PUBLIC COMMENT

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U.S. Department of Justice

Criminal Division

Office of the Assistant Attorney General *Washington, DC 20530-0001*

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Members of the
U.S. Sentencing Commission
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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.

I. Child Pornography Offenses

A. Consolidation of Possession and Trafficking Offenses Under §2G2.2

We agree with the proposed consolidation of child pornography possession offenses and child pornography receipt/trafficking offenses under a single guideline.[1] The existing scheme, with a cross reference from the possession guideline, has created a great deal of confusion and, we believe, has been applied inconsistently. Also, as the Commission is well aware, whether a person can be shown to have received child pornography or simply to have possessed it is often based more on the quality of forensic evidence than on the person's actual culpability. Thus, we support the proposed consolidation, as we believe it is likely to promote greater consistency in sentencing.

1. Option 1 vs. Option 2 – Base Offense Levels

Although we favor consolidation, in light of the fact that Congress has chosen to impose a mandatory minimum sentence for receipt offenses, but not possession offenses, we believe some higher base offense level for receipt offenses is still appropriate. We favor a variation of Option 1; we believe one base offense level should apply to possession offenses without the intent to traffic in, or distribute the material. Other offenses sentenced pursuant to the guideline, all of which are subject to a five year mandatory minimum penalty, should be subject to a higher base offense level.

2. Choice of Base Offense Level and Enhancements, Generally

Currently, the base offense level for possession offenses under §2G2.4 is level 15. The base offense level for receipt and distribution offenses under §2G2.2 is level 17. The new statutory mandatory minimum penalty for receipt and distribution cases is 60 months, which is within the sentence range of offense level 24 or 26, Criminal History Category I. Under Option 1, the Commission has proposed a base offense level of either 15, 18 or 20 for possession, receipt, and solicitation offenses that do not involve the intent to distribute and a base offense level of either 22, 24, 25 or 26 otherwise (which encompasses distribution, transportation, possession with intent to distribute, etc.). As stated above, because possession offenses are not subject to a statutory minimum sentence, we do not believe the base offense level for such offenses should be exactly the same as that for receipt.[2]

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[1]Our comments, infra, are relevant whether or not the Commission chooses to consolidate the guidelines. For example, our recommended alternative base offense levels are suggested for either a consolidated guideline or in two separate guidelines.

[2]We recognize that even if receipt and possession have the same base offense level, the guideline sentence can be meaningfully different in that one convicted of possession can benefit from a downward adjustment for acceptance of responsibility, bringing him below the five year

We believe the base offense level for receipt and distribution offenses should be level 24 or 26.[3] This offense level will ensure that the less serious offenses within Criminal History Category I will be sentenced at the mandatory minimum while at the same time ensuring that sentences for more serious offenses and offenders will be proportionally distributed between the mandatory minimum and statutory maximum set by Congress. If the base offense level in §2G2.2 is lower than offense level 24, the sentencing enhancements will have not have full effect and dissimilar conduct will be sentenced similarly. In line with our comments above, we would recommend a base offense level of 20 for possession offenses not involving the intent to distribute.

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mandatory minimum that will apply to those convicted of receipt. However, the distinction that Congress sought between possession and receipt offenses in that circumstance will only be reflected in cases where the defendants benefit from the downward adjustment for acceptance of responsibility.

[3] The Commission has historically, and we believe correctly, set the base offense level for offenses subject to mandatory minimum penalties so that the low end of the sentencing range for a defendant in Criminal History Category I would be no lower than the statutory minimum sentence. Thus, for example, the base offense level for drug offenses subject to a five year mandatory minimum sentence is set at level 26, which carries a sentencing range of 63-78 months in Criminal History Category I. We believe this is the proper method of implementing mandatory minimum statutes within the guidelines; a method that keeps the guidelines consistent with all Acts of Congress.

We recognize, however, that in PROTECT Act cases, unlike drug or other cases subject to a mandatory minimum statute, several special offense characteristics will likely apply to the "typical" case. For example, Commission data shows that the enhancement for the use of a computer, included by the Commission in many of the child pornography guidelines as directed by Congress, will apply in about 90% of the cases. Thus, a base offense level of 26 would result in a sentence above the mandatory minimum in 90% of the cases, even assuming no other enhancements applied and a Criminal History Category I. Moreover, there are multiple and cumulative special offense characteristics which are likely to apply in the typical case. Accordingly, we have recommended base offense levels that incorporate the mandatory minimum sentence and, thereby, ensure that the least serious offenses within Criminal History Category I will be sentenced to the mandatory minimum while at the same time ensuring that the sentences for more serious offenses having multiple special offense characteristics and within higher criminal history categories are sentenced more severely and are proportionally distributed between the mandatory minimum and statutory maximum set by Congress. This distribution is analogous to drug cases where the sentences are proportionally distributed between the mandatory minimum and statutory maximum based upon the amount of the drug. A base offense level lower than 24, however, will not give full effect to the special offense characteristics and will result in cases with and without special offense characteristics to receive the same sentence.

More culpable conduct involving distribution offenses would be subject to several enhancements, under proposed subsection (b)(2). The new, broad, definition of "Distribution" contained in the proposed Application Notes would ensure that behavior such as distribution and possession with intent to traffic result in an increased sentence.

We believe one gap in the proposal is that there is no enhancement for advertisement, which also involves the prospect of distribution. Generally, advertising offenses under § 2251(d)(1)(A) (formerly § 2251(c)(1)(A)) now are sentenced pursuant to §2G1.1. To the extent that some advertising offenses (such as § 2252A(a)(3)(B)) will be sentenced pursuant to §2G2.2, we believe a two level enhancement should be provided for advertising. This could be accomplished either by adding a provision to subsection (b)(2) or by expanding the definition of "Distribution" to include advertising.

3. §2G2.2(b)(2) – "Defendant's Conduct" or "Offense Involved"

The Commission has recommended amending the language which triggers the different base offense levels in the consolidated §2G2.2; making the higher base offense level applicable only if "defendant's conduct" included the more culpable factors rather than if the "offense involved" the more culpable factors. The Department strongly disagrees with this approach. Such a change would insulate conspiracies from appropriate upward adjustments, contrary to the generally applicable federal sentencing scheme. We believe a defendant should receive an enhancement for distribution, for example, if he was involved in a conspiracy to distribute, even if he himself did not distribute the material. The Commission's proposal may be motivated by a concern that a defendant not receive an enhancement for distribution when he only received child pornography. This concern is valid. However, a better way to address the concern would be to add an application note making it clear that a defendant should be liable only for his own conduct, unless he is part of a conspiracy or criminal enterprise.

4. Enhancement for Bestiality or Excretory Material

We suggest that the Commission consider clarifying the enhancement in §2G2.2(b)(3) for material that "portrays sadistic or masochistic conduct or other depictions of violence" to ensure that it includes material containing bestiality or depicting excretory functions. Material that depicts bestiality or excretory functions is harmful in ways similar to that depicting sadistic or masochistic conduct or other depictions of violence, and we believe should be treated accordingly. The distribution of such material warrants an enhancement, because of the degradation inflicted on persons depicted in images. While we believe that there is an argument that bestiality and excretory material are already encompassed by the existing sadistic and masochistic enhancement, a clarification making it explicit should be considered.

5. Enhancement for Video Clips

We agree with the definition of "image" proposed by the Commission. However, we urge that an enhancement be provided for "moving images" such as video, streaming video, etc. The proposed definition correctly limits the definition of "image" to the visual depiction itself, rather than the humans depicted in it. Although "image" is not defined in 18 U.S.C. § 2256, the definition of "visual depiction" in § 2256(5) suggests that "image" properly refers to the visual depiction itself, rather than to each human depicted. Defining "image" to include each human depicted is somewhat inconsistent with § 2256 and probably would not make a significant difference in the vast majority of cases.

Determining how many "images" are in a video/movie clip is more complex. A definition that treated a video/movie and a still image as both being one image, we believe, would be arbitrary. A video/movie that contains even one second of sexually explicit conduct is a more serious item than a still image. The Motion Picture Association of American defines video as 24 frames per second. Each frame is equivalent to one still image. Thus, a one minute video is equivalent to 1440 still images. While counting each minute of video as 1440 images would be inappropriate, considering the increased harm caused by moving videos, a two or three level enhancement for offenses that involve video clips (defined as any type of moving images) would be appropriate.

6. §2G2.2(c)(1) Cross Reference to Production Guideline

The Department suggests clarifying the cross reference contained in §2G2.2(c)(1) (and similar cross references throughout the guidelines) so that it is clear that it applies when the defendant has, in any way, unsuccessfully sought or solicited a "minor" to engage in sexually explicit conduct for the purpose of producing a visual depiction of such conduct. The current wording of the cross reference invites the argument that it is only when the defendant seeks "by notice or advertisement," and not by direct means such as an e-mail sent to a "minor," that the cross reference is triggered.

B. Production of Child Pornography Offenses – §2G2.1

1. Choice of Base Offense Level

Similar to our analysis regarding §2G2.2, we believe the base offense level for offenses involving the production of child pornography should balance appropriate sentence length (arrived at in consideration of applicable mandatory minimum statutes) with the ability of specific offense characteristics to adjust sentences in appropriate cases. For production offenses, the mandatory minimum sentence was increased from ten to 15 years by the PROTECT Act, which lies within offense level 34 or 36. Similar to the analysis in determining the base offense level in §2G2.2, we believe a base offense level of 34 or 36 will ensure that the least serious offenses within Criminal History Category I will satisfy the mandatory minimum while sentences

for more serious offenses and offenders will be proportionally distributed between the mandatory minimum and statutory maximum set by Congress.[4]

2. Enhancement for Conduct Described in 18 U.S.C. §§ 2241 and 2242

We believe a four level enhancement is warranted if the production offense involved conduct described in 18 U.S.C. § 2241(a) or (b). The same conduct receives a four level enhancement under §2G1.3 and includes the most egregious aspects of sexual abuse, including force and threats of death. It is, however, a significant oversight that the almost equally reprehensible conduct described in 18 U.S.C. § 2242 has not previously led to an enhancement under these guidelines. Section 2241(a)(2), for example, includes causing someone to engage in a sexual act by threatening that person with death or serious bodily injury. Section 2242(1) includes engaging in a sexual act by otherwise threatening the victim. Similarly, § 2241(b)(2) includes engaging in a sexual act with a person after surreptitiously administering an intoxicant that impairs that person's ability to appraise or control his or her conduct. Section 2242(2) includes engaging in a sexual act with a person who is physically incapable of declining participation in that sexual act. The conduct described by both of these statutes involves an even higher level of culpability than the behavior typically covered by §2G2.1 and §2G1.3. Therefore, we believe an enhancement of three levels should be added to §2G2.1(b) if "the offense involved conduct described in 18 U.S.C. § 2242."

3. Choice of Enhancement for Sadistic or Masochistic Material

We believe the enhancement at §2G2.1(b)(2) for material that "portrays sadistic or masochistic conduct or other depictions of violence" should be four levels, consistent with that in §2G2.2(b)(3). Additionally, this enhancement should be broadened to include material containing bestiality or depicting excretory functions, as described earlier.

4. Choice of Enhancement for Distribution

We believe the table of enhancements for distribution in §2G2.2(b)(2) should similarly apply in the guideline for child pornography production. For example, there should be at least a five level enhancement for production of child pornography for pecuniary gain or the receipt of a thing of value. Similarly, an offense that involved the distribution to a minor should receive a five level enhancement. Other types of distribution should receive a two-level enhancement.

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[4]It is not clear to us that §1591 crimes should be referenced directly to §2G2.1. Rather, we believe such offenses would more logically be sentenced under §2G1.3 and §2G1.1. We do believe a cross reference to §2G2.1 would be appropriate in some cases.

II. Travel and Transportation Cases

A. Proposed Amendment to §2G1.3

1. Choice of Base Offense Level

A five year mandatory minimum prison sentence applies to crimes under 18 U.S.C. §§ 2422 and 2423(a), which is roughly equivalent to an offense level 24 or 26.[5] Hence, we believe the base offense level should be set at 24 or 26.

2. Clarification of Enhancement for Conduct Described in 18 U.S.C. § 2241

Variations of the enhancement contained in §2G1.3(b)(2) – for conduct described in § 2241 – are contained in other guidelines, such as §2G2.1(b)(4) in cases involving the production of child pornography. There are certain complexities in the cases covered by §2G1.3, however, which make this enhancement and its application note confusing. For example, a person convicted of sex trafficking of children under 18 U.S.C. § 1591 may be a pimp who used physical force against a minor to get the minor to engage in commercial sex acts with others. A defendant in such a situation might argue that because the conduct described in § 2241 involves engaging in a sexual act with a person by means such as force or the administration of intoxicants, the offense for which he was convicted is not subject to the enhancement unless he actually had sex with the minor. Similarly, a person may be convicted under § 1591 for harboring a minor knowing that the minor would be caused to engage in a commercial sex act. In addition, such a defendant might know that the pimps with whom he or she was working used physical force to obtain the compliance of minor victims. Such a person, who knowingly benefits from the use of force (by others) to cause minors to engage in commercial sex acts (with others), we believe, should also be subject to the enhancement contained in §2G1.3(b)(2). A clarification could be effected by adding a sentence such as "the enhancement in subsection (b)(2) is to be construed broadly to include all instances in which the offense involved the use of force or other conduct described in § 2241(a) or (b). It may apply even if the defendant did not personally use force against the minor or did not personally engage in a sexual act with the minor."

There is one additional complicating factor, which is that Congress has set a higher maximum sentence of life imprisonment for cases under § 1591 not only involving force, but also those involving fraud or coercion against victims less than fourteen years of age. See 18 U.S.C. § 1591(b)(1). Yet, an enhancement simply tied to conduct described in § 2241(a) or (b) would not cover an offense involving fraud, for example. Additionally, an initial review of other

[5]Section 2G1.3 also applies to sex trafficking offenses, which includes the use of children for commercial sex acts.

statutes and guidelines involving sexual abuse of minors indicates that the age of fourteen is not chosen anywhere else as the cutoff point for liability or enhanced punishment. It may therefore be appropriate to have the enhancement in §2G1.3 tied more broadly to the use of force, fraud or coercion or to add an additional enhancement for offenses involving fraud or other conduct not covered by the enhancement for conduct described in § 2241.

3. Additional Enhancement for Conduct Described in 18 U.S.C. § 2242

As discussed above, we believe it is a significant oversight that the conduct described in 18 U.S.C. § 2242 has not previously triggered an enhancement under the guidelines. We believe an enhancement of three levels should be added to §2G2.1(b) if "the offense involved conduct described in 18 U.S.C. § 2242." Such an enhancement is especially advisable because cases involving conduct described in § 2242 were subject to a cross reference to §2A3.1 under previous guidelines and were thus treated as seriously as offenses described in 18 U.S.C. § 2241(a) or (b).[6]

4. Choice Between Option 1A or 1B

Both Option 1A and Option 1B provide for higher sentences for offenses that involve minors under the age of 12. Option 1A would do so through an enhancement while Option 1B would do so through a cross reference to §2A3.1. The language in Option 1B would also have the effect of cross referencing offenses involving minors of any age in cases involving conduct covered by §2A3.1. This includes conduct described in § 2241, which is already subject to an enhancement under §2G1.3(b)(2). We believe the enhancements in Option 1A provide a much clearer approach as long as the resulting offense level is as high as the offense level that would be imposed under §2A3.1; we believe an eight-level enhancement for offenses involving minors less than twelve years of age would be appropriate.

5. Enhancement for Minor Between the Ages of 12 and 16

Like the child pornography production guideline §2G2.1, §2G1.3 covers offenses involving sixteen or seventeen-year-old victims (for example, offenses under § 1591). Like §2G2.1, we think there should be a second enhancement for minors between the ages of 12 and 16. Under Option 1A, §2G1.2(b)(3) might read: "If the offense involved a minor who had (A) not attained the age of 12 years, increase by eight levels; or (B) attained the age of twelve years but not attained the age of sixteen years, increase by four levels."

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[6]An application note should be added here as well to clarify that the enhancement applies to those such as recruiters or pimps who may not themselves apply force or coercion against a minor or have sex with a minor but who are nevertheless responsible for the use of such means in connection with the offense.

6. Choice Between Option 2A and 2B: Need for a Broader Enhancement

Because § 1591 cases involving minors are covered by this guideline, Options 2A and 2B are both overly narrow and would lead to inconsistent results. Options 2A and 2B provide an enhancement for the conduct described in 18 U.S.C. § 2423(d), which targets those who facilitate the travel of a participant knowing that the participant is engaging, or will engage, in illicit sexual conduct. Illicit sexual conduct includes both non-commercial and commercial sexual activity. Section 1591(a)(2) has a similar provision covering those who knowingly benefit from a venture involving the use of a minor in commercial sexual activity. This similarly culpable conduct should also result in an enhancement. In addition, §§ 1591 and 2423 both cover the activities of pimps, or those who directly entice, transport, or sell children for commercial sex acts. This extremely reprehensible conduct is not presently subject to any enhancement under §2G1.3. Perhaps the simplest solution is to replace 2A and 2B with an enhancement, such as: "If the offense involved a commercial sex act, increase by three levels." "Commercial sex act" could be further defined by reference to § 1591(c)(1).[7]

7. Multiple Victims

The language of subsection (d)(1) involving multiple victims, in combination with Application Note 7(A), makes it appear as if multiple victims listed in the same count of conviction should only be treated as if they were contained in a separate count of conviction for travel or transportation offenses. We believe this language should be clarified to indicate that victims listed in the same count in offenses under §§ 1591 and 2422 should similarly be treated as if they were contained in separate counts of conviction.

8. Comment on Subsection (d)(1)

The special instruction in subsection (d)(1) refers to "victim" instead of "minor." Due to the new definition of "minor," which includes undercover law enforcement officers, we believe "minor" should be substituted for "victim." While the definition of "victim" in Application Note 7 includes undercover law enforcement officers, using two different terms to cover the same situations could cause confusion. The similar instruction in §2G2.1(d)(1) uses the term "minor."[8]

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[7]As is the case with the cross reference contained in §2G2.2(c)(1) (and similar cross references throughout the guidelines), the cross reference in §2G2.4(c)(1) should make clear that it applies when the defendant has unsuccessfully sought or solicited a "minor" to engage in sexually explicit conduct for the purpose of producing a visual depiction of such conduct.

[8]Application Note 6 addresses the cross reference to the production guidelines contained (c)(1). While the cross reference uses the broadly-defined term "minor," the application note uses the term "person less than 18 years of age." We believe this language is confusing and should be changed to "minor."

B. Proposed Amendment to §2G1.1

While the proposed new §2G1.1 would cover only cases involving adult victims, it would nonetheless apply to a broad range of offense conduct. It would cover cases under 18 U.S.C. §§ 2421 and 2422(a), in which the participation of the person transported or enticed to travel for prostitution may have been entirely voluntary; it would also cover 18 U.S.C. § 1591 offenses, in which it must be proven that the defendant knew that force, fraud or coercion would be used to cause a person to engage in a commercial sex act. Given this background, we believe the combination of the enhancement in subsection (b)(1) for "physical force, fraud or coercion" and the cross reference at (c)(1) for criminal sexual abuse is very confusing. Criminal sexual abuse refers back to §§ 2241 and 2242, which include everything subject to the enhancement in subsection (b)(2), except fraud and perhaps some sort of coercion. As an initial matter, then, all § 1591 cases involving adults would seem eligible for the enhancement contained in (b)(2). If the cross reference is properly applied, however, the only § 1591 cases remaining under §2G1.1 would be those involving fraud or some sort of coercion not described in §§ 2241 or 2242. A subset of cases under 8 U.S.C. § 1328 and 18 U.S.C. §§ 2421 and 2422(a) would also be subject to the enhancement under (b)(2) or to the cross reference. The cross reference and enhancement are also marked by some of the complexities discussed in relation to similar enhancements under §2G1.3 involving culpability of those who recruit or harbor a victim knowing that force will be used to cause the person to engage in a commercial sex act but may not themselves use force against the victim or have sex with a victim. We therefore recommend that the enhancement be narrowed so that it does not overlap with the cross reference and that the cross reference itself be clarified.

1. Narrowing the Enhancement for Force, Fraud or Coercion

The enhancement could be changed along the lines of the following: "[i]f the offense involved fraud or coercion other than that described in 18 U.S.C. §§ 2241(a) or (c) or 2242, increase by four levels." The application notes could then clarify that all § 1591 convictions involving adult victims should be subject either to the enhancement or to the cross reference and take out references to offenses involving force.

Application Note 2 for subsection (b)(1) is also somewhat problematic in its current form, because it indicates that the enhancement "generally will not apply if the drug or alcohol was voluntarily taken." In contrast, the cross reference at subsection (c)(1) would apply in some circumstances where drugs or alcohol were voluntarily taken, because such situations are sometimes covered by § 2242. It is anomalous to send offenses involving victims who were unconscious because of voluntary intoxication, for example, to a more serious guideline through the application of the cross reference at (c)(2) but not to apply an enhancement to such cases. Accordingly, we recommend that the last sentence of Application Note 2 be deleted.

2. Clarification of Cross Reference

We believe the cross reference should be clarified to indicate that all offenses involving force or coercion, such as threats of violence, are subject to the cross reference. Whether the language of the cross reference is changed to parallel the language of the enhancement in §2G1.3(b)(2) or not, it is essential to clarify the cross reference through the application note so that it is clear that a pimp who uses force to cause a person to engage in prostitution is subject to the cross reference.

Similar to the application note for §2G1.3(b)(2), Application Note 4 should be revised to clarify that the cross reference applies when the defendant knowingly participates in an offense involving force or threat. The application note could, for example, include the following:

> "Conduct described in 18 U.S.C. § 2241(a) or (b)" means using force against the victim; threatening or placing the victim in fear that any person will be subject to death, serious bodily injury, or kidnapping; rendering the person unconscious; or administering by force or threat of force, or without the knowledge or permission of the victim, a drug, intoxicant, or other similar substance and thereby substantially impairing the ability of the victim to appraise or control conduct. "Conduct described in § 2242" means threatening or placing the victim in fear (other than by threatening or placing the victim in fear that any person will be subjected to death, serious bodily injury, or kidnapping); or engaging or causing another to engage in a sexual act with the victim if the victim is incapable of appraising the nature of the conduct; or physically incapable of declining participation in, or communicating unwillingness to engage in, that sexual act. The cross reference in subsection (c)(1) is to be construed broadly to include all instances in which the offense involved the use of conduct described in 18 U.S.C. §§ 2241(a) or (b) or 2242. It may apply even if the defendant did not personally use force against the victim or did not personally engage in a sexual act with the victim.

III. Obscenity and Misleading Domain Names – §2G3.1

Similar to our earlier comments, the enhancement in §2G3.1(b)(4) for material that "portrays sadistic or masochistic conduct or other depictions of violence" should be broadened to include material containing bestiality or depicting excretory functions.

IV. Conditions of Probation and Supervised Release – §5B1.3 and §5D1.3

We recommend that the language at §5B1.3(d)(7)(B) and §5D1.3(d)(7)(B) read, "A condition limiting or prohibiting the use of a computer or an interactive service in cases in which the offense involved the use of such items." We believe that "or prohibiting" should be included to make explicit the court's ability to ban computer use by the defendant. Additionally, we believe "the offense involved" language is preferable to the "defendant used" in order to account for situations in which the defendant was part of a conspiracy or criminal enterprise.

V. Chapter 2, Part A, Subpart 3 (Criminal Sexual Abuse) Amendments

A. Proposed §2A3.1 – Option 1, Option 2, or Option 3

The Commission has provided three options in §2A3.1 to cover cases involving the production of child pornography. Option 1 does not appear separately to account for circumstances in which the offense involved the production of child pornography. Option 2 does account for such circumstances, but by way of an enhancement, which in our view is more likely to cause confusion than a clear cross reference. Accordingly, we support Option 3, as it provides an appropriate cross reference to the production guideline in §2G2.1 and thus ensures that all production cases will be sentenced under the same guideline.[9]

B. Proposed §2A3.2 – Base Offense Level

As currently drafted, the base offense level for §2A3.2 offenses will be 18, with no enhancements for violations of Chapter 117. Given that §2A3.2 would be the guideline applicable to an offender who had sex with a 12-year-old (the oldest victim typically sentenced under this guideline would be 15), we believe the base offense level should at least be commensurate with that for enticing a child (who may be an undercover officer) to engage in sexual activity. Moreover, an offender who had sex with an 11-year-old would be sentenced under §2A3.1, which under any proposal under consideration would have a base offense level of at least 27, and perhaps as high as offense level 36. Under these circumstances, we do not

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[9]If Option 3 is used, we note that Application Note 6 (discussing the enhancement under Option 2 if the offense involved the production of child pornography) should be deleted. If the Commission selects Option 1, we recommend that the base offense level under §2A3.1(a)(1) be 36, and the base offense level under §2A3.1(a)(2) be 30. If Option 2 is chosen, we recommend that the base offense level under §2A3.1(a) be 30. Moreover, if Option 2 is chosen, we recommend that the enhancement under §2A3.1(b)(7) be three levels to avoid inconsistency with §2G2.1. Overall, these recommendations are based on our belief that §2A3 guidelines should be increased to maintain proportionality with increases in the base offense levels in the §2G guidelines.

believe that there should be such a great disparity between the base offense levels for §2A3.1 and §2A3.2. Accordingly, we recommend that the base offense level for §2A3.2 be increased.[10]

C. Proposed §2A3.3 – Base Offense Level

Because we believe that increases in the §2A3 guidelines should be increased to maintain proportionality with the increases in the §2G guidelines, we recommend that the base offense level for §2A3.3 offense be increased to 12. This increase will mean that even if neither enhancement applies and the offender receives all three levels for acceptance of responsibility, the guideline range would still call for at least four months' imprisonment.

D. Proposed §2A3.4

We support raising the base offense level under §2A3.4, as it appears that many offenses sentenced under this guideline involve attempted forcible sexual acts where it is difficult to prove that the defendant had the intent to commit a sexual act rather than sexual contact.

VI. Responses to Issues for Comment Not Addressed Above

A. Violent Child Pornography

The Department agrees with the Seventh Circuit's decision in United States v. Richardson, 238 F.3d 837 (7th Cir. 2001), finding strict liability for receiving violent child pornography. We do not believe that the Commission should provide a definition of sadistic or masochistic conduct or other depictions of violence that would unduly constrain courts in determining whether specific images portray sadistic or masochistic conduct. If a definition is proposed, it should be broad enough to include conduct that is per se painful, coercive, degrading or abusive, such as material portraying sexual penetration of prepubescent minors. As we discuss above, we recommend that the Commission clarify that the enhancements for material that "portrays sadistic or masochistic conduct or other depictions of violence" include material depicting bestiality or excretory functions.

B. Offenses Under 18 U.S.C. § 2425

We recommend that offenses under 18 U.S.C. § 2425 be sentenced pursuant to the proposed §2G1.3. We do not believe that § 2425 offenses should be analogized to harassment or threatening communications offenses, because § 2425 offenses include, for example, defendants

[10]While we recognize that an argument can be made that the operation of §4B1.5 (applying to repeat and dangerous sex offenders against minors) in most cases will reduce the disparity, we believe that relying only on §4B1.5 to address the issue may be inadequate because §4B1.5 will not apply in all §2A3.2 cases.

trafficking in child prostitutes and using interstate facilities to transmit information about the minors. Thus, §2G1.1, which now applies only to offenses involving adults, would not be the appropriate guideline. Similarly, §2A6.1, which covers offenses involving threatening or harassing communications and has a base offense level of 12, would also be inappropriate, because its base offense level does not adequately account for the severity of the conduct involved. We note that other offenses similar to § 2425 offenses, such as §§ 1591, 1421, 2422(b), and 2423 offenses, are all sentenced pursuant to §2G1.3. With respect to the Commission's question concerning whether any specific offense characteristic should be added to a guideline to account for § 2425 conduct, we believe that the enhancement at §2G1.3(b)(7) is sufficient.

C. Incest

Incest is, of course, a particularly heinous crime and usually involves both an abuse of trust as well as care, custody, or control of the victim. We have seen that in cases where incest has occurred, courts have sometimes applied the abuse of trust guideline in §3B1.3. While this guideline seems particularly applicable to incest crimes, we believe the Commission should explicitly specify in §3B1.3 that offenses involving incest should receive the two-level enhancement. The enhancement at §3B1.3 should be in addition to any available enhancement for care, custody, or control of the victim, which may, but does not always, apply. While we recognize that the Commission is considering an enhancement for offenses involving incest in the §§2A3.1 through 2A3.4 and §§2G1.1 through 2G3.1 guidelines, we believe that including such an enhancement at §3B1.3 would maximize the likelihood that the enhancement were applied in all appropriate cases. The relationships that should be listed in §3B1.3 include:

1) Father and daughter or stepdaughter or son or stepson;

2) Mother and daughter or stepdaughter or son or stepson;

3) Siblings of the whole blood or of the half blood;

4) Grandparent and grandchild;

5) Aunt and nephew or niece; and

6) Uncle and nephew or niece.

D. Interactive Computer Service

We believe the definition of "interactive computer service" used in the guidelines is broad enough to cover Internet-capable phones or phones that can take digital photographs and transmit them directly to the recipient.

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 if 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 morion "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.

II. The Proposed Consolidated Guideline at §2C1.1

A. Title

The title of the proposed new §2C1.1, which is a product of the consolidation with §2C1.7, we believe should include the phrase "Conspiracy to Defraud by Interference with Governmental Functions," which is currently included in the title of §2C1.7. Similarly, the Statutory Provisions section of the commentary should include a reference to18 U.S.C. § 371. As mentioned above, we do not believe it is the intent of the Commission, and we do not believe the consolidation of §2C1.1 and §2C1.7 should result in any change to the sentencing for this conspiracy offense, which is closely related to the honest services mail and wire fraud offense, but which is grounded in a different statute. Absent this revision, an inference will be drawn that this conspiracy offense is no longer covered by this guideline.

B. More Than One Bribe

The proposed specific offense characteristic §2C1.1(b)(1) would require a determination of whether the offense involved more than one "incident" of bribery or honest services fraud. In the context of corruption cases, and honest services fraud in particular, the use of the term "incident" would be ambiguous and difficult to apply. We suggest two alternative ways of dealing with this problem. First, the two level increase could be folded into the base offense level, raising it to a level 14, and eliminating any litigation regarding the issue. Given that this enhancement applies in a large majority of cases, we think this would be an appropriate step. Second, if the enhancement remains, we propose that it remain as it is worded in the current guideline, to avoid any confusion.

C. "Unlawful Payment"

The proposed language for §2C.1.1(b)(2) reflects the addition of a new phrase: "unlawful payment." We believe that the use of this new term, with a new definition in the proposed commentary, is unnecessary, and will inappropriately miss instances that occur frequently in honest services cases and cases involving conspiracies to defraud the United States. In those cases, the corruption may occur despite the absence of any payment. For example, an honest services case might involve a city council member who has an undisclosed financial interest in a company that is a bidder on a contract on which the city council votes. The city council member's hidden financial interest is not in the form of a payment, but it is a financial interest that causes corruption, and it should be taken into account in calculating the appropriate offense level.

Instead, we suggest that, if there is a consolidated guideline, the language that is currently used in §2C1.7(b)(1)(A), regarding honest services cases, be used in the new, consolidated guideline. Specifically, we believe that the specific offense characteristic should begin with the following language: "If the value of anything obtained or to be obtained by a public official, the

benefit received or to be received in return for the payment, or the loss to the government from the offense . . ." This broad language covers all things of value obtained by public officials as a result of the offense, whether it is in the form of a payment or, as in some honest services cases, an undisclosed financial interest that may take a form other than an actual payment.

D. Enhancement for Payment to a Public Official – §2C1.1(b)(3)

We agree with the proposal to make this enhancement cumulative with the enhancement for the monetary amount, rather than as an alternative. We believe that the enhancement should be four levels – currently it is eight – and also agree with the proposed a minimum offense level of 18.

We are concerned about the use of the term "payment" in this specific offense characteristic as well. As discussed above, this term will not capture aggravating conduct in many honest services cases, which do not involve direct payments to public officials. The proposed enhancement begins with the following language from the bribe guideline: "If the offense involved an unlawful payment for the purpose of influencing an official act of a public official [holding a high-level position] . . ." Consistent with the language currently used in §2C1.7, we suggest that the enhancement should simply read: "If the offense involved [a high-level official] . . ."

We have several concerns regarding the proposed language describing the officials who will qualify for this enhancement: "a public official in a high position of public trust." We believe that the proposed change will narrow the scope of the types of officials who will qualify, thus lowering the total offense levels in corruption cases. In addition, we believe that this revision to guideline language and commentary that has been used for many years will unsettle matters unnecessarily.

First, for many years now, this enhancement has applied to all elected officials, and, under the proposed amendment, elected officials would no longer automatically receive this enhancement. We believe that this bright line rule is effective and that it is important that this enhancement apply to any public official who is elected by the voters. Regardless of the particular title that a person holds, when a populace or government determines that a position is of sufficient importance that the officeholder should run for office and be elected by the voters, that person holds a position of elevated public trust that warrants a sentencing enhancement if corrupted. We are not aware of any federal case in which this enhancement has been applied to an elected official whose authority and position of trust did not warrant such an enhancement. To the extent that courts may have been hesitant to apply the enhancement in a particular case, that hesitancy will be reduced by the fact that, in most cases, the enhancement will now be only four levels, rather than eight.

Second, the proposed language does not include individuals who hold "sensitive" positions, as the current guideline does. Thus, for example, there is no enhancement for someone who is not an "agency head" but who holds a position in which he is entrusted with particularly sensitive information or decisions. Similarly, we believe that a juror holds a sensitive position, but not a "high position," and, as the proposed commentary indicates, an offense involving a juror should qualify for this enhancement. If the language regarding sensitive positions is removed, we are concerned that the enhancement will apply only to "agency heads."

Third, the proposed commentary indicates that the "high position of public trust" involves a greater level of trust than that required under §3B1.3 (Abuse of Trust). The language in the commentary to §3B1.1 indicates that §3B1.1 applies only where the public official has "substantial discretionary judgment that is ordinarily given considerable deference." By placing the bar even higher than this already elevated level, the proposed §2C1.1(b)(3) enhancement will apply to a narrower range of cases than the enhancement in the current guideline. We do not believe that the amendments should reduce the range of cases in which this enhancement will apply.

Finally, the language that is currently employed in §2C1.1 and §2C1.7 ("high-level decision-making or sensitive position") and accompanying commentary has been used and interpreted by prosecutors, probation officers, and the courts for years now. We believe that adopting new language will unsettle matters considerably as the courts attempt to discern precisely how much higher the new bar should be placed relative to where it has been. We do not see a corresponding benefit to be derived from the change.

E. Enhancement for Public Officials

The proposed amendment includes an enhancement for defendants who are themselves public officials, as opposed to the defendants who bribe and corrupt them. Although we agree with a two level enhancement for public officials as part of the overall revisions proposed by the Commission, we note that this automatic enhancement may be inconsistent with proposed Application Note 8, which indicates that the non-public official may be more culpable in some cases. We do not see any need for this proposed application note, given that it should be clear to prosecutors, probation officers, and judges that the relative culpability of participants in any crime depends upon their individual roles in the crime.

F. Enhancement for Border Related Crimes

We agree with the proposal to add an enhancement for an offense that involves allowing people, vehicles, and cargo into the county. We do not, however, believe that the enhancement should single out the United States Customs Border Protection Inspectors for the enhancement. Instead, we think it should apply in any case involving anyone, including a Border Protection Inspector, who commits an offense that permits things to enter the country illegally. The

potential defendants could include data entry personnel, administrative assistants, supervisors, law enforcement personnel, and the people who corrupt them.

We believe that the enhancement should not use the term "unlawful payment." As discussed above regarding §2C1.1(b)(2), we believe that this will fail to cover certain forms of honest services mail and wire fraud, or conspiracies to defraud the United States.

G. Proposed Application Note 1 – Definitions

We do not believe that there is any need to define the term "bribe." There is no such definition in the current guideline or in title 18, and we are not aware of any difficulty caused by this absence. We also do not believe that the term "official act" should be included in §2C1.1(b)(3), and thus see no reason to include it in the definitions. We note that bribery includes instances in which the public official refrains from taking some official action, 18 U.S.C. § 201(b)(1)(B), and instances that involve defrauding the government without taking official action, 18 U.S.C. § 201(b)(1)(B). As a result, using this term in the guideline may result in excluding certain bribery offenses from the reach of the enhancements. We do not believe that this was the intent of using and defining this term.

We do not believe that there is any need for a definition of the term "public official." If such a definition is included, we believe that it should simply parallel the definition in 18 U.S.C. § 201(a)(1), which is designed to include individuals, such as government contractors, who act "for or on behalf of" the government under some official authority. See, Dixson v. United States, 465 U.S. 482 (1984). We also believe that the language in the proposed definition regarding a government contractor and the contractor's position of trust "with respect to a government agency" is not sufficiently clear.

As discussed above, we do not believe that the term "unlawful payment" should be used or defined in the guideline.

H. Cross References

We believe the cross references for cases where the offense was committed to facilitate another criminal offense or to conceal or obstruct the investigation of another offense are important and should be maintained. For example, in a case in which a law enforcement officer solicits a bribe or extorts a payment from a drug dealer, this cross reference provides a vehicle for insuring that the offense level for the bribe or extortion will reflect the relative seriousness of the drug dealer's underlying crime. Department prosecutors have used this cross reference in such cases, and obtained substantially higher (and appropriate) sentences than would have applied without the cross-reference.

I. Issue for Comment – Election and Balloting Integrity

In response to one of the issues for comment, we think the Commission should seriously consider the addition of a two level enhancement for a bribe, extortion, or honest services offense that may affect the integrity of the balloting, voting, and election process. For example, such an enhancement might apply to an offense involving a local election official or clerk who does not hold a "high level" position, but whose position is important to the integrity of the election process.

II. Gratuity Offenses

We agree with the Commission that the gratuity guideline should be amended proportionally with the bribery guideline and that the language used should parallel the language used in the bribery guideline. However, all of the language adjustments that we propose for the bribery guideline, to ensure coverage of honest services fraud and conspiracy to defraud the United States, need not be made to the gratuity guideline.

* * * * *

§2C1.1. **Offering, Giving, Soliciting, or Receiving a Bribe; Extortion Under Color of Official Right; Fraud Involving the Deprivation of the Intangible Right to Honest Services of Public Officials; Conspiracy to Defraud the United States by Interference with Governmental Functions**

(a) Base Offense Level: **12**

(b) Specific Offense Characteristics

(1) If the offense involved more than one bribe or extortion, increase by **2** levels.

(2) If the loss to the government or the value of anything obtained or to be obtained by a public official or others acting with a public official, whichever is greatest (A) exceeded $2000 but did not exceed $5,000, increase by **1** level; or (B) exceeded $5,000, increase by the number of levels from the table in §2B1.1 (Theft, Property Destruction, and Fraud) corresponding to that amount.

(3) If the offense involved an elected official or any official holding a high-level decision making or sensitive position, increase by **4** levels. If the resulting offense level is less than level **18**, increase to level **18**.

(4) If, at the time of the offense, the defendant was a public official and the offense involved an abuse of the defendant's official position in any manner, increase by **2** levels.

(5) If the offense involved obtaining (A) entry into the United States for a person, a vehicle, or cargo; (B) a passport or a document relating to naturalization, citizenship, legal entry, or legal resident status; or (C) a government identification document, increase by **2** levels.

* * *

Application Notes:

1. *"Official holding a high-level decision-making or sensitive position" includes, for example, prosecuting attorneys, judges, agency administrators, law enforcement officers, and other governmental officials with similar levels of responsibility. It also includes jurors and election officials because of the sensitivity of the processes over which they have influence.*

* * * * *

§2C1.2 Offering, Giving, Soliciting, or Receiving a Gratuity

(a) Base Offense Level: **9**

(b) Specific Offense Characteristics

(1) If the offense involved more than one gratuity, increase by **2** levels.

(2) If the value of the gratuity (A) exceeded $2000 but did not exceed $5,000, increase by **1** level; or (B) exceeded $5,000, increase by

the number of levels from the table in §2B1.1 (Theft, Property Destruction, and Fraud) corresponding to that amount.

(3) If the offense involved an elected official or any official holding a high-level decision making or sensitive position, increase by **4** levels. If the resulting offense level is less than level **15**, increase to level **15**.

(4) If, at the time of the offense, the defendant was a public official and the offense involved an abuse of the defendant's official position in any manner, increase by **2** levels.

* * *

Application Notes:

1. *"Official holding a high-level decision-making or sensitive position" includes, for example, prosecuting attorneys, judges, agency administrators, law enforcement officers, and other governmental officials with similar levels of responsibility. It also includes jurors and election officials because of the sensitivity of the processes over which they have influence.*

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DRUGS (INCLUDING GHB)

I. GHB / GBL

Two options are provided for raising sentencing levels for GHB (gamma hydroxybutyric acid) and GBL (gamma-butyrolactone).[11] For GHB, Option One would effectively set penalties so that 1 gallon (3.785 liters) of GHB would result in offense level 26 and 10 gallons in offense level 32. Option Two would make five gallons (18.925 liters) trigger offense level 26 and 50 gallons trigger offense level 32. Either option would be a substantial improvement over the current guidelines, which require over 13 gallons (100,000 "units" as defined at §2D1.1(c) (Drug Quantity Table), Note (F)) to reach offense level 26.

[11]Both options are expressed in the proposed guidelines as liter equivalents to marijuana. GHB and GBL are illicitly distributed both as liters and gallons.

We support Option One, because we believe it is an appropriate approach to sentencing this serious drug of abuse and tool of sexual predators. To begin with, mid-level dealers work in quantities ranging from several ounces to a few gallons, and high-level dealers often sell multi-gallon quantities (even up to 55-gallon drums). We believe it is critical that the ten year guideline sentence apply to most distributors at that level. Second, while GHB is, pharmacologically speaking, a depressant, several factors with respect to its abuse and trafficking counsel against a strict dose-for-dose comparison to heroin or other Schedule I depressants in setting the guideline penalty.

- Perceived effect. Regardless of pharmacology, GHB is not only abused for its depressant /euphoric effects on the central nervous system; it is also abused for its perceived hallucinogenic effects (i.e., altered sensory sensations). GHB is more likely to be trafficked along with other club drugs that have widely accepted hallucinogenic effects, such as MDMA, ketamine and LSD. At least some segments of the abusing population ingest it for these effects, rather than its depressant properties. A very recent study stated: "[o]f the known motives for using GHB, 80% reported psychic effects."[12] GHB's popular street names "liquid ecstasy" or "liquid x" illustrate its close tie to MDMA in the abusers' minds and shows the correlation it has with club drug culture. New GHB guidelines should recognize these trafficking patterns and perceived effects.

- Young user profile. GHB is a "club drug" abused primarily by young people (though not quite as young as MDMA). DAWN statistics for 2001 indicate that 58% of drug-related emergency room episodes involved individuals aged 25 and younger.

- Use in combination. GHB is frequently used with other drugs – most often alcohol – which compounds its effect. According to the study cited above, 84% of GHB users reported using it with other drugs, including alcohol (64%), cocaine (15%), or marijuana (14%).

- "Date rape" drug. GHB is now the most prevalent drug used by sexual offenders to commit drug-facilitated sexual assaults.[13] Neither the availability of the alternative charge in 21 U.S.C. § 841(b)(7) in certain cases, nor an enhancement for drug-facilitated sexual assault along the lines being considered by the Commission, would sufficiently account for this uniquely pernicious use of the drug at the trafficking level of mid- and high-level distributors that are generally the targets of federal prosecution.

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[12]Maxwell, J.C.; *Patterns of Club Drug Use in the U.S., 2004*, Gulf Coast Addiction Technology Transfer Center, Univ. of Texas at Austin, February 2004.

[13]One street name for GHB is "easy lay."

- Ease of trafficking and concealment. GHB is easy to manufacture from widely available precursor chemicals, which are sold under the thin disguise of being "cleaning agents," "organic solvents," and the like. A drug this easy to make, and whose precursors are this easy to traffic and conceal, should be given special consideration.

- High profit margin. Like many other synthetic drugs of abuse, the profit margin for GHB is very high. Gallons of the precursors GBL or 1,4-butanediol might sell at wholesale over the Internet for about $200. They may then be broken down and sold in 4-ounce bottles. Later, after simple conversion to GHB and passing down the distribution chain, capfuls or "drops" of 1-5 grams may eventually be sold at retail for between $5 and $30, with $10 being the prevailing rate at rave events. At each stage, the solution may be diluted several times, multiplying the profit margin. Given that the initial gallon costs only $200 (undiluted) and produces about 1,000 doses, the profit margin is astounding.

In addition, more than for any other Schedule I controlled substance, distributors use the Internet to sell GHB and its analogue (and precursors). This permits high-level traffickers to work in much larger quantities than smaller traffickers, making the 10:1 quantity ratio (between the mid-level and high-level sentences) built into the guidelines somewhat inapposite to the context of Internet GHB/GBL trafficking. The guideline enhancements for use of the Internet, which we address below under "Issues for Comment," would have particular relevance for mid- to high-level GHB traffickers.

With respect to GBL as a precursor chemical addressed in §2D1.11, we understand that this guideline tracks the quantities under the drug guideline, with certain fixed quantity "discounts" used by the Commission. Thus, all things being equal, we expect that whichever decision is made with respect to the treatment of GHB in the drug quantity table would also be reflected in the guideline for GBL as a List I chemical. However, we think the Commission should seriously reconsider one element of the "discount" that assumes a 50% conversion ratio of the precursor chemical to the target controlled substance. While this discount may be appropriate (though very conservative) for ephedrine, pseudoephedrine and phenylpropanolamine – with respect to methamphetamine and amphetamine – it is not appropriate for GBL, which converts to GHB (with addition of sodium hydroxide) at a ratio of approximately 1:1. Accordingly, we do not believe this part of the "discount" calculation should apply to GBL.

II. Controlled Substance Analogues and Controlled Substances Not Currently Referenced in the Guidelines.

This proposed amendment explicitly adresses, for the first time, controlled substance analogues in Application Note 5 of §2D1.1. It also provides a mechanism to address controlled substances for which there is no current reference in the guidelines in either the Drug Quantity

Table or the Drug Equivalency Tables at Application Note 10. We support the intent behind this amendment, but it has technical flaws that may serve to confuse the issue. However, these shortcomings can be easily addressed.

One problem with the proposed amendment is that it conflates the two distinct issues of sentencing (1) controlled substance analogues as defined at 21 U.S.C. § 802(32) and (2) actual, scheduled controlled substances for which no guideline exists. We suggest instead the following language (strikeouts indicate deletions, boldface indicates additions to the Commission's proposed text):

Proposed Amendment: Analogues and Drugs Not Listed in §2D1.1

Synopsis of Proposed Amendment: *This proposed amendment provides an application note regarding* ***analogues and*** *controlled substances not currently referenced in §2D1.1. The note directs the court to use,* ***in the case of a controlled substance analogue,*** *the marihuana equivalency of the* ***substance to which it is an analogue, and in the case of other controlled substances not referenced in the guideline, the controlled substance to which it is most closely related,*** ~~*the closest analogue of the controlled substance*~~ *in order to determine the base offense level. The note also refers the court to 21 U.S.C. § 802(32) for a definition of "analogue."*

Proposed Amendment:

§2D1.1. **Unlawful Manufacturing, Importing, Exporting, or Trafficking (Including Possession with Intent to Commit These Offenses); Attempt or Conspiracy**

Commentary

Application Notes:

* * *

5. *Controlled Substance Analogues and Controlled Substances Not Referenced in this Guideline.*—*Any reference to a particular controlled substance in these guidelines includes all salts, isomers,* ~~*and*~~ *all salts of isomers, and, except as otherwise provided, any analogue of that controlled substance. Any reference to cocaine includes ecgonine and coca leaves, except extracts of coca leaves from which cocaine and ecgonine have been removed. For purposes of this guideline, "analogue" has the meaning given "controlled substance analogue" in 21 U.S.C. § 802(32).*

In the case of a controlled substance that is not referenced in either the Drug Quantity Table or the Drug Equivalency Tables of Application Note 10, determine the base offense level using the marihuana equivalency of the most closely related analogue of that controlled substance. See USSG § 2X5.1 and note; see also, United States v. Ono, 918 F.2d 1462, 1466 (9th Cir. 1990). However, the court may, where appropriate, account for the greater or lesser potency of such substance compared to the substance for which there is a specified guideline.

In determining "the most closely related controlled substance" to a controlled substance not identified in the Drug Quantity Table or Drug Equivalency Tables, the court should consider the marijuana equivalency of the substance that is most similar to the unlisted controlled substance in question. Relevant factors could include, for example, the class of the substance (opiates, stimulant, depressant, hallucinogen); relative potency; the structure, pharmacology and effect of the substance; the appearance and representations with respect to the substance; and other harms associated with the drug. Expert testimony may be the best means to ascertain an appropriate equivalency.

Our revised draft provides clearer guidance for the following reasons. First, it treats separately the two problems of sentences for analogues versus sentences for controlled substances that have no guidelines. Analogues would be sentenced like the drugs they mimic (with any adjustments the court may deem appropriate for potency). Controlled substances for which no guideline or equivalency currently exists – including, but not limited to, temporarily scheduled "emerging" drugs of abuse, most of which are synthetic stimulants and/or hallucinogens – would be sentenced like the "most closely related" substance. By using the term "most closely related," we consciously avoid use of the defined term "analogue" in any form, in order to avoid language likely to confuse litigants and sentencing courts. The use of the phrase "analogue" in the context proposed by the Commission creates confusion (and, in fact, legal impossibility), because the Commission's proposal directs the court to use the "closest analogue" of the scheduled controlled substance for which no guideline or equivalency currently exists. The guidelines and equivalency tables in almost all cases set forth equivalencies for scheduled controlled substances, and scheduled controlled substances, by definition, cannot be analogues. See 21 U.S.C. § 802(32)(C)(I) ("Such term [analogue] does not include a controlled substance").

Thus, the Commission's proposal directs the court to compare two scheduled controlled substances and identifies the relationship between the two to be an "analogue" relationship. This is a legal impossibility since a scheduled drug cannot be an analogue. To remedy the problem, we suggest that the Commission substitute the phrase "most closely resembles" for "closest analogue."

Equally important, in some cases of controlled substances for which there is no guideline, there may not be a scheduled drug to which it is an "analogue" as defined in the Controlled Substances Act. In such cases, the court should simply look to the most closely related substance for which a guideline exists. As set forth in our suggested application note, when making such a determination, a court should look, inter alia, to the class of drug, its relative potency, pharmacology and effect, and other pertinent factors. This result is dictated by logic, as well as §2X5.1. However, we think it should be explicitly set out in the drug guidelines.

Second, our draft provides a measure of needed flexibility for courts to account for variance in potency in determining quantity equivalencies for analogues and controlled substances for which no guideline exists. Even controlled substance analogues can be more or less potent than the scheduled substance to which they are similar. For example, in United States v. Ono, 918 F.2d 1462, 1466 (9th Cir. 1990), the district court accounted for the 100 times greater potency of the drug in question (OPP/MPPP is 100 times more potent than MPPP). The Ninth Circuit Court of Appeals reversed that part of the district court decision, holding that the law requires a 1:1 ratio. The language we propose affords an opportunity for courts to "account" for potency upwards or downwards as they deem appropriate, based on evidence including expert testimony.

III. Correction of Technical Error in Drug Quantity Table

This amendment corrects a technical error where no maximum base offense level was explicitly set forth in the current guidelines for Schedule III controlled substances. We fully support this fix, which clarifies any possible confusion with respect to the limit for Level 20 at 40,000 units or more.

IV. Update of Statutory References in §2D1.11

This amendment updates the statutory references to incorporate the changed designation in Sec. 9 of Pub. L. 106-172, the Hillory J. Farias and Samantha Reid Date-Rape Drug Prohibition Act of 2000. It also expands the application of the three-level reduction for cases where "reasonable cause to believe," rather than actual knowledge, is proven. The corrected references are a helpful clarification. The inclusion of references to paragraphs in 21 U.S.C. § 960(d) for three-level reductions for "reasonable cause to believe" is appropriate, given that the mens rea is the same and the statutes at issue are generally analogous.

V. Addition of White Phosphorous and Hypophosphorous Acid.

This amendment adds white phosphorous and hypophosphorous acid to the chemical guideline in the same quantities as red phosphorous. This amendment is entirely appropriate, and addresses an oversight in the last amendment cycle. White phosphorous is directly substituted at a 1:1 ratio for red phosphorous by clandestine methamphetamine "cooks" (one part phosphorous to 1.5 parts iodine). Hypophosphorous acid (in a 50% solution) is used at a ratio of

approximately two-thirds of either red or white phosphorous (one part hypophosphorous acid to one part iodine). Actual quantities vary widely in the field, as most clandestine chemists lack training or theoretical understanding of the chemical reactions. The wide variability of quantities used is such that we think it is fair, and is certainly simpler, to lump all three of these related List I chemicals together at the same quantities for guidelines purposes.

VI. Deletion of Reference to § 957 from Statutory Index

This deletion is appropriate, as 21 U.S.C. § 957 is not a substantive criminal offense but a regulatory (registration) provision; violations are prosecuted under appropriate subsections of § 960.

VII. Issues for Comment

A. Offenses Involving Anhydrous Ammonia

The Methamphetamine Anti-Proliferation Act of 2000 (Pub. L. 106-310) established a federal crime for the theft or unlawful transportation of anhydrous ammonia ("AA") knowing, intending or having reasonable cause to believe it will be used to manufacture a controlled substance. The applicable sentencing guideline, §2D1.12, provides for a base offense level of 12 if the defendant intends, knows, or believes the chemicals will be used to manufacture methamphetamine, and offense level nine if he only has reasonable cause to believe such is the case. In either event, a two-level enhancement is applied if the drug involved is methamphetamine.

Taken as a whole, this guideline is woefully inadequate, and we are pleased that the Commission is seeking comment on a possible revision. By cross-reference to 21 U.S.C. § 843(d), the statutory penalty for offenses involving anhydrous ammonia in § 864 is: (1) generally up to 4 years imprisonment, but (2) up to ten years if it involved the intentional manufacture or intentional facilitation of the manufacture of methamphetamine. The maximum guideline sentence of level 14 (12 + 2) under §2D1.12 yields sentences of under two years – short even of the four year basic sentence, and well under the ten year maximum.

We propose the addition of two alternative specific offense characteristics if the offense involves AA. We would provide (1) a 12-level enhancement for a defendant who violates § 864 with the intent of manufacturing or facilitating the manufacture of methamphetamine – the state of mind required for the ten year maximum sentence to be available under § 843(d)(2) – or (2) a four level enhancement for defendants whose offense conduct otherwise involved AA – including through violations of 21 U.S.C. §§ 864 or 843(a)(6) or (7) – but who can not be shown to have done so with the state of mind set forth in § 843(d)(2). To avoid double-counting under this proposed rubric, the defendant would not receive the two level increase under current

§2D1.12(b)(1) (incorporated into revised and redesignated (b)(3) under the scheme set forth below) if he or she were sentenced under one of the specific AA provisions. The combined effect of our proposal would be to increase guideline sentences from the current level 14 (12 +2) to level 24 (12 + 12) for offenders who steal or transport AA in violation of § 864 with intent to manufacture or facilitate the manufacture of methamphetamine, and otherwise to level 16 (12 + 4) for other offenses covered by the guideline that involve anhydrous ammonia. In addition, in current §2D1.12(b)(2) (as renumbered to (b)(4)), the two level enhancement for specified actions that threaten public health and the environment, could apply to AA cases.

To effect these revisions, we propose for the Commission's consideration that §2D1.12 be revised and renumbered as follows:

§2D1.12(a)(1) & (2):	No change. Level 12 if the defendant intended (or knew or believed substance would be used) to manufacture a controlled substance, and level nine if the defendant had reasonable cause to believe it would be used to manufacture a controlled substance.
§2D1.12(b)(1):	If the defendant stole or transported anhydrous ammonia in violation of 21 U.S.C. § 864 and had the intent to manufacture or to facilitate the manufacture of methamphetamine, increase by 12 levels.
§2D1.12(b)(2):	If the offense involved anhydrous ammonia but §2D1.12(b)(1) does not apply, increase by four levels.
§2D1.12(b)(3):	In circumstances other than those described in §2D1.12(b)(1) or (b)(2), where the defendant (A) intended to manufacture methamphetamine, or (B) knew, believed or had reasonable cause to believe that the prohibited flask, equipment, chemical, product, or material was to be used to manufacture methamphetamine, increase by two levels.
§2D1.12(b)(4)	[Redesignate existing §2D1.12(b)(2) (two level SOC for unlawful discharge or transportation) as (b)(4)]

In addition, although the matter was not placed at issue by the Commission's notice seeking these comments, we believe that a sizeable enhancement under this guideline should not be limited to violations of § 864 involving anhydrous ammonia. It should be available for any

violations subject to the penalty enhancements of § 843(d)(2) – including violations of § 843(a)(6) and (7), if related to methamphetamine manufacture. The referenced provisions make it a crime to possess or distribute substances, materials, or equipment knowing or having reasonable cause to believe they will be used to manufacture a controlled substance. An amended guideline could provide a more appropriate sentence for cases charged under these provisions, which may involve, for example, triple-neck flasks, heating mantels, non-listed chemicals, or listed chemicals. Some prosecutors with expertise in this area have expressed puzzlement and frustration with this guideline. Whereas Congress appears, by its gradation of penalties, to have intended sentences under § 843(d) to occupy a "middle tier" for cases that are more serious than regulatory violations but which lack all the elements to prove a violation of, e.g., 21 U.S.C. § 841(c)(1) or (2), in practice there is no corresponding "middle tier" sentencing guideline corresponding to these violations.

B. Internet Enhancement

The Internet provides a tool of unprecedented power and efficiency for certain drug trafficking activities. It permits virtually instantaneous, widespread, and anonymous communications, and has been used especially to sell GHB analogues such as GBL and 1,4-butanediol, as well as substances promoted as "legal Ecstasy" (MDMA). Moreover, the Internet has been used to promote drug-oriented "raves" and similar events, which frequently target teenagers under the legal drinking age but who ingest "club drugs" at the events. Noting the two level enhancement for use of a computer or the Internet in the course of promoting a commercial sex act or prohibited sexual conduct in §2G1.1(b)(5), we think that a similar adjustment is appropriate for the use of the computer or the Internet to facilitate drug transactions. We would recommend that any enhancement refer to the "mass marketing of illegal drugs, such as through the Internet," rather than mere use of the Internet itself. Relying only upon mere use will make the proposed enhancement apply in some cases involving a small finite conspiracy where a facilitating e-mail substituted for a telephone call. Application of the enhancement in that situation would not, we believe, fulfill the purpose of the adjustment.

C. Drug-facilitated Sexual Assault

The Commission raises an important issue with respect to the appropriate sentence for an offense involving drug facilitated sexual assault in a case where the victim knowingly and voluntarily ingested the drug. The knowing/voluntary drug ingestion renders 21 U.S.C. § 841(b)(7) inapplicable. We believe it would be appropriate to apply the Chapter Three vulnerable victim adjustment, set forth in §3A1.1, in this circumstance, providing a two level increase.

D. Resolving Circuit Split on Application Note 12 of §2D1.1

The Commission, citing a circuit split, asks if Application Note 12 to §2D1.1 should be amended to clarify whether, in a reverse sting situation (government "selling" drugs to the

defendant), the last sentence of the Note should operate to allow a defendant to establish that he did not intend to purchase or was not reasonably capable of purchasing all of the controlled substance(s) that he negotiated to purchase, and to thereby reduce the amount of controlled substances attributed to him for relevant conduct purposes (typically the amount of controlled substances under negotiation).

We believe the Note as currently written is fairly interpreted as excluding from relevant conduct (negotiated amount) the amount of drugs that the defendant did not intend to provide or was not reasonably capable of providing in situations where the defendant was distributing or selling (rather than purchasing) drugs. We support resolving the circuit split by clarifying that the last sentence of Note 12 does not apply to situations involving a defendant's negotiation to purchase drugs. We oppose amending the Note to allow defendants in reverse sting situations to argue that they did not intend to purchase or were not reasonably capable of purchasing the controlled substances for which they negotiated.

Typically in a regular undercover "sting" investigation, where a defendant is providing controlled substances to the government, the government is able to engage in multiple transactions with a defendant in order to obtain all of the controlled substance that the defendant has agreed to provide or to otherwise obtain evidence that the defendant is capable of providing the agreed-upon amount. In a "reverse sting" investigation, as observed in Gomez, 103 F.3d 249, 253 (2d Cir. 1997), the defendant may have negotiated to hold money in reserve pending his testing of a sample of the product or to take the drugs on consignment or on partial credit with a down payment, or he may simply seek to do so at the time of the transaction. This may occur because the defendant suspects law enforcement involvement or harbors some other suspicion about the seller. In any event, the government does not release any controlled substances to the defendant in such situations and typically does not have the opportunity for further fruitful investigation to definitively establish a defendant's intent and capability with respect to the negotiated purchase.

Although some defendants have raised the argument that they only intended to purchase the amount of drugs for which they produced payment at the time of the transaction, explicit allowance of such an argument likely would result in its routine use. Although the argument would be without merit, the burden on the government to rebut it would be undue given the investigation circumstances described above.

MITIGATING ROLE

We continue to believe that the Commission erred in 2002, by creating a maximum base offense level for drug defendants who receive a mitigating role adjustment ("mitigating role

cap"). The Department has supported, and continues to support efforts in Congress to repeal the mitigating role cap.

In 1987, the Sentencing Commission tied the sentencing guidelines for drug trafficking offenses to the quantity of drug associated with the offense. The guidelines call for base offense levels ranging from level six to level 38, based on two level increments determined by the quantity of drugs trafficked by the defendant. The guidelines are tied – correctly we believe – to the applicable mandatory minimum drug trafficking statutes. The amount of controlled substance that triggers a mandatory minimum in a given case corresponds to a particular base offense level. For example, 100 grams of heroin triggers a mandatory minimum sentence of five years and is tied to a base offense level of 26, with a corresponding sentence of 63-78 months for a first offender. Congress, in 21 U.S.C. § 841, specified the quantity thresholds that trigger mandatory minimum sentences. Some observers, have criticized this premise of the sentencing guidelines scheme, arguing that this quantity-based scheme does not adequately address other relevant sentencing factors. We disagree with this criticism.

We continue to believe there is no need for a mitigating role cap. Absent such a cap, federal statutes and the otherwise applicable sentencing guidelines appropriately allow for the consideration of aggravating factors such as the use of a gun or a defendant's criminal history or bodily injury in appropriate cases. Also, these statutes and guidelines – through, for example, the so-called safety valve exception to mandatory minimums, the guidelines' mitigating role adjustment, and guideline departures when a defendant provides substantial assistance in the investigation or prosecution of another person – appropriately allow for the consideration of mitigating factors.

The purpose of the mitigating role cap was supposedly to reduce further the impact of drug quantity on the sentence as a measure of the seriousness of a drug-trafficking crime. We continue to believe that, in most cases, the quantity of a controlled substance involved in a trafficking offense is an important measure of the dangers presented by that offense. Assuming no other aggravating factor in a particular case, the distribution of a larger quantity of a controlled substance results in greater potential for greater societal harm than the distribution of a smaller quantity of the same substance. Further, in establishing mandatory minimum penalties for controlled substance offenses, Congress relied on the type of substance involved. Thus, the most serious drugs of abuse carry the highest statutory penalties, regardless of whether violence or other criminal activity is present in a particular case.

In addition, we strongly believe the "mitigating role cap" provides an excessive windfall to minor role defendants who are involved in large narcotics trafficking transactions. For example, a minor role defendant in a 150-kilogram cocaine transaction will have his offense level reduced from 38 to 28 under the "mitigating role cap," thereby reducing the defendant's guideline range (assuming no criminal history) from 235-293 to 78-97 months incarceration.

Such an extensive sentencing reduction is not appropriate, especially since a minor role defendant in a 3-kilogram cocaine transaction would also end up with an offense level of 28. The minor role defendant in a 150-kilogram transaction should not be placed in the same sentencing position as a minor role defendant in a 3-kilogram transaction.

In sum, we continue believe the mitigating role cap should be repealed.

HOMICIDE AND ASSAULT

I. Homicide Offenses

We commend the Commission both for the amendments passed last year relating to involuntary manslaughter offenses and for agreeing to consider the issue of homicide and assault further this amendment year. As we have stated on several occasions, we believe the guideline penalties for all homicide, other than for first degree murder, are inadequate. While the number of homicides prosecuted in federal court is relatively small because of the limitations of federal jurisdiction, the relevant guidelines are extremely important because of the seriousness of the crimes.

The guidelines for second degree murder and attempted murder are particularly problematic. We believe that a defendant who accepts responsibility for a second degree murder, regardless of criminal history category, should receive a sentence of approximately 15 years imprisonment. We thus think the Commission should increase the base offense level for second degree murder to offense level 38.

First and second degree murder have much in common under federal law. Both are the "unlawful killing of a human being with malice aforethought." 18 U.S.C. § 1111(a). The difference in the two degrees of murder is that the more serious form is accomplished with premeditation or in the perpetration of certain enumerated felonies. However, the presence or absence of premeditation is a jury matter that sometimes turns on fine distinctions; in many cases, the difference turns on the degree of intoxication (which may negate the existence of premeditation). Because both are extremely serious offenses, the relatively low guideline sentence for second degree murder fails adequately to recognize the similarity between the two crimes or the maximum life sentence available for second-degree murder. The inadequate guideline sentence for second degree murder also creates a significant gap with the mandatory life sentence applicable to first degree murder.

For voluntary and involuntary manslaughter offenses, we believe the Commission should increase the base offense levels to create an appropriately tiered system of punishment. Our basic principle is that first degree murder should result in a life a sentence; second degree murder

should result in at least a 15 year sentence; voluntary manslaughter should result in at least a five year sentence; and involuntary manslaughter should result in some imprisonment. Based on this and in light of the statutory maximum penalties set by Congress for these various offenses, we believe the Commission should provide a base offense level of 28 for voluntary manslaughter and a base offense level of 26 for involuntary manslaughter offenses involving the reckless operation of a means of transportation. We also believe, in response to the issues for comment, that enhancements for the use of a weapon and the use of a firearm are appropriate.

II. Attempted Murder

We have previously expressed our concern about how attempted murder is treated under the current guidelines, especially where the attempt, had it been successful, would have caused the death of many people (e.g., a bomb on a plane, ship, subway, in a federal building, etc.). In cases where the attempt may not have been successful because of bad design or interruption by law enforcement or a good Samaritan, the defendant should be sentenced close to the level which would have been applicable had he been successful. Elsewhere in the guidelines, an attempt is typically treated three levels lower than the underlying offense under §2X1.1(b)(1). However, "attempted murder" can be 15 levels lower than the underlying crime, pursuant to §2A2.1. We think this is something that the Commission appropriately is reexamining.

We support a base offense level of 36 for attempted murder, if the object of the offense would have constituted first degree murder. This is seven offense levels below that for first degree murder, and if a defendant accepts responsibility for such a crime, would lead to a sentence of roughly 11 years imprisonment in Criminal History Category I and up to the statutory maximum penalty of 20 years under Criminal History Category VI. For attempts to commit second degree murder, we believe the base offense level should 30, which is eight levels below our recommended base offense level for second degree murder and which would result in sentences of roughly six years to 11 years (depending on criminal history category) for offenders who accept responsibility.

III. Obstructing or Impeding Officers – §2A2.4 – and the Official Victim Enhancement – §3C1.1

Section 1108(e) of the 21st Century Department of Justice Appropriations Authorization Act (the "Act"), Pub. L. 107-273, directed the Commission to review and amend the guidelines to provide an appropriate sentencing enhancement for offenses involving influencing, assaulting, resisting, impeding, retaliating against, or threatening a Federal judge, magistrate judge, or any other official described in section 111 or 115 of title 18. In response, the Commission has proposed increasing the base offense levels for offenses involving obstructing or impeding officers (§2A2.4), providing a specific offense characteristic if injury occurs, and also increasing the enhancement for the "Official Victim" adjustment (§3C1.1) from three levels to six levels.

We fully support these increases. While the increases will only be applicable in a handful of cases every year, we believe they are of particular importance because the crimes involved often attack or retaliate against the authority of the law and those who enforce it. In response to one of the issues for comment, we believe that obstructing or impeding an officer should be treated much more closely to aggravated assault. We do not, though, believe it is justified to differentiate cases based upon distinctions made in §3A1.2(a) and (b). In fact, such an approach would appear to minimize the significance of an assault upon a law enforcement officer or prison guard when done in a manner creating a substantial risk of serious bodily injury as compared to an offense of conviction motivated by the victim's status as a government officer or employee. We do believe there should be an invited upward departure if the assault or threatened assault involved family members of the official victim or if many official victims are placed in peril.[14]

MISCELLANEOUS AMENDMENT PACKAGE

We sincerely appreciate the Commission's ongoing efforts to address minor and technical issues through the annual miscellaneous amendments package. We support the package but have comments on several of the pending miscellaneous amendment proposals.

