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Faculty Offices

February 26, 2004

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

Dear Mr. Courlander,

I am writing to submit several brief comments on the Sentencing Commission's proposals for revisions to Chapter 8 of the federal sentencing guidelines which were published in the Federal Register edition of December 30, 2003. As a member of the Ad Hoc Advisory Group on the Organizational Sentencing Guidelines, it was my pleasure to have participated in the detailed review of Chapter 8 of the sentencing guidelines conducted by the Advisory Group over the past year and to have contributed to the recommendations of the Advisory Group which were delivered to the Sentencing Commission in the Advisory Group's report of October 7, 2003. To the extent that many of the Advisory Group's recommendations are reflected in the Sentencing Commission's proposed guideline changes, the Advisory Group's report amply describes the justifications for these changes. I fully support the Advisory Group's recommendations and statements of rationales for its proposed changes in the sentencing guidelines and write here only to comment on those aspects of the Sentencing Commission's proposals that concern issues not considered and addressed by the Advisory Group and its report.

These additional issues were raised in the Sentencing Commission's description of issues for comment in the portion of the above federal register notice dealing with organizational sentencing. Each of the issues for comment raised in this portion of the notice is addressed below.

Compliance Program Characterization in Cases of Unreasonable Reporting Delay

The first issue for comment concerns whether the guidelines' current bar to a three-point culpability score reduction for an effective compliance program should be retained for a convicted organization which unreasonably delays in reporting a detected offense. In essence, this current standard indicates that a

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compliance program in an organization which unreasonably delays reporting should never be deemed an effective program for purposes of determining organizational culpability and the appropriate level of a corresponding sentence reduction.

I believe that, so long as the nature of an unreasonable delay is assessed carefully, the present standard characterizing a compliance program as deficient in these circumstances should be retained. It is important to realize in assessing the impact of this standard that a mere delay in reporting will not always preclude a finding of an effective program. Indeed, there are a wide variety of circumstances in which a substantial delay in reporting may be deemed reasonable and, consequently, not an adequate basis to preclude a finding that a program was generally effective.

For example, if there were substantial reasons that a company did not detect an offense for a long period -- such as unusually effective efforts by an individual offender to conceal his or her misconduct -- then a long delay in reporting would not be an unreasonable delay. Likewise, a delay necessary to complete a reasonable investigation of evidence of an offense should not make a resulting reporting delay unreasonable. About the only circumstance in which an organization's delay should be deemed unreasonable is where organizational officials have clear evidence which would convince a reasonable party that an offense has been committed and the officials fail over a substantial period to act on that information by reporting it to public authorities.

While this type of reporting delay may not be illegal of itself, it does indicate a lesser degree of public service and organizational responsibility than would prompt self-reporting of the misconduct. In the context of characterizing a compliance program, such a reporting failure by top organizational officials calls into question the degree of support of those officials for law compliance and for the just punishment those who engage in apparent misconduct in the course of organizational activities. Absent this support for law compliance and just punishment, it is unlikely that corporate officials have diligently pursued the sort of compliance program that will be generally effective in detecting and preventing organizational violations of law.

Even if a sentence reduction for its compliance program is not available to an organization following an unreasonable delay in reporting an offense, there are still ample incentives in the guidelines for offense reporting even after an initial period of delay. Organizational self-reporting, coupled with an exceptional degree of subsequent cooperation with public authorities, can justify an extensive sentence reduction under subsection (g) of § 8C2.5 of the sentencing guidelines.

In sum, where an unreasonable delay in reporting known misconduct is present, this delay suggests that corporate leaders do not possess the sort of strong law compliance values and support for law enforcement that are also needed to conduct an effective compliance program involving ongoing efforts to prevent illegal activities. Hence, no sentence reduction should be granted under the provisions of subsection (f) of § 8C2.5 which are primarily concerned with the adequacy of organizational actions taken prior to an offense to prevent illegal misconduct. However, even where such preventive actions are missing or of questionable quality, an organization can qualify for special sentence reductions even after an unreasonable delay in reporting where the organization finally takes the initiative, makes an offense report to public authorities, and cooperates in some particularly extensive or helpful way with subsequent investigations and prosecutions by public officials. This type of assistance -- so long as it entails significant aid to law enforcement efforts -- stands on its own as a basis for recognizing responsible organizational action and making corresponding reductions in recommended sentences.

Compliance Program Characterization Following Involvement of a High-Level Organizational Official in an Offense

The issues for comment section raises the question of whether the proposed presumption of inadequacy of a compliance program is appropriate where a high-level manager of an organization has participated in, condoned, or was willfully ignorant of a violation of law. This section also questions whether this type of presumption should apply in assessing compliance programs in small organizations where, because of the size of the organizations, high-level managers may frequently be in contact with and, hence, be involved in or condone illegal conduct undertaken by other organizational employees.

