22, 1999, (meaning on the reservation). The Federal Judge Kornmann comments came from the fact most of his federal cases came from the Indian Reservation here in South Dakota.

For these reasons above the current Court Appointed Attorneys through the federal courts must be willing to strive forward at their best in the interest of their clients who are already facing harsh prison sentence(s) by and through the current sentencing guidelines in place in federal courts.

Sincerely,



William Kindle, President
Rosebud Sioux Tribe

11 Legion Avenue
Phone: 605-747-2381

P.O. Box 430
Fax: 605-747-2905

Rosebud, SD 57570-0430
E-mail: rsiakota@gwtc.net

ROSEBUD SIOUX TRIBE

October 31, 2001

United States Sentencing Commission
One Columbus Circle NE Suite 2-500
South Lobby
Washington, DC 20002-8002

Attention: Public Affairs Commission

To improve the operations of the federal guidelines and to consider all viable methods in the areas that have a significant Native American Indian population. My foremost immediate concerns lie in the following:

INTERPRETERS

The federal courts must allow an interpreter to be available at all times. The majority of the court appearances in federal court here in the state of South Dakota are Native American Indians by a population ratio figure. The majority of our Native Americans do not have education and sometimes do not understand federal charges that are being read to them let alone know the procedures available for them.

A non-Indian in federal court has a difficult time when such charges are read to him and he speaks that same language every day in life, from the time of his birth yet, he has a hard time understanding.

Our Native American people always speak their Sioux language at home, social gatherings and elsewhere, so to try to comprehend thoroughly the federal charges initiated against him is usually a devastating experience for that person charged.

An interpreter may help the defendant understand the charges clearly so a proper defense can be initiated for the trial should there be one. An interpreter's presence will show the federal court's initiation of fair play extended even to those who may seem semi-illiterate. The availability of an interpreter would be essential and a vital part of the federal court operations.

Sincerely,



William Kindle, President
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ROSEBUD SIOUX TRIBE

October 31, 2001

**United States Sentencing Commission
One Columbus Circle NE Suite 2-500
South Lobby
Washington, DC 20002-8022**

Attention: Public Affairs Commission

To improve the operations of the federal guidelines and to consider all viable methods in the areas that have a significant Native American population. My foremost concerns lie in the following:

FEDERAL JUDGE/DISCRETIONARY SENTENCING

The strict sentencing guidelines calls for a federal judge to remain within these guidelines, thus, the discretionary source of a federal judge is no longer viable in sentencing when mitigating circumstances do surface when sentencing a defendant.

We assumed the strict sentencing guidelines arose because of the organized crime activities and other related troublesome groups here in the United States and not so much for individual offense(s), such as that of the Native American Indians here in U.S. we may be wrong.

Sincerely,



**William Kindle, President
Rosebud Sioux Tribe**

**11 Legion Avenue
Phone: 605-747-2381**

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**Rosebud, SD 57570-0430
E-mail: rsiakota@gwte.net**



Spokane Tribe of Indians

P.O. Box 100 • Wellpinit, WA 99040 • (509) 258-4581 • Fax 258-9243

CENTURY OF SURVIVAL
1881 - 1981

October 29, 2001

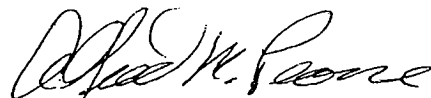
United States Sentencing Commission
Attn: Public Affairs
One Columbus Circle, NE.,
Suite 2-500 South Lobby
Washington, DC 30003-8002

Dear Ms. Murphy:

The Spokane Tribe of Indians agrees that the Sentencing Commission should form an *ad hoc* advisory group to study the impact of the federal sentencing guidelines on Native Americans. Because of our unique status and the general trust obligation of all agencies of the United States in relation to Native American people, the sentencing guidelines should be given careful scrutiny under the highest of standards.

The composition of this group should be comprised of the people directly affected: Indian people. Efforts should be made to solicit applications for members from organizations such as the National Council of American Indians (NCAI) along with its regional sub-organizations, and the Native American Rights Fund (NARF).

Sincerely,



Alfred Peone, Chairman

November 5, 2001

United States Sentencing Commission
One Columbus Circle NE
Suite 2-500, South Lobby
Washington, DC 20002
ATT: Public Affairs

RE: Formation of Advisory Group on Organizational Guidelines

In response to your request for comment on the possible formation of an ad hoc advisory group on the organizational guidelines, Cingular Wireless hereby files these comments for your consideration.

Cingular believes the organizational sentencing guidelines have had an enormous influence on the development, shape and scope of compliance programs in many companies. This impact goes beyond the relatively limited number of organizational sentencing cases that come before the courts each year. But instead, is revealed in the increasing numbers of companies that have joined organizations such as the Ethics Officer's Association, desiring to benchmark their compliance programs. Now is an appropriate time, ten years after the organizational guidelines were implemented in 1991, to review their application and make recommendations for improvement.

An advisory group is an excellent vehicle for undertaking this review and providing the Commission with the most comprehensive information and recommendations. As the Commission realizes, this effort will take some time, if done properly and thus the advisory group should be given sufficient time to conduct a careful, thoughtful and extensive review of the broad impact the organization guidelines have had on companies, including the possible reforms to improve them.

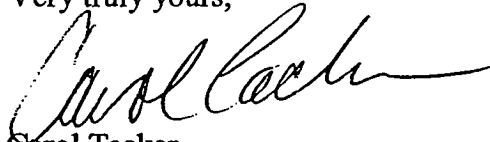
This group should include ethics and compliance officers and other experts on ethics and compliance, in addition to members of the bar who represent corporations in criminal matters. Ethics and compliance officers can: describe the impact the organizational guidelines and each of the seven elements has had on their organization, address the strengths and weaknesses of the guidelines as written and also detail other legal and regulatory developments which may make it more difficult to establish and maintain the "effective" compliance program contemplated by the guidelines.

A

The advisory group should, consistent with the Commission's legal authority, have the ability and time to review these other legal and regulatory initiatives, such as regulatory compliance guidance, voluntary disclosure programs, self-audit and source privilege issues, False Claims Act proceedings, corporate integrity agreements and other enforcement activity. These initiatives may also offer helpful suggestions for improvement in the guidelines themselves.

If you have any questions regarding our comments, please call Carol Tacker, Compliance Officer on 404-236-6030 or Kathy Rehmer, Executive Director – Ethics and Compliance on 314-835-2519.

Very truly yours,

A handwritten signature in black ink, appearing to read "Carol Tacker", with a long, sweeping horizontal line extending to the right.

Carol Tacker

Compliance Officer – Cingular Wireless



November 5, 2001

United States Sentencing Commission
One Columbus Circle NE
Suite 2-500, South Lobby
Washington, DC 20002-8002

Attention: Public Affairs

Dear Sir or Madam:

As a member of the Board of Directors of the Ethics Officer Association (EOA), I write to commend the Commission on its plan to establish an advisory group to review the organization sentencing guidelines. The guidelines have provided an effective roadmap for ethics and compliance officers to develop meaningful programs.

I urge the Commission to include business ethics practitioners, including representatives from the EOA, in the advisory group and that the group be provided with sufficient time to conduct a thorough review, of the broadest scope, prior to making its recommendations to the Commission.

Sincerely,

A handwritten signature in cursive script, reading 'Frank Z. Ashen'.