I. Multiple Victim Rule in Fraud/Theft Cases – Supart B

Subpart B would expand the special multiple victim rule in §2B1.1, Application Note 4(B)(ii), to include privately owned mail boxes. The proposal is sound and we support it, although we think it should go further. The proposal does not clearly apply to theft of material for delivery by private or commercial interstate carriers (i.e., courier services), even though such private carriers often are used in lieu of the United States mail to send or receive correspondence and other material in interstate or international shipments. Other substantive sections of the United States Code cover fraud involving either the United States mail or courier services (see 18 U.S.C. § 1341), as well as theft from the United States mail (18 U.S.C. § 1708) and theft from interstate shipment (18 U.S.C. § 659).

To ensure that the multiple-victim rule extends to both types of delivery, we recommend that the proposal be revised, in pertinent part, to read as follows: ". . . or any other thing used or designed for use in the conveyance of United States mail **or any matter or thing to be sent or delivered by a private or commercial interstate carrier** to multiple addresses, whether such

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[14]The Commission proposes amending Application Note 5 of §3A1.2 to provide that an upward departure may be appropriate if "the official victim is an exceptionally high-level official, such as the President" etc. We believe that rather than limiting this upward departure to those rare situations involving "an exceptionally high-level official," an upward departure may be appropriate in any instance where the assault or threatened assault results in the disruption of a governmental function.

thing is privately owned or owned by the United States Postal Service . . ." (Changes in bold). This revision, which incorporates Option 2 of the Commission proposal, would track the language of 18 U.S.C. § 1341 to ensure coverage of both privately owned mail boxes and privately owned collection boxes, delivery vehicles, and related collection mechanisms for courier service packages.

II. Use of a Minor in Crimes of Violence – Subpart D

Subpart D addresses the new offense, created by the PROTECT Act, of using a minor in a crime of violence, 18 U.S.C. § 25. The new crime provides a maximum penalty of double that of the underlying crime for a first offense and triple for subsequent convictions. Currently, the guidelines provide a two level adjustment for this conduct, §3B1.4. The Commission proposes a new guidelines section, §2X6.1, which would provide an increase of either two, four, or six levels above the offense level for the underlying offense. We believe §2X6.1 should provide at least a three level increase above the offense level for the underlying offense. We believe Congress, in enacting § 25 and the PROTECT Act as a whole, intended greater protections for children. Section 25 provides a dramatic increase in the maximum statutory penalty, and if the Commission provides no additional increase in penalty beyond current law, we think the will of Congress will not have been followed. In response to the issue for comment, we believe §3B1.4 should be amended to provide a similar three level increase.

III. Double Counting in Certain Firearms Cases – Subpart J

The Commission requests comment regarding application of the guidelines in cases in which the defendant (1) is convicted under 18 U.S.C. 922(g) (felon in possession), (2) is an armed career criminal under §4B1.4, and (3) is also convicted under 18 U.S.C. § 924(c) (use of a firearm during a drug trafficking offense or crime of violence). Three options are proposed for addressing this circumstance: (1) leave §4B1.4 in its present form; (2) include an exception in §4B1.4, like that in §2K2.4, that provides that the guideline sentence is the term of imprisonment required by statute; or (3) include the exception, but also add a note that suggests an upward departure when the application of the exception may result in a guideline range that produces a total maximum penalty that is less than the range that would have resulted from applying the enhanced offense level and criminal history category.

We believe an exception is generally not warranted here, because the circumstances are unlike those, described in the issue for comment, where the defendant is simply convicted of a violation of only 18 U.S.C. § 924(c). In that latter situation, with the exception, the defendant still receives an enhanced penalty – pursuant to § 924(c) – for the aggravated circumstance of using the gun in a crime of violence or controlled substance offense. In the case being contemplated here, the defendant has acted illegally and been convicted both of possessing the gun as a felon with a serious criminal background and in addition of using the gun in the commission of a crime of violence or controlled substance offense. We think a penalty over and above that provided by § 924(c) is warranted in light of the defendant's felon status.

MANPADS AND OTHER DESTRUCTIVE DEVICES

I. MANPADS, Destructive Devices, and Chapter Two, Part K

Portable rockets and missiles are a category of destructive device that pose a particular risk to the public due to their range, accuracy, portability, and destructive power. Included within this category of devices are MANPADS (man-portable air defense systems) and similar weapons that have been used by terrorists; for example, in the 2002 attack in Kenya on an Israeli aircraft (using a shoulder-fired missile). They have the ability to inflict death or injury on large numbers of persons if fired at a building, aircraft, train, or similar target. Even if death or injury does not result from such an attack, there may be significant economic consequences and adverse effects on public confidence in the transportation or other industries. For example, if a MANPAD were fired at a commercial aircraft, but no casualties resulted, the news alone that an attempted attack had occurred would likely severely harm the airline industry and create a potential domino effect on industries involved in other forms of transportation.

MANPADS and similar weapons are currently highly regulated under the National Firearms Act ("NFA"), 26 U.S.C. Chapter 53, and the Gun Control Act of 1968 ("GCA"), 18 U.S.C. Chapter 44. Under the NFA, such weapons are classified as "destructive devices." See 26 U.S.C. § 5845(f). Currently, the sentencing guidelines provide for a two level increase to the base offense level applicable to unlawful possession and certain other offenses involving NFA weapons, if the offense involves a destructive device. However, the sentencing guidelines do not provide for an increase specifically addressing MANPADS and similar weapons. See §2K2.1. As a result, an offender who unlawfully possesses a MANPAD could face a guideline offense level of 20, which requires only 33-41 months of imprisonment if the defendant is in Criminal History Category I.

We believe individuals who are convicted of possessing MANPADS and similar weapons should be treated much more severely than the current sentencing guidelines allow. Therefore, we support an increase to a 15-level enhancement for the unlawful possession of portable rockets or missiles or devices for use in launching a portable rocket or missile in the proposed new §2K2.2(b)(3)(A).[15]

The unlawful possession of other destructive devices also poses a danger to public safety that warrants more severe punishment than that under the current sentencing guidelines. In the case of all destructive devices other than portable rockets or missiles, we support the highest

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[15]We note that our original proposal limited the MANPADS increase to portable rockets or portable missiles. We continue to recommend that the proposed amendment be changed to apply the portability criterion to rockets and missiles.

appropriate increase in the proposed new §2K2.2(b)(3)(B) and believe that it should be a six to nine level enhancement. We also believe that there should be no limitation on the cumulative offense level in §2K2.1 to prevent an inappropriately low offense level from becoming the ceiling in a particular case.

II. Issues for Comment

The Commission requests comment regarding whether 18 U.S.C. § 1993(a)(8), relating to attempts, threats, or conspiracies, to commit any of the substantive terrorist offenses in 18 U.S.C. § 1993(a), should be referenced in Appendix A (Statutory Index) to §2A5.2 (Interference with Flight Crew Member or Flight Attendant; Interference with Dispatch, Operation, or Maintenance of Mass Transportation Vehicle or Ferry) rather than, or in addition to, §2A6.1 (Threatening or Harassing Communications). Similarly, the Commission requests comment regarding whether any or all of the substantive criminal provisions of 18 U.S.C. § 32 should be referenced only to §2A5.2. We agree that there should be cross references, which would allow for the most applicable sentencing guideline to be chosen for a particular case. For the same reason, we do not believe that § 32 offenses should only be referenced to §2A5.2. There are numerous subsections in section 32 and the most appropriate guideline should be available to the court.

The Commission also requests comment regarding whether there should be a cross reference to §2A5.2 or §2M6.1 in any guideline to which offenses under 18 U.S.C. §§ 32, 1993, and 2332a are referenced, if the offense involved interference or attempted interference with a flight crew, interference or attempted interference with the dispatch, operation, or maintenance of a mass transportation system (including a ferry), or the use or attempted use of weapons of mass destruction. We think there should be such cross references for the reasons stated above.[16]

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[16]The Commission also seeks comment on whether the "destructive device" definition at Application Note 4 of §2K2.1(Unlawful Receipt, Possession, or Transportation of Firearms or Ammunition; Prohibited Transactions Involving Firearms or Ammunition) should be amended. According to the issue for comment, practitioners have commented that it is unclear whether certain types of firearms qualify as "destructive devices". We do not believe the definition is unclear and therefore do not think an amendment is necessary.

ABERRANT BEHAVIOR

I. We Continue To Believe That Aberrant Behavior Should Be Eliminated as a Ground for Departure Altogether

As we have stated on a number of previous occasions, we believe aberrant behavior (§5K2.20 (Policy Statement)) should be eliminated as a ground for downward departure. We continue to believe that sentences under Criminal History Category I are properly gauged to first time offenders and that aberrant behavior as a departure ground is prone to inconsistent application and abuse, since "aberrant" behavior presupposes little more that an otherwise law-abiding life. See, e.g., United States v. Brenda Working, 287 F.3d 801 (9th Cir. 2002) (reversing, for a second time, a departure from sentencing range of 87-108 months to a one day sentence for a defendant/wife who pleaded guilty to assault with intent to commit first degree murder after luring her husband to a remote location and shooting him in the back; the case was reassigned to a different judge for resentencing on the second remand). Although the aberrant behavior policy statement was amended effective November 1, 2000, to preclude such departures in cases involving, among other things, a firearm or serious bodily injury, the fact that the amendment was even needed illustrates the potential for inconsistency and mischief inherent in such departures.

Section 5K2.20 allows for a departure "in an exceptional case" if the defendant's criminal conduct constituted aberrant behavior. The court may depart only if "the defendant committed a single criminal occurrence or single criminal transaction that (1) was committed without significant planning; (2) was of limited duration; and (3) represents a marked deviation by the defendant from an otherwise law-abiding life." §5K2.20(b).[17] Only first offenders will qualify for an aberrant behavior departure – defendants with no significant prior criminal behavior. We believe the guideline definition invites this argument for nearly every first offender. Every first offender has no criminal history points and no significant prior criminal activity. Each presumably has led an "otherwise law-abiding life" or at least the documented record would suggest an otherwise law-abiding life. Yet at the same time, the Commission has clearly signaled that first-time offenders are not automatically eligible for an aberrant behavior departure. For example, the Commission has explicitly taken the absence of a prior criminal history into account in setting the guideline ranges for Criminal History Category I offenders, and has prohibited departures below the lower limit of the applicable guideline range for Criminal History Category I. §4A1.3(b)(2)(A). Section 5K2.20 seems to be inconsistent with that prohibition.

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[17]The PROTECT Act categorically prohibits aberrant behavior departures for certain offenses listed in §5K2.20(a).

In addition, in determining whether to depart based upon a claim of aberrant behavior, §5K2.20 encourages courts to consider a number of circumstances, many of which are not ordinarily relevant in determining whether to depart. Application Note 3 encourages sentencing courts to consider the defendant's "(A) mental and emotional conditions; (B) employment record; (C) record of prior good works; (D) motivation for committing the offense; and (E) efforts to mitigate the effects of the offense." Elsewhere in the guidelines, a defendant's mental or emotional condition and his employment record are "not ordinarily relevant" in determining whether a sentence should be outside the applicable guideline range. §5H1.3 and §5H1.5. Similarly, "prior good works" are not ordinarily relevant. §5H1.11. The defendant's motivation for committing the offense may already be considered in setting his offense level, and would therefore not be a proper basis for departure. See, e.g. §2L1.1(b)(1) and §2L2.1(b)(1) (each providing for a three level decrease if the offense was committed other than for profit); §2K2.1(b)(2) (providing for a reduced offense level if the defendant possessed firearms or ammunition solely for lawful sporting purposes or collection, and did not unlawfully discharge or use them). And efforts to mitigate the effects of the offense are taken into account under §3E1.1 (Acceptance of Responsibility). We believe §5K2.20 is simply ill conceived because it encourages courts to consider discouraged factors or factors already taken into account elsewhere in the guidelines.[18]

II. Aberrant Behavior Should Not Be Integrated Into the Defendant's Criminal History Score under §4A1.1

We strongly oppose integration of aberrant behavior into the criminal history calculation. As we note above, the guidelines already account for first offenders through Criminal History Category I, the lowest available criminal history category. Incorporating aberrant behavior into the criminal history calculus will simply exacerbate what we believe is the existing problem under §5K2.20. In our view, to give a first offender more lenient treatment than that already allowed by a Criminal History Category I, may run afoul of 18 U.S.C. 3553(a)'s requirement that a sentence "reflect the seriousness of the offense," "promote respect for the law," "afford adequate deterrence to criminal conduct," and "protect the public from further crimes of the defendant." Further, we think the impact of incorporating aberrant behavior into criminal history could have a substantial, and potentially devastating, impact on a variety of crime types and enforcement programs, including civil rights, tax, fraud and other white collar, and environmental crimes.

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[18]Another example of the logical inconsistency of this provision is that many of those who may qualify for an aberrant behavior departure – educated people with good employment histories and solid backgrounds – may actually be the least appropriate for such a departure. It is for this reason that socio-economic status is a prohibited ground for departure under §5H1.10.

If the Commission chooses to maintain the aberrant departure provision, we think it should be limited even further than it is today. Rather than disqualifying only offenses involving serious bodily injury or death, or cases in which the defendant discharged a firearm or otherwise used a firearm or other dangerous weapon (which does not include, for example, unarmed bank robberies, unarmed rapes not resulting in serious injury, and many assaults), §5K2.20(c) should categorically preclude any offense constituting a crime of violence as defined in §4B1.2. Further, if the sentencing court finds that the defendant meets all of the requirements for a departure based on aberrant behavior and that such a departure is appropriate, the extent of the departure should be limited to no more than one or two offense levels, much the same as departure under §4A1.3(b)(3)(A) for career offenders is limited to one criminal history category.

HAZARDOUS MATERIALS

As you know, the transportation of hazardous materials poses significant and wide ranging risks to the public. We think the Commission's effort to ensure appropriate sentencing policy for those who violate the law surrounding the transportation of hazardous materials is a significant step toward the goal of reducing those risks, and we appreciate the Commission efforts to address this issue.

I. New Guideline for Hazardous Materials Offenses

As we stated in our August 1, 2003, letter to the Commission, the guideline currently covering hazmat transportation crimes, §2Q1.2, was written chiefly for hazardous waste crimes, not hazardous materials violations. Because the specific offense characteristics of §2Q1.2 are designed for hazardous waste crimes, their application in hazmat cases will often yield sentences that are inadequate in terms of both punishment and deterrence. Adoption of a new sentencing guideline for hazmat crimes therefore is a Department priority. We believe a new guideline would focus upon those characteristics that are critical to hazmat transportation crimes, and with such a focus, would be relatively easy for courts and probation offices to apply. We also believe a separate guideline would yield sentences that are appropriate for hazmat violations.

Dealing with hazmat crimes by amending existing §2Q1.2 likely would have two significant negative effects. First, the addition of specific offense characteristics for hazmat transportation violations to a guideline that is designed for pollution crimes could create confusion for sentencing courts. For example, existing §2Q1.2(b)(1)(A) provides an enhancement for repetitive crimes, but only if releases occur. This approach fits the context of pollution crimes that commonly involve repetitive releases of hazardous or toxic substances. However, it is a poor fit for hazmat transportation crimes. For those crimes, both releases and repetitiveness are appropriate specific offense characteristics, but by the nature of the offenses, both do not necessarily occur together. Therefore, application of the §2Q1.2(b)(1)(A) formula to hazmat crimes would ignore any repetitiveness that did not include releases. Amending §2Q1.2

by adding to it provisions to take account of hazmat transportation repetitiveness and releases would cause uncertainty as to when those provisions should be applied versus when existing subsection (b)(1)(A) should be used. Second, amending §2Q1.2 could invite the reopening of issues that courts already have resolved in litigation involving that guideline. The adoption of a new and entirely separate hazmat guideline would allow hazmat crimes to be specifically addressed in a manner that would not involve revisiting well-settled §2Q1.2 issues.

II. Key Elements of a Hazmat Guideline

The hazmat guideline should cover violations of 49 U.S.C. §§ 5124, 46312, and possibly all or part of § 60123. In order to avoid any confusion over what constitutes a "hazardous material," that term should be defined in a new guideline by specific reference to the appropriate regulatory provision, 49 CFR § 105.5. In application notes, both "release" and "environment" should be specifically defined for purposes of hazardous materials transportation crimes. Appropriate definitions for those terms are as follows:

> "Environment" includes all surface waters, ground waters, drinking water supplies, land surfaces, subsurface strata, or air. The term is not limited to those parts of the environment that are within or subject to the jurisdiction of the United States.

> "Release" includes any spilling, leaking, pumping, pouring, emitting, emptying, discharging, injecting, escaping, leaching, dumping, burning, or disposing into the environment or within or from any building, structure, facility, package, container, motor vehicle, rolling stock or equipment, rail car, aircraft, pipeline, or vessel. It also includes the abandonment or discarding of containers or other closed receptacles containing hazardous materials. A "release" is not restricted to locations within or subject to the jurisdiction of the United States. For example, a violation occurring within United States jurisdiction may result in a release on or from a vessel in the mid-Pacific or a train that has crossed into Canada. As long as a release results from a violation occurring within the jurisdiction of the United States, it is a "release" for purposes of this section.

The "environment" definition is adapted from the Comprehensive Environmental Response, Compensation, and Liability Act, 42 U.S.C. § 9601(8)(B). The proposed definition of "release" is adapted from the Comprehensive Environmental Response, Compensation, and Liability Act, 42 U.S.C. § 9601(22), and the Emergency Planning and Community Right-to-Know Act, 42 U.S.C. § 11049(8). Since both statutes deal with releases of dangerous materials into the environment, they are logical sources for definitions of "release" and "environment." The additional language in the latter portions of both definitions makes clear that they do not apply only within the jurisdiction of the United States. As long as the crime itself is committed within the jurisdiction of the United States, a sentencing court should be able to take into account a release into the environment wherever it may occur.

III. Base Offense Level and Aggravating and Mitigating Factors

Given the inherent danger posed by the transportation of hazardous materials, the appropriate base offense level is eight, as it is for dangerous pollutants under §2Q1.2. We believe many of the aggravating factors outlined by the Commission in the issue for comment merit some treatment within the guidelines and we address each of these in turn.

- Passenger-carrying modes of transportation. The unlawful transportation of hazardous material on any passenger-carrying mode of transportation potentially involves large numbers of victims with limited escape possibilities. An even higher offense level, we believe, should attach to hazmat crimes involving passenger-carrying aircraft, because successful escape from an aircraft is even less likely than it is from other modes of transportation.

- Concealment. Concealment, by whatever means, is a particularly insidious characteristic of some hazardous material transportation crimes and, therefore, merits an enhancement. First responders, innocent cargo handlers, and the public at-large are especially vulnerable to harm when they are not even aware of the presence of hidden hazmat.

- Release, damage to the environment, critical infrastructure, and emergency response. The release of a hazardous material, the disruption of, or damage to, critical infrastructure, the release of a hazardous material resulting in damage to the environment, or to public or private property, and required emergency response and/or evacuation of a community or part thereof are all factors that, if present with respect to a particular hazmat crime, reflect harm or a threat of harm to the public.

- Repetitiveness. A hazmat crime arising from a terrorist act likely would be a one time violation. However, conventional hazmat crimes are prone to repetitiveness. The person who reduces shipping costs by failing to identify materials as hazardous, for example, is likely to do so as often as he thinks he can get away with it. With each repetition of such a crime there is another chance that the risk of harm will materialize into reality; hence it also is a characteristic meriting an enhancement.

- Serious bodily injury or death. The risk of death or serious bodily injury or their actual occurrence are the most serious harms that the hazmat laws are intended to prevent. Therefore, they should be treated as specific offense characteristics with significant offense level additions. We recommend the following provision:

If the offense resulted in (A) a substantial likelihood of death or serious bodily injury, increase by eight levels; (B) actual serious bodily injury, increase by 12 levels; or (C) death, increase by 16 levels.

The (A) portion of this provision would be consistent with §2Q1.2(b)(2), which adds 9 levels for a substantial likelihood of death or serious bodily injury. However, subsection (b)(2) deals only with the likelihood, not with the actual harms (except through departures). In (B) and (C) above, the recommended language would add four levels for actual serious bodily injury and four more levels for death (to which an application note should add an upward departure option for multiple victims).

Increasing the offense levels for actual serious bodily injury or for death would provide greater certainty of sentencing and would be consistent with a number of other guidelines. Among those that include increases for injury are the following:

§2A2.2(b)(3)(B)	Aggravated Assault
§2B3.1(b)(3)(B)	Robbery
§2B3.2(b)(4)(B)	Extortion by Force, etc.
§2E2.1(b)(2)(B)	Extortionate Extension of Credit, etc.
§2L1.1(b)(6)(2)	Alien Smuggling

While death is not as commonly dealt with by specific offense characteristics, there are precedents for doing so. For death under the air piracy guideline, §2A5.2(b)(1), five levels are added. The same is true for §2D2.3 (operating a common carrier under the influence), although the five levels are added by an alternative base offense level rather than a specific offense characteristic, a distinction without a difference. (Note that §2D2.3 also adds eight levels for serious bodily injury, again through an alternative base offense level.) Under §2M6.1(b)(2), four levels are added for death.

Express additions of levels for death or serious bodily injury would avoid heavy reliance upon departures and they would step beyond §2Q1.2's focus only upon risk to address the actual harm to people that occurs when risk turns to reality.

- Particular types of hazardous materials. We believe the inclusion of a specific offense characteristic for particular types of hazardous materials should be avoided. The problems with such an approach lie with both the wide variety of materials and the fact that their potential effects can vary widely with circumstances. Explosive materials provide a good illustration. They vary so much in their power that the Department of

Transportation has placed them in six different labeling categories, all of which might not merit tougher treatment than, for example, inhalation poisons. See 49 C.F.R. § 172.400. Rather than trying to choose among the lethal qualitites of so wide an array of substances, those qualities may better be part of the assessment of the risk involved in a violation.

- A terrorist motive. A hazmat crime that involves a terrorist motive should be treated by a cross-reference with a provision such as the one below:

  If the offense was committed with intent (A) to injure the United States or (B) to aid a foreign nation or a terrorist organization, apply §2M6.1.

- Proper training. Training violations are among a number of offenses that can increase the risk of a hazardous material being released into the environment. Other examples include packaging or packing violations. Rather than having separate specific offense characteristics for each of these types of offenses, they could all be addressed in a single "risk-based" specific offense characteristic. This specific offense characteristic could be made part of a multi-part guideline provision, such as the example below, that addresses releases of hazardous materials in a descending scale from those that cause damage through releases for which damage is not established to risk of release.

  (A) If the offense resulted in the release of a hazardous material and damage to the environment or to property or harm to any (i) marine mammals that are listed as depleted under the Marine Mammal Protection Act (as set forth in 50 C.F.R. § 216.15); (ii) fish, wildlife, or plants that are listed as endangered or threatened by the Endangered Species Act (as set forth in 50 C.F.R. Part 17); or (iii) fish, wildlife, or plants that are listed in Appendices I or II to the Convention on International Trade in Endangered Species of Wild Fauna or Flora (as set forth in 50 C.F.R. Part 23), increase by four levels; or

  (B) If the offense otherwise resulted in the release of a hazardous material, increase by three levels; or

  (C) If the offense resulted in the risk of release of a hazardous material, increase by two levels.

A risk-based specific offense characteristic as in subsection (C) should be accompanied by an application note explaining some of the types of behavior to which it would apply. Below is language that could be incorporated into such an application note:

> If the offense resulted in a risk of a hazardous material being released, then two offense levels are added under Subsection (C). This subsection is intended to apply to violations including, but not limited to, inadequate packaging, packing, or training. Packaging or packing violations increase the likelihood of hazardous material releases even if all other requirements are met. Failure to properly train people working with hazardous material transportation increases the likelihood that those people will mishandle hazardous materials and that those materials will be released.

- The procurement of a license through fraudulent means. Fraudulently obtained commercial drivers' licenses with hazmat endorsements could allow persons to transport hazmat with the intent to use it to commit other crimes. For example, a person with a fraudulent license could drive a tanker filled with anhydrous ammonia to a point where he could release it into subway vents, causing widespread death. In order to reduce the traffic in fraudulent licenses, this behavior should be subject to an enhancement.

IV. Interaction With Chapter Eight of the Guidelines

If a new guideline is adopted for hazardous material transportation crimes, it should relate to Chapter Eight in the same manner as other Part 2Q crimes. We believe, therefore, there is no need for additional compliance requirement factors.

There is, however, a compliance-related change to Chapter Eight that would be useful for hazmat and other similar regulatory crimes: the expansion of §8D1.4(c)(4), concerning a recommended condition of probation, to allow regular or unannounced physical inspections of property in order to determine whether an organization is in compliance with terms of probation. Currently that provision allows for only inspection of books and records and interrogation of knowledgeable individuals. While that provision may be adequate for conventional financial crimes that are reflected in records, it does not deal effectively with crimes that involve physical objects or facilities. For example, an inspection of books and records will not reveal that a convicted violator has continued to conceal hazmat in shipments of otherwise benign cargo. In other regulated areas neither will such an inspection of books and records alone uncover the critical facts, such as a convicted hazardous waste generator's disposal of waste by dumping it on the ground.

V. Cross References

Because a hazmat violation could well involve an act designed to kill people, perhaps for purposes involving the security of the United States, a hazmat transportation guideline should be cross-referenced to the homicide and terrorist guidelines. We recommend that a provision such as the one below be included in the guideline:

(1) If the offense resulted in death, apply §2A1.1 (First Degree Murder) if the death was caused intentionally or knowingly or, otherwise, apply §2A1.2 (Second Degree Murder), if the resulting offense level would be greater than that determined above.

(2) If the offense was tantamount to attempted murder, apply §2A2.1 (Assault with Intent to Commit Murder; Attempted Murder), if the resulting offense level would be greater than that determined above.

(3) If the offense was committed with intent (A) to injure the United States or (B) to aid a foreign nation or a terrorist organization, apply §2M6.1.

For examples of other guidelines containing provisions similar to (1) and (2), see §2N1.1(c)(1) and (2) covering tampering with consumer products and §2Q1.4(c)(1) and (2) relating to Safe Drinking Water Act offenses.

VI. Civil Penalties

Prior similar misconduct that has been the subject of a civil or administrative action, we believe, could be treated as a basis for an upward departure, as it is in Application Note 9 to §2Q1.2.

VII. Multiple Counts

The grouping rules of Part 3D should apply to hazmat crimes just as they would to any other federal crimes. (Note, though, that §§2Q1.1-2Q1.6 are neither specifically included in nor specifically excluded from operation of the grouping rule at §3D1.2(d).) For example, if a transporter hauled a hazardous waste (which also would be a hazardous material; see 49 C.F.R. § 171.8) to an unpermitted disposal site in violation of 42 U.S.C. § 6928(d)(1) and also failed to appropriately placard the load in violation of 49 U.S.C. § 5124(b), those two violations might be grouped for sentencing purposes. See §3D1.2, Application Note 6, Example (7). On the other hand, for pollution and hazmat crimes that are not closely associated, grouping would not be appropriate. As with other multiple crimes by the same defendant, the circumstances of the

various crimes must be analyzed in order to determine whether they would belong in a common group or in separate groups.

While generally we believe that the grouping rules should apply to a hazmat crime as they would to any other Part 2Q guideline, for crimes that involve substantial threats to more than one victim, it may be appropriate to include a provision that tracks §2Q1.4(d):

(d) Special Instruction

(1) If the defendant is convicted of a single count involving (A) the death or permanent, life-threatening, or serious bodily injury of more than one victim; or (B) conduct tantamount to the attempted murder of more than one victim, Chapter Three, Part D (Multiple Counts) shall be applied as if the defendant had been convicted of a separate count for each such victim.

IMMIGRATION

I. Alien Smuggling

We agree with the underlying premise of the proposal – i.e., that those who illegally smuggle people into the country should be punished differently depending upon the alien's purpose. However, we believe it should go further if it is to have effect.

A. Entering the United States to Engage in Certain Activity

The proposed new specific offense characteristic would require that the defendant have "knowledge" of the alien's intended unlawful activity within the United States at the time the defendant assisted the alien to illegally enter the country. However, a defendant who "smuggled, transported, or harbored" an alien knowing that the alien intended to engage in terrorist activity could also be charged as a co-conspirator in the underlying terrorist activity and thus already would be subject to a substantial sentence. Significantly, this proposal does not address the more typical situation of smugglers who assist "all comers" and who are often deliberately ignorant of the identity or motive of the person entering the country illegally.

We believe this proposal is far too restrictive. Aliens who are inadmissable pose a serious threat to the security of the United States. The guidelines and laws already address individuals, who with direct knowledge, facilitate those entering illegally to commit acts of terrorism and other specific crimes. What the guidelines do not adequately address are the smugglers who are used by terrorists and others to gain entry, but do so without fully revealing to the smugglers their real identity or intent. The smugglers who enable terrorists to illegally enter

this country undetected should not be able to escape increased liability simply because they did not "know" what specific illegal act the alien intended to commit.

As such, we recommend that the guidelines impose a strict liability standard rather than imposing a knowledge requirement. We believe that once a defendant has been convicted of the underlying smuggling offense, the offense level should be increased under a new specific offense characteristic that would take into account the reason the alien was coming into the country (to engage in terrorist activity, in a crime of violence or controlled substance offense) or why they were barred from entry pursuant to 8 U.S.C. § 1182(a)(2) or (3). This could be accomplished by changing proposed specific offense characteristic §2L1.1(b)(4) to read:

"(4) If the defendant smuggled, transported, or harbored an alien, who -

(A) entered the United States

A. to engage in a crime of violence or controlled substance offense, increase by:

i) two levels, if only one such alien was smuggled, transported or harbored;

ii) four levels, if two-five such aliens were smuggled, transported or harbored; and

iii) six levels, if six or more such if aliens were smuggled, transported or harbored.

B. to engage in terrorist activity, increase by [12] levels, but if the resulting offense is less than [32], increase to level [32].

(2) was inadmissable as defined in 8 U.S.C. §1182(a)(2) or (3) increase

i) two levels, if only one such alien was smuggled, transported or harbored;

ii) four levels, if two-five such aliens were smuggled, transported or harbored; and

iii) six levels, if six or more such if aliens were smuggled, transported or harbored."

This alternative is similar to the criteria used in §2K2.1 (Unlawful Receipt, Possession, or Transportation of Firearms). An individual found guilty of illegally possessing a firearm faces a base offense level of 12. However, if the weapon is one that is particularly dangerous – as described in 26 U.S.C. § 5845(a) or 18 U.S.C. § 921(a)(30) – then the offense level is increased six levels to a level 18. It is not necessary that the defendant have knowledge of the restricted nature of the weapon. See, e.g., United States v. Fry, 51 F.3d 543 (5th Cir 1995).

This proposal would also increase the enhancement commensurate with the number of dangerous aliens smuggled, in a manner similar to that used in §2L1.1(b)(2). A person who smuggles six aliens barred from entry because they were designated terrorists should receive a substantially higher increase than just the three levels under current §2L1.1(b)(2)(A).

B. Offenses Involving Death

The published proposal suggests three changes that would impact the treatment of deaths resulting from alien smuggling. The first removes the specific offense characteristic subcategory from its present grouping with other injuries and creates a new specific category and suggests, in the alternative, increases of eight (current), 10, or 12 levels. The second proposed change expands a related cross-reference to include deaths involving manslaughter and not just murder,[19] while the third proposed amendment would also address incidents of multiple deaths.

We support the three amendments. The first change, separating the death enhancement from the other injuries and providing a minimum offense level of 25, will have an impact on those cases where the death results from negligence rather than just intentional or reckless conduct. Under the proposed §2L1.1(b)(8), alien smuggling resulting in a death due to negligence would result in an offense level of at least 25 (57-71 months under Criminal History Category I) while under exiting guidelines it would most likely result in a level 20 (33-41 months). We support increasing the minimum offense level for these cases to any of the

[19]A similar provision exists at §2K1.3(c)(1)(B); §2K2.1(c)(1)(B); §2K2.5(c)(1)(B); §2M5.3(c)(1); §2M6.1(c)(1); §2Q1.4(c)(1)

alternative minimum levels between 25 to 30, but would suggest that they should be commensurate to other guidelines where underlying criminal conduct results in death.[20]

We also support the amendment to treat multiple deaths occurring in a single incident as if the case involved multiple counts. It would bring §2L1.1 in conformity with other similar guideline provisions such as §§2D2.3(b)(1), 2G2.1(c)(1), 2M6.1(d)(1), 2N1.1(d)(1) and 2Q1.4(d)(1). In recent years, we have seen a number of alien smuggling cases involving multiple deaths. This provision would, we believe, result in an appropriate increase in the sentence imposed.

C. Number of Illegal Aliens

We support the Commission's proposal to expand the specific offense characteristic that increases the offense levels depending upon the number of unlawful aliens smuggled, transported, or harbored, adding groupings of "200 to 299", and of "300 or more" with a corresponding increase in levels of either 11 or 12, for the first set and either 13,15 or 18 for the second.

We believe increases in offense levels of 12 and 15 for the two new groups would be an appropriate extension of the enhancements already assigned to the lower levels. This would result in increases of three, six, nine, 12, and 15 levels for the entire specific offense characteristic. It would provide a six level enhancement for the first 99 aliens smuggled and then three level increases for each additional 100 illegal aliens. Sentencing courts would still be able to depart upward in those cases involving substantially more than 300 aliens, pursuant to Application Note 4.

II. Document Fraud

People entering into this country using false documents are a serious national security threat. The recent hearings of the National Commission on Terrorists Attacks Upon the United States ("the 9-11 Commission") revealed that many of the terrorists involved in the airline highjackings of September 11th entered the country using fraudulent passports and/or made false statements to gain entry.[21] Although we recognize that most who enter the country illegally are not terrorists, ensuring the security of our borders is critical to protecting the safety of all Americans, and maintaining the integrity of U.S. passports and other immigration documents is absolutely necessary to securing the borders. We strongly support the proposed amendments

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[20]See for example, §2D2.3(a)(1) (base offense level 26, if death resulted from operating or directing the operation of a common carrier under the influence of alcohol or drugs).

[21]*Entry of the 9/11 Highjackers in the United States*, Staff Statement No. 1, January 26, 2004, http://www.9-11commission.gov/hearings/hearing7/staff_statement_1.pdf.

here (with some suggested revisions, see infra), which would increase penalties for fraudulently acquiring or misusing a passport or other immigration documents and strike the right balance of just punishment for all offenses.

We especially support the proposed increases for fraud related to the acquisition and use of U.S. passports. The U.S. passport is the most respected travel document in the world and is the most widely accepted and versatile identity document. Whereas visas allow a person to enter the United States, holders of U.S. passports are granted all of the privileges of U.S. citizens both in the United States and throughout the world. A U.S. passport is the "gold standard" of all passports and identity documents and is used not only as a travel document but also to open bank and credit card accounts, obtain a driver's license, obtain government benefits, cash checks, and obtain a host of other privileges of U.S. citizenship. The proposed amendment properly recognizes the unique nature of U.S. passports with significant penalties when a defendant fraudulently obtains or uses such a document. As a whole, we think the proposed amendments are critical to the nation's homeland security efforts, and we thank the Commission for considering them now.

A. Base Offense Level

We support the proposed revision of the base offense level under §2L2.2. Stricter penalties for document fraud offenses are needed to help stem the growing number of instances in which such fraud is used as a means to enter the country or obtain purported United States citizenship. We also believe an increase is necessary simply to bring the guideline into parity with §2B1.1, which provides enhanced penalties for "the unauthorized transfer or use of any means of identification to produce or obtain any other means of identification." See §2B1.1(b)((9)(C)(i). In any monetary crime, e.g., a credit card fraud involving a small dollar loss, a two level increase applies if the case involved the unauthorized use of a social security number or other means of identification to obtain the credit card with a minimum offense level of 12. Although the same circumstance arises in nearly all passport or document fraud cases, where an applicant unlawfully submits a false or stolen name, birth certificate and/or social security number in support of a passport application, these crimes yield a base offense level of eight under

§2L2.2.[22] We strongly urge the Commission to provide a base offense level of 12 for these offenses.

B. Specific Offense Characteristics

The proposed amendment also includes two new specific offense characteristics: when the defendant is a fugitive and when the case involves a U.S. Passport. We support these proposed enhancements. As for fugitive status, we recommend that the enhancement be accompanied by an explanatory note about the type of evidence necessary to prove the fugitive status. Obtaining complete foreign court records to prove that a defendant is a fugitive in a foreign country can be very difficult. It might involve the Mutual Legal Assistance Treaty process, which usually takes many months, and may depend upon the cooperativeness of the foreign responding authority. We believe an explanatory note in the guideline stating that prima facie proof is sufficient if a foreign government has notified the United States of the defendant's foreign fugitive status or if the defendant's foreign fugitive status has been entered in an international organization's data base (such as Interpol) would be helpful. In addition, we believe the enhancement should not apply to defendants who are being prosecuted for offenses that would not be recognized as criminal in the United States, either because of First Amendment or other civil rights concerns, to avoid the appearance of the United States' complicity in another country's political persecution.

The second enhancement would apply in any case where "the defendant fraudulently obtained or used a United States passport". We think the proposed enhancement properly distinguishes cases involving U.S. passports from cases involving visa fraud or foreign passports and visas. As we mention above, the U.S. passport is the most respected travel document in the world, and its integrity must be maintained. Whereas visas only allow a person to enter the United States, holders of U.S. passports are granted the privileges of U.S. citizens both in the United States and around the world. The enhancement also recognizes that non-citizens who

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[22]The guideline in its current form also frustrates efforts to seek detention at bail hearings in passport fraud cases. Despite the fact that these cases often present compelling flight risk indicators, many U.S. Magistrate Judges will not order detention if the defendant is charged with passport fraud, because the sentence that follows a finding of guilt almost never involves a period of incarceration. The worst scenario occurs when a passport fraud defendant would remain in administrative custody pending deportation by ICE in the absence of criminal proceedings, but is ordered released by a Magistrate Judge upon transfer to the court's jurisdiction. In this situation prosecution actually works to the defendant's benefit. The low sentence range results in pretrial release, and provides the defendant an opportunity to flee and thereby avoid both prosecution and deportation.

obtain passports by fraud engage in a host of collateral criminal activity each time the passport is used for any domestic or travel purposes.

We support the enhancement's limited scope – it would apply only if a United States passport was "fraudulently obtained or used." The majority of passport fraud cases arise when the crimes are detected by the State Department at the application stage, before the passport is actually issued, and thus would not be subject to the enhancement. For those defendants whose crime results in actually obtaining the fraudulent passport, a much more severe penalty is warranted. First of all, a criminal's success in moving an application past the approval stage is usually attributable to the sophistication of the fraudulent application. The defendant may have obtained a high quality counterfeit birth certificate or stolen the true birth certificate and social security number of a real victim/citizen. Furthermore, many who have obtained fraudulent passports have enjoyed the benefits of citizenship and passport ownership for many years. Some of these offenders are now being detected for the first time as they send in the unlawfully obtained passports for renewal. This is a class of offenders to which the enhanced penalties are surely appropriate.[23]

Overall, we believe in order to maintain the integrity of U.S. passports, the repercussions of someone fraudulently obtaining a U.S. passport must be significantly increased from current policy. We support the adoption of the proposed specific offense characteristic but recommend a slightly revised tiered enhancement: four levels if the defendant fraudulently obtained or used a United States passport, and eight levels if the defendant fraudulently obtained or used a United States passport, intending to enter the United States to engage in terrorist activity.

Unlike the proposed amendment for alien smuggling, where a defendant who smuggles an alien into the United States to engage in terrorist activity would receive a notably greater increase in sentence than one who smuggles an alien into the United States to engage in other crime, the proposed amendment as published by the Commission, makes no distinction between terrorism related activities and others. As such, a terrorist who fraudulently applied for and obtained a United States passport would receive exactly the same level increase as any nonviolent offender who also fraudulently applied for and obtained a United States passport. We think some distinction should be made in the guideline.[24] This bifurcated approach is also

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[23]We believe this specific offense characteristic should be accompanied by an application note which makes clear that the "use" of a passport includes the attempted renewal of the previously-issued passport. This would allow the application of §2L2.2(b)(4) to all cases involving fraudulent applications for renewal of U.S. passports (Form DSP-82).

[24]We also recommend the inclusion of the following proposed Application Note for this version of proposed §2L2.2(b)(4):

Application of Subsection (b)(4). The first sentence of Subsection (b)(4)

consistent with the approach followed in the general identity theft statute, 18 U.S.C. § 1028(a)(7). Under § 1028(a)(7), the maximum term of imprisonment for identity theft is (1) 15 years imprisonment, if as a result of the offense anyone committing the offense obtained anything of value aggregating $1,000 or more during a one year period; (2) 20 years imprisonment, if the offense is committed to facilitate a drug trafficking offense or in connection with a crime of violence; or (3) 25 years imprisonment, if the offense is committed to facilitate an act of international terrorism. See 18 U.S.C. § 1028(b)(1)(D), (b)(3)-(4).

IMPLEMENTATION OF THE CAN-SPAM ACT OF 2003

The Commission has published a number of issues for comment in response to section four of the Controlling the Assault of Non-Solicited Pornography and Marketing Act of 2003 (the "CAN-SPAM Act of 2003"), Pub. L. 108–187, which directs the Commission to review and, as appropriate, amend the sentencing guidelines and policy statements to establish appropriate penalties for the criminal offenses created the act – i.e. 18 U.S.C. § 1037 – and other offenses that may be facilitated by the sending of a large volume of unsolicited e-mail. Section four further directs the Commission to consider providing sentencing enhancements for several listed factors.

I. Statutory Reference for § 1037 Offenses

We recommend that the Commission reference in the Statutory Index all five sections of 18 U.S.C. §1037 to §2B1.1. The "hacking spam" provision in §1037(a)(1) prohibits one from

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would establish a four-level increase in any case (other than the special circumstance set forth in the second sentence of that subsection) in which the defendant fraudulently obtained or used a United States passport. As the Department of State has noted, "The U.S. passport is the most valuable identity document in the world as it establishes American citizenship and allows its bearer unlimited access to virtually every country in the world." [Source: http://www.state.gov/m/ds/investigat/] In addition, United States passports – especially if they are legitimate passports obtained by fraud – are likely to be given greater credence, as proof of identity by financial institutions and other businesses, than many other types of identifying documents than can be more easily forged or counterfeited. The second sentence of Subsection (b)(4) would establish an eight-level increase in any case where the defendant fraudulently obtained or used a United States passport intending to enter the United States to engage in terrorist activity. The defendant need not have actually entered the United States or actually engaged in terrorist activity within the United States for this latter increase to apply.

knowingly accessing a protected computer without authorization and intentionally initiating the transmission of multiple commercial electronic mail messages from or through that computer. This provision is intended for the prosecution of those who break into computer systems of others, set up an e-mail server, and start sending out electronic mail messages. It is intended to fill a perceived gap in § 1030 when the resulting damage from the hacking offense does not meet the $5,000.00 threshold or is otherwise the type of damage established under § 1030(a)(5)(B). Given that §2B1.1 already encompasses similar conduct, we believe the same guideline section should apply to violations of §1037(a)(1).

The "open relay" provision of §1037(a)(2) prohibits one from knowingly using a protected computer to relay or retransmit multiple commercial electronic mail messages, with the intent to deceive or mislead recipients, or any Internet access service, as to the origin of those messages. This subsection is intended for the prosecution of people who send spam through mail servers that are configured to accept mail from any source and forward it to mail servers on other networks. Such mail servers, or "open relays," are often otherwise available to the public, but not necessarily intended for the use of spam. Consequently, the use is not necessarily "without authorization," but is nonetheless an abuse of the servers, especially when the origin of the spam is disguised. This fills a perceived gap in § 1030(a)(5) when a computer is intentionally accessed, but not necessarily without authorization, and where the type of damage under § 1030(a)(5)(B) cannot be proven. Again, §2B1.1 already encompasses similar conduct, and as such is the logical reference to violations of §1037(a)(2).

The "false header" provision in § 1037(a)(3) prohibits one from knowingly and materially falsifying header information in multiple commercial electronic mail messages and intentionally initiating the transmission of those messages. This subsection is intended for the prosecution of persons who create false e-mail headers to frustrate efforts by recipients, Internet Service Providers ("ISP"), or investigating agencies in determining the true sender of the electronic mail. Since this is a type of fraud, to the extent it is criminalized, we believe it can also be adequately addressed by §2B1.1.

The "false registration" provision in §1037(a)(4) prohibits one from registering for five or more e-mail addresses or online user accounts, or two or more domain names, knowingly using information that materially falsifies the identity of the registrant, and then initiating the transmission of multiple commercial electronic mail messages from any combination of such accounts or domain names. This is a companion provision to § 1037(a)(3), and prohibits persons from sending out commercial electronic mail that reflects a true electronic mail address, but which address points to an account that has been registered with bogus information. Again, as a type of fraud, it can be adequately addressed by § 2B1.1.

Finally, the "false IP address" provision of the statute, covered by § 1037(a)(5) prohibits one from falsely representing oneself to be the registrant or legitimate successor in interest to the

registrant of five or more Internet Protocol addresses, and intentionally initiating the transmission of multiple commercial electronic mail messages from those addresses. This subsection is intended for the prosecution of those involved in the developing problem of "zombie spam," where spammers attempt to get around IP-level blocking software by falsely assuming the identity of a legitimate domain name and convincing the appropriate IP-block administrator to re-establish routing to the spammer's ISP, effectively hijacking legitimate IP blocks for spam-sending purposes. Once again, it is a type of fraud which can be addressed by §2B1.1.

II. Base Offense Level and Enhancements

We believe that the present base offense level under §2B1.1 is appropriate for all provisions of §1037. At the current base offense level of six, a misdemeanor violator would receive a penalty of 0-6 months in Criminal History Category I through to a penalty of 12 months in Criminal History Category VI (since the applicable 12-18 month range would be capped by the statutory maximum). Additional levels could be added for the more serious conduct described in § 1037(b)(2).

In keeping with the statutory directive, however, we believe additional enhancements should be triggered by the amount of loss to victims, the amount of gain to the defendant,[25] quantity of electronic mail sent, number of false domain and address registrations, unauthorized access to a computer system in the course of the offense, and role as an organizer or leader.[26] We believe that an enhancement of at least four levels is necessary to appropriately capture the increased statutory penalty enacted by Congress where these aggravating factors are present.

We recommend against applying the multiple victim enhancement and mass-marketing enhancement to simple misdemeanor violations of the statute. Since the offense described in 18 U.S.C. § 1037 inherently involves mass-marketing, adding an enhancement on top of the base offense level would effectively establish a higher base offense level because the enhancement would apply to every case. Because we believe that the present base offense level of six is an appropriate starting point for the guideline calculation, we would not seek an automatic enhancement to level eight.

However, we believe the "multiple victim" enhancement should apply if, for example, a defendant accessed more than ten protected computers to send out commercial electronic mail

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[25]Specifically, we believe that the sentencing guidelines should, at least in the spam context, treat gain more affirmatively than they do at present – in which gain can only be considered as a measure when loss to the victim cannot be reasonably calculated. See §2B1.1 Commentary (n. 3(B)).

[26]We believe that the leadership role can be appropriately applied through the existing §3B1.1 enhancements.

messages in violation of § 1037(a)(1). Furthermore, in cases where the conduct is widespread or significant, such as cases where the amount of electronic mail initiated significantly exceeds the minimum thresholds of § 1037(b)(2)(C), a mass-marketing enhancement would be appropriate. Major financial institutions and other online businesses, for example, are being increasingly targeted for "phishing" – i.e., the use of unsolicited e-mail, designed to appear that it is being sent by those institutions or businesses, that seeks to deceive multiple Internet users into disclosing their personal financial or identifying data, which the phishing scheme can then use to gain access to Internet or financial accounts and commit identity theft and fraud. During 2003 and early 2004, several dozen phishing schemes have used the names and corporate logos of leading U.S. financial institutions and financial services-related businesses such as Bank One, Bank of America, Citibank, eBay, PayPal, and U.S. Bank.

Therefore, we recommend revising Application Note 4 in §2B1.1 relating to the mass-marketing enhancement to address the use of spam in furtherance of schemes to conduct online identity theft and fraud to read as follows (changes in bold):

> For purposes of subsection (b)(2), "mass-marketing" means a plan, program, promotion or campaign that is conducted through solicitation by telephone, mail, the Internet, or other means to induce a large number of persons to (i) purchase goods or services; (ii) participate in a contest or sweepstakes; **(iii)** invest for financial profit**; or (iv) disclose personal financial or identifying data.** "Mass-marketing" includes, for example, a telemarketing campaign that solicits a large number of individuals to purchase life insurance policies**, or a campaign of unsolicited e-mail that solicits a large number of people to assist in transfers of funds or to disclose personal financial or identifying data**.

Inclusion of the proposed language would also serve as a suitable alternative to creating a new and separate enhancement for the sending of a large volume of unsolicited e-mail in cases that would be governed by §2B1.1 (e.g., fraud and identity theft cases).

Although to some extent, a level of sophistication is inherent in all spam, we believe there are circumstances under which an offense under § 1037 could be considered to involve sophisticated means which should trigger the application of an additional enhancement. For example, if an offender created or distributed a virus or trojan horse program to assist in accessing the computers of a number of innocent users to facilitate the sending of unsolicited commercial email, or if an offender routed his communications overseas to frustrate investigation or prosecution of a spam offense, the sophisticated means enhancement should apply. Accordingly, we do not believe that commentary discouraging application of the enhancement should be included.

We also recommend an enhancement for defendants who obtain e-mail addresses through improper means such as harvesting of e-mail addresses or who knowingly send or advertise an internet domain registered with false information, in keeping with the directive in section 4(b)(2)(A) of the Act. Such e-mails are more pernicious because the threat of being spammed creates a disincentive for legitimate users to use the Internet – these users will be less likely to purchase merchandise online or engage in other beneficial activities if they believe that their e-mail address might be misused or misappropriated by an Internet vendor. In addition, when the receipt of spam e-mail that relates to a false domain name, it is harder to report those violations to the Federal Trade Commission or the Department of Justice. Therefore, such an enhancement should be at least two and possibly four levels, to adequately reflect the additional culpability reflected by this behavior.

Finally, we recommend an additional enhancement for sending large quantities of electronic mail in the course of commission of crimes involving fraud, obscenity, child pornography, and sexual exploitation of children, among others. We believe, however, that rather than amending a number of individual guidelines sections to add this enhancement, a more generally applicable role/means enhancement in Chapter Three of the guidelines should be considered. If, however, the Commission believes that amending a number of individual guidelines provisions is more appropriate, then the fraud, obscenity, child pornography and sexual exploitation of children guidelines should be covered comprehensively, in order to best effectuate the express intent of Congress.

III. Other Issues

In response to one of a the Commission's question, we believe the term "large quantities of electronic mail" as used in the CAN-SPAM Act should at least include such quantities that would trigger the felony provisions of § 1037(b)(3) – i.e., 2,500 messages within a 24-hour period, 25,000 within 30 days, or 250,000 within one year. The Commission could also appropriately choose to set the guidelines lower than that, to the point that would trigger misdemeanor violations of § 1037. This would be particularly appropriate in cases involving child pornography and sexual exploitation of children, in which a few hundred messages might permit a defendant to find potential child victims.

In regards to violations of 15 U.S.C. § 7704, we recommend they be referenced to §2G3.1. Where the offense does not involve the transmission of child pornography, § 7704 violations are roughly analogous to offenses under 18 U.S.C. § 2252B and should be sentenced accordingly. In cases where the offense involves the transmission of child pornography, offenders would almost certainly be charged under one of the statutes sentenced at §2G2.2 and the existing cross-reference in §2G3.1 would nonetheless direct the court to §2G2.2. For offenses not involving the transmission of child pornography, the enhancements at §2G3.1 are generally sufficient, with one exception. Currently, proposed §2G3.1(b)(2) is written to cover "use of a misleading domain name on the Internet with the intent to deceive a [minor][person]

into viewing material that is harmful to minors." This enhancement should be expanded to cover "a violation of 15 U.S.C. Section 7704(d)."

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We appreciate the opportunity to provide the Commission with our views, comments, and suggestions. We look forward to working further with you and the other Commissioners to refine the sentencing guidelines and to develop effective, efficient, and fair sentencing policy.

Sincerely,

Deborah J. Rhodes

Counselor to the Assistant Attorney General

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February 27, 2004

VIA HAND DELIVERY

United States Sentencing Commission
One Columbus Circle, N.E.
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Washington, D.C. 20002-8002

Re: 2004 Proposed Amendments and Issues for Comment

Dear Commissioners:

We write on behalf of the Practitioners Advisory Group to address the notice of proposed amendments and issues for comment published in the Federal Register notices of January 14, 2004. As always, we view our primary role as assisting the Commission by drawing on our expertise as defense attorneys to respond to the issues for comment and specific amendments proposed by the Commission.

I. Proposed Amendments to Chapter 8 (Amendment #2)[1]

Initially, the PAG applauds the Commission for the formation of this Ad Hoc Advisory Group. From our perspective, this is sentencing policy-making at its best, and it stands in unfortunate contrast to the process that has led to many of the recent amendments that have resulted from Congressional directive. We also wish to compliment the Ad Hoc Advisory Group on its excellent work product. It is refreshing to see sentencing policy formulated through a process that brings together experienced individuals from different backgrounds and ideological perspectives. Although we do not necessarily agree with all of the Group's recommendations, we hope that the Group's success can serve as a model for future policy-making in this arena. We do wish to provide input on the four issues for comment:

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[1] The PAG expresses its appreciation to Eugene Illovsky and Greg Smith for their assistance in preparing this portion of our submission.

A. Eliminate the Automatic Preclusion for Unreasonable Delay.

Under U.S.S.G. § 8C2.5(f), an organization cannot receive the three point culpability score reduction if it "unreasonably delayed reporting the offense to appropriate governmental authorities." The proposed amendment retains that prohibition in subsection (f)(2), even though the clear thrust of amended § 8C2.5(f) is the adequacy of the organization's compliance program.

The prohibition should be removed. An organization's delay in reporting is sufficiently considered in the guideline's subsection explicitly addressed to such self-reporting, U.S.S.G. § 8C2.5(g). Under that section, an organization cannot get the five point culpability score reduction for self-reporting and acceptance of responsibility if it does not "report[] the offense to appropriate government authorities" within a "reasonably prompt time."

An organization with an excellent compliance program may, for some reason, delay its self-reporting of the violation. That decision, if later deemed unreasonable, may not necessarily reflect on inefficacy of the organization's program to "prevent and detect violations of law." It is proper to have reporting delay be the subject of subsection (g) and remove it from subsection (f).

B. High-Level Personnel Involvement Should Create a Rebuttable Presumption.

If certain high-level personnel participated in, condoned, or were willfully blind to the offense, § 8C2.5(f) automatically precludes the three-point culpability score reduction for an effective compliance program. The proposed amendment changes the automatic preclusion to a rebuttable presumption that the organization's compliance program was not effective.

The PAG believes the proposed amendment, reflected in subsection(f)(3), correctly treats the issue of high-level employee involvement. The PAG believes the Commission should not try to distinguish further between 'large' and 'small' organizations for the purpose of leaving some version of the automatic preclusion in place. An "automatic" rule will invariably lead to unjust results in some cases.

An automatic preclusion also unnecessarily restricts judicial discretion. Removing it gives judges the discretion to consider each organization's circumstances, and the particulars of the higher-level employee involvement, on a case-by-case basis. The organization should have the opportunity to present its case to the judge as to how it can rebut the presumption in those particular circumstances. Judges will no doubt exercise that discretion in light of precisely those factors recognized to be important, such as the organization's size and the number and type of high-level employees involved in the offense.

C. Increase The Culpability Score Point Reduction.

The PAG supports increasing the culpability score reduction from three to four points. Awarding more points for an effective compliance program would not only appropriately reflect the heightened requirements of U.S.S.G. § 8B2.1, but would also create an incentive for organizations to examine the adequacy of their current programs.

D. Factors Relating to Small and Mid Size Organizations.

Chapter Eight's impact on small and mid-size companies requires further study. Historically, the great majority of sentenced companies are small, closely-held entities. And, as the Advisory Group's Report notes, since 1991 an overwhelming number of convicted organizations failed to receive effective compliance program sentencing credit for reasons related to their smaller size. The PAG seconds the Advisory Group's recommendation that the Commission devote resources to reaching and training small and mid-size companies about corporate compliance.

The PAG believes that many factors or considerations could be incorporated into Chapter Eight to encourage small and mid size organizations to develop and maintain compliance programs. There is likely, however, to be some spirited disagreement among business interests, the defense bar, and the Department of Justice as to which factors or considerations will likely be most effective or important. And, to say the issue is a difficult one may understate things. The Advisory Group Report noted the difficulties it had in getting feedback on the matter.

The PAG therefore proposes that the Commission convene a working group dedicated solely to the study of the specific issue of the guidelines' application to small and mid size companies. This working group will no doubt have the first, difficult task of even defining the best methodology for studying this issue. The PAG envisions that the working group would reflect the usual affected constituencies (e.g., business, defense bar, prosecutors), but also that it might fruitfully be broadened to include an economist and/or other academics who have studied these issues from a broader perspective. The interdisciplinary approach may be the most effective way to give the Commission the help it needs to tackle this complex yet exceedingly important guidelines matter.

II. Proposed Amendments relating to Public Corruption (Amendment #4)

The PAG is unaware of any data or even anecdotal examples suggesting a need for increased penalties under these guidelines. No such basis or justification is included in the materials accompanying the proposed amendments. Although the Synopsis of the proposed amendment states that it "aims at moving away from a guideline structure that relies heavily on monetary harm to determine the severity of the offense," it does not appear that the proposed amendment in fact does so (assuming there are policy reasons for such a change, which are not explained in the published materials). The new guidelines incorporate the §2B1.1 loss table in precisely the same fashion as the existing guidelines. Accordingly, the PAG does not believe any

increase to the base offense levels for bribery and gratuity cases has been demonstrated to be warranted. Indeed, these base offense levels could instead be *reduced* to achieve proportionality with 2B1.1, the guideline governing other similar economic crimes.

The PAG agrees that Guidelines 2C1.1 and 2C1.7 may readily be consolidated, but the 2-level enhancement for multiple incidents should be limited to those cases currently sentenced under 2C1.1 to avoid even further unwarranted disparity between cases involving intangible rather than tangible harm. Similarly, if guidelines 2C1.2 and 2C1.6 are consolidated, the 2-level enhancement for multiple incidents should be limited to cases currently sentenced under 2C1.2 to avoid unwarranted disparity between cases involving mere gratuities rather than actual theft.

Briberies and gratuities are purely economic crimes. While the acceptance of a bribe or gratuity by a public or bank official is a serious offense because it serves to undermine the public's confidence in government and banks, there is little reason to believe it does so to any greater degree than outright theft or embezzlement by such officials, particularly where the official's position does not involve high-level decision-making or other sensitive matters, and is not an elected office. Because the base offense level for economic crimes is either 6 or 7, depending on the statutory maximum sentence, the current base offense level of 10 for bribery offenses results in unwarranted disparity. Increasing the base offense level from 10 to 12 would exacerbate this unwarranted disparity rather than cure it, and result in sentences that are unjust.

Consider, for example, a typical bribery case in which a low-level public official accepts two $5,000 bribes to award a $100,000 contract on which the contractor makes a $20,000 profit.[2] Under the current version of 2C1.1, the base offense level would be 10, increased by 2 levels for multiple incidents, plus 4 levels under the 2B1.1 table reflecting the $20,000 "benefit received," resulting in an adjusted offense level of 16. If the base offense level is increased by two levels as proposed in the amendment, the adjusted offense level would be 18.

Contrast this $10,000 bribery scenario with a case in which a public official simply steals $10,000 outright from the public fisc. Assuming some use of the mails or wires, the base offense level would be 7, plus 4 levels for the loss, plus 2 levels for abuse of trust, resulting in an adjusted offense level of 13. Why should a low-level public official be sentenced 3 levels higher for accepting a $10,000 bribe from a third party than stealing the $10,000 directly from the public fisc? And if the proposed amendment were adopted, the disparity would be 5 levels. This means that the minor official who accepts the $10,000 bribe would be sentenced 1 level *higher* (18) than an official who outright steals up to $120,000 – *more than the entire value of the contract* (7+8+2=17).

The unwarranted disparity noted above would be further exacerbated by the consolidation of 2C1.7 with 2C1.1 if the 2-level increase for multiple incidents is applied across the board.

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[2] Obviously the numbers used in hypotheticals such as this are important. We believe the numbers above are quite reasonable, and further believe our overall point would be amplified by having the Commission Staff apply and contrast the fraud and bribery guidelines to randomly selected actual bribery cases.

Section 2C1.7 deals with acts of dishonesty by public officials that cause purely *intangible* harm. Section 2B1.1, coupled with a 2-level increase for abuse of trust, would presumably apply in non-bribery cases to acts of public officials which actually cause tangible harm, such as thefts or embezzlements. If the amendment were enacted as proposed, cases of *intangible* harm with multiple incidents would have an offense level of 14, while cases of *tangible* harm would be *5 levels lower* (7+2=9).

Similar disparities result from raising the base offense levels for mere gratuities – cases which by definition do not involve any *quid pro quo* and are largely misdemeanors. These disparities will be furthered amplified by consolidating the bank gratuity cases with 2C1.2 and applying the 2-level multiple incident adjustment across the board. A bank employee who accepts two $3,000 gratuities not causing loss to the bank will be sentenced at the same level (13) as a bank employee who embezzles up to $30,000 directly from the bank. (9+2+2=13 (proposed 2C1.2); 7+2+4=13 (existing 2B1.1)).

To be sure, there are bribery cases in which the harm is largely non-economic because of the impact on the public perception of and faith in governmental decision-making. But this characteristic is more than fully accounted for by the 8-level upward adjustment in cases involving elected officials or officials holding high-level decision-making or sensitive positions. In those cases, the disparity between the bribery guideline and theft guideline will be nothing short of dramatic. For example, if the amendment were enacted as proposed, an official in a high position of public trust involved in more than one incident who accepted $10,000 for the purpose of influencing an official act will be sentenced at the same level (12+2+2+(2 or 4)+(2 or 4)= 20 to 24) as if the official had embezzled from $400,000 to $2,500,000, depending on which options are selected from the proposed increases.

The existing bribery and gratuity guidelines are already out of proportion with the guidelines for economic offenses, and should be reduced by at least 2 levels to eliminated incongruous results. Raising the bribery and gratuity offense levels, particularly in conjunction with applying the 2-level multiple incident adjustment to intangible rights and bank gratuity cases, will lead to results that are intellectually indefensible.

III. Proposed Amendments relating to the Mitigating Role Cap (Amendment # 6)

The PAG will provide a supplemental submission addressing this issue.

IV. Proposed Amendment to Multiple Victim Rule in USSG §2B1.1, (comment.) n. 4(B)(ii) (Amendment #8b)[3]

The proposed amendment to U.S.S.G. §2B1.1, comment. (n. 4(B)(ii)) would expand a special rule to provide that offenses involving mail stolen from mailboxes serving multiple postal

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[3] The PAG thanks Richard Crane for his assistance with this portion of our submission.

customers, such as those found in apartment complexes, would presumptively involve 50 or more victims.

Presently, the special rule provides that when United States mail is taken from a Postal Service relay box, collection box, delivery vehicle, satchel or cart, the offense is considered to have involved at least 50 victims. This rule was added to the guidelines in 2001 because of "(i) the unique proof problems often attendant with such offenses, (ii) the frequent significant, but difficult to quantity, non-monetary losses in such offenses, and (iii) the importance of maintaining the integrity of the United States Mail." U.S.S.G. Amend. 617 (Reason for Amendment). These reasons provide no support for the changes contemplated in Proposed Amendment 8(b).

A. Amendment Does Not Address Unique Proof Problems

Unique proof problems exist when mail is stolen from a Postal Service mailbox, vehicle, cart or satchel because there is usually no way to determine how many pieces of mail were in the container or conveyance at the time of the theft. Without knowing the number of pieces of mail, the scope of the theft and number of victims is impossible to ascertain.

These proof problems do not exist when dealing with banks of mailboxes. In fact, it is often easier to prove the number of victims when mail is stolen from apartment unit boxes than if it were stolen from individual residence mailboxes. For example, if the offender stole mail by entering an apartment unit box from the front,[4] the door to the mailbox will almost always show signs of tampering to overcome the box's locking mechanism. On the other hand, mail taken from individual home mailboxes would not show such tampering because these boxes are rarely locked. If the apartment mail was stolen via the back way, it would be more difficult to determine the number of victims, but no more so than determining the number of victims when mail is stolen from individual home mailboxes.

B. Quantifying Non-Monetary Losses Is No More Difficult Than In Other Cases

As noted above, we do not believe it is more difficult to quantify non-monetary losses resulting from theft of mail from apartment cluster mailboxes than single residence mailboxes.

C. Amendment Will Not Further the Purposes of the Guidelines

It may be important to protect the soundness of the United States Postal Service by providing greater penalties for those who would steal from a Postal Service vehicle or container. But we do not believe it is necessary to the soundness and integrity of the US mail to punish persons who steal from an apartment complex more harshly than those who steal mail from individual residences.

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[4]From the front" means that the mail was taken out of the box in the same manner as the recipient would have taken it. In some cases, mail can be accessed from the back by unlocking the entire bank of boxes or by approaching the boxes from the rear (as is done with the individual boxes located in a Post Office. [1-71]

On the other hand, the purposes of the guidelines will be frustrated if the proposed amendment is adopted. The basic objective of the guidelines is to provide reasonably uniform sentences for similar offenses committed by similar offenders. USSG Ch 1, Pt. A(3). Mandating longer sentences for offenders who steal a single welfare check from an apartment cluster of 50 boxes, than for those who steal the same check from a single mailbox on a street with fifty houses, will create sentencing disparity and undermine the objectives of the guidelines.

The proposed amendment will also create confusion as to the meaning of the term 'victim.' For purposes of mail theft, 'victim' is defined as "any person who sustained any part of the actual loss" or "any person who was the intended recipient or addressee" USSG §2B1.1 App. Note 4(B)(i). In either case, the definition requires an identifiable victim. The definition has been weakened, perhaps necessarily, by the present special rule that does away with the need to identify the victims when mail is stolen from a Postal Service container or conveyance. It should not be weakened further by adoption of an amendment where the identity of the victims is easily obtainable.

D. Placing Burden On Defendant to Prove Number of Victims is Unfair[5]

Requiring a defendant to prove that his mail theft offense involved less than fifty victims puts the burden on the party in the worst position to do so. The government is in a far superior position to prove the number of victims because it can obtain this information immediately upon discovery of the offense. It is one thing to ascertain how many apartments were vacant and how many people had already retrieved their mail when the question is asked the same day as the offense and another to get answers when the questions are asked months later. Additionally, government agents have the perceived authority to ask people if they have already retrieved their mail and, if not, whether they were expecting anything valuable or time-sensitive. An attorney or investigator representing the alleged thief would have a far more difficult time getting answers to these questions.

Additionally, the present rule reasonably assumes that a person who steals from a Postal Service box or conveyance intends to steal all the mail, while breaking into a single apartment mailbox does not evidence such an intent.

E. There Is No Demonstrated Need for the Amendment

Finally, we question the seriousness of the problem addressed by the proposed amendment. We can find only one case where a similar situation arose. In *U.S. v. Gray*, 71

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[5]As published, the amendment provides that any theft from a cluster of mailboxes would be considered to have involved 50 or more victims. This would result in a four level enhancement even if the apartment complex had less than 50 apartments. At the very least, this should be changed to read that where there are multiple boxes, there is a presumption that the number of victims corresponds to the number of boxes. But, even this refinement would not alter our opposition to the amendment for the reasons stated above.

Fed.Appx. 300 (5th Cir 2003), a two-level enhancement was imposed on the defendant for having more than ten and fewer than 50 victims because he pried off the mailbox panels in an apartment building, exposing 42 individual boxes. On appeal the enhancement was vacated because there was no proof that there were at least ten people who had mail in their boxes at the time of the offense. There was, however, no indication that it would have been difficult to obtain sufficient evidence proving the number of victims, especially considering the reduced degree of proof required at a sentencing hearing.

V. Issue for Comment regarding Aberrant Behavior (Amendment #10)

With regard to aberrant behavior, Issue for Comment 10, the PAG opposes as premature the elimination of the aberrant behavior downward departure provision, U.S.S.G. § 5K2.20. While we agree in principle that the mandate of 28 U.S.C. § 994(j) should be implemented and true first offenders should receive more lenient sentences and more opportunities for sentences that do not involve incarceration, it does not make sense to eliminate the aberrant behavior downward departure before proposing an amendment to U.S.S.G. § 4A1.1 designed to accomplish this objective. The Commission has been engaged in a two-year study of criminal history. The PAG suggests that the Commission formulate an appropriate amendment to U.S.S.G. § 4A1.1 based on the results of that study. At that point, but not before, it makes sense to consider whether or not the aberrant behavior downward departure remains necessary.