The proposed change to a presumption of inadequacy of a compliance program in these situations strikes the right balance between an outright bar to a favorable compliance program characterization in this type of situation and a standard that would overlook the implications of high level misconduct in characterizing a compliance program. The key issue with respect to the meaning of high level misconduct in determining the likely effectiveness of a compliance program is whether the presence of that misconduct indicates a lack of core values supporting law compliance in the organization at hand or a likelihood that persons holding those values would be intimidated in following through on them by seeking law compliance in the organization. In general, the presence of misconduct at high organization levels indicates a lack of such values or a high likelihood of the sort of intimidation that will undercut effective compliance efforts. Hence, it is appropriate to presume that a compliance program is ineffective when such misconduct is present.

However, there are circumstances where the misconduct of a particular high level party is isolated in some way from other corporate value setting functions and compliance program activities. If this is the situation, the presence of high-level misconduct in an organization would not indicate the likelihood of widespread disregard for law compliance or intimidation in carrying out law compliance tasks. Where an organization can make a convincing case that these sorts of circumstances isolating high-level misconduct from the general operation of the organization's compliance program are present, the organization should be able to avoid the normal implications of high-level misconduct and overcome the presumption of compliance program ineffectiveness that will otherwise preclude a recommended sentence reduction.

Enhancing the Sentencing Benefits of an Effective Compliance Program

The issues for comment section raises the question of whether the culpability score benefit for organizations with effective compliance programs should be increased from 3 to 4 culpability score points. I believe that this is a valuable change. The altered compliance program standards in the Commission's proposed guideline changes demand more of organizations in order for their programs to be considered to be effective compliance programs and it is appropriate to give greater benefits and rewards to organizations that undertake these greater efforts. Indeed, the Commission may wish to increase the benefit associated with an effective compliance program to a 5 point reduction in an organization's culpability score.

Along with these increases in the benefits that organizations receive for effective compliance programs meeting all of the tests stated in the revised sentencing guidelines, the Commission may wish to authorize a lesser degree of sentence reduction for organizations that have adopted compliance programs with most, but not all of the required features of an effective compliance program. Such a change would transform the present "all or nothing" system of compliance program rewards and incentives into a more graded approach with partial credit for meaningful, but less than complete compliance program efforts.

For example, the guidelines might authorize a 1 or 2 point reduction in an organization's culpability score if the organization had, at the time an offense was committed, adopted a compliance program with most of the seven types of features addressed in the guidelines' standards for an effective compliance program, but which lacked a few of these features. Such a partial reward for a compliance program could be limited to circumstances where a convicted organization had adopted a

compliance program which was likely to have a substantial impact on law compliance, but which lacked a few of the required features necessary to qualify the program as a generally effective compliance program under the guidelines.

Incentives for Compliance Programs in Small and Mid-Size Organizations

The last issue raised for comment concerns the proper means to encourage the adoption of compliance programs by small and mid-size organizations. The commentary proposed to be included in Application Note 2(B)(ii) following new § 8B2.1 addresses the key considerations in encouraging small and mid-sized organizations to adopt meaningful compliance programs. This commentary correctly indicates that, for small organizations, an adequate compliance program must address the types of functional activities specified in the guidelines' tests for a generally effective compliance program, but may do so in the course of business activities conducted for other purposes and without the need for any special compliance organization or significant set of separate practices related to law compliance. If the leaders of a small organization regularly address law compliance in their directions to employees, regularly monitor whether those employees are complying with applicable law compliance instructions, and follow up affirmatively on evidence of specific incidents of illegal conduct with appropriate investigations and reforms, the leaders will have adopted an adequate compliance programs for a firm of their small size.

The general principle at work here is that operational methods and organizational structures devoted to law compliance in a small organization should be no more or less extensive than the measures that an organization of the same size generally devotes to other significant features of organizational performance. The same principle would suggest the types of methods and resources that a mid-size company should devote to law compliance. If, for example, mid-size companies in the same industry would typically devote a separate organizational unit (or even part of the time of a particular corporate employee) to securing the integrity and completeness of corporate financial reports or the quality of corporate products, corporate law compliance should receive similar attention with management methods and organizational units of similar scope and nature.

In general, however, small organizations will not need any compliance staff or organization and can adequately address compliance through systematic efforts within existing management structures and practices. In order to clarify this point and specify at what size an organization should be concerned about its lack of a separate compliance staff or compliance organization, it might be useful to include a specific size figure in the guidelines' commentary as a general threshold size

below which an organization would generally not be required to have a separate compliance officer or organization in order to have a generally effective compliance program. For example, a statement might be included at the end of Application Note 2(B)(ii) following new § 8B2.1 that: "In most organizations having 100 or fewer employees, an effective compliance organization can be implemented through management processes undertaken for other purposes and no separate compliance staff will be necessary."

I appreciate the chance to address these issues related to the Sentencing Commission's proposed changes in the organizational sentencing guidelines. If I can be of 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 S. Gruner
Richard S. Gruner
Professor of Law