HEALTH CARE COMPLIANCE ASSOCIATION

18105 46th Avenue North • Plymouth, MN 55446 • Tel: 763/478-4490 • email: rsnell@hcca-info.org

November 16, 2001

Mr. Michael Courlander
Public Affairs Officer
United States Sentencing Commission
Columbus Circle, NE., Suite 2-500, South Lobby
Washington, DC 20002-8002
Fax: 202/502-4699

Dear: Mr. Courlander:

I am responding to your call for members to participate in the ad hoc group reviewing the US Sentencing Commissions Guidelines, Chapter 8 – Sentencing of Organizations. I am the Chief Executive Officer of the Health Care Compliance Association (HCCA), which has 3000 individual members. All of our members are compliance professionals. HCCA's mission is to assist the health care industry in implementing compliance programs. Our board members are from prominent health care organizations such as University of Pennsylvania, Mayo Foundation, HCA Healthcare, and TAP Pharmaceuticals (see attached). Our Board representation also comes from outside groups such as the Office of Inspector General (OIG) and the U.S. Treasury.

We have conducted several joint roundtable meetings between the health care industry and the OIG on subjects such as the Physician Compliance Guidance and Corporate Integrity Agreements. We have conducted dozens of conferences and audio conferences on the Seven Elements of corporate compliance as listed in the USSC Sentencing Guidelines. We have published books, CDs, audio-tapes, videotapes and a newsletter on compliance related matters. We have also developed a certification programs for compliance professionals.

We have recently started to examine the topic of compliance program effectiveness. Paula Desio has participated in these discussions and several of our Officers met with Judge Murphy and John Steer in Minneapolis. Mary Didier has attended several of our meetings.

We would be interested in discussing with you, which of our constituents would be best suited to participate in your ad hoc group. Should you need a Chair of the group I would suggest Greg Warner who, as of January 1, 2002, will be our Immediate Past President and is the Compliance Officer for the Mayo Foundation. Mayo is a committee-run organization and Greg has 20 years of experience working with committees. Chairing a group of diverse participants can be challenging and he would be an asset to you. If you are looking for a general member we have many individuals who could be considered and would represent our constituency well.

Roy Snell
CEO HCCA
18105 46th Ave. N.
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763 478-4490
rsnell@hcca-info.org

At

HCCA 2001 Leadership Directory

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Email: alan.yuspeh@columbia.net



ENTER FOR ETHICAL
BUSINESS CULTURES

November 6, 2001

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

Dear Judge Murphy:

BUSINESS
PARTNERING WITH
THE UNIVERSITY OF
ST. THOMAS
GRADUATE SCHOOL
OF BUSINESS
AND
THE UNIVERSITY OF
MINNESOTA
CARLSON SCHOOL
OF MANAGEMENT

I am writing this letter in follow up to the United States Sentencing Commission's requested comment on formation of an ad hoc advisory group pertaining to Chapter Eight of the Sentencing of Organizations.

Upon reviewing Chapter Eight and the supporting Chapters of the Federal Sentencing Guidelines, I support the concept of forming an advisory group to explore possible revision of the guidelines.

It has been ten years since the guidelines were first promulgated. During this ten-year period, a sufficient number of real experiences have occurred that provide a means for exploring the impact of the guidelines from several perspectives. First, a comparison of the intent of the guidelines with the actual impact could be made. It is important to continually assess whether the intent of the guidelines is having the desired outcomes. Secondly, an analysis of the changing business environment could be made to determine whether any changing external factors impact the guidelines effectiveness. Finally, it is useful to examine themes from real occurrences that provide greater clarity and aid practitioners in improving their ethics and compliance programs.

Questions pertaining to membership of the advisory group need to be pondered with considerable care. It is important to achieve balanced feedback and input. Membership of the ad hoc group should favor enlistment of a diverse cross section of corporate practitioners, academic ethicists, business ethicists and representatives from the United States Sentencing Commission. While membership should be balanced, considerable care should be given to hearing the voices of corporate practitioners and the United States Sentencing Commission, the two groups most knowledgeable of and interactive with the organizational guidelines.

I wish to thank you and the United States Sentencing Commission for providing an opportunity for input into this matter of great importance. If I can be of further assistance in the future please do not hesitate to contact me at the CEBC at 651-962-4123.

Respectfully

Ron James
President and CEO

1000 LaSalle Avenue
M 12
Minneapolis, Minnesota
55403-2005

651 962 4120
TELEPHONE

651 962 4042
FACSIMILE

mail@cebcglobal.org
www.cebcglobal.org



November 1, 2001

Judge Diana E. Murphy
Chair, U.S. Sentencing Commission
% United States Sentencing Commission
One Columbus Circle, N.E., Suite 2-500
South Lobby
Washington, DC 20002-8002

Judge Murphy:

This letter is being written in response to your recent announcement that the commission is considering forming an ad hoc advisory group to consider development of proposals on the organizational guidelines for the Commission's consideration.

We recommend that you consider contacting the Ethics Officers Association (EOA) to seek their official participation on this ad hoc group. You may contact them at www.eoa.org.

The Sentencing Guidelines are very important to us as a business unit within our company. We have relied heavily on them for strategic guidance in developing our communication, training, marketing, and case management programs. We would kindly ask that you take the proposals offered, including ours, under careful consideration and give this matter as much time and diligence as necessary.

We offer our support in any phase of this endeavor going forward.

Thank you for your consideration.

Sincerely,

Compaq Computer Corporation

A handwritten signature in cursive script that reads "Robert T. Spencer, Jr.".

Robert T. Spencer, Jr.
Director, Office of Business Practices
Chief Privacy Officer

MEMORANDUM

UNITED STATES DISTRICT COURT

Date: November 1, 2001
To: United States Sentencing Commission
Re: Comments on possible ad hoc advisory group
From: Judge Kornmann

I endorse and support the formation of an ad hoc advisory group to address federal sentencing guidelines issues for Native Americans in Indian Country. I refer you to the article I authored for the Federal Sentencing Reporter for September/October 2000 and I enclose a copy.

The group should include only individuals who are knowledgeable about the sentencing guidelines and how they work. General philosophical statements and accusations are of little value, very frankly. I am constantly amazed at how little tribal leaders know about the Sentencing Guidelines. They often write to me, urging that an Indian defendant who is a tribal member be sentenced to a term of probation, this despite the fact that the Guidelines and the case law would absolutely not permit that. I receive the same letters from family members and friends of the defendant, again with no information about the Guidelines. They write often about factors that are prohibited or at least discouraged.

Thank you for your continuing interest in doing something about how unfairly Native Americans in federal court are impacted by the Sentencing Guidelines.



CHARLES B. KORNMANN
UNITED STATES DISTRICT JUDGE
United States Courthouse
102 Fourth Avenue SE, Suite 408
Aberdeen, SD 57402

Injustices: Applying the Sentencing Guidelines and Other Federal Mandates in Indian Country

Ask virtually any United States District Judge presiding over cases from Indian Country whether the Federal Sentencing Guidelines are fair to Native Americans; ask virtually any appellate judge dealing with cases from Indian Country the same question, and I believe the answer would largely be the same: No. Too often are we required to impose sentences based on injustice rather than justice, and this bothers us greatly.

Our ancestors forced these original residents of North America into federal enclaves known as reservations, leaving them land that was largely undesirable to homesteaders and others. Surely, I need not recount the list of broken treaties and failures of the federal government to keep our promises and meet our obligations to Native Americans—these failures continue today.

It is a misnomer to call handcuffs "guidelines." If sentencing handcuffs must be placed on federal judges, at least the guidelines with regard to Indian Country should be structured differently. First, they should recognize the tremendous differences that exist between Indian Country and the rest of America. For many reasons Indian Country is a different world than any other part of this fantastically prosperous nation of ours. Second, one must keep in mind that Congress enacts statutes, very likely with little, if any, thought as to how severely they impact Native Americans.

