



**DEFENSE
INDUSTRY
INITIATIVE**

ON BUSINESS ETHICS AND CONDUCT

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

**Re: Chapter Eight Amendment – “Organizations shall otherwise promote
an organizational culture that encourages a commitment to
compliance with the law”**

Dear Commissioners:

This recommendation is, by far, the most important of the several significant recommendations offered by the Advisory Group at the conclusion of its 18 months-long review of the Organizational Guidelines. There are three key reasons supporting its adoption:

The underlying predicate for Chapter Eight of the Guidelines is the recognition that, in imputing the wrongdoing of its people to the organization, there are gradations of organizational culpability. Hence, for the organization that evidences an effective compliance program, the guidelines authorize a lesser penalty than for the organization which does not have an effective program. Having an effective program signals reduced culpability. The Guidelines recognize that no organization can achieve “effectiveness” through a compliance-based litany of “shall nots”. To the contrary, the Guidelines contemplate at least seven positive steps. By virtue of faithful implementation of these positive measures, the organization does manifest a culture encouraging compliance. Hence, this change to the Guidelines makes explicit what has been implicit in an effective compliance program.

While the sentencing guidelines nominally are for application in sentencing a convicted organization, the application of the guidelines is much broader. The guidelines are consulted by prosecutors in reaching a charging decision in criminal

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cases, by debarring officials in deciding whether it is appropriate to impute individual misconduct to the organization, and by organizations seeking guidance in the development of or review of their own ethics and compliance programs. By adding the recommended language as to a culture of commitment, the revised guidelines will make stronger the expectation that a set of organizational compliance rules is not enough. What is really important is that the organization demonstrate what the EPA refers to as the "right corporate attitude".

Making explicit the expectation for fostering a culture of compliance also will harmonize the guidelines with the responses to the recent accounting and financial reporting scandals. The Sarbanes-Oxley Act of 2002¹ encourages companies to adopt codes of ethics which include "standards that are reasonably necessary to promote honest and ethical conduct". The Securities and Exchange Commission regulations² now recognize that codes of ethics should include written standards that are reasonably designed to deter wrongdoing and to promote honest and ethical conduct. Similarly, the New York Stock Exchange³ emphasizes the importance of an ethical culture as a means of improving compliance. As far back as 1986, the defense industry, then in the midst of wide-spread fraud and abuse, established the Defense Industry Initiative on Business Ethics and Conduct (see www.dii.org) which binds that industry together with a common aspiration to the highest level of ethical conduct. In 1991, the Environmental Protection Agency published "Policies Regarding the Role of Corporate Attitude, Policies, Practices and Procedures, in Determining Whether to Remove a Facility From the EPA List of Violating Facilities Following a Criminal Conviction.", which characterizes the right "corporate attitude" as a significant factor for justifying removal from "the List"⁴. In the Deputy U. S. Attorney General's January 20, 2003 Memorandum, "Principles of Federal Prosecution of Business Organizations", the role of management is singled out as an important factor in determining whether to prosecute the organization: "...management is responsible for a corporate culture in which criminal conduct is either discouraged or tacitly encouraged." For the Guidelines not to give voice to this growing consensus would be to render the Guidelines discordant with the thrust of the legal policy applicable to organizational governance.

¹ Pub. L. No. 107-204, 116 STAT. 745 (2002).

² 68 Fed. Reg. 5110, 5118, 5129 (January 31, 2003).

³ <http://www.NYSE.com/pdfs/corp_gov_pro_b.pdf

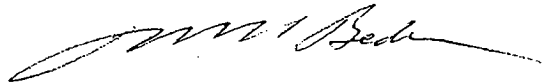
⁴ 56 F.R. 65785 (December 12, 1991).

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The foregoing comments are my own, having been formed as a member of the Ad Hoc Advisory Group on Organization Sentencing Guidelines, and as the Coordinator, Defense Industry Initiative on Business Ethics and Conduct (DII). I do not purport to write on behalf of any individual signatory to the DII. I would be pleased to testify in support of the views offered in this letter.

Sincerely yours,

A handwritten signature in dark ink, appearing to read "Richard J. Bednar", with a long, sweeping horizontal line extending to the right.

Richard J. Bednar

cc: Paula Desio , USSC (priority mail)

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