VI. Proposed Amendment to Immigration Guidelines (Proposed Amendment #12)

The PAG intends to comment on this proposed amendment but has not yet finalized its submission on his issue. A supplemental comment addressing this proposed amendment will be forthcoming in the next few days.

As always, we appreciate the opportunity to present our perspective on these important issues. We are available to provide further information or meet with the Commission if it would be useful.

Sincerely,

James Felman
Barry Boss
Co-chairs, Practitioners' Advisory Group

cc: Charles Tetzlaff, Esq.
Timothy McGrath, Esq.

March 1, 2004

Advance copy by electronic mail
United States Sentencing Commission
One Columbus Circle, N.E.
Washington, D.C. 20002-8002

Re: Proposed Amendment 6 to the Sentencing Guidelines and Issue for Comment 10.

Dear Commissioners:

I write on behalf of Families Against Mandatory Minimums Foundation (FAMM) to urge that you leave undisturbed for now the mitigating role cap and the aberrant conduct departure. Both provide necessary relief for the very small number of people who qualify. Morever, both the cap and changes to the aberrant conduct departure are so recent that it is too soon to tell if the concerns that motivated them have been addressed or how well they are presently working. Finally, built-in mechanisms ensure correct sentences when the operation of the guidelines fails to properly account for culpability: upward departure in the case of a capped sentence that is too low and either denial of the aberrant conduct departure or, in the case it is invoked, appellate review of the aberrant conduct departure if it is used inappropriately.

Proposed Amendment 6: Mitigating Role

The guidelines overemphasize drug quantity as a measure of blameworthiness and frequently cannot adequately account for role in the offense. FAMM's case files are filled with defendants serving unconscionably long sentences for drug offenses. Many are first-time, non-violent offenders. The relevant conduct rules and severe mandatory minimums drive these low-level participants' sentences well beyond those warranted. Many of their stories are truly disturbing. The mitigating role cap provides some limited relief to defendants like them. Below are a few examples of defendants who received mitigating role reductions. They are meant to illustrate the kinds of defendants this cap is designed to assist.[1]

Lori Gibson's boyfriend, Larry Copeland, was a drug dealer. Ms. Gibson had heard that Mr. Copeland dealt drugs but had never discussed his business with him. He had never included her in his illegal activities and had never, to her knowledge, brought the drug trade home with him. He was also alcoholic and abusive. She was used to doing as she was told. Once, while out

[1] None of these defendants received the cap as it was instituted after they were sentenced and has not been made retroactive.

of town, Mr. Copeland called Ms. Gibson and asked her to pick up something from a man named Eric McKinnon. Unaware of what she was picking up or why, Ms. Gibson did as she was asked. She met Mr. McKinnon, who she did not know, in a parking lot and received $3,600 from him. She did not know that the money was intended to settle a debt from a sale by Larry Copeland of 113 grams of cocaine base. At Mr. McKinnon's direction, she called Mr. Copeland, told him she had the money, and gave the telephone to Mr. McKinnon. They arranged another drug deal, but in coded language that Ms. Gibson did not understand. Mr. McKinnon was an informant and Ms. Gibson was arrested within minutes of leaving her meeting with him.

Ms. Gibson went to trial and was found not guilty of conspiracy but guilty of one count of possession with intent to distribute cocaine base. She was originally sentenced at level 34 to 151 months (for the crack cocaine from the prior sale as well as that arranged while she was in the car) and did not receive a mitigating role adjustment despite counsel's arguments. Her case was affirmed but remanded for resentencing by the Eleventh Circuit Court of Appeals. In 1998, she was resentenced to 126 months, receiving a reduction of 2 levels in recognition of her minor role in the offense. Ms. Gibson has two children, now 11 and 18 years old. Their 66-year-old grandmother cares for them. Ms. Gibson will be released in early 2005.

Tammi Bloom's husband of 15 years distributed cocaine from an apartment that he shared with his mistress in Ocala, Florida. Ms. Bloom testified at her trial that she was unaware of her husband's affair or the sales in Ocala. A confidential informant said that she was present for other sales at her own home with Mr. Bloom in Miami and counted money for him.

After Ronald Bloom and his mistress were arrested, the police searched the home he shared with Ms. Bloom and discovered cocaine, cocaine base, 3 firearms and drug ledgers. Besides a small bag of cocaine on her husband's nightstand, she did not know about the other evidence as it was hidden, even from her, in a septic tank and in a part of the house used primarily by her husband.

The PSI identified Mr. Bloom as the most culpable defendant in the case because he exercised decision-making authority over his wife and others. Ms. Bloom was held accountable for drugs distributed from the home in Miami on three occasions for a total of 2.41 kilograms of cocaine and 510.05 grams of cocaine base. She received a two-level enhancement for the guns and a two-level obstruction of justice enhancement for testifying, allegedly falsely, to her innocence at trial. While she received a two-level reduction for minor participant, she still received the longest sentence of anyone convicted in the conspiracy: 235 months or19 years and seven months. Her husband received 210 months, or 17.5 years, his mistress 78 months and another asociate, 168 months.

Ms. Bloom has two children, 16 and 18, who are being raised by their maternal grandmother. Ms. Bloom's father died in 2002 and her mother is struggling to keep the family

going without him.

Tammi Bloom will leave prison in late 2015.

In October 1990, **Daisy Diaz** accompanied her husband and others on a boat trip to several Caribbean islands. She believed the trip was for pleasure. After 41 kilograms of cocaine were discovered on an island the boat had just departed, the boat was searched by Bahamian police. The party was arrested and a gun found in a bag carried by Ms. Diaz. She and the boat's captain, Antonio Mateau, said he placed the gun there as he anticipated being arrested. (Mr. Mateau later provided an affidavit to that effect after he was finally captured, years later.) The party was released but later detained again. The vessel was searched and found to contain 176.1 kilograms of cocaine hidden near the fuel tank. Ms. Diaz denied knowledge of the drugs, which were so well hidden it took more than a day to locate them. She was considered, even by the prosecuting attorney, to be merely a decoy to make the trip appear not a drug smuggling run but a family vacation. She was charged with the amount of drugs found on the boat as well as the 41 kilograms found on the island. Ms. Diaz was convicted and sentenced to 235 months, a base offense level of 38, with an enhancement for Mr. Mateau's gun.

The two-level downward adjustment was warranted, according to the Probation Officer, who agreed with the AUSA that she was merely a decoy.

Ms. Diaz, who had no criminal history, received the longest sentence of the party -- with the exception of Mateau who died in prison -- including that of her husband, who received 12 years. She maintains her innocence to this day. She will not be released in September 2008.

The mitigating role cap is an effort to account for a defendant's minor or mitigating role by establishing a realistic base offense level. It is an explicit recognition that quantity alone is relied on to such an extent in the guideline drug calculations that the least culpable end up with sentences that well exceed the dangerousness or harm of their conduct. Some even exceed the sentences of the most culpable defendants, even after credit for mitigating role.

Senator Jeff Sessions (R-Al), speaking for himself and Senator Orrin Hatch (R-UT), recognized and attempted to fix the problem when he introduced S. 1874, the Drug Sentencing Reform Act of 2001. The bill was designed to more appropriately account for role by increasing sentences for certain kinds of conduct and reducing them for the least involved.

He remarked, when introducing the bill that "the primary focus of the mandatory minimums and the Sentencing Guidelines on quantity has resulted in a blunt instrument that data now shows is in need of refinement." 178 Cong. Rec. S13962 (daily ed. Dec. 20, 2001). First-time, non-violent offenders were least likely to be rearrested and the presence of violence or a dangerous weapon, he concluded, were better predictors of recidivism than drug quantity.

Sen. Sessions called for a cap on base offense levels of down to level 30 for those receiving minimal role adjustments:

> This is very significant because couriers, who are often low-level participants in a drug organization, can have disproprotionate sentences of 20 or 30 years simply because they are caught with a large amount of drugs in their possession. By capping the impact of drug quantity on the minimal role offenders, the bill allows a greater role for the criminality, or lack of criminality, of their conduct in determining their ultimate sentences.
>
> For example, the bill provides a decrease for the super-mitigating factor of the girlfriend or child who plays a minimal role in the offense. These are often the most abused victims of the drug trade, and we should not punish them as harshly as the drug dealer who used them.

178 Cong. Rec. S13964 (daily ed. Dec. 20, 2001).

Defendants receive reductions for minor or minimal participation in fewer than 15 percent of drug distribution cases. In 2001 for example, only 2.3 percent of defendants received a minimal role reduction, 10 percent received a minor role reduction and .9 percent received one in between. No data is publicly available since the institution of the cap, but these numbers do not suggest an excess of leniency on the part of sentencing judges prior to its adoption.

It is particularly disturbing that the Commission chooses to revisit the cap, which it passed unanimously, so soon after it was instituted. There is simply no basis to judge whether and how it is affecting sentences, whether mitigating role adjustments are being invoked more or less frequently, and whether the government is appealing the adjustments. Furthermore, it is unclear how judges are handling cases where they believe a defendant warrants a mitigating role adjustment but may not warrant a reduction to level 30. Presumably, those sentences are subject to upward departure where the weight attached to the mitigating role adjustment is excessive. The better course would be to study how the cap is working before eliminating it or reducing its impact.

In light of the terrible outcomes that quantity-driven guideline sentencing guarantee, the recency of the amendment, and the few sentences it affects, we urge you to exercise restraint and neither eliminate nor adjust the role cap for the time being. Of course, if you choose to go forward with an amendment, we strongly encourage you to do so in a way that preserves as much flexibility in achieving sentencing relief for the less culpable who must suffer the brunt of quantity-driven sentences.

Issue for Comment 10 Regarding Aberrant Behavior

FAMM urges that the Commission not eliminate or amend the ability of courts to depart on the basis of aberrant conduct at this time. Not only was the departure significantly amended and its use restricted recently, the Commission has not completed its study and recommendations concerning criminal history. It strikes us as at least premature to remove an entire ground for downward departure on limited information The Commission can make a significant contribution to understanding the place that criminal history plays and should play at sentencing by staying its hand and studying the impact of the various changes to the departure made so far.

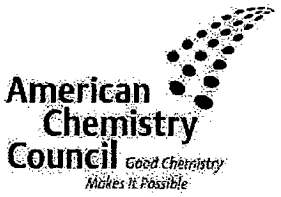
Departures from the guidelines were fashioned in part to provide feedback on the operation of the guidelines. That a departure is invoked teaches that judges feel the need to account for a factor or feature not provided for in the guidelines. That the departure is invoked, should never lead to the conclusion that it ought to be eliminated, even in this post-Feeney era.

We urge you to wait until you have complete information before you eliminate this important ground for departure.

Thank you for considering our views.

Sincerely,

Mary Price
General Counsel



March 1, 2004

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

Re: Comments on Two Aspects of the Commission's December 30, 2003 Notice (68 Fed. Reg, 75340):
- Amendment 2: "Effective Compliance Programs in Chapter 8"; and
- Issue for Comment 11: "Hazardous Materials"

Dear Sir or Madam:

The American Chemistry Council (ACC or the Council) is pleased to submit these comments on two aspects of the Commission's December 30, 2003 Notice: Amendment 2: "Effective Compliance Programs in Chapter 8," and Issue for Comment 11: "Hazardous Materials." ACC represents the leading companies engaged in the business of chemistry, and our members are responsible for about 90% of basic chemical production in the United States. The business of chemistry is a $460 billion enterprise and a key element of the nation's economy. It is the nation's largest exporter, accounting for ten cents out of every dollar in U.S. exports. Our members employ approximately 556,000 employees, with sales of $238 billion and 1,447 facilities. Chemistry companies invest more in research and development than any other business sector. Safety and security have always been primary concerns of ACC members, and they have only intensified their efforts, working closely with government at all levels, to improve security and to defend against any threat to the nation's critical infrastructure.

Due to the nature of their business, ACC member companies are heavily regulated under virtually all of the laws covered by the Sentencing Guidelines, and particularly in the areas of health, safety, environment, and maritime security. As a result, these companies have developed extensive and sophisticated compliance management systems. These systems influenced, and have been influenced by, the definition of an effective compliance program in the Organizational Guidelines. Any changes to those Guidelines will have direct effect on those companies' programs. ACC member companies also ship

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[1-79]

substantial quantities of hazardous materials, and the major bulk hazardous materials carrier companies are Partners in ACC's Responsible Care® program.[1] Accordingly, ACC has a vital interest in both of these aspects of the Commission's current notice.

Executive Summary

Effective Compliance Programs

Corporate Governance. The Commission has done a good job to ensure consistency between the Guidelines and the many other sources of authority that affect corporate governance. ACC suggests the Commission clarify that:

- the phrase "shall report directly to the governing authority or an appropriate subgroup" means to provide information to, not be supervised by, these bodies; and
- the high-level personnel with direct, overall responsibility to ensure the implementation and effective administration of the organization's compliance program need not be the high-level line management with the actual compliance obligation, but may be a separate staff function.

"Ethics" Issues. The Commission has wisely constructed its proposal so that an organization implementing the seven elements of an effective compliance program can attain both the compliance with law and organizational culture called for under the proposed Guidelines. The Commission should resist entreaties to go "beyond compliance" by requiring free-standing ethics programs.

Cooperation & Waiver. ACC urges the Commission to delete the last sentence of its proposed amendment to Application Note 12, so that there would be no exception to its general rule that waiver is not a prerequisite when evaluating cooperation for sentencing purposes. Otherwise, the Commission should drop the entire amendment, and leave defendants free to argue that the merits of the issue without the Commission being perceived as having agreed with the Department of Justice.

Litigation Dilemma. The Commission should sponsor additional public workshops, or joint studies with the judiciary committees of Congress, to promote a resolution of this increasingly problematic issue.

Deletion of "propensity" language. ACC supports the Commission's proposed change to subsection (b)(3).

Promotion and Enforcement. ACC agrees with expanding compliance standards enforcement to encompass appropriate incentives, rather than solely disciplinary measures. It is crucial, however, that organizations be free to determine what punishments or incentives, if any, are appropriate.

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[1] Attachment A is a Responsible Care® Fact Sheet.

Effect of Involvement of High-Level Personnel. ACC supports the Commission's proposal that involvement of high-level personnel raises a rebuttable, rather than conclusive, presumption that the organization did not have an effective compliance program. ACC also believes that this change should apply across the board, and not be limited to small organizations.

Expansion of the Compliance Program's Scope to Civil Compliance. ACC requests the Commission to clarify that the expansion of scope to include civil compliance:

- is not intended to require organizations to establish any new compliance programs or mechanisms beyond those changes enumerated in the current proposal; and
- should not serve as the basis for prosecutors to inquire into, and request demonstrations regarding, compliance programs for legal regimes that do not have criminal penalties.

"Risk Assessment." ACC has no objection to this approach in concept, but urges the Commission to drop the phrase "risk assessment," due to extraneous connotations the phrase automatically incorporates from areas such as public health. If it does not drop the phrase, the Commission should clarify that it is not intended to import technical or scientific concepts of risk assessment.

Deleting "unreasonable delay" as a basis for a reduction for self-reporting. ACC supports this approach. There simply is no policy basis for the current prohibition.

Retaining the automatic preclusion of credit where high-level personnel of large organizations were involved in an offense. ACC supports the Commission's across-the-board proposal that involvement of high-level personnel raises a rebuttable, rather than conclusive, presumption that the organization did not have an effective compliance program.

Changing the reduction available for an effective compliance program from three points to four. The Commission's proposals would impose substantially greater obligations on organizations seeking a reduced fine. Increasing the possibly available reduction from three points to four is thus entirely appropriate.

Request for Comments re Hazardous Materials

ACC strongly opposes making any changes to the existing organizational Guidelines, or creating any new Guidelines, regarding hazardous materials (hazmat) transportation.

ACC fundamentally questions the premises of DOJ's arguments for tougher hazmat Guidelines. Hazmat incidents can be amply punished under the existing Guidelines, and the Commission should await action on Senate-passed legislation that would increase those punishments. Hazmat incidents are not more consequential than fixed facility incidents.

[1-81]

DOJ's proposal would add little to the impressive punishments already available to terrorists, but would be overly severe for non-terrorist-related hazmat violators. Terrorists are already subject to extraordinary sanctions, and new hazmat rulemakings already address the problem of inadvertently helping terrorists. DOJ's proposal would punish nonterrorist hazmat personnel as severely as, and more commonly than, the terrorists who attack or exploit them.

A free-standing hazmat guideline would greatly complicate the job of organizations attempting to implement an effective compliance system.

Discussion

I. Effective Compliance Programs

ACC commends the Commission for the open and deliberative approach that it has taken over the past 3-plus years in its consideration of this issue. The Commission's Advisory Group gathered a great deal of public comment in very thorough, focused and dialogic fashion in which Group members were actively engaged. The Group then worked very diligently and came up with recommendations that, in ACC's view, generally adopt the right approach. The overall thrust of ACC's prior comments and testimony was that the current Guidelines have worked well: beyond their strict role as providing rules for criminal sentences, they have already driven the development of effective compliance programs in businesses and will continue to do so. ACC noted that it was not aware of objective evidence indicating that compliance systems based on the current Guidelines were deficient. ACC recommended that any significant changes to the Guidelines be based on concrete evidence of shortcomings in the Guidelines that could be cured by the proposed changes. We also cautioned against expanding the Guidelines further into areas of corporate governance or corporate ethics, and by large the Commission has heeded those cautions.[2]

The following comments highlight areas of the proposal that ACC believes are particularly praiseworthy and reiterate concerns about making more sweeping changes. We also urge the Commission consider expressing a stronger position on the problem of waiver in connection with cooperation, and to serve in the "fulcrum" role recommended by the Advisory Group to advance the debate on this issue and the related litigation dilemma.

A. Corporate Governance.

ACC is particularly pleased that the Commission has worked to ensure consistency between (i) the Guidelines and (ii) Sarbanes-Oxley and the many other laws, rules and self-regulatory provisions that affect corporate governance. ACC's earlier comments in

[2] ACC has filed four sets of comments and testimony since the Commission's 2001 notice requesting comment on whether to create the Advisory Group. Attachment B is the testimony we filed in connection with the November 14, 2002 public meeting.

this docket addressed this issue at length, and we were invited to make a presentation specifically on this issue at the Group's public meeting. The Group's report recognized the substantial effect of Sarbanes-Oxley and other current drivers of change in corporate governance,[3] and noted concerns that the Commission not do anything to interfere with these ongoing processes.[4] The Group emphasized that its recommendations "will not impose upon organizations anything more than the law requires, nor will it conflict with industry-specific regulatory requirements."[5]

ACC does recommend two clarifications in this regard. Proposed Section 8B2.1(b)(2) provides that "[s]pecific individual(s) within high-level personnel of the organization shall be assigned direct, overall responsibility to ensure the implementation and effectiveness of the [compliance] program . . . and shall report directly to the governing authority or an appropriate subgroup . . . ."

What does "report" mean? ACC suggests the Commission clarify that the phrase "shall report directly to the governing authority or an appropriate subgroup" means only to "provide . . . information" to these bodies (as stated in proposed Application Note 3). However, if "report" were construed to mean "be directly accountable to and be supervised by," that interpretation would wreak havoc with corporate governance in many, if not most businesses, where only the president or CEO reports (in the accountability sense) to the board, and all other employees and officers report to him or her (including the person(s) with overall and direct responsibility to ensure the effectiveness of the compliance program). While persons responsible for compliance programs should have the capability and authority to provide information directly to the governing authority, having separate lines of accountability for staff officers of a company or the CEO to the governing authority is a recipe for competition and dysfunction. ACC would appreciate clarification that it has interpreted proposed Application Note 3 correctly.

The split between accountability for compliance and for monitoring the compliance program. In many (if not most) leading business organizations, the responsibility for compliance with the law lies with line management, not with a corporate staff function. This alignment of responsibility makes compliance as much a part of these managers' responsibility as meeting production or sales targets, and prevents a dynamic in which compliance becomes the obligation of a corporate "overhead" or "police" function not directly responsible for the actual conduct that constitutes compliance or noncompliance. Under this arrangement, the people who actually have to direct business activity to comply with the law are the ones charged with implementing the program to ensure compliance.

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[3] Report of the Ad Hoc Advisory Group on the Organizational Sentencing Guidelines (Oct. 7, 2003) at 39-48.
[4] *Id.* at 59 and n. 207.
[5] *Id.* at 54.

In many of these same companies, a corporate staff function is tasked with supporting and monitoring the line managers in their implementation of the compliance program. For example, a corporate environmental, health and safety department headed by a vice president of EH&S might play this role, supporting the vice presidents of manufacturing or the business unit vice presidents who actually have the EH&S compliance obligation within the company. In these companies, this corporate staff function – not the line managers -- typically has the job of surveilling the implementation by line management, of the compliance program and, in particular, reporting to the governing authority on the status of the program. However, the ultimate responsibility for the effectiveness of the compliance program -- i.e., compliance -- remains with line management.

Section 8B2.1(b)(2) should would allow for this flexibility in how companies establish responsibility for compliance and for the administration of the compliance system. It should not require dramatic and potentially dysfunctional shifts in corporate management (e.g, making the corporate staff "responsible" for compliance instead of line management, even though the staff do not control the behaviors that constitute compliance or noncompliance).

To address this issue, ACC recommends that the Commission adopt one of three options:

- clarify that the high-level personnel "with direct, overall responsibility to ensure the implementation and effective**[] administration** of the organization's [compliance] program" need not be the high-level line management with the actual compliance obligation, but may be a separate staff function (we assume this is the Commission's intent);
- clarify that, if line managers have "direct, overall responsibility to ensure the implementation of and effectiveness of the organization's [compliance] program," they can do so with the support of, and may report through, the corporate staff responsible for supporting and monitoring the compliance program; or simply
- provide that the organization must specify the roles of high level personnel in the compliance program, which would include responsibilities for (i) compliance, (ii) administration of the compliance program and (iii) reporting to the governing authority.

B. "Ethics" concerns

To its credit, the Advisory Group resisted the call to increase fines for organizations that do not establish "ethics programs" above and beyond their compliance programs. While the Group proposed requiring an organization with effective compliance program to "otherwise promote an organizational culture that encourages a commitment to compliance with the law," the Group wisely constructed its recommendations so that a company implementing the seven elements of an effective compliance program "can attain both the compliance with law and organizational culture called for under the proposed guideline. . . . The proposal avoids the need for determinations of whether a particular organization has adopted a good 'set of values' or appropriate 'ethical

[1-84]

standards,' subjects which may be very difficult, if not impossible, to evaluate in an objective, consistent manner."[6] The Commission has proposed to adopt this approach.

Within a month of publishing the instant Federal Register notice, the Commission was already being assailed by some consultants for "fail[ing]," "sidestep[ping]" and "neglect[ing]" opportunities to "go 'beyond compliance'" by requiring free-standing ethics programs.[7] ACC urges the Commission to resist these entreaties, for the reasons explained at length in our prior comments:

- Over the years, the Guidelines have clearly taken on a significant collateral role as an inspiration and template for the development of effective corporate compliance programs. These programs in turn have frequently grown into, or been merged with, more general programs designed to foster ethical behavior and that extend beyond notions of law-abidance.
- However, the Commission's purpose is to promulgate "detailed guidelines prescribing the appropriate sentences for offenders convicted of federal crimes."[8] Courts use the Guidelines to sentence those convicted of crimes. The purpose of the Guidelines, therefore, is to "further the basic purposes of criminal punishment, i.e., deterring crime, incapacitating the offender, providing just punishment, and rehabilitating the offender."[9]
- Establishing criminal sentences based on ethical judgments would effectively be creating new federal crimes, a course of action that lies within the jurisdiction of Congress, not the Commission.
- The focus of the Guidelines should remain on systems that assure compliance with legal requirements, not ethics programs that may focus on important questions in a wider domain. This is particularly true given the lack of any detailed set of "ethical criteria" that is agreed upon by the nation as a whole against which organizations could be measured or that could be the basis for setting criminal penalties.

It is good that the Guidelines are being integrated with aspirational ethics programs. It would be wrong, however, for organizations now to be punished more severely for not having taken these "leading," "best practice" steps, especially given the difficulty in identifying and measuring them. The Commission should retain its proposed approach.

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[6] *Id.* at 56.

[7] Letter dated Jan. 28, 2004 from Robert Olson, Principal Consultant, MetaEthics to the "Honorable Jude [sic] Diana M. Murphy."

[8] U.S. Sentencing Commission, *2003 Federal Sentencing Guidelines Manual*, Ch.1, Pt. A, General Application Principle 1 (Nov. 1, 2003).

[9] *Id.* General Application Principle 2.

C. Cooperation, Waiver & the Litigation Dilemma

1. Cooperation and waiver

The Advisory Group devoted a remarkable and admirable amount of effort to assessing the concern that prosecutors are requiring waivers of attorney-client privilege and work product protection in order to obtain credit for "cooperation" under the Guidelines. The Group's report also devotes much space to this crucial issue. Finally, the Group and the Commission deserve credit for addressing the issue in the proposed amendments in the face of the Justice Department's statement that it "sees no need" for the Guidelines to do so.[10]

Unfortunately, the proposed amendment to Application Note 12, while perhaps disfavored by the Justice Department, effectively codifies DOJ's official position: waiver is not required to satisfy the requirement for cooperation, except in the circumstances where it is. Given the "significant and increasingly entrenched divergence of opinion between [DOJ] and the defense bar" as to this issue,[11] and the even more worrisome divergence between DOJ's official position and the government's practice, as reported by the defense bar, ACC questions whether codifying DOJ's position in the Guidelines will help matters. On balance, we are concerned that it will only make matters worse, by signaling to judges and others that the Commission has considered and rejected the view that privileges and protections deserve such high respect that they should not be trumped by the government's interest in expediency.

Representatives of regulated entities – not just criminal defense lawyers – have argued often and at length that concerns about the near inevitability of waiver in the case of a government investigation have gravely hampered the effectiveness of internal investigations and the ability of corporate staff to gain the cooperation of employees. This has certainly been first-hand experience of ACC member companies. Our member companies' experience in conducting internal investigations over the past several years is that the status quo is having a serious chilling effect on communications between attorneys (especially outside counsel) and management. While unintended, this is a very negative consequence.

Previously, outside counsel conducting an internal investigation would provide extensive written advice to senior management of the company, clearly outlining the facts, legal assessment and recommendations for remedial action (including potential disciplinary action against personnel). Now, because of the very real concern that the company will be coerced to waive privileges and protections and turn the documents over to the government to receive credit for cooperation, those issues -- to the extent they are documented at all -- are likely to remain in the law firm's file in the form of internal memos. Otherwise, the documents potentially will not only provide a roadmap for prosecution but, because the action of giving them to the government could be construed

[10] Advisory Group Report at 102.
[11] *Id.* at 105.

as a broad waiver of the underlying information, could be discoverable for use in third party litigation (discussed immediately below). The net effect is that high-level personnel and the governing authority do not get the information and advice they need to fully appreciate the magnitude of the problem and allow them to take the sometimes painful steps involved in changing the culture of the company. Thus, the cooperation/waiver issue impedes not only compliance with law but the promotion of an organizational culture that encourages it.

ACC therefore urges the Commission to take the bold step of deleting the last sentence of its proposed amendment to Application Note 12, so that there would be no exception to its general rule that waiver is not a prerequisite for evaluating cooperation for sentencing purposes. Doing so would not impede the Justice Department from taking whatever positions it wishes for purpose of initiating or declining an investigation or for settling versus filing cases. It simply means that an organization would not have to compromise its compliance program to receive credit for it at sentencing.

If the Commission is unwilling to delete the last sentence of its proposed amendment to Application Note 12, ACC reluctantly believes that the Commission should drop the entire amendment, and leave defendants free to argue that the merits of the issue without the Commission being perceived as having agreed with DOJ.

2. The litigation dilemma

Relatedly, the Advisory Group's report devotes even greater length to a very thorough and reasoned exposition of the litigation dilemma; that is, the concern that the very steps an organization takes to make its compliance program effective puts it at risk by arming prosecutors or civil plaintiffs who can use this information against it. The Group concluded that "the potential importance of this issue for purposes of encouraging truly effective compliance programs suggests . . . that the Sentencing Commission should, through its unique status and powers as an independent agency within the judiciary, serve as a fulcrum to advance the debate among policy makers."[12] Unfortunately, the Commission's latest Federal Register notice does not address this recommendation. ACC urges the Commission to do so, and to sponsor additional public workshops, or joint studies with the judiciary committees of Congress, to promote a resolution of this increasingly problematic issue.

D. Deletion of "propensity" language

ACC supports the Commission's proposed change to subsection (b)(3). The Advisory Group frankly recognized the "inscrutable" nature of the current language and the "difficulties" people have had interpreting it.[13] The alternative proposal -- "a history of engaging in violations of law or other conduct inconsistent with an effective [compliance] program" -- is much more objective and implementable.

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[12] Advisory Group Report at 131.

[13] *Id.* at 65-66 (quoting ACC).

ACC offers two comments in this regard:

- The Commission should clarify that the "other conduct" referenced above should be readily determinable, overt acts of attempted illegality or deception, or failures to act in clear and extreme circumstances -- rather than simple possession of supervisory power during a period that subordinate persons committed actual or potential violations of law. As the size of an organization grows, so does the unfairness of imputing to management every act or omission of those under it.
- How implementable any system of due diligence is, unfortunately, limited by the tendency of former employers -- motivated by privacy concerns, among other things -- not to comment about a person's employment history beyond noting dates of service. The Commission should acknowledge this difficulty in some fashion.

E. Promotion and Enforcement

ACC generally supports proposed subsection (b)(6). In particular, we agree with expanding compliance standards enforcement to encompass appropriate incentives, rather than solely disciplinary measures. This approach is more consistent with organizational psychology and best practices regarding what things best motivate employees and encourage desired behavior.

It is crucial, however, that organizations be free to determine what punishments or incentives, if any, are "appropriate." The law of unintended consequences operates in this area as in all others, and well-meaning incentives can promote undesired behavior. (For example, offering bonuses to managers without reported incidents can serve as a disincentive to reporting incidents, not a good outcome.) ACC also requests clarification that "appropriate" modifies "disciplinary measures" as well as "incentives," for the same reason (and to avoid mandating steps that could be seen as punishing whistleblowers or others that report potential problems).

F. Effect of Involvement of High-Level Personnel in Offense

ACC supports the Commission's proposal that involvement of high-level personnel raises a rebuttable, rather than conclusive, presumption that the organization did not have an effective compliance program. ACC also believes that this change should apply across the board, and not be limited to small organizations (the second "issue for comment" under Amendment 2). In fact, as organizations grow in size, the greater number of high-level personnel exist who have the potential to deprive the organization of the benefit under the Guidelines of an effective program. Any such case should be dealt with on its own merits, so that the organization has the opportunity to show that its program was nonetheless effective.

G. Expansion of the Compliance Program's Scope to Civil Compliance

ACC agrees with the Advisory Group that organizations typically do not establish separate criminal and civil compliance programs, and that in most cases conduct that can give rise to civil violations may, if intentional, be punishable criminally. On the other hand, the purpose of the Sentencing Guidelines remains criminal sentencing. The Guidelines have no effect in civil cases. ACC requests the Commission to clarify two points which we believe it intends -- that the expansion of scope to include civil compliance:

- is not intended to require organizations to establish any new compliance programs or mechanisms beyond those changes enumerated in the current proposal; and
- should not serve as the basis for prosecutors to inquire into, and request demonstrations regarding, compliance programs for legal regimes that do not have criminal penalties (e.g., the Emergency Planning and Community Right-to-Know Act, 42 U.S.C. §§ 11001-11050).

H. "Risk Assessment" Under Proposed Subsection (c)

ACC recognizes that the proposed Application Note explaining this proposed new subsection is largely a restatement of current note 3(k)(7), wrapped up in more formal language about assessment, prioritization and modification. ACC has no objection to this approach in concept. However, ACC is concerned about the use of the phrase "risk assessment" to capture the approach. While compliance programs in the banking and health care fields may have pioneered use of that phrase for this purpose, the phrase automatically incorporates an enormous amount of complexity in more technical areas such as food, drugs, safety, environment and public health, due to the highly refined, extensive and controversial literature and practices associated with it.[14]

ACC strongly urges the Commission not to use the term "risk assessment" and instead simply to describe what organizations should do. That is, organizations should know their legal obligations, understand how those obligations apply to their businesses, and focus their compliance programs on the applicable laws most relevant to their activities and operations, taking into account the likelihood that violations of those laws might occur. Organizations should periodically review their legal obligations, operations and compliance programs to verify that the programs are designed to address the appropriate requirements and operations and the likelihood of noncompliance. If the Commission decides to retain the term "risk assessment," it should clarify that the phrase is not intended to import technical or scientific concepts of risk assessment, such as quantitative analysis or complicated statistical tools (such as probabilistic or "Monte Carlo" simulations).

[14] *See, e.g.*, National Research Council, *Science & Judgment in Risk Assessment* (1994).

[1-89]

I. Issues for Comment under Amendment 2

1. *Deleting "unreasonable delay" as a basis for a reduction for self-reporting.* ACC supports this approach. There simply is no policy basis for the current prohibition. Any time an organization self-reports, the law enforcement system benefits by learning of wrongdoing that it otherwise may never have discovered. The Advisory Group's long discussion of the litigation dilemma dramatizes the substantial downsides associated with self-reporting. This both explains the reason for delay in some cases and shows the inequity of continuing to penalize companies that do come forward by denying them credit where that delay was "unreasonable." EPA's experience with its self-audit policy provides some illumination in this regard. The policy originally had a fairly strict 10-day deadline for self-reporting, but over time EPA extended the deadline to 21 days and, more important, has created periodic "incentive programs" where industry sectors have had upward of six months to disclose. No evidence has been cited or reported in studies of EPA's program that these longer periods in any way compromised the overall effectiveness of the disclosures or the public benefit they have produced.

2. *Retaining the automatic preclusion of credit where high-level personnel of large organizations were involved in an offense.* See "Effect of Involvement of High-Level Personnel in Offense," above.

3. *Changing the reduction available for an effective compliance program from three points to four.* In the overview to its executive summary, the Advisory Group concluded:

> [L]egal standards in a remarkably diverse range of fields . . . have increasingly articulated more detailed and sophisticated criteria for organizational law compliance programs that warrant favorable organizational treatment. Efforts and experience by industry and private organizations have also contributed to an evolution of 'best practices' during the last decade. In short, the Advisory Group believes that the organizational Guidelines should be updated to reflect the learning and progress in the compliance field since 1991. [15]

There can be no doubt that, if an organization hopes for favorable treatment under the law, its obligations have increased steadily and substantially over the past decade. The bar has clearly been raised, and the Commission's proposals will codify that change. Given the increasingly heavy lifting this imposes on organizations, and the increasingly greater legal risk that such voluntary efforts poses through the litigation dilemma, increasing the possibly available reduction from three points to four is entirely appropriate. It should also spur continued private implementation of effective compliance programs and supporting organizational cultures. Conversely, not raising the available reduction effectively debases the value of the Guidelines, as organizations will be getting less credit for unit of effort.

[15] Advisory Group Report at 3.

[1-90]

II. Request for Comments re Hazardous Materials

ACC strongly opposes making any changes to the existing organizational Guidelines, or creating any new Guidelines, regarding hazardous materials (hazmat) transportation. In particular, pending legislation could render DOJ's concerns moot.

A. ACC Fundamentally Questions the Premises of DOJ's Arguments for Tougher Hazmat Guidelines

1. Hazmat incidents can be amply punished under the existing Guidelines, and the Commission should await action on pending legislation that would increase those punishments

DOJ asserts that application of Section 2Q1.2 of the Guidelines to criminal hazmat violations produces inadequate sentences. ACC disagrees. Under the Hazardous Materials Transportation Act (HMTA), knowing violations of proscriptions on tampering with required marking, labeling, placarding or documents, and any other willful violation of the statute or regulations or orders under it, are punishable by fines under Title 18 or five years imprisonment.[16]

The Senate has already passed comprehensive HMTA reauthorization legislation that would increase the available jail time to 20 years in any case where a hazardous material was released in connection with the offense -- the very circumstance that motivates DOJ's concerns.[17] Given the prospects of this legislation being enacted this year, the Commission should defer any further action on this subject.

The offense characteristics in Section 2Q1.2, moreover, would substantially elevate sentences under the HMTA. Assume, for example, that a terrorist hijacked a gasoline tank truck and drove it into a shopping center, causing an immense conflagration, many deaths and a major evacuation. While the hijacking terrorist would presumably no longer be available for prosecution, assume further that several accomplices are arrested and convicted of aiding and abetting, and thus punishable under the same offense. Under Section 2Q1.2, these terrorists' sentences would:

- Begin at offense level 8;
- Be increased by 4 levels because the attack involved a release of a hazardous substance;
- Be increased by 9 levels for posing a substantial risk of death or serious bodily injury; and
- Be increased by 4 levels for resulting in evacuation of a community.

[16] *See* 49 U.S.C. 5124.
[17] *See* S. 1072, § 4442(b).

Since the terrorist driving the truck likely did not have a commercial drivers license with the required hazardous materials endorsement, the sentences would likely also be increased 4 levels for involving transportation without a permit.[18]

Based on the foregoing, ACC submits that the terrorists' sentences would be significant, and that the Guidelines do not be revised to increase them further.

2. Hazmat incidents are not more consequential than fixed facility incidents

Contrary to DOJ's assertions, hazmat incidents are not peculiarly high-casualty, high-consequence events, and conversely "offenses involving the environment" at fixed facilities are not necessarily ongoing, continuing and repetitive (and hence implicitly minor). Fixed facility incidents have the potential to be equally as, if not more, devastating than hazmat transport incidents. Bhopal is the most obvious example. Indeed, an entire EPA program -- the Risk Management Program established under Section 112(r) of the Clean Air Act -- is devoted exclusively to preventing and minimizing the consequences of catastrophic air releases of toxic or flammable chemicals.[19] While EPA notes that "catastrophic chemical accidents . . . are fortunately relatively rare,"[20] some 15,000 facilities across the United States are regulated under this program, and hence incidents involving them are exactly the kind of "one-time, catastrophic occurrence . . . present[ing] a 'target rich' environment . . . and that . . . could affect a large population" contemplated by DOJ. Thus DOJ's first basis for distinguishing between fixed and transportation activities does not hold up to analysis.

B. DOJ's Proposal Would Add Little to the Impressive Punishments Already Available to Terrorists But Be Overly Severe for Non-Terrorist-Related Hazmat Violators

1. Terrorists are already subject to extraordinary sanctions

An entire chapter of Title 18 of the U.S. Code is dedicated to the criminal punishment of terrorists.[21] Post 9/11, it specifically addresses "domestic terrorism."[22] It contains

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[18] Not only must hazmat drivers have a special endorsement, but most hazmat shippers and carriers must register with the DOT, something else that a terrorist is not likely to do. ACC believes DOJ reads the word "permit" in Section 2Q1.2 too narrowly; in our view, a court is likely to interpret "permit" to encompass the licenses and registrations that are ubiquitous in the hazmat world, such that this basis for upward adjustment should apply routinely in terrorism cases..

[19] *See* 42 U.S.C. § 7412(r)(7); 40 C.F.R. Part 68.

[20] EPA, *Assessment of the Incentives Created by Public Disclosure of Off-Site Consequence Information for Reduction in the Risk of Accidental Releases* 47 (April 18, 2000).

[21] 18 U.S.C. Ch. 113B.

[22] *Id.* § 2331(5).

provisions directly addressed to use of "weapons of mass destruction," "explosives" and "other lethal devices," one or more of which definitions is likely to apply to any use of hazmat shipment for terrorist purposes.[23] The punishments under these provisions generally are any term of years or life, or death if death results from the offense.[24]

Similarly (but unnoted by DOJ), a separate section of the Guidelines already addresses these terrorist offenses, as well as attempts and conspiracies to commit them. Section 2M6.1 applies to offenses involving unlawful use, transfer or possession of weapons of mass destruction or toxins, among other things, and if the offense involved intent to injure the United States, *begins at offense level 42.*[25]

These provisions together assure that, in any case where terrorists use a hazmat to accomplish their goals, they will be punished as severely as U.S. law permits.

2. DOJ's proposal would result most commonly in harsh sentences being imposed in cases not involving terrorism

ACC would be unconcerned about DOJ's proposal if the new or enhanced guideline provisions applied only where the offender was liable under one of the antiterrorism statutes discussed immediately above. Unfortunately, DOJ seems equally intent on preventing terrorist attacks by severely punishing criminally culpable but otherwise patriotic Americans whose hazmat violations could potentially facilitate a terrorist attack.[26]

At the outset, ACC notes that DOJ has offered no evidence of an epidemic of such violations. Before the Commission significantly changes the criminal sentences in this area, it is incumbent on DOJ to offer some empirical substantiation for these changes. Instead, DOJ has proffered a rather academic comparison of hazmat versus fixed-facility offenses and their treatment under the Guidelines -- which as shown above is unpersuasive.

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[23] "Weapon of mass destruction" includes "any weapon that is designed or intended to cause death or serious bodily injury through the release, dissemination or impact of toxic or poisonous chemicals, or their precursors." *Id.* § 2332a(c)(2)(B). An "'other lethal device' means any . . . device that . . . has the capability to cause death, serious bodily injury, or substantial damage to property through the release, dissemination or impact of toxic chemicals, biological agents or toxins . . . ." *Id.* § 2332f(e)(9).

[24] *E.g., id.* § 2332a(a).

[25] *See* Section 2M6.1(a)(1). Sentences are to be increased by four levels if the offense results in death and by an additional four levels if it causes public disruption. *Id.*

[26] Actually, in some cases hazmat compliance could well facilitate a terrorist attack. For example, the very placards that ensure that emergency responders know what is contained in a tank truck advertise that truck's attractiveness to a terrorist. Failure to placard a truck would actually impede terrorists (though it would jeopardize first responders). This conundrum is now being hotly debated within the hazmat community.

DOJ's goal of punishing hazmat violations that might aid terrorists is unnecessary and inappropriate for at least two other reasons:

New hazmat rulemakings already address the problem of inadvertently helping terrorists. DOT recently issued a new regulation requiring hazmat shippers and carriers required to register with it to implement security plans and to train their employees on these plans. These requirements will help ensure that hazmat businesses recognize their vulnerabilities to terrorism and that they take steps both to minimize them and to sensitize their employees to them.[27] Separately, the Transportation Security Administration has issued new regulations regarding governmental background checks and security threat assessments for persons seeking hazmat endorsements to their commercial drivers licenses.[28] These steps are a far more narrowly tailored, and likely far more effective, approach to this problem than blunderbuss increases in criminal penalties.

DOJ's approach is unfair. ACC believes DOJ goes to far in proposing to punish nonterrorist hazmat personnel as severely as the terrorists who attack or exploit them. As DOJ itself recognizes, "so many different parties (e.g., shippers, carriers, freight forwarders, brokers, agents and others) are routinely involved in moving hazardous materials, as a practical matter no single party can be exclusively responsible for its safety."[29] In our view, this complexity and diffusion of responsibility is exactly why the Commission should not dramatically increase the criminal penalties potentially associated with hazmat transport. With so many people filling differing and interdependent roles, it would be too easy, in the event a terrorist exploited the system, for innocent or at least non-intentional conduct to be elevated to the level of crime; too easy for a less culpable person to become the fall guy for the conduct of the terrorist. The Commission should not exacerbate that problem.

Even worse, DOJ appears to be using the foregoing purposes as a convenient opportunity to hike the sentences applicable to anyone convicted of a hazmat crime, without regard to whether the offense could even theoretically have served to assist a terrorist. ACC is gravely troubled by this prospect. While it is impossible to predict the future probability of terrorist attacks involving hazmats, it seems undeniable that they will be highly infrequent relative to the number of times hazmat crimes will occur for reasons unassociated with terrorism. Thus, the predominant effect of DOJ's proposal would be to harshly punish hazmat offenders whose offenses had no connection with terrorism. For the reasons discussed above, ACC believes such offenses are already subject to sufficient sanction and likely will be even further sanctionable under pending legislation.

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[27] 68 Fed. Reg. 14510 (March 25, 2003).
[28] 68 Fed. Reg. 23852 (May 5, 2003).
[29] Annual Submission of the Department of Justice to the Commission (August 1, 2003), at 16.

C. A Separate Hazmat Guideline Is Particularly Objectionable

ACC is especially opposed to the creation of a new guideline applicable only to hazardous materials. Entirely apart from the appropriateness or equities of the sentences that might be handed down under it, establishment of such a free-standing guideline would greatly complicate the job of organizations attempting to implement an effective compliance system. Presumably the separate guideline would have its own concept of such a system, and any business involved in hazardous materials transportation would then need to implement, and integrate, its generic organizational and hazmat Guidelines compliance programs. Even a business that does nothing but hazmat transport would need two compliance programs, one for its hazmat-regulated activities and one for the balance of its federally-regulated activities (e.g., tax, corporate, antitrust).

* * *

ACC appreciates this opportunity to comment on these two aspects of the instant notice. If you have any questions, please do not hesitate to contact the undersigned at 703-741-5166.

Sincerely,

James W. Conrad, Jr.
Counsel

Attachment A: Responsible Care Fact Sheet
Attachment B: Testimony of ACC in connection with the Commission's November 14, 2002 public meeting.

[1-95]

Attachment A

Fact Sheet

Responsible Care®
Contact: Lisa S. Grepps at 703-741-5842 May 1, 2003

SUMMARY

The chemical industry applies its tremendous knowledge and technologies to make life better, healthier and safer – not only in the products it manufactures, but in the processes by which it operates. For the past 15 years, the industry's Responsible Care initiative has guided the industry's performance by addressing issues that go beyond the bottom line and resonate on a personal level: the safety and well-being of employees and communities; enhanced security; environmental quality; and consumer protection. By focusing on these values, Responsible Care has elevated the chemical industry – greatly improving its environmental performance and making it the safest workplace in the United States. To follow through on its commitment to continuous performance, the chemical industry must regularly set new, more stringent goals for its performance. This year, ACC members considerably raised the bar for the industry by adopting a number of enhancements to Responsible Care.

DETAILS

Responsible Care continues to strengthen its commitments and enhance the public credibility of the industry. New program enhancements adopted by the American Chemistry Council as a condition of membership include:

- **A Responsible Care Management System (RCMS).** Responsible Care is moving beyond codes of management practices to achieve better EHS performance and obtain more business value for our members and partners. The RCMS replaces the current practice of applying six codes with a combined 106 management practices (e.g., community awareness and emergency response, distribution, employee health and safety, pollution prevention, process safety and product stewardship). Instead, relevant aspects of the existing codes are subsumed into a RCMS that is based on effective management practices of leading private sector companies, initiatives developed through the Global Environmental Management Initiative, International Standards Organization and other bodies, and requirements of national regulatory authorities. The framework for the RCMS includes such areas as Policy & Leadership; Planning; Implementation, Operation & Accountability; Performance Measurement & Corrective Action; and Management Systems Review.

- **Independent Third-Party Certification.** A credible, independent third party will certify that each Responsible Care company has a RCMS in place. The mandatory certification will be conducted at company/business group headquarters and chemical facilities on a regular cycle. The RCMS provides the framework and content for the identification and implementation of management systems elements that enable continuous improvement in all aspects of Responsible Care implementation.

- **Performance Measures.** Responsible Care has a set of uniform industry wide metrics to measure individual company and industry performance through the program. The measures will enable member and partner companies to identify areas for continuous improvement and provide a means for the public to track individual company and industry performance in an accessible and transparent way. The measures address performance across a broad range of issues including economics, environment, health, safety, security and products.

- **Security Code.** Safety is an inherent part of how the chemical industry does business. In fact, the industry's practices and procedures have made it the safest industry in the country. The Security Code is designed to help companies enhance this long-standing safety culture, safeguard their facilities and surrounding communities, and continuously improve their security performance. It provides a framework for companies to check potential vulnerabilities, act on them and have an independent third party verify that security enhancements have been made. Since the security of our companies, communities and nation is so critical, implementation of this code is mandatory for ACC members.

- **Responsible Care 14001.** The Responsible Care 14001 certification process combines ISO 14001 and Responsible Care and allows participating organizations to gain accredited certificates for both ISO 14001 Environmental Management Systems and Responsible Care Management Systems in a single audit. Responsible Care 14001 certification is an option for companies that may be required by customers or other parties to gain ISO 14001 certification, but want to also gain credit for their existing Responsible Care activities that go beyond the scope of an environmental management system such as occupational health and safety, product stewardship, community outreach and transportation safety activities.

Attachment B

STATEMENT OF JAMES W. CONRAD, JR., ESQ. FOR THE AMERICAN CHEMISTRY COUNCIL TO THE ADVISORY GROUP ON ORGANIZATIONAL SENTENCING GUIDELINES TO THE UNITED STATES SENTENCING COMMISSION RELATED TO THE REVIEW OF CHAPTER EIGHT OF THE U.S. SENTENCING GUIDELINES NOVEMBER 14, 2002

Good morning, my name is James Conrad, counsel with the American Chemistry Council. On behalf of the Council, I thank you for the opportunity to testify today before the Advisory Group on Organizational Guidelines to the United States Sentencing Commission.

The American Chemistry Council represents the leading companies 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 business of chemistry is a $460 billion-a-year enterprise and a vital part 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.

The Council submitted written comments to the Advisory Group on May 16 and October 11 of this year. We have explained our views in some detail in these comments, including our responses to some of the specific questions posed by the Advisory Group. I would like to highlight some important principles for you today.

The Advisory Group has initiated the action called for by Congress in Sarbanes-Oxley.

In Section 805(a)(5) of the Sarbanes-Oxley Act of 2002, Congress directed the Commission to ensure that the *Guidelines* "are sufficient to deter and punish criminal misconduct." At least with respect to those elements of the Guidelines establishing the criteria for an effective compliance assurance program, the Advisory Group is already considering this question. Sarbanes-Oxley does not call for a separate or new review: you are simply ahead of schedule.

The *Guidelines* should continue to focus on criminal conduct in the context of criminal sentencing.

The Commission is charged with promulgating "detailed guidelines prescribing the appropriate sentences for offenders convicted of federal crimes." The courts use the *Guidelines* to sentence those convicted of crimes. The purpose of the *Guidelines,* therefore, is to "further the basic purposes of criminal punishment: deterrence, incapacitation, just punishment, and rehabilitation." The Commission should not stray from this mission. The *Guidelines* should not be expanded to address general issues of corporate social responsibility or ethics that are not governed by criminal laws or that are not directly relevant to criminal sentencing.

The Council's members strongly believe in ethical behavior and responsible social conduct. However, the Commission is tasked to address criminal conduct, not promulgate a code of ethics. Any suggested

changes to the *Guidelines* must be evaluated in the very serious criminal sentencing context in which the *Guidelines* are used.

The *Guidelines* should not be used to encourage organization to foster "ethical cultures" to ensure compliance with the "intent" of the law as opposed to "technical compliance." Our members certainly support ethical conduct by organizations, and recognize that encouraging organizations to create an "ethics infrastructure" that goes "beyond compliance" with criminal law is a laudable goal. However, that is not the function of the Sentencing Commission. Establishing criminal sentences based on ethical judgments would effectively be creating new federal crimes, a course of action that lies within the jurisdiction of Congress, not the Commission. The focus of the *Guidelines* should remain on systems that assure compliance with legal requirements, not ethics programs that may focus on important questions in a wider domain. This is particularly true given that there is no agreed-upon set of ethical criteria against which organizations can be measured and that can be the basis for setting criminal penalties.

Any changes to the *Guidelines* should be based on objective evidence and a demonstrable need for change.

Any suggested changes to the *Guidelines* should be based on facts, not theory. Thousands of organizations have invested significant resources implementing compliance systems based on the *Guidelines*. Yet, we are unaware of any actual data or other evidence in the public record showing deficiencies in the *Guidelines* that need correcting. On the contrary, as the Commission has noted, the "organizational guidelines have had a tremendous impact on the implementation of compliance and business ethics programs over the past ten years." The Advisory Group should follow the adage: "If it ain't broke, don't fix it." Material changes should only be considered after finding the *Guidelines* are flawed and that the user community is demanding changes.

Some may say that something must be done because of the alleged criminal activities and corporate governance scandals that currently are high-visibility issues. However, the mere existence of alleged illegal or unethical conduct in some organizations does not mean that the *Guidelines* were at fault or that changing the *Guidelines* would have produced a different result. Changes to the *Guidelines* should be based on objective evidence that the *Guidelines* have not established adequate criteria for effective compliance systems, not on general concerns about unethical conduct.

The *Guidelines* must remain flexible, practical and generally applicable to all organizations in all sectors.

The *Guidelines* currently offer the flexibility needed to allow organizations of all sizes and types to implement effective compliance programs. Any proposed changes to the *Guidelines* should take into account the small and medium-sized organizations that are the vast majority of U.S. businesses. This is not a theoretical concern. The Commission's statistics reveal that in FY 2000, some 87% of organizations sentenced under Chapter 8 had fewer than 200 employees, while approximately 65% of all sentenced organizations had fewer than 50. Whatever obstacles small and medium-sized businesses face will not be lessened by increasing the level of detail or complexity in the *Guidelines*. Further, attempting to create unique provisions in the *Guidelines* for small and medium-sized businesses would require the Sentencing Commission to be able to discern which obstacles are unique to such businesses

and to draw arbitrary lines between which businesses would "qualify" for any unique provisions and which would not.

The "best practices" developed by sophisticated companies, consulting firms or academia should not become the model for what all organizations must undertake. While smaller organizations should follow the *Guidelines*, they should not be potentially subject to greater criminal penalties if they cannot implement the "best practices" of large enterprises. Indeed, "raising the bar" might only serve to discourage organizations from implementing effective compliance assurance systems.

The *Guidelines* already provide sufficient guidance on designing, implementing or auditing compliance systems.

Some commenters have suggested that the *Guidelines* should include more detailed guidance on designing, implementing or auditing compliance systems. These suggestions, however well-intentioned, are misplaced. The *Guidelines* should remain generic and applicable to all organizations.

There is no evidence of a "market need" for the Commission to provide detailed implementation guidance. There has been a proliferation of sector-specific, public, private, national and international guidance documents and standards on compliance assurance, many of which we surveyed in our May 16 comments. This vast literature is already available to the user community. Indeed, it is not the function of the Commission to provide such general educational assistance through the *Guidelines*, since the failure of an organization to conform to the *Guidelines* can have direct implications in the criminal sentencing context.

Moreover, if the Commission were inclined to provide more detail on compliance programs, the practical impact of that effort must be carefully weighed. The available specific guidance on compliance programs continues to be refined and tailored to the needs of specific areas of regulation. For example, several Federal agencies have already developed sector-specific guidance or even regulations on compliance management systems. Adding detail to the *Organizational Guidelines* could create conflicts with these other efforts, leading to practical implementation problems.

The Guidelines do not need to provide more detail on "corporate governance."

It is no secret that corporate governance is a significant topic of public interest, and that there are several major legislative and regulatory initiatives that are making significant changes to corporate governance. Not the least of these are the new requirements just created by Congress in the Sarbanes-Oxley Act of 2002 and are being implemented by various regulatory and self-regulatory bodies such as the Securities & Exchange Commission, the New York Stock Exchange and the National Association of Securities Dealers.

Adding specific corporate governance responsibilities in the *Guidelines* at this time could create conflicts with the flood of new requirements already being generated. For example, the *Guidelines* should not provide detail on the responsibilities of boards of directors or equivalent governance bodies in overseeing compliance programs. Not all organizations, particularly smaller ones, have such governance bodies, and the *Guidelines* already embody the principle that compliance programs should be supervised by "high level" personnel. Further, specifying the responsibilities of particular functions

associated with corporate governance (e.g., CEO or CFO), expanding the definitions of "high level personnel," or providing additional comments on what is intended by "specific individual(s) within high-level personnel of the organization" would decrease the flexibility that is currently an outstanding feature of the *Guidelines*. These are all issues that are already topics of considerable federal legislative, regulatory and self-regulatory attention.

To provide one last example, more specificity on whistleblower protection is not necessary. We agree that whistleblowers must be completely protected from acts of retribution. However, the *Guidelines* already clearly state that internal reporting should be without fear of retribution. Further, many statutes already provide specific whistleblower protections. Adding more specific whistleblower provisions in the *Guidelines* might either create conflicts with existing substantive laws or be duplicative, or even create loopholes that might result in less protection.

It is not the function of the Sentencing Commission to create new corporate governance rules. That is properly the province of Congress and the numerous regulatory bodies that have been delegated the authority to promulgate and enforce regulations on this topic. The flurry of legislative and regulatory activity demonstrates that there is not a "gap" that the Commission must fill. As the legal requirements on corporate governance are revised and expanded, organizations that implement compliance assurance systems that conform to the criteria in the *Guidelines* will necessarily have to include those new requirements in their systems. Therefore, without any modification to the Guidelines themselves, any new corporate governance requirements will become elements of an effective compliance assurance system.

Thank you again for the opportunity to speak today. I would be happy to answer any questions you may have, and look forward to participating in this afternoon's sessions.

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March 1, 2004

United States Sentencing Commission
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Dear Commissioners:

This letter is respectfully submitted in response to the Commission's request for public comment, BAC2210-40/2211-01. In particular, my comments relate to Issues for Comment 11: Hazardous Materials.

I am a partner in the law firm of Ballard Spahr Andrews & Ingersoll, LLP, practicing in the Government Enforcement/White Collar Crime Group and the Environmental Group. I was formerly Chief of the Environmental Crimes Section of the U.S. Department of Justice. Before that, I was an assistant United States attorney and Chief of Major Crimes in the United States Attorney's Office in the Eastern District of Pennsylvania, where I supervised all the environmental crimes prosecutions in the district.

In its annual submission to the Commission dated August 1, 2003, the Justice Department asked the Commission to consider revising the guidelines for offenses involving the illegal transportation of hazardous materials. In essence, the Department argued that the specific offense characteristics of the applicable sentencing guideline, § 2Q1.2, often do not apply to these "hazmat" offenses and therefore the guidelines are too low. Among other things, the Commission's request for comments lists eighteen possible aggravating factors, (A) through (R), that might be incorporated into the guidelines as specific offense characteristics (hereinafter the "proposed S.O.C.'s"). I suggest the following framework to help simplify and clarify the analysis of these issues.

Crimes involving illegal transportation of hazardous materials can be broken into three categories. The first category consists of acts of terrorism, that is, transportation offenses where the actors intend there to be releases of hazardous materials to the environment. The

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second category consists of other, non-terrorist related hazmat offens es that also result in releases to the environment. These releases are usua lly accidental. Unlike more typical pollution offenses, which often involve the intentiona l discharge, release or dumping of waste to avoid the costs of proper disposal, hazardous materials re gulations generally involve transportation of valuable products. The release and loss of valuable product into the environment is an unintended result of a hazmat offense. The th ird category consists of hazmat transportation offenses where there are no releases. As expl ained below, the sentencing guidelines already address the first two cat egories of offenses.

As for the first category, terrorist acts , the Department's letter of August 1, 2003 highlights the relevance of hazardous material transportation to acts of terrorism. (see , e.g., Justice Department letter dated August 1, 2003, p. 14: "Illegal transp ortation of hazardous materials has emerged as a significant terrorist vulnerability. . . ."). Certainly, a guideline calculation should be subject to enhancement if a hazmat tran sportation offense involves a terrorist act. However, § 3A1.4 already provides for an increase in offense level for any offenses involving or intending to promote a federal crime of terrorism. Specifically, it provides for an increase either of 12 levels, or an increase to level 32, whichever re sults in a higher offense level. Thus, there is no need to modify § 2Q1.2 or Part Q to take into account terrorism since it is already covered in chapter 3, and adding a specific offense characteristic for "a terrorist motive" (item (O) in the proposed S.O.C.'s) appears duplicative of § 3A1.4.

Similarly, with respect to the second category, hazmat offenses resulting in accidental releases, the presence of the releases brings these offenses into the "heartland" of other more typical pollution offenses covered by § 2Q1.2. In particular , the existing specific offense characteristics of § 2Q1.2 already provi de a series of cumulative enhancements corresponding to the severity of any releases to the environment. These specific offense characteristics adequately reflect the varying se riousness of offenses that include environmental releases.

Indeed, I am not aware of the Justice Department taki ng the position that § 2Q1.2 results in sentencing that is in any way inadequa te for such environmental crimes. For example, in July 2002, I had the opportunity to testify before a subcommittee of the Senate Committee on the Judiciary on the topic: "Criminal and Civ il Enforcement of Environmental Laws: Do We Have All the Tools We Need?" Representatives of the Justice Department, the Environmental Protection Agency and others also testifie d. While many different "tools" for stronger enforcement were discussed, there was no sugges tion that tougher sentences were needed for environmental crimes i nvolving actual releases.

Many of the possible specific offense char acteristics listed by the Commission in the Issues for Comment 11 simply repeat ones already included in § 2Q1.2, including the one-time release of hazardous material (§ 2Q1.2(b)(1)(B) – increase of 4 levels), the evacuation of a community (§ 2Q1.2(b)(3) – increase of 4), a substantial expenditure for remediation (id. – increase of 4 levels), and the substantial likeli hood of death or serious injury (§ 2Q1.2(b)(2) – increase of 9) (items (D), (G), (K), (I) in the proposed S.O.C.'s).

That leaves the third and final category of hazmat transportation offenses – those that are not related to any environmental release, whether intentional or accidental. This is the only category that arguably is not already addressed under the guidelines, since the enhancements to § 2Q1.2 assume a release or a permit violation. Therefore, the evaluation of the need for additional enhancements and the assessment of what such enhancements might be should be focused on this category. However, the analysis of specific offense characteristics for these non-release cases is especially challenging. In the more typical environmental offenses involving releases, the specific offense characteristics reflect the egregiousness of the offenses based on the actual results caused by the offenses – the repetition and impact of the release or releases of the harmful material into the environment. These impacts are empirically observable and measurable. By contrast, there is no actual harm associated with this third category of hazmat offenses since there are no releases into the environment. Instead, the severity of these offenses arise from the relative risk of harm to the public. The guidelines presently address risk with a departure for offenses that significantly endanger public safety. See § 5K2.14. However, rather than this departure, the Department seeks to add new specific offense characteristics. Accordingly, the specific offense characteristics that might be relevant are ones that serve as surrogates for measuring relative risk to the public. Possible examples of these from the list of proposed S.O.C.'s include the transportation of a hazardous material on a passenger-carrying or other aircraft (item A), the transportation of a hazardous material on any passenger-carrying mode of mass transportation (item B), the concealment of the hazardous material during its transportation (item C), the transportation of radioactive or explosive material (item N), and the failure to properly train transporters (item Q).

The difficulty in assessing these proposals is increased not only by the added difficulty in measuring risk as compared to the impact of actual releases, but also by the absence of a significant body of criminal cases or sentencing experience for hazmat transportation offenses. There are relatively few cases on which to evaluate whether or to what extent current sentencing of hazmat cases is inadequate.

In summary, the analysis of hazardous materials transportation offenses should focus on cases which do not involve an environmental release, because this is the only category that may be outside the "heartland" of environmental crimes cases already adequately addressed by the guidelines. Since the existing specific offense characteristics for cases involving actual environment releases are widely viewed as being adequate, there is no justification for adding new specific offense characteristics that relate to the impact of actual releases. Instead, the justification for any enhanced sentencing would have to be that the current guidelines do not adequately reflect the increased risk to public safety caused by hazmat offenses that do not include environmental releases. Therefore, the only S.O.C.'s relevant to the analysis are those that may reflect increased risk in such cases. Such analysis is made more challenging by the inherent difficulty in basing guidelines calculations on risk, rather than impact, and the small pool of relevant criminal experience on which to draw.

There are certainly hazmat offenses that can cause very signif icant risks to public safety, but the trick is to stri ke a proper balance that avoids painting with too broad a brush.

Respectfully,

Ronald A. Sarachan

RAS/km

PHL_A #1853840 v1

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FILE NO:

March 1, 2004

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Dear Commissioners:

This letter is sent on behalf of the Association of Oil Pipelines (AOPL). The AOPL writes in response to the Commission's request for comments regarding possible revisions to the guideline treatment for the illegal transportation of hazardous materials.

The AOPL is an unincorporated nonprofit organization started in 1947. AOPL represents 49 common carrier oil pipeline companies. AOPL members carry nearly 80% of the crude oil and refined petroleum products moved by pipeline in the United States. Among other things, the AOPL represents its members on legislative and regulatory matters and in the federal courts.

The Commission has sought comments in response to the August 1, 2003 Department of Justice submission which alleges that the sentencing guideline applicable for hazardous materials, § 2Q1.2 is not adequately suited to illegal transportation of hazardous materials. The Department of Justice suggests two grounds to justify changes to the guidelines: first, that illegal transportation of hazardous material is different from typical pollution offenses covered by § 2Q1.2 and has characteristics not addressed by that guideline; and, second, that the specific offense characteristics set forth in § 2Q1.2 are not characteristic of illegal transportation of hazardous materials. For the reasons set forth below, the AOPL urges the Commission to reject the structure of the Department's approach and offers an alternative approach more closely tailored to the stated need.

The AOPL supports the Department's effort to obtain enhancement of penalties where hazardous materials and/or the hazardous material transportation infrastructure are used to commit (or attempt to commit) acts of terrorism. As described in the attached summary of

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industry security efforts[1], the pipeline industry has entered into close cooperation with federal law enforcement and regulatory agencies to address shared concerns about the integrity and security of the nation's critical private infrastructure. In addition, the AOPL support the Department's effort to obtain enhancement of penalties where violations involve controlled substance manufacturing or trafficking offenses.

As set forth below, there are existing provisions of the Guidelines that address the potential misuse of the nation's hazmat transportation infrastructure as a weapon. To the extent further revision is considered appropriate, there is precedent within the guidelines for a much more straightforward approach to this issue.

To address "one-time, catastrophic occurrences," involving illegal hazardous materials transportation by terrorists, the guidelines already provide for a "victim related enhancement" at § 3A1.4 for crimes which involved or were intended to promote terrorism.

If further revision is thought to be necessary, a direct and simple precedent is found in § 2B1.1(b)(12)(B)(i) which provides for a specific offense characteristic in crimes involving theft and embezzlement if:

> the offense (i) substantially jeopardized the safety and soundness of a financial institution . . .[2]

Using this model to address illegal hazardous material transportation by those with the intent to commit acts of terrorism, or to engage in controlled substance manufacturing or trafficking offenses, the guidelines could add a new specific offense characteristic to § 2Q1.2 as follows:

> (7) If the offense: (i) involved, or was intended to promote a federal crime of terrorism, increase by 12 levels; but if the resulting offense level is less than level 32, increase to level 32; (ii) involved, or was intended to promote a controlled substance manufacturing or trafficking offense, increase by 2 levels, but if the resulting offense level is less than level 14, increase to level 14.

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[1] See Attachment 1, "Security Planning and Preparedness in the Oil Pipeline Industry," API-AOPL Environmental and Safety Initiative, August, 2003, available at: http://www.aopl.org/pubs/reports.html.

[2] United States Sentencing Guidelines, § 2b1.1(b)(12)(B)(i) (January, 2003).

This would provide additional specific offense characteristics that would be consistent with the model utilized in § 2B1.1, and with the language for victim-related adjustments for crimes involving terrorism in § 3A1.4 and for transportation offenses involving drugs in § 2D1.12(a)(12)and(b).

The Department correctly notes that § 2Q1.2 was not originally designed to cover hazardous material transportation violations. However, as the Department also notes, since 1993, hazmat crimes were added to § 2Q1.2.

Thus, illegal transportation of hazardous material *is* covered by § 2Q1.2.[3] Further, almost all of the offense characteristics proposed for comment for illegal transportation of hazardous material are covered by the existing guidelines. Thus, a violation of the legal limits on hazardous material transportation results in a base offense level of 8. If there is a release, a four-level enhancement may apply, and if there is a related evacuation or disruption of public utilities or a significant clean up, then another four-level enhancement would apply. Should the offense result in a substantial likelihood of death or serious bodily injury, a nine-level enhancement would apply.[4] The Department has long noted that these sanctions available under § 2Q1.2 provide serious punishments for environmental violations.

Moreover, the use of criminal enforcement of environmental laws has proceeded step-wise, with criminal enforcement following the gradual clarification of regulatory requirements and as a support and enhancement to the government's other enforcement tools of administrative and civil enforcement.

