



U.S. Department of Justice

Criminal Division

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Members of the
U.S. Sentencing Commission
One Columbus Circle, NE
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Washington, DC 20002-8002

Commissioners:

On behalf of the Department of Justice, I submit the following comments regarding the proposed amendments to the federal sentencing guidelines and issues for comment published in the Federal Register on December 30, 2003, and January 14, 2004. We thank the members of the Commission – and the Commission staff – for being responsive to many of the Department's sentencing policy priorities this amendment year and for working extremely hard with us to develop proposed amendments to implement these priorities. We look forward to continuing to work with the Commission during the remainder of this amendment year on all of the published amendment proposals.

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CHILD PORNOGRAPHY AND SEXUAL ABUSE OF MINORS

The proposed guideline amendments for child pornography and the sexual abuse of minors largely implement provisions of the Prosecutorial Remedies and Other Tools to end the Exploitation of Children Today Act of 2003, (the "PROTECT Act"), Pub. L. 108-21. Child pornography and the sexual abuse of minors involve many complicated statutory and guideline issues, and the Commission and staff have methodically and diligently worked to both faithfully implement the new law and at the same time strive to make sentencing policy in this area as easy as possible to apply. We support most of the published proposed amendments and offer a host of comments below.

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EFFECTIVE COMPLIANCE PROGRAMS IN CHAPTER EIGHT

I. Introduction

We commend the Commission for having had the foresight to convene the Advisory Group on Organizational Sentencing Guidelines and in so doing fulfilling the Commission's ongoing statutory responsibility to regularly review the sentencing guidelines, including the guidelines for organizational crime. We also want once again publicly to thank the members of the Advisory Group for their service and for the thoughtful and comprehensive report the Group prepared.

The proposed amendments to the sentencing guidelines for organizational defendants, recommended by the Advisory Group and published by the Commission, are intended primarily to give greater guidance to organizations and courts regarding the criteria for an effective program to prevent and detect violations of the law ("compliance programs"). The proposed amendments add to Chapter Eight, Part B, a new guideline, §8B2.1 (Effective Program to Prevent and Detect Violations of Law), that identifies for the first time in the body of the sentencing guidelines the purposes of an effective compliance program, sets forth more clearly the seven minimum steps for such a program, and provides greater guidance for their implementation. We strongly support these amendments. We believe compliance programs are key to reducing crime within organizations and that the sentencing guidelines for organizations have been not only a real innovation but also a great success in providing incentives for organizations to develop and operationalize these programs. The proposed amendments will communicate to the corporate community, with greater emphasis and clarity, the federal policy of encouraging self-policing through effective compliance programs and self-reporting if violations of law are detected. Moreover, the continuing policy of ascribing a benefit to having such programs will, we believe, likely lead to better compliance programs and practices and increased information to corporations about monitoring their own conduct and self-reporting any misconduct.

Despite our general support for these amendments, we do have concerns about a few specific provisions of the proposed amendments.

II. Rebuttable Presumption When High-Level Personnel Are Involved In Crime

Currently, there is a provision in §8C2.5(f) that prohibits an organization from receiving a three level downward adjustment to its culpability score for having an effective compliance program if an individual within high-level personnel of the organization, or a person within high-level personnel of a unit having more than 200 employees and within which the offense was committed, or an individual responsible for the administration or enforcement of a compliance program participated in, condoned, or was willfully ignorant of the offense; and there is a rebuttable presumption against receiving the adjustment if an individual within substantial-

authority personnel participated in the offense. The Commission proposes to delete this provision in its entirety and replace it with one that creates a rebuttable presumption against receiving the adjustment where high-level personnel of the organization participated in, condoned, or were willfully ignorant of the offense. The synopsis to the proposed amendment indicates that "this modification is intended to assist smaller organizations that currently may be automatically precluded, because of their size, from arguing for a culpability score reduction for their compliance efforts under §8C2.5(f)." In its issues for comment, the Commission "requests comment regarding whether the automatic preclusion should continue to apply in the context of large organizations. Moreover, should the rebuttable presumption apply in the context of small organizations, in which high-level individuals within the organization almost necessarily will have been involved in the offense?"

We oppose this proposed change for several reasons. First, we do not believe the proposed amendment logically is suggested by or flows from the Advisory Group study, report, or recommendations. The Advisory Group report notes that small organizations rarely qualify for the three level downward adjustment to their culpability score for having an effective compliance program. Two causes are mentioned: one, small organizations frequently fail to establish effective compliance programs, and two, the involvement of high-level officials in the commission of an offense is likely in the case of the small, closely-held organizations that are in fact prosecuted in federal court and that do make up the majority of organizations sentenced under Chapter 8. Report at 131-32. The only recommendation related to small organizations made by the Advisory Group is that "the Sentencing Commission devote resources to reaching and training this target audience (small organizations), perhaps through coordinating with the Small Business Administration and other appropriate policy makers." Report at 133. The Report provides little or no support for the proposed amendment beyond the language already quoted.