I. The Impact of Congressional Legislation

Congress in recent years has moved far from the principles of federalism under which our country was founded by federalizing a large number of offenses. We even have a federal drunk driving law whose title—"Laws of States adopted for areas within Federal jurisdiction"—is a misnomer. Instead of simply adopting by reference the statutory scheme and the maximum penalties from the state in which the federal enclave lies, so as to treat members of the military and Native Americans the same as others living in that state, Congress added very serious penalties. If a Native American drives impaired in South Dakota's Indian Country, for example, he or she not only receives what a similar drunk driver would receive in Sioux Falls but the punishment "shall include an additional term of imprisonment of not more than 1 year, or if serious bodily injury of a minor is caused, not more than 5 years, or if death of a minor is caused, not more than 10 years, and an additional fine . . . or both, if a minor (other than the offender) was present in the motor vehicle when the offense was committed . . ." Thus, if an impaired Native American driver in Indian Country

who otherwise obeys the law is hit by another driver who drives through a stop sign and a child in the Native American's vehicle is injured or killed, the Native American pays the enhanced penalty. Although many would seriously question whether Congress should address drunk driving in such a manner or perhaps in any manner, I do not argue that the penalties as such are necessarily out of line. That is a matter for our elected representatives to determine. However, I do argue strenuously that it is terribly wrong to treat Native American impaired drivers more severely than similarly impaired drivers in the rest of the United States.

Let me provide another example. Congress has seen fit to severely punish those who sell drugs from "protected locations," such as a "housing facility owned by a public housing authority." The statute calls for twice the maximum punishment authorized by 21 U.S.C. § 841(b) and "at least twice any term of supervised release" authorized by 21 U.S.C. § 841(b). In addition, a fine up to twice the amount authorized by 21 U.S.C. § 841(b) may be imposed. Except to the extent a greater minimum sentence is called for by 21 U.S.C. § 841(b), a person violating this statute "shall be" imprisoned for not less than one year. Only if the sale involved five grams or less of marihuana is the minimum sentence not required.

Guideline § 2D1.2 (a)(1) provides for a two-level enhancement for selling drugs from a "protected location." This section results from a directive to the Sentencing Commission in Section 6454 of the Anti-Drug Abuse Act of 1988. At least two circuits, including the Eighth Circuit in *United States v. Oppedahl*, 998 F.2d 584 (8th Cir. 1993), hold that regardless of the application or lack of application of a statutory mandatory minimum, the guidelines provision must still be applied. In the Eighth Circuit, we are told to start with § 2D1.1 if the sale occurred in a protected location and then apply the enhancement under § 2D1.2.

The rationale for enhancing the sentences of drug dealers who deal from large public housing projects run by "public housing authorities" in major cities where law abiding residents are challenged daily by drug dealers and other criminals is certainly understandable and remains a matter of legislative decision making. However, Congress failed to take into account that, for the most part, public housing in Indian country which is run by Indian Housing Authorities consists of single family dwellings. Why should a wealthy or even a mid-level income person who rents or owns his or her



CHARLES B. KORNMANN
U.S. District Judge,
District of
South Dakota

own home and sells drugs be subject to significantly lesser penalties than a Native American of limited means who lives in a single family "public housing" home on the reservation and sells drugs from that home? I have interpreted 21 U.S.C. § 860 and the two-level guideline enhancement as not applicable to people who live in homes owned by Indian Housing Authorities. A "public housing authority" is a different entity than an "Indian Housing Authority." This is supported by my analysis of 25 U.S.C. §§ 4101 *et seq.*, and the rather extensive statutory scheme in Chapter 42 dealing with "Native American Housing Assistance and Self-Determination." I looked also at 42 U.S.C. § 1437a(b)(6) and the legislative history of removing any reference to Indian Housing Authorities in the definition of "public housing authority", this having been accomplished in 25 U.S.C. § 4101 by an Act of October 26, 1996, effective October 1, 1997. I considered also the rule of lenity and other statutes. Thus far, my interpretations have not been appealed.

II. The Impact of Substance Abuse on Sentencing

Substance abuse problems are rampant in Indian Country. Extreme poverty, lack of almost any job opportunities, feelings of oppression and discrimination, histories of domestic and other abuse, undesirable peer pressures, and loss of feelings of self worth all contribute to addictions. Convictions for driving under the influence (and similar convictions by whatever name they are known) often increase the criminal history categories of Native Americans pursuant to application note five to § 4A1.2. By contrast, those sentenced in state court (at least in South Dakota) for assaults, thefts and other offenses are not generally penalized for past convictions of drunk driving because the state judges simply pay little, if any, attention to such offenses. I believe that is true as well in other states, at least in those without sentencing guidelines. In any event, we are permitted no such luxury in Indian Country cases.

The sentencing guidelines are also especially harsh to Native Americans who have resisted arrest, often while under the influence of some substance. A citizen in state court for a similar offense would usually be sentenced to time served while he or she "sobered up." In federal court, however, Native Americans are often charged with impeding, obstructing or resisting a federal officer and, upon conviction, routinely go to a federal penitentiary as "obstructing or impeding an officer" calls for a base offense level of six pursuant to § 2A2.4(a). The definition of federal officer includes any tribal police officer when the tribe has entered into a contract with the federal government which virtually every tribe has done. If the defendant had "physical contact" with the officer, a three level enhancement is applied. Obviously, all arrests involve physical contact between the officer and the person being arrested and a defendant who is intoxicated will often touch the

officer in an improper manner. Thus, for a defendant with a criminal history I category who goes to trial and is convicted, the sentence range is four to ten months. This is an excessive sentence when the officer has not been injured in any way. Putting up with drunks is to some extent "part of the territory" for police officers. Therefore, people who resist arrest while intoxicated anywhere else in this country tend not go to prison for resisting arrest, regardless of what their past criminal history might be. I hasten to add that a Native American who actually injures an officer is often charged with a different offense, namely assault with a dangerous weapon or assault resulting in serious bodily injury. The definition of a dangerous weapon includes "shod feet", e.g. kicking someone with tennis shoes.

III. The Need for More Departure Opportunities

Sentencing judges are largely prohibited from taking into account the realities in Indian Country. Under § 5H1.10 we can neither consider race or national origin nor the fact that we took away the culture, the language, the religion, the land, the buffalo, the pride, and the very freedom of Native Americans years ago. It is not only Blacks who have suffered greatly in America but also Native Americans.

Also, under § 5H1.12 we are prevented from considering lack of guidance as a youth and similar circumstances. If you could only see the terrible parenting that Article III judges see on so many occasions in Indian Country, this prohibition would not apply here. Why is it not a sentencing consideration to look at how the young person was raised and what the person was taught or not taught? How and why should the young person be sentenced without considering that the child's or young adult's parents were largely absent and, when present, often intoxicated and engaged in domestic violence? How could we not know that being raised in such an environment would cause the child as a young adult to reap what was sowed by the parents? The age of a young defendant who has just emerged or escaped from such a home of violence is not ordinarily relevant under U.S.S.G. § 5H1.1. It should be.

One might say that such departures should also be available to other disadvantaged youth. Perhaps so. However, the levels of hopelessness, lack of employment opportunities, alcoholism, drug abuse, domestic violence, sexual abuse of women and children, and complete lack of parental discipline or even presence are far worse in Indian Country than in any major city ghetto. Listen to what I hear virtually every week in trials and hearings and what I read in the presentence investigation reports. The conditions described are simply not on the "national radar"; they are not even on the "radar" of people living in the states where Indian Country is found. Few people off the reservations know what is happening and what has happened there.