In that context, it should be considered that hazardous material transportation regulation is in a remarkable state of change. In response to 9/11, new partnerships have developed between the private sector and federal, state and local governments to devise the means to identify the areas of greatest potential risk and develop the strategies most likely to address those risks. To the extent that the Department's proposal seeks to increase penalties as a means of reducing those risks, the effort is premature, as the government itself is still determining what acts (or failures

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[3] United States Sentencing Guidelines, Appendix A (November 2002) Listing Statutory Provisions found at title 49.

[4] Of course other enhancements could apply as well, such as those dealing with the offenders role in the offense in Chapter 3B and for acts of obstruction under 3C.

to act) in the area of hazardous material transportation constitute the greatest potential risk (and which therefore might receive greater sanctions should they be violated).[5]

A recent Congressional Research Service Report for Congress noted that after the terrorist attacks:

> Pipeline operators reviewed procedures, tightened security, rerouted transportation patterns, closely monitored visitors and made capital improvements to harden key facilities. The Association of Oil Pipelines (AOPL) and the American Petroleum Institute (API), working together, provided guidance to member companies on how to develop a recommended pipeline security protocol analogous to an existing protocol on managing pipeline integrity.[6]

Ninety-five percent of AOPL operators had developed new security plans and instituted appropriate security procedures by February 2003. Pipeline operators have joined with the Department Homeland Security to establish a cooperative, industry-directed database to provide real-time threat alerts, cyber alerts and solutions. AOPL members have also worked with the Department of Homeland Security to identify critical facilities that warrant government protection should they be threatened and have responded to requests by the DOT's Office of Pipeline Safety and DHS's Transportation Security Administration to conduct vulnerability assessments. These are only a few of the ways that the AOPL and its members have moved to respond to security threats and to increase government-industry partnerships to enhance the protection of the nation's critical infrastructure. These efforts to identify risks and problems in the hazardous material transportation industry are still in process.

In the context of these efforts, most of the suggested revisions to § 2Q1.2 are not focused on the utility of this guideline provision as a means of addressing national security threats or drug trafficking. Guidelines revisions have generally flowed from the careful study of empirical information. Outside of the approach noted above to address acts of terrorism against our nation's critical private infrastructure or drug related offenses, the small number of criminal

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[5] For example, in a proposed rulemaking, the DOT and the Transportation Security Administration are evaluating the need to require further security enhancements on materials or categories of materials that present the most serious security risks in transportation. 68 Fed. Reg. 37,470, 34,477 (June 9, 2003).

[6] CRS Report for Congress, "Pipeline Security: An Overview of Federal Activities and Current Policy Issues," updated February 5, 2004, p. CRS-11.

hazmat cases do not provide a basis for the non-security focused proposals on § 2Q1.2. There is simply too little "additional information and . . . firm empirical basis" which the Commission itself considers a necessary basis for revisions to the guidelines.[7]

* * *

While not the main focus of these comments, the reference to possible changes to the Chapter Eight guidelines to specifically cover hazmat compliance appears to conflict with the past design of Chapter Eight and the Commission's current proposal to revise Chapter Eight. As the Commission is well aware, Chapter Eight provides leniency for effective programs to prevent and detect violations of law. Chapter 8 has long served an outsize role in determining the shape and content of corporate compliance plans. Following the October 2003 report of the Ad Hoc Advisory Group on the Organizational Sentencing Guidelines, the Commission has published proposed amendments to Chapter Eight which propose a new standalone guideline focused on compliance programs.

The provisions of the Chapter Eight guidelines that address compliance programs have been crafted to have broad application. Notably, some concerns over the proposed changes focus on whether or not expanding the specificity of the definition of an effective compliance program is beyond the Committee's purview or expertise. This concern would be amplified should the Commission begin developing industry specific criteria. What is considered to be the most effective compliance program for a given industry is subject to a vast number of economic, technological and other factors. It would undermine the broad impact of the Chapter Eight guidelines in this area should the Commission attempt to make such narrow prescriptions.

* * *

The AOPL hopes that these comments are useful to the Commission. The AOPL would appreciate the opportunity to send a representative to testify before the Commission's public hearing on March 17, 2004.

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[7] United States Sentencing Commission, Guidelines Manual, Chapter 1, Part A, Introduction and General Application Principles, "A Concluding Note."

Respectfully submitted,

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SPS/kmm
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Security Planning and Preparedness in the Oil Pipeline Industry

August 2003

Almost two years have elapsed since the tragic events of September 11, 2001. The oil pipeline industry is committed to the integrity and security of the national oil pipeline network. We would like to take this opportunity to bring you up to date on oil pipeline industry security actions that have taken place since September 11, but focusing on recent months.

The oil pipeline network is a valuable national asset, which is owned, maintained and operated by private companies. Pipelines are the irreplaceable core of the U.S. petroleum transportation system and the means for both delivery of foreign and domestic crude oil to refineries and for moving finished products from refining and producing centers to consuming regions. Oil pipeline shipments account for 17% of all domestic freight moved nationwide, delivering more than 14 billion barrels (600 billion gallons) per year. The nation's oil pipeline network includes 160,000 miles of interstate transmission pipelines. Those pipelines are regulated from a safety and environmental perspective by the federal government through the U.S. Department of Transportation Office of Pipeline Safety.

Pipelines are physically robust. The vast majority of pipeline systems are underground and less vulnerable than aboveground facilities. Pipeline operators have been managing the integrity, safety and security of pipeline systems for many years. Most damage to pipelines can be readily repaired and pipeline operators have emergency response plans in place. Disruptions in supply can often be avoided by providing alternative forms of transportation for short periods or by using interconnections to move products around the site of damage to a pipeline.

Pipeline operators cooperated readily with the federal government to identify, for preparedness purposes, those pipeline facilities that are critical to the nation Key critical pipeline assets have been identified using system risk analysis along with mutual discussion between operators and the Department of Homeland Security, the Department of Energy and the Department of Transportation. In addition to key critical assets, other pipeline systems may be considered viable terrorist targets or a release resulting from a terrorist attack from certain pipeline systems might have a significant impact on people,

API-AOPL Environmental and Safety Initiative

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on public drinking water, on regional energy supply, on military facilities important to national defense, or could potentially impact other modes of transportation or other critical infrastructures (electric power generation, telecommunications, or other utilities). These pipeline systems or portions of pipeline systems, have also been specifically identified by operators. Information about critical assets forms a part of our nation's security and is not subject to public disclosure.

Security guidance for pipeline facilities is in place and pipeline operators are implementing that guidance for critical facilities. In July 2002, the American Petroleum Institute published "Guidelines for Developing and Implementing Security Plans for Petroleum Pipelines." By developing a pipeline security plan operators can improve the security of pipeline systems and develop the knowledge and processes for making security related decisions. Pipeline operators have and will continue to:

- Identify and analyze actual and potential events that can result in pipeline security related incidents
- Identify the likelihood and consequence of such events
- Provide an integrated means for examining and evaluating risks and selecting risk reduction actions
- Establish and track security plan effectiveness
- Establish security conditions (using the national treat advisory system) and specific protective measures based on the threat level

The security of pipeline facilities has also been considered in relationship to other energy assets. The petroleum industry as a whole has published, "Security Guidance for the Petroleum Industry" (April 2003) in close cooperation with the Department of Homeland Security, Information Analysis and Infrastructure Protection division.

The federal government has established pipeline security contingency planning guidance, published that guidance for action by pipeline operators and asked that all pipeline operators submit a written statement concerning security preparedness. In September 2002, the U.S. Department of Transportation, in coordination with the Department of Energy and agencies that became the Department of Homeland Security, published a pipeline security information circular. The circular defined critical pipeline facilities, identified appropriate measures for protecting critical facilities (based on the national threat advisory system) and defined a process by which the federal government would verify that operators had taken appropriate action and implemented satisfactory security procedures and plans. The information circular requested that operators submit a written statement confirming that the operator has:

- Reviewed the information circular and the Pipeline Security Contingency Planning Guidance
- Reviewed the consensus security guidance appropriate to its segment (oil or natural gas) of the pipeline industry
- Identified its critical facilities
- Developed a corporate security plan
- Begun implementing its corporate security plan to protect the physical and cyber security of its critical facilities

As of April 1, 2003, the U.S. Department of Transportation Office of Pipeline Safety has received certifications from operators of 95% of the U.S. oil pipeline infrastructure -- more than 150,000 miles – regulated by the U.S. Department of Transportation. The companies that comprise the 95% are substantially all of the operators who operate large oil pipeline systems in the United States, as well as many smaller operators. The remaining 5% include smaller pipeline operators or companies that are primarily in other businesses but may also have pipelines between plant facilities, may connect a manufacturing plant to a larger pipeline, or similar systems. The pipeline industry continues to recommend that all pipeline operators have security plans in place and certify to the federal government as requested by the U.S. DOT Office of Pipeline Safety. In addition to the mileage of pipelines regulated by the Department of Transportation, there are another 30-40,000 miles of small diameter, widely scattered oil pipelines servicing domestic production fields. These pipelines do not pose a security risk to energy facilities, energy supplies or to the public.

Beginning this past April and continuing, the U.S. Department of Transportation and the Department of Homeland Security, Transportation Security Administration are conducting verification checks at pipeline companies to validate the certifications made by pipeline operators. The U.S. Department of Transportation Office of Pipeline Safety is the federal agency responsible for providing oversight for oil and natural gas pipelines. The Office of Pipeline Safety has a trained inspection force in place, which has been conducting safety and environmental audits and inspections of pipeline systems for many years. OPS inspectors operate out of five regional offices and are very familiar with the pipeline operations within and across the regions. The Transportation Security Administration and the Office of Pipeline Safety have prepared a set of protocols for validating pipeline security preparedness and are conducting verification checks. Five pipeline operators have been reviewed as of August 2003 and approximately 30 of the largest operators will be reviewed by the end of 2003.

Pipeline operators are conducting and will continue to conduct vulnerability assessments of critical pipeline facilities as the federal government and the pipeline industry develop a better understanding of terrorist threats and terrorist capabilities. Prior to September 11, 2001, the federal government did not provide guidance nor recommend the need for private industries, such as the energy industry, to conduct vulnerability assessments based on terrorist threats. Many petroleum companies operating globally have had experience planning to prevent terrorists or other criminals from breaching their facilities and committing crimes, including the release of petroleum products or the damaging of facilities and potentially the communities around those facilities. Since 9/11, knowledge from companies operating oversees, from federal agencies responsible for nuclear plants and military facilities, and from security services (the FBI and private security companies) has been mined to provide guidance to domestic pipeline and other energy companies on conducting vulnerability assessments. The national laboratories (National Energy Technology Lab and Sandia) housed in the Department of Energy have made guidance and experts available to the energy industry. Pipeline operators have conducted vulnerability assessments or participated in

vulnerability assessments of larger manufacturing or port facilities encompassing multiple operators, industries, and transportation modes.

A new methodology for assessing the vulnerabilities of petroleum industry operations has been developed in cooperation with the Department of Homeland Security. Vulnerability assessments must encompass specific facilities as well as the supply chain for the distribution of petroleum products. "Vulnerability Assessment for the Petroleum Industry," published by API in May 2003, provides guidance to operators and encompasses the recommendations and concerns of the DHS Information Analysis and Infrastructure Protection division. The methodology is being evaluated by the U.S. Coast Guard for use in petroleum facilities associated with U.S. ports.

The pipeline industry is now developing an industry standard for the protection of control functions and Supervisory Control and Data Acquisitions Systems (SCADA). In addition to the focus on the physical security of pipeline facilities, the industry is also evaluating the potential vulnerabilities of information technology systems, process control and data exchange from the pipeline to the control center. The industry has conducted a review of the SCADA standards for other industries and is now drafting a SCADA security standard for pipelines.

Security actions have taken many forms depending on the specific circumstances an operator faces with a particular pipeline system, the critical nature of the services, and the current level of threat warning issued by the federal government. Provided here is a sampling of the types of actions, other than planning and awareness, which operators have taken, are taking or will take as circumstances dictate. Pipeline operator security plans are in place. Employees have been provided with information and techniques to improve their awareness of the potential for terrorist or criminal acts. Awareness is the single most important aspect of preparedness. It is helpful to understand some of the other types of actions pipeline operators have taken. Some of these actions have taken place at many facilities, some are specific to critical facilities, and some are taken only as the threat level increases. The following are some examples of actions taken to give readers a sense of the oil pipeline industry's preparedness. Pipeline operators have --

- Direct relationships, including telephone contact and face-to-face meetings, with FBI regional field personnel.
- Joined FBI Infragard program
- Established inter-company cooperative efforts for specific locations
- Obtained "secret" level security clearances for selected operational personnel to ensure that threat information can be communicated directly under circumstances when such discussions are warranted
- Joined government-industry threat information dissemination services including API and the Energy Information Sharing and Analysis Center (ISAC)
- Installed surveillance cameras at certain facilities
- Installed physical barriers to entrances to certain facilities

- Conducted response drills using terrorist scenarios as a basis for training personnel and working with new federal partners including law enforcement and the FBI under emergency circumstances
- Used guard patrols at certain facilities under certain threat conditions
- Limited access to facilities and entrance only after positive identification

The pipeline industry and the petroleum industry have been conducting informational briefings on how pipeline systems function to ensure that government agencies and intelligence personnel understand the services provided, the potential risks and vulnerabilities, and what pipeline operators are doing to improve security. The pipeline industry has recognized that it is crucial for those that are evaluating intelligence information to understand the infrastructures they are working to protect. The pipeline industry and individual pipeline companies have briefed officials at the Department of Homeland Security, the Transportation Security Administration, the DOT Office of Pipeline Safety, the U.S. Coast Guard, the Occupational Health and Safety Administration, the Environmental Protection Agency, the Department of Energy, the National Institute for Standards and Technology, the staff of Congressional Committees charged with oversight of security agencies, and intelligence personnel from various federal agencies. This industry will continue to take advantage of opportunities to provide such informational briefings.

The oil pipeline industry is committed to pipeline safety, to environmental protection and to providing reliable pipeline transportation services. The oil pipeline industry has plans in place to assure pipeline security to the extent that is practical and reasonable. Oil pipeline operators have taken prudent protective actions and will continue to analyze vulnerabilities of pipeline systems. Pipeline operators will be continuously monitoring threat information that is provided by federal, state and local law enforcement agencies. The pipeline industry will continue to work cooperative with the Department of Homeland Security, the Transportation Security Administration, the DOT Office of Pipeline Safety and the intelligence community.

INSTITUTE OF
MAKERS OF
EXPLOSIVES

The safety and security association of the commercial explosives industry • Founded 1913

March 1, 2004

Via Hand-Delivery

United States Sentencing Commission
One Columbus Circle, NE., Suite 2-500
Washington, D.C. 20002-8002
Attention: Public Affairs

Re: Comments of the Institute of Makers of Explosives; U.S. Sentencing Commission; Sentencing Guidelines for U.S. Courts; Notice, 68 Fed. Reg. 75340 (Dec. 30, 2003). Issues for Comment 11: Hazardous Materials

Dear Sir or Madam:

IME is pleased to provide comments on the above-captioned Federal Register Notice.

IME is the safety association of the commercial explosives industry. Our mission is to promote safety and security and the protection of employees, users, the public and the environment; and to encourage the adoption of uniform rules and regulations in the manufacture, transportation, storage, handling, use and disposal of explosive materials used in blasting and other essential operations.

IME represents all U.S. manufacturers of high explosives and other companies that distribute explosives or provide other related services. Over 2.5 million metric tons of explosives are consumed annually in the United States of which IME member companies produce over 95 percent. These products are used in every state in the Union and are distributed worldwide. The value of these products is estimated to be in excess of $1 billion annually. The ability to manufacture, transport, store, and use these products safely and securely is critical to this industry. Accordingly, IME is interested in any changes to the U.S. Sentencing Guidelines that have the potential to impact the transportation of hazardous materials.

We submit the following comments on the above-captioned notice.

(1) A New Guideline Should be Created to Address Offenses Involving HAZMAT Transportation

IME agrees in principle with the concern expressed by the U.S. Department of Justice ("DOJ"), that the current sentencing guideline applicable to hazardous materials (§2Q1.2 *Mishandling of Hazardous or Toxic Substances or Pesticides; Recordkeeping, Tampering, and Falsification; Unlawfully Transporting Hazardous Materials in Commerce*), is not adequately suited to hazardous materials ("HAZMAT")-related transportation offenses.

1120 Nineteenth Street, NW, Suite 310, Washington, DC 20036, USA, (202) 429-9280, FAX (202) 293-2420

[1-117]

As noted in the Federal Register notice, the §2Q1.2 Guidelines clearly are intended to cover offenses under the various U.S. environmental protection statutes and associated regulations and could, conceivably, be difficult to meaningfully apply to Department of Transportation ("DOT")-regulated HAZMAT transportation offenses. For example, the only mention of transportation offenses in the §2Q1.2 Guidelines is at (b)(4); "If the offense involved transportation, treatment, storage, or disposal without a permit or in violation of a permit, increase by 4 levels." §2Q1.2(b)(4). Clearly, this provision is directed at environmental *permitting* violations rather than the types of transportation-related offenses possible under DOT HAZMAT regulations. Where such offenses do not involve permitting, the Guideline is even less relevant as an appropriate tool.

Given the specificity of the current §2Q1.2 Guidelines to violations of environmental statutes, and the narrow, tailored structuring of the guideline to correspond to "typical" environmental recordkeeping and permitting requirements, and environmental "release" events, we believe there is substantial merit to DOJ's recommendation that the §2Q1.2 Guidelines not be the sole frame of reference for sentencing violations of DOT HAZMAT requirements.

Accordingly, IME supports the alternative noted in the Federal Register Notice that a new guideline be created to more adequately and specifically address offenses involving the transportation of hazardous materials.

(2) An Appropriate Base Level For Offenses Involving the Transportation of Hazardous Materials Should Be Conservative Given the Diversity of Potential Hazards Posed by the Transportation of Commercial HAZMAT

As the Commission is no doubt aware, the transportation of hazardous materials is an essential, integral component of industrial and commercial activity and is ubiquitous throughout the United States ("U.S.") and internationally. In addition, the quantity and variety of hazardous materials that are daily shipped in legitimate commerce in the U.S. is enormous, including widely recognizable materials such as gasoline to less obvious HAZMAT substances such as automotive airbags, various cosmetics, and a number of common food additives. Likewise, the relative potential danger – in a criminal context – posed by the myriad materials classified as HAZMAT varies as widely as the nature of the materials themselves.

While IME's expertise in the area of HAZMAT transportation is limited to the transportation of explosives and related products, it is essential that the Commission fully appreciate the diversity and volume of these and other materials that are transported as HAZMAT. Similarly, the Commission should understand the potential (or lack thereof) that such materials might "provide a 'target-rich' environment for terrorists" or others with criminal intent. 68 Fed. Reg. at 75377. Any sentencing guidelines addressing hazardous materials offenses will necessarily and unavoidably have extraordinarily broad potential applicability and impact.

[1-118]

In view of the foregoing, the Commission may wish to consider establishing a conservative base level for HAZMAT offenses in general and devise a series of base level enhancements that, to the extent possible, correspond to the nature of the hazard potentially posed by such materials. For example, if an offense proximately increases the likelihood that hazardous materials could be obtained by those with terrorist intent *and* the materials could be used to inflict the type of catastrophic harm associated with acts of "terrorism," the severity of the enhancement should reflect this potential. This arrangement would both account for the diverse hazardous characteristics of HAZMAT materials and pointedly address the concern expressed by DOJ in the Federal Register Notice.

(3) Base Level Enhancements Should Account for Minor Offenses Involving a Low Potential for Serious or "Catastrophic" Consequences

As in any regulatory scheme, there are any number of potential criminal offenses that involve relatively minor infractions of regulatory requirements and/or may have a limited potential for harmful consequences (e.g., a low or nonexistent likelihood of death or serious bodily injury). Base level enhancements unique to HAZMAT transport offenses should take into account such "lesser" offenses. We note that existing sentencing guidelines for other categories of offenses are oriented in this manner (e.g., offenses involving simple recordkeeping and reporting violations are assigned a base level mitigating factor of 2 levels in the §2Q1.2 Guidelines). Similar "simple" violations should be afforded the same treatment in the context of HAZMAT transportation.

(4) The Commission Should Incorporate the HAZMAT Classification System Devised and Administered by DOT Into Any HAZMAT Offense Sentencing Guidelines

As the Commission may be aware, all HAZMAT transportation in the U.S. is governed by a comprehensive classification system developed and administered by DOT. In preparing any sentencing guidelines specific to HAZMAT, IME recommends that the Commission ensure that the guidelines and associated base level enhancements correspond to and are consistent with this classification scheme.

(5) The Chapter 8 Guidelines for Sentencing of Organizations Should Not Require Amendment To Include a HAZMAT-Specific Compliance Program

The Request for Comments includes an inquiry regarding how new HAZMAT guidelines might interact with the sentencing guidelines for organizations.

The Chapter 8 Guidelines for Sentencing of Organizations appear to be purposely drafted in broad terms to account for offenses committed by organizations under a host of federal regulatory requirements. Accordingly, the guidelines *should* be adequate to cover any violations of HAZMAT regulations attributable to an organization.

[1-119]

In the event the Commission opts to draft new HAZMAT sentencing guidelines, however, the Chapter 8 guidelines will necessarily have to be reviewed and evaluated to ensure their continued relevance, consistency, and effectiveness. IME has not had the opportunity to fully evaluate the how the Chapter 8 guidelines are generally interpreted by the courts. That said, we recommend that, as part of any effort to develop a new HAZMAT sentencing guideline, the Commission also examine the Chapter 8 guidelines to ensure that the guidelines are adequate to accommodate situations unique to the HAZMAT transportation sector.

Specifically, the Chapter 8 Commentary and Application Notes at section (j) and, particularly, at section (k), should be available to limit, if warranted, the severity of any penalties imposed on organizations whose liability stems from the actions of third party shippers, etc. over whom the organization has little or no realistic control.

For example, a shipper contracts with a freight forwarder, broker, or agent to arrange transportation of a hazardous material to a consignee. Even in instances where the shipper arranges the transportation, once the material is no longer physically in the shipper's care and custody, the shipper can exercise little control over the safe handling or security of the material during transit. Likewise, carriers rely on the certification of shippers that the hazmat presented for transportation is correctly identified, documented, marked, labeled, and packaged as required. For these reasons, DOT will reach back to shippers for violations of "shipper/offeror" functions on a carrier's watch, and will charge carriers for knowingly violating "carrier" functions required by statute or the Department's hazardous materials regulations.

* * *

IME appreciates the opportunity to submit these comments. If you have any questions regarding these comments or if we can provide any additional information, please do not hesitate to contact Susan JP Flanagan at sjflanagan@ime.org or 202.429.9280 ext. 315 or Cynthia Hilton at chilton@ime.org or 202.429.9280 ext. 319.

Sincerely,

Susan JP Flanagan
Counsel, Environment, Safety & Health
Institute of Makers of Explosives

[1-1207]

American Chemistry Council
Good Chemistry Makes It Possible

March 1, 2004

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

Re: Comments on Two Aspects of the Commission's December 30, 2003 Notice (68 Fed. Reg, 75340):
- Amendment 2: "Effective Compliance Programs in Chapter 8"; and
- Issue for Comment 11: "Hazardous Materials"

Dear Sir or Madam:

The American Chemistry Council (ACC or the Council) is pleased to submit these comments on two aspects of the Commission's December 30, 2003 Notice: Amendment 2: "Effective Compliance Programs in Chapter 8," and Issue for Comment 11: "Hazardous Materials." ACC represents the leading companies engaged in the business of chemistry, and our members are responsible for about 90% of basic chemical production in the United States. The business of chemistry is a $460 billion enterprise and a key element of the nation's economy. It is the nation's largest exporter, accounting for ten cents out of every dollar in U.S. exports. Our members employ approximately 556,000 employees, with sales of $238 billion and 1,447 facilities. Chemistry companies invest more in research and development than any other business sector. Safety and security have always been primary concerns of ACC members, and they have only intensified their efforts, working closely with government at all levels, to improve security and to defend against any threat to the nation's critical infrastructure.

Due to the nature of their business, ACC member companies are heavily regulated under virtually all of the laws covered by the Sentencing Guidelines, and particularly in the areas of health, safety, environment, and maritime security. As a result, these companies have developed extensive and sophisticated compliance management systems. These systems influenced, and have been influenced by, the definition of an effective compliance program in the Organizational Guidelines. Any changes to those Guidelines will have direct effect on those companies' programs. ACC member companies also ship

substantial quantities of hazardous materials, and the major bulk hazardous materials carrier companies are Partners in ACC's Responsible Care® program.[1] Accordingly, ACC has a vital interest in both of these aspects of the Commission's current notice.

Executive Summary

Effective Compliance Programs

Corporate Governance. The Commission has done a good job to ensure consistency between the Guidelines and the many other sources of authority that affect corporate governance. ACC suggests the Commission clarify that:

- the phrase "shall report directly to the governing authority or an appropriate subgroup" means to provide information to, not be supervised by, these bodies; and
- the high-level personnel with direct, overall responsibility to ensure the implementation and effective administration of the organization's compliance program need not be the high-level line management with the actual compliance obligation, but may be a separate staff function.

"Ethics" Issues. The Commission has wisely constructed its proposal so that an organization implementing the seven elements of an effective compliance program can attain both the compliance with law and organizational culture called for under the proposed Guidelines. The Commission should resist entreaties to go "beyond compliance" by requiring free-standing ethics programs.

Cooperation & Waiver. ACC urges the Commission to delete the last sentence of its proposed amendment to Application Note 12, so that there would be no exception to its general rule that waiver is not a prerequisite when evaluating cooperation for sentencing purposes. Otherwise, the Commission should drop the entire amendment, and leave defendants free to argue that the merits of the issue without the Commission being perceived as having agreed with the Department of Justice.

Litigation Dilemma. The Commission should sponsor additional public workshops, or joint studies with the judiciary committees of Congress, to promote a resolution of this increasingly problematic issue.

Deletion of "propensity" language. ACC supports the Commission's proposed change to subsection (b)(3).

Promotion and Enforcement. ACC agrees with expanding compliance standards enforcement to encompass appropriate incentives, rather than solely disciplinary measures. It is crucial, however, that organizations be free to determine what punishments or incentives, if any, are appropriate.

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[1] Attachment A is a Responsible Care® Fact Sheet.

Effect of Involvement of High-Level Personnel. ACC supports the Commission's proposal that involvement of high-level personnel raises a rebuttable, rather than conclusive, presumption that the organization did not have an effective compliance program. ACC also believes that this change should apply across the board, and not be limited to small organizations.

Expansion of the Compliance Program's Scope to Civil Compliance. ACC requests the Commission to clarify that the expansion of scope to include civil compliance:

- is not intended to require organizations to establish any new compliance programs or mechanisms beyond those changes enumerated in the current proposal; and
- should not serve as the basis for prosecutors to inquire into, and request demonstrations regarding, compliance programs for legal regimes that do not have criminal penalties.

"Risk Assessment." ACC has no objection to this approach in concept, but urges the Commission to drop the phrase "risk assessment," due to extraneous connotations the phrase automatically incorporates from areas such as public health. If it does not drop the phrase, the Commission should clarify that it is not intended to import technical or scientific concepts of risk assessment.

Deleting "unreasonable delay" as a basis for a reduction for self-reporting. ACC supports this approach. There simply is no policy basis for the current prohibition.

Retaining the automatic preclusion of credit where high-level personnel of large organizations were involved in an offense. ACC supports the Commission's across-the-board proposal that involvement of high-level personnel raises a rebuttable, rather than conclusive, presumption that the organization did not have an effective compliance program.

Changing the reduction available for an effective compliance program from three points to four. The Commission's proposals would impose substantially greater obligations on organizations seeking a reduced fine. Increasing the possibly available reduction from three points to four is thus entirely appropriate.

Request for Comments re Hazardous Materials

ACC strongly opposes making any changes to the existing organizational Guidelines, or creating any new Guidelines, regarding hazardous materials (hazmat) transportation.

ACC fundamentally questions the premises of DOJ's arguments for tougher hazmat Guidelines. Hazmat incidents can be amply punished under the existing Guidelines, and the Commission should await action on Senate-passed legislation that would increase those punishments. Hazmat incidents are not more consequential than fixed facility incidents.

DOJ's proposal would add little to the impressive punishments already available to terrorists, but would be overly severe for non-terrorist-related hazmat violators. Terrorists are already subject to extraordinary sanctions, and new hazmat rulemakings already address the problem of inadvertently helping terrorists. DOJ's proposal would punish nonterrorist hazmat personnel as severely as, and more commonly than, the terrorists who attack or exploit them.

A free-standing hazmat guideline would greatly complicate the job of organizations attempting to implement an effective compliance system.

Discussion

I. Effective Compliance Programs

ACC commends the Commission for the open and deliberative approach that it has taken over the past 3-plus years in its consideration of this issue. The Commission's Advisory Group gathered a great deal of public comment in very thorough, focused and dialogic fashion in which Group members were actively engaged. The Group then worked very diligently and came up with recommendations that, in ACC's view, generally adopt the right approach. The overall thrust of ACC's prior comments and testimony was that the current Guidelines have worked well: beyond their strict role as providing rules for criminal sentences, they have already driven the development of effective compliance programs in businesses and will continue to do so. ACC noted that it was not aware of objective evidence indicating that compliance systems based on the current Guidelines were deficient. ACC recommended that any significant changes to the Guidelines be based on concrete evidence of shortcomings in the Guidelines that could be cured by the proposed changes. We also cautioned against expanding the Guidelines further into areas of corporate governance or corporate ethics, and by large the Commission has heeded those cautions.[2]

The following comments highlight areas of the proposal that ACC believes are particularly praiseworthy and reiterate concerns about making more sweeping changes. We also urge the Commission consider expressing a stronger position on the problem of waiver in connection with cooperation, and to serve in the "fulcrum" role recommended by the Advisory Group to advance the debate on this issue and the related litigation dilemma.

A. Corporate Governance.

ACC is particularly pleased that the Commission has worked to ensure consistency between (i) the Guidelines and (ii) Sarbanes-Oxley and the many other laws, rules and self-regulatory provisions that affect corporate governance. ACC's earlier comments in

[2] ACC has filed four sets of comments and testimony since the Commission's 2001 notice requesting comment on whether to create the Advisory Group. Attachment B is the testimony we filed in connection with the November 14, 2002 public meeting.

this docket addressed this issue at length, and we were invited to make a presentation specifically on this issue at the Group's public meeting. The Group's report recognized the substantial effect of Sarbanes-Oxley and other current drivers of change in corporate governance,[3] and noted concerns that the Commission not do anything to interfere with these ongoing processes.[4] The Group emphasized that its recommendations "will not impose upon organizations anything more than the law requires, nor will it conflict with industry-specific regulatory requirements."[5]

ACC does recommend two clarifications in this regard. Proposed Section 8B2.1(b)(2) provides that "[s]pecific individual(s) within high-level personnel of the organization shall be assigned direct, overall responsibility to ensure the implementation and effectiveness of the [compliance] program . . . and shall report directly to the governing authority or an appropriate subgroup . . . ."

What does "report" mean? ACC suggests the Commission clarify that the phrase "shall report directly to the governing authority or an appropriate subgroup" means only to "provide . . . information" to these bodies (as stated in proposed Application Note 3). However, if "report" were construed to mean "be directly accountable to and be supervised by," that interpretation would wreak havoc with corporate governance in many, if not most businesses, where only the president or CEO reports (in the accountability sense) to the board, and all other employees and officers report to him or her (including the person(s) with overall and direct responsibility to ensure the effectiveness of the compliance program). While persons responsible for compliance programs should have the capability and authority to provide information directly to the governing authority, having separate lines of accountability for staff officers of a company or the CEO to the governing authority is a recipe for competition and dysfunction. ACC would appreciate clarification that it has interpreted proposed Application Note 3 correctly.

The split between accountability for compliance and for monitoring the compliance program. In many (if not most) leading business organizations, the responsibility for compliance with the law lies with line management, not with a corporate staff function. This alignment of responsibility makes compliance as much a part of these managers' responsibility as meeting production or sales targets, and prevents a dynamic in which compliance becomes the obligation of a corporate "overhead" or "police" function not directly responsible for the actual conduct that constitutes compliance or noncompliance. Under this arrangement, the people who actually have to direct business activity to comply with the law are the ones charged with implementing the program to ensure compliance.

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[3] Report of the Ad Hoc Advisory Group on the Organizational Sentencing Guidelines (Oct. 7, 2003) at 39-48.
[4] *Id.* at 59 and n. 207.
[5] *Id.* at 54.

In many of these same companies, a corporate staff function is tasked with supporting and monitoring the line managers in their implementation of the compliance program. For example, a corporate environmental, health and safety department headed by a vice president of EH&S might play this role, supporting the vice presidents of manufacturing or the business unit vice presidents who actually have the EH&S compliance obligation within the company. In these companies, this corporate staff function – not the line managers -- typically has the job of surveilling the implementation by line management, of the compliance program and, in particular, reporting to the governing authority on the status of the program. However, the ultimate responsibility for the effectiveness of the compliance program -- i.e., compliance -- remains with line management.

Section 8B2.1(b)(2) should would allow for this flexibility in how companies establish responsibility for compliance and for the administration of the compliance system. It should not require dramatic and potentially dysfunctional shifts in corporate management (e.g, making the corporate staff "responsible" for compliance instead of line management, even though the staff do not control the behaviors that constitute compliance or noncompliance).

To address this issue, ACC recommends that the Commission adopt one of three options:

- clarify that the high-level personnel "with direct, overall responsibility to ensure the implementation and effective**[] administration** of the organization's [compliance] program" need not be the high-level line management with the actual compliance obligation, but may be a separate staff function (we assume this is the Commission's intent);
- clarify that, if line managers have "direct, overall responsibility to ensure the implementation of and effectiveness of the organization's [compliance] program," they can do so with the support of, and may report through, the corporate staff responsible for supporting and monitoring the compliance program; or simply
- provide that the organization must specify the roles of high level personnel in the compliance program, which would include responsibilities for (i) compliance, (ii) administration of the compliance program and (iii) reporting to the governing authority.

B. "Ethics" concerns

To its credit, the Advisory Group resisted the call to increase fines for organizations that do not establish "ethics programs" above and beyond their compliance programs. While the Group proposed requiring an organization with effective compliance program to "otherwise promote an organizational culture that encourages a commitment to compliance with the law," the Group wisely constructed its recommendations so that a company implementing the seven elements of an effective compliance program "can attain both the compliance with law and organizational culture called for under the proposed guideline. . . . The proposal avoids the need for determinations of whether a particular organization has adopted a good 'set of values' or appropriate 'ethical

standards,' subjects which may be very difficult, if not impossible, to evaluate in an objective, consistent manner."[6] The Commission has proposed to adopt this approach.

Within a month of publishing the instant Federal Register notice, the Commission was already being assailed by some consultants for "fail[ing]," "sidestep[ping]" and "neglect[ing]" opportunities to "go 'beyond compliance'" by requiring free-standing ethics programs.[7] ACC urges the Commission to resist these entreaties, for the reasons explained at length in our prior comments:

- Over the years, the Guidelines have clearly taken on a significant collateral role as an inspiration and template for the development of effective corporate compliance programs. These programs in turn have frequently grown into, or been merged with, more general programs designed to foster ethical behavior and that extend beyond notions of law-abidance.
- However, the Commission's purpose is to promulgate "detailed guidelines prescribing the appropriate sentences for offenders convicted of federal crimes."[8] Courts use the Guidelines to sentence those convicted of crimes. The purpose of the Guidelines, therefore, is to "further the basic purposes of criminal punishment, i.e., deterring crime, incapacitating the offender, providing just punishment, and rehabilitating the offender."[9]
- Establishing criminal sentences based on ethical judgments would effectively be creating new federal crimes, a course of action that lies within the jurisdiction of Congress, not the Commission.
- The focus of the Guidelines should remain on systems that assure compliance with legal requirements, not ethics programs that may focus on important questions in a wider domain. This is particularly true given the lack of any detailed set of "ethical criteria" that is agreed upon by the nation as a whole against which organizations could be measured or that could be the basis for setting criminal penalties.

It is good that the Guidelines are being integrated with aspirational ethics programs. It would be wrong, however, for organizations now to be punished more severely for not having taken these "leading," "best practice" steps, especially given the difficulty in identifying and measuring them. The Commission should retain its proposed approach.

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[6] *Id.* at 56.

[7] Letter dated Jan. 28, 2004 from Robert Olson, Principal Consultant, MetaEthics to the "Honorable Jude [sic] Diana M. Murphy."

[8] U.S. Sentencing Commission, *2003 Federal Sentencing Guidelines Manual*, Ch.1, Pt. A, General Application Principle 1 (Nov. 1, 2003).

[9] *Id.* General Application Principle 2.

C. Cooperation, Waiver & the Litigation Dilemma

1. Cooperation and waiver

The Advisory Group devoted a remarkable and admirable amount of effort to assessing the concern that prosecutors are requiring waivers of attorney-client privilege and work product protection in order to obtain credit for "cooperation" under the Guidelines. The Group's report also devotes much space to this crucial issue. Finally, the Group and the Commission deserve credit for addressing the issue in the proposed amendments in the face of the Justice Department's statement that it "sees no need" for the Guidelines to do so.[10]

Unfortunately, the proposed amendment to Application Note 12, while perhaps disfavored by the Justice Department, effectively codifies DOJ's official position: waiver is not required to satisfy the requirement for cooperation, except in the circumstances where it is. Given the "significant and increasingly entrenched divergence of opinion between [DOJ] and the defense bar" as to this issue,[11] and the even more worrisome divergence between DOJ's official position and the government's practice, as reported by the defense bar, ACC questions whether codifying DOJ's position in the Guidelines will help matters. On balance, we are concerned that it will only make matters worse, by signaling to judges and others that the Commission has considered and rejected the view that privileges and protections deserve such high respect that they should not be trumped by the government's interest in expediency.

Representatives of regulated entities – not just criminal defense lawyers – have argued often and at length that concerns about the near inevitability of waiver in the case of a government investigation have gravely hampered the effectiveness of internal investigations and the ability of corporate staff to gain the cooperation of employees. This has certainly been first-hand experience of ACC member companies. Our member companies' experience in conducting internal investigations over the past several years is that the status quo is having a serious chilling effect on communications between attorneys (especially outside counsel) and management. While unintended, this is a very negative consequence.

Previously, outside counsel conducting an internal investigation would provide extensive written advice to senior management of the company, clearly outlining the facts, legal assessment and recommendations for remedial action (including potential disciplinary action against personnel). Now, because of the very real concern that the company will be coerced to waive privileges and protections and turn the documents over to the government to receive credit for cooperation, those issues -- to the extent they are documented at all -- are likely to remain in the law firm's file in the form of internal memos. Otherwise, the documents potentially will not only provide a roadmap for prosecution but, because the action of giving them to the government could be construed

[10] Advisory Group Report at 102.
[11] *Id.* at 105.

as a broad waiver of the underlying information, could be discoverable for use in third party litigation (discussed immediately below). The net effect is that high-level personnel and the governing authority do not get the information and advice they need to fully appreciate the magnitude of the problem and allow them to take the sometimes painful steps involved in changing the culture of the company. Thus, the cooperation/waiver issue impedes not only compliance with law but the promotion of an organizational culture that encourages it.

ACC therefore urges the Commission to take the bold step of deleting the last sentence of its proposed amendment to Application Note 12, so that there would be no exception to its general rule that waiver is not a prerequisite for evaluating cooperation for sentencing purposes. Doing so would not impede the Justice Department from taking whatever positions it wishes for purpose of initiating or declining an investigation or for settling versus filing cases. It simply means that an organization would not have to compromise its compliance program to receive credit for it at sentencing.

If the Commission is unwilling to delete the last sentence of its proposed amendment to Application Note 12, ACC reluctantly believes that the Commission should drop the entire amendment, and leave defendants free to argue that the merits of the issue without the Commission being perceived as having agreed with DOJ.

2. The litigation dilemma

Relatedly, the Advisory Group's report devotes even greater length to a very thorough and reasoned exposition of the litigation dilemma; that is, the concern that the very steps an organization takes to make its compliance program effective puts it at risk by arming prosecutors or civil plaintiffs who can use this information against it. The Group concluded that "the potential importance of this issue for purposes of encouraging truly effective compliance programs suggests . . . that the Sentencing Commission should, through its unique status and powers as an independent agency within the judiciary, serve as a fulcrum to advance the debate among policy makers."[12] Unfortunately, the Commission's latest Federal Register notice does not address this recommendation. ACC urges the Commission to do so, and to sponsor additional public workshops, or joint studies with the judiciary committees of Congress, to promote a resolution of this increasingly problematic issue.

D. Deletion of "propensity" language

ACC supports the Commission's proposed change to subsection (b)(3). The Advisory Group frankly recognized the "inscrutable" nature of the current language and the "difficulties" people have had interpreting it.[13] The alternative proposal -- "a history of engaging in violations of law or other conduct inconsistent with an effective [compliance] program" -- is much more objective and implementable.

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[12] Advisory Group Report at 131.
[13] *Id.* at 65-66 (quoting ACC).

ACC offers two comments in this regard:

- The Commission should clarify that the "other conduct" referenced above should be readily determinable, overt acts of attempted illegality or deception, or failures to act in clear and extreme circumstances -- rather than simple possession of supervisory power during a period that subordinate persons committed actual or potential violations of law. As the size of an organization grows, so does the unfairness of imputing to management every act or omission of those under it.
- How implementable any system of due diligence is, unfortunately, limited by the tendency of former employers -- motivated by privacy concerns, among other things -- not to comment about a person's employment history beyond noting dates of service. The Commission should acknowledge this difficulty in some fashion.

E. Promotion and Enforcement

ACC generally supports proposed subsection (b)(6). In particular, we agree with expanding compliance standards enforcement to encompass appropriate incentives, rather than solely disciplinary measures. This approach is more consistent with organizational psychology and best practices regarding what things best motivate employees and encourage desired behavior.

It is crucial, however, that organizations be free to determine what punishments or incentives, if any, are "appropriate." The law of unintended consequences operates in this area as in all others, and well-meaning incentives can promote undesired behavior. (For example, offering bonuses to managers without reported incidents can serve as a disincentive to reporting incidents, not a good outcome.) ACC also requests clarification that "appropriate" modifies "disciplinary measures" as well as "incentives," for the same reason (and to avoid mandating steps that could be seen as punishing whistleblowers or others that report potential problems).

F. Effect of Involvement of High-Level Personnel in Offense

ACC supports the Commission's proposal that involvement of high-level personnel raises a rebuttable, rather than conclusive, presumption that the organization did not have an effective compliance program. ACC also believes that this change should apply across the board, and not be limited to small organizations (the second "issue for comment" under Amendment 2). In fact, as organizations grow in size, the greater number of high-level personnel exist who have the potential to deprive the organization of the benefit under the Guidelines of an effective program. Any such case should be dealt with on its own merits, so that the organization has the opportunity to show that its program was nonetheless effective.

G. Expansion of the Compliance Program's Scope to Civil Compliance

ACC agrees with the Advisory Group that organizations typically do not establish separate criminal and civil compliance programs, and that in most cases conduct that can give rise to civil violations may, if intentional, be punishable criminally. On the other hand, the purpose of the Sentencing Guidelines remains criminal sentencing. The Guidelines have no effect in civil cases. ACC requests the Commission to clarify two points which we believe it intends -- that the expansion of scope to include civil compliance:

- is not intended to require organizations to establish any new compliance programs or mechanisms beyond those changes enumerated in the current proposal; and
- should not serve as the basis for prosecutors to inquire into, and request demonstrations regarding, compliance programs for legal regimes that do not have criminal penalties (e.g., the Emergency Planning and Community Right-to-Know Act, 42 U.S.C. §§ 11001-11050).

H. "Risk Assessment" Under Proposed Subsection (c)

ACC recognizes that the proposed Application Note explaining this proposed new subsection is largely a restatement of current note 3(k)(7), wrapped up in more formal language about assessment, prioritization and modification. ACC has no objection to this approach in concept. However, ACC is concerned about the use of the phrase "risk assessment" to capture the approach. While compliance programs in the banking and health care fields may have pioneered use of that phrase for this purpose, the phrase automatically incorporates an enormous amount of complexity in more technical areas such as food, drugs, safety, environment and public health, due to the highly refined, extensive and controversial literature and practices associated with it.[14]

ACC strongly urges the Commission not to use the term "risk assessment" and instead simply to describe what organizations should do. That is, organizations should know their legal obligations, understand how those obligations apply to their businesses, and focus their compliance programs on the applicable laws most relevant to their activities and operations, taking into account the likelihood that violations of those laws might occur. Organizations should periodically review their legal obligations, operations and compliance programs to verify that the programs are designed to address the appropriate requirements and operations and the likelihood of noncompliance. If the Commission decides to retain the term "risk assessment," it should clarify that the phrase is not intended to import technical or scientific concepts of risk assessment, such as quantitative analysis or complicated statistical tools (such as probabilistic or "Monte Carlo" simulations).

[14] *See, e.g.*, National Research Council, *Science & Judgment in Risk Assessment* (1994).

I. Issues for Comment under Amendment 2

1. *Deleting "unreasonable delay" as a basis for a reduction for self-reporting.* ACC supports this approach. There simply is no policy basis for the current prohibition. Any time an organization self-reports, the law enforcement system benefits by learning of wrongdoing that it otherwise may never have discovered. The Advisory Group's long discussion of the litigation dilemma dramatizes the substantial downsides associated with self-reporting. This both explains the reason for delay in some cases and shows the inequity of continuing to penalize companies that do come forward by denying them credit where that delay was "unreasonable." EPA's experience with its self-audit policy provides some illumination in this regard. The policy originally had a fairly strict 10-day deadline for self-reporting, but over time EPA extended the deadline to 21 days and, more important, has created periodic "incentive programs" where industry sectors have had upward of six months to disclose. No evidence has been cited or reported in studies of EPA's program that these longer periods in any way compromised the overall effectiveness of the disclosures or the public benefit they have produced.

2. *Retaining the automatic preclusion of credit where high-level personnel of large organizations were involved in an offense.* See "Effect of Involvement of High-Level Personnel in Offense," above.

3. *Changing the reduction available for an effective compliance program from three points to four.* In the overview to its executive summary, the Advisory Group concluded:

> [L]egal standards in a remarkably diverse range of fields . . . have increasingly articulated more detailed and sophisticated criteria for organizational law compliance programs that warrant favorable organizational treatment. Efforts and experience by industry and private organizations have also contributed to an evolution of 'best practices' during the last decade. In short, the Advisory Group believes that the organizational Guidelines should be updated to reflect the learning and progress in the compliance field since 1991. [15]

There can be no doubt that, if an organization hopes for favorable treatment under the law, its obligations have increased steadily and substantially over the past decade. The bar has clearly been raised, and the Commission's proposals will codify that change. Given the increasingly heavy lifting this imposes on organizations, and the increasingly greater legal risk that such voluntary efforts poses through the litigation dilemma, increasing the possibly available reduction from three points to four is entirely appropriate. It should also spur continued private implementation of effective compliance programs and supporting organizational cultures. Conversely, not raising the available reduction effectively debases the value of the Guidelines, as organizations will be getting less credit for unit of effort.

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[15] Advisory Group Report at 3.

II. Request for Comments re Hazardous Materials

ACC strongly opposes making any changes to the existing organizational Guidelines, or creating any new Guidelines, regarding hazardous materials (hazmat) transportation. In particular, pending legislation could render DOJ's concerns moot.

A. ACC Fundamentally Questions the Premises of DOJ's Arguments for Tougher Hazmat Guidelines

1. Hazmat incidents can be amply punished under the existing Guidelines, and the Commission should await action on pending legislation that would increase those punishments

DOJ asserts that application of Section 2Q1.2 of the Guidelines to criminal hazmat violations produces inadequate sentences. ACC disagrees. Under the Hazardous Materials Transportation Act (HMTA), knowing violations of proscriptions on tampering with required marking, labeling, placarding or documents, and any other willful violation of the statute or regulations or orders under it, are punishable by fines under Title 18 or five years imprisonment.[16]

The Senate has already passed comprehensive HMTA reauthorization legislation that would increase the available jail time to 20 years in any case where a hazardous material was released in connection with the offense -- the very circumstance that motivates DOJ's concerns.[17] Given the prospects of this legislation being enacted this year, the Commission should defer any further action on this subject.

The offense characteristics in Section 2Q1.2, moreover, would substantially elevate sentences under the HMTA. Assume, for example, that a terrorist hijacked a gasoline tank truck and drove it into a shopping center, causing an immense conflagration, many deaths and a major evacuation. While the hijacking terrorist would presumably no longer be available for prosecution, assume further that several accomplices are arrested and convicted of aiding and abetting, and thus punishable under the same offense. Under Section 2Q1.2, these terrorists' sentences would:

- Begin at offense level 8;
- Be increased by 4 levels because the attack involved a release of a hazardous substance;
- Be increased by 9 levels for posing a substantial risk of death or serious bodily injury; and
- Be increased by 4 levels for resulting in evacuation of a community.

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[16] *See* 49 U.S.C. 5124.

[17] *See* S. 1072, § 4442(b).

Since the terrorist driving the truck likely did not have a commercial drivers license with the required hazardous materials endorsement, the sentences would likely also be increased 4 levels for involving transportation without a permit.[18]

Based on the foregoing, ACC submits that the terrorists' sentences would be significant, and that the Guidelines do not be revised to increase them further.

2. Hazmat incidents are not more consequential than fixed facility incidents

Contrary to DOJ's assertions, hazmat incidents are not peculiarly high-casualty, high-consequence events, and conversely "offenses involving the environment" at fixed facilities are not necessarily ongoing, continuing and repetitive (and hence implicitly minor). Fixed facility incidents have the potential to be equally as, if not more, devastating than hazmat transport incidents. Bhopal is the most obvious example. Indeed, an entire EPA program -- the Risk Management Program established under Section 112(r) of the Clean Air Act -- is devoted exclusively to preventing and minimizing the consequences of catastrophic air releases of toxic or flammable chemicals.[19] While EPA notes that "catastrophic chemical accidents . . . are fortunately relatively rare,"[20] some 15,000 facilities across the United States are regulated under this program, and hence incidents involving them are exactly the kind of "one-time, catastrophic occurrence . . . present[ing] a 'target rich' environment . . . and that . . . could affect a large population" contemplated by DOJ. Thus DOJ's first basis for distinguishing between fixed and transportation activities does not hold up to analysis.

B. DOJ's Proposal Would Add Little to the Impressive Punishments Already Available to Terrorists But Be Overly Severe for Non-Terrorist-Related Hazmat Violators

1. Terrorists are already subject to extraordinary sanctions

An entire chapter of Title 18 of the U.S. Code is dedicated to the criminal punishment of terrorists.[21] Post 9/11, it specifically addresses "domestic terrorism."[22] It contains

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[18] Not only must hazmat drivers have a special endorsement, but most hazmat shippers and carriers must register with the DOT, something else that a terrorist is not likely to do. ACC believes DOJ reads the word "permit" in Section 2Q1.2 too narrowly; in our view, a court is likely to interpret "permit" to encompass the licenses and registrations that are ubiquitous in the hazmat world, such that this basis for upward adjustment should apply routinely in terrorism cases.

[19] *See* 42 U.S.C. § 7412(r)(7); 40 C.F.R. Part 68.

[20] EPA, *Assessment of the Incentives Created by Public Disclosure of Off-Site Consequence Information for Reduction in the Risk of Accidental Releases* 47 (April 18, 2000).

[21] 18 U.S.C. Ch. 113B.

[22] *Id.* § 2331(5).

provisions directly addressed to use of "weapons of mass destruction," "explosives" and "other lethal devices," one or more of which definitions is likely to apply to any use of hazmat shipment for terrorist purposes.[23] The punishments under these provisions generally are any term of years or life, or death if death results from the offense.[24]

Similarly (but unnoted by DOJ), a separate section of the Guidelines already addresses these terrorist offenses, as well as attempts and conspiracies to commit them. Section 2M6.1 applies to offenses involving unlawful use, transfer or possession of weapons of mass destruction or toxins, among other things, and if the offense involved intent to injure the United States, *begins at offense level 42*.[25]

These provisions together assure that, in any case where terrorists use a hazmat to accomplish their goals, they will be punished as severely as U.S. law permits.

2. DOJ's proposal would result most commonly in harsh sentences being imposed in cases not involving terrorism

ACC would be unconcerned about DOJ's proposal if the new or enhanced guideline provisions applied only where the offender was liable under one of the antiterrorism statutes discussed immediately above. Unfortunately, DOJ seems equally intent on preventing terrorist attacks by severely punishing criminally culpable but otherwise patriotic Americans whose hazmat violations could potentially facilitate a terrorist attack.[26]

At the outset, ACC notes that DOJ has offered no evidence of an epidemic of such violations. Before the Commission significantly changes the criminal sentences in this area, it is incumbent on DOJ to offer some empirical substantiation for these changes. Instead, DOJ has proffered a rather academic comparison of hazmat versus fixed-facility offenses and their treatment under the Guidelines -- which as shown above is unpersuasive.

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[23] "Weapon of mass destruction" includes "any weapon that is designed or intended to cause death or serious bodily injury through the release, dissemination or impact of toxic or poisonous chemicals, or their precursors." *Id.* § 2332a(c)(2)(B). An "'other lethal device' means any . . . device that . . . has the capability to cause death, serious bodily injury, or substantial damage to property through the release, dissemination or impact of toxic chemicals, biological agents or toxins . . . ." *Id.* § 2332f(e)(9).

[24] *E.g., id.* § 2332a(a).

[25] *See* Section 2M6.1(a)(1). Sentences are to be increased by four levels if the offense results in death and by an additional four levels if it causes public disruption. *Id.*

[26] Actually, in some cases hazmat compliance could well facilitate a terrorist attack. For example, the very placards that ensure that emergency responders know what is contained in a tank truck advertise that truck's attractiveness to a terrorist. Failure to placard a truck would actually impede terrorists (though it would jeopardize first responders). This conundrum is now being hotly debated within the hazmat community.

DOJ's goal of punishing hazmat violations that might aid terrorists is unnecessary and inappropriate for at least two other reasons:

New hazmat rulemakings already address the problem of inadvertently helping terrorists. DOT recently issued a new regulation requiring hazmat shippers and carriers required to register with it to implement security plans and to train their employees on these plans. These requirements will help ensure that hazmat businesses recognize their vulnerabilities to terrorism and that they take steps both to minimize them and to sensitize their employees to them.[27] Separately, the Transportation Security Administration has issued new regulations regarding governmental background checks and security threat assessments for persons seeking hazmat endorsements to their commercial drivers licenses.[28] These steps are a far more narrowly tailored, and likely far more effective, approach to this problem than blunderbuss increases in criminal penalties.

DOJ's approach is unfair. ACC believes DOJ goes to far in proposing to punish nonterrorist hazmat personnel as severely as the terrorists who attack or exploit them. As DOJ itself recognizes, "so many different parties (e.g., shippers, carriers, freight forwarders, brokers, agents and others) are routinely involved in moving hazardous materials, as a practical matter no single party can be exclusively responsible for its safety."[29] In our view, this complexity and diffusion of responsibility is exactly why the Commission should not dramatically increase the criminal penalties potentially associated with hazmat transport. With so many people filling differing and interdependent roles, it would be too easy, in the event a terrorist exploited the system, for innocent or at least non-intentional conduct to be elevated to the level of crime; too easy for a less culpable person to become the fall guy for the conduct of the terrorist. The Commission should not exacerbate that problem.

Even worse, DOJ appears to be using the foregoing purposes as a convenient opportunity to hike the sentences applicable to anyone convicted of a hazmat crime, without regard to whether the offense could even theoretically have served to assist a terrorist. ACC is gravely troubled by this prospect. While it is impossible to predict the future probability of terrorist attacks involving hazmats, it seems undeniable that they will be highly infrequent relative to the number of times hazmat crimes will occur for reasons unassociated with terrorism. Thus, the predominant effect of DOJ's proposal would be to harshly punish hazmat offenders whose offenses had no connection with terrorism. For the reasons discussed above, ACC believes such offenses are already subject to sufficient sanction and likely will be even further sanctionable under pending legislation.

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[27] 68 Fed. Reg. 14510 (March 25, 2003).
[28] 68 Fed. Reg. 23852 (May 5, 2003).
[29] Annual Submission of the Department of Justice to the Commission (August 1, 2003), at 16.

C. A Separate Hazmat Guideline Is Particularly Objectionable

ACC is especially opposed to the creation of a new guideline applicable only to hazardous materials. Entirely apart from the appropriateness or equities of the sentences that might be handed down under it, establishment of such a free-standing guideline would greatly complicate the job of organizations attempting to implement an effective compliance system. Presumably the separate guideline would have its own concept of such a system, and any business involved in hazardous materials transportation would then need to implement, and integrate, its generic organizational and hazmat Guidelines compliance programs. Even a business that does nothing but hazmat transport would need two compliance programs, one for its hazmat-regulated activities and one for the balance of its federally-regulated activities (e.g., tax, corporate, antitrust).

* * *

ACC appreciates this opportunity to comment on these two aspects of the instant notice. If you have any questions, please do not hesitate to contact the undersigned at 703-741-5166.

Sincerely,

James W. Conrad, Jr.
Counsel

Attachment A: Responsible Care Fact Sheet
Attachment B: Testimony of ACC in connection with the Commission's November 14, 2002 public meeting.

Attachment A

Fact Sheet

Responsible Care®
Contact: Lisa S. Grepps at 703-741-5842 May 1, 2003

SUMMARY

The chemical industry applies its tremendous knowledge and technologies to make life better, healthier and safer – not only in the products it manufactures, but in the processes by which it operates. For the past 15 years, the industry's Responsible Care initiative has guided the industry's performance by addressing issues that go beyond the bottom line and resonate on a personal level: the safety and well-being of employees and communities; enhanced security; environmental quality; and consumer protection. By focusing on these values, Responsible Care has elevated the chemical industry – greatly improving its environmental performance and making it the safest workplace in the United States. To follow through on its commitment to continuous performance, the chemical industry must regularly set new, more stringent goals for its performance. This year, ACC members considerably raised the bar for the industry by adopting a number of enhancements to Responsible Care.

DETAILS

Responsible Care continues to strengthen its commitments and enhance the public credibility of the industry. New program enhancements adopted by the American Chemistry Council as a condition of membership include:

- **A Responsible Care Management System (RCMS).** Responsible Care is moving beyond codes of management practices to achieve better EHS performance and obtain more business value for our members and partners. The RCMS replaces the current practice of applying six codes with a combined 106 management practices (e.g., community awareness and emergency response, distribution, employee health and safety, pollution prevention, process safety and product stewardship). Instead, relevant aspects of the existing codes are subsumed into a RCMS that is based on effective management practices of leading private sector companies, initiatives developed through the Global Environmental Management Initiative, International Standards Organization and other bodies, and requirements of national regulatory authorities. The framework for the RCMS includes such areas as Policy & Leadership; Planning; Implementation, Operation & Accountability; Performance Measurement & Corrective Action; and Management Systems Review.

- **Independent Third-Party Certification.** A credible, independent third party will certify that each Responsible Care company has a RCMS in place. The mandatory certification will be conducted at company/business group headquarters and chemical facilities on a regular cycle. The RCMS provides the framework and content for the identification and implementation of management systems elements that enable continuous improvement in all aspects of Responsible Care implementation.

- **Performance Measures.** Responsible Care has a set of uniform industry wide metrics to measure individual company and industry performance through the program. The measures will enable member and partner companies to identify areas for continuous improvement and provide a means for the public to track individual company and industry performance in an accessible and transparent way. The measures address performance across a broad range of issues including economics, environment, health, safety, security and products.

- **Security Code.** Safety is an inherent part of how the chemical industry does business. In fact, the industry's practices and procedures have made it the safest industry in the country. The Security Code is designed to help companies enhance this long-standing safety culture, safeguard their facilities and surrounding communities, and continuously improve their security performance. It provides a framework for companies to check potential vulnerabilities, act on them and have an independent third party verify that security enhancements have been made. Since the security of our companies, communities and nation is so critical, implementation of this code is mandatory for ACC members.

- **Responsible Care 14001.** The Responsible Care 14001 certification process combines ISO 14001 and Responsible Care and allows participating organizations to gain accredited certificates for both ISO 14001 Environmental Management Systems and Responsible Care Management Systems in a single audit. Responsible Care 14001 certification is an option for companies that may be required by customers or other parties to gain ISO 14001 certification, but want to also gain credit for their existing Responsible Care activities that go beyond the scope of an environmental management system such as occupational health and safety, product stewardship, community outreach and transportation safety activities.

Attachment B

STATEMENT OF JAMES W. CONRAD, JR., ESQ. FOR THE AMERICAN CHEMISTRY COUNCIL TO THE ADVISORY GROUP ON ORGANIZATIONAL SENTENCING GUIDELINES TO THE UNITED STATES SENTENCING COMMISSION RELATED TO THE REVIEW OF CHAPTER EIGHT OF THE U.S. SENTENCING GUIDELINES NOVEMBER 14, 2002

Good morning, my name is James Conrad, counsel with the American Chemistry Council. On behalf of the Council, I thank you for the opportunity to testify today before the Advisory Group on Organizational Guidelines to the United States Sentencing Commission.

The American Chemistry Council represents the leading companies 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 business of chemistry is a $460 billion-a-year enterprise and a vital part 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.

The Council submitted written comments to the Advisory Group on May 16 and October 11 of this year. We have explained our views in some detail in these comments, including our responses to some of the specific questions posed by the Advisory Group. I would like to highlight some important principles for you today.

The Advisory Group has initiated the action called for by Congress in Sarbanes-Oxley.

In Section 805(a)(5) of the Sarbanes-Oxley Act of 2002, Congress directed the Commission to ensure that the *Guidelines* "are sufficient to deter and punish criminal misconduct." At least with respect to those elements of the Guidelines establishing the criteria for an effective compliance assurance program, the Advisory Group is already considering this question. Sarbanes-Oxley does not call for a separate or new review: you are simply ahead of schedule.

The *Guidelines* should continue to focus on criminal conduct in the context of criminal sentencing.

The Commission is charged with promulgating "detailed guidelines prescribing the appropriate sentences for offenders convicted of federal crimes." The courts use the *Guidelines* to sentence those convicted of crimes. The purpose of the *Guidelines,* therefore, is to "further the basic purposes of criminal punishment: deterrence, incapacitation, just punishment, and rehabilitation." The Commission should not stray from this mission. The *Guidelines* should not be expanded to address general issues of corporate social responsibility or ethics that are not governed by criminal laws or that are not directly relevant to criminal sentencing.

The Council's members strongly believe in ethical behavior and responsible social conduct. However, the Commission is tasked to address criminal conduct, not promulgate a code of ethics. Any suggested

changes to the *Guidelines* must be evaluated in the very serious criminal sentencing context in which the *Guidelines* are used.

The *Guidelines* should not be used to encourage organization to foster "ethical cultures" to ensure compliance with the "intent" of the law as opposed to "technical compliance." Our members certainly support ethical conduct by organizations, and recognize that encouraging organizations to create an "ethics infrastructure" that goes "beyond compliance" with criminal law is a laudable goal. However, that is not the function of the Sentencing Commission. Establishing criminal sentences based on ethical judgments would effectively be creating new federal crimes, a course of action that lies within the jurisdiction of Congress, not the Commission. The focus of the *Guidelines* should remain on systems that assure compliance with legal requirements, not ethics programs that may focus on important questions in a wider domain. This is particularly true given that there is no agreed-upon set of ethical criteria against which organizations can be measured and that can be the basis for setting criminal penalties.

Any changes to the *Guidelines* should be based on objective evidence and a demonstrable need for change.

Any suggested changes to the *Guidelines* should be based on facts, not theory. Thousands of organizations have invested significant resources implementing compliance systems based on the *Guidelines*. Yet, we are unaware of any actual data or other evidence in the public record showing deficiencies in the *Guidelines* that need correcting. On the contrary, as the Commission has noted, the "organizational guidelines have had a tremendous impact on the implementation of compliance and business ethics programs over the past ten years." The Advisory Group should follow the adage: "If it ain't broke, don't fix it." Material changes should only be considered after finding the *Guidelines* are flawed and that the user community is demanding changes.

Some may say that something must be done because of the alleged criminal activities and corporate governance scandals that currently are high-visibility issues. However, the mere existence of alleged illegal or unethical conduct in some organizations does not mean that the *Guidelines* were at fault or that changing the *Guidelines* would have produced a different result. Changes to the *Guidelines* should be based on objective evidence that the *Guidelines* have not established adequate criteria for effective compliance systems, not on general concerns about unethical conduct.

The *Guidelines* must remain flexible, practical and generally applicable to all organizations in all sectors.

The *Guidelines* currently offer the flexibility needed to allow organizations of all sizes and types to implement effective compliance programs. Any proposed changes to the *Guidelines* should take into account the small and medium-sized organizations that are the vast majority of U.S. businesses. This is not a theoretical concern. The Commission's statistics reveal that in FY 2000, some 87% of organizations sentenced under Chapter 8 had fewer than 200 employees, while approximately 65% of all sentenced organizations had fewer than 50. Whatever obstacles small and medium-sized businesses face will not be lessened by increasing the level of detail or complexity in the *Guidelines*. Further, attempting to create unique provisions in the *Guidelines* for small and medium-sized businesses would require the Sentencing Commission to be able to discern which obstacles are unique to such businesses

and to draw arbitrary lines between which businesses would "qualify" for any unique provisions and which would not.

The "best practices" developed by sophisticated companies, consulting firms or academia should not become the model for what all organizations must undertake. While smaller organizations should follow the *Guidelines*, they should not be potentially subject to greater criminal penalties if they cannot implement the "best practices" of large enterprises. Indeed, "raising the bar" might only serve to discourage organizations from implementing effective compliance assurance systems.

The *Guidelines* already provide sufficient guidance on designing, implementing or auditing compliance systems.

Some commenters have suggested that the *Guidelines* should include more detailed guidance on designing, implementing or auditing compliance systems. These suggestions, however well-intentioned, are misplaced. The *Guidelines* should remain generic and applicable to all organizations.

There is no evidence of a "market need" for the Commission to provide detailed implementation guidance. There has been a proliferation of sector-specific, public, private, national and international guidance documents and standards on compliance assurance, many of which we surveyed in our May 16 comments. This vast literature is already available to the user community. Indeed, it is not the function of the Commission to provide such general educational assistance through the *Guidelines*, since the failure of an organization to conform to the *Guidelines* can have direct implications in the criminal sentencing context.

Moreover, if the Commission were inclined to provide more detail on compliance programs, the practical impact of that effort must be carefully weighed. The available specific guidance on compliance programs continues to be refined and tailored to the needs of specific areas of regulation. For example, several Federal agencies have already developed sector-specific guidance or even regulations on compliance management systems. Adding detail to the *Organizational Guidelines* could create conflicts with these other efforts, leading to practical implementation problems.

The Guidelines do not need to provide more detail on "corporate governance."

It is no secret that corporate governance is a significant topic of public interest, and that there are several major legislative and regulatory initiatives that are making significant changes to corporate governance. Not the least of these are the new requirements just created by Congress in the Sarbanes-Oxley Act of 2002 and are being implemented by various regulatory and self-regulatory bodies such as the Securities & Exchange Commission, the New York Stock Exchange and the National Association of Securities Dealers.

Adding specific corporate governance responsibilities in the *Guidelines* at this time could create conflicts with the flood of new requirements already being generated. For example, the *Guidelines* should not provide detail on the responsibilities of boards of directors or equivalent governance bodies in overseeing compliance programs. Not all organizations, particularly smaller ones, have such governance bodies, and the *Guidelines* already embody the principle that compliance programs should be supervised by "high level" personnel. Further, specifying the responsibilities of particular functions

associated with corporate governance (e.g., CEO or CFO), expanding the definitions of "high level personnel," or providing additional comments on what is intended by "specific individual(s) within high-level personnel of the organization" would decrease the flexibility that is currently an outstanding feature of the *Guidelines*. These are all issues that are already topics of considerable federal legislative, regulatory and self-regulatory attention.

To provide one last example, more specificity on whistleblower protection is not necessary. We agree that whistleblowers must be completely protected from acts of retribution. However, the *Guidelines* already clearly state that internal reporting should be without fear of retribution. Further, many statutes already provide specific whistleblower protections. Adding more specific whistleblower provisions in the *Guidelines* might either create conflicts with existing substantive laws or be duplicative, or even create loopholes that might result in less protection.

It is not the function of the Sentencing Commission to create new corporate governance rules. That is properly the province of Congress and the numerous regulatory bodies that have been delegated the authority to promulgate and enforce regulations on this topic. The flurry of legislative and regulatory activity demonstrates that there is not a "gap" that the Commission must fill. As the legal requirements on corporate governance are revised and expanded, organizations that implement compliance assurance systems that conform to the criteria in the *Guidelines* will necessarily have to include those new requirements in their systems. Therefore, without any modification to the Guidelines themselves, any new corporate governance requirements will become elements of an effective compliance assurance system.