Second, we do not believe simply making it easier for small organizations to qualify for the adjustment for having an effective compliance program by creating a litigatable issue is good public policy. By definition, it is more likely that crime involving small organizations (as compared to larger organizations) will involve high-level personnel. But whether in a small organization or large, when high-level personnel are involved in crime, there can be no effective organizational self-policing and therefore no downward adjustment for an effective compliance program is warranted.

Yet, even if the Commission found the small business rationale compelling, the proposed amendment is considerably overbroad. It sweeps away the current automatic preclusions on receiving the adjustment for high-level personnel involvement in the offense, as well as the rebuttable presumption against receiving the adjustment for substantial-authority personnel involvement in the offense, for all organizations, large and small. There is no discussion in the Report concerning the need to make it easier for large organizations to qualify for the adjustment despite high-level or substantial-authority personnel involvement in the offense of conviction. In

fact, such a change would be directly contrary to the thrust of the Report, which is to increase the involvement of governing authorities and organizational leadership both in the oversight of compliance programs and, more significantly, in creating law-abiding organizational cultures.

[T]he corporate scandals that exploded shortly following the tenth anniversary of the adoption of the organizational sentencing guidelines demonstrated that the involvement of officers and directors in corporate crime was not confined to small businesses. The corporate scandals of 2002 greatly contributed to the public's lack of confidence in the capital markets. In virtually all of the scandals, the alleged malfeasance occurred at the senior management and/or governing authority level. Where there was no actual malfeasance by members of the governing authority, there were often instances of negligence.

Report at 57.

As a result of this finding, the amendments now under consideration would require higher levels of awareness of, and involvement in, compliance programs by governing authorities and organizational leaders in order for those programs to be considered to be effective. They also propose that to be considered effective a compliance program must not only be designed to prevent and detect violations of law, but it must also "promote an organizational culture that encourages a commitment to compliance with the law." Proposal at 60. We believe to propose, at the same time, an amendment that would make it easier to qualify for the adjustment where there is actual involvement in (or willful negligence of) the instant offense by high-level and substantial-authority personnel is inconsistent at best. The involvement of these personnel in compliance programs is the clearest indication of a law-abiding organizational culture and their involvement in criminal activity the clearest indication that the organization's compliance program is ineffective. That was the reason that the limitations on receiving the adjustment were originally imposed, and the spectacular failure of the leadership of numerous large organizations in recent years to obey the law is the strongest possible argument in favor of retaining them.

For example, in many recent major international antitrust/cartel prosecutions, including the prosecutions of Archer Daniels Midland Company, UCAR International Inc., and F. Hoffmann-La Roche Ltd. and BASF Aktiengesellschaft, high-level personnel participated in and, in fact, were among the leaders of the cartels. It is impossible, as many of the proposed amendments put forward by the Advisory Group and the Commission recognize, to create a law-abiding organizational culture from the bottom up; respect for the law must begin at the top and permeate downward by means of an effective compliance program. If an organization is rotten at the top it cannot be the good corporate citizen that the adjustment for having an effective compliance program was designed to reward.

This is true to an equal, if not greater, extent in small organizations as in large. Clearly, there should be distinctions between what large and small organizations must do to establish effective compliance programs. An effective compliance program in a small organization may be much less formal than in a large organization. The Commission proposes to add commentary to the guidelines making this plain, and we support this commentary. "For example, in a small business, the manager or proprietor, as opposed to independent compliance personnel, might perform routine audits with a simple checklist, train employees through informal staff meetings, and perform compliance monitoring through daily "walk-arounds" or continuous observation while managing the business." This proposal recognizes that in a small organization the personal involvement of an owner/manager is the key element to creating an effective compliance program. Yet how can personal involvement create a law-abiding organizational culture when the manager or proprietor is engaged in unlawful activity?

To the extent that small organizations are not receiving credit for having effective compliance programs, the better solution is the one identified by the Advisory Group: making greater efforts to educate small companies on their obligations under the law and working with them to establish effective compliance programs, rather than giving them credit for compliance programs despite the participation of their owners and high-level managers in criminal activity. Adopting the proposed amendment, even revised to apply only to small organizations, would send exactly the opposite message to the one being sent by virtually every other change being proposed by the Commission regarding compliance programs.

III. Waiver of Attorney-Client Privilege and Work Product Protections

There has been considerable debate – within the Advisory Group and beyond – about the circumstances under which an organization ought to be asked to waive the attorney-client privilege or its work product protections in order to receive a reduction in its culpability score for cooperation with the government or to receive a downward departure for providing substantial assistance in the investigation or prosecution of another. The Department's position on this has been, and continues to be that what is required to receive these reductions is simply cooperation and substantial assistance; and that neither waiver of the attorney-client privilege nor waiver of the work product protections are prerequisites to receiving these reductions. We recognize and the Advisory Group recognized, however, that in many cases, cooperation and substantial assistance will not be fully achieved unless there is a waiver of some kind. It comes down to a case-by-case analysis, depending on the particular circumstances of the investigation.