All

Many young Native Americans appear at an early age in federal court. Sixty percent of all the juveniles (under age 18) prosecuted in federal court in the United States come from the District of South Dakota. This is an astounding and frightening statistic. It is particularly astounding since the federal Bureau of Prisons (BOP) neither operates nor owns any facility in this country to house or treat juvenile delinquents but rather relies on state or private facilities. The BOP does not even pretend to know what to do with juveniles. Because of these factors, federal judges dealing with juveniles, almost regardless of the crime committed, place the juvenile on probation to enable the United States Probation Officers to place and then supervise these young people. While the sentencing guidelines do not apply to juveniles, they pay the price later when they return to federal court as adults with a juvenile record. See U.S.S.G. § 4A1.2 (d)(2).

IV. A Proposal

A recent study by the United States Department of Justice as reported by the news media in March of 2001 tells us that what we have been doing in Indian Country is not working. The study period covered 1983 through 1998. Violent crime against blacks has fallen by 38%, against whites by 29%, and against Hispanics by 45%. Only Native Americans are "left out." The rate for blacks was 43 per 1,000; for whites 38 per 1,000; and for Asians 22 per 1,000. By contrast, in 1998, 110 Indians out of 1,000 were victims of violence. Indian women were victimized by their partners more than twice as often as black women but the incidents were reported less often than among blacks. In the words of James Alan Fox, criminal justice professor at Northeastern University, "the staggeringly high rates of violence, especially domestic violence, reflect the impact of severe poverty, alcoholism and lack of access to social and legal support systems and education."

But what to do? A partial solution would be for Congress to adequately fund tribal court systems to establish for the first time an independent judiciary with lawyers as judges, adequate staff support, and all the other safeguards commonly found in non-tribal courts in this country. Many cases now prosecuted in federal court could then be processed in tribal courts. Adequate and independent police departments and pretrial and

probation officers would also be required as would be a few other changes. The Indian Civil Rights Act, 25 U.S.C. § 1302, creates a body of substantive rights for Indians which are patterned, in part, on the Bill of Rights. The statute, however, does not grant a right to counsel in tribal court. This should be changed if more cases are to proceed in tribal court. Such a fundamental change would also create at least some good jobs in Indian Country. In the end its implementation depends on sufficient funding.

Alternatively, is there any chance of simply recognizing that Indian Country is different and that sentencing judges should be given true "guidelines" in dealing with these cases? A sentencing factor could be added to take into account the realities of these young Native Americans in coming of age. In short, a measure of mercy and understanding should be added. Another sentencing factor could allow the judge to take into account, in sentencing Native Americans or others in federal enclaves, similar sentences imposed in state courts in the state in which the judge presides. I realize this would not succeed with regard to all offenses, such as drug crimes, given the apparent mood of the country with regard to the so-called war on drugs, firearms offenses and other similar federal crimes that apply evenly throughout the country. Regardless of where a felon possesses a firearm and is federally prosecuted, the penalties should be largely the same. But the situation is different in the cases of assault, resisting arrest, drunk driving, theft, and similar offenses which are not usually prosecuted in federal court other than whenever they originate in Indian Country and other federal enclaves.

I hope the Sentencing Commission will carefully study these issues and, with the help of Congress, address the great unfairness that now exists as to Native Americans in federal court. I wish them well.

Notes

¹ See 18 U.S.C. § 13.

² See 21 U.S.C. § 860.

³ Primarily Native Americans are sentenced under this provision. However, it also applies in federal enclaves, such as national parks and monuments.

A12



November 6, 2001

Commissioner Elsie Meeks' Public Comment To The United States Sentencing Commission On The Merits Of Forming An Advisory Group On Issues Related To The Impact Of The Sentencing Guidelines On Native Americans In Indian Country

Merits of Forming an Advisory Committee

An advisory group to the United States Sentencing Commission needs to be formed to do a comprehensive review of the impact of the Federal Sentencing Guidelines in Indian country. The federal sentencing structure as applied to crimes committed by Indians on Indian reservations neither deters crime nor rehabilitates offenders, two key purposes of criminal punishment identified by the U. S. Sentencing Commission in its report *Manslaughter Working Group Report to the Commission*. Federal sentencing of Indians convicted of Indian country crimes is, however, breeding resentment because of inequities, real and perceived. A comprehensive review will provide the facts needed to move the discussion about federal sentencing of Indian country criminal defendants from anecdote and rhetoric to an informed dialogue that will aid future decision-making.

The impact of the Federal Sentencing Guidelines on Native Americans first came to my attention in 1999. Tribal members and leaders, defense attorneys, and federal judges were voicing their concerns that federal sentences were longer than state sentences for similar typical local-law violations. Because of federal jurisdiction on Indian reservations, these offenses that would normally have been heard in a local forum were prosecuted in federal court. Native Americans, therefore, were receiving longer federal sentences than non-Indians who were getting more lenient state sentences for similar violations. This fueled perceptions that sentences were unfair to Indians and created distrust in the justice system.

What I have found is that there is little data concerning the sentencing of Native Americans publicly available. The Sentencing Commission has issued three reports that show because of federal jurisdiction on Indian reservations the majority of those sentenced in federal court for manslaughter and sex-related crimes are Indians. While these reports -- *Manslaughter Working Group Report to the Commission* (December 1997), *Report to the Congress: Sex Crimes Against Children* (June 1996), and *Report to the Congress: Analysis of Penalties for Federal Rape Cases* (March 1995) -- are very informative, their focus is on those specific crimes and attendant sentences, not the Guidelines effect on American Indians.

There have been a number of sentencing studies by race, but they have looked at only four races: white, black, Hispanic, and "other," with Native Americans falling into

the other category. The lack of an in-depth analysis of the Guidelines effect on American Indians prevents a true understanding of the Sentencing Guidelines impact on Native Americans. Given that Indians are the only group that is subject to federal criminal jurisdiction based on race and where they effect a crime, a comprehensive review of the effect of the Federal Sentencing Guidelines in Indian country is long overdue.

Scope of Review by Advisory Committee

The exact scope of a review should be decided upon by an advisory committee after it has been formed and more is known about what data are already available, what data are needed, and what resources will be needed for the committee to complete its task. Necessary, though, are timetables to keep the project moving forward to prevent it from withering on the vine, an all too often occurrence with initiatives to address conditions in Indian country. The final work product must include findings and specific recommendations that the Sentencing Commission and Congress can take under consideration.

One thing a committee must do is an analysis of the options available to address the concerns of the impact of the Guidelines in Indian country. At the Sentencing Commission hearing in Rapid City, South Dakota, we heard requests for and against more reservation crimes being prosecuted in tribal court, more sentencing discretion for judges to take into consideration the unique circumstances that exist on most Indian reservations, and tribes consenting to the application of the Guidelines ("opt-in provision"). Each of these potential options, and others, needs to be flushed out more with the pros and cons of each identified.

Deferring to Tribal Court

The possibility of the U.S. Attorney deferring more criminal cases to tribal courts needs to be looked at. In the Sentencing Commission's 1997 report on federal sentencing and cocaine, the Commission advocated for more local control to better address drug crimes. The Sentencing Commission reported that federal policy inappropriately used limited federal resources by focusing law enforcement efforts at the lowest level. The Commission believed that local governments may be able to address some criminal issues more economically and with more locally-focused penal and social goals than could be achieved by the federal government. The same could be said about the federal government's policies in Indian country.