Thank you again for the opportunity to speak today. I would be happy to answer any questions you may have, and look forward to participating in this afternoon's sessions.

American Express Company
General Counsel's Office
200 Vesey Street
49th Floor
New York, NY 10285

February 24, 2004

Mr. Michael Courlander
Public Affairs Officer
United States Sentencing Commission
One Columbus Circle, N.E.
Suite 2-500, South Lobby
Washington, DC 20002-8002

Dear Mr. Courlander:

I am writing to respond to the request for public comment on the proposed amendments to Chapter Eight of the sentencing guidelines for organizations. I previously wrote to the Ad Hoc Advisory Group on October 4, 2002, to address the need for confidential reporting in any revision to the Commentary to the Organizational Guidelines and to discuss how we at the American Express Company accomplish that goal, in part, with our ombuds program.

In reviewing the recommendations and report from the Advisory Group, I note that while they have cited a great deal of authority on the need for confidentiality, the recommendation for a new section 8B2.1(b)(5)(c) does not contain any reference to confidentiality. I understand that the Advisory Group may have felt that referring to ombuds programs would be too restrictive, but such programs are responsive to the need for confidentiality cited by the Advisory Group. Moreover, they demonstrate that confidentiality can be achieved consistent with other legal requirements. I am enclosing the 2003 Annual Report of the American Express Office of the Ombudsperson to provide the Commission with a better sense of just how this type of program can be implemented to provide a confidential resource for employees who are concerned about misconduct. The composite scenarios included in the report are particularly revealing of how this program fits into our overall efforts to foster "an organizational culture that encourages commitment to compliance with the law."

[2-24]

Mr. Michael Courlander
Public Affairs Officer
February 24, 2004

Other organizations may have other good ways to permit employees to raise issues confidentiality. Even though one specific solution such as an ombuds program may not be appropriate for all organizations, some provision for confidentiality should be included in the new guidelines. The ideal answer would be to add the word "confidential" to the end of the section to require "...mechanisms to allow for *confidential* and anonymous reporting. This would be consistent with the language used in the Sarbanes-Oxley Act of 2002. Even if the Commission were not willing to make that change, it could amend the recommendation for the beginning of that section to provide that a system allow employees and other agents to "report or *confidentially* seek guidance...." Such an amendment also would be responsive to the need for confidentiality while steering clear of the legal tangle involving "confidential reporting."

Regardless of which of these two approaches the Commission may take, I urge the Commission to address the need for confidentiality in its final recommendations to Congress.

Very truly yours,

John E. Parauda

John Parauda
Managing Counsel

Enclosure

[2-25]

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AMERICAN EXPRESS

10th year 1994-2004

OFFICE OF THE OMBUDSPERSONS

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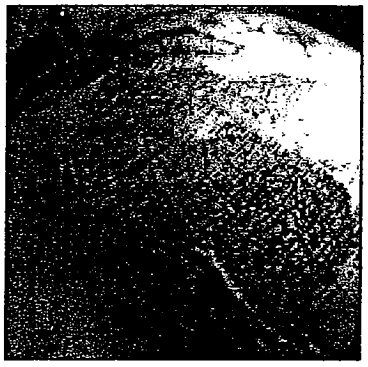
"We urge you to raise any issues that prevent us from achieving our employee, customer, and shareholder goals and from ultimately winning in the marketplace."
Ken Chenault

Dear Colleagues:

2004 marks the tenth year since the Office of the Ombudspersons was established at American Express. The Office was created in 1994 to meet a need for an alternative channel of communication where American Express people could discuss concerns in a confidential environment and without fear of retribution. Since that time, we have provided assistance to more than 25,000 people, helping to raise issues that might not have surfaced through the formal channels. Individuals were able to put aside their fears and consequently, the organization was able to appropriately address the concerns. In the past ten years, we have also shared trends with leaders in many markets and helped to influence policy and practice changes when necessary.



As we move through the rest of 2004, we will continue to focus on raising issues that could negatively impact corporate governance and the American Express brand. We will also ensure our communications clearly articulate the types of issues to bring to our Office and utilize opportunities to reinforce our confidentiality based on the feedback you gave us in our 2003 survey.

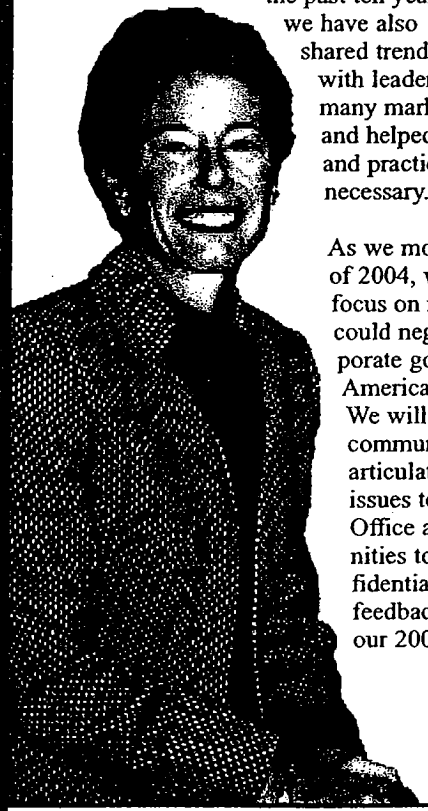
In the meantime, we encourage you to read the Code of Conduct, become familiar with the Company's policies and take responsibility to speak up when you become aware of unethical or inappropriate actions. Sometimes our culture and beliefs may go against speaking up, however American Express fosters a global work environment that encourages employees to voice concerns, and supports those who come forward. We each have a duty to report Code of Conduct and policy violations, so that the Company can take steps to rectify the problem and prevent recurrence. The formal resources in the organization, including management and Human Resources, are available to assist; however, you can also speak informally and confidentially with an Ombudsperson.

We invite you to read more about how our Office can help the people of American Express in the following pages.

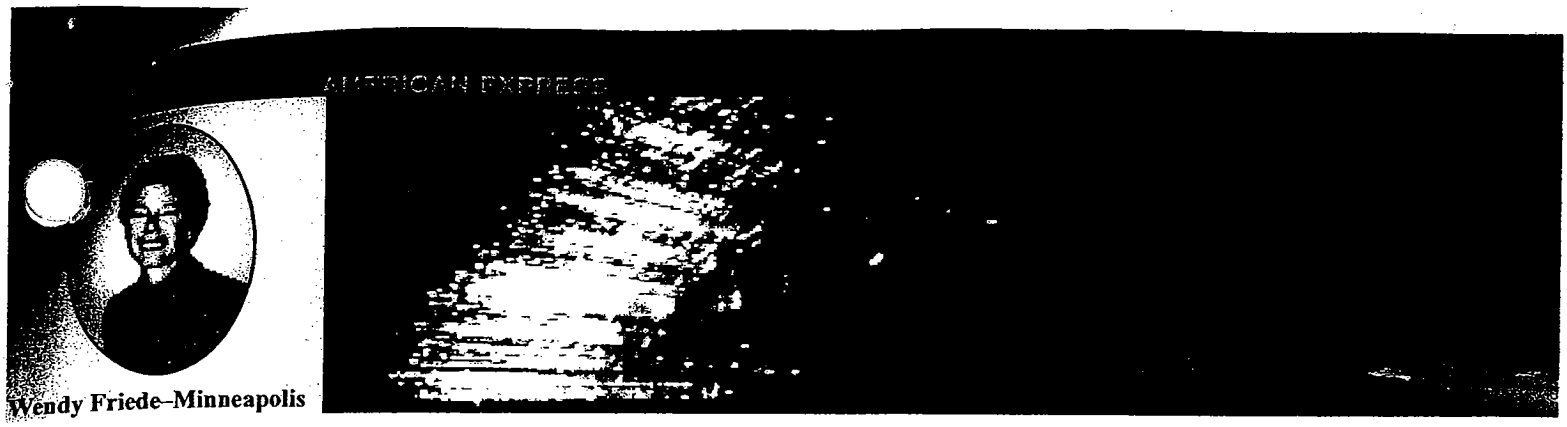
As always, you have our commitment for continued assistance in a neutral, informal and confidential environment, utilizing our worldwide team of Ombudspersons.

Cordially,

Wendy E. Friede
Corporate Ombudsperson



[2-26]



Wendy Friede–Minneapolis

Tom Barnette
Greensboro

Beatriz Barciela Dale
Miami Lakes

Jan Sullivan-Chalmers
Brighton

Pradeep Chatterjee
Singapore

Office of the Ombudspersons

WHAT IS THE OFFICE OF THE OMBUDSPERSONS?

The Office of the Ombudspersons is a confidential, informal and neutral resource where you can air work-related issues with confidence that your concerns will remain off the record and without fear of retribution.

The Office is an alternative resource available to all American Express full time, part time and temporary employees; vendors; and independent contractors.

WHAT DOES THE OFFICE DO?

We listen, coach, and assist in developing options within the Company's processes and structures to help move issues to resolution. For example, an Ombudsperson can:

- Provide coaching on how to approach your leader or other formal channels within the company to resolve your issue.
- Help you pass on information to your leader or other formal channel while protecting your identity.
- Identify alternative options when you have already approached your leader or other formal channel with your issue but reached no resolution.

IS THE OFFICE AN ADVOCATE FOR EMPLOYEES?

An Ombudsperson does not take sides. We are a designated neutral; neither an advocate for the inquirer,* coworker, manager nor any other party involved. The Office is an advocate for a fair process.

The Ombudsperson listens without passing judgment, assists in identifying resolution options within the Company and does not take sides as to the outcome.

The Office is an independent function that reports to the Office of the Chairman and to the Audit Committee of the Board of Directors.

Our Office does not report to or form part of any business unit or staff function.

*Consistent with our commitment to neutrality, we call the persons who contact us "inquirers" rather than any other term that might suggest we are advocates for any party in an issue.

HOW IS THE OFFICE INFORMAL?

- The Office is not part of the Company's management structure and therefore does not make policy, make management decisions, or conduct formal investigations.
- Contacting the Ombudsperson does not put the Company on formal notice.
- Conversations with the Ombudsperson are confidential and considered off the record.

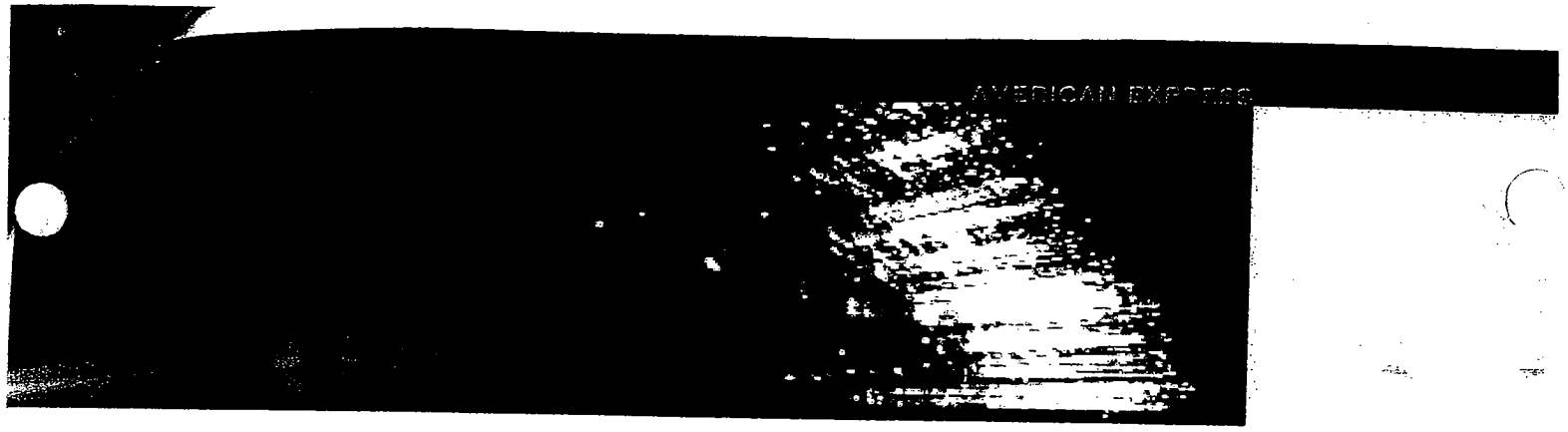
WHAT SHOULD I EXPECT WHEN I CONTACT THE OFFICE?

The Office of the Ombudspersons will:

- Listen to your concerns with an open mind.
- Remain impartial to all individuals involved.
- Keep information confidential.
- Help you identify approaches in communicating the situation.
- Identify alternative resolutions within the Company.
- Assist in achieving outcomes consistent with fairness, the Blue Box Values, and the Code of Conduct.

[2-27]

For more information please visit: www.aexp.com/ombudsperson



Office of the Ombudsperson

HOW CAN I BE SURE THAT MY CONTACT WITH THE OFFICE IS CONFIDENTIAL?

Confidentiality is the cornerstone of our practice. Conversations with the Ombudsperson are privileged, off the record and made with the understanding that they will be kept confidential. This agreement to maintain confidentiality is what makes the Office so unique as an alternative channel of communication.

- The Ombudsperson will not use an individual's name or raise an issue on his or her behalf unless in the course of our discussions we are granted specific permission.
- Our telephones are separate from the Company's phone system and the phone numbers we contact are not accessible in the billing data provided to the Company.
- We maintain a private computer network separate from that of the Company's.
- The Office keeps no documents or permanent records that identify individuals; we retain only demographic statistics on people who contact us and the types of issues they raise, enabling us to identify trends or concerns within business units or geographic areas.
- We are available, by appointment, to speak with individuals when they are away from work, including evening calls if necessary.
- Individuals may contact the Office anonymously or work with an Ombudsperson to have an issue raised within the Company anonymously.

IS THE OFFICE THE ONLY PLACE I CAN RAISE WORK-RELATED ISSUES?

The Office complements but does not replace the formal issue resolution resources you are encouraged to use when raising issues or concerns at American Express. The primary resource is usually a direct one: your leader. Other resources include: Line management, Human Resources (Employee Online Services), Compliance, Audit, Employee Assistance Program, Employee Representative Bodies, Security, and the General Counsel's Office.

As a guideline, we are an informal and confidential place to go if you:

- Want to discuss suspicions of violations of the Code of Conduct
- Suspect fraud or improper business practices
- Want to discuss possible harassment or discrimination
- See something that presents a potential security risk or conflict of interest
- Want to discuss a concern about improper leadership behavior

10 years
1.9.94 - 2004

[2-28]

THE OMBUDSMAN CODE OF ETHICS

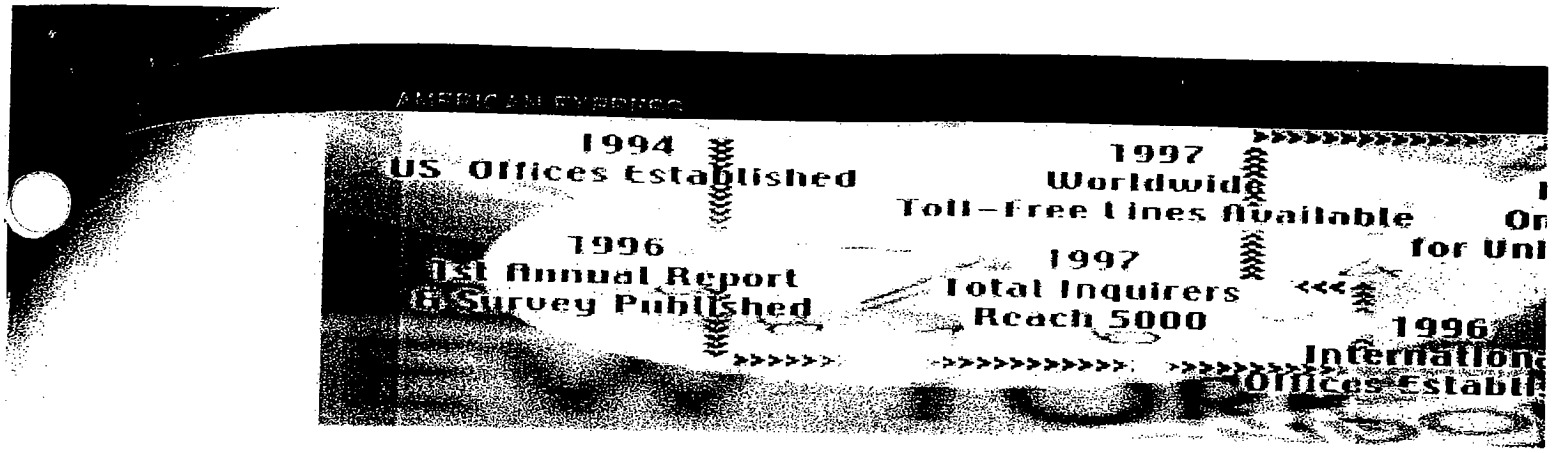
The Ombudsman, as a designated neutral, has the responsibility of maintaining strict confidentiality concerning matters that are brought to his/her attention unless given permission to do otherwise. The only exceptic at the sole discretion of the Ombudsman, is where there appears to be imminent threat of serious harm.

The Ombudsman must take all reasonable steps to protect any records and files pertaining to confidential discussions from inspection by all other persons, including management.

The Ombudsman should not testify in any formal judicial or administrative hearing about concerns brought to his/her attention.

When making recommendations, the Ombudsman has the responsibility to suggest actions or policies that will be equitable to all parties.

For more information please visit: www.aexp.com/ombudsperson



ORIGIN OF SCENARIOS

While the Office cannot discuss specific cases, we can provide representative scenarios reflecting the kinds of situations we handle. These scenarios are composite examples and do not represent actual cases.

CHANGING TRENDS - THEN AND NOW

Below are the population demographics of people using the Office of the Ombudspersons:

	1994-1996	2003
Female	65%	64%
Male	35%	36%
Exempt	30%	46%
Non-Exempt	70%	64%

Following are the kinds of issues brought to the Office, expressed as a percentage of the total.

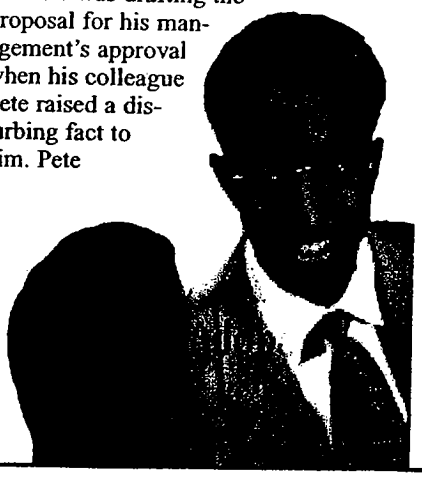
Leadership	48%	35%
Communication		
Respectfulness		
Change Management		
Collaboration & Influence		
Job Itself	21%	32%
Counseling		
Company Practices		
Meritocracy	16%	11%
Compensation		
Severance		
Company Assets	15%	22%
Business Process Control		
ial Control		
Compliance		
Workplace Policy		
Safe & Healthy Workplace		
Fraud		
Theft & Embezzlement		

ALLIANCES CAN BE TRICKY

Andrew had recently been assigned to a project team for developing a new alliance partner in the rich but emerging market of Zoukais. This market had recently gained independence and the country was at a stage where its constitution and governance structures were still evolving. There were however, many wealthy business groups who had built their businesses through traditional trading of commodities for which their country was famous.

Andrew met several of these potential partners who wined and dined him very well. They were more than willing to provide personal favors to establish an alliance with American Express. After several rounds of meetings, Andrew zeroed in on one firm: Zebbellin Pte. They had a strong balance sheet, excellent connections with government regulators, the resources to deal with difficult market situations or competitors, and a history of over 25 consecutive years in profitable businesses.

Andrew was drafting the proposal for his management's approval when his colleague Pete raised a disturbing fact to him. Pete informed Andrew he had heard from his connections in Zoukais and that this group's real source of cash flow was drugs, narcotics, and gambling. The hotels, designer boutiques, spas, fine dining restaurants, and finance companies were nothing but a front to cover up their real activities. Andrew was distressed upon hearing this information but felt nonetheless that he could still form a strong, profitable alliance with Zebbelin Pte.

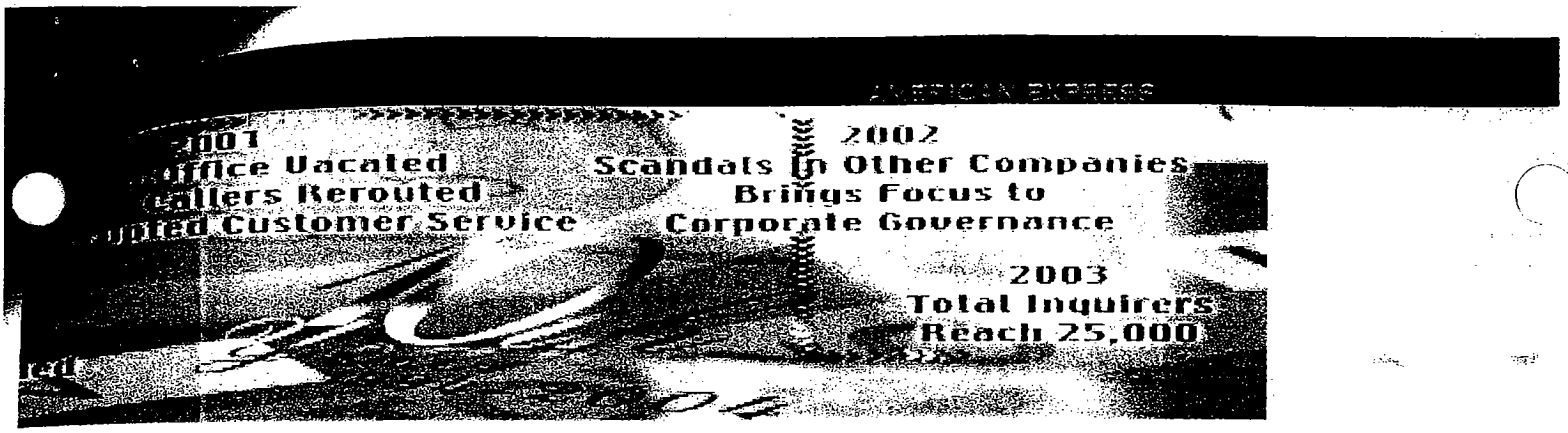


Pete was concerned with Andrew's decision to pursue this proposal and decided to talk confidentially with an Ombudsperson. Pete explained that he was aware of a proposal for alliance with a potential business partner that should not be acceptable under Amex's standards and values. He wanted to report the matter, but was unsure as to who could investigate it. The Ombudsperson and Pete reviewed several options for Pete to report his concerns. Pete decided to give permission to the Ombudsperson to anonymously alert the Head of Business Alliance and the General Counsel's Office. The Ombudsperson relayed the information that Pete had provided.

An independent investigation established that Pete's information was correct. Andrew's proposal was not approved. Andrew was counseled by his leader and scheduled for Brand Training. Pete was very satisfied that no one ever knew that he had reported the issue.

[2-29]

For more information please visit: www.aexp.com/ombudsperson



Scenarios

"CAN'T LOOK THE OTHER WAY"

When Max finally worked up the courage to call the Ombudsperson he still wasn't sure he had a legitimate issue. Several weeks earlier, Max had observed some behavior at a social event for his work unit that made him very uncomfortable. It was well known within the group that two colleagues, Alan and Samantha had been involved with each other but Samantha had recently broken off the relationship. Alan and others had been drinking at this event and began rating their co-workers based on their bodies and sex appeal. The group became loud and boisterous and Max became quite disturbed by the comments being made. At one point Alan said very negative personal things about Samantha as well as about her work performance. Samantha heard these comments and left the event, obviously upset. The tough part of this for Max was that Alan and Max's boss, Henry, had heard the whole thing and did nothing.

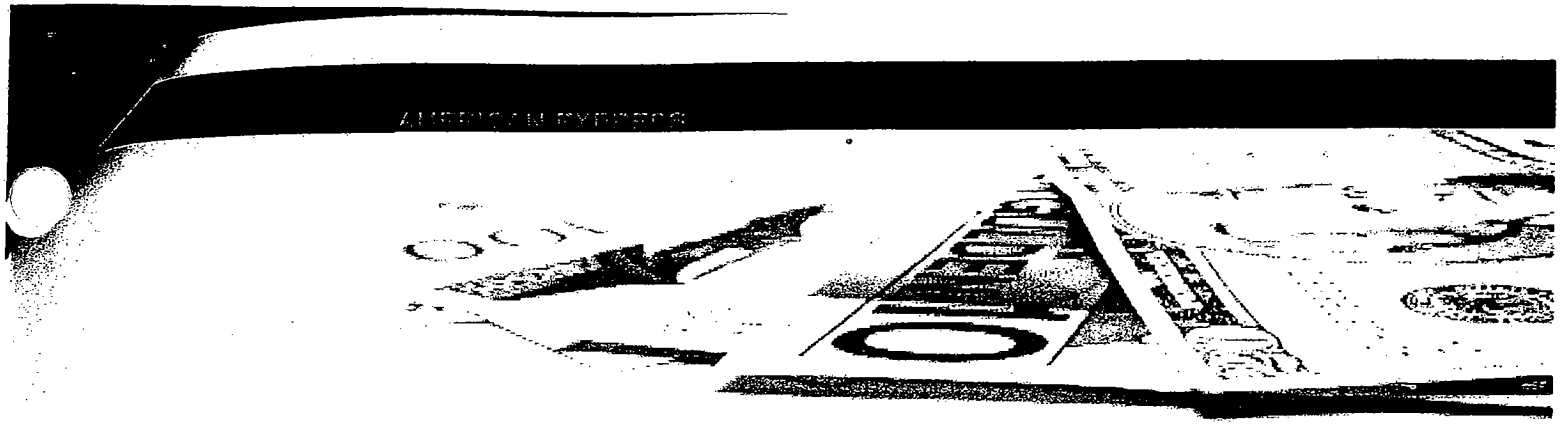
When Max brought these events to the attention of the Ombudsperson, they discussed options for escalating Max's concerns. They discussed either going to Human Resources, to Henry's boss or to Henry himself. After discussing the pros and cons of each option, Max decided that the fair thing to do was to let Henry know how uncomfortable he was with these events. Max hoped Henry would take appropriate action. Max understood that if Henry didn't address the events, he still had the option of going to Human Resources or to Henry's boss. Max agreed to follow up with the Ombudsperson after his discussion with Henry.

A few days later, Samantha also called the Ombudsperson to discuss the event she witnessed. The Ombudsperson did not reveal that she already knew about the situation because she had to maintain the confidentiality of the discussion with Max. After reviewing her options, Samantha decided she would directly report the incident to Human Resources who investigated the incident. Alan was given a final warning and Henry was reprimanded, as the Senior Leader, for not taking action to stop the inappropriate behaviors. The Amex Code of Conduct document was also re-distributed to the unit.

[2-30]

2003 RESULTS

- Increased percentage of issues that were high impact/company asset related from 13% in 2001 to 21% in 2003
- Implemented initial stages of a global servicing model
- Visited over twenty Amex locations to build awareness of the Office listen to concerns and share trends with business leaders
- Implemented first stages of a plan to build awareness of the Office within third party vendors
- Directed inquirers with concerns around harassment and discrimination to appropriate formal resources
- Helped surface issues about:
  - Travel and expense violations
  - Leadership span of control issues
  - Behaviors of joint venture leaders inconsistent with the Blue Box Values
  - Overspending on consultants
  - Security concerns in handling cash
  - Privacy and confidentiality of employee & custo: data
  - Improper sales practices
  - Conflicts of interest with external vendors



Scenarios

CORPORATE GOVERNANCE

Conflicts of interest, deceptive sales practices, harassment, and discrimination are just some of the practices that violate the Company's ethical standards and in some cases, break the law.

Effective corporate governance is critical to protecting the American Express Brand. It is every employee's responsibility to speak up when they become aware of unethical and inappropriate actions. However, fear of retribution and perceived lack of management support can cause people to be reluctant to act.

If you are in doubt about any situation or behavior, the formal resources of the organization, including management and HR, are available to all employees who wish to discuss their concerns. You can also speak informally and confidentially with an Ombudsperson.

YOU CAN'T LIE, ESPECIALLY TO AN AUDITOR

Muriel is a Senior Cashier at an International Operating Center where Cardmembers can pay their monthly Card statement and transact other services such as buying Travelers Cheques and Emergency Check Cashing. At a department staff meeting, her supervisor Robert announces that an audit of the department is starting. Robert tells all the cashiers that if the auditors ask them questions, they should just reply that they don't know, and will get back to them with the answer. When the meeting ended, Robert asked Muriel to stay for a minute. He told her not to say anything about the $20,000 cash Travelers Cheques purchased ten days before by the important restaurant owner, an Amex high spending Cardmember. The VP of Marketing had ordered the Travelers Cheque transaction be completed quickly, as the Cardmember had arrived with a suitcase full of cash. In the rush, the appropriate cash exception reports had not been prepared. He also told Muriel, "Be sure not to mention the backlog in the ledger account reconciliation either, but don't worry because the auditors may not detect anything and there is no risk since the VP of Marketing knows the Cardmember very well."

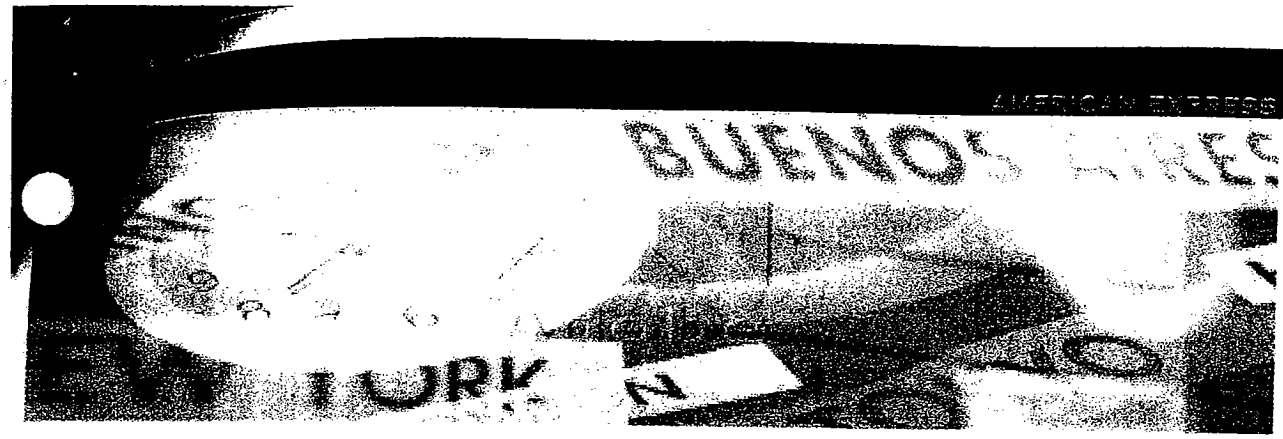
Muriel was surprised by the supervisor's message and became worried that the auditors might question her. She had recently attended the Code of Conduct Training session conducted by Compliance, and she decided to call the Ombudsperson to discuss the situation.

She explained her concerns to the Ombudsperson, and they discussed in detail each of the possible options available where Muriel could report this policy violation:

- Compliance
- Controller
- Audit
- Internal Control
- Human Resources
- Her Department's Boss' boss

Muriel decided that she would report the situation to the Controller. The Ombudsperson gave her the telephone number and email address, and Muriel sent an email reporting the incident. The Controller and the auditors investigated discreetly, and the appropriate actions were taken to correct the control weaknesses and to reinforce policy. It was soon announced that Robert was no longer with the Company. Muriel knew she had done the right thing by not keeping quiet.

[2-31]



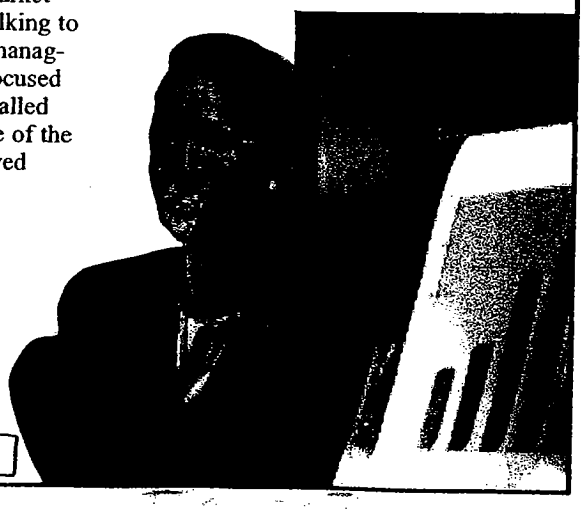
Scenarios

"DISCOUNTING" THE BRAND

Raul couldn't have been happier last month when his employer got a contract to handle a telephone sales function for American Express. He had a lot of industry experience and was convinced that the Company offered the best product in the marketplace. Now he and his colleagues had a chance to use their excellent sales skills to produce outstanding results for American Express and provide a quality product to customers.

But Raul was concerned about the sales technique of one of his colleagues, Sam, who was producing the most sales on the team. Raul noticed that his colleague was consistently departing from the standard sales script when speaking with customers. He overheard Sam using words like "deal", "discount" and "bargain" when making his sales presentation. Raul remembered from training that such language could damage the American Express brand in the marketplace. Raul wasn't comfortable talking to Sam directly or approaching his manager. The manager appeared to be focused entirely on closing sales. Raul recalled some information about the Office of the Ombudspersons that he had received during orientation to the Amex account. He decided to give the Office a call for an appointment.

That same night, Raul spoke anonymously with the Ombudsperson. After listening carefully to his concern, the Ombudsperson offered to encourage the Amex Vendor Relationship leader to partner with Raul's management team to do some joint quality control monitoring. Raul gave his permission for the Ombudsperson to proceed and within a few days he noted a decidedly positive change in Sam's approach to potential customers.



[2-32]

AMERICAN EXPRESS' BLUE BOX VALUES

Customer Commitment
We develop relationships that make a positive difference in our customers' lives.

Quality
We provide outstanding products and unsurpassed service that, together, deliver premium value our customers.

Integrity
We uphold the highest standards of integrity in all of our actions.

Teamwork
We work together, across boundaries, to meet the needs of our customers and to help the company win.

Respect for People
We value our people, encourage their development and reward their performance.

Good Citizenship
We are good citizens in the communities in which we live and work.

A Will to Win
We exhibit a strong will to win in the marketplace and in every aspect of our business.

Personal Accountability
We are personally accountable for delivering on our commitments.

AMERICAN EXPRESS

Contacting the Office of the Ombudspersons

To arrange a confidential discussion with an Ombudsperson, dial the secure and toll free number listed for your country. Once connected and if you are comfortable doing so, you will be asked by an assistant to provide the following information:

1. Your name (can be fictional if you don't wish to be identified).
2. Your location and business unit.
3. A home or work telephone number where the Ombudsperson can call you.
4. A convenient time for the Ombudsperson to phone - this can be during or after normal working hours, Monday through Friday.
5. The general nature of your issue - this will help the Assistant determine if the Ombudsperson is the most appropriate channel to help you.

The Assistant can also arrange an interpreter if required.

Alternatively, you may request an appointment via fax or e-mail*.

* Because of limitations of current technology, confidentiality cannot be assured when using e-mail. As a matter of prudent practice, an Ombudsperson does not discuss issues via e-mail. However, you may contact us via e-mail to request an appointment.

U.S. & CANADA

Toll Free:
1-800-297-1010

Confidential Fax:
1-212-267-1626

E-mail: amexombud@aol.com

LATIN AMERICA

Toll-free numbers:
Argentina 0 800 5554 288 + 888 231 0373
Brazil 0 800 890 0288 + 888 231 0373
Chile 123 00 312 + 888 231 0373
Mexico 001 800 658 5454 + 888 231 0373
Uruguay 000 410 + 888 231 0373
USA (including Puerto Rico) 888 231 0373

AT&T Direct Services work from home or public phone. The toll-free number is not available from American Express office locations that have satellite connection to the U.S.

Confidential Fax:
1-305-231-0372

E-mail Address:
ombudspersonLAC@aexp.com

EUROPE, MIDDLE EAST, AFRICA

Freefone Numbers:
Austria 0800 201 821
Bahrain* 8000 44
Belgium 00 800 297 12345
Czech Republic* 00 42 00 44 01
Denmark* 800 1 02 90
Egypt* 365 36 44 (Cairo)
02 365 36 44 (Elsewhere)
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Greece 00 800 4412 0013
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Poland 00 800 441 1269
Russia 737 08283
Slovakia* 08000 044 01
South Africa* 0800 99 0144
Spain 900 99 8913 (Spanish speaking Ombudsperson 900 99 00 11/888 231 0373)
Sweden* 00 800 297 12345
Switzerland 00 800 297 12345
Turkey* 00 800 44 1177
U.A.E.* 800 11 44
UK 00 800 297 12345
For all other countries:
+44 1273 577000

*To contact our office, dial the access code as quoted for the country you are in. When prompted by a recorded message OR when asked by an Operator for account number and pin, use this number 235 965 916 386, and you will be connected to the Office of the Ombudspersons.

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South Korea 00368 610 0001
Sri Lanka 430 800* (Colombo metropolitan area)
01 430 800* (Outside Colombo metropolitan area)
Taiwan 00 800 297 12345**
Thailand 001 800 297 12345**

*Your call will initially be answered by an operator or a recorded message – please follow the instructions below for quick connection to the Office:

- Operator – ask for connection to "MTF 6298 0555".
- Recorded Message – select 2 for Enhanced International Toll Free Service and then enter this number: 6298-0555#.

**Service may only be available from phones with International Direct Dial facility (IDD).

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E2-337

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February 10, 2004

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

Submitted via email:
pubaffairs@ussc.gov

Attn: Public Affairs

Re: Comments of the Association of Corporate Counsel on The Report of the Ad Hoc Advisory Group on the Organizational Sentencing Guidelines (Proposed Amendments to Chapter Eight, United States Sentencing Guidelines)

Ladies and Gentlemen:

On behalf of the 16,000 individual in-house counsel members of the Association of Corporate Counsel (ACC) (formerly known as the American Corporate Counsel Association), we thank you for the opportunity to submit comments for your consideration as you review and consider the incorporation of the proposed amendments of the Advisory Group on the Organizational Sentencing Guidelines to the US Sentencing Guidelines, Chapter 8.[1]

Founded in 1982 as the "in-house bar association," ACC provides its members with networks, resources, education, and advocacy, all of it by corporate counsel, and for corporate counsel. ACC members, who work in over 7,000 separate private sector organizations, are particularly well positioned to comment on the practical impact of the guidelines' compliance requirements and on contemplated changes to the guidelines proposed under these amendments. Our members design preventive compliance programs, train corporate employees on how to comply with the laws, assist senior executives and the board in the creation of initiatives to promote an ethical corporate culture, advise line management on emerging legal responsibilities, and maintain, evaluate, and continuously improve their clients' legal compliance efforts. ACC members are often the top corporate compliance officials within their companies, and when not so formally vested, they are nonetheless considered key players in supporting the chief compliance officer and other managers with whatever legal guidance and practical resources are necessary to ensure preventive compliance and ethical behavior.

ACC members believe that whatever the original presumptions were of the Organizational

1 The complete US Sentencing Guidelines for Organizations, first adopted in 1991, can be found on the webpages of the US Sentencing Commission at http://www.ussc.gov/orgguide.htm; the report of the Ad Hoc Advisory Group to update and amend the organizational guidelines is provided at http://www.ussc.gov/corp/advgrprpt/advgrprpt.htm,

[2-347]

Comments of the Association of Corporate Counsel
United Sates Sentencing Commission
March 1, 2004

Sentencing Guidelines (as adopted in 1991), the resulting impact has been far greater than most might have anticipated. Beyond the obvious intent to standardize the sentencing process for corporate defendants, the guidelines have done a great deal to change the way that companies focus on preventive compliance.

Certainly much of the focus of the Advisory Group is on fine-tuning the current standards and definitions to reflect the experience of the last 12-13 years. Indeed, corporations will continue to use the Guidelines as a prescription for appropriate and reasonable efforts that would help them prove that the actions of errant employees are not condoned by, representative of, or anticipated behaviors; if the guidelines are not operating in a manner that connects this desired outcome with the guidelines prescribed requirements, then the guidelines should be reconsidered.

ACC and its members are deeply cognizant that the field of corporate compliance is one that is subject to increasing scrutiny (by shareholders, regulators, the public and media, and the courts), as well as increasing regulation (by Congress and the regulatory agencies of the federal government, as well as the states and local governments within whose domains corporations reside and bear responsibilities as members of the community). While the regulatory environment of 1991 was sophisticated and extensive, in the Post-Enron,/Sarbanes-Oxley world of today, companies are more than mindful of not only their compliance obligations, but the increasing number of stakeholders, prosecutors, plaintiff's counsel, and regulators who will scrutinize and judge their efforts, sometimes at counter-purposes with each other.

In this letter, we wish to both recognize the Advisory Group's achievements in proposing amendments to help make the Guidelines better, but to also bring to your attention some concerns and larger policy questions that we believe are still not addressed adequately by the existing Guidelines or the Advisory Group's proposal to amend them, especially as we see these proposed amendments in the light of other regulatory guidance that our members are seeking to implement under the prescriptions of Sarbanes Oxley and related regulations.

There is a flaw in the presumption that compliance and deterrence are tightly connected concepts in addressing corporate criminal behavior.

Recent highly publicized and significant failures at several public companies (some with highly regarded compliance programs in place that simply were focused on the wrong kinds of misconduct), coupled with a ten-fold increase in the number of prosecutions in the 1990's (as compared to the 1980's), shows us that the Sentencing Guidelines' prescriptions by themselves have not been effective in eliminating wrongdoing at companies by employees who are intent to break the law. Rather than immediately presuming that the Guidelines need to be strengthened, it might be wise re-examine the relationship between compliance and deterrence outside a purely punitive context.

Perhaps the Sentencing Commission and the Sentencing Guidelines as applied by courts are well-positioned to help control outcomes flowing from those who agree with the precept that compliance is desirable, but some suggest that the Guidelines are poorly-situated to address

[2-35]

deterrence of those who are intent on acting outside of the preventive law systems established within the company. Heaping greater punitive standards and increased accountability on the corporation as a whole for the undeterred criminal intent of the few may not do anything to stop or deter that which we all agree is most damaging to the company's legal health. It is difficult to legislate morality in any fashion, so we should not respond to an increase in high visibility corporate crimes and prosecutions by immediately presuming that more legislation with greater sanctions will solve our problems.

What will? We have no answer, except to note that the Advisory Group, while well-intended, continues to try to fashion a remedy from a cloth that has proven insufficient to cover the task. None of us has spent sufficient time looking at the necessary connection between compliance and deterrence, nor at the entities that may be better positioned than the Sentencing Commission to take on such new initiatives. Before adopting stricture requirements in the Guidelines, we encourage the Commission to think about this link.

Resist the temptation to expand the Guidelines to attach criminal liability and sanctions to all violations of law, including non-criminal violations of regulations.

Relatedly, we are concerned that the changes proposed in Application Notes 1 and 4(A) to Section 8B2.1 are well-intended, but are moving in the wrong direction. Rather than helping companies understand where to focus their efforts, the Advisory Group has suggested that compliance programs which were once focused on preventing criminal violations must now also be created to detect and prevent violations of *any* law, criminal or non-criminal, including regulatory violations; violations of *any* laws or regulations will be dealt with as criminal violations, with criminal sanctions.

While companies should try to prevent all wrongdoing and most make every effort to do so, the Sentencing Guidelines were written to address criminal behaviors by meting out consistent criminal penalties and remedies. It is wrong to impose criminal liability and penalties on companies whose employees have committed less than criminal acts. To do so is not only a blurring of the Commission's charter, but a dangerous move toward eliminating any meaningful gradation of punishment that that is consistent and appropriate to the underlying allegations. The Guidelines should not become a blunt instrument that attempts to bludgeon companies for every kind of misdeed – however minor or even unrelated to the larger allegations that we are most concerned about – that a corporate employee could conceive or commit.

There are over 300,000 federal regulations that subject companies to criminal liability. That does not include state statutes and non-criminal regulations and violations which companies must try to contemplate when designing compliance initiatives. If the Commission is concerned about the increase in corporate wrongdoing and prosecutions in recent years, it should be doing more to work with prosecutors and companies to define those areas of weakness in the corporate armor and focus laser-like attention to those issues. The Commission should not expand the responsibility of corporate compliance officials to anticipate every conceivable violation possible (and then risk assess it, train for compliance with it, and measure results and adjust the system to

[2-36]

respond to anything less than 100% success). Exponential expansion of the number of laws and regulations that could subject a company to entity-threatening penalties and criminal liabilities will only succeed in "dummying down" the most important compliance activities that companies should be focusing on implementing in an effort to cover every base, no matter how minor or unlikely it might be to cause problems of a material nature.

There just isn't enough time or money or focus to contemplate training and detailed compliance systems designed to address every violation of law that the company could imagine; to admit that is not a cop-out by companies who don't want to live up to their responsibilities of good corporate citizenship ... it is just a fact of business. The Commission and the Department of Justice need to join companies in the risk-assessment exercises the Commission is considering prescribing for companies in the Advisory Group's proposed reforms; by doing so, it might succeed in identifying and more meaningfully identifying those compliance failures that plague us most so that we can all work to eradicate them. We ask the Commission to resist the temptation to believe that they will do more to stymie crime by identifying every violation of law as a crime and creating a criminal liability to attach to it; indeed, we ask you to contemplate how much more effective we can be in addressing those crimes which hurt us most by focusing more attention (including carrots and sticks) on them through the Guidelines.

Comments of the Association of Corporate Counsel
United Sates Sentencing Commission
March 1, 2004

Mere identification of the litigation dilemma, without ideas or plans to overcome it, is not enough.

We commend the Advisory Group's recognition of the so-called "litigation dilemma": this has long concerned corporate legal leaders as a burdensome counterweight to the establishment of meaningful compliance initiatives and self-reporting initiatives. The Litigation Dilemma refers to the recognition that no significant enterprise in the history of mankind has been 100% free of mistakes or failures: when companies establish meaningful compliance initiatives, they create documents, education and training programs, systems of reporting, and even stakeholder expectations, all of which are "evidence" that will be used against the company by the government and, of greater concern, the plaintiff's bar, should (or should we say "when") a compliance failure occurs.

Thus, while the Advisory Group's decision to address this issue in their report is a tremendous step forward and long overdue, recognition of the issue without proposing any solutions to address the problem does nothing to solve an increasingly impossible situation for corporate America. If businesses are to remain competitive, they must be able to meet the legal obligations of Sarbanes Oxley and other compliance expectations without putting themselves at risk of attack by the plaintiff's bars' privateers.

Given that the Guidelines have already created an environment in which attorney-client privileged communications and information are already more likely to be surrendered to the government as a part of a company's cooperation with an investigation (see below for additional comments on this subject), ACC suggests that the Commission consider proposal of a self-evaluative privilege to be recognized by Congress which would allow privileged investigations to be shared with the government and the government only. If the point of the Guidelines and the compliance systems they are intended to stimulate is to prevent wrongdoing and mitigate its damage to others through self-reporting and remedial actions, companies that take this responsibility seriously and seek to follow the Guidelines' directives in good faith should not be put at risk of bankruptcy or crippling litigation by third parties who seek to profit from the company's attempts to do the right thing.

Value the attorney-client privilege, since it does more to encourage compliance than to frustrate the efforts of prosecutors seeking information about company misdeeds.

Having raised the subject of the privilege, we wish to take time to commend the Advisory Group for seeking to bolster the Guidelines' respect for the importance of the attorney-client privilege. The Guidelines currently punish companies who do not offer to waive the privilege (as a sign of uncooperative behavior) and offer credit to companies that do waive he privilege. The Advisory Group acknowledges that the issue of attorney-client privilege is of concern and offers a middle road, proposing that the following comment be added to the guidelines:

If the defendant has satisfied the requirements for cooperation . . ., wavier of

[2-38]

> **the attorney-client privilege and of work product protections is not a prerequisite to a reduction in culpability score . . .. However, in some circumstances, waiver of the attorney-client privilege and of work product protections may be required in order to satisfy the requirements of cooperation. (Advisory Committee Report, pages 105-106)**

While this progress is laudable, it still likens the importance attorney-client privilege to a bargaining chip. The attorney-client privilege exists because it is recognized as an important element of the lawyer-client relationship. Lawyers need clients to talk openly with them; clients need reassurance from their lawyers that their decision to seek guidance from a lawyer will not be used against them. If clients don't believe that lawyers can be trusted in even the most delicate of situations, they are not likely to either seek out a lawyer, or to provide that lawyer with all the information necessary to assess the necessary response. Indeed, it bears repeating that clients don't have to consult with lawyers at all if they don't choose to do so. They certainly are under no obligation to have to hire lawyers to join every company strategic team to make sure the teams receive ongoing advice and counsel. And they don't have to form the respectful relationship with lawyers that strengthen their tendencies to listen to legal counsel and pursue recommended legal strategies.

The Advisory Group's middle road solution fails in that it still subjugates the privilege to the needs of prosecutors, which is antithetical to the purposes of the privilege in the first place. The Advisory Group suggests that the privilege does not have to be waived in order to get credit for the company's compliance initiatives, but if the prosecutor needs privileged information, the prosecutor can have it. It is hard to conceive of a prosecutor who won't claim a need for privileged information; it could be argued as germane and even crucial to proving the facts of virtually any case. We would never suggest in the individual criminal defense context that the mere fact that the prosecutor would find his case easier to prove if he could discover what the client told his lawyer would override the client's right to counsel and confidentiality; why is it that in the corporate context we find it easier to suggest that clients shouldn't have the same privileges? The penalties are still stiff and the liabilities are entity threatening. And the reasoning behind the privilege – encouraging the client to seek out competent and meaningful representation – remains the same in either context.

ACC believes that the diminution of the privilege is inappropriate and defeats the larger compliance goals of the Sentencing Guidelines. We should encourage clients to spend time consulting openly and honestly with lawyers; we should not punish them for having done so by allowing prosecutors to rummage through their conversations with counsel. Added to the concerns raised above about the plaintiff's bar and the litigation dilemma, this issue has double impact in that under current rules, that which is divulged that was privileged cannot be protected from discovery by subsequent third parties. Once revealed to the government (either voluntarily or under duress), the privilege cannot be applied against others who wish to make the same foray into confidential files.

If the Commission believes that in-house lawyers can have an important role in the creation, development, maintenance, and reporting of compliance initiatives, then we encourage the

Commission to recognize that the attorney-client privilege is the foundation of the attorney-client relationship, as well as the foundation of the trust that clients have in the counsel that their lawyers provide them.

Other Issues Before the Commission

ACC does not wish to repeat arguments that have already been made so well to the Commission by others, but we wish to note our support for purposes of your consideration.

We commend to you the comments of United Technologies regarding their concerns with the use of the term "anonymous" (versus "confidential") when considering appropriate employee reporting mechanisms in Section 8B2.1(b)(5)(C).

We also commend to you the comments of the National Association of Criminal Defense Lawyers (NACDL) generally, and especially their praise for the improvements proposed by the Advisory Group to subsection (f) of Section 8C2.5 regarding the report's proposals for increased flexibility of judges to consider the participation (or lack thereof) of high level officials in the organization.

ACC also commends the thoughtful comments of the Ethics Resource Centers Fellows Program in general, and in specific, their suggestions regarding risk assessment under Section 8B.2(c).

We thank you for your consideration of our comments, and offer our assistance if we can be of any help to you in the process of amending and updating the Guidelines.

Sincerely,

Susan Hackett
Senior Vice President and General Counsel

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February 27, 2004

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

Re: Proposed Amendments to Chapter 8 / Focus on Smaller Businesses

Dear Commissioners:

In response to your request for responses to the Proposed Amendment 2: Effective Compliance Programs in Chapter Eight, I would like to add the following comments:

Comment 2 regarding high-level individuals.

I agree with the Commission's position that the three-point reduction be changed to a rebuttal presumption if certain high-level individuals were involved or willfully ignorant. With the passage of Sarbanes-Oxley and stricter SEC regulations, all officers, directors, and senior managers of large organizations are well aware of the higher standards to which they are held and of the well-publicized examples of those organizations that did not conform to these standards. However, to automatically preclude the reduction without giving the defendant organization an opportunity to provide facts in rebuttal could place an undue burden on the organization. This is particularly true with small organizations. As stated in your Issue, by their very nature small organizations almost necessarily will have high-level individuals involved in the offense. To automatically preclude the reduction does not allow the prosecutor leeway in determining the ultimate score and, by extension, increases the maximum of the range within which the prosecutor can set fines. Because smaller organizations are only now beginning to address their compliance program needs, they should be allowed, in effect, a "grace period" of time wherein prosecutors could levy smaller fines and penalties. As compliance programs within smaller organizations mature, small defendants would have to present a stronger rebuttal argument in order to be granted the reduction. But the flexibility should be available while these programs are developed. The Commission could use this "grace period" as an incentive to small organizations to institute their compliance programs earlier rather than later.

Comment 3 regarding increasing reduction to 4 points.

As stated in Issue 3, requirements for an effective compliance program under the proposed amendment are more stringent than in the existing Guidelines. Given the additional requirements and expectations, and the associated cost and use of resources involved, recognition of an organization's efforts should be recognized and rewarded by providing a greater reduction for an effective program. Again, increasing the reduction for a good program should provide an incentive to all organizations, large and small, to implement an effective program sooner rather than later.

[2-41]

Comment 4 regarding other factors to provide incentives to small and mid-size organizations.

Consideration should be given to the progress being made in establishing a program given fewer resources than that available to large organizations. If a small organization is spending a proportionately larger portion of its revenues than larger organizations in order to comply with the Guidelines, it should be given credit for this, not necessarily with a reduction in the Culpability Score, but with the fine or penalty ultimately selected by the prosecutor within the determined range.

Final comments.

Finally, many smaller organizations are unaware of their requirements under the Guidelines. In my initial interviews with very small organizations, some did not even know that they fit within the definition of "organization". Educating the public at events such as the annual EOA conference, management forums and the like is an excellent way to publish your message, but the audience at these events usually consists of representatives of larger organizations. An outreach program that educates small and mid-size organizations, either through advertising or speaking at functions where representatives of these smaller organizations attend, would greatly enhance the awareness of and receptiveness to the Guidelines.

I would appreciate the opportunity to work with the Commission on such an outreach program.

Deanna Parmenter

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DEFENSE
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February 10, 2004

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United States Sentencing Commission
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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

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 there 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 2002[1] 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 regulations[2] 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 Exchange[3] 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.

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[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).

[2-44]

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,

Richard J. Bednar

cc: Paula Desio , USSC (priority mail)

[2-45]

Business Roundtable

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February 27, 2004

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Dear Commissioners:

The attached comments are submitted on behalf of the Business Roundtable, an association of chief executive officers of leading corporations with a combined workforce of more than 10 million employees in the United States and $3.7 trillion in annual revenues. Thank you for the opportunity to comment on the Commission's recently proposed revisions to the Federal Organizational Sentencing Guidelines as they apply to programs designed to ensure an organization's compliance with the law. As stated in our comments, the Roundtable strongly believes in the need to develop appropriate and effective sentencing guidelines. In our pursuit of the highest corporate ethical standards, we recognize the importance of clear direction for the establishment of effective corporate compliance programs.

Again, thank you for this opportunity. We look forward to working with you in the future.

Sincerely,

John J. Castellani

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Business Roundtable

February 27, 2004

COMMENTS OF THE BUSINESS ROUNDTABLE ON PROPOSED AMENDMENTS TO THE ORGANIZATIONAL SENTENCING GUIDELINES (U.S.S.G. § 8B2.1)

The Business Roundtable is pleased to comment on the United States Sentencing Commission's recently proposed revisions to the federal Organizational Sentencing Guidelines as they apply to programs designed to ensure an organization's compliance with the law. [1] The Roundtable has been an active participant in the process of developing appropriate and effective sentencing guidelines for corporations, previously addressing the unique aspects of corporate criminal liability in its comments on the proposed Guidelines in 1990, the *Discussion Materials on Organizational Sanctions* in 1988, and the *Preliminary Draft Guidelines* in 1986. [2]

Introduction

The Business Roundtable strongly supports effective organizational compliance programs. It seeks the continual improvement of corporate governance practices, and strives to promote the highest ethical standards among its members and the business community at large.

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1 *See* 68 Fed. Reg. 249 (Dec. 30, 2003).

2 *Comments of the Business Roundtable* (Feb. 14, 1990) ("1990 Comments"); *Comments of the Business Roundtable* (Dec. 1, 1988) ("1988 Comments"); *Comments of the Business Roundtable* (Dec. 3, 1986) ("1986 Comments").

The Roundtable applauds the Sentencing Commission's efforts to provide greater guidance regarding the criteria for an effective compliance program in its proposed revisions to the Organizational Sentencing Guidelines. The Roundtable has four areas of concern regarding the proposed revisions.

- First, the Sentencing Commission should reject the proposed revisions to the extent that they would increase judicial subjectivity in the event that a corporation's compliance program did not effectively prevent and detect *non-criminal* violations of law entirely unrelated to those charged in the pending criminal proceeding.
- Second, the proposed inclusion of a new, additional requirement for mitigation – that the organization otherwise "promote an organizational culture that encourages a commitment to compliance with the law" – should be eliminated because it is undefined, vague, and introduces an element of judicial subjectivity that the Guidelines were intended to eliminate.
- Third, the Commission should reject the proposed provision stipulating that a judge may not award mitigation unless the corporation's compliance program precisely meets all seven of the enumerated criteria.

- Finally, the proposed revision regarding waiver of the attorney-client and work-product privilege protections should be modified so that waiver is not a prerequisite for a reduction in culpability score if the defendant has otherwise cooperated.

These comments are predicated on the fact that, as the Organizational Sentencing Guidelines recognize, business organizations have special characteristics that affect the appropriate sentence in a given case.

1. A corporation may be convicted of a crime even though the individual who committed the offense acted contrary to the corporation's policies and the express instructions of her superiors, and corporate management may have no knowledge of the offenses. If the individual's conduct was taken in contravention of express corporate policy, the corporation may be a victim of its employee's conduct rather than a participant in it.
2. The people who bear the financial burden of corporate criminal sanctions – shareholders, other employees, suppliers and customers – are usually innocent of any wrongdoing. Furthermore, many of the innocent people who suffer when the organization is punished may not have had any connection with the organization when the offenses were committed.

3. Many criminal statutes are regulatory in nature and not intuitively obvious. They may be obscure or difficult to interpret, so violations may not involve moral culpability by the individual actors in the usual sense.

4. The deterrent effects of criminal penalties on organizations are not necessarily commensurate with the effects on individuals because the people who should be deterred – the actual wrongdoers – are not the people who actually pay the corporate fines. These wrongdoers can – and should – be deterred by individual penalties, but additional corporate penalties typically do not deter the individuals responsible for the criminal conduct.

I. The Business Roundtable Actively Supports Effective Corporate Governance and Organizational Compliance Programs

The Business Roundtable, which is comprised of the chief executive officers of approximately 150 major U.S. corporations, has taken a leading role in developing programs to promote corporate adherence both to the law and to the highest ethical standards. Our previous comments have consistently advocated that the Guidelines should consider effective corporate compliance programs to be a mitigating factor in the district court's culpability assessment. [3] We have also suggested that district courts should

[3] *See, e.g.*, 1990 Comments at 16.

consider the adoption and implementation of a compliance program to mitigate a sentence for a corporate criminal defendant. [4]

The Roundtable also has consistently advocated rigorous governance standards. Beginning as far back as 1978, it issued a statement on "The Role and Composition of the Board of Directors of the Large Publicly Owned Corporation." In 1997, the Roundtable issued a "Statement on Corporate Governance" recommending best practices regarding the structure and operations of the Board of Directors. [5] The Statement's underlying premise was that effective compliance policies are in the best interests of the corporation's shareholders. Since then, many of the practices suggested in the Roundtable's Statement have become commonly accepted in the business community.

The Roundtable more recently issued follow-up guidance entitled "Principles of Corporate Governance" in 2002. [6] These Principles stress the critical role of the Chief Executive Officer and senior management in operating the corporation in an ethical manner. [7] Moreover, the Principles highlight the role of the Board of Directors in ensuring that effective compliance programs are in place and are periodically reviewed by the Board. For example, one key aspect of the Board's role is seeing that the corporation

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[4] *See* 1988 Comments at 19.

[5] The Business Roundtable, "Statement on Corporate Governance," Sept. 1, 1997, *available at* http://www.businessroundtable.org/pdf/11.pdf.

[6] The Business Roundtable, "Principles of Corporate Governance," May 14, 2002, *available at* http://www.businessroundtable.org/pdf/704.pdf.

[7] *Id.* at 8.

has appropriate "mechanisms for employees to alert management and the board to allegations of misconduct without fear of retribution." [8] The Audit Committee often takes a lead with respect to this Board responsibility, and the Principles advocate a regular review by the Audit Committee of "the corporation's procedures addressing compliance with the law and important corporate policies, including the corporation's code of ethics or code of conduct." [9]

Finally, the Roundtable recently established and funded the Institute for Corporate Ethics at the Darden Graduate School of Business Administration at the University of Virginia. The Institute will create a cutting-edge business ethics curriculum and develop best practices in the area of corporate and business ethics. The Institute is an ambitious program designed to bring together business leaders and business school students with the best educators in the field to strengthen ethical business practices among current and future business leaders. In addition to teaching current business students, the Institute will offer executive-level training sessions for current CEOs and other senior members of corporate leadership teams to incorporate the latest business ethics education into existing corporate structures. The Roundtable believes that providing practical, hands-on ethics

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[8] *Id.* at 27. This concept was ultimately incorporated into the Sarbanes-Oxley Act of 2002, which requires Audit Committees to establish procedures for "the confidential, anonymous submission by employees of the issuer of concerns regarding questionable accounting or auditing matters." Sarbanes-Oxley Act of 2002, Pub. L. 107-204, § 301.

[9] *Id.* at 18.

training to both current and emerging business leaders is an effective method of shaping corporate culture.

In light of our experience in advocating adherence to best practices for corporate governance and compliance, we applaud the Sentencing Commission's efforts to provide additional guidance on what is required to establish an effective program to prevent and detect violations of law. However, we also recognize that different organizations may need different practices for effective compliance programs, depending on factors such as the size of the organization and its industry. Certain aspects of the proposed revisions may undercut their effectiveness, and it is to these particular provisions that we now turn.

II. The Sentencing Commission Should Reject a Definition of the Phrase "Violations of Law" That Includes Non-Criminal Conduct

The proposal to revise the definition of the phrase "violations of law" to include non-criminal conduct within the scope of compliance programs for the purpose of evaluating mitigation of sentence is inconsistent with the Sentencing Commission's statutory purpose and past practices. The Commission was created by the Sentencing Reform Act of 1984, which stated that one of the Commission's purposes was to "establish sentencing policies and practices [that] ... assure the meeting of the purposes of sentencing as

set forth in section 3553(a)(2) of title 18, United States Code."[10] It is clear from the Commission's enabling legislation that the Commission must focus on *criminal* conduct. 18 U.S.C. § 3553(a)(2) lists four factors for the Commission to consider in assessing appropriate sentences: (A) provide "just punishment" for the offense; (B) provide "adequate deterrence to criminal conduct"; (C) "protect the public from further crimes" by the defendant; and (D) provide rehabilitation. None of these factors include non-criminal law violations, and two of them – deterrence and prevention – are expressly limited to criminal conduct.

The legislative history of the Act demonstrates that the "just punishment" for an offense should not depend on having an effective compliance program to prevent and detect unrelated non-criminal conduct. The Senate Judiciary Committee Report on the Act stated that the "just punishment" factor "is another way of saying that the sentence should reflect the gravity of the defendant's conduct."[11] The adequacy of a compliance program to prevent and deter unrelated civil or regulatory violations has little, if anything, to do with the "gravity" of a criminal offense. Similarly, these unrelated non-criminal law violations have no bearing on the rehabilitation goal in the Guidelines. Therefore, including compliance programs to prevent and deter unrelated non-criminal conduct as a factor in

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[10] 28 U.S.C. § 991(b)(1)(A).

[11] S. Rep. No. 225, 98th Cong., 1st Sess. at 75 (1983), reprinted in 1984 U.S.C.C.A.N. 3182.

a court's determination of criminal liability is not consistent with the statutory purposes of the Guidelines.

Moreover, the Sentencing Commission's mandate is to ensure that the sentencing process supports the objectives of the criminal justice system: to deter and punish violations of *criminal* law. Corporate criminal liability is vicarious – it results from the criminal conduct of individual corporate agents – and it is much broader than civil concepts of respondeat superior. When individual criminal conduct is imputed to the corporation and punishment is meted out, many thousands of innocent individuals – employees, shareholders and customers – may suffer as a result.

To avoid needlessly inflicting harm on innocent shareholders and employees, mitigation of corporate criminal punishment under the Sentencing Guidelines is appropriate where the corporation has taken proper steps to prevent and detect violations of criminal law. While the Roundtable believes that all corporations should have effective programs to prevent and detect *all violations of law*, that is not relevant to the Guidelines and should not be included as a condition for mitigation.

The current Guidelines allow a court to reduce a corporation's culpability score where an effective compliance program demonstrates that the corporation did not intend its employees to engage in the alleged criminal

conduct and took reasonable steps to prevent them from doing so.[12] We support this view. For example, a corporation should not be denied mitigation for a criminal fraud by one of its employees because it lacks an effective program to prevent and detect an entirely unrelated civil or regulatory violation of law – such as a violation of OSHA's record-keeping regulations – that has no bearing on the corporation's efforts to prevent and detect the criminal fraud at issue.

The proposed revision would also have significant adverse – and, we believe, unintended – effects on a corporation's incentives for resolving claims of violations of civil or administrative law. For example, in an environmental case, a corporation may compromise with a regulatory agency because (1) the corporation is trying to avoid the expense of protracted litigation, and (2) the regulatory standards may be vague and difficult to resolve. Rather than reach an efficient compromise, the proposed revision could give the corporation an incentive to litigate each alleged non-criminal violation in order to avoid the possibility of reducing the mitigation potential of its corporate compliance program in future criminal litigation. The Sentencing Guidelines should not establish such a perverse incentive, which will lead to increased enforcement and litigation costs without improving corporations' commitment to preventing and detecting violations of law.

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[12] *See, e.g.*, U.S. Sentencing Comm'n, "An Overview of the United States Sentencing Commission and the Organizational Guidelines," *available at* http://www.ussc.gov/TRAINING/corpover.PDF.

III. The Proposed "Organizational Culture" Provision is too Vague and Undefined to be Administrable and is Inconsistent with the Purposes of the Sentencing Guidelines

The proposed amendments also include a new provision stating that, in addition to "exercis[ing] due diligence to prevent and detect violations of law" by implementing an effective corporate compliance program, corporations must also "otherwise promote an organizational culture that encourages a commitment to compliance with the law." [13] According to the proposed changes, promotion of such an organizational culture "*minimally* require[s]" following the seven enumerated steps. [14]

The Roundtable agrees that organizational culture can play an important role in effective corporate compliance. Our 2002 Principles of Corporate Governance emphasize the important role of a corporation's Chief Executive Officer and senior management in "setting a tone at the top that establishes a culture of integrity and legal compliance communicated to personnel at all levels of the corporation." Further, the Roundtable's Institute for Corporate Ethics is designed to foster organizational cultures built on ethical principles by inculcating the highest standards of business ethics in both the current crop of corporate leaders and business school students who will soon join these corporations in more junior positions. One

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[13] § 8B2.1(a).

[14] § 8B2.1(b) (emphasis added).

of the Institute's stated goals is to enable business leaders to create and maintain a "cutting-edge culture of ethical business practices" within their organizations. [15]

But we believe that the proposed revision related to organizational culture should be rejected because it provides no substantive criteria by which to evaluate a corporation's performance other than the seven enumerated features of a corporate compliance program. District courts and corporations will have no formal guidance as to what constitutes an "organizational culture that encourages a commitment to compliance with the law."

This new requirement is also inconsistent with the underlying goals of the Guidelines for two primary reasons: (1) it introduces an element of subjectivity for district courts that could lead to unwarranted sentencing disparities, and (2) it denies mitigation where the corporation has taken all appropriate steps to detect and prevent violations of criminal law. Absent extraordinary circumstances, a corporation that implements and adheres to the seven enumerated criteria in the Guidelines should be entitled to receive the mitigating credit for having an effective program to prevent and detect violations of law.

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[15] "Business Roundtable Unveils First-of-its-kind Initiative On Ethics," Jan. 14, 2004, *available at* http://www.thebusinessroundtable.org/newsroom/Document.aspx?qs=55F6BF807822B0F13D1459167F75A70478252.