It is for these reasons that we accept the proposed new language in §8C2.5, Application Note 12, that clearly indicates that in certain circumstances, but not all cases, a waiver will be necessary to receive the reduction in the culpability score for cooperation. Where we believe the Application Note falls a bit short is in recognizing that the government is in a unique position to assist the court in determining whether the defendant has effectively cooperated and whether a waiver of the privilege or work product protection is necessary for full cooperation.

The current guideline Application Note 12 correctly points out that “[a] prime test of whether an organization has disclosed all pertinent information is whether the information is sufficient for law enforcement personnel to identify the nature and extent of the offense and the individual(s) responsible for the criminal conduct.” We believe that in determining whether sufficient cooperation has occurred, the sentencing court should consider all evidence but should give extra weight to the government’s assessment of the defendant’s cooperation and the government’s assessment of the sufficiency of the cooperation in identifying the nature and extent of the crime and those responsible. We think the language of the proposed Application Note would be improved with the following:

If the defendant has satisfied the requirements for cooperation set forth in this note, waiver of the attorney-client privilege and of work product protections is not a prerequisite to a reduction in culpability score under subsection (g). However, in other circumstances, waiver of the attorney-client privilege and of work product protections may be required in order to satisfy the requirements of cooperation. Substantial weight should be given to the government’s evaluation of the extent of the defendant’s cooperation and whether waiver of either the privilege or work product protections is necessary to identify the nature and extent of the offense and the individual(s) responsible for the criminal conduct.

IV. Substantial Assistance

These same principles surrounding the waiver of the attorney-client privilege and the work product protections apply in the context of substantial assistance motions. However, one critical difference between substantial assistance departures and reductions in culpability score for cooperation is that under existing statutes and guidelines, the availability of a substantial assistance departure is triggered only by the government. Simply put, departures for substantial assistance pursuant to 18 U.S.C. § 3553(e), §5K1.1, or §8C4.1 may not be made absent a motion by the government. In Wade v. United States, 504 U.S. 181, 185-86 (1992), the Supreme Court clearly held that the making of a substantial motion is the sole prerogative of the government. The only authority a district court has to review a prosecutor’s refusal to file such a motion and the only authority a court has to grant a remedy is if the court finds “that the refusal was based on an unconstitutional motive.” Id. The Court gave as an example of an unconstitutional violation the refusal to file the motion “because of the defendant’s race or religion.” Id.

We believe that proposed Application Note 2 in §8C4.1, which mirrors Application Note 12 in §8C2.5, suggests that the government’s determination of whether or not to file a substantial assistance motion is reviewable, at least to the extent that the government’s determination may hinge on a waiver of the privilege or waiver of the work product protections. We think this

suggestion is at best confusing and at worst contrary law. We strongly urge that this proposed application note be eliminated.

BODY ARMOR

We support the Commission proposal to create a new guideline, at §2K2.6, to cover the new offense of possessing, purchasing, or owning body armor by a violent felon – 18 U.S.C. § 931. We believe that a base level of 12 is appropriate for the new guideline, which would provide a sentence of 8-14 months for a typical offender in Criminal History Category II, well below the three year statutory maximum penalty. In creating this new crime, Congress found that body armor enables armed criminals to both cause more harm and be more difficult to apprehend. The congressional findings specifically cite three separate incidents of law enforcement officers who were killed during shootouts with armed criminals shielded by body armor. We share Congress's belief that armed criminals protected by body armor are an extremely serious threat and believe that a base offense level of 12 properly reflects that threat.

We further believe that if a violent felon uses body armor in the commission of any offense, that a sentence at the statutory maximum would be appropriate, irrespective of the offender's criminal history score. We therefore recommend that a four level enhancement be provided for such conduct.

PUBLIC CORRUPTION

I. Introduction

We support the majority of the proposed changes to the public corruption guidelines, and, in particular, agree with the effort to reduce the emphasis on the dollar amounts involved in the crime in calculating the offense level under the primary corruption guideline, §2C1.1. We appreciate the opportunity over the course of the last several months to work with the Commission to develop a workable and effective sentencing policy for corruption cases. We recognize, however, many of the technical difficulties related to sentencing policy for these cases. For example, we have been working with the Commission closely on the proposed consolidation of the guideline for bribery offenses (§2C1.1) with that for honest services fraud (§2C1.7). In our view, the consolidation is not necessary and raises issues stemming from the special nature of honest services fraud cases. Several of our specific comments are designed to address these issues and insure that no substantive change in the coverage or scope of the guidelines results from the consolidation. For example, we do not think it is the intent of the Commission – and we oppose – any amendments that will have the effect of reducing the number of defendants who will receive an enhancement as a result of holding a high-level decision-making or sensitive position. We have included, at the end of this section of the letter, a draft of the applicable guidelines which include revisions along the lines of our comments below.