More Sentencing Discretion for Judges

Many want judges to have more sentencing discretion in Indian country cases to take into account the extraordinary conditions that exist in Indian country. Attached is an article, *The Unique Circumstances of Native American Juveniles Under Federal Supervision*, written by a federal probation officer that gives an excellent summary of

those conditions. A different culture perseveres on reservations, despite attempts of forced assimilation to accept the dominant society's ways. Also, living on a reservation subjects a person to the burden of federal criminal jurisdiction over what are ordinarily local law offenses. And the abuse of alcohol, caused by the dire socioeconomic conditions that exist on reservations, is involved with the vast majority of crimes committed in Indian country. The Federal Sentencing Guidelines do not adequately consider these circumstances.

Opt-in Provision for Sentencing Guidelines

Congress and the executive branch have recognized the burden of living under federal criminal jurisdiction and have included "opt-in" clauses in crime legislation. Opt-in provisions in federal law require tribal consent for the law to be applicable to the tribe. Tribal opt-in clauses are in the Violent Crime Control and Law Enforcement Act of 1994, the Federal Death Penalty Act of 1994, and the Federal Juvenile Delinquency Act of 1994.

In addition to these possible options, policies focused on preventing crime rather than after-the-fact penalties and culturally relevant practices need to be considered.

Inter-Jurisdictional Comparison

Most agree that federal sentences are generally more severe than state sentences for similar offenses and that individuals convicted of Indian country crimes are disparately impacted by this. What is unknown is to what degree Indians are effected. To determine this, a committee could do an inter-jurisdictional comparison between state and federal sentences for similar offenses committed on and off a reservation. While looking at state and federal sentences may not be the best comparison, for it assumes that state sentences are more appropriate than say tribal customary practice, it may be the most practical. Since most if not all felonies that occur in Indian country are prosecuted in federal court and not a tribal forum, data about tribal sentences may not be readily available.

An inter-jurisdictional comparison will provide a benchmark to help determine if the Guidelines do disparately impact American Indians and if so, to what degree. The Sentencing Commission has done these type of comparisons in its reports *Manslaughter Working Group Report to the Commission* and *Report to the Congress: Analysis of Penalties for Federal Rape Cases*. The comparisons showed where the federal guidelines were longer than state sentences and vice versa. These reports could serve as models.

An inter-jurisdictional comparison between federal and state sentences for similar offenses should include as many offenses and jurisdictions as practically possible or needed to provide meaningful information. One possibility is a comparison of federal and state sentences of all similar offenses in one jurisdiction. For example, a committee could compare all federal Indian country sentences with the state sentences for similar

offenses in South Dakota. Another possibility is to compare federal and state sentences for selected similar offenses in multiple jurisdictions with large federal Indian country crime dockets.

Advisory Committee Membership

Because I live in South Dakota, the people I know who are interested in reviewing the impact of the Federal Sentencing Guidelines in Indian country are from South Dakota. No doubt there are others from other states whose membership would benefit the committee. Some I can think of, based on my readings, are the Honorable William Canby, Jr. (9th Circuit Court of Appeals), Kevin Gover (Former Assistant Secretary for Indian Affairs), Jon Sands (Arizona Federal Public Defender), and Michael Tonry (law professor). There are many others, I'm sure, and hopefully the public comment submitted to the Sentencing Commission has identified some of those individuals.

I will assist the Sentencing Commission in any way I can to form an advisory committee to review the effect of the Federal Sentencing Guidelines on Native Americans. I am willing to serve on a committee but will understand if that cannot be accommodated. It is important that those who do serve will be able to give the time and attention needed to analyze the impact of the Federal Sentencing Guidelines in Indian country. Membership on a committee should include stakeholders representing a variety of interests:

- Recognized experts of the Federal Sentencing Guidelines
- Academicians
- Federal judges, prosecutors, and public defenders whose workloads consist of a large number of Indian country criminal cases
- Private defense attorneys who are very experienced with Indian country cases
- Representatives from the Native American community (organizations to contact for candidates: National Congress of American Indians, Native American Rights Fund, Indian Law Section of the Federal Bar Association, Department of Justice Office of Tribal Justice, National American Indian Court Judges Association)

There are many that could serve ably on an advisory group. Because of their demonstrated commitment to seeking fairness in sentencing, the following individuals would be an asset to a committee:

- The Honorable Charles Kornmann, District of South Dakota
- Federal Public Defender Bob Van Norman, District of South Dakota
- Former U.S. Attorney Terry Pechota, Rapid City, South Dakota
- USD law professor and Indian law scholar Frank Pommersheim, Vermillion, South Dakota
- Attorney Patrick Duffy, Rapid City, South Dakota
- Attorney Bruce Ellingson, Rapid City, South Dakota

I have not confirmed whether or not these individuals would serve, but I am inclined to believe they would. They all have a wealth of experience related to Indian country criminal cases and Indian law. Their service would be invaluable.

Ending Remarks

The U.S. Sentencing Commission has a body of work that could assist a committee in its task. The manslaughter and sex-related crimes reports mentioned before show that Native Americans are sentenced far more often in federal court than any other race for those crimes. Those reports show why a perception of disparate and unfair treatment of Native Americans in the federal criminal justice system exists. The Sentencing Commission has twice recommended that a penalty structure that results in a perception of unfairness because the sentences appear to be more severe for racial minorities be changed (1995 and 1997 Sentencing Commission reports to Congress on cocaine sentencing policy).

Punishing Native Americans more harshly based on their status of being Indian and living on a reservation may be lawful, but it is not just. Nor is it effective. The impact of the Federal Sentencing Guidelines on Native Americans has long been overlooked. Quoting from the latest Federal Sentencing Reporter (Vol. 13, No. 2):

Congress and the Sentencing Commission need to consider what goals the federal sentencing of Native Americans serves. Equal treatment for all may easily turn into inequality when the basic conditions differ so dramatically between reservations and the rest of the country. Therefore, the Commission should view the sentencing of Native Americans against the backdrop of the long and tortured history of Native Americans in this country...Native Americans remain the forgotten minority which continues to suffer from centuries of long abuse. In light of the high crime rate in Indian Country, in the long run it might be useful to focus less on punishing crimes committed on reservations but instead on putting together a comprehensive program to *prevent* such crime, which would have to include substantial efforts against alcohol abuse (emphasis in original).

Federal Probation
December, 1999

***68 THE UNIQUE CIRCUMSTANCES OF NATIVE AMERICAN JUVENILES UNDER FEDERAL SUPERVISION**

Brenda Donelan
United States Probation Officer, District of South Dakota

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The Myth and the Reality

THE ROMANTICIZED view of Indian reservations is that of a closely-knit family dealing with day-to-day problems in a rural setting. While this notion may be true to a degree, reservation life has been greatly idealized by Hollywood. The typical individual living on an Indian reservation in the United States faces poverty, alcoholism, unemployment, and violence on a near daily basis. Broken homes, as well as lack of access to education and health care, are also major impediments in reservation areas. Contrary to popular belief, the majority of Native Americans do not reside on or near a reservation. As of 1990, 22 percent of Native Americans lived on an Indian reservation, while 15 percent resided near a reservation (Aguirre and Turner, 1995). Thus, the remaining 60 percent made their homes in non-reservation areas.