The phrases "minimally requires" in § 8B2.1(b) and "promote an organizational culture that encourages a commitment to compliance with the law" in § 8B2.1(a) reduce the clarity of the Guidelines. The Advisory Group Report indicates that its proposed revisions were intended to "eliminate ambiguities ... and to define more precisely the essential attributes of successful compliance programs." [16]

The proposed revised Guidelines state that an effective compliance program will "minimally require" the seven enumerated steps, which implies that creating an "organizational culture of compliance" entails something more. But the Application Notes accompanying the proposed revisions provide no definition of this term. The Notes simply state "[e]ach of the requirements set forth in subsections (a) and (b) shall be met by an organization." [17]

This ambiguity will produce uncertainty for district courts applying the Guidelines. Is adherence to the seven enumerated steps for a compliance program sufficient? If not, what more must be done to produce an acceptable organizational culture? Without answers to these questions, district courts will have to rely on their own subjective interpretations of "organizational culture" in sentencing. For example, a district court could be forced to determine whether, despite implementing a compliance program that meets

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[16] *Report of the Ad Hoc Advisory Group on the Organizational Sentencing Guidelines*, Oct. 7, 2003, at 49, *available at* http://www.ussc.gov/corp/advgrprpt/ advgrprpt.htm.

[17] 68 Fed. Reg. at 75,357.

the seven enumerated criteria, a corporation's internal memoranda and the Chief Executive Officer's speeches to employees sufficiently promoted honest and ethical conduct for the corporation to receive mitigation. This subjectivity could well ultimately lead to disparate criminal penalties for corporate defendants engaging in similar conduct, which undermines one of the basic purposes of the Guidelines. [18]

This is markedly different from the approach suggested by the Advisory Group. While it recommended "adding to the Organizational Sentencing Guidelines a specific requirement that organizations seek to develop a culture in which compliance with the law is the expected behavior," the Group made clear its intention that this requirement

> not impose upon organizations anything more than the law requires, nor will it conflict with industry-specific regulatory requirements. It is also intended to avoid requiring prosecutors to litigate and judges to determine whether an organization has a good "set of values" or appropriate "ethical standards," *subjects which are very difficult, if not impossible, to evaluate in an objective, consistent manner.* [19]

The Roundtable recommends that, to avoid permitting prosecutors and district courts to engage in the very inquiry about which the Advisory Group warned, the Commission should make clear that substantial fulfillment of the seven enumerated criteria for an effective program to deter and prevent

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[18] *See* 28 U.S.C. § 991(b)(1)(B) (Commission's guidelines should "avoid[ ] unwarranted sentencing disparities among defendants with similar records who have been found guilty of similar criminal conduct").

[19] Advisory Group Report at 53 (emphasis added).

violations of law should entitle a corporate defendant to the mitigating credit provided under the Guidelines without regard to whether the defendant otherwise had an "organizational culture" that promoted compliance with the law.

IV. Absent Extraordinary Circumstances, Corporate Compliance Programs That Substantially Adhere to the Seven Enumerated Criteria Should Receive Some Mitigation Credit

The Advisory Notes of the current Guidelines provide some guidance regarding the seven "types of steps" that comprise an effective compliance program. [20] The proposed revisions replace these more general provisions with detailed requirements regarding the minimum acceptable components of a corporation's compliance program. This is very helpful guidance for which the Commission deserves recognition. But the usefulness of the guidance is undercut by unduly strict and all or nothing language in the proposed Guidelines indicating that an effective compliance program would "*minimally* require[ ]" satisfying the seven criteria listed in § 8B2.1(b).

The Roundtable believes that this proposed change would produce unintended negative consequences. As we have stated in previous comments to the Commission, the Guidelines must recognize that no corporate compliance program is foolproof, and that corporations do not ignore laws just because the likely penalties are small. The proposed change would unduly

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[20] § 8A1.2, Application Note 3(k).

harm corporations – and innocent shareholders and employees – that make a good faith effort to employ an effective compliance program, but are deemed by the court to have fallen just short of meeting one of the criteria. For example, if the court determines that the corporation's compliance training program is not sufficiently "effective" under § 8B2.1(b)(4)(A) – which, according to the Advisory Group Report, could simply mean, for example, that the program adequately educated the employees but was insufficiently "motivating," [21] – the corporation loses the entire reduction in the culpability score. It is treated as if it had never implemented any compliance program at all. [22] With no flexibility to award a culpability score reduction unless all seven criteria are strictly met, district courts cannot adequately address cases where the corporation has made a good faith effort to implement an effective compliance program, but falls short in one minor respect. Rather than adopting such a rigid requirement, the Guidelines should take into account the effort that corporate management has exerted to foster compliance with the law, recognizing that large organizations cannot guarantee the honesty or competence of all their employees.

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[21] Advisory Group Report at 70.

[22] The proposed revisions would not eliminate the ambiguity in the required aspects of an effective compliance program; the ambiguity would merely shift from what the list of requirements includes to the details of the individual requirements themselves. Moreover, the Advisory Group Report notes that the "burden would ... remain on the organization to explain what training occurred and why it was effective." Advisory Group Report at 72.

The Commission should alter the proposed revisions in one of several ways. First, the Commission could replace the phrase "minimally requires" in § 8B2.1(a) with the phrase "usually requires" or "generally requires." Alternatively, § 8C2.5(f)(1) could be amended to provide a smaller reduction in the culpability score where the corporation substantially complies with the seven steps or meets most of the seven criteria.

V. The Privilege Waiver Revisions Should be Modified to Eliminate Vagueness

Finally, the proposed revisions to the Guidelines include an addition to the Application Notes under § 8C2.5 stating that:

> 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 some circumstances, waiver of the attorney-client privilege and of work product protections may be required in order to satisfy the requirements of cooperation. [23]

The revisions would also add a similar statement to the Application Notes under § 8C4.1 regarding the relationship between waiver and downward departures: "[T]he government may determine that waiver of the attorney-client privilege and of work product protections is necessary to ensure substantial assistance sufficient to warrant a motion for departure." [24] This

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[23] 68 Fed. Reg. 249 at 75,359.

[24] *Id.*

language largely codifies the Department of Justice's position regarding waivers of the attorney client privilege. [25]

The Roundtable agrees with the first sentence of the proposed addition above, i.e., that the Sentencing Guidelines should include a clear statement that privilege waivers are not required to obtain credit for cooperation. Such a statement encourages aggressive internal investigations, which are an important component of the revised Guidelines' emphasis on promoting compliance programs that effectively detect violations of law. The statement also reflects the primary purpose of the attorney-client privilege, which is "to encourage full and frank communication between attorneys and their clients and thereby promote broader public interests in the observance of law and the administration of justice." *Swidler & Berlin v. United States*, 524 U.S. 399, 403 (1998).

However, the second sentence of proposed additions undermines the benefit of the first sentence by adding the qualifying sentence that waiver may be required in some circumstances. The Commission should reject such a statement for two reasons. First, it would have a chilling effect on internal investigations because it potentially implicates adverse criminal and civil consequences for the defendant. In most jurisdictions, a privilege waiver for DOJ would also apply to any potential civil litigation. Corporations facing a

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[25] *See* Larry D. Thompson, "Principles of Federal Prosecution of Business Organizations," Jan. 20, 2003, *available at* http://www.usdoj.gov/dag/cftf/business _organizations.pdf.

DOJ investigation may often also expect a potentially crippling class action civil lawsuit – where the resulting liability could dwarf any penalties assessed in a criminal proceeding – regarding the same conduct, as well as other parallel civil and/or administrative proceedings. Corporations in such situations may be forced into a Hobson's choice of declining to cooperate with DOJ, even if it would otherwise be in the corporation's best interests to do so, if cooperation requires the waiver of a privilege that would materially increase the chances of an adverse result in their civil case. Therefore, the proposed revisions would risk creating a disincentive for corporations seeking to avoid burdensome additional litigation to engage in internal investigations or cooperate with DOJ. Additionally, individual employees would be less likely to cooperate with the corporation's internal investigation if they believed that their testimony would not be privileged.

Second, the proposed addition leaves open far more questions than it answers. Under what circumstances would a waiver be required to earn culpability score mitigation for cooperation? Who determines whether waiver is required? When, if ever, would a partial waiver be sufficient? Is there any benefit awarded for partial waiver in other circumstances? The Application Notes provide no answers to these questions. The vagueness in the revisions gives prosecutors undue leverage in pressing firms to waive the privilege in

order to obtain a recommendation for a reduction for cooperation.[26] The Commission should delete these proposed additions to the Application Notes under §§ 8C2.5 and 8C4.1.

Conclusion

In summary, the Commission should reject the proposed amendments to the Sentencing Guidelines that (1) include non-criminal conduct in the definition of the phrase "violations of law," (2) create an undefined additional requirement to "otherwise promote an organizational culture that encourages a commitment to compliance with the law," (3) strictly require a compliance program to meet all seven criteria before any mitigation credit is awarded, and (4) require waiver of the attorney-client and work product privileges as a prerequisite to a reduction in culpability score.

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[26] As a former Deputy Attorney General recently said, "An aggressive policy of requests for privilege waivers as a component of cooperation can also be a wedge driven between the organization and its counsel. Such splintering of a relationship long recognized as crucial to the ability of organizations to make informed decisions in their own best interests – and, in the case of publicly traded entities, in the interests of their shareholders – deserves more than a passing nod from prosecutors and policy-makers." *See* George J. Terwilliger III, *Privilege in Jeopardy*, NATIONAL LAW JOURNAL, Feb. 9, 2004.

Catholic Healthcare West
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February 20, 2004

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Attn: Public Affairs

Subject: United States Sentencing Commission Proposed Changes to the Federal Sentencing Guidelines

Dear Commissioners:

The purpose of this letter is to provide comment on the proposed changes to the Federal Sentencing Guidelines (Guidelines) related to compliance programs. I appreciate the increased emphasis on compliance programs contained in the proposed changes. It is my view that the proposed changes will improve and enhance compliance programs within organizations. However, I do have concerns with respect to two of the proposed changes. Those concerns are set forth below.

First, the proposed amendments suggest that the compliance officer of the organization is ultimately accountable for the effectiveness of the program. The proposed changes have added language to § 8B2.1(b)(2) which states that the high level person responsible for the program (the compliance officer) has the responsibility to "ensure the implementation and effectiveness of the program."

My concern is that this amendment overstates the role and authority of the compliance officer in most organizations and at the same time absolves management in the organization of its responsibility. As a practical matter, the role of the compliance officer is to develop a compliance program and a structure for implementing the program. The compliance officer should then provide necessary leadership and coordination of the program, monitor program performance, and report to management and the board regarding program implementation.

However, it is ultimately management of the organization which must embrace and assume accountability to ensure the program is effectively implemented. Few compliance officers are involved in the day-to-day management of employees, departments, divisions, business units or ultimately the organization itself. For a compliance program to be effective, each member of management, particularly those at high levels within the organization, must embrace the compliance program and ensure those whom they direct in the organization actively participate in and execute the program. The proposed amendments could be viewed as relieving management of its responsibility to ensure the organization is compliant. I believe that the guidelines should strengthen rather than weaken managements'

accountability for the organization's compliance efforts. Specifically, I would recommend that the proposed amendment be modified to read as follows:

> "Specific individuals within high-level personnel of the organization shall be assigned direct, overall responsibility to coordinate the design, oversee the implementation, and evaluate and report to management and the board on the effectiveness of the program to prevent and detect violations of laws."

From a historical perspective, it is important to remember that since the Ninth Circuit decision in United States v. Hilton Hotels Corp. 467F.2d1000 (9th Circuit 1972), cert. denied 409 U.S. 1125(1973), corporations have been found liable for the criminal conduct of their agents. Such liability has been based on the courts findings that a corporation has a duty to supervise its employees. In the Hilton case, the courts sustained the jury's instruction that stated that "[a] corporation is responsible for the acts and statements of its agents, done or made within the scope of their employment, even though their conduct may be contrary to their actual instructions or contrary to the corporation's mission statement policy." Id. at 1004. In short, given Hilton and the many cases that have followed that precedent, I'm troubled by the suggestion that "effectiveness" of the compliance program, which is heavily dependent on the acts of many in the organization, rests on the shoulder of the compliance officer. Consequently, I believe the guidelines should emphasize the role of management in the organization, particularly senior management, in ensuring the program is effectively implemented.

My second concern relates to the treatment of an organization which identifies problems even though the organization had a compliance program in place. While the proposed changes appear to be an improvement over the existing guidelines, it is my view that the proposed changes should do more to promote effective compliance programs.

As drafted, the proposed amendments create a rebuttable presumption that the compliance program was ineffective. However, I would propose a rebuttable presumption that the program is effective if it is the organization that discovers and brings the offense to the attention of the government. The rebuttable presumption of ineffectiveness creates a disincentive for organizations to thoroughly investigate and disclose wrongful conduct. Conversely, a rebuttable presumption that the program is effective (where the organization has uncovered and disclosed the wrongdoing) creates incentives to both investigate and disclose, an approach that is more consistent with the overall emphasis on compliance in Chapter 8 of the Guidelines.

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I would encourage the Commission to consider the changes suggested above. Again, I would like to take the opportunity to express my appreciation for the work of the Commission and for the significant improvement the proposed amendments in Chapter 8 reflect.

Sincerely,

Daniel R. Roach
VP Compliance and Audit
Catholic Healthcare West

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Coca-Cola Enterprises

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February 23, 2004

Mr. Michael Courlander
Public Affairs Officer
United States Sentencing Commission
One Columbus Circle, N.E.
Suite 2-500, South Lobby
Washington, DC 20002-8002

Dear Mr. Courlander:

I am writing to comment on the report and recommendations of the Ad Hoc Advisory Group on Organizational Guidelines for amendment of Chapter Eight of the sentencing guidelines for organizations.

As of January 28, 2004, I am the West Central Region Vice President and General Manager for Coca-Cola Enterprises, and, for several years prior, I was its Senior Vice President and General Counsel. As General Counsel, I was aware of the federal sentencing guidelines and the positive impact they have had on the development of the role of ethics and compliance officers in corporations. I applaud the Advisory Group's recommendations to amend the guidelines to further promote efforts by corporations to "exercise due diligence to prevent and detect violations of law" and to "otherwise promote an organizational culture that encourages a commitment to comply with the law."

I would, however, like to make one suggestion for improving upon the recommendations made by the Ad Hoc Advisory Group. Proposed § 8B2.1(b)(5)(c) provides that an "organization shall take reasonable steps - ... (C) to have a system whereby the organization's employees and agents may report or seek guidance regarding potential or actual violations of law without fear of retaliation, including mechanisms to allow for anonymous reporting." This proposed amendment is a worthwhile improvement, but it does not go far enough in addressing what, in my view, is the single most important inhibitor to employee reporting -- lack of confidentiality in seeking guidance about how and where to report.

The text of the report's discussion relating to this proposed amendment makes it clear that confidentiality is an extremely important consideration for employees and others who may want to report misconduct and violations of law to the corporation. The report also describes the "litigation dilemma" that prevents confidentiality from being guaranteed in connection with "reporting" misconduct. A good solution to this impasse

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would be to require that, as part of an organization's "system," it have a means whereby employees and agents may "confidentially seek guidance regarding potential or actual violations of law without fear of retaliation ... ."

Such a modification of the proposed amendment would help those who need more guidance and reassurance on how and where to report violations to receive it, and allow them to become familiar with what the process may be and what action they may expect from the corporation. The proposed amendment, as it currently reads, does provide for anonymous reporting, and this is clearly an important component of any system. Anonymous reporting, however, is not a substitute for receiving confidential guidance, and often is too passive or not responsive to an employee's legitimate concern over what may happen if something is reported. I believe that helplines and hotlines are good and should be encouraged, but they are not enough. Having a confidential mechanism to seek guidance would strongly promote the culture of compliance that the proposed amendments are trying to encourage.

My experience at Coca-Cola Enterprises has lead me to believe that a confidential means of providing guidance can be very effective in resolving workplace disputes and in encouraging a culture of compliance with the law. We accomplish this mission with our Office of the Ombuds. It operates just as I have outlined. It is a confidential place where employees can go to ask questions, seek guidance, learn about reporting channels, or just get a better understanding of the process. Ombuds help employees find the most appropriate way to report, consistent with their comfort level; they are not themselves a reporting channel, since they are not part of management, do not do investigations, and do not accept notice of claims on behalf of the company. Under these circumstances, there is no inherent inconsistency between their informational and informal assistance function they serve and the more formal role served by our compliance officers. The ombuds, therefore, act as a supplement and complement to our compliance officers, not in lieu of them.

I understand that the Advisory Group did not want to dictate specific means by which organizations can accomplish the requirements imposed by the proposed amendments. This is as it should be. While I believe that an ombuds program is an ideal way in which to provide this confidential guidance, each organization should be allowed to find a way that is appropriate for it. The important thing is to provide a confidential means to seek guidance.

Very truly yours,

John R. Parker. Jr.

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February 12, 2004

The Honorable Judge Diana M. Murphy, Chair
U.S. Sentencing Commission
One Columbus Circle NE, Suite 2-500
Washington DC 20002-8002

Dear Judge Murphy,

I have reviewed the suggestions that my colleagues Michael Hoffman, Robert J. Olson and Stuart Gilman drafted regarding the Proposed Amendments to the U.S. Sentencing Commission and strongly agree with their comments.

We know that the process of drafting the Proposed amendments and making them available for public comment has involved considerable time and resources. The result, however, has been amendments to the Guidelines that will make them more relevant to the new millennium.

Yet we're concerned that they are not as germane and significant as they could be. Indeed, if the goal was to go "beyond compliance," they disappoint by not going as far as numerous other governmental bodies, such as the SEC and Congress, have done already. As they stand now, the Proposed Amendments:

- fail to support the integration of "ethics" into compliance programs,
- sidestep an opportunity to re-define "effectiveness" in a substantive way, and
- neglect to reconsider the purview of an ethics and compliance program in the current environment of corporate malfeasance.

In our opinion, the Proposed Amendments need to reflect the proposition that ethics is the heart of law.

We respectfully offer our suggested changes to the Proposed Amendments with an accompanying justification (please see enclosures). It is our hope that you will consider them in the spirit in which they are offered—a mutual concern for enhancing the public good. We will also be contacting members of Congress in the same spirit. If there's anything we can do to assist the Commission in further understanding these suggested changes—or obtaining documents in support of them—please do not hesitate to contact us.

This process for amending the Federal Sentencing Guidelines for Organizations presents an exciting opportunity, one that will probably not come again for another ten years. We urge the Sentencing Commission to retain its *leadership role* in preventing corporate malfeasance by including the changes we've suggested in the final amendments.

Sincerely,

John W. Dienhart

[2-72]

PART B – REMEDYING HARM FROM CRIMINAL CONDUCT, AND PREVENTING AND DETECTING VIOLATIONS OF THE LAW

1. REMEDYING HARM FROM CRIMINAL CONDUCT

* * *

2. PREVENTING AND DETECTING VIOLATIONS OF LAW

§8B2.1 Effective Programs to Prevent and Detect Violations of Law

(a) To have an effective program to prevent and detect violations of law, for purposed of subsection (f) of §8C2.5 (Culpability Score) and subsection (c)(1) of §8D1.4 (Recommended Conditions of Probation – Organizations), an organization shall—

(1) Exercise due diligence to prevent and detect violations of law; and

(2) otherwise promote and organizational culture that encourages a commitment to the ethical principles that inform law

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Such program shall be reasonably designed, implemented, and enforced so that the program is generally effective in preventing and detecting violations of law, as well as promoting an organizaitonal culture committed to ethical principles, that is, one that demonstrates commitment to ethical principles and compliance with law. The failure to prevent or detect instant offense leading to sentencing does not necessarily mean that the program is not generally effective in preventing and detecting violations of law, as well as in promoting an organizational culture committed to ethical principles.

(b) Due diligence and the promotion of an organizational culture that encourages a commitment to compliance with law and the ethical principles that inform law within the meaning of subsection (a) minimally require the following steps:

(1) The organization shall establish ethics and compliance standards and procedures to prevent and detect violations of law, as well as to promote an organizational culture committed to ethical principles.

(2) The organizational leadership shall be knowledgeable about the content, operation, and effectiveness of the program to prevent and detect violations of law, as well as to promote an organizational culture committed to ethical principles.

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The organization's governing authority shall be knowledgeable about the content, operation, and effectiveness of the program to prevent and detect violations of law, as well as to promote an organizational culture committed to ethical principles, and shall exercise reasonable oversight with respect to the implementation and effectiveness of the program to prevent and detect violations of the law, as well as to promote an organizational culture committed to ethical principles.

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Specific individual(s) within executive-level personnel of the organization shall be assigned direct, full-time, overall responsibility to ensure implementation and effectiveness of the program to prevent and detect violations of law, as well as to promote an organizational culture committed to ethical principles. Such individual(s) shall be given adequate resources and authority to carry out such responsibility, including full participation in all major executive decisions, and shall report on the implementation and effectiveness of the program to prevent and detect violations of law, as well as in promoting an organizational culture committed to ethical principles, directly to the governing authority or an appropriate subgroup of the governing authority.

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(3) The organization shall use reasonable efforts not to include within the substantial authority personnel of the organization any individual whom the organization knew, or should have known through exercise of due diligence, has a history of engaging in violations of law or other conduct inconsistent with an effective program to prevent and detect violations of law, as well as to promote an organizational culture committed to ethical principles.

(4)(A) The organization shall take reasonable steps to institutionalize its ethics and compliance program by

(i) using model practices in organizational and systems change and

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(ii) communicating, in a practical manner its ethics and compliance standards and procedures, and other aspects of the program to prevent and detect violations of law, as well as to promote an organizational culture committed to ethical principles, to the individuals referred to in subdivision (B) by conducting effective training programs that include but are not limited to subjects such as ethical and legal decision making, and otherwise disseminating information, appropriate to such individual's respective roles and responsibilities, with special emphasis on the organization's executive team.

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(B) The individuals referred to in subdivision (A) are the members of the governing authority, the organizational leadership, the organization's employees, and, as appropriate, the organization's agent.

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(5) The organization shall take reasonable steps—

(A) to ensure that the organization's program to prevent and detect violations of law, as well as to promote an organizational culture committed to ethical principles, is followed, including use of monitoring and auditing systems that

(i) are designed to prevent and detect violations of law and ethical principles that inform law, and

(ii) function at all levels and in all functions of the organization, including, but not limited to, the executive and governing authority level;

(B) to evaluate at least annually, the effectiveness of the organization's program to prevent and detect violations of law, as well as to promote an organizational culture committed to ethical principles; and

(C) to have a system whereby the organization's employees and agents may report or seek guidance regarding potential or actual violations of law without fear of retaliation, including mechanisms to allow for anonymous reporting.

(6) The organization's program to prevent and detect violations of law, as well as to promote an organizational culture committed to ethical principles, shall be promoted and enforced consistently through appropriate incentives, such as including compliance with law and commitment to ethical principles as a major component in performance reviews, to perform in accordance with such program and disciplinary measures for engaging in violations of law and for failing to take reasonable steps to prevent or detect violations of law, as well as to promote an organizational culture committed to ethical principles.

(7) After a violation of law or ethical principles that inform law has been detected, the organization shall take reasonable steps to respond appropriately to the violation of law or ethical principles that inform law and to prevent further similar violations of law or ethical principles that inform law, including making any necessary modifications to the organization's program to prevent and detect violations of law, as well as to promote an organizational culture committed to ethical principles, and to the organization's business practices, as necessary.

(c) In implementing subsection (b), the organization shall conduct at least annually ongoing risk assessment and take appropriate steps to design, implement, or modify each step set for the in subsection (b) to reduce violations of law or ethical principles that inform law identified by the risk assessment.

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Commentary

Application Notes:

1. *Definitions. For purposes of this guideline:*

"Ethics and compliance standards and procedures" means standards of conduct, such as a code of ethics or statement of values, and internal control systems that are reasonably capable of reducing the likelihood of violations of law and ethical principles that inform law.

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"Governing authority" means (A) the Board of Directors, or (B) if the organization does not have a Board of Directors, the highest level governing body of the organization.

"Organizational leadership" means (A) executive-level personnel of the organization; (B) executive-level personnel of a unit of the organization; and (C) substantial authority personnel. The terms "executive-level personnel of the organization" and "substantial authority personnel" have the meaning given those terms in the Commentary to §8A1.2 (Application Instructions – Organizations). The term "executive-level personnel of a unit of the organization" has the meaning given that term in the Commentary to §8C2.5 (Culpability Score).

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"Effective" means not only the count resulting from specific program activities, but also (A) the impact (measured changes in knowledge, attitudes/values/beliefs, and/or short-term practice) of those activities and (B) the outcome of those activities (actual reductions in violations of law or ethical principles that inform law—or well-documented proxies for those violations).

Except as provided in Application Note 4(A), "violations of law" means violations of any law, criminal or noncriminal (including a regulation), for which the organization is, or would be, liable.

2. *Factors to Consider in Meeting Requirements of Subsections (a) and (b).—*

(A) In General.—Each of the requirements set forth in subsections (a) and (b) shall be met by an organization; however, in determining what specific actions are necessary to meet those requirements, the organization shall consider factors that include (i) the size of the organization, (ii) applicable government regulations, and (iii) any ethics and compliance practices and procedures that are well-documented as standard or model practices for businesses similar to the organization.

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(B) The Size of the Organization.—

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violations of law, as well as to promote an organizational culture committed to ethical principles, is assigned to specific individuals within executive-level personnel of the organization, it is incumbent upon all individuals within the organizational leadership to be knowledgeable about the content, operation, and effectiveness of the program to detect and prevent violations of law, as well as to promote an organizational culture committed to ethical principles, pursuant to subsection (b)(2), and to perform their assigned duties consistent with the exercise of due diligence, and the promotion of an organizational culture that encourages a commitment to ethical principles that inform the law, under subsection (a).

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4. *Application of Subsection (b)(3).—*

   (A) Violations of Law.—Notwithstanding Application Note 1, "violations of law," for purposes of subsection (b)(3), means any official determination of a violation or violations of any law, whether criminal or noncriminal (including a regulation).

   (B) Consistency with Other Law.—Nothing in subsection (b)(3) is intended to require conduct inconsistent with any Federal, State, or local law, including any law governing employment or hiring practices.

   (C) Implementation.—In implementing subsection (b)(3), the organization shall hire and promote individuals consistent with Application Note 3(C) so as to ensure that all individuals with the organizational leadership will perform their assigned duties with the exercise of due diligence, and the promotion of an organizational culture that encourages a commitment to ethical principles that inform law, under subsection (a). With respect to the hiring or promotion of any specific individual within the substantial authority personnel of the organization, an organization shall consider factors such as: (i) the individual's combined academic and certificated training in ethics and/or law, as well as training in organizational change strategies and behavioral training methodologies (ii) the recency of the individual's violations of law and other misconduct (i.e., the individual's other conduct inconsistent with an effective program to prevent and detect violations of law, as well as to promote an organizational culture committed to ethical principles); (iii) the relatedness of the individual's violations of law and other misconduct to the specific responsibilities the individual is anticipated to be assigned as part of the substantial authority personnel of the organization; and (iii) whether the individual has engaged in a pattern of such violations of law and other misconduct.

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5. *Risk Assessments under Subsection(c).—Risk assessments required under subsection (c) shall include the following:*

   (A) Assessing periodically the risk that violations of law or commitment to ethical principles that inform law will occur, including an assessment of the following:

(i) The nature and seriousness of such violations of law.

(ii) The likelihood that certain violations of law or commitment to ethical principles that inform law may occur because of the nature of the organization's business. If, because of the nature of an organization's business, there is a substantial risk that certain types of violations of law or ethical principles that inform law may occur, the organization shall take reasonable steps to prevent and detect those types of violations of law or ethical principles that inform law. For example, an organization that, due to the nature of its business, handles toxic substances shall establish ethics and compliance standards and procedures designed to ensure that those substances are always handled properly. An organization that, due to the nature of its business, employs sales personnel who have flexibility to set prices shall establish ethics and compliance standards and procedures designed to prevent and detect price-fixing. An organization that, due to the nature of its business, employs sales personnel who have the flexibility to represent the material characteristics of a product shall establish ethics and compliance standards and procedures designed to prevent fraud. Furthermore, an organization shall establish ethics and compliance standards and procedures designed to prevent corporate malfeasance that may result from the decisions of executive management and governing authority.

(iii) The prior history of an organization. The prior history of an organization may indicate types of violations of law or ethical principles that inform law that it shall take actions to prevent and detect. Recurrence of similar violations of law or ethical principles that inform law creates doubt regarding whether the organization took reasonable steps to prevent and detect violations of law or ethical principles that inform the law.

(B) Prioritizing, periodically as appropriate, the actions taken under each step set forth in subsection (b), in order to focus on preventing and detecting the violations of law or ethical principles that inform law identified under subdivision (A) as most likely to occur and most serious.

(C) Modifying, as appropriate, the actions taken under any step set forth in subsection (b) to reduce the risk of violations of law or ethical principles that inform law identified in the risk assessment.

(D) Assessing at least annually one or more of these characteristics of organizational culture: executive decision making process, impact and/or outcome of this process through use of an "ethics impact report," level of organizational trust, public image, relative disparity in employee compensation, bottom-line mentality and others that are well-documented in the literature.

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Background: This section sets forth the requirements for an effective program to prevent and detect violations of law. This section responds to section 805(a)(2)(5) of the Sarbanes-Oxley Act of 2002, Public Law 107-204, which directed the Commission to review and amend, as appropriate, the guidelines and related policy statements to ensure that the guidelines that apply to organizations in this Chapter "are sufficient to deter and punish organizational criminal misconduct."

The requirements set forth in this guideline are intended to achieve reasonable prevention and detection of violations of law, both criminal and noncriminal, for which the organization would be vicariously liable, as well as to promote an organizational culture committed to ethical principles. The prior diligence of an organization in seeking to detect and prevent violations of law, as well as to promote an organizational culture committed to ethical principles, has a direct bearing on the appropriate penalties and probation for the organization if it is convicted and sentenced for a criminal offense.

* * *

January 25, 2004

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

RE: Proposed Chapter 8 Amendments to the United States Sentencing Commission

Dear Commissioners:

I write in response to the Commission's request for comments regarding the proposed amendments to Chapter 8 of the Federal Sentencing Guidelines and very much appreciate the opportunity to do so. I am a licensed clinical and consulting psychologist whose practice focuses on assisting organizations to introduce and implement significant changes at the workplace. I am also the cofounder of the Ethics Officer Association, which currently has more than 800 members, and have worked for 19 years as a consultant to organizations engaged in introducing, implementing, and evaluating broad-based ethics and compliance initiatives.

The Commission has proposed a new guideline at §8B2.1 Effective Program to Prevent and Detect Violations of Law, and, as part of that, has established two obligations of an effective compliance program—i.e., the exercise of due diligence and the promotion of an organizational culture that encourages a commitment to compliance. My experience is that culture always trumps specific rules or guidelines that aim to influence behavior in organizations. Therefore, this enormously significant addition will directly contribute to the efforts of ethics and compliance officers throughout the United States. I would, however, urge that the Commission add the phrase "and shared accountability," so that the final wording reads, ". . . promotion of organizational culture that encourages a commitment to and shared accountability for compliance throughout the organization." Taken even further, this phrase might read, ". . . that promotes an organizational culture that encourages a commitment to compliance and that expects all employees to hold themselves and one another personally accountable for ethical and legal conduct." The benefit of incorporating accountability into the wording is that it will provide specific direction to the construct of organizational culture. It will, in effect, tell ethics and compliance officers and, more significantly, their superiors and other organizational stakeholders that a commitment to compliance is one in which all employees hold themselves and each other accountable for specific types of behavior. Organizational culture is much more than what senior management "says." In its truest form, it is a reflection of what employees actually "do."

Again in §8B2.1 the Commission defined the purpose of a compliance program to be, in part, "taking reasonable steps to prevent illegal conduct in organizational activities." I would urge the Commission to consider changing the phrase "illegal conduct" to "violations of law," in all mentions (e.g., including §8B2.1 (a) (b), etc.). The Commission's words, when published, will be read closely and carefully. The term "violations of law" creates a subtle but potentially very significant change in the spirit of that statement in two ways. First, the "violations of law" has, in common usage, a much broader implication than the phrase "illegal conduct" and speaks to the Commission's increased focus on getting organizations to speak to the spirit, not simply the letter, of the guidelines. Second, many tend to think of violations of law as something to prevent (i.e., before they occur) and illegal conduct as something to address (i.e., after it occurs).

Part of proposed guideline §8B2.1 (i.e., subsection (b) (2)) speaks to the role of "high level personnel of the organization" who shall "be assigned direct, overall responsibility to ensure the implementation and effectiveness of the program to prevent and detect violations of law." The guideline, in part, speaks to the requirement that these individuals engage in periodic meetings with the "governing authority or an appropriate subgroup of the governing authority." I would urge the Commission to make two changes to the wording of this statement.

First, change "periodically" (i.e., as stated in the Commentary) to "quarterly" and consider stating that as part of the guideline itself. The danger of using the term "periodically" is that it may, de facto, encourage adherence to the letter but not the spirit of this proposed guideline. As I have observed so many times, organizations and their management rarely embrace change simply because they believe it is the right thing to do. Most often, they embrace change when the "cost" for not doing so becomes too great. Providing senior level managers with specific guidance in this and other areas takes into account the fact that many will, at least initially, not embrace the spirit of the guidelines and will, instead, comply with the most narrow definition (i.e., that definition that requires the least change) instead. I assume that the goal of this proposed guideline (and others) is to provide the structure and clarity necessary to ensure that the behavioral change the Commission seeks not only becomes habit on the part of those organizations that are affected by the Federal Sentencing Guidelines but that they also adopt the right kind of habit.

Second, I would urge the Commission to add the phrase (provides the high level person) with "overall responsibility for ensuring the implementation of the program with direct access to the governing authority in between designated meetings." The goal of this modification is to ensure that person has access on an as needed basis (i.e., when he or

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she specifically believes such contact is necessary) in addition to regularly scheduled access. As before, my experience is that, at least initially, engaging in the culture change the Commission aims to engender will be facilitated by as much clarity as can be provided without becoming too rigid or unnecessarily constraining. Put even more bluntly, unless this is stated in the final wording, it is most unlikely to ever occur in the real world of organizations. Further, and equally important, that high-level person must have, and indeed be mandated to, meet with the governing authority or the appropriate subgroup in private, and I would urge the Commission to rewrite the proposed text to reflect that. All too often I have been witness to meetings such as these where the responsible person changes what he or she might otherwise say to the members of the governing authority (almost always in the direction of being less candid than might otherwise occur or than the situation actually requires) when his/her superiors or other more senior level people are present in the room.

Regarding proposed guideline §8B2.1 subsection (b) (4), I recommend that the Commission take this further and specifically extend the training requirement to upper levels of the organization. Even more important, I recommend that this phrase require that the training upper-level individuals participate in be of the same length and depth as the training in which others within the organization participate. Too often ethics and compliance training for the broad employee population is "condensed" for senior managers, either because they claim, or because others presume, that their time is "too valuable" to do otherwise. The nature of the training that senior managers take part in may be different from the nature of the program that employees take part in, and that is as it should be—but not the length (and, therefore, the commitment it symbolically speaks to). So, for example, when I designed and helped facilitate training for employees, managers, and senior managers at Pacific Bell, following a series of widely publicized unethical and illegal sales practices during the 1980s, we required training for senior managers be of the same length as that of first level supervisors. We did, however, change the orientation of the training for senior managers to focus on their unique ability to build and maintain an ethical work culture throughout the organization.

Proposed guideline §8B2.1 subsection (b) (5) would require organizations to take reasonable steps to periodically evaluate the effectiveness of their programs to prevent and detect violations of law. Measuring the effectiveness of a compliance and ethics programs has been the subject of enormous debate for years. Central to that debate is the question, "How do we define effectiveness?" The Commission's guidelines could help provide direction in answering that question. Ultimately, the effectiveness of any training should be measured by its impact in changing employee's behavior (or sustaining and maintaining desired behavior). So, for example, an evaluation that simply reports the number of calls to the Hotline as a measure of effectiveness often masks the real truth. The program may be completely effective or completely ineffective regardless of the

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number of calls received. If training results in changed behavior, it works. If it doesn't, it does not.

Regarding the unreasonable delay in self-reporting by organizations (Section 8C2.5 (f)), which mandates a three point reduction in the culpability score for effective compliance programs if the organization delays unreasonably in reporting offenses, I urge the Commission to maintain this as it is currently described. As stated previously, organizations typically only change when the penalties associated with not changing become too great. The more personal and consequential those changes are, the more likely behavior will change. This is not meant to represent a Machiavellian view of management or of organizations in general, nor to suggest that senior managers are really Rasputins in disguise, waiting for opportunities to say, in effect, "If it's not prohibited, then I can do it." Rather, the argument is that providing specific, concrete guidance regarding requirements and consequences is much more likely to produce the desired behavior than anything that does not.

I hope that these comments are relevant and useful and speak to some of the issues the Commission hopes will be addressed during the public comment period. I would be most interested in testifying before the Commission in person if the benefit of my experience would be of help.

Yours very truly,

Craig Dreilinger, Ph.D.
Clinical and Consulting Psychologist

cc: Paula Desio, Deputy General Counsel

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Ethics & Policy Integration Centre

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28 January 2004

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

Re: Response to Request for Public Comment on Amendments to Chapter Eight

This letter and attachment are offered in response to the Commission's request for public comment. I have consulted internationally on ethics and compliance programs since 1993 with an emphasis on program evaluation and good governance in emerging market economies. My practice has involved evaluating ethics and compliance programs for the U.S. Air Force under its Voluntary Disclosure Program and work with the Maryland Mediation and Alternative Conflict Resolution Office on a national project to evaluate public policy programs.

We believe that, on balance, the proposed changes/additions reflect well-considered evaluation of the corporate experience in designing and implementing an effective program to prevent and detect violations of the law ("compliance programs"). We are confident that the provisions, such as those aimed at achieving a culture of commitment to compliance, will provide greater guidance to organizations and courts regarding the criteria for evaluating such programs.

There are areas, however, where we think they can be improved as set forth in the following pages and the attachment. We think three issues are important enough to warrant further discussion and request the opportunity to address the Commission: (1) prominent display of the requirements for program evaluation, (2) prominent recognition of the challenges of designing and implementing ethics/compliance programs for small to medium enterprises, and (3) promising confidentiality to encourage employees to come forward with their concerns.

Sincerely,

/S/

KENNETH W. JOHNSON
Director,
Ethics & Policy Integration Centre

Attachment: Proposed Amendments/EPIC Recommendations

cc: Paula Desio Deputy General Counsel

[2-84]

A. Require a more active, policy role for the governing authority

It is helpful to distinguish between governance and management and ensure that both aspects of organization life are covered by the Federal Sentencing Guidelines for Organizations (FSGO). We recommend that the FSGO make more explicit that the governing authority has an active role in—and responsibility for—requiring and setting broad guidance for the compliance program.

The source of a corporate board's authority is the owners of the enterprise. [1] The board is the pivotal authority. Its authority is neither granted nor defined by management. Policies generated by the board control everything, both governance and management.

In practice, however, the board is often considered an advisor to management rather than its source of authority. Indeed, many recent corporate ethics failures in the U.S. can be traced to the failure of boards to exercise their authority as representatives of the owners.

The FSGO should require a more active board role. See e.g., IN RE CAREMARK INTERNATIONAL INC. DERIVATIVE LITIGATION, 698 A.2d 959 (Del.Ch. 1996) where Chancellor Allen noted the Federal Sentencing Guidelines for Organizations and expressed the view that "a director's obligation includes a duty to attempt in good faith to assure that a corporate information and reporting system, which the board concludes is adequate, exists."

The Chancellor also said such a reporting system should be designed to provide "timely, accurate information sufficient to allow management and the board, each within its scope, to reach informed judgments concerning both the corporation's compliance with laws and its business performance."

This more active role of the governing authority should be reflected in three areas:

- Recommendation: §8B2.1 subsection (b)(1) Include term "governing policies," to read:

"The organization shall establish governing policies and compliance standards and procedures to prevent and detect violations of law."

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[1] John Carver and Caroline Oliver, *Corporate Boards that Create Value: Governing Company Performance from the Boardroom* (San Francisco: Jossey-Bass, 2002), pp. xxi-xxii.

- Recommendation: §8B2.1 subsection (b)(2): Change order to place governing authority first in order, then organizational leadership and provide that governing authority shall:

  (1) Set policy for the compliance program
  (2) Ensure that the compliance program meets its own requirements for information

  See proposed language in the attachment.

- FSGO 3 Recommendation: §8B2.1 subsection (b)(3): define members of the "governing authority" as "substantial authority."

B. Provide for a more active role for organizational leadership

- Recommendation: §8B2.1 subsection (b)(2): require that they also demonstrate commitment to the compliance program as a matter of leadership. See proposed language in the attachment.

- Recommendation: §8B2.1 subsection (b)(4): Include statements of the organizational leadership demonstrating their commitment to the program as examples of appropriate communication. See proposed language in the attachment.

C. Include requiring the senior personnel administering the compliance program to have access to the governing authority

As presently drafted, subsection (b)(2) requires only that the "high-level responsible officer" report to the board. In practice, such an officer often does not administer the program. Indeed, the "ethics/compliance officer," is frequently not the responsible officer, yet has significant insight into the operations of the compliance program. We recommend that this division of authority be recognized in the guidelines. See proposed language in the attachment.

D. Integrate risk assessment and program evaluation in §8B2.1(c)

The provision requiring risk assessment is a positive development, but it should be expanded to require that the risk assessment be translated into specific expected program outcomes and the program be regularly evaluated to determine whether the program is effective at meeting expect outcomes.

Where the corresponding commentary specifies that organizations must prioritize the actions taken to implement an effective compliance program and modify such actions in light of the risks identified in the risk assessment, this can best be done with reference to expected program outcomes.

In the same vein, the requirement for program evaluation should be removed from subsection (b)(5) and placed in §8B2.1(c). The provisions for auditing, monitoring, and reporting in subsection (b)(5) are internal to the program itself. Evaluation of the program itself is not aimed at compliance per se, but rather the program effectiveness. Program evaluation is more akin to risk assessment and establishing program outcomes. For example, subsection (b)(1) is informed by the risk assessment in §8B2.1(c). It could be a part of that subsection, but is properly some that must be done to inform the "steps" required in the program. See the attachment for proposed language.

E. Do not require training in subsection §8B2.1(b)(4)

The importance of subsection (b)(4) is that the [governing policy and] compliance standards and procedures be adequately communicated, not that any particular form be required. Especially for the small to medium enterprise (SME), training may not be the best or most cost-effective way to proceed. Without more definition, requiring training invites training merely for the sake of meeting a requirement. Furthermore, if any communication is advisable, it is that the organizational leadership communicate its commitment to the program.

We recommend retaining the "e.g.," but add the language extending the scope of training and including "statements of organizational leadership demonstrating commitment," or words to that effect. See the attachment for proposed language.

F. Add language requiring that a program offer a promise of confidentiality where appropriate and enforceable at law

The proposed amendment replaces the existing reference to "reporting systems without fear of retribution" with the more specific requirement for the implementation of "mechanisms to allow for anonymous reporting." The FSGO should follow the relevant provision in Sarbanes-Oxley, which requires a "confidential, anonymous" reporting mechanism.[2] As has been pointed out in the

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[2] Under Section 301 of the Sarbanes-Oxley Act of 2002, audit committees are required to establish procedures for receipt of complaints by employees:

(4) COMPLAINTS- Each audit committee shall establish procedures for--

literature, this precise wording is grammatically problematic, but the intent reflects experience that the appropriate officials will gain more information where they are able to promise confidentiality than when they only offer anonymity. See proposed language in the attachment.

G. In all steps other than §8B2.1(b)(1) refer to "compliance standards and procedures," not "violations of law"

Since an organization must establish adequate compliance standards and procedures to "prevent and detect violations of law", the test thereafter should be whether they have adequate structures, systems, procedures, and practices to follow those standards and procedures. For example, the mechanism to seek guidance and report concerns will be more valuable if employees and other agents can raise issues of compliance standards and procedures precisely because they are designed to prevent and detect actual violations.

Therefore, after successfully complying with §8B2.1(b)(1), references in steps 5, 6, and 7, in particular, should refer to these compliance standards and procedures, not just to violations of law.

H. In all steps after §8B2.1(a) refer to "compliance program"

We further recommend that in §8B2.1(b)(1) the cumbersome term "program to prevent and detect violations of law" be described as a "compliance program" thereafter.

I. Response to Issue Number 1: Self-reporting should be treated as a rebuttable presumption

The Commission requests comment regarding whether the prohibition should be eliminated so that an organization could be considered for the reduction under §8C2.5(f) regardless of whether the organization unreasonably delayed reporting the offense after its detection.

In our view, elimination of this prohibition may be appropriate to encourage organizations to implement compliance programs without having to deal *ab initio*

(A) the receipt, retention, and treatment of complaints received by the issuer regarding accounting, internal accounting controls, or auditing matters; and

(B) the confidential, anonymous submission by employees of the issuer of concerns regarding questionable accounting or auditing matters.

with the issue of self-reporting. Self-reporting as a matter of policy is problematic for many counsel in view of the "litigation dilemma" so well discussed in the Advisory Group's report. While we feel strongly that organizations should both self-report and remedy any harm they cause, it is also our view that the two factors (an "effective program" and "self-reporting") should not be bound together except where the failure to self-report tends to indicate that the program was not effective.

If this is followed, however, the reduction in the culpability score under §8C2.5(f) for an effective program to prevent and detect violations of law currently should remain at three.

J. Response to Issue Number 4: Provide a separate provision re: the challenges to the small to medium enterprise (SME)

The Commission asked whether there were factors or considerations that could be incorporated into Chapter Eight (Sentencing of Organizations), particularly §8C1.2, to encourage small and midsize organizations to develop and maintain compliance programs?

Domestically and around the globe, approaching ethics and compliance programs for the small to medium enterprise (SME) has been challenging. While there are references to these challenges throughout the guidelines, we recommend that an additional section, §8B2.1(d), be added to give specific guidance to the judiciary. The Commission's doing so will be particularly helpful to those making the case for the SME ethics/compliance program as they will be able to point to a separate provision addressing the SME.

We recommend language and commentary covering the following points:

> Each small to medium enterprise ("SME")[3] is unique, often taking on the character of its owners and managers. There is surprisingly little research ethics and compliance programs for the SME. Moreover, it is difficult, at best, to generalize the SME experience.
>
> In most economies, SMEs provide the bulk of jobs, especially new jobs, and contribute significantly to the welfare of their communities because they are so closely connected. On the other hand, SMEs often lack the capital, staff, or time of large, complex enterprises ("LCEs") to address many business

[3] There are many definitions of the SME, especially the small enterprise. The World Bank definition of the small enterprise is under 300 employees, while the U.S. Small Business Agency definition is 500 employees.

issues. For example, tracking and meeting changing laws and regulations are relatively more costly for the SME.

Though many of the best practices developed over the last two decades reflect the experiences of LCEs, the process of developing standards, procedures, and expectations is the same for all enterprises. The answers for each enterprise will depend upon the size and complexity of the enterprise itself. The goal for the SME, then, is not to duplicate the standards, procedures, infrastructure, practices, and expectations of LCEs, but to learn from them—and to improve them.

SMEs have an additional incentive to adopt the discipline of responsible business conduct: to create a wider commercial network. Where owners and managers embrace the global language of responsible business through a Business Ethics Program, a network of business enterprises and supportive NGOs based on shared values is possible. Such a network allows the individual SME to develop some of the synergies and economies of scale that only larger enterprises can afford.

Due to resource limitations, most small to medium enterprise ("SME") program strategy and planning will be informal. Owners and managers will be less apt to use formal teams and processes to set goals, objectives, strategies, and action plans than large enterprises. Nonetheless, they can adapt the processes and best practices of LCEs to meet their circumstances.[4]

The following table is included in the forthcoming work identified above intended to address the concerns of SMEs. We do not recommend that it be included in the Guidelines, but it is illustrative of what may be possible.

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[4] This language summarizes various provisions in a forthcoming work, Kenneth W. Johnson and Igor Y. Abramov, *Business Ethics: Manual on Managing the Responsible Business Enterprise in Emerging Market Economies* (Washington, D.C.: Government Printing Office, 2004).

Business Ethics Infrastructure SME Conversion Chart	
Function	**Typical SME Staffing**
High-level responsibility for program oversight (the "Responsible Officer")	Often an owner, but another highly respected employee, who has substantial authority in the enterprise, is preferable.
Performing or coordinating the specific functions of the Business Ethics Program (the "Business Ethics Officer")	Typically, a respected staff member performs or coordinates the functions of the Business Ethics Officer. An SME can form or join a business association to develop training materials and provide a forum for managers to discuss ethics, compliance, and social responsibility issues, problems, and solutions. The SME can employ an independent answering service to provide a mechanism for employees and agents to seek advice or report concerns anonymously. The SME can use an outside service to conduct a periodic evaluation of its Business Ethics Program.
Advising the Responsible Officer and Business Ethics Officer that represents the enterprise as whole ("Business Ethics Council")	An SME can conduct regular meetings of all or representative employees, perhaps 30-60 minutes per meeting, once a month, to discuss enterprise core beliefs; standards, procedures, and expectations; and current ethics, compliance, and social responsibility issues. A medium enterprise, especially one with multiple locations, can appoint

Business Ethics Infrastructure SME Conversion Chart	
Function	**Typical SME Staffing**
	members to such a council, but meet regularly by telephone. An SME can form or join a business association to provide a forum to discuss current ethics, compliance, and social responsibility issues, problems, and solutions. A college, university, or business development council might host a forum for SMEs. A large enterprise can, and often should, host a forum for its suppliers and service providers to address the requirements of its program.
Advising the Responsible Officer, Business Ethics Officer, and employees and agents about professional ethics, compliance and social responsibility issues, most often seen in hospitals, ("Professional Ethics Council")	An SME can conduct regular meetings of all or representative professionals, perhaps 30-60 minutes, once a month, to discuss enterprise core beliefs, standards, procedures, and expectations on current professional ethics, compliance, and social responsibility issues. A medium enterprise, especially one with multiple locations, can appoint members to such a council, but meet regularly by telephone An SME can form or join a business association to develop training materials and provide a forum to discuss current professional ethics, compliance, and social responsibility issues, problems, and solutions. A college, university, or business

Business Ethics Infrastructure SME Conversion Chart	
Function	**Typical SME Staffing**
	development council can host a forum for SMEs. A large enterprise might host or sponsor a forum for its suppliers and service providers.
Individuals at various levels of the enterprise who link a central ethics office with the field ("Business Conduct Representatives")	For the SME, these may be respected, knowledgeable staff members at its various levels or locations, who have the right to communicate directly with the Owner/Owner-representatives, Responsible Officer, or Business Ethics Officer on responsible business conduct issues: ethics, compliance, and social responsibility. These Business Conduct Representatives can also conduct responsible Business Conduct training and education and assist in program evaluation at local levels.
Related executive and department functions, such as the Chief Financial Officer; Legal Counsel; Human Resources; Internal Audit; Environmental, Health and Safety; government procurement; and Investor Relations	The SME often uses trusted, independent professionals to perform many of these functions. If so, they should participate in enterprise responsible business conduct training programs and, where practicable, its discussions of current ethics, compliance, and social responsibility issues. These independent professionals can form their own independent forums to discuss current ethics, compliance, and social responsibility issues. They may also be engaged to advise SME owners and managers on how to

Business Ethics Infrastructure SME Conversion Chart	
Function	**Typical SME Staffing**
	design and implement a Business Ethics Program using this Manual and other resources. Provided they respect the confidences and proprietary information of each SME, they can amortize the cost of providing these services over multiple clients.
The individual responsibility of every employee and agent of the enterprise to abide by the standards and procedures and strive to meet reasonable stakeholder expectations	Individual responsibility of employees and agents applies to all enterprises regardless of size. In the SME, it may be difficult for employees to seek advice or report concerns confidentially and anonymously. Owners and managers of SMEs must work to develop an organizational culture where employees and agents are able to speak up confidently and safely.

28 January 2004

SPECIFIC PROPOSALS FOR AMENDMENTS TO THE DEFINITION OF AN "EFFECTIVE PROGRAM TO PREVENT AND DETECT VIOLATIONS OF LAW"

	DEFINITION OF AN "EFFECTIVE PROGRAM TO PREVENT AND DETECT VIOLATIONS OF LAW"		
Basic Questions	**Existing Provisions**	**Proposed Amendment**	**Epic Recommendations**
Background		Consequently, the new guideline at §8B2.1 proposed by the Advisory Group contains separate subdivisions describing several important characteristics of an effective compliance program: • the purpose of a compliance program and the importance of preventive due diligence and organizational culture in carrying out such a program (§8B2.1(a)); • the seven minimum attributes that should be present in all compliance programs (§8B2.1(b)); and • the need for risk assessments and related compliance program adaptation as a basis for constructing and operating a generally effective program to prevent and detect violations of law (§8B2.1(c)).	Needs assessment is properly recognized as necessary for an effective compliance program. It provides the factual basis for each step. No less important—in the same vein—is for the organization to establish expected program outcomes *and* regularly evaluate the compliance program to determine whether it was effective. A program is unlikely to hit targets it does not explicitly aim for. *Epic Recommendation* In implementing subsection (b), the organization shall conduct ongoing risk assessment; take appropriate steps to design, implement, or modify each step set forth in subsection (b) to reduce the risk of violations of law identified by the risk assessment; and regularly evaluate its program with reference to specific expected program outcomes. (§8B2.1(c)).

[2-95]

Basic Questions	DEFINITION OF AN "EFFECTIVE PROGRAM TO PREVENT AND DETECT VIOLATIONS OF LAW"		
	Existing Provisions	**Proposed Amendment**	**Epic Recommendations**
	(k) *An "effective program to prevent and detect violations of law" means a program that has been reasonably designed, implemented, and enforced so that it generally will be effective in preventing and detecting criminal conduct. Failure to prevent or detect the instant offense, by itself, does not mean that the programs was not effective. The hallmark of an effective program to prevent and detect violations of law is that the organization exercised due diligence in seeking to prevent and detect criminal conduct by its employees and other agents.*	§8B2.1(a) To have an effective program to prevent and detect violations of law, for purposes of subsection (f) of §8C2.5 (Culpability Score) and subsection (c)(1) of §8D1.4 (Recommended Conditions of Probation - Organizations), an organization shall— (1) exercise due diligence to prevent and detect violations of law; and (2) otherwise promote an organizational culture that encourages a commitment to compliance with the law. Such program shall be reasonably designed, implemented, and enforced so that the program is generally effective in preventing and detecting violations of law. The failure to prevent or detect the instant offense does not necessarily mean that the program is not generally effective in preventing and detecting violations of law.	*Epic recommendation* §8B2.1(a) To have an effective program to prevent and detect violations of law ..., an organization shall— .... Due diligence includes governing policies; risk assessment; designing and implementing compliance structures and systems; communication and feedback; aligning operations; and evaluating and learning from the compliance program's governing policies, standards, and procedures. Such program, hereinafter referred to as a "compliance program," shall be reasonably designed, implemented, and enforced so that the program is generally effective in preventing and detecting violations of law. The failure to prevent or detect the instant offense leading to sentencing does not necessarily mean that the program is not generally effective in preventing and detecting violations of law.

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Basic Questions	DEFINITION OF AN "EFFECTIVE PROGRAM TO PREVENT AND DETECT VIOLATIONS OF LAW"		
	Existing Provisions	**Proposed Amendment**	**Epic Recommendations**
What norms, values and standards should we set to guide our members and foster reasonable expectations among our stakeholders?	(k) . . . *Due diligence requires at a minimum that the organization must have taken the following types of steps:* *(1) The organization must have established compliance standards and procedures to be followed by its employees and other agents that are reasonably capable of reducing the prospect of criminal conduct.*	§8B2.1(b) (b) Due diligence and the promotion of an organizational culture that encourages a commitment to compliance with the law within the meaning of subsection (a) minimally require the following steps: (1) The organization shall establish compliance standards and procedures to prevent and detect violations of law. Application Note Under this definition, **"compliance standards and procedures"** are described as **"standards of conduct and internal control systems that are reasonably capable of reducing the likelihood of violations of law."** This definition emphasizes that standards of conduct and internal controls are essential aspects of effective compliance programs and that these measures should be developed, implemented, and evaluated in terms of their impact on reducing the likelihood of violations of law.	To encourage more governing authority involvement in the compliance program, require that the governing authority set "governing policy" for the compliance program. *Epic recommendation* (1) The organization shall establish governing policy and compliance standards and procedures to prevent and detect violations of law. Commentary The governing authority shall establish policy governing a compliance program to prevent and detect violations of law and the organizational leadership shall establish consistent compliance standards and procedures addressing its identified risks, which are consistent with its organizational culture.

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	DEFINITION OF AN "EFFECTIVE PROGRAM TO PREVENT AND DETECT VIOLATIONS OF LAW"		
Basic Questions	**Existing Provisions**	**Proposed Amendment**	**Epic Recommendations**
What style, structure, and systems of authority and responsibility at all levels should we exercise?	(k) . . . *Due diligence requires at a minimum that the organization must have taken the following types of steps:* *(2) Specific individuals within high-level personnel of the organization must have been assigned overall responsibility to oversee compliance with such standards and procedures.*	§8B2.1(b)(2) The organizational leadership shall be knowledgeable about the content and operation of the program to prevent and detect violations of law. The organization's governing authority shall be knowledgeable about the content and operation of the program to prevent and detect violations of law and shall exercise reasonable oversight with respect to the implementation and effectiveness of the program to prevent and detect violations of law. Specific individual(s) within high-level personnel of the organization shall be assigned direct, overall responsibility to ensure the implementation and effectiveness of the program to prevent and detect violations of law. Such individual(s) shall be given adequate resources and authority to carry out such responsibility and shall report directly to the governing authority or an appropriate subgroup of the governing authority regarding the implementation and effectiveness of the program to prevent and detect violations of law.	*Epic recommendation* §8B2.1(b)(2) The organization's governing authority shall establish the guiding policy for the organization's program to prevent and detect violations of law, be knowledgeable about its design and exercise reasonable oversight with respect to its implementation and effectiveness. The organizational leadership shall be knowledgeable about the design of a compliance program consistent with the governing policy and support its operation. Specific individual(s) within high-level personnel of the organization shall be assigned direct, overall responsibility to ensure the implementation and effectiveness of the compliance program. The organization may also use responsible personnel to administer the compliance program. Both such individual(s) shall be given adequate resources and authority to carry out their responsibility and shall report directly to the governing authority or an appropriate subgroup of the governing authority as set forth in governing policy regarding the implementation and effectiveness of the compliance program directly.

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	DEFINITION OF AN "EFFECTIVE PROGRAM TO PREVENT AND DETECT VIOLATIONS OF LAW"		
Basic Questions	**Existing Provisions**	**Proposed Amendment**	**Epic Recommendations**
How can we ensure that we have the right people in the right places to pursue our purpose as an enterprise?	(k) . . . *Due diligence requires at a minimum that the organization must have taken the following types of steps:* *(3) The organization must have used due care not to delegate substantial discretionary authority to individuals whom the organization knew, or should have known through the exercise of reasonable due diligence, had a propensity to engage in illegal activities.*	§8B2.1(b) Due diligence and the promotion of an organizational culture ... minimally require the following steps: (3) The organization shall use reasonable efforts not to include within the substantial authority personnel of the organization any individual whom the organization knew, or should have known through the exercise of due diligence, has a history of engaging in violations of law or other conduct inconsistent with an effective program to prevent and detect violations of law. Application Note Definition of "substantial authority."	Agreed

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Basic Questions	DEFINITION OF AN "EFFECTIVE PROGRAM TO PREVENT AND DETECT VIOLATIONS OF LAW"		
	Existing Provisions	Proposed Amendment	Epic Recommendations
How can we most effectively communicate our standards and procedures and foster reasonable expectations among our stakeholders?	(k) . . . *Due diligence requires at a minimum that the organization must have taken the following types of steps: . . .* *(4) The organization must have taken steps to communicate effectively its standards and procedures to all employees and other agents, e.g., by requiring participation in training programs or by disseminating publications that explain in a practical manner what is required.*	§8B2.1(b) Due diligence and the promotion of an organizational culture ... minimally require the following steps: (4) (A) The organization shall take reasonable steps to communicate in a practical manner its compliance standards and procedures, and other aspects of the program to prevent and detect violations of law, to the individuals referred to in subdivision (B) by conducting effective training programs and otherwise disseminating information appropriate to such individual's respective roles and responsibilities. (B) The individuals referred to in subdivision (A) are the members of the governing authority, the organizational leadership, the organization's employees, and, as appropriate, the organization's agents.	Agree with (b), but prefer original language. Epic is concerned about requiring training. This tends to suggest that formal training is the best means of communicating organizational standards and procedures. This is not necessarily true, especially for small to medium enterprises. Emphasizing the general importance of training can best be described in Application Note. Provision is awkwardly drafted, including circular reference to "individuals." The recommended language below expands the elements of an effective program and expands the list of target audiences to include suppliers and service providers, which is an emerging best practice.

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Basic Questions	DEFINITION OF AN "EFFECTIVE PROGRAM TO PREVENT AND DETECT VIOLATIONS OF LAW"		
	Existing Provisions	Proposed Amendment	Epic Recommendations
			Epic recommendation §8B2.1(b) Due diligence and the promotion of an organizational culture … minimally require the following steps: (4) The organization shall take reasonable steps to communicate its compliance standards and procedures, and other aspects of the program to prevent and detect violations of law. An effective communication program shall involve: (A) A balance of formal and informal means of communication that reflects the organization's style of leadership, resources available, and organizational culture: e. g., leaders declaring support for the compliance program, requiring participation in training programs, or disseminating publications that explain what is required of individuals, and (B) Communication of governing policy and compliance standards and procedures, as appropriate, to all members of the organization, including its governing authority, leadership, and employees, as well as its agents and suppliers or service providers.

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	DEFINITION OF AN "EFFECTIVE PROGRAM TO PREVENT AND DETECT VIOLATIONS OF LAW"		
Basic Questions	**Existing Provisions**	**Proposed Amendment**	**Epic Recommendations**
How can we know that our members are following our standards and procedures and meeting reasonable stakeholder expectations?	(k) . . . *Due diligence requires at a minimum that the organization must have taken the following types of steps:* *(5) The organization must have taken reasonable steps to achieve compliance with its standards, e.g., by utilizing monitoring and auditing systems reasonably designed to detect criminal conduct by its employees and other agents and by having in place and publicizing a reporting system whereby employees and other agents could report criminal conduct by others within the organization without fear of retribution.*	§8B2.1(b) Due diligence and the promotion of an organizational culture ... minimally require the following steps: (5) The organization shall take reasonable steps— (A) to ensure that the organization's program to prevent and detect violations of law is followed, including using monitoring and auditing systems that are designed to detect violations of law; (B) to evaluate periodically the effectiveness of the organization's program to prevent and detect violations of law; and (C) to have a system whereby the organization's employees and agents may report or seek guidance regarding potential or actual violations of law without fear of retaliation, including mechanisms that allow for anonymous reporting.	*Epic Recommendation* (5) The organization shall take reasonable steps— (A) To ensure that the organization's compliance program is followed, including using monitoring and auditing systems that are designed to detect its compliance standards and procedures; and (B) To have a system whereby the organization's employees and agents may report or seek guidance regarding potential or actual violations of its compliance standards and procedures without fear of retaliation, including mechanisms that allow for anonymous reporting and promises of confidentiality, where appropriate and enforceable as a matter of law.

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	DEFINITION OF AN "EFFECTIVE PROGRAM TO PREVENT AND DETECT VIOLATIONS OF LAW"		
Basic Questions	**Existing Provisions**	**Proposed Amendment**	**Epic Recommendations**
How can we encourage our members to follow our standards and procedures and meet the reasonable expectations of our stakeholders?	(k) . . . *Due diligence requires at a minimum that the organization must have taken the following types of steps:* (6) *The standards must have been consistently enforced through appropriate disciplinary mechanisms, including, as appropriate, discipline of individuals responsible for the failure to detect an offense. Adequate discipline of individuals responsible for an offense is a necessary component of enforcement; however, the form of discipline that will be appropriate will be case specific.*	§8B2.1(b) Due diligence and the promotion of an organizational culture ... minimally require the following steps: (6) The organization's program to prevent and detect violations of law shall be promoted and enforced consistently through appropriate incentives to perform in accordance with such program and disciplinary measures for engaging in violations of law and for failing to take reasonable steps to prevent or detect violations of law.	*Epic recommendation* (6) The organization's compliance program shall be promoted and enforced consistently through appropriate incentives to perform in accordance with said program and disciplinary measures for violating its compliance standards and procedures or failing to take reasonable steps to prevent or detect violations thereof.

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	DEFINITION OF AN "EFFECTIVE PROGRAM TO PREVENT AND DETECT VIOLATIONS OF LAW"		
Basic Questions	**Existing Provisions**	**Proposed Amendment**	**Epic Recommendations**
What do we owe our stakeholders when mistakes, misconduct, or misunderstandings occur that involve our standards and procedures or their reasonable expectations?	(k) . . . *Due diligence requires at a minimum that the organization must have taken the following types of steps:* *7) After an offense has been detected, the organization must have taken all reasonable steps to respond appropriately to the offense and to prevent further similar offenses -- including any necessary modifications to its program to prevent and detect violations of law.*	§8B2.1(b) Due diligence and the promotion of an organizational culture ... minimally require the following steps: (7) After a violation of law has been detected, the organization shall take reasonable steps to respond appropriately to the violation of law and to prevent further similar violations of law, including making any necessary modifications to the organization's program to prevent and detect violations of law.	If an organization must self-report violations of law to receive credit for having an effective program, recommend including that as a required response. *Epic recommendation* (7) After a violation of <u>it compliance standards and procedures</u> has been detected, the organization shall take reasonable steps to respond appropriately and prevent similar violations, e. g., including self-reporting a violation of law to appropriate authorities and making any necessary modifications to the its compliance program.

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	DEFINITION OF AN "EFFECTIVE PROGRAM TO PREVENT AND DETECT VIOLATIONS OF LAW"		
Basic Questions	**Existing Provisions**	**Proposed Amendment**	**Epic Recommendations**
How should we monitor, track, and report our performance as an enterprise, and continuously learn from it?		§8B2.1(c) In implementing subsection (b), the organization shall conduct ongoing risk assessment and take appropriate steps to design, implement, or modify each step set forth in subsection (b) to reduce the risk of violations of law identified by the risk assessment.	Needs assessment is properly recognized as necessary for an effective compliance program. It provides the factual basis for each step. No less important—in the same vein—is for the organization to establish expected program outcomes and regularly evaluate the compliance program to determine whether it was effective. A program is unlikely to hit targets it does not explicitly aim for. *Epic Recommendation* §8B2.1(c) In implementing subsection (b), the organization shall conduct ongoing risk assessment; regular program evaluation with reference to specified expected program outcomes; and take appropriate steps to design, implement, or modify each step set forth in subsection (b) to prevent and detect violations of law.

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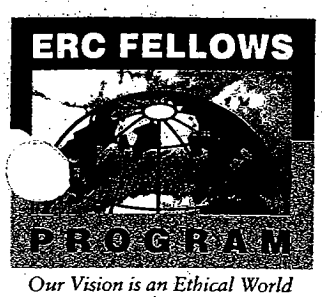

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Ed Petry
Executive Director
Ethics Officer Association

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President
Institute for Global Ethics

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United States Sentencing Commission

Barbara B. Hannigan
Ethics Counsel
Securities Exchange Commission

Jack Covaleski
Deputy Director for Agency Programs
U.S. Office of Government Ethics

Gaston Gianni
Inspector General
Federal Deposit Insurance Corporation

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February 20, 2004

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

Attention: Public Affairs.

This letter is on behalf of the Ethics Resource Centers (ERC) Fellows Program. The Fellows Program is made up of corporate, academic, non-profit and government representatives who focus on questions of ethics in business. The Fellows Program appreciates the opportunity to comment and the tremendous effort that both the Ad Hoc Advisory Group and the entire United States Sentencing Commission have spent in clarifying and modifying the current organizational sentencing guidelines.

There are many excellent improvements that the proposed guidelines offer. We think the change in §8B2.1(b)(3) is a good one. The new language in this section and the commentary to this section, provide a much more objective standard by which to judge the substantial authority personnel.

The change to §8C2.5(f)(3) is also a positive change. We think creating only a rebuttable presumption as to the effectiveness of the program based on high-level personnel participation in the alleged misdeed provides a more balanced approach. Rogue employees can be found at all levels and if only one of many high-level employees acts contra to the program the entire program should not be discounted.

The Fellows Program does have some concerns with several of the proposed changes. The following sections will discuss the concerns, plus propose possible modifications.

