

January 14, 2004

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

Attention: Public Affairs

Re: Proposed Amendments to
Sentencing Guidelines/Compliance Programs

Ladies and Gentlemen:

I just read with interest your proposed amendment to Chapter 8 relating to the required indicia for Compliance Programs as a mitigating factor in the sentencing of organizational defendants.

The Commission's proposed expansion of the compliance program litmus test from coverage of "criminal conduct" to all "violations of law" will substantially increase the complexity of review. The proper goal of the mitigation factor should be to encourage companies to have compliance programs at least in those areas of highest risk to society (i.e., where criminal penalties are imposed). The Commission's expansion to all areas of law might effectively do away with the compliance program mitigation factor by allowing sufficient leeway to always find something insufficient with the defendant's program. In effect, this well intentioned effort may cause organizations to ignore this mitigation factor.

The proposed amendment goes far beyond the role of the Sentencing Commission to develop guidelines with respect to sentencing for criminal conduct. Adoption of the proposed amendment will have a significant impact on establishing minimum "standards of care" relevant in the civil law (particularly tort) context which is not what was envisioned when the Sentencing Commission was established. Is the Sentencing Commission equipped to fully understand the civil law ramification of its actions?

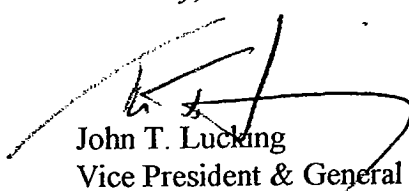
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The term "violation of law" is defined as including a "non-criminal law" for which an organization would be liable. This clearly includes all Federal, State and local statutes, regulations, ordinances, decrees, etc. However the word "law" is so ambiguous in its usage, it could be construed to cover non-criminal "law" promulgated by means other than legislative authority (e.g., court decisions, executive decrees, etc.). This ambiguity will lead to inconsistent results and further unpredictability in our criminal legal system. The focus for organizational compliance programs should be on criminal behavior. It is not the role of the Sentencing Commission to establish incentives for civil law compliance. If anything, the Sentencing Commission should be helping to prioritize compliance program activity by keeping the focus on society's most egregious conduct. Instead, the Sentencing Commission will be diluting that focus by making the standards potentially overwhelming. If the Sentencing Commission would like to criminalize certain civil law non-compliance, I recommend they write their elected representatives.

Once it becomes standard operating procedure for all organizations to have appropriate criminal law compliance programs in place (which is by no means certain at the present time), then we can assemble a panel of civil law experts to review the merits of legislation on having civil damages reduced by effective civil law compliance programs.

I urge you to retain the reference to "criminal conduct" in Chapter 8.

Sincerely,



John T. Lucking
Vice President & General Counsel

JTL/ao

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