Most felony and some misdemeanor offenses committed by Native Americans on reservation land fall under the jurisdiction of the federal court. Native Americans constitute less than one percent of the total population in the United States; however, Indian offenses amount to nearly ten percent of the overall federal cases (Sands, 1998). In some states, such as South Dakota, Indian offenses constitute a major part of the court docket. The Native American population in South Dakota in 1995 was approximately 7 percent (Dvorak, 1995); however, as of October 1999, the percentage of Native Americans on federal supervision in the state was 67 percent (U.S. Probation Office, 1999). Nationally, Indian offenses constitute over 20 percent of murders and assaults in federal court and nearly 75 percent of all manslaughter and sexual abuse cases (Sands, 1998). The number of Native Americans per capita confined in state and federal prisons is approximately 38 percent above the national average. The rate of confinement in local jails is estimated to be nearly four times the national average (Bureau of Justice, 1999).

According to Bureau of Justice statistics for 1995, United States attorneys filed cases against 240 individuals for alleged acts of juvenile delinquency. Out of the 240 cases, 122 were adjudicated in the federal court system, accounting for 0.2 percent of the total amount of cases federally adjudicated during 1995 (Cohn, 1997). Over half (61 percent) of the juveniles adjudicated in federal court are Native Americans. Bureau of Justice statistics for 1995 also revealed that 37 percent of the juveniles adjudicated delinquent were committed to a correctional facility, with the average length of commitment being 34 months (Cohn, 1997). As of October 1999, the U.S. Probation Office for the District of South Dakota was supervising 107 Native American juvenile offenders (U.S. Probation Office, 1999). The statistics illustrate that Native American youths are disproportionately represented in the federal court system. The purpose of this article is to illustrate the uniqueness of Native American juveniles: specifically, the Sioux Indians of South Dakota, who fall under the jurisdiction of the federal court system.

Indian and non-Indian Views on Crime and Delinquency

There is a vast difference between Indian and non-Indian perceptions of wrongdoing and the most effective means of dealing with crime. In the non-Indian community, a person who commits a crime is deemed a bad person who must be punished. Indian communities, however, view offenses as misbehavior which calls for teaching or illness which requires healing (Sandven, 1999). Non-Indian communities tend to favor a punishment modality, whereas Indian communities traditionally put their faith in education, treatment, and medicine. Obviously, these differing views lead to clashes between the cultures. When dealing with delinquent Native American youth, non-Indians may feel the best course of action is

juvenile detention, whereas Indian communities may favor probation, participation in traditional cultural ceremonies, or mentoring by a tribal elder.

Alcohol Abuse

Alcoholism is a major problem on Indian reservations in the United States. According to Bureau of Justice statistics (1999), 70 percent of jailed Native Americans convicted of violence reported that they had been drinking at the time of the offense. With regard to American Indians, the arrest rate for alcohol-related offenses such as drunken driving, public drunkenness, and liquor law violations was more than double that for the total population during 1996. Finally, the Bureau of Justice reported that almost 4 in 10 Native Americans held in local jails had been charged with a public order offense, most notably driving while intoxicated.

There is no doubt that alcohol abuse and alcoholism play a volatile role in the lives of people of all cultures. Native American populations, however, seem to be more susceptible *69 to the disease of alcoholism. Some studies have suggested that there is a physiological component to Native Americans' increased propensity toward alcoholism, while others have found that a variety of socio-economic factors such as poverty and lack of opportunities play the largest role in this issue.

When a juvenile or adult offender is a substance abuser, probation officers typically deal with this issue through inpatient or outpatient treatment, aftercare services, and Alcoholics Anonymous (AA) or Narcotics Anonymous (NA) meetings. While these services may be of benefit to both Indian and non-Indian populations, Native Americans tend to rely on cultural methods to deal with their sobriety. Specifically, a sweat lodge ceremony, or a "sweat" as it is sometimes called, is used as a means of obtaining spiritual purification through prayer. Individuals enter the sweat lodge and engage in traditional prayers as a ceremonial process of cleansing their souls. In addition to getting in touch with their spirituality, participants in the sweat lodge ceremonies seek clarification and guidance concerning problems dealing with family, substance abuse, violence, and other pertinent issues.

The Sun Dance is a ceremony in which participation requires total abstinence from alcohol and drugs. In this sacred ceremony, Sun Dancers (who must be male) pierce their chests with sharp skewers which are attached to ropes connected to a center pole. The Dancers move around the center pole in a circle while pulling against the skewers piercing their muscles. During the Sun Dance, participants gaze at the sun and pray. The Sun Dance may last several days, during which the Dancers traditionally are not allowed food, water, or rest. Interestingly, the Sun Dance was prohibited by federal law from 1904 to 1935 (Brown, 1993). Although this sacred ceremony was proclaimed illegal, it continued in secrecy. By 1959, the right to hold and participate in Sun Dance ceremonies was reinstated.

Instead of insisting on only AA or NA attendance for Native American juvenile offenders, probation officers should consider balancing the traditional sobriety requirements with those of the Native American culture. Specifically, voluntarily attending a sweat or Sun Dance could take the place of mandatory attendance at a weekly AA meeting. Participation in sweats could be alternated with weekly AA meetings or used to supplement AA attendance. Another viable option is inpatient/outpatient treatment facilities operated by the Indian tribes. These types of facilities are typically located on Indian reservations. They offer a traditional chemical dependency treatment program which incorporates aspects of the Indian culture.

By including Native American culture and ceremonies in the traditional treatment regime, the probation officer approaches sobriety from a dual standpoint. It is now widely accepted that in order to be effective, treatment must be matched to client characteristics. It logically follows that Native American juveniles interested in their culture should be allowed to tap into it for help and support in achieving sobriety.

The Concept of Family

Another difference between the Indian and non-Indian communities is the concept of family, or "tiwahe," as it is called by

	indians	whites	blacks	asians
sexual Assaults	7	2	3	1
robberies	12	5	13	7
agg. Assaults	35	10	16	6
simple Assaults	70	32	30	15

Life Chances

Compared with other ethnic populations in the United States, Native Americans have been severely constrained in their interaction with mainstream society (Aguirre and Turner, 1995). This isolation is largely the result of the numerous treaties between the U.S. government and the Native American tribes, which placed tribal members in subordinate positions. The subordination, in turn, had the effect of limiting their opportunities to secure life chances. Typically, life chances are defined as the access to satisfactory education, housing, employment, income, and medical care. In essence, life chances are valued resources.

President John F. Kennedy was quoted as saying, "For a subject worked and reworked so often in novels, motion pictures, and television, American Indians remain probably the least understood and most misunderstood Americans of us all" (Brown, 1993). In the 1970s, the United States government officially acknowledged that Native Americans were the most impoverished group in the United States and that this population lived in conditions rivaling those found in Third World countries (U.S. Department of Health, Education, and Welfare, 1976). As little as 20 years ago, 14 percent of Native Americans lived in overcrowded housing, 67 percent lived in houses without running water, 48 percent lived in houses without toilets, and 32 percent had no means of transportation (Aguirre and Turner, 1995). These factors paint a dismal picture for Native Americans, especially those living in isolated reservation communities. Although living conditions have generally improved for most Indian communities, a large proportion of the Native American population still lives below the poverty line. See Table 2.

TABLE 2. PERCENTAGE OF FAMILIES LIVING BELOW THE POVERTY LINE, 1970-1990

year	white Americans	native Americans
1970	8.6	33.2
1980	7.0	23.7
1990	9.8	36.1

Educational attainment is another life chance in which Native Americans fall below the average level. With the exception of Hispanics, American Indians are the least likely of all minority groups to graduate from high school or college. According to Aguirre and Turner (1995), in 1992, 78 percent of Indians had earned a high school diploma, compared with 91 percent of non-Hispanic whites. When comparing college graduates, however, only 11 percent of Native Americans

had earned a college degree, compared with 28 percent of non-Hispanic whites. At the high school level, there was a 13 percentage point difference between the two groups. When comparing the two groups for college graduates, non-Hispanic whites were nearly three times as likely as Indians to have achieved a college degree. These figures can be explained, in part, by a lack of access to satisfactory elementary education. The parents of all minority youths, as a whole, tend to have less formal education than their white counterparts. Because parental educational attainment is often linked to a student's academic performance, minority students may start school at a disadvantage (O'Hare, 1992). Finally, much of the focus of education utilizes the white culture as a basis from which to compare all other cultures. Using the white culture as a point of reference is not necessarily pertinent or interesting to students of other cultures, races, and ethnicities.