Expanding the definition of Violation of Laws:

Under the current Chapter 8 Guidelines, §8A1.2, Application note (k), the Sentencing Commission defines an "effective program to prevent and detect violations of law" as "a program that has been reasonably designed, implemented, and enforced so that it generally will be effective in preventing and detecting criminal conduct." This is the requirement that organizations have been basing their compliance and ethics effort on for the past thirteen years. It is also logical and consistent with the mission of the United States Sentencing Commission, to focus on criminal conduct.

The Fellows Program does have some concern about the proposed §8B2.1, Application note 1 definition of the concept "violations of law". The proposal would expand the scope of violations of law to include, "criminal or noncriminal (including a regulation) for which the organization is or would be liable, or in the case of Application note 4(A), for which the individual would be liable."

Part of the rationale for expanding the definition is cited in the Ah Hoc Advisory Group's Report (pp.54):

> The consideration of an organization's prior efforts and success in preventing violations of law beyond just criminal offeses is consistent with existing provisions of the organizational sentencing guidelines that treat prior civil and administrative offenses (§8C2.5(c)) and prior misconduct leading to restrictive court orders (§8C2.5(d)) as relevant sentencing considerations justifying elevated organizational fines.

Closer inspection of these current Guideline provisions may not justify the expansion of violations of laws to include "violation of any law, whether criminal or noncriminal (including a regulation) for which the organization is or would be liable. §8C2.5(c)) currently states:

> If the organization (or separately managed line of business) committed any part of the instant offense less than ten years after (A) a criminal adjudication based on similar misconduct; or (B) civil or administrative adjudication(s) *based on two or separate instances of similar misconduct* (emphasis added by author) ...

§8C2.5(d)(1) Violation of an Order seems to provide even less of a rationale for expanding the definition of laws to include criminal and noncriminal. This section states:

> (A) If the commission of the instant offense violated a judicial order or injunction, other than a violation of a condition of probation; or (B) if the organization (or separately managed line of business) violated a condition of probation by engaging in *similar misconduct* (emphasis added by author) to that for which it was placed on probation.

While these sections do mention prior civil or administrative offenses, and violations of orders, they require separate instances of SIMILAR MISCONDUCT. This is potentially very different than the proposed expansion of violation of law to include any criminal or noncriminal violations.

Since the Sentencing Guidelines recognize that you can still have a violation when you have an effective program, it would be unfair for organizations to not receive credit for their program due to any civil compliance weakness. An organization could conceivably have an effective program to prevent and detect violations of the Foreign Corrupt Practices Act and still have an FCPA violation. Under the existing Guidelines, you would still be able to prove due diligence and gain the benefit of having a program. But

under the proposed amendments, you could lose that benefit if you did not also have a program for something as unrelated as appropriately training your groundskeepers to assure compliance with local regulations regarding interfering with wildfowl nesting areas. While this may be important, failure to conduct this type of training should not be an indictment of your compliance program, sufficient to affect the organization's sentencing for an FCPA violation.

Recommendation: Keep the status quo and do not expand the definition of "violation of law" to include noncriminal (including a regulation) offenses.

Risk Assessment:

The Fellows Program acknowledges that assessing risks for criminal violations is at least an implied part of the current guidelines, but has a concern about how "risk assessment" has become a formal requirement of an effective program to prevent and detect a violation of laws. This is especially true, if the concept of violation of laws would be expanded to include both criminal and noncriminal laws. §8B.2(c) states, "In implementing subsection (b), the organization shall conduct ongoing risk assessment and take appropriate steps to design, implement, or modify each step set forth in subsection (b) to reduce the risk of violations of law identified by the assessment."

The Fellows foresee two potential problems with the proposal: (1) scope, and (2) formality. Regarding scope, it would be extremely difficult to evaluate all laws, both criminal and noncriminal. The formality of the term "risk assessment" conjures up a very detailed and extensive analysis of every possible criminal and noncriminal risk. The Fellows would prefer the concept of "assessing the relevant risks" be used in place of the term risk assessment.

Recommendation: Eliminate §8B.2(c), and amend §8B2.1(b)(1) to state, "The organization shall assess the relevant risks, then establish compliance standards and procedures to prevent and detect violations of law."

Confidentiality:

§8B2.1(b)(5) states that the organization shall take reasonable steps: "(C) to have a system whereby the organization's employees and agents may report or seek guidance regarding potential or actual violations of law without fear of retaliation, including mechanisms that allow for *anonymous reporting*." The Fellows Program commends the Sentencing Commission for recognizing the importance of anonymous reporting, but would encourage the Commission to follow the Sarbanes-Oxley Act of 2002 in its call for reporting which is either confidential or anonymous. §301 (m)(4) of the Sarbanes-Oxley Act of 2002, defines an audit committee's duty to include, "Complaints – Each audit committee shall establish procedures for ...(B) the confidential, anonymous submission by employees of the issuer of concerns regarding questionable accounting or auditing matters."

In this section of the Sarbanes-Oxley Act of 2002, Congress saw the wisdom in requiring either "confidential" or "anonymous" submissions. These terms may appear identical, but in reality could have a very different meaning. "Anonymous" reporting typically means that a company can not disclose the identity of reporting sources, because they do not know their identity. "Confidential" usually means that a company does know the identity of reporting sources, and tries to protect their identity. This could be done by removing all information from a report that would identify the reporting source. All of the remaining information would be available for review by other parties, both within and outside the organization.

It may be preferable to have "confidential" reporting because the person receiving the information (e.g. ombuds, ethics officer, human resources, legal, or compliance officer) can use the face to face conversations to establish a trusting relationship, address misconceptions and gather additional information. It is also much easier to have follow-up conversations with the reporting source when their identity is known. This type of program has effectively been implemented at major corporations like United Technologies and they have successfully protected the reporting source's identity, even when sought through litigation.

Recommendation: To be consistent with the Sarbanes-Oxley Act of 2002, the Fellows would request that the Sentencing Commission change proposed §8B2.1(5)(C) to read "to have a system whereby the organization's employees and agents may report or seek guidance regarding potential or actual violations of law without fear of retaliation, including mechanisms that allow for *confidential,* anonymous reporting.

Managerial Oversight:

The Proposed Guidelines §8B2.1(b) (2) states, "The organizational leadership shall be knowledgeable about the content and operation of the program..." Given the importance of ethical leadership, the statement that "the organizational leadership shall be knowledgeable about the content and operation of the program" could be much stronger. Simply sending a report to the executive team once a year could be seen as satisfying that requirement.

Recommendation: §8B2.1(b)(2) language should be changed to: "The organizational leadership shall provide direction to and be knowledgeable of the content and operation of the program."

Consistent Discipline:

Proposed §8B2.1 (b)(6) focuses on incentives and disciplinary measures. First, it is difficult to provide "incentives" for legal compliance. It does not make sense to most people to "reward" day to day legal or ethical conduct. Rather, this section should focus more on the messages sent by standards and procedures about what is rewarded and punished in the organization.

Recommendation: §8B2.1(b)(6) language should be changed to: "Compliance with the law ...shall be encouraged and supported consistently through standards and procedures that holds employees accountable for appropriate conduct and incorporates such accountability into regular promotion and compensation decisions. In addition, legal compliance should be enforced through appropriate disciplinary measures for engaging in violations of the law and for failing to take reasonable steps to prevent or detect violations of the law."

Internal Controls:

§8B2.1 Application note 1 defines compliance standards and procedures as "standards of conduct and internal control systems that are reasonably capable of reducing the likelihood of violations of law." The Fellows Program believes that effective internal controls can be an important part of a program to prevent and detect violations of law for large and small organizations. Instead of referring to "internal controls systems", the Commission should consider the more generic term of "internal controls" as a process. Many small organizations may not have adopted a formal internal control system (such as COSO), but still need effective internal controls (e.g. segregation of duties or requiring two signatures to authorize a check).

Recommendation: §8B2.1, Application Note 1, should change the words "internal controls systems" to "internal controls".

One final request would be that the United States Sentencing Commission work with the Department of Justice to make information available to the business community about what, if any, credit is given to organizations with an effective program to prevent and detect violations of law in charging decisions and criminal settlements. Most large corporations that have violations settle before trial. This information could be extremely helpful to ethics and compliance officers in demonstrating the positive impact their programs had with their discussions with the Department of Justice.

The ERC Fellows Program understands that the US Sentencing Commission is considering a public hearing on the proposed changes on March 17, 2004. The Fellows Program would be very happy to have a representative testify at that hearing.

Regards,
Mr. Stephen D. Potts, Esq.
Chairman
ERC Fellows Program

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WHITTIER LAW SCHOOL
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 scope 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

HCCA
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February 16, 2004

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

Dear Commissioners:

The Health Care Compliance Association (HCCA), established in 1996, is the only national, nonprofit organization dedicated solely to improving the quality of compliance. Its membership is made up of over 3,000 compliance professionals who oversee the compliance efforts of thousands of organizations both in and outside of health care. The HCCA has a rich history of facilitating the development and maintenance of compliance programs, providing a forum for understanding complicated regulatory environments, and collaborating with enforcement agencies to provide tools, resources, and educational opportunities for those involved with compliance. Its mission is to "champion ethical practice and compliance standards in the health care community and to provide the necessary resources for compliance professionals and others who share these principles."

HCCA Website: http://www.hcca-info.org/

The Executive Committee of the Health Care Compliance Association offers the following comments on the proposed changes to the US Sentencing Guidelines – See attached.

Sincerely,

Al Josephs
President
Health Care Compliance Association

[2-123]

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February 16, 2004

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

Subject: United States Sentencing Commission Proposed Changes

Dear Commissioners:

The purpose of this letter is to comment on the proposed changes to the Federal Sentencing Guidelines (Guidelines) relating to compliance programs. At the outset I would note that the Commission appears to be placing increased emphasis on the importance of compliance programs and the role of the compliance officer as a member of senior management. We completely support this effort. Moreover, we agree with the many changes proposed by the Commission to provide additional guidance and direction to organizations regarding compliance programs and to emphasize the need for compliance officers to have sufficient authority and resources to be able to perform effectively. While the board of directors of the Health Care Compliance Association supports virtually all of the proposed changes to the Guidelines, it does have concerns with two of the proposed changes. Those concerns are outlined below.

First, the proposed amendments suggest that the compliance officer of the organization is accountable for the effectiveness of the program. The proposed changes have added language to § 8B2.1(b)(2)which states that the high level person responsible for the program (the compliance officer) has the responsibility to "ensure the implementation and effectiveness of the program."

Our concern is that this amendment may not reflect the fact that compliance can only be achieved if the operating management of an organization (at all levels) performs the roles and responsibilities assigned to it through the compliance program. As a practical matter, the role of the compliance officer is to develop a compliance program and a structure for implementing the program. The compliance officer should then provide leadership and coordination of the program, as well as monitoring program performance and reporting to management and the board on program implementation.

Ultimately, however, the operating management of the organization must embrace, the program and assume accountability to ensure that the compliance program is effectively implemented. It is not realistic to hold the compliance officer alone responsible for the overall success or failure of the compliance program. If there are failures, the responsibility may reside with the compliance officer or may reside with any number of other leaders in an organization. The proposed amendments could be read as relieving management of the job of ensuring the organization is compliant. We believe that the guidelines should strengthen rather than weaken managements' accountability for the

organization's compliance efforts. For the reasons stated above, we would recommend that the proposed amendment be modified to read as follows:

"Specific individuals(s) within high-level personnel of the organization shall be assigned direct, overall responsibility to coordinate the design, oversee the implementation, and evaluate and report to management and the board on the effectiveness of the program to prevent and detect violations of laws."

Our second concern relates to the treatment of organizations which encounter trouble even though the organization had a compliance program in place. While the proposed changes are an improvement over the existing guidelines, it is our view that the proposed changes could do more to promote effective compliance programs.

As drafted, the proposed amendments create a rebuttable presumption that the compliance program was ineffective. However, we would propose a rebuttable presumption that the program is effective if it is the organization that discovers and brings the offense to the attention of the government. The rebuttable presumption of ineffectiveness creates a disincentive for organizations to thoroughly investigate and disclose wrongful conduct. Conversely, a rebuttable presumption that the program is effective (where the organization has uncovered and disclosed the wrongdoing) creates incentives to both investigate and disclose -- an approach that is more consistent with the overall emphasis on compliance in Chapter 8 of the Guidelines.

In summary, we support most of the proposed changes to the Guidelines and applaud the work of the Commission. The changes proposed by the Commission will help us strengthen organizational compliance programs and the role of the compliance officer. However, we would strongly encourage the Commission to revise the proposed Guidelines on the two very important points discussed above.

Sincerely,

Executive Committee
Health Care Compliance Association
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[2-125]

March 1, 2004

United States Sentencing Commission
One Columbus Circle, N.E.
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Attn: Public Affairs

LRN is pleased to have the opportunity to respond to the United States Sentencing Commission's request for public comment on its proposed amendments to Chapter Eight of the United States Sentencing Guidelines regarding effective compliance programs. LRN commends the Ad Hoc Advisory Group on the Organizational Sentencing Guidelines for its insightful report and recommendations. We further commend the Commission for addressing in the proposed amendments the important issues raised by the Advisory Group.

For over ten years, it has been LRN's privilege to work with hundreds of organizations, both large and small, on legal, compliance, and ethics issues. During this time, we have gained a better understanding of the relationship between ethics and compliance, and more broadly, the relationship between corporate cultures and compliance. We have also gained insight into how organizations best communicate not only the legal and regulatory requirements of their business, but also respect for the law more broadly, as well as their values and standards. And we have had the opportunity to witness and participate in what we believe could well turn out to be a sea change in the approach to addressing these critical issues.

We are observing an emerging trend in the development of effective compliance programs, and we believe this trend is a positive one. In particular we are observing that in communicating their values and providing employees with the knowledge and information they need to succeed and thrive, they are emphasizing both ethics and legal compliance. Indeed, attention to ethics within organizations now takes many forms, from bringing to life codes of conduct through education and other means by which they are woven into the very fabric of the organization, to structuring education curricula in which law and the ethics are taught together. The goal of such programs is to not only comply with the law, but to instill in the organization's members an atmosphere of trust and a sense of mutual respect and benefit.

We offer the following comments to provide context to the current corporate environment – one characterized by what we observe to be intense skepticism and a lack of trust from the public. It is our belief that the Commission has a historic opportunity to do more than dictate prescriptive

rules of compliance, but instead embrace both the letter and the animating spirit of the recent reforms.

ORGANIZATIONAL ETHICS ARE ESSENTIAL TO LEGAL COMPLIANCE

We strongly endorse adoption of the Ad Hoc Group's recommendations, except as stated below, and greatly appreciated the thoroughness, thoughtfulness and insight of their report. The report states that "the Advisory Group is not aware of any empirical evidence that the widespread movement to adopt compliance programs has resulted in the institution of *effective* compliance programs" (Report at 35), but nevertheless acknowledges that the state of the art for compliance programs has advanced, and the Sentencing Commission's organizational guidelines should reflect that advance. (Executive summary at 3). We offer comments to further that goal, suggesting that the Guidelines require programs that instill ethical behavior in allegiance to standards that animate the Guidelines in addition to legal compliance with the Guidelines.

The highly publicized ethical scandals that began to crescendo in 2001 showed that companies with "paper compliance programs," but no true ethical culture, collapse quickly as unethical conduct is revealed. The scandals that led to the recent reforms, while violating the law, were reflective of a broader ethical failure that was even more troubling than the actual legal violations.

Prosecutors frequently struggled to identify the appropriate laws and charges. The positive law had not kept up with the ability of highly proficient, yet ethically untethered individuals and organizations to find loopholes. Nearly all agreed, however, that the conduct was so egregious as to breach norms of ethical behavior. A collective cry arose that "there ought to be a law."

In response, several laws, as well as regulations and new rules for self-governing organizations, such as the stock exchanges, were passed. The aim of nearly all of these was to address the shortcomings extant in the positive law; namely, its failure to address conduct that was, while unethical, not necessarily illegal. At the federal level, both the legislative and executive branches have acted to redress those shortcomings.

The animating principles and foundational precepts of the rule of law originate from shared, common values. Businesses that embrace the letter and spirit behind the law inspire and uphold a higher standard of conduct in allegiance to these shared values. This higher standard considers the consequences of actions beyond their immediate outcome to consider the ultimate impact. This higher standard also acknowledges that everything is not relative and subject to equivocation and "clever pleading"; there are fundamental truths and values that should be adopted and championed simply because they are the right thing to do.

The judiciary, through the Commission, now has the opportunity to take its proper place beside its co-branches of government in ensuring ethics plays a key role in the lawful conduct of all organizations.

The Commission has, in its proposed changes to the Guidelines, taken the bold step of recognizing the vital role organizational culture plays in establishing and maintaining an effective compliance program. In that regard, the Commission has proposed that an organization must "(1) exercise due diligence to prevent and detect violations of law; and (2) otherwise promote an *organizational culture that encourages a commitment to compliance with the law.*" (emphasis supplied).

By this statement about culture, along with its emphasis on the role of the organization's leadership, the Ad Hoc Advisory Group recognizes that the carrot and stick approach goes only so far. A compliance program is about self- governance, and an entity must use the same leadership and process management to achieve compliance that it uses to achieve any other strategic initiative. Leadership is about values, not law.

Is legal self-governance ("compliance"), possible without a commitment to ethical self-governance? That is, will a focus on legal compliance alone be sufficient?

We think not, because rules-based systems have tended to invite behavior that seeks to subvert the spirit of those rules while honoring their letter. We have seen in recent years companies attempting to "game the system" and the never-ending pursuit of loopholes and devices designed to avoid legal requirements without overtly violating them. In addition, compliance, absent an allegiance to ethics, is truly about nothing more than doing the minimum required to comply with the basic requirements. Past precedent, as discussed more fully later in this document, demonstrates that culture grounded in values and ethics has more sustainable success in establishing and maintaining higher standards of conduct than a culture that merely "encourages compliance."

The creation of an organizational culture that does what's right is not a project, but an ongoing perennial investment. Adherence to the rule of law and strict conformity with compliance obligations is necessary, but not sufficient to create such a culture. Even in areas where there is no technical violation of the law, there is a critical distinction, as Justice Potter Stewart observed, between that which one has a right to do and that which is right to do.

The emphasis on doing what is right arises from the fact that corporate reputation, as well as an individual leader's reputation, is now more at the center of public scrutiny. And it appears that businesses are increasingly recognizing that reputation is a valuable asset to be preserved, protected, and reinforced. But it is also an asset that can be damaged under the weight of negative public perception and especially judgment of ethical impropriety. Programs that address both ethics and law serve to nurture these valuable reputations by fostering cultures in which employees appreciate the gravity of their decisions and the actions they take. These well-informed decisions and actions, then observed by all who come in contact with the company--investors, customers, suppliers, consumers, etc.--garner greater trust, which may lead to preserving and, perhaps even improving, a company's reputation. The necessary condition, then, for enjoying a valuable and enduring reputation is that those who come in contact with the company believe they can trust it; but they can only trust if on a consistent basis the company does that which is right by them and others. Therein lies the centrality of reputation.

The Ad Hoc Group report also recognizes that ethics and compliance are intertwined. As the Commission notes in the proposed amendment, the "organizational culture" addition is:

> intended to reflect the emphasis on ethics and values incorporated into recent legislative and regulatory reforms, as well as the proposition that compliance with all laws is the expected behavior within organizations. (Fed. Reg. Vol.68, No. 249, 75340 at 75355 (Dec. 30, 2003)).

Discussions of ethics and its role in organizational culture permeate much of the Advisory Group's report. Indeed, the report recognizes that ethics is central to organizational culture and thus an effective compliance program. According to the report, "values-based" compliance programs already appear to be the norm among member organizations surveyed by the Ethics Officer Association (Ad Hoc Report at 52). The Ad Hoc Group also recognizes that "law compliance" is a subset of general ethical behavior. (Report at 40) "Culture," by definition, is shared values (Ad Hoc Report at 52) and, as we have pointed out above, laws are an expression of values, and legal violations are often failures of ethics.

The Defense Industry Initiative on Business Ethics and Conduct, an organization founded by 32 members of that industry, reached a similar conclusion and stated as its purpose:

> DII's essential purpose is to combine the common dedication of its Signatories to a culture and practice of ethics and right conduct in all business with the U.S. Defense Department and with others. The defense industry Signatories are united in the commitment to adopt and implement principles of business ethics and conduct that acknowledge and address their organizational responsibilities under federal procurement policy and law, thereby contributing to the National Defense. Further, they each accept the responsibility to create an organizational culture in which ethics is paramount, and compliance with federal procurement laws is a strict obligation. The DII's essential strength lies in sharing best practices to maintain the highest ethical standards, encouraging employees to ethical conduct, and requiring compliance in the course of its business activities. The DII, while not a lobbying organization, is an advocate of its principles to the defense industry, to the Government and to the Public.

Nevertheless, the Ad Hoc Group expressly intends to limit ethical assessments by courts, prosecutors and parties, stating only that "determinations of whether a particular organization has adopted a good 'set of values'" or appropriate 'ethical standards' are 'subjects which may be very difficult, if not impossible, to evaluate in an objective, consistent manner." (Report at 55).

This conclusion wrongly supposes, we believe, that the courts may lack the judgment found in self-regulating bodies and other branches of the government. Neither Congress, in The Sarbanes-Oxley Act, nor the SEC in approving the listing standards of the NYSE and Nasdaq shied away from the concept of ethics. Under those laws, and many others that we discuss below, courts will and have grappled with these subjects.

While ethics can seem to be an abstraction that calls for relative, somewhat subjective value judgments, there is actually a far more grounded, practical definition. Ethics is, simply, the shared values and norms that define how people interact. Principally, ethics is how people treat each other. Very often, ethics is explicitly expressed as positive law; at all times, ethics informs the positive law. They are inexorably intertwined.

Our concern with the proposed language and its underlying rationale, therefore, is that it both "sells the courts short" and does not comport with these more recent statutes and regulations. As a result, it could lead to *inconsistent enforcement* of both the letter and spirit of those laws.

Consequently, we believe the current environment presents a singular opportunity to establish a general requirement for *promoting a culture of ethics and compliance*, as opposed to merely a culture of compliance. We believe this is not only an achievable goal, but moreover sends a strong signal that compliance with legal minimums will not be the standard by which the sentencing courts will evaluate behavior, but instead virtue and values do indeed matter. Only through reference to fundamental legal *and ethical* principles will the Commission be able to properly discourage actions that while technically legal, undermine the spirit of the law.

Indeed, the criteria currently proposed by the Commission to determine whether an organization has promoted a culture of compliance with the law may just as easily be used to assess whether the organization has promoted a culture of compliance with law *and ethics*. Courts and prosecutors may then use the standards currently espoused in the proposed amendments for promoting a culture of compliance to just as easily measure an organization's commitment to promoting a culture of ethics and compliance. This allows for an analysis of how well the organization promotes ethics without requiring an analysis of how ethical an organization is.

Without a commitment to ethics, the Commission runs the risk of its guidelines fostering the same types of corporate cultures that allowed individuals to seek out "loopholes" in the law that led to many of the recent corporate crises. By including ethics in §8B2.1.(a)(2), the Commission not only retains intellectual consistency, but it will be implementing both the words and spirit of recent legislation and regulations.

THE PRECEDENT FOR ETHICS

The notion of at least some government oversight of business ethics is a well-established one. And contrary to the Advisory Group's assertion, courts and prosecutors are both equipped and willing to engage in at least some assessment of ethical behavior. Indeed, much of the criminal law and the analysis of criminal behavior in the courtroom relies on an assessment of a defendant's motive. Every day, courts and juries examine motive, comparing it against the community's values (*i.e.*, its ethical framework) to determine how well or mal-intentioned the defendant's actions were. This values-based (or ethics-based) determination informs the culpability decision and ultimately, the sentence meted out. Moreover, the basic tenets of tort law are based on ethics. Before the advent of standards of strict liability, which effectively compensate harm based on notions of causation and, ultimately, who can afford to pay the compensation, tort law had as its foundation the precept of duty. Duty is simply the assigned

moral obligation to behave in a certain way--an obligation interpreted and assigned by judges and which ultimately established the common law of torts.

There is also a long history of all three branches of government encouraging, if not explicitly mandating, at least some focus on ethics in business. Indeed, among Congress's objectives in passing the federal securities laws in the early 1930s was the promotion of honest securities markets. By passing these laws, Congress sought "'to substitute a philosophy of full disclosure for the philosophy of caveat emptor and thus to achieve a high standard of business ethics in the securities industry.'" *Affiliated Ute Citizens of Utah v. United States*, 406 U.S. 128, 151, 92 S.Ct. 1456, 31 L.Ed.2d 741 (1972) (footnote omitted). And since their passage, the courts have broadly construed the securities laws over the years to achieve this stated purpose. *See Davenport v. A.C. Davenport & Son Co.*, 903 F.2d 1139, C.A.7 (Ill.),1990 ("The fundamental purpose of section 10(b) and rule 10(b)(5) is to achieve a high standard of business ethics. This purpose is taken seriously and is broadly construed").

Of course, ethics is not limited to the securities laws. Many federal laws are founded on ethical principles and require at least some recognition of those principles in applying the laws to the facts of any particular case. *See, e.g., Vulcan Engineering Co., Inc. v. Fata Aluminium, Inc.*, 278 F.3d 1366 Fed Cir. C.A.Fed. (Mich.),2002, Feb. 5, 2002. ("The rules of patent infringement are rules of *business ethics*, and require prudent commercial actions in accordance with law")(emphasis added).

And in government procurement, by both statute and regulation, the executive branch is required to assess an organization's ethics on a regular basis. Pursuant to both the Office of Federal Procurement Policy Act of 1974 and the Federal Acquisition Regulation (FAR), some of the factors to be considered in determining whether a prospective contractor is a "responsible source" include whether it has adequate financial resources; the ability to comply with delivery and performance schedule; a satisfactory performance record; and a satisfactory record of *integrity and business ethics*. 41 U.S.C. § 403(7)(Supp.2001); 48 C.F.R. § 9.104-1(a)-(d). 1

Even the common law is rife with examples of ethics finding their way into the legal analysis. One example is the tort of interference with contract. *See* RESTATEMENT (SECOND) OF TORTS § 767 cmt. i (1977) (stating that, when the courts have yet to approve or disapprove of a certain practice, "[r]ecognized standards of *business ethics* and business customs and practices are pertinent" in determining whether interference with a contract was improper) (emphasis supplied). *See also, Saglioccolo v. Eagle Ins. Co.*, 112 F.3d 226, (6th Cir. 1997) (citing the Restatement with approval); *Morrow v. FBS Ins. Montana-Hoiness Labar, Inc.*, 749 P.2d 1073, 1076 (Mont.1988) (Montana Supreme Court cited approvingly to the Restatement (Second) of Torts, § 767 at 38-39 (1977), as a correct statement of the law in Montana on proper or improper motive.); *Ackerson v. Ackerson*, 895 F.2d 1416 (Table) C.A.9 (Mont.),1990 (unpublished opinion) (noting that the Restatement in Comment 1 concludes that "when there is room for different views, the determination of whether the interference is improper or not is ordinarily left to the jury, to obtain its common feel for the state of community mores and for the manner in which they would operate upon the facts in question").

Another example is the tort of economic duress. The tort finds its basis in business ethics. "The rationale underlying the principle of economic duress is the imposition of certain minimal standards of *business ethics* in the market place." *Centric Corp. v. Morrison-Knudsen Co.*, 731 P.2d 411, 413 (Okla.1986).

Moreover, as the Advisory Group and Commission recognized, Congress and regulators have been even more than willing to prescribe at least some focus on ethics within organizations. For example, codes of ethics for senior executives of publicly traded companies are now essentially mandated by law and regulation 2, and Nasdaq and NYSE-listed companies must have codes of ethics for all employees.

In addition, the Department of Health and Human Services Office of Inspector General requires pharmaceutical manufacturers have written policies and procedures and recommends that they "develop a general corporate statement of ethical and compliance principles that will guide company operations." According to the OIG, the purpose of such a code is to "function in the same fashion as a constitution, *i.e.*, as a document that details the fundamental principles, values, and framework for action within an organization." *OIG Compliance Program Guidance for Pharmaceutical Manufacturers*, Office of Inspector General, Department of Health and Human Services, Fed. Reg. Vol. 68, No. 86, 23731 at 23733 (May 5, 2003).

And lately, responding to the sense of frustration felt by the public, even the courts have willingly entered the ethics debate, indicating a fundamental shift in the manner in which they view ethics as part of the judicial process. This has manifested itself in several ways. First, as a greater emphasis on ethics in analysis:

"The facts involved in this case reflect an inexplicable lack of *business ethics and an atmosphere of general lawlessness* that infected the very heart of one of America's leading corporate citizens." *U.S. v. Andreas*, 216 F.3d 645, (7th Cir. 2000) (referring to agricultural conglomerate Archer Daniels Midland Co.) (emphasis added).

"Rejecting [defendant's] assertions, the SEC viewed his felonious conduct as a serious breach of his obligation to maintain high standards of business ethics, a threat to the integrity of the securities market, and undermining federal taxing power...We find no basis to set aside the SEC's findings and conclusions, and therefore affirm." *Haberman v. S.E.C*, 205 F.3d 1345 (8th Cir. 2000) (unpublished disposition).

This is not to say that there should be no limitations on the courts' ability to assess ethical standards and conduct. The point of judicial analysis of an organization's commitment to ethics and law should be to assess whether the organization has effectively promoted them and not whether they have achieved some standardized culture of ethical and legal compliance. That is, courts should not assess *how ethical* an organization is, but *how hard* it has tried.

Moreover, we believe that there is little risk that a court would choose to engage in the exercise of assessing an organization's ethics. This is especially so when the principles applicable at law (*i.e.*, the Chapter 8 guidelines) provide ample guidance toward the appropriate analysis: whether

the organization has effectively *promoted* a culture of ethics and compliance. Indeed, as recently as last October, Judge Pollack declined to engage in the exercise of assessing an organization's ethical behavior, stating that "[t]he plaintiffs in the above-captioned putative class actions would have this Court punish breaches of business ethics by principles applicable at law which did not at the time apply to such conduct." However, the implication is that, had such "principles applicable at law" applied at the time, Judge Pollack would have engaged in the appropriate analysis. *In re Merrill Lynch & Co., Inc. Research Reports Securities Litigation,* 289 F.Supp.2d 416, 418 (SDNY. 2003).

And perhaps most remarkable to date has been the recent landmark settlement response – with the enforceability of the court's permanent injunction – to one of the largest securities frauds ever to occur in the United States. In *SEC v. Worldcom*, Judge Rakoff noted:

In the instant lawsuit, however, the Securities and Exchange Commission (the "Commission"), with the full cooperation of the company's new management and significant encouragement from the Court-appointed Corporate Monitor (Richard C. Breeden, Esq.), has sought something different:
-- not just to clean house but to put the company on a new and positive footing;
-- not just to enjoin future violations but to create models of corporate governance and internal compliance for this and other companies to follow;
-- not just to impose penalties but to help stabilize and reorganize the company and thereby help preserve more than 50,000 jobs and obtain some modest, if inadequate, recompense for those shareholder victims who would otherwise recover nothing whatever from the company itself.

The permanent injunction also requires the company to provide a large segment of its employees with specialized training in accounting principles, public reporting obligations, and *business ethics*, in accordance with programs being specially developed for the company by New York University and the University of Virginia. At the behest of the Corporate Monitor, the Court also obtained from the new Chief Executive Officer a sworn "*Ethics Pledge*," requiring, on pain of dismissal, a degree of transparency well beyond S.E.C. requirements. The company has since required its senior management to sign a similar pledge, and has plans to obtain similar pledges from virtually all employees.

S.E.C. v. Worldcom, Inc., 273 F.Supp.2d 431, S.D.N.Y.,2003 (emphasis added).

In sum it is our considered opinion that as long as the guidelines focus on compliance and do not explicitly include an ethical component, the discussion will remain about that which is required to do and not that which is right to do. A more prudent course, and one more consistent with the activities of the other branches of government and of industry itself, is to foster a culture based on both compliance and ethics. Only in that way will we help build a system in which both compliance and virtue are their own rewards.

Consequently, we believe the Commission should make the following changes to the proposed amendments:

§8B2.1(a)(2)
"otherwise promote an organizational culture that encourages a commitment to ethics and the law."

§8B2.1(b)
"Due diligence and the promotion of an organizational culture that encourages a commitment to ethics and compliance with the law."

§8B2.1(b)(1)
"The organization shall establish ethics and compliance standards and procedures to prevent and detect violations of law."

LRN would like to again thank the Commission for this opportunity. We hope that our comments will help inform the Commission's considerations and would welcome an opportunity to testify before the Commission to further amplify our perspective.

Sincerely,

Dov Seidman
Chairman and Chief Executive Officer

[1] We also note that most government employees at the local, state, and national level are subject to various ethics requirements, including statutory ethical duties found in ethics-in-government legislation.

[2] The Securities and Exchange Commission requires that companies have and disclose codes of ethics for certain senior executives or disclose why they do not have such codes.

WRITTEN TESTIMONY OF DOV SEIDMAN,
CHAIRMAN AND CHIEF EXECUTIVE OFFICER
LRN

Let me begin my testimony by thanking the members of the Sentencing Commission and staff for giving me this opportunity. And let me also commend the Ad Hoc Advisory Group on the Organizational Sentencing Guidelines for its insightful report and recommendations. We further commend the Commission for addressing in the proposed amendments the important issues raised by the Advisory Group.

We are in troubling times for the business community, and your work is greatly appreciated by it. Trust of American business is at an exceedingly low level, perhaps the lowest since the Great Depression. The actions of a few, spectacular malfeasants have sullied the reputation of business as a whole and exposed the need for greater vigilance, and greater penalties for failures of compliance and ethics.

As the Commission has recognized, though, simply creating penalties for those who do wrong is not enough. We must provide incentives for companies to do the right thing, and encourage their employees to do the right thing, even when it may not be the easy thing.

The proposed changes to the Organizational Sentencing Guidelines are a positive continuation of the work the Commission has done in the past to further compliance, and the Commission is to be commended for that work.

However, I believe the Commission would have a greater impact on organizational behavior if it added the requirement that organizations promote an internal culture that encourages a commitment to both the law, as it has in the past, and to ethics.

I make this statement based on over ten years working with hundreds of organizations, both large and small, on legal, compliance, and ethics issues. During this time, I and my colleagues at LRN have gained a better understanding of the relationship between ethics and compliance, and more broadly, the relationship between corporate cultures and compliance. We have also gained great insight into how organizations best communicate not only the legal and regulatory requirements of their business, but also respect for the law more broadly, as well as their values and standards. And we have had the opportunity to witness and participate in what we believe could well turn out to be a sea change in the approach to addressing these critical issues.

We are observing an emerging best practice in the development of effective compliance programs. In particular, we are observing that in communicating their values and providing employees with the knowledge and information they need to succeed and thrive, they are emphasizing both ethics and legal compliance. Indeed, attention to ethics within organizations now takes many forms, from bringing to life codes of conduct through education and other means by which they are woven into the very fabric of the organization, to structuring education curricula in which law and the ethics are taught together. Or, put another way, they are designed

to remind employees of what Justice Potter Stewart taught us: that there is a difference between that which you have a right to do and that which is right to do.

The goal of such programs is to not only comply with the law, but to instill in the organization's members an atmosphere of trust, a sense of mutual respect and benefit, and a commitment to doing the right thing, not simply the required thing.

If we look to the highly publicized ethical scandals that began to crescendo in 2001, we see that companies with "paper compliance programs," but no true ethical culture, collapse quickly as unethical conduct is revealed. The scandals that led to the recent reforms, while violating the law, were reflective of a broader ethical failure that was even more troubling than the actual legal violations.

Prosecutors frequently struggled to identify the appropriate laws and charges. The positive law had not kept up with the ability of highly proficient, yet ethically untethered individuals and organizations to find loopholes. Nearly all agreed, however, that the conduct was so egregious as to breach norms of ethical behavior. A collective cry arose that "there ought to be a law." That cry helped lead us to this hearing room today.

The aim of nearly all of the laws adopted in the wake of these scandals was to address the shortcomings extant in the positive law; namely, its failure to address conduct that was, while unethical, not necessarily illegal. At the federal level, both the legislative and executive branches have acted to redress those shortcomings.

This is consistent with past law, since the animating principles and foundational precepts of the rule of law originate from shared, common values. Businesses that embrace the letter and spirit behind the law inspire and uphold a higher standard of conduct in allegiance to these shared values. This higher standard considers the consequences of actions beyond their immediate outcome to consider the ultimate impact. This higher standard also acknowledges that everything is not relative and subject to equivocation and "clever pleading"; there are fundamental truths and values that should be adopted and championed simply because they are the right thing to do.

The judiciary, through the Commission, now has the opportunity to take its proper place beside its co-branches of government in ensuring ethics plays a key role in the lawful conduct of all organizations.

The Commission has, in its proposed changes to the Guidelines, taken the bold step of recognizing the vital role organizational culture plays in establishing and maintaining an effective compliance program. In that regard, the Commission has proposed that an organization must "(1) exercise due diligence to prevent and detect violations of law; and (2) otherwise promote an *organizational culture that encourages a commitment to compliance with the law.*" (emphasis supplied).

By this statement about culture, along with its emphasis on the role of the organization' s leadership, the Ad Hoc Advisory Group recognizes that the carrot and stick approach goes only

so far. A compliance program is about self- governance, and an entity must use the same leadership and process management to achieve compliance that it uses to achieve any other strategic initiative. Leadership is about values, not law.

Is legal self-governance ("compliance"), possible without a commitment to ethical self-governance? That is, will a focus on legal compliance alone be sufficient?

We think not, because rules-based systems have tended to invite behavior that seeks to subvert the spirit of those rules while honoring their letter. We have seen in recent years companies attempting to "game the system" and the never-ending pursuit of loopholes and devices designed to avoid legal requirements without overtly violating them. In addition, compliance, absent an allegiance to ethics, is truly about nothing more than doing the minimum required to comply with the basic requirements. Past precedent demonstrates that culture grounded in values and ethics has more sustainable success in establishing and maintaining higher standards of conduct than a culture that merely "encourages compliance."

The emphasis on doing what is right arises from the fact that corporate reputation, as well as an individual leader's reputation, is now more at the center of public scrutiny. And it appears that businesses are increasingly recognizing that reputation is a valuable asset to be preserved, protected, and reinforced. But it is also an asset that can be damaged under the weight of negative public perception and especially judgment of ethical impropriety. Programs that address both ethics and law serve to nurture these valuable reputations by fostering cultures in which employees appreciate the gravity of their decisions and the actions they take. These well-informed decisions and actions, then observed by all who come in contact with the company--investors, customers, suppliers, consumers, etc.--garner greater trust, which may lead to preserving and, perhaps even improving, a company's reputation. The necessary condition, then, for enjoying a valuable and enduring reputation is that those who come in contact with the company believe they can trust it; but they can only trust if on a consistent basis the company does that which is right by them and others. Therein lies the centrality of reputation.

The Ad Hoc Group report also recognizes that ethics and compliance are intertwined. As the Commission notes in the proposed amendment, the "organizational culture" addition is:

> intended to reflect the emphasis on ethics and values incorporated into recent legislative and regulatory reforms, as well as the proposition that compliance with all laws is the expected behavior within organizations. (Fed. Reg. Vol.68, No. 249, 75340 at 75355 (Dec. 30, 2003)).

Discussions of ethics and its role in organizational culture permeate much of the Advisory Group's report. Indeed, according to the report, "values-based" compliance programs already appear to be the norm among member organizations surveyed by the Ethics Officer Association. The Ad Hoc Group also recognizes that "law compliance" is a subset of general ethical behavior. (Report at 40) "Culture," by definition, is shared values (Ad Hoc Report at 52) and, as we have pointed out above, laws are an expression of values, and legal violations are often failures of ethics.

The Defense Industry Initiative on Business Ethics and Conduct, an organization founded by 32 members of that industry, reached a similar conclusion and, as a result, included in its statement of purpose:

> DII's essential purpose is to combine the common dedication of its Signatories to a culture and practice of ethics and right conduct in all business with the U.S. Defense Department and with others.

Nevertheless, the Ad Hoc Group expressly intends to limit ethical assessments by courts, prosecutors and parties, stating only that "determinations of whether a particular organization has adopted a good 'set of values'" or appropriate 'ethical standards' are 'subjects which may be very difficult, if not impossible, to evaluate in an objective, consistent manner." (Report at 55).

This conclusion wrongly supposes, we believe, that the courts may lack the judgment found in the other branches of the government and self-regulating bodies. Neither Congress, in The Sarbanes-Oxley Act, nor the SEC in approving the listing standards of the NYSE and Nasdaq shied away from the concept of ethics. Under those laws, and many others that we discuss below, courts will and have grappled with these subjects.

While ethics can seem to be an abstraction that calls for relative, somewhat subjective value judgments, there is actually a far more grounded, practical definition. Ethics is, simply, the shared values and norms that define how people interact. Principally, ethics is how people treat each other. Very often, ethics is explicitly expressed as positive law; at all times, ethics informs the positive law. They are inexorably intertwined.

Our concern with the proposed language and its underlying rationale, therefore, is that it both "sells the courts short" and does not comport with these more recent statutes and regulations. As a result, it could lead to *inconsistent enforcement* of both the letter and spirit of those laws.

Consequently, we believe the current environment presents a singular opportunity to establish a general requirement for *promoting a culture of ethics and compliance*, as opposed to merely a culture of compliance. We believe this is not only an achievable goal, but moreover sends a strong signal that compliance with legal minimums will not be the standard by which sentencing courts will evaluate behavior, but instead virtue and values do indeed matter. Only through reference to fundamental legal *and ethical* principles will the Commission be able to properly discourage actions that while technically legal, undermine the spirit of the law.

Indeed, the criteria currently proposed by the Commission to determine whether an organization has promoted a culture of compliance with the law may just as easily be used to assess whether the organization has promoted a culture of compliance with law *and ethics*. Courts and prosecutors may then use the standards currently espoused in the proposed amendments for promoting a culture of compliance to just as easily measure an organization's commitment to promoting a culture of ethics and compliance. This allows for an analysis of how well the organization promotes ethics without requiring an analysis of how ethical an organization is.

Without a commitment to ethics, the Commission runs the risk of its guidelines fostering the same types of corporate cultures that allowed individuals to seek out "loopholes" in the law that led to many of the recent corporate crises. By including ethics in §8B2.1.(a)(2), the Commission not only retains intellectual consistency, but it will be implementing both the words and spirit of recent legislation and regulations.

THE PRECEDENT FOR ETHICS

The notion of at least some government oversight of business ethics is a well-established one. And courts and prosecutors are both equipped and willing to engage in at least some assessment of ethical behavior. Indeed, much of the criminal law and the analysis of criminal behavior in the courtroom relies on an assessment of a defendant's motive. Every day, courts and juries examine motive, comparing it against the community's values *(i.e.*, its ethical framework) to determine how well or mal-intentioned the defendant's actions were. This values-based (or ethics-based) determination informs the culpability decision and ultimately, the sentence meted out. Moreover, the basic tenets of tort law are based on ethics. Before the advent of standards of strict liability, which effectively compensate harm based on notions of causation and, ultimately, who can afford to pay the compensation, tort law had as its foundation the precept of duty. Duty is simply the assigned moral obligation to behave in a certain way--an obligation interpreted and assigned by judges and which ultimately established the common law of torts.

There is also a long history of all three branches of government encouraging, if not explicitly mandating, at least some focus on ethics in business. Indeed, among Congress's objectives in passing the federal securities laws in the early 1930s was the promotion of honest securities markets. By passing these laws, Congress sought "'to substitute a philosophy of full disclosure for the philosophy of caveat emptor and thus to achieve a high standard of business ethics in the securities industry.'" And since their passage, the courts have broadly construed the securities laws over the years to achieve this stated purpose.

Of course, ethics is not limited to the securities laws. Many federal laws are founded on ethical principles and require at least some recognition of those principles in applying the laws to the facts of any particular case.

And in government procurement, by both statute and regulation, the executive branch is required to assess an organization's ethics on a regular basis. Pursuant to both the Office of Federal Procurement Policy Act of 1974 and the Federal Acquisition Regulation (FAR), some of the factors to be considered in determining whether a prospective contractor is a "responsible source" include whether it has adequate financial resources; the ability to comply with delivery and performance schedule; a satisfactory performance record; and a satisfactory record of *integrity and business ethics.*

Even the common law is rife with examples of ethics finding their way into the legal analysis. One example is the tort of interference with contract stating that, when the courts have yet to

approve or disapprove of a certain practice, "[r]ecognized standards of *business ethics* and business customs and practices are pertinent" in determining whether interference with a contract was improper

Moreover, as the Advisory Group and Commission recognized, Congress and regulators have been even more than willing to prescribe at least some focus on ethics within organizations. For example, codes of ethics for senior executives of publicly traded companies are now essentially mandated by law and regulation, and Nasdaq and NYSE-listed companies must have codes of ethics for all employees.

In addition, the Department of Health and Human Services Office of Inspector General requires pharmaceutical manufacturers have written policies and procedures and recommends that they "develop a general corporate statement of ethical and compliance principles that will guide company operations." *OIG Compliance Program Guidance for Pharmaceutical Manufacturers*, Office of Inspector General, Department of Health and Human Services, Fed. Reg. Vol. 68, No. 86, 23731 at 23733 (May 5, 2003).

And lately, responding to the sense of frustration felt by the public, even the courts have willingly entered the ethics debate, indicating a fundamental shift in the manner in which they view ethics as part of the judicial process. This has manifested itself in several ways. First, as a greater emphasis on ethics in analysis, including in U.S. *v. Andreas*, 216 F.3d 645, (7th Cir. 2000) and *Haberman v. S.E.C*, 205 F.3d 1345 (8th Cir. 2000) (unpublished disposition).

This is not to say that there should be no limitations on the courts' ability to assess ethical standards and conduct. The point of judicial analysis of an organization's commitment to ethics and law should be to assess whether the organization has effectively promoted them and not whether they have achieved some standardized culture of ethical and legal compliance. That is, courts should not assess *how ethical* an organization is, but *how hard* it has tried.

Moreover, we believe that there is little risk that a court would choose to engage in the exercise of assessing an organization's ethics. This is especially so when the principles applicable at law (*i.e.*, the Chapter 8 guidelines) provide ample guidance toward the appropriate analysis: whether the organization has effectively *promoted* a culture of ethics and compliance. Indeed, as recently as last October, Judge Pollack declined to engage in the exercise of assessing an organization's ethical behavior, stating that "[t]he plaintiffs in the above-captioned putative class actions would have this Court punish breaches of business ethics by principles applicable at law which did not at the time apply to such conduct." However, the implication is that, had such "principles applicable at law" applied at the time, Judge Pollack would have engaged in the appropriate analysis. *In re Merrill Lynch & Co., Inc. Research Reports Securities Litigation*, 289 F.Supp.2d 416, 418 (SDNY. 2003).

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S.E.C. v. Worldcom, Inc., 273 F.Supp.2d 431, S.D.N.Y.,2003 (emphasis added).

In sum it is our considered opinion that as long as the guidelines focus on compliance and do not explicitly include an ethical component, the discussion will remain about that which is required to do and not that which is right to do. A more prudent course, and one more consistent with the activities of the other branches of government and of industry itself, is to foster a culture based on both compliance and ethics. Only in that way will we help build a system in which both compliance and virtue are their own rewards.

Consequently, we believe the Commission should make the following changes to the proposed amendments:

§8B2.1(a)(2)
"otherwise promote an organizational culture that encourages a commitment to ethics and the law."

§8B2.1(b)
"Due diligence and the promotion of an organizational culture that encourages a commitment to ethics and compliance with the law."

§8B2.1(b)(1)
"The organization shall establish ethics and compliance standards and procedures to prevent and detect violations of law."

LRN would like to again thank the Commission for this opportunity. We hope that our comments will help inform the Commission's considerations.

[2-141]

SOUTHERN METHODIST UNIVERSITY

Maguire Center for Ethics and Public Responsibility

February 13, 2004

The Honorable Judge Diana M. Murphy, Chair
U.S. Sentencing Commission
One Columbus Circle NE, Suite 2-500
Washington DC 20002-8002

Dear Judge Murphy,

I have read Robert Olson, Stuart Gilman, and Michael Hoffman's thoughtful letter, bill mark-up, and justification with respect to proposed amendments to the FSGO. They deserve your most careful reading and consideration.

It is vital to address the authors' recommendation that Guidelines stress society's aspirations for a supportive organizational culture and good ethical environment, beyond mere compliance. The founding fathers recognized this. We should too. This amendment must set noble goals as well as legalistic minimums.

Thank you for your time and consideration.

Sincerely,

Richard O. Mason, Director
The Cary M. Maguire Center for Ethics
and Public Responsibility
and Carr P. Collins Distinguished Professor
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ROM:lt

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Stuart Gilman, PhD, President
Michael Hoffman, PhD, Executive Director

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January 28, 2004

The Honorable Jude Diana M. Murphy, Chair
U.S. Sentencing Commission
One Columbus Circle NE, Suite 2-500
Washington DC 20002-8002

Dear Judge Murphy,

We congratulate you, your, your fellow commissioners, and your staff for drafting the Proposed Amendments and making them available for public comment. We know that the process has involved considerable time and resources. The result, however, has been amendments to the Guidelines that will make them more relevant to the new millennium.

Yet we're concerned that they are not as germane and significant as they could be. Indeed, if the goal was to go "beyond compliance," they disappoint by not going as far as numerous other governmental bodies, such as the SEC and Congress, have done already. As they stand now, the Proposed Amendments:

- fail to support the integration of "ethics" into compliance programs,
- sidestep an opportunity to re-define "effectiveness" in a substantive way, and
- neglect to reconsider the purview of an ethics and compliance program in the current environment of corporate malfeasance.

In our opinion, the Proposed Amendments need to reflect the proposition that ethics is the heart of law

We respectfully offer our suggested changes to the Proposed Amendments with an accompanying justification (please see enclosures). It is our hope that you will consider them in the spirit in which they are offered—a mutual concern for enhancing the public good. We will also be contacting members of Congress in the same spirit. If there's anything we can do to assist the Commission in further understanding these suggested changes—or obtaining documents in support of them—please do not hesitate to contact us.

This process for amending the Federal Sentencing Guidelines for Organizations presents an exciting opportunity, one that will probably not come again for another ten years. We urge the Sentencing Commission to retain its *leadership role* in preventing corporate malfeasance by including the changes we've suggested in the final amendments.

Sincerely,

[signature on file]

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[2-143]

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PART B – REMEDYING HARM FROM CRIMINAL CONDUCT, AND PREVENTING AND DETECTING VIOLATIONS OF THE LAW

1. REMEDYING HARM FROM CRIMINAL CONDUCT

* * *

2. PREVENTING AND DETECTING VIOLATIONS OF LAW

§8B2.1 Effective Programs to Prevent and Detect Violations of Law

(a) To have an effective program to prevent and detect violations of law, for purposed of subsection (f) of §8C2.5 (Culpability Score) and subsection (c)(1) of §8D1.4 (Recommended Conditions of Probation – Organizations), an organization shall—

(1) Exercise due diligence to prevent and detect violations of law; and

(2) otherwise promote and organizational culture that encourages a commitment to the ethical principles that inform ~~compliance with~~ law

Such program shall be reasonably designed, implemented, and enforced so that the program is generally effective in preventing and detecting violations of law, as well as promoting an organizaitonal culture committed to ethical principles, that is, one that demonstrates commitment to ethical principles and compliance with law. The failure to prevent or detect instant offense leading to sentencing does not necessarily mean that the program is not generally effective in preventing and detecting violations of law, as well as in promoting an organizational culture committed to ethical principles.

(b) Due diligence and the promotion of an organizational culture that encourages a commitment to compliance with law and the ethical principles that inform law within the meaning of subsection (a) minimally require the following steps:

(1) The organization shall establish ethics and compliance standards and procedures to prevent and detect violations of law, as well as to promote an organizational culture committed to ethical principles.

(2) The organizational leadership shall be knowledgeable about the content, ~~and~~ operation, and effectiveness of the program to prevent and detect violations of law, as well as to promote an organizational culture committed to ethical principles.

The organization's governing authority shall be knowledgeable about the content, and operation, and effectiveness of the program to prevent and detect violations of law, as well as to promote an organizational culture committed to ethical principles, and shall exercise reasonable oversight with respect to the implementation and effectiveness of the program to prevent and detect violations of the law, as well as to promote an organizational culture committed to ethical principles.

Specific individual(s) within high executive-level personnel of the organization shall be assigned direct, full-time, overall responsibility to ensure implementation and effectiveness of the program to prevent and detect violations of law, as well as to promote an organizational culture committed to ethical principles. Such individual(s) shall be given adequate resources and authority to carry out such responsibility, including full participation in all major executive decisions, and shall report on the implementation and effectiveness of the program to prevent and detect violations of law, as well as in promoting an organizational culture committed to ethical principles, directly to the governing authority or an appropriate subgroup of the governing authority.

(3) The organization shall use reasonable efforts not to include within the substantial authority personnel of the organization any individual whom the organization knew, or should have known through exercise of due diligence, has a history of engaging in violations of law or other conduct inconsistent with an effective program to prevent and detect violations of law, as well as to promote an organizational culture committed to ethical principles.

(4)(A) The organization shall take reasonable steps to institutionalize its ethics and compliance program by:

(i) using model practices in organizational and systems change and

(ii) communicating communicate in a practical manner its ethics and compliance standards and procedures, and other aspects of the program to prevent and detect violations of law, as well as to promote an organizational culture committed to ethical principles, to the individuals referred to in subdivision (B) by conducting effective training programs that include but are not limited to subjects such as ethical and legal decision making, and otherwise disseminating information, appropriate to such individual's respective roles and responsibilities, with special emphasis on the organization's executive team.

(B) The individuals referred to in subdivision (A) are the members of the governing authority, the organizational leadership, the organization's employees, and, as appropriate, the organization's agents.

(5) The organization shall take reasonable steps—

(A) to ensure that the organization's program to prevent and detect violations of law, as well as to promote an organizational culture committed to ethical principles, is followed, including use of monitoring and auditing systems that

(i) are designed to prevent and detect violations of law and ethical principles that inform law, and

(ii) function at all levels and in all functions of the organization, including, but not limited to, the executive and governing authority level;

(B) to evaluate at least annually ~~periodically~~ the effectiveness of the organization's program to prevent and detect violations of law, as well as to promote an organizational culture committed to ethical principles; and

(C) to have a system whereby the organization's employees and agents may report or seek guidance regarding potential or actual violations of law without fear of retaliation, including mechanisms to allow for anonymous reporting.

(6) The organization's program to prevent and detect violations of law, as well as to promote an organizational culture committed to ethical principles, shall be promoted and enforced consistently through appropriate incentives, such as including compliance with law and commitment to ethical principles as a major component in performance reviews, to perform in accordance with such program and disciplinary measures for engaging in violations of law and for failing to take reasonable steps to prevent or detect violations of law, as well as to promote an organizational culture committed to ethical principles.

(7) After a violation of law or ethical principles that inform law has been detected, the organization shall take reasonable steps to respond appropriately to the violation of law or ethical principles that inform law and to prevent further similar violations of law or ethical principles that inform law, including making any necessary modifications to the organization's program to prevent and detect violations of law, as well as to promote an organizational culture committed to ethical principles, and to the organization's business practices, as necessary.

(a) In implementing subsection (b), the organization shall conduct at least annually ongoing risk assessment and take appropriate steps to design, implement, or modify each step set for the in subsection (b) to reduce violations of law or ethical principles that inform law identified by the risk assessment.

Commentary

Application Notes:

1. *Definitions. For purposes of this guideline:*

"Ethics and cCompliance standards and procedures" means standards of conduct, such as a code of ethics or statement of values, and internal control systems that are reasonably capable of reducing the likelihood of violations of law and ethical principles that inform law.

"Governing authority" means (A) the Board of Directors, or (B) if the organization does not have a Board of Directors, the highest level governing body of the organization.

"Organizational leadership" means (A) executivehigh-level personnel of the organization; (B) executivehigh-level personnel of a unit of the organization; and (C) substantial authority personnel. The terms "executivehigh-level personnel of the organization" and "substantial authority personnel" have the meaning given those terms in the Commentary to §8A1.2 (Application Instructions – Organizations). The term "executiveexecutive-level personnel of a unit of the organization" has the meaning given that term in the Commentary to §8C2.5 (Culpability Score).

"Effective" means not only the count resulting from specific program activities, but also (A) the impact (measured changes in knowledge, attitudes, values/beliefs, and/or short-term practice) of those activities and (B) the outcome of those activities (actual reductions in violations of law or ethical principles that inform law, or well-documented proxies for those violations).

Except as provided in Application Note 4(A), "violations of law" means violations of any law, criminal or noncriminal (including a regulation), for which the organization is, or would be, liable.

2. *Factors to Consider in Meeting Requirements of Subsections (a) and (b).—*

(A) In General.—Each of the requirements set forth in subsections (a) and (b) shall be met by an organization; however, in determining what specific actions are necessary to meet those requirements, the organization shall consider factors that include (i) the size of the organization, (ii) applicable government regulations,

and (iii) any ethics and compliance practices and procedures that are well-documented ~~generally accepted~~ as standard or model practices for businesses similar to the organization.

(B) The Size of the Organization.—

(i) In General.—The formality and scope of actions that an organization shall take to meet the requirements of subsections (a) and (b), including the necessary features of the organization's ethics and compliance standards and procedures, depend on the size of the organization. A larger organization generally shall devote more formal operations and greater resources in meeting such requirements than shall a smaller organization.

(ii) Small Organizations.—In meeting the requirements set forth in subsections (a) and (b), small organizations shall demonstrate the same degree of commitment to compliance with the law and commitment to ethical principles that inform law, as larger organizations, although generally with less formality and fewer resources than would be expected of larger organizations.

1. Application of Subsection (b)(2).—

(A) Governing Authority.—The responsibility of the governing authority under subsection (b)(2) is to exercise reasonable oversight of the organization's efforts to ensure compliance with the law and ethical principles that inform law. In large organizations, the governing authority likely will discharge this responsibility through oversight, whereas in some organizations, particularly small ones, it may be more appropriate for the governing authority to discharge this responsibility by directly managing the organization's ethics and compliance efforts.

(B) Executive ~~High~~-Level Personnel.—The organization has discretion to delineate the activities and roles of the specific individual(s) within executive ~~high~~-level personnel of the organization assigned overall and direct responsibility to ensure the effectiveness and operation of the program to detect and prevent violations of law, as well as to promote an organizational culture committed to ethical principles; however, the individual(s) must be able to carry out their overall and direct responsibility consistent with subsection (b)(2), including the ability to report on the effectiveness and operation of the program to detect and prevent violations of law, as well as to promote an organizational culture committed to ethical principles, to the governing authority, or to an appropriate subgroup of the governing authority.

In addition to receiving reports from the foregoing individual(s), the governing authority or an appropriate subgroup thereof typically should receive at least

annually periodically information on the implementation and effectiveness of the program to detect and prevent violations of law, as well as to promote an organizational culture committed to ethical principles, from the individual(s) with day-to-day operational responsibility for the program.

(C) Organizational Leadership.—Although the overall and direct responsibility to ensure the effectiveness and operation of the program to detect and prevent violations of law, as well as to promote an organizational culture committed to ethical principles, is assigned to specific individuals within executive high-level personnel of the organization, it is incumbent upon all individuals within the organizational leadership to be knowledgeable about the content, and operation, and effectiveness of the program to detect and prevent violations of law, as well as to promote an organizational culture committed to ethical principles, pursuant to subsection (b)(2), and to perform their assigned duties consistent with the exercise of due diligence, and the promotion of an organizational culture that encourages a commitment to ethical principles that inform the compliance with the law, under subsection (a).

1. Application of Subsection (b)(3).—

(A) Violations of Law.—Notwithstanding Application Note 1, "violations of law," for purposes of subsection (b)(3), means any official determination of a violation or violations of any law, whether criminal or noncriminal (including a regulation).

(B) Consistency with Other Law.—Nothing in subsection (b)(3) is intended to require conduct inconsistent with any Federal, State, or local law, including any law governing employment or hiring practices.

(C) Implementation.—In implementing subsection (b)(3), the organization shall hire and promote individuals consistent with Application Note 3(C) so as to ensure that all individuals with the organizational leadership will perform their assigned duties with the exercise of due diligence, and the promotion of an organizational culture that encourages a commitment to ethical principles that inform law compliance with the law, under subsection (a). With respect to the hiring or promotion of any specific individual within the substantial authority personnel of the organization, an organization shall consider factors such as: (i) the individual's combined academic and certificated training in ethics and/or law, as well as training in organizational change strategies and behavioral training methodologies, (ii) the recency of the individual's violations of law and other misconduct (i.e., the individual's other conduct inconsistent with an effective program to prevent and detect violations of law, as well as to promote an organizational culture committed to ethical principles); (iii) the relatedness of the individual's violations of law and other misconduct to the specific responsibilities the individual is anticipated to be assigned as part of the substantial authority personnel of the organization; and (iii) whether the individual has engaged in a pattern of such violations of law and other misconduct.

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1. Risk Assessments under Subsection(c).—Risk assessments required under subsection (c) shall include the following:

(A) Assessing periodically the risk that violations of law or commitment to ethical principles that inform law will occur, including an assessment of the following:

(i) The nature and seriousness of such violations of law.

(ii) The likelihood that certain violations of law or commitment to ethical principles that inform law may occur because of the nature of the organization's business. If, because of the nature of an organization's business, there is a substantial risk that certain types of violations of law or ethical principles that inform law may occur, the organization shall take reasonable steps to prevent and detect those types of violations of law or ethical principles that inform law. For example, an organization that, due to the nature of its business, handles toxic substances shall establish ethics and compliance standards and procedures designed to ensure that those substances are always handled properly. An organization that, due to the nature of its business, employs sales personnel who have flexibility to set prices shall establish ethics and compliance standards and procedures designed to prevent and detect price-fixing. An organization that, due to the nature of its business, employs sales personnel who have the flexibility to represent the material characteristics of a product shall establish ethics and compliance standards and procedures designed to prevent fraud. Furthermore, an organization shall establish ethics and compliance standards and procedures designed to prevent corporate malfeasance that may result from the decisions of executive management and governing authority.

(iii) The prior history of an organization. The prior history of an organization may indicate types of violations of law or ethical principles that inform law that it shall take actions to prevent and detect. Recurrence of similar violations of law or ethical principles that inform law creates doubt regarding whether the organization took reasonable steps to prevent and detect violations of law or ethical principles that inform the law.

(B) Prioritizing, periodically as appropriate, the actions taken under each step set forth in subsection (b), in order to focus on preventing and detecting the violations of law or ethical principles that inform law identified under subdivision (A) as most likely to occur and most serious.

(C) Modifying, as appropriate, the actions taken under any step set forth in subsection (b) to reduce the risk of violations of law or ethical principles that inform law identified in the risk assessment.

(D) Assessing at least annually one or more of these characteristics of organizational culture, executive decision making process, impact and/or outcome of this process through use of an "ethics impact report," level of organizational trust, public image, relative disparity in employee compensation, bottom-line mentality and others that are well documented in the literature.

Background: This section sets forth the requirements for an effective program to prevent and detect violations of law. This section responds to section 805(a)(2)(5) of the Sarbanes-Oxley Act of 2002, Public Law 107-204, which directed the Commission to review and amend, as appropriate, the guidelines and related policy statements to ensure that the guidelines that apply to organizations in this Chapter "are sufficient to deter and punish organizational criminal misconduct."

The requirements set forth in this guideline are intended to achieve reasonable prevention and detection of violations of law, both criminal and noncriminal, for which the organization would be vicariously liable, as well as to promote an organizational culture committed to ethical principles. The prior diligence of an organization in seeking to detect and prevent violations of law, as well as to promote an organizational culture committed to ethical principles, has a direct bearing on the appropriate penalties and probation for the organization if it is convicted and sentenced for a criminal offense.

* * *

JUSTIFICATION
for
Suggested Changes to Proposed Amendments to FSGO

It is questionable whether a compliance program can be truly effective if it does not have an ethics component.
- - - Diana E. Murphy[y]

The changes we have suggested to the Proposed Amendments to the FSGO can be divided into three general categories: Omission of Ethics, Expansion of Ethics and Compliance Program Purview, and Measurement of Program Effectiveness. For each of these categories, we will provide a justification for the suggested changes.

Omission of Ethics

There is no mention of "ethics" in the Proposed Amendments *even though*

- ethics was discussed extensively in the Advisory Group's Recommendations for Proposed Amendments, primarily in relation to the new developments in the arenas of compliance, ethics, and corporate governance with which the Advisory Group was trying to "synchronize" its recommendations (though *not* in the amendments and commentary it actually recommended);
- ethics figures largely in the "new developments" mentioned by the Advisory Group. For example, the SEC, Sarbanes-Oxley Act of 2002, and the NYSE all encourage or require their constituents to move beyond a compliance-based program to an ethics/values/ integrity-based program for the prevention of fraud, waste, and abuse. In addition, the FASB has recently proposed a rule that would change its approach from rule-based to principle-based. All of these "new developments," although they preceded the Proposed Amendments, are bolder, more innovative, and consistent with best practices, than the Proposed Amendments;
- ethics is the real tenor of "organizational culture" as enunciated in the Proposed Amendments. The concept of "organizational culture" that is apparently substituted for "ethics" simply begs the question of how an organization gets "beyond compliance" and how it measures whether its culture "promotes compliance with law." An organization can strengthen its compliance program by enforcing more compliance with law ever more rigorously (and penalties for noncompliance), but in doing so it risks turning itself into a police state. Alternatively, it can situate compliance in ethics inasmuch as the laws that are the object of compliance are already grounded in ethical principles. To do otherwise only reinforces what William Widen in a recent article in *The Business Lawyer* refers to as "technical compliance"[i]—or the Office of the Inspector General calls a "paper program";
- ethics is no more "fuzzy" than the law. Both require interpretation, ethics within the organization as business decisions are made, and law in the judicial system by attorneys (and at much greater cost to the organization and public). Furthermore, the reluctance to refer to ethics in the Proposed Amendments seems to be based, in part, on the mistaken notion that by doing so they obviate the need for "...prosecutors to litigate and judges to determine whether an organization has a 'good set of values' or 'appropriate ethical standards.'[i] This is simply not the case. Prosecutors and judges would still have to make a separate determination about the effectiveness of the organizational culture in

a separate determination about the effectiveness of the organizational culture in promoting compliance with law. In contrast, they could determine the effectiveness of the organization's *ethics- compliance program* based on

1) the existence of a statement of ethical principles and the integrated ethics-compliance interventions taken by the organization to realize them (and, thus, achieve compliance with the letter *and* the spirit of the law) and/or
2) the resulting, tested/ observed changes in knowledge, attitudes/ values/beliefs/norms, and short-term practices among employees and, consequently, the organization.

The latter is preferable, of course, because due diligence is only a tenth of the battle—the proof is in the pudding. Furthermore, prosecutors and judges would have to do no more than they are already doing with regard to evaluating an compliance programs. That is, they would simply

1) ask for documentation that explains the program,
2) compare the program against existing model standards, and
3) then assess the extent to which the organization has effectively implemented its program.

Each of these steps fits with current and proposed approaches to measuring compliance program effectiveness.

- ethics could be integrated into the Proposed Amendments *without breaking new ground* for the Sentencing Commission, thereby raising questions about its mission. That ground was broken with the original, 1991 guidelines when the Sentencing Commission shifted its attention from looking solely at the crime, its perpetrators, and the organization as a whole—to looking at ways to prevent the occurrence of crime. Compliance programs went part of the way (but, given the epidemic of corporate in the last several years, clearly not far enough); ethics goes the rest of the way. The integration of ethics into compliance programs only enhances those programs and increases their effectiveness.

The time is ripe for the Sentencing Commission to maintain its leadership in the prevention of corporate crime by giving ethics its rightful place in the Proposed Amendments.

Expansion of Ethics and Compliance Program's Purview

If we've learned anything in the last several years about prevention of corporate crime, it is that ethics and compliance programs need to drill deeper and climb higher in the organization. When they do not, the result is often what Widen describes with respect to Enron:

> The cultural problem revealed by Enron ultimately is not subject to correction by teaching lawyers more accounting, fine tuning rules governing the use of "gatekeepers" in corporate matters, or requiring and expecting more from independent directors, though all these measures would help in a small way. The problem is that corporate and legal culture has lost all sense of right and wrong. Norms and business behavior have evolved so that compliance with the positive law is the so-called standard of ethical conduct—a role for which positive law is ill-suited.[iv]

For this reason, we have suggested changes to the Proposed Amendments that expand the ethics and compliance program into all levels and functions of the organization (total internal market penetration, if you will), particularly the decisions made by officers and directors.

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For example, we recommend that

- the Ethics and Compliance Officer be a *real* officer of the corporation with full rights and responsibilities in all executive decisions.
- this individual have academic and/or certificated training in both ethics and law (though she need not have a PhD in ethics or a JD in law).
- the Sentencing Commission consider including language in the commentary to the proposed "auditing and monitoring amendment" that suggests an "ethical impact report" for all major strategy and financial decisions. Many an Enron could have been prevented if an ethical impact report would have laid bare *in a documented fashion* the potential violations of ethical principles and law *before* a decision was made to go forward.