Two final life chances to be addressed are occupational attainment and income levels. In 1995, the unemployment rate for whites in South Dakota was 3.2 percent. Native Americans had a 32 percent unemployment rate during the same time period (Dvorak, 1995). Astonishingly, the unemployment rate for Indians was ten times higher than that for whites. As has already been discussed, Native Americans have lower levels of educational attainment. Low levels of education have an inverse relationship with high unemployment rates. The isolation of reservation communities also prevents access to well-paying jobs. Finally, reservations *71 have difficulty in attracting businesses and industry to their already economically-depressed areas.

In South Dakota, as well as the rest of the United States, there exists a major economic difference in the median household income of Indians and whites living in the same area. In 1995, the median income for whites living in South Dakota was \$27,000 per year, compared to less than \$10,000 annually earned by Native Americans (Dvorak, 1995). It is important to remember that these figures are based on household income. As was previously mentioned, several extended family members and non-relatives may all live under one roof in Indian homes. At non-Indian residences, however, there are typically just parents and children. Therefore, Native Americans are supporting larger households on less income.

Probation officers dealing with Native American juvenile offenders need to consider the harsh reality that these individuals may not have transportation to get to school, running water in which to bathe, or the immunizations and nutrition necessary to keep them healthy. Expecting these individuals to attend school on a daily basis may largely be out of their control if transportation is not available. Once at school, Native American youths may find little value in an education which does not address issues from an Indian perspective. Further, payments of restitution may be few and far between due to the high unemployment rates and lack of industry in reservation areas. While the typical teenager's most important dilemma may be deciding the most fashionable outfit to wear to school, a Native American youth may be shivering because the family does not have the money for a winter coat.

Conclusion

"Man did not weave the web of life. He is merely a strand in it. Whatever he does to the web, he does to himself" (Dvorak, 1995). This quote by Chief Seattle warns of the negative consequences that the human race will inevitably face if we continue to mistreat our own people. When comparing the life chances of Indians to non-Indians in South Dakota, it is obvious that Native Americans do not have the same access to satisfactory housing, education, employment, and income as do whites. Further, there are cultural differences between the perception of crime, the treatment of alcohol abuse, the concept of family, and victimization. The purpose of this article was not necessarily to elicit sympathy for the plight of the American Indians. The primary objective was to enlighten probation officers as to the cultural and socio-economic differences that may exist between the Indian and non-Indian populations. When one begins to understand the experiences and culture of others, it tends to lessen conflict and miscommunication. Since a primary aim of probation officers is to reduce recidivism, it only makes sense that increased awareness and sensitivity would aid in the battle against juvenile re-offending.

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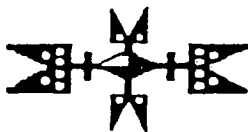
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DAKOTA PLAINS LEGAL SERVICES

November 9, 2001

Commissioner John R. Steer
United States Sentencing Commission
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Suite 2-500, South Lobby
Washington, DC 20002-8002

RE: training seminar for CJA defense attorney's in South Dakota

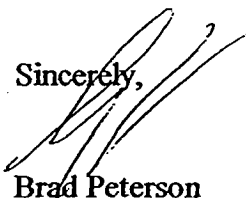
Dear Commissioner Steer:

Thank you for taking time out of your busy schedule to come to South Dakota and do a presentation to the CJA panel attorney's. I had the opportunity to take part in the training in Pierre, South Dakota. I found it to be quite informative and useful.

I presently serve as the managing attorney on the Standing Rock Sioux Indian Reservation for one of the legal service programs in South Dakota. If it is possible, I would like to be included in the Native American Issues Advisory Group that the U.S. Sentencing Commission is planning in 2002.

Thank you again for coming to South Dakota, I hope you enjoyed your stay.

Sincerely,



Brad Peterson

Please address reply to:

☐ P.O. Box 727
Mission, SD 57555-0727
605-856-4444 • 1-800-658-2297
FAX 605-856-2075

☒ P.O. Box 507
Fort Yates, ND 58538-0507
701-854-7204
FAX 701-854-3686

☐ 518 2nd Ave. E.
Sisseton, SD 57262-1406
605-698-3971
FAX 605-698-4156

☐ P.O. Box 1989
Pine Ridge, SD 57770-1989
605-867-1020
FAX 605-867-1092

☐ P.O. Box 500
Eagle Butte, SD 57625-0500
605-964-2175
FAX 605-964-1215

☐ P.O. Box 20
Fort Thompson, SD 57339-0020
605-245-2341
FAX 605-245-2393

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POTAWATOMI
(Keeper of the Fire)

Forest County Potawatomi Community
P.O. Box 340, Crandon, Wisconsin 54520

05 November 2001

United States Sentencing Commission
ATTN: PUBLIC AFFAIRS
One Columbus Circle, NE Suite 2-500
South Lobby
Washington, DC 20002-8002

VIA United States Mail and
FACSIMILE 202/502-4699

RE: Native Americans in Indian Country

Dear Sir or Madam:

The Forest County Potawatomi Community has reviewed the Federal Register for Wednesday, September 19, 2001 regarding the Notice of the United States Sentencing Commission. The Forest County Potawatomi Community supports the formation of an ad hoc advisory group on issues related to the impact of the sentencing guidelines on Native Americans in Indian Country. While Wisconsin is a P.L. 280 state, the Forest County Potawatomi Community is well aware of the issues faced by Native Americans in sentencing before Federal authorities.

Our Native American brothers and sisters are incarcerated in Federal facilities at disproportionate rates to the Anglo population; this includes death row. Native Americans tend to face more harsh penalties when being sentenced in Indian Country. State courts have greater flexibility in fashioning appropriate sentences. In the Federal system, Native Americans serve longer sentences than non-minorities.

While the Tribe supports the formation of an ad hoc committee as an initial step, it is suggested that the Sentencing Commission take steps to establish a more permanent, formal group that has some authority and continuing review responsibility over any implemented changes. It is suggested that membership terms be at least three to four years. The membership could be comprised of tribal members that have an expertise in matters of sentencing and the impact of Federal sentencing guidelines on Tribal communities, scholars who have studied the rates of incarceration of Native Americans, and representatives from appropriate civil rights organizations as well as Department of Justice prosecutors and Federal Judges. The group must have a clear charge of their scope of authority—which should be broad. It must also be clear that the advisory group will actually play valid role in tempering the Federal justice system. There must be a commitment to change by the Sentencing Commission.

Sincerely,

Harold Gus Frank
Chairman

COPY: Executive Council
File

A24

Greenville Rancheria

P.O. Box 279 • 410 Main Street
Greenville, CA 95947
Phone (530) 284-7990
Fax (530) 284-6612

October 22, 2001

*United States Sentencing Commission
One Columbus Circle
Suite 2-500, South Lobby
Washington, DC 20002-8002*

In Re: Memorandum Dated October 18, 2001 Regarding Sentencing Information

After reviewing your correspondence, it is apparent that your comments regarding the creation of an "ad hoc advisory group" warrants consideration and support.

Viable methods need to be developed to bring these issues to the forefront to improve federal sentencing guidelines in all areas that have a significant impact on Native Americans.

We are interested in obtaining any letters available from your commission regarding the organizational guidelines and any suggested changes.

Please forward copies of these letters to us and keep us informed about any progress that occurs.



*Robert Bare
Administrator*

cc: Tribal Council

A25

UNITED STATES PROBATION & PRETRIAL SERVICES OFFICE
DISTRICT OF NORTH DAKOTA

Richard W. Crawford

Chief U.S. Probation Officer
Suite 154

220
East Rosser Avenue

P.O. Box 793
Bismarck, ND 58502
Tel. 701-530-2400
Fax 701-530-2412

January 2, 2002

Attn: Public Affairs
Diana E. Murphy, Chair
U.S. Sentencing Commission
One Columbus Circle, N.E.
Suite 2-500, South Lobby
Washington, DC 20002-8002

Re: Advisory Group on Issues Related to the Impact of Federal Sentencing
Guidelines on Native Americans in Indian Country.

Dear Chairwomen Murphy:

I'm sorry about the lateness of this letter, but I did not receive notice of your intent to look at Indian country issues until after the deadline noted in the *Federal Register*. I hope that you will still take my comments into consideration even though they are late.

In the District of North Dakota approximately 40% or more of our defendants and offenders on supervision are Native Americans sentenced for crimes that occurred in Indian country. It is my belief that there is disparity in the sentences imposed in the federal system compared to those imposed by the State courts. To support this claim, I asked the state penitentiary for some data regarding Native Americans and the crime they were sentenced for and the length of their sentence. Defendants convicted of aggravated assault with a dangerous weapon were sentenced to an average term of imprisonment of one year. A similar offense under the guidelines would have resulted in an offense level of 19 -2 points for acceptance with a sentencing range of 24-30 months. This is just one example of the disparity.

I am also concerned about other forms of disparity in sentencing. For example, there are insufficient resources on many of the Indian Reservations therefore; sentences that are normally available to other federal offenders are not always available to Native Americans. Sentencing options to keep an offender in the community are rarely available for the court to impose. In North Dakota, there are no halfway house (community treatment centers) on any of the five Indian Reservations. Most Native American defendants live with extended family and the homes do not have a telephone nor do they have the financial wherewithal to afford a telephone for electronic monitoring. Our issues are the same with treatment. The majority of the reservations do not have treatment programs for offenders and their variety of needs. Native Americans with court ordered treatment conditions often fail to complete treatment programs because they lack funding to obtain transportation to and from the major communities that have the programs they require.

Indian country issues are different than inner city issues and therefore they require special consideration by the court and the U.S. Sentencing Commission. If the Commission decides to put together a committee to look at Indian Country issues, I will gladly volunteer to participate on behalf of the U.S. Probation and Pretrial Services Office for the District of North Dakota. Should you have any questions or concerns regarding this letter, please contact me at 701-530-2404, or by one of the following methods: mail - P.O. Box 793, Bismarck, ND 58502-0793; E-mail at marcus_roehrich@ndp.uscourts.gov <mailto:marcus_roehrich@ndp.uscourts.gov>. Thank you.

Sincerely,

Marcus Roehrich
QCS/Deputy Chief
U.S. Probation & Pretrial Services Office

THE FEDERAL DEFENDERS OF MONTANA

ANTHONY R. GALLAGHER
FEDERAL DEFENDER

MISSOULA OFFICE
218 EAST FRONT STREET, SUITE 208
P.O. BOX 9380
MISSOULA, MONTANA 59807
(406) 721-6749
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ASSISTANT FEDERAL DEFENDERS:
MARK WERNER - Billings
TIMOTHY CAVAN - Billings
MICHAEL DONAHOE - Helena
DAVID NESS - Great Falls
JOHN RHODES - Missoula

December 7, 2001

United States Sentencing Commission
One Columbus Circle, NE
Suite 2-500
South Lobby
Washington D.C. 20002-80002

Attn: Public Affairs

I write regarding the possible formation of an ad hoc advisory group to consider the impact of the Guidelines on Native Americans in Indian Country.

First, I apologize for providing this comment after the November 6 deadline. I have been informed by Maria Jankowski, however, that Theresa Cooney welcomes my input.

Second, per the attached letter, I will be joining the Commission in May or June 2002 as the Federal Defender intern with the Commission. I look forward to working with you.

As an Assistant Defender in Montana, I have worked on many reservation cases. I applaud the Commission for recognizing that an advisory group could assist the Commission in improving the application of the Guidelines to reservation defendants. At the same time, I recognize that many of the persistent problems endemic in the interplay of Indian Country and the Federal criminal justice system cannot be addressed by the authority of the Commission. Nonetheless, those underlying problems influence the impact of the Guidelines on reservation defendants. For instance, alcohol abuse is nearly always a driving force in the reservation cases that I have defended (I can think of one exception). On the positive side, the more exposure I have to the Plains Indian culture, the more impressed I am by the tribal sense of family and community and the resulting restorative justice: repeatedly, I have witnessed victims who have strongly voiced their belief that the punishment required by the Guidelines is too severe and fails to incorporate adequate rehabilitation programs. These and many other issues may be beyond the authority of the Commission to address but are relevant considerations in improving the Guidelines.

I strongly encourage the formation of the proposed advisory group and am personally willing to serve in any capacity requested by the Commission. I suggest that the group examine the specific (e.g. Offenses Against The Person) Guidelines that regularly govern reservation cases. For instance, the assault base offense level is, in my opinion, too high and that section should include a victim's conduct reduction; should the Guideline base offense level be lowered, perhaps an aggravating enhancement can be devised for application in cases warranting more severe punishment. I also suggest that the group examine departure issues that are particularly relevant to reservation cases. For instance, perhaps Section 5K can include a discussion of a departure based upon comparing the Guidelines range with state sentences for the same offense. Another idea is to for the group to

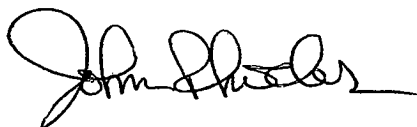
examine whether life on the reservation is a socio-economic or a political or otherwise permitted departure factor. See, e.g., United States v. Big Crow, 898 F.2d 1326 (8th Cir. 1990). These are merely a few specific ideas for consideration by an advisory group. More generally, I believe that consideration of the Guidelines regularly applied in reservation cases and departures relevant to such cases should be included in the scope of an advisory group because those are the factors that determine sentences, and in reality, to the Indian families and communities, that's what counts.

The membership of an advisory group should include people who go to the reservations. Thus, I strongly believe that United States probation officers and federal defenders from reservation districts should be part of the group. I also recommend including federal prosecutors and district court judges from Indian Country districts; victim advocates would also contribute to the group. In my personal experience, it is important to work with the reservation communities rather than trying to assist by external fiat. Accordingly, I suggest including tribal members, perhaps judges or law enforcement officers, family of Native American offenders and victims, and most importantly, elders.

As for the duration of such a group, I confess that I am unfamiliar with the time necessary for an advisory group to effectively assist Commission, so I leave input on that issue to more learned individuals.

I again commend the Commission for its sensitivity to this issue and to the more general issue of the relationship between the United States and Native Americans, a relationship that is at the core of the American Experience. I look forward to working with you and am willing to assist in the proposed advisory group in any manner requested. Thank you for considering my opinion.

Sincerely,

A handwritten signature in black ink, appearing to read "John Rhodes", with a stylized, flowing script.

JOHN RHODES
Assistant Federal Defender
Federal Defenders of Montana

Enclosure