Finally, the effectiveness of an ethics and compliance program is not only measured in terms of the channels and messages it uses for communicating with employees; it is also effective in terms of the ways and extent to which it institutionalizes itself. In fact, it the literature is right, the latter may be much more significant than the former. One way to institutionalize itself is the command-and-control structure that sets up the program, designs its policies and procedures, and communicates them to the organization. The other—and far more effective—is the participatory structure that seeks the participation of employees, managers, officers, and directors (and other stakeholders, as appropriate) in the design, implementation, and evaluation of the program. Models for this latter structure include The Conference Model, Future Search, and Whole System Change. Thus, if an ethics and compliance program is going to be truly effective, it will need to become simply the way the organization goes about its business.

Measurement of Program Effectiveness

- The Proposed Amendments fail to enunciate any real measures of program effectiveness. Instead, they add more due diligence criteria, which, in the final analysis, cannot distinguish between a "paper program" and a truly effective program (one that follows the letter of the law and one that captures its spirit). Even the highlighting of the Health Care Compliance Association's criteria[v] does little to advance the discussion since these criteria simply measure more refined aspects of due diligence. Knowing whether something occurred or how many of it occurred, however, is not the same as knowing the impact and outcome of that occurrence.
- The Proposed Amendments, then, ignore written and verbal testimony that delineated strategies for measuring impact, that is, changes in knowledge, attitudes/values/ beliefs/norms, and short-term practices. At the very least, these might include pre-and post-testing of training sessions and periodic, self-reported surveys of all employees on key, organizational risk and protective factors for fraud, waste, and abuse. It would not be sufficient, for example, to know that a self-described attorney went to law school (or, to represent another common measure, liked it a lot); we'd want to know that she had passed both law school and the bar exam.
- There are methodologically sound ways, contrary to the opinions expressed in the document,[vi] to measure the effectiveness of ethics-compliance intervention—and even to relate these impact measures to the desired outcomes, namely, the prevention of fraud, waste, and abuse. Program evaluators and behavioral scientists would prove very helpful in this endeavor. At the very least, they could identify proxy measures that are strongly correlated with the incidence of various types of corporate corruption. It is never enough to say that just because we provided compliance training to 3,000 employees that the training

had any impact on them—or achieved the organizational goals of preventing violations of law.

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[i] Diana E. Murphy, "The Federal Sentencing Guidelines for Organizations: A Decade of Promoting Compliance and Ethics," *Iowa Law Review* 87 (2002): 716.
[ii] William H. Widen, "Enron at the Margin," *The Business Lawyer* 58 (May 2003): *passim*.
[iii] Advisory Group on Organizational Guidelines (AGOG), "Recommendations for Proposed Amendments for Federal Sentencing Guidelines for Organizations" (October 27, 2003): 54.
[iv] Widen 962-3.
[v] AGGO 76ff.
[vi] AGOG 35ff.

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January 28, 2004

The Honorable Jude Diana M. Murphy, Chair
U.S. Sentencing Commission
One Columbus Circle NE, Suite 2-500
Washington DC 20002-8002

Dear Judge Murphy,

We congratulate you, your, your fellow commissioners, and your staff for drafting the Proposed Amendments and making them available for public comment. We know that the process has involved considerable time and resources. The result, however, has been amendments to the Guidelines that will make them more relevant to the new millennium.

Yet we're concerned that they are not as germane and significant as they could be. Indeed, if the goal was to go "beyond compliance," they disappoint by not going as far as numerous other governmental bodies, such as the SEC and Congress, have done already. As they stand now, the Proposed Amendments:

- fail to support the integration of "ethics" into compliance programs,
- sidestep an opportunity to re-define "effectiveness" in a substantive way, and
- neglect to reconsider the purview of an ethics and compliance program in the current environment of corporate malfeasance.

In our opinion, the Proposed Amendments need to reflect the proposition that ethics is the heart of law

We respectfully offer our suggested changes to the Proposed Amendments with an accompanying justification (please see enclosures). It is our hope that you will consider them in the spirit in which they are offered—a mutual concern for enhancing the public good. We will also be contacting members of Congress in the same spirit. If there's anything we can do to assist the Commission in further understanding these suggested changes—or obtaining documents in support of them—please do not hesitate to contact us.

This process for amending the Federal Sentencing Guidelines for Organizations presents an exciting opportunity, one that will probably not come again for another ten years. We urge the Sentencing Commission to retain its *leadership role* in preventing corporate malfeasance by including the changes we've suggested in the final amendments.

Sincerely,

[signature on file]

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PART B – REMEDYING HARM FROM CRIMINAL CONDUCT, AND PREVENTING AND DETECTING VIOLATIONS OF THE LAW

1. REMEDYING HARM FROM CRIMINAL CONDUCT

* * *

2. PREVENTING AND DETECTING VIOLATIONS OF LAW

§8B2.1 Effective Programs to Prevent and Detect Violations of Law

(a) To have an effective program to prevent and detect violations of law, for purposed of subsection (f) of §8C2.5 (Culpability Score) and subsection (c)(1) of §8D1.4 (Recommended Conditions of Probation – Organizations), an organization shall—

(1) Exercise due diligence to prevent and detect violations of law; and

(2) otherwise promote and organizational culture that encourages a commitment to the ethical principles that inform ~~compliance with~~ law

Such program shall be reasonably designed, implemented, and enforced so that the program is generally effective in preventing and detecting violations of law, as well as promoting an organizaitonal culture committed to ethical principles, that is, one that demonstrates commitment to ethical principles and compliance with law. The failure to prevent or detect instant offense leading to sentencing does not necessarily mean that the program is not generally effective in preventing and detecting violations of law, as well as in promoting an organizational culture committed to ethical principles.

(b) Due diligence and the promotion of an organizational culture that encourages a commitment to compliance with law and the ethical principles that inform law within the meaning of subsection (a) minimally require the following steps:

(1) The organization shall establish ethics and compliance standards and procedures to prevent and detect violations of law, as well as to promote an organizational culture committed to ethical principles.

(2) The organizational leadership shall be knowledgeable about the content, ~~and~~ operation, and effectiveness of the program to prevent and detect violations of law, as well as to promote an organizational culture committed to ethical principles.

The organization's governing authority shall be knowledgeable about the content, and operation, and effectiveness of the program to prevent and detect violations of law, as well as to promote an organizational culture committed to ethical principles, and shall exercise reasonable oversight with respect to the implementation and effectiveness of the program to prevent and detect violations of the law, as well as to promote an organizational culture committed to ethical principles.

Specific individual(s) within ~~high~~executive-level personnel of the organization shall be assigned direct, full-time, overall responsibility to ensure implementation and effectiveness of the program to prevent and detect violations of law, as well as to promote an organizational culture committed to ethical principles. Such individual(s) shall be given adequate resources and authority to carry out such responsibility, including full participation in all major executive decisions, and shall report on the implementation and effectiveness of the program to prevent and detect violations of law, as well as in promoting an organizational culture committed to ethical principles, directly to the governing authority or an appropriate subgroup of the governing authority.

(3) The organization shall use reasonable efforts not to include within the substantial authority personnel of the organization any individual whom the organization knew, or should have known through exercise of due diligence, has a history of engaging in violations of law or other conduct inconsistent with an effective program to prevent and detect violations of law, as well as to promote an organizational culture committed to ethical principles.

(4)(A) The organization shall take reasonable steps to institutionalize its ethics and compliance program by

(i) using model practices in organizational and systems change and

(ii) communicating ~~communicate~~ in a practical manner its ethics and compliance standards and procedures, and other aspects of the program to prevent and detect violations of law, as well as to promote an organizational culture committed to ethical principles, to the individuals referred to in subdivision (B) by conducting effective training programs that include but are not limited to subjects such as ethical and legal decision making, and otherwise disseminating information, appropriate to such individual's respective roles and responsibilities, with special emphasis on the organization's executive team.

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(B) The individuals referred to in subdivision (A) are the members of the governing authority, the organizational leadership, the organization's employees, and, as appropriate, the organization's agents.

(5) The organization shall take reasonable steps—

(A) to ensure that the organization's program to prevent and detect violations of law, as well as to promote an organizational culture committed to ethical principles, is followed, including use of monitoring and auditing systems that

(i) are designed to prevent and detect violations of law and ethical principles that inform law; and

(ii) function at all levels and in all functions of the organization, including, but not limited to, the executive and governing authority level;

(B) to evaluate at least annually ~~periodically~~ the effectiveness of the organization's program to prevent and detect violations of law, as well as to promote an organizational culture committed to ethical principles; and

(C) to have a system whereby the organization's employees and agents may report or seek guidance regarding potential or actual violations of law without fear of retaliation, including mechanisms to allow for anonymous reporting.

(6) The organization's program to prevent and detect violations of law, as well as to promote an organizational culture committed to ethical principles, shall be promoted and enforced consistently through appropriate incentives, such as including compliance with law and commitment to ethical principles as a major component in performance reviews, to perform in accordance with such program and disciplinary measures for engaging in violations of law and for failing to take reasonable steps to prevent or detect violations of law, as well as to promote an organizational culture committed to ethical principles.

(7) After a violation of law or ethical principles that inform law has been detected, the organization shall take reasonable steps to respond appropriately to the violation of law or ethical principles that inform law and to prevent further similar violations of law or ethical principles that inform law, including making any necessary modifications to the organization's program to prevent and detect violations of law, as well as to promote an organizational culture committed to ethical principles, and to the organization's business practices, as necessary.

(a) In implementing subsection (b), the organization shall conduct at least annually ongoing risk assessment and take appropriate steps to design, implement, or modify each step set for the in subsection (b) to reduce violations of law or ethical principles that inform law identified by the risk assessment.

Commentary

Application Notes:

1. *Definitions. For purposes of this guideline:*

"Ethics and c~~C~~ompliance standards and procedures" means standards of conduct, such as a code of ethics or statement of values, and internal control systems that are reasonably capable of reducing the likelihood of violations of law and ethical principles that inform law.

"Governing authority" means (A) the Board of Directors, or (B) if the organization does not have a Board of Directors, the highest level governing body of the organization.

"Organizational leadership" means (A) executive~~high~~-level personnel of the organization; (B) executive~~high~~-level personnel of a unit of the organization; and (C) substantial authority personnel. The terms "executive~~high~~-level personnel of the organization" and "substantial authority personnel" have the meaning given those terms in the Commentary to §8A1.2 (Application Instructions – Organizations). The term "executive~~executive~~-level personnel of a unit of the organization" has the meaning given that term in the Commentary to §8C2.5 (Culpability Score).

"Effective" means not only the count resulting from specific program activities, but also (A) the impact (measured changes in knowledge, attitudes, values/beliefs, and/or short-term practice) of those activities and (B) the outcome of those activities (actual reductions in violations of law or ethical principles that inform law or well-documented proxies for those violations).

Except as provided in Application Note 4(A), "violations of law" means violations of any law, criminal or noncriminal (including a regulation), for which the organization is, or would be, liable.

2. *Factors to Consider in Meeting Requirements of Subsections (a) and (b).—*

(A) In General.—Each of the requirements set forth in subsections (a) and (b) shall be met by an organization; however, in determining what specific actions are necessary to meet those requirements, the organization shall consider factors that include (i) the size of the organization, (ii) applicable government regulations,

and (iii) any ethics and compliance practices and procedures that are well-documented ~~generally accepted~~ as standard or model practices for businesses similar to the organization.

(B) The Size of the Organization.—

(i) In General.—The formality and scope of actions that an organization shall take to meet the requirements of subsections (a) and (b), including the necessary features of the organization's ethics and compliance standards and procedures, depend on the size of the organization. A larger organization generally shall devote more formal operations and greater resources in meeting such requirements than shall a smaller organization.

(ii) Small Organizations.—In meeting the requirements set forth in subsections (a) and (b), small organizations shall demonstrate the same degree of commitment to compliance with the law and commitment to ethical principles that inform law, as larger organizations, although generally with less formality and fewer resources than would be expected of larger organizations.

1. Application of Subsection (b)(2).—

(A) Governing Authority.—The responsibility of the governing authority under subsection (b)(2) is to exercise reasonable oversight of the organization's efforts to ensure compliance with the law and ethical principles that inform law. In large organizations, the governing authority likely will discharge this responsibility through oversight, whereas in some organizations, particularly small ones, it may be more appropriate for the governing authority to discharge this responsibility by directly managing the organization's ethics and compliance efforts.

(B) ~~Executive~~High-Level Personnel.—The organization has discretion to delineate the activities and roles of the specific individual(s) within ~~executive~~ high-level personnel of the organization assigned overall and direct responsibility to ensure the effectiveness and operation of the program to detect and prevent violations of law, as well as to promote an organizational culture committed to ethical principles; however, the individual(s) must be able to carry out their overall and direct responsibility consistent with subsection (b)(2), including the ability to report on the effectiveness and operation of the program to detect and prevent violations of law, as well as to promote an organizational culture committed to ethical principles, to the governing authority, or to an appropriate subgroup of the governing authority.

In addition to receiving reports from the foregoing individual(s), the governing authority or an appropriate subgroup thereof typically should receive at least

~~annually~~periodically information on the implementation and effectiveness of the program to detect and prevent violations of law, as well as to promote an organizational culture committed to ethical principles, from the individual(s) with day-to-day operational responsibility for the program.

(C) Organizational Leadership.—Although the overall and direct responsibility to ensure the effectiveness and operation of the program to detect and prevent violations of law, as well as to promote an organizational culture committed to ethical principles, is assigned to specific individuals within ~~executive~~high-level personnel of the organization, it is incumbent upon all individuals within the organizational leadership to be knowledgeable about the content ~~and~~ operation and effectiveness of the program to detect and prevent violations of law, as well as to promote an organizational culture committed to ethical principles, pursuant to subsection (b)(2), and to perform their assigned duties consistent with the exercise of due diligence, and the promotion of an organizational culture that encourages a commitment to ethical principles that inform the ~~compliance with the~~ law, under subsection (a).

1. *Application of Subsection (b)(3).—*

(A) Violations of Law.—Notwithstanding Application Note 1, "violations of law," for purposes of subsection (b)(3), means any official determination of a violation or violations of any law, whether criminal or noncriminal (including a regulation).

(B) Consistency with Other Law.—Nothing in subsection (b)(3) is intended to require conduct inconsistent with any Federal, State, or local law, including any law governing employment or hiring practices.

(C) Implementation.—In implementing subsection (b)(3), the organization shall hire and promote individuals consistent with Application Note 3(C) so as to ensure that all individuals with the organizational leadership will perform their assigned duties with the exercise of due diligence; and the promotion of an organizational culture that encourages a commitment to ethical principles that inform law~~compliance with the law~~, under subsection (a). With respect to the hiring or promotion of any specific individual within the substantial authority personnel of the organization, an organization shall consider factors such as: (i) the individual's combined academic and certificated training in ethics and/or law, as well as training in organizational change strategies and behavioral training methodologies, (ii) the recency of the individual's violations of law and other misconduct (i.e., the individual's other conduct inconsistent with an effective program to prevent and detect violations of law, as well as to promote an organizational culture committed to ethical principles); (iii) the relatedness of the individual's violations of law and other misconduct to the specific responsibilities the individual is anticipated to be assigned as part of the substantial authority personnel of the organization; and (iii) whether the individual has engaged in a pattern of such violations of law and other misconduct.

1. Risk Assessments under Subsection(c).—Risk assessments required under subsection (c) shall include the following:

(A) Assessing periodically the risk that violations of law or commitment to ethical principles that inform law will occur, including an assessment of the following:

(i) The nature and seriousness of such violations of law.

(ii) The likelihood that certain violations of law or commitment to ethical principles that inform law may occur because of the nature of the organization's business. If, because of the nature of an organization's business, there is a substantial risk that certain types of violations of law or ethical principles that inform law may occur, the organization shall take reasonable steps to prevent and detect those types of violations of law or ethical principles that inform law. For example, an organization that, due to the nature of its business, handles toxic substances shall establish ethics and compliance standards and procedures designed to ensure that those substances are always handled properly. An organization that, due to the nature of its business, employs sales personnel who have flexibility to set prices shall establish ethics and compliance standards and procedures designed to prevent and detect price-fixing. An organization that, due to the nature of its business, employs sales personnel who have the flexibility to represent the material characteristics of a product shall establish ethics and compliance standards and procedures designed to prevent fraud. Furthermore, an organization shall establish ethics and compliance standards and procedures designed to prevent corporate malfeasance that may result from the decisions of executive management and governing authority.

(iii) The prior history of an organization. The prior history of an organization may indicate types of violations of law or ethical principles that inform law that it shall take actions to prevent and detect. Recurrence of similar violations of law or ethical principles that inform law creates doubt regarding whether the organization took reasonable steps to prevent and detect violations of law or ethical principles that inform the law.

(B) Prioritizing, periodically as appropriate, the actions taken under each step set forth in subsection (b), in order to focus on preventing and detecting the violations of law or ethical principles that inform law identified under subdivision (A) as most likely to occur and most serious.

(C) Modifying, as appropriate, the actions taken under any step set forth in subsection (b) to reduce the risk of violations of law or ethical principles that inform law identified in the risk assessment.

(D) Assessing at least annually one or more of these characteristics of organizational culture, executive decision-making process, impact and/or outcome of this process through use of an "ethics impact report", level of organizational trust, public image, relative disparity in employee compensation, bottom-line mentality and others that are well documented in the literature.

Background: This section sets forth the requirements for an effective program to prevent and detect violations of law. This section responds to section 805(a)(2)(5) of the Sarbanes-Oxley Act of 2002, Public Law 107-204, which directed the Commission to review and amend, as appropriate, the guidelines and related policy statements to ensure that the guidelines that apply to organizations in this Chapter "are sufficient to deter and punish organizational criminal misconduct."

The requirements set forth in this guideline are intended to achieve reasonable prevention and detection of violations of law, both criminal and noncriminal, for which the organization would be vicariously liable, as well as to promote an organizational culture committed to ethical principles. The prior diligence of an organization in seeking to detect and prevent violations of law, as well as to promote an organizational culture committed to ethical principles, has a direct bearing on the appropriate penalties and probation for the organization if it is convicted and sentenced for a criminal offense.

* * *

JUSTIFICATION
for
Suggested Changes to Proposed Amendments to FSGO

It is questionable whether a compliance program can be truly effective if it does not have an ethics component.
- - - Diana E. Murphy[y]

The changes we have suggested to the Proposed Amendments to the FSGO can be divided into three general categories: Omission of Ethics, Expansion of Ethics and Compliance Program Purview, and Measurement of Program Effectiveness. For each of these categories, we will provide a justification for the suggested changes.

Omission of Ethics

There is no mention of "ethics" in the Proposed Amendments *even though*

- ethics was discussed extensively in the Advisory Group's Recommendations for Proposed Amendments, primarily in relation to the new developments in the arenas of compliance, ethics, and corporate governance with which the Advisory Group was trying to "synchronize" its recommendations (though *not* in the amendments and commentary it actually recommended);
- ethics figures largely in the "new developments" mentioned by the Advisory Group. For example, the SEC, Sarbanes-Oxley Act of 2002, and the NYSE all encourage or require their constituents to move beyond a compliance-based program to an ethics/values/ integrity-based program for the prevention of fraud, waste, and abuse. In addition, the FASB has recently proposed a rule that would change its approach from rule-based to principle-based. All of these "new developments," although they preceded the Proposed Amendments, are bolder, more innovative, and consistent with best practices, than the Proposed Amendments;
- ethics is the real tenor of "organizational culture" as enunciated in the Proposed Amendments. The concept of "organizational culture" that is apparently substituted for "ethics" simply begs the question of how an organization gets "beyond compliance" and how it measures whether its culture "promotes compliance with law." An organization can strengthen its compliance program by enforcing more compliance with law ever more rigorously (and penalties for noncompliance), but in doing so it risks turning itself into a police state. Alternatively, it can situate compliance in ethics inasmuch as the laws that are the object of compliance are already grounded in ethical principles. To do otherwise only reinforces what William Widen in a recent article in *The Business Lawyer* refers to as "technical compliance"[i]—or the Office of the Inspector General calls a "paper program";
- ethics is no more "fuzzy" than the law. Both require interpretation, ethics within the organization as business decisions are made, and law in the judicial system by attorneys (and at much greater cost to the organization and public). Furthermore, the reluctance to refer to ethics in the Proposed Amendments seems to be based, in part, on the mistaken notion that by doing so they obviate the need for "...prosecutors to litigate and judges to determine whether an organization has a 'good set of values' or 'appropriate ethical standards.'[i] This is simply not the case. Prosecutors and judges would still have to make a separate determination about the effectiveness of the organizational culture in

promoting compliance with law. In contrast, they could determine the effectiveness of the organization's *ethics- compliance program* based on

1) the existence of a statement of ethical principles and the integrated ethics-compliance interventions taken by the organization to realize them (and, thus, achieve compliance with the letter *and* the spirit of the law) and/or
2) the resulting, tested/ observed changes in knowledge, attitudes/ values/beliefs/norms, and short-term practices among employees and, consequently, the organization.

The latter is preferable, of course, because due diligence is only a tenth of the battle—the proof is in the pudding. Furthermore, prosecutors and judges would have to do no more than they are already doing with regard to evaluating an compliance programs. That is, they would simply

1) ask for documentation that explains the program,
2) compare the program against existing model standards, and
3) then assess the extent to which the organization has effectively implemented its program.

Each of these steps fits with current and proposed approaches to measuring compliance program effectiveness.

- ethics could be integrated into the Proposed Amendments *without breaking new ground* for the Sentencing Commission, thereby raising questions about its mission. That ground was broken with the original, 1991 guidelines when the Sentencing Commission shifted its attention from looking solely at the crime, its perpetrators, and the organization as a whole—to looking at ways to prevent the occurrence of crime. Compliance programs went part of the way (but, given the epidemic of corporate in the last several years, clearly not far enough); ethics goes the rest of the way. The integration of ethics into compliance programs only enhances those programs and increases their effectiveness.

The time is ripe for the Sentencing Commission to maintain its leadership in the prevention of corporate crime by giving ethics its rightful place in the Proposed Amendments.

Expansion of Ethics and Compliance Program's Purview

If we've learned anything in the last several years about prevention of corporate crime, it is that ethics and compliance programs need to drill deeper and climb higher in the organization. When they do not, the result is often what Widen describes with respect to Enron:

> The cultural problem revealed by Enron ultimately is not subject to correction by teaching lawyers more accounting, fine tuning rules governing the use of "gatekeepers" in corporate matters, or requiring and expecting more from independent directors, though all these measures would help in a small way. The problem is that corporate and legal culture has lost all sense of right and wrong. Norms and business behavior have evolved so that compliance with the positive law is the so-called standard of ethical conduct—a role for which positive law is ill-suited.[v]

For this reason, we have suggested changes to the Proposed Amendments that expand the ethics and compliance program into all levels and functions of the organization (total internal market penetration, if you will), particularly the decisions made by officers and directors.

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For example, we recommend that

- the Ethics and Compliance Officer be a *real* officer of the corporation with full rights and responsibilities in all executive decisions.
- this individual have academic and/or certificated training in both ethics and law (though she need not have a PhD in ethics or a JD in law).
- the Sentencing Commission consider including language in the commentary to the proposed "auditing and monitoring amendment" that suggests an "ethical impact report" for all major strategy and financial decisions. Many an Enron could have been prevented if an ethical impact report would have laid bare *in a documented fashion* the potential violations of ethical principles and law *before* a decision was made to go forward.

Finally, the effectiveness of an ethics and compliance program is not only measured in terms of the channels and messages it uses for communicating with employees; it is also effective in terms of the ways and extent to which it institutionalizes itself. In fact, it the literature is right, the latter may be much more significant than the former. One way to institutionalize itself is the command-and-control structure that sets up the program, designs its policies and procedures, and communicates them to the organization. The other—and far more effective—is the participatory structure that seeks the participation of employees, managers, officers, and directors (and other stakeholders, as appropriate) in the design, implementation, and evaluation of the program. Models for this latter structure include The Conference Model, Future Search, and Whole System Change. Thus, if an ethics and compliance program is going to be truly effective, it will need to become simply the way the organization goes about its business.

Measurement of Program Effectiveness

- The Proposed Amendments fail to enunciate any real measures of program effectiveness. Instead, they add more due diligence criteria, which, in the final analysis, cannot distinguish between a "paper program" and a truly effective program (one that follows the letter of the law and one that captures its spirit). Even the highlighting of the Health Care Compliance Association's criteria[a] does little to advance the discussion since these criteria simply measure more refined aspects of due diligence. Knowing whether something occurred or how many of it occurred, however, is not the same as knowing the impact and outcome of that occurrence.
- The Proposed Amendments, then, ignore written and verbal testimony that delineated strategies for measuring impact, that is, changes in knowledge, attitudes/values/ beliefs/norms, and short-term practices. At the very least, these might include pre-and post-testing of training sessions and periodic, self-reported surveys of all employees on key, organizational risk and protective factors for fraud, waste, and abuse. It would not be sufficient, for example, to know that a self-described attorney went to law school (or, to represent another common measure, liked it a lot); we'd want to know that she had passed both law school and the bar exam.
- There are methodologically sound ways, contrary to the opinions expressed in the document,[i] to measure the effectiveness of ethics-compliance intervention—and even to relate these impact measures to the desired outcomes, namely, the prevention of fraud, waste, and abuse. Program evaluators and behavioral scientists would prove very helpful in this endeavor. At the very least, they could identify proxy measures that are strongly correlated with the incidence of various types of corporate corruption. It is never enough

to say that just because we provided compliance training to 3,000 employees that the training had any impact on them—or achieved the organizational goals of preventing violations of law.

[i] Diana E. Murphy, "The Federal Sentencing Guidelines for Organizations: A Decade of Promoting Compliance and Ethics," *Iowa Law Review* 87 (2002): 716.
[ii] William H. Widen, "Enron at the Margin," *The Business Lawyer* 58 (May 2003): *passim.*
[iii] Advisory Group on Organizational Guidelines (AGOG), "Recommendations for Proposed Amendments for Federal Sentencing Guidelines for Organizations" (October 27, 2003): 54.
[iv] Widen 962-3.
[v] AGGO 76ff.
[vi] AGOG 35ff.

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One Columbus Circle, N.E.
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Washington, DC 20002

January 26, 2004

Re: Proposed Amendments to Chapter Eight

Dear Commissioners:

The United States Sentencing Commission has published and requested comments on proposed amendments to Chapter Eight of the Sentencing Guidelines relating to compliance programs. I offer the following comments as a practitioner in the compliance and business ethics field and as one with a strong interest in the success of the Sentencing Commission's efforts to promote effective compliance programs in organizations[1]. I previously had the opportunity to testify in the Ad Hoc Advisory Group's information gathering process and to provide other information for the Group's use prior to the submission of the proposed amendments. I would be happy to testify regarding these comments or any other matters relating to the proposed amendments, should the Commission desire such testimony during this amendment cycle.

The proposed amendments are a positive step

The Sentencing Guidelines have brought clarity and commitment to the field of compliance. Indeed, one can fairly mark the emergence of compliance as a discrete field to the date the Guidelines went into effect. If this is so, then it could fairly be asked, why is a change necessary? Perhaps the best answer is that the proposed amendments are not really so much of a change as they are a recognition that this field has evolved and changed over time. The proposed amendments, in effect, actually recognize the reality of industry best practices and bring the Guidelines up to date.

Moreover, these revisions serve to strengthen organizational compliance programs and drive them to be more effective. We need programs that will withstand the circumstances we have all seen in the cases, from Enron to Andersen, and from WorldCom to Parmalat. The proposed changes show excellent insight into the dynamics of compliance programs, and what it takes for them to be truly effective.

Comments on question 4

[1] Partner, Compliance Systems Legal Group; Vice-Chairman, Integrity Interactive Corporation; Co-editor, ethikos. These comments reflect my personal opinions and may not necessarily reflect the views of any organization with which I am associated.

[2-169]

The Commission asks for comment on four questions. These comments address one of those questions.

The challenge: Can we reach smaller organizations? Question four asks if there are factors that could encourage smaller organizations to develop and maintain compliance programs. I strongly believe the answer is "yes." Of course, government could try the stick approach – make it mandatory, legislate or regulate it, etc. But none of these strong-arm approaches will cause companies to be creative and to take initiative in making their programs truly effective. And they will be accompanied by protests about overregulation and expensive bureaucratic requirements. The preferred approach is to provide a real incentive for companies to adopt programs – the same model that worked for larger organizations in 1991.

The Guidelines now offer all organizations the one incentive of lower fines (and avoiding forced imposition of a program through probation). In truth, however, what has meant more to companies is the prospect that prosecutors and regulators will take good corporate citizenship into account when deciding whether to prosecute any company. It is the same carrot and stick model as the sentencing process, but because this carrot occurs so much earlier in the process, and so few major companies take criminal cases to actual trials and sentencing, it is the carrot of not being prosecuted that stands out as being truly worthwhile to larger companies.

Experience shows that larger companies have been much more influenced by the Sentencing Guidelines. Partly this is because just about any large organization knows it is likely to be in the crosshairs of a prosecutor or regulator at some time and place. Perhaps even more importantly, while larger companies have their own in-house legal departments and are more likely to consider such government initiatives, smaller organizations are notorious for being focused primarily on survival and growth. While long-term wellbeing is important to all companies, short term survival and growth opportunities are the greater, sometimes all-consuming demand on the time of managers at smaller companies.

What will actually reach these smaller organizations? The best incentive is an economic one that has real-world meaning for competitive businesses. For this the most practical approach is to look to the supply chains of the larger companies that are committed to compliance and ethics programs. If the leading companies were to ask their suppliers and contractors about having compliance and ethics programs, and if this became a significant factor in winning business and benefits from these larger companies, such a change could cause a dramatic transformation of the compliance landscape.

Just to give one example, Integrity Interactive Corporation, the online compliance training company I co-founded, has grown dramatically and has instituted its own compliance program, with its own compliance officer, required employee training, and a code of conduct. In 2003 it became a member of the Ethics Officer Association. Integrity Interactive did this because it was the right thing to do, but also because we believed it was something our customers should expect of any substantial supplier.

In contrast, the company has simply not seen compliance officers from the major law firms joining the EOA, or contacting Integrity Interactive for training, or doing any of the other things that Integrity and its customers do. We have not seen stories in the compliance press about the major US law firms adopting Sentencing Guidelines-type compliance programs; even though they are as much "organizations" as the companies they advise.

If law firms and other service providers can successfully offer compliance-related services to compliance sensitive major companies without even being asked if they have compliance programs themselves, this suggests very little market incentive for others to adopt such programs.

It should be noted that many of these smaller organizations may have the type of subject-specific "programs" that were characteristic of large corporations before the Guidelines – perfunctory EEO training, signs over the copiers warning people about copyright infringement, unread labor standards fliers on a bulletin board -. but nothing that matches the management focus and rigor of the Guidelines.

How could larger companies make this change happen? I would not recommend that companies be expected to require that all of their suppliers have compliance programs, or that they be expected to police their entire supply chain. Such a demand would not be realistic, and could be an enormous distraction for companies. On the other hand, the current environment in which companies do not even ask such compliance-sensitive suppliers as their outside counsel whether they have a compliance program, is hard to justify.

Large companies could require that some suppliers in sensitive areas, such as those who handle their hazardous waste, have rigorous programs. (The risk is so high, this is likely already a common practice) But they could also just enquire of other suppliers whether they have such programs. Companies could make it clear that having such a program is a plus factor in selecting suppliers. Any indication that a compliance program at a supplier represents a competitive advantage could have a dramatic effect on this next tier of the economy. Compliance advocates in all companies look to be able to sell management on the advantages of having an effective compliance program, but usually must rely on scare tactics; imagine the impact of being part of the team that actually wins business because of the compliance program; few things could matter more.

What would be the rationale for larger companies to take this step? Perhaps the best reason is that it helps strengthen their own compliance programs and could help cut off problems at the source. For example, a supplier with a strong compliance program is less likely to offer gifts and hospitality that are unethical. It is less likely to get its customer into trouble for environmental violations or improper overseas payments. Its employees are less likely to engage in harassment which could also be attributed to its customer. And it is less likely to engage in the types of aiding and abetting in financial fraud that are alleged to have happened in the Enron case. A contractor, agent, or consultant is less

likely to aid a customer's employees in engaging in misconduct if that supplier has instituted strong procedures to ensure legal and ethical conduct.

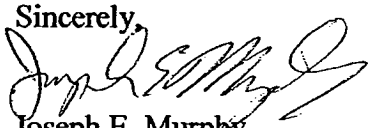
How would this fit into the Guidelines standards? There are several options. It could be included in item 1, through the Commentary, as one of the standards and procedures a company would adopt. A reference could also be added in commentary on item 4, to the effect that to the extent it was appropriate to have compliance communications to agents, this element could be discharged by having one's agents institute programs of their own. The risk assessment discussion could note that an organization that uses third parties to perform functions for it may require that those third parties themselves adopt compliance programs. Attached is copy of the proposed Guidelines amendments with these insertions marked in.

Comments on the "litigation dilemma" and the Commission's role

Finally, these Comments second a point made by the Advisory Group about the role of the Commission as a catalyst for change. The litigation dilemma identified in the Advisory Group's report needs to be examined, and policy makers need to consider how best to promote compliance consistently. It is also absolutely essential that the Department of Justice and other enforcement and regulatory arms of the government understand how important their role is in getting organizations to energize their compliance programs. If the Department were to be more public about how it takes compliance programs into account and how it measures them, this could add enormous clout to in-house compliance people. For example, if the government were publicly to consider it a sign of bad faith for a company to fail to ask its outside counsel and accountants about those legal and accounting firms' compliance programs, this could change the compliance landscape in entire sectors of the economy.

The Commission is the agency best able to foster the needed discussion in these areas, based on its unique mandate and independent position in the government. I encourage the Commission to formally undertake this mission as a catalyst for change going forward.

Sincerely,



Joseph E. Murphy

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The proposed revisions addressing question 4 are in black, in the Commentary.

2. PREVENTING AND DETECTING VIOLATIONS OF LAW

§8B2.1. Effective Program to Prevent and Detect Violations of Law

(a) To have an effective program to prevent and detect violations of law, for purposes of subsection (f) of §8C2.5 (Culpability Score) and subsection (c)(1) of §8D1.4 (Recommended Conditions of Probation - Organizations), an organization shall—

(1) exercise due diligence to prevent and detect violations of law; and

(2) otherwise promote an organizational culture that encourages a commitment to compliance with the law.

Such program shall be reasonably designed, implemented, and enforced so that the program is generally effective in preventing and detecting violations of law. The failure to prevent or detect the instant offense leading to sentencing does not necessarily mean that the program is not generally effective in preventing and detecting violations of law.

(b) Due diligence and the promotion of an organizational culture that encourages a commitment to compliance with the law within the meaning of subsection (a) minimally require the following steps:

(1) The organization shall establish compliance standards and procedures to prevent and detect violations of law.

(2) The organizational leadership shall be knowledgeable about the content and operation of the program to prevent and detect violations of law.

The organization's governing authority shall be knowledgeable about the content and operation of the program to prevent and detect violations of the law and shall exercise reasonable oversight with respect to the implementation and effectiveness of the program to prevent and detect violations of the law.

Specific individual(s) within high-level personnel of the organization shall be assigned direct, overall responsibility to ensure the implementation and effectiveness of the program to prevent and detect violations of law. Such individual(s) shall be given adequate resources and authority to carry out such responsibility and shall report on the implementation and effectiveness of the program to prevent and detect violations of law directly to the governing authority or an appropriate subgroup of the governing authority.

(3) The organization shall use reasonable efforts not to include within the substantial authority personnel of the organization any

individual whom the organization knew, or should have known through the exercise of due diligence, has a history of engaging in violations of law or other conduct inconsistent with an effective program to prevent and detect violations of law.

(4) (A) The organization shall take reasonable steps to communicate in a practical manner its compliance standards and procedures, and other aspects of the program to prevent and detect violations of law, to the individuals referred to in subdivision (B) by conducting effective training programs, and otherwise disseminating information, appropriate to such individual's respective roles and responsibilities.

(B) The individuals referred to in subdivision (A) are the members of the governing authority, the organizational leadership, the organization's employees, and, as appropriate, the organization's agents.

(5) The organization shall take reasonable steps—

(A) to ensure that the organization's program to prevent and detect violations of law is followed, including using monitoring and auditing systems that are designed to detect violations of law;

(B) to evaluate periodically the effectiveness of the organization's program to prevent and detect violations of law; and

(C) to have a system whereby the organization's employees and agents may report or seek guidance regarding potential or actual violations of law without fear of retaliation, including mechanisms to allow for anonymous reporting.

(6) The organization's program to prevent and detect violations of law shall be promoted and enforced consistently through appropriate incentives to perform in accordance with such program and disciplinary measures for engaging in violations of law and for failing to take reasonable steps to prevent or detect violations of law.

(7) After a violation of law has been detected, the organization shall take reasonable steps to respond appropriately to the violation of law and to prevent further similar violations of law, including making any necessary modifications to the organization's program to prevent and detect violations of law.

(c) In implementing subsection (b), the organization shall conduct ongoing risk assessment and take appropriate steps to design, implement, or modify each step set forth in subsection (b) to reduce the risk of violations of law identified by the risk assessment.

[2-174]

Commentary

Application Notes:

1. *Definitions.—For purposes of this guideline:*

"Compliance standards and procedures" means standards of conduct and internal control systems that are reasonably capable of reducing the likelihood of violations of law. To the extent that an organization's culture and ability to comply with the law are affected by those third parties who provide it services, its control systems may include efforts to have such third parties adopt their own programs to prevent and detect violations of law.

"Governing authority" means the (A) the Board of Directors, or (B) if the organization does not have a Board of Directors, the highest level governing body of the organization.

"Organizational leadership" means (A) high-level personnel of the organization; (B) high-level personnel of a unit of the organization; and (C) substantial authority personnel. The terms "high-level personnel of the organization" and "substantial authority personnel" have the meaning given those terms in the Commentary to §8A1.2 (Application Instructions - Organizations). The term "high-level personnel of a unit of the organization" has the meaning given that term in the Commentary to §8C2.5 (Culpability Score).

Except as provided in Application Note 4(A), "violations of law" means violations of any law, whether criminal or noncriminal (including a regulation), for which the organization is, or would be, liable.

2. *Factors to Consider in Meeting Requirements of Subsections (a) and (b).—*

(A) In General.—Each of the requirements set forth in subsections (a) and (b) shall be met by an organization; however, in determining what specific actions are necessary to meet those requirements, the organization shall consider factors that include (i) the size of the organization, (ii) applicable government regulations, and (iii) any compliance practices and procedures that are generally accepted as standard or model practices for businesses similar to the organization.

(B) The Size of the Organization.—

(i) In General.—The formality and scope of actions that an organization shall take to meet the requirements of subsections (a) and (b), including the necessary features of the organization's compliance standards and procedures, depend on the size of the organization. A larger organization generally shall devote more formal operations and greater resources in meeting such requirements than shall a smaller organization.

(ii) Small Organizations.—In meeting the requirements set forth in subsections (a) and (b), small organizations shall demonstrate the same degree of commitment to compliance with the law as larger organizations, although generally with less formality and fewer resources than would be expected of larger organizations. While each of the requirements set forth in subsections (a) and (b) shall be

substantially satisfied by all organizations, small organizations may be able to establish an effective program to prevent and detect violations of law through relatively informal means. 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. In appropriate circumstances, this reliance on existing resources and simple systems can demonstrate the same degree of commitment that, for a much larger organization, would require more formally planned and implemented systems.

(C) Applicable Government Regulations.—The failure of an organization to incorporate within its program to prevent and detect violations of law any standard required by an applicable government regulation weighs against a finding that the program was an "effective program to prevent and detect violations of law" within the meaning of this guideline.

3. Application of Subsection (b)(2).—

(A) Governing Authority.—The responsibility of the governing authority under subsection (b)(2) is to exercise reasonable oversight of the organization's efforts to ensure compliance with the law. In large organizations, the governing authority likely will discharge this responsibility through oversight, whereas in some organizations, particularly small ones, it may be more appropriate for the governing authority to discharge this responsibility by directly managing the organization's compliance efforts.

(B) High-Level Personnel.—The organization has discretion to delineate the activities and roles of the specific individual(s) within high-level personnel of the organization assigned overall and direct responsibility to ensure the effectiveness and operation of the program to detect and prevent violations of law; however, the individual(s) must be able to carry out their overall and direct responsibility consistent with subsection (b)(2), including the ability to report on the effectiveness and operation of the program to detect and prevent violations of law to the governing authority, or to an appropriate subgroup of the governing authority.

In addition to receiving reports from the foregoing individual(s), the governing authority or an appropriate subgroup thereof typically should receive periodically information on the implementation and effectiveness of the program to detect and prevent violations of law from the individual(s) with day-to-day operational responsibility for the program.

(C) Organizational Leadership.—Although the overall and direct responsibility to ensure the effectiveness and operation of the program to detect and prevent violations of law is assigned to specific individuals within high-level personnel of the organization, it is incumbent upon all individuals within the organizational leadership to be knowledgeable about the content and operation of the program to detect and prevent violations of law pursuant to subsection (b)(2), and to perform their assigned duties consistent with the exercise of due diligence, and the promotion of an organizational culture that encourages a commitment to compliance with the law, under subsection (a).

4. *Application of Subsection (b)(3).—*

(A) Violations of Law.—Notwithstanding Application Note 1, "violations of law," for purposes of subsection (b)(3), means any official determination of a violation or violations of any law, whether criminal or noncriminal (including a regulation).

(B) Consistency with Other Law.—Nothing in subsection (b)(3) is intended to require conduct inconsistent with any Federal, State, or local law, including any law governing employment or hiring practices.

(C) Implementation.—In implementing subsection (b)(3), the organization shall hire and promote indiviudals consistent with Application Note 3(C) so as to ensure that all individuals within the organizational leadership will perform their assigned duties with the exercise of due diligence, and the promotion of an organizational culture that encourages a commitment to compliance with the law, under subsection (a). With respect to the hiring or promotion of any specific individual within the substantial authority personnel of the organization, an organization shall consider factors such as: (i) the recency of the individual's violations of law and other misconduct (i.e., the individual's other conduct inconsistent with an effective program to prevent and detect violations of law); (ii) the relatedness of the individual's violations of law and other misconduct to the specific responsibilities the individual is anticipated to be assigned as part of the substantial authority personnel of the organization; and (iii) whether the individual has engaged in a pattern of such violations of law and other misconduct.

5. *Application of Subsection (b)(4).— To the extent it is appropriate to provide training and otherwise disseminate information to the organization's agents, an organization may satisfy this provision if the agent adopts its own program to prevent and detect violations of law that includes such training and dissemination of information..*

6. *Risk Assessments under Subsection (c).—Risk assessment(s) required under subsection (c) shall include the following:*

(A) Assessing periodically the risk that violations of law will occur, including an assessment of the following:

(i) The nature and seriousness of such violations of law.

(ii) The likelihood that certain violations of law may occur because of the nature of the organization's business. If, because of the nature of an organization's business, there is a substantial risk that certain types of violations of law may occur, the organization shall take reasonable steps to prevent and detect those types of violations of law. For example, an organization that, due to the nature of its business, handles toxic substances shall establish compliance standards and procedures designed to ensure that those substances are always handled properly. An organization that, due to the nature of its business, employs sales personnel who have flexibility to set prices shall establish compliance standards and procedures designed to prevent and detect price-fixing. An organization that, due to the nature of its

business, employs sales personnel who have flexibility to represent the material characteristics of a product shall establish compliance standards and procedures designed to prevent fraud. An organization that uses third parties to perform functions for it may require that those third parties themselves adopt programs to prevent and detect violations of law.

(iii) The prior history of the organization. The prior history of an organization may indicate types of violations of law that it shall take actions to prevent and detect. Recurrence of similar violations of law creates doubt regarding whether the organization took reasonable steps to prevent and detect those violations of law.

(B) Prioritizing, periodically as appropriate, the actions taken under each step set forth in subsection (b), in order to focus on preventing and detecting the violations of law identified under subdivision (A) as most likely to occur and most serious.

(C) Modifying, as appropriate, the actions taken under any step set forth in subsection (b) to reduce the risk of violations of law identified in the risk assessment.

Background: This section sets forth the requirements for an effective program to prevent and detect violations of law. This section responds to section 805(a)(2)(5) of the Sarbanes-Oxley Act of 2002, Public Law 107–204, which directed the Commission to review and amend, as appropriate, the guidelines and related policy statements to ensure that the guidelines that apply to organizations in this Chapter "are sufficient to deter and punish organizational criminal misconduct."

The requirements set forth in this guideline are intended to achieve reasonable prevention and detection of violations of the law, both criminal and noncriminal, for which the organization would be vicariously liable. The prior diligence of an organization in seeking to detect and prevent violations of law has a direct bearing on the appropriate penalties and probation terms for the organization if it is convicted and sentenced for a criminal offense.

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NATIONAL ASSOCIATION OF CRIMINAL DEFENSE LAWYERS

February 27, 2004

United States Sentencing Commission
One Columbus Circle, N.E.
Washington, DC., 20002

The purpose of this letter is to set forth on behalf of the National Association of Criminal Defense Lawyers (NACDL) our comments on the proposed amendments to Chapter 8 (Sentencing of Organizations) of the Federal Sentencing Guidelines. We ask that the Sentencing Commission consider these comments before finalizing the proposed amendments.

Possibly the most significant change is the requirement that effective compliance programs would no longer be required to attempt to detect and prevent violations of criminal law, but would now be required to attempt to detect and prevent violations of any law, criminal or non-criminal, including regulatory violations. See Application Notes 1 and 4(A) to Section 8B2.1. This proposed change conforms with a dangerous trend toward blurring the distinctions between criminal law and regulatory violations. Under the proposed changes, an organization's punishment for a criminal violation would be dependent, in part, on its implementation of programs to prevent civil administrative regulations. See Section 8C2.5(f)(an organization's culpability score would be lower if it had in place an effective program to detect and prevent "violations of law"). Criminal sanctions should be reserved for violations of criminal laws. They should not be used as a back door route to increase the penalties for regulatory non-compliance. The Sentencing Commission should resist the temptation indirectly to criminalize conduct that can be, and is, sanctioned through the administrative regulatory process.

Another proposed change in one of the criterion for an effective compliance program would change a provision that now says that the organization should use due care not to delegate substantial discretionary authority to individuals whom the organization knows, or should have known, "have a propensity to engage in illegal activities," to a new provision that states that the organization shall use reasonable efforts not to include within the substantial authority personnel of the organization any individual whom the organization knows, or should have known, has a history of engaging in violations of law or other conduct inconsistent with an effective compliance program. Section 8B2.1(b)(3). This proposed provision and the commentary to the provision are an improvement over the present version, but should make clear that the mere fact that a person of substantial authority within the

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organization has a prior violation or violations of any law (including civil administrative regulations) is not by itself inconsistent with the existence of an effective compliance program. Rather, the organization should merely be required to consider the factors set forth in proposed Application Note 4C (recency of violation(s), relation of violation(s) to current duties and whether or not there is a pattern of prior violations) in determining whether or not including the individual within the organization's substantial authority personnel presents a significant impediment to the effectiveness of the compliance program.

Proposed Application Note 2C to Section 8B2.1 should be eliminated. In accordance with the proposed change to make effective compliance programs responsible not merely for detecting and preventing criminal violations, but regulatory violations, this proposed Application Note would make it weigh against a finding that a program is effective if any standard required by any administrative regulation is not incorporated in the compliance program. A compliance program required to preclude punishment for violations of criminal law should not need to be a comprehensive regulatory compliance program.

Subsection (f) of Section 8C2.5 currently prohibits the three-level reduction in the culpability score even if the organization has an effective compliance program, if the organization unreasonably delayed reporting the offense to governmental authorities. Section 8C2.5(g) provides a five-level decrease based on cooperation, which includes timely notification of the offense. In light of this provision, a failure of timely notification should not preclude the application of the three-level decrease.

Subsection (f) of Section 8C2.5 also currently prohibits the three level-reduction in the culpability score even if the organization has an effective compliance program, if certain high-level officials within the organization were culpable in the offense. The proposed amendments change this prohibition to a rebuttable presumption that this reduction does not apply if certain high-level officials within the organization were culpable in the offense. This is a positive change that gives discretion to sentencing judges to assess the facts on a case-by-case basis. NACDL endorses this amendment and believes it should apply regardless of the size of the organization.

The Sentencing Commission seeks comments on whether the current three-level reduction under Section 8C2.5(f) should be changed to four levels to reflect the increased requirements of an effective compliance program. NACDL opposes the

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increased requirements as discussed above. If, however, the requirements are to increase, it would be appropriate to increase the reduction for having an effective program to four levels.

Proposed Application Note 12 to Section 8C2.5 notes that if various criteria are met, waiver of the attorney-client privilege and the work product doctrine will not be a prerequisite to a reduction in culpability for "cooperation." However, the proposed Application Note states, waiver of the attorney-client privilege and the work product doctrine may be required in order to obtain the reduction for cooperation. NACDL believes that under no circumstance should waiver of the attorney-client privilege or the work product doctrine be a prerequisite to obtaining credit for cooperation. Respect for these privileges is necessary in order for the organization frankly and candidly to determine whether there have been criminal violations, the scope of any such violations and appropriate corrective actions. An organization can cooperate with the government without waiving these privileges and should not be required to waive these privileges in order to obtain appropriate recognition for its cooperation.

Proposed Application Note 4 to Section 8C2.8 says that in determining where within the applicable range to set a fine, the court "should" consider any prior criminal record of an individual within high-level personnel. This proposed Application Note should state that the mere fact of a prior criminal record of such an individual is not necessarily relevant to where within the range to set the fine. Based on the criteria set forth in Application Note 4C to Section 8B2.1(b)(3), such a criminal record may be wholly irrelevant to whether or not the organization had an effective compliance program. In such cases, it should likewise be irrelevant to where within the applicable range the fine is set.

Proposed Application Note 2 to Section 8C4.1 states that if various criteria are met, waiver of the attorney-client privilege and the work product doctrine will not be a prerequisite to a providing "substantial assistance." However, the proposed Application Note states, the Government may determine that waiver of attorney-client privilege or work product doctrine may be necessary to ensure that a substantial assistance departure motion will be made. NACDL believes that under no circumstance should waiver of the attorney-client privilege or the work product doctrine be a prerequisite to obtaining credit for substantial assistance. Respect for these privileges is necessary in order for the organization frankly and candidly to determine whether there have been criminal violations, the scope of any such violations and appropriate corrective actions. An organization can substantially

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assist the government without waiving these privileges and should not be required to waive these privileges in order to obtain appropriate recognition for its substantial assistance.

Very truly yours,

Barry J. Pollack
Co-chair, White Collar Committee
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March 1, 2004

VIA HAND DELIVERY AND ELECTRONIC MAIL

United States Sentencing Commission
One Columbus Circle, N.E.
Suite 2-500
Washington, D.C. 20002-8002
Attention: Public Affairs

Re: Request for Public Comment by the United States Sentencing Commission on Proposed Amendments to Sentencing Guidelines

Dear Commissioners:

We are writing on behalf of 21 pharmaceutical companies,[1] in response to the request for public comment issued by the United States Sentencing Commission (USSC) on December 30, 2003.[2] Our comments concern the proposed amendments to Chapter Eight (the Organizational Guidelines), which describes the elements of effective compliance programs.

By way of background, the group of pharmaceutical companies we represent has substantial experience with voluntary compliance programs, and a long-standing commitment to compliance. That commitment is reflected both in individual companies' compliance efforts, and in a variety of collective efforts to improve compliance practices. Along with a number of other pharmaceutical companies, the group's members have been meeting semi-annually for the past five years to identify "best practices" for promoting compliance. Most of the group's current members also submitted comments to the Department of Health and Human Services Office of Inspector General (OIG) to

[1] These companies are: Abbott Laboratories, Alcon Laboratories, Inc., Allergan, Inc., Amgen Inc., AstraZeneca Pharmaceuticals LP, Aventis Pharmaceuticals, Inc., Bayer Corporation, Boehringer Ingelheim Corporation, Bristol-Myers Squibb Company, Daiichi Pharmaceutical Corporation, Eli Lilly & Company, Fujisawa Healthcare, Inc., Genentech, Inc., GlaxoSmithKline, ICOS Corporation, Johnson & Johnson, Merck & Co., Inc., Novartis Pharmaceuticals Corporation, Pfizer Inc., TAP Pharmaceutical Products Inc., and Wyeth Pharmaceuticals.

[2] Notice of proposed amendments to sentencing guidelines, policy statements, and commentary. Request for public comment, including public comment regarding retroactive application of any of the proposed amendments, 68 Fed. Reg. 75340 (Dec. 30, 2003).

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help the OIG develop its voluntary compliance guidelines for the pharmaceutical industry,[3] and submitted comments responding to requests for public comment by the USSC Advisory Group on the Organizational Guidelines. We appreciate the Advisory Group's recognition of our comments. Given the seminal role that the Organizational Guidelines have played in fostering effective compliance programs, we welcome the USSC's initiative to update and refine the Guidelines' criteria.

Our previous comments to the USSC Advisory Group emphasized two key principles: (1) articulating core compliance program standards that give individual companies the flexibility necessary to create "customized" programs tailored to their unique circumstances; and (2) encouraging vigorous self-policing, by reducing the penalties associated with organizational self-analysis and self-reporting. As discussed below, we believe that the proposed amendments promote these principles and will advance the goals of the Organizational Guidelines, although in some instances revisions to the proposal can further advance these goals. Our comments also address: (1) ethics-based compliance approaches; (2) the effect of misconduct by high-level personnel on organizational sentencing; (3) responsibility for compliance program implementation; and (4) proposed language on "model" compliance practices. We hope that these comments will be of assistance to the USSC in finalizing its amendment to the Organizational Guidelines.

* * *

I. Enhancing Compliance Program Effectiveness by Defining Fundamental Standards that Preserve Flexibility

The companies in our group support the proposed amendments, which would retain the seven-element framework of the existing Guidelines, while also creating a number of new obligations and broadening the required scope of effective compliance programs. For instance, the proposed Guidelines would require that companies: establish compliance programs designed to prevent and detect any violations of law or regulation (rather than violations of criminal laws, as in the current Guidelines);[4] promote an "organizational culture" encouraging a commitment to compliance;[5] satisfy new

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[3] See 66 Fed. Reg. 31246 (June 11, 2001) (OIG notice requesting comment on the development of voluntary compliance program guidance for pharmaceutical manufacturers); 67 Fed. Reg. 62057 (Oct. 3, 2002) (draft OIG guidance and request for comment); 68 Fed. Reg. 23731 (May 5, 2003) (final OIG guidance).

[4] Proposed Commentary to § 8B2.1.

[5] Proposed § 8B2.1(a).

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internal reporting and more detailed oversight requirements;[6] provide compliance training;[7] periodically evaluate the effectiveness of their compliance programs;[8] provide incentives to employees to follow compliance policies,[9] in addition to enforcing compliance standards through disciplinary measures; and conduct ongoing risk assessments.[10]

These various changes reflect sound compliance principles that have crystallized since the initial adoption of the Organizational Guidelines, and we support their incorporation into the Guidelines.[11] At the same time, we hope the USSC will emphasize that - - within the parameters set by this new and more rigorous framework - - flexibility is still essential for companies to build compliance programs that are genuinely effective. As the USSC has explained previously, the Organizational Guidelines were designed "to encourage flexibility and independence by organizations in designing programs that are best suited to their particular circumstances."[12] Encouraging flexibility and independence is equally critical today. Without the freedom to use their best judgment - - to develop customized compliance programs tailored to their individual needs and circumstances, their past experience with compliance strategies that have proved successful or disappointing, and their insights on innovations likely to strengthen their compliance efforts - - companies would lack "ownership" of their compliance programs and may not feel empowered to design their programs for maximum effectiveness. The Organizational Guidelines have been "a real success story for the United States

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6 Proposed § 8B2.1(b)(2) requires that: (1) the organizational leadership be knowledgeable about the content and operation of the compliance program; (2) the organization's board of directors be knowledgeable about the content and operation of the program, and exercise reasonable oversight over implementation and effectiveness of the compliance program; (3) specific individuals within high-level personnel have overall responsibility to oversee the compliance program; and (4) these individuals provide periodic reports on compliance matters to the organization's board. The current Guideline commentary only requires (3).

7 Proposed § 8B2.1(b)(4) makes compliance training a requirement, as opposed to an option, and extends the training requirement to the organization's upper levels as well as its employees and agents.

8 See proposed § 8B2.1(b)(5).

9 See proposed § 8B2.1(b)(6).

10 See proposed § 8B2.1(c).

11 Recognizing that the amended Guidelines would create "heightened requirements" for an effective compliance program, the USSC asked whether the credit organizations receive for effective compliance programs should be increased from three to four points. 68 Fed. Reg. at 75359-60. Because these heightened requirements would "raise the bar" for effective compliance programs in a number of significant respects, we believe such a change is warranted. Coupling heightened requirements with a modest increase in the incentives for satisfying these requirements would be a useful step.

12 An Overview of the Organizational Guidelines, Paula Desio, Deputy General Counsel, United States Sentencing Commission, available on the USSC website, http://www.usc.gov.

Sentencing Commission in its work to deter crime and encourage compliance with the law,"[13] and the Guidelines' balance between structure and flexibility has been an important part of that success story. We believe the amended Guidelines can best stimulate ongoing improvements in companies' compliance practices if accompanied by commentary emphasizing that their revised criteria must be interpreted in the same flexible spirit that has characterized the Guidelines since their inception.

One example of why flexibility is important involves the proposed requirement to give employees "appropriate incentives to perform in accordance with [the compliance program]."[14] Companies must be able to implement this provision in a way that reinforces their efforts to make compliance an ingrained part of the organizational culture. We would be concerned with any interpretation of this requirement that mandated "bonuses" for adherence to the law and company policy, which should be a basic obligation of every company employee rather than something "above and beyond" employees' normal duties. Individual companies need the freedom to design incentive systems carefully, so as to ensure that their incentive systems do not inadvertently undermine or dilute the message that compliance with the law and company policy is expected of all employees as an ordinary part of their day-to-day responsibilities.

II. Encouraging Self-Policing

Vigorous self-policing by organizations - - the "first line of defense" in the effort to detect and prevent violations of the law - - is critical to achieving the goals of the Organizational Guidelines. The proposed amendments include two changes that would encourage self-policing, which we strongly support. We hope the USSC will also consider additional measures that would complement these changes: creating a presumption that a company that voluntarily discloses self-discovered violations has an effective compliance program; removing current Guideline language that reduces the incentive for effective compliance programs by tying the credit for an effective compliance program to a requirement for self-reporting; and working with stakeholders to address the "litigation dilemma" confronting companies that embrace self-policing.

Companies today face significant penalties for engaging in candid self-analysis and for reporting self-discovered improprieties to the Government. The USSC Ad Hoc Advisory Group's report on the Organizational Guidelines[15] provides a thoughtful analysis of this problem. According to the Advisory Group, "[a] central objective of the organizational sentencing guidelines is to deter criminal conduct by creating incentives

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[13] Diana E. Murphy, The Federal Sentencing Guidelines for Organizations: A Decade of Promoting Compliance and Ethics, 87 Iowa L. Rev. 697, 719 (Jan. 2002).

[14] Proposed § 8B2.1(b)(6).

[15] See Report of the Ad Hoc Advisory Group on the Organizational Sentencing Guidelines (Oct. 7, 2003), available on the USSC website, http://www.usc.gov.

for voluntary compliance and by rewarding organizations that help the government discover misconduct."[16] However, the "litigation dilemma" creates countervailing incentives that can discourage vigorous self-policing. As the Advisory Group explained:

> [T]he same information that an organization should use to improve its compliance and training efforts is also of potentially enormous value to those who may become involved in litigation with the organization, whether it be administrative, civil or criminal litigation. This gives rise to the "litigation dilemma" and often a justifiable reluctance by many organizations to "dig deep" for fear of creating a roadmap for litigants against it.[17]

In elaborating on the risks of effective compliance programs, the Advisory Group noted, for example, that "audits and investigative reports may become litigation roadmaps for potential adversaries" and even compliance training programs are "potentially riddled with peril because of the litigation dilemma."[18] Moreover, since "[u]nder present law, compliance program and audit materials are rarely confidential," they are often subject to disclosure. "[I]f such disclosures are routinely allowed," the Advisory Group warned, "they will undermine the law enforcement policies upon which the organizational sentencing guidelines . . . are premised: that corporate good citizenship can be induced through incentives that promote self-policing."[19] In short, the litigation dilemma "is recognized as one of the major greatest impediments to the institution or maintenance of truly effective compliance programs."[20]

A closely related problem addressed by the Advisory Group, which exacerbates the litigation dilemma, is that companies that voluntarily disclose suspected misconduct to the Government may be required to turn over privileged documents to the Government as a condition of cooperation. However, as the Advisory Group noted, voluntary disclosure of privileged documents may waive the privilege as to all parties who seek the disclosed documents.[21] Consequently, even otherwise-privileged documents generated by a company's voluntary self-policing efforts may become available to litigation adversaries and harm the company. All of these problems penalize companies for

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16 Id. at 92.

17 Id. at 109.

18 Id. at 108, 116.

19 Id. at 117.

20 Id. at 6.

21 Id. at 118.

building strong compliance programs and work against the USSC's goal of rewarding vigorous self-policing.

The USSC proposed two chang... ...tify these problems. First, the Guidelines currently requ... ...ormation known by the organization" to ob... ...uthorities.[22] This "all pertinent ... ...mation to allow law enf... ...ed in criminal conduct. The ... ...not necessarily require waiv... ...lition, the proposed amen... ...d departures for provid... ...ongly support these propos... ...e incentives for voluntar... ...estions in this regard.

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Second, o... ...to the Government are n... ...or effective complianc... ...ibition may be appropriate... ...eration with Government au... ...on this issue.[26] We agree tha... ...eceive credit for an effective ... ...in the final amended Guidelines. ... ...ing, fairness suggests that organizations shoul... ...not denied credit for an effective compliance program if th... ...Moreover, the risks that may accompany

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22 See current § 8C2.5(g) and accompanying Commentary 12.

23 See proposed Commentary 12 to § 8C2.5(g).

24 See proposed Commentary 2 to § 8C4.1.

25 See current § 8C2.5(f).

26 68 Fed. Reg. at 75359.

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self-reporting - - Government requests that the company turn over privileged documents, which may waive the privilege as to all potential litigation adversaries - - means that conditioning the credit for effective compliance programs on self-reporting diminishes the incentive for developing effective compliance programs that can prevent violations from occurring.

Finally, the USSC's Advisory Group recommended that the USSC become a "fulcrum to advance the debate [regarding the litigation dilemma] among policy makers."[27] Specifically, the "Sentencing Commission should consider how . . . it can advance and further the dialogue among the branches of government and interested members of the public," since "a dialogue seeking to resolve the litigation dilemma is fundamental to the full and effective operation of the organizational sentencing guidelines and public polices that they are intended to advance."[28] We endorse this recommendation and encourage the USSC to act on it.

III. Ethics-Based Approach to Compliance Programs

The proposed Guidelines would require that organizations exercise due diligence to prevent and detect violations of law and "otherwise promote an organizational culture that encourages a commitment to compliance with the law."[29] In its synopsis describing the amendments, the USSC explained that this proposal "is intended to reflect the emphasis on ethics and values incorporated into recent legislative and regulatory reforms, as well as the proposition that compliance with all laws is the expected behavior within organizations."[30] The companies in our group strongly support an ethics-based approach to compliance. Nevertheless, "ethics and values" are terms that might inject an unwarranted degree of subjectivity into Government determinations about whether a company's compliance program was effective; whether the company acted diligently to prevent and detect violations of announced legal standards is a more straightforward and objective inquiry. Consequently, we hope the USSC will emphasize the textual requirement that companies "promote an organizational culture that encourages a commitment to compliance with the law,"[31] and make clear that companies have the flexibility to incorporate ethics-based approaches into their compliance programs in a manner best suited to their individual circumstances.

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27 Advisory Group Report at 129.

28 Id.

29 Proposed § 8B2.1(a).

30 68 Fed. Reg. at 75355.

31 Proposed § 8B2.1(a) (emphasis added).

[2-189]

IV. Misconduct By High-Level Personnel

Under the proposed amendments, high-level personnel participating in, condoning, or being willfully ignorant of an offense would create a rebuttable presumption that the organization's compliance program was ineffective, instead of the current conclusive presumption.[32] We support this change. Organizations should be allowed to demonstrate that their compliance programs are effective, and to receive credit for the program if they do so, even in circumstances where an individual at a high level of the organization engaged in misconduct or malfeasance.

The USSC requested comment on: (1) whether the conclusive presumption should continue to apply in the context of large organizations; and (2) whether the rebuttable presumption should apply in the context of small organizations "in which high-level individuals within the organization almost necessarily will have been involved in the offense."[33] We believe it is unfair and counterproductive to apply the conclusive presumption to any organization. We understand the USSC's concern that even a rebuttable presumption can create special problems for small companies, and believe that eliminating the rebuttable presumption for small companies may be an appropriate step to address this concern.

V. Responsibility For Compliance Program Implementation

The proposed amendments add new language stating that "specific individual(s) within high-level personnel [i.e., the compliance officer] shall be assigned direct, overall responsibility to ensure the implementation and effectiveness" of the compliance program,[34] whereas the current Guidelines only require that "[s]pecific individuals within high-level personnel of the organization . . . have overall responsibility to oversee compliance."[35]

We are concerned that the proposed language could be misinterpreted to relieve company managers of their responsibilities for ensuring the implementation and effectiveness of the compliance program - - essentially making compliance efforts a discrete area that can be assigned exclusively to compliance professionals, rather than an integral part of the whole organization's culture. For a compliance program to succeed, all of the organization's operating management must embrace the program, feel a personal investment in its success, and assume accountability for its effective implementation. The compliance officer has critical duties - - providing leadership and

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32 See proposed and current § 8C2.5(f).

33 68 Fed. Reg. at 75359.

34 See proposed § 8B2.1(b)(2).

35 Current Commentary to § 8A1.2.

[2-190]

coordination of the compliance program, monitoring the program's performance, and keeping the company's management and board apprised of program implementation issues - - but cannot be held exclusively responsible for the overall success or failure of the program. We urge the USSC to clarify this point, emphasizing that effective compliance programs call for an organization-wide commitment involving all of the company's management.

VI. Proposed Language on "Model" Compliance Practices

The proposed amendments include language suggesting that organizations' compliance programs be measured against "model" practices. Specifically, a proposed commentary states that the precise actions required for an effective compliance program depend partly on "compliance practices and procedures that are generally accepted as standard or model practices for businesses similar to the organization."[36] By contrast, the current Guidelines provide that failure to follow "applicable industry practice" weighs against the finding of an effective compliance program.[37]

Measuring compliance programs against industry practice is an important means to assess effectiveness. However, since industry guidelines describing "model" practices are often aspirational documents purposely designed to go beyond applicable industry standards - - to promote new approaches that would advance the state of the art in the compliance arena - - requiring compliance with these models is an unwarranted step that could actually discourage their creation. These aspirational models provide an important impetus for improvements in industry compliance practices, and should not be discouraged by making them mandatory. Industry groups may hesitate to develop model guidelines if they fear that the guidelines will be transformed into legal requirements, and there is no basis for a presumption that a company's compliance program is not effective unless it represents a "model" program. Instead, a company's adoption of model compliance practices should create a presumption that its compliance program is effective. We believe the "model" language in the proposed commentary to § 8B2.1 could be counterproductive, and should therefore be deleted. To advance the USSC's goals, industry groups should be encouraged to develop guidelines describing and promoting model compliance practices, and companies that adopt these model practices should be affirmatively rewarded for doing so.

* * *

[36] Proposed Commentary 2(A) to § 8B2.1 (emphasis added.)

[37] Current Commentary to § 8A1.2. [2-191]

We hope that these comments will be useful to the USSC. We appreciate your consideration of these comments, and appreciate all of your efforts in this critical area.

Sincerely,

John T. Bentivoglio
Arnold & Porter LLP
(202-942-5508)

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February 27, 2004

VIA HAND DELIVERY

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

Re: 2004 Proposed Amendments and Issues for Comment

Dear Commissioners:

We write on behalf of the Practitioners Advisory Group to address the notice of proposed amendments and issues for comment published in the Federal Register notices of January 14, 2004. As always, we view our primary role as assisting the Commission by drawing on our expertise as defense attorneys to respond to the issues for comment and specific amendments proposed by the Commission.

I. Proposed Amendments to Chapter 8 (Amendment #2)[1]

Initially, the PAG applauds the Commission for the formation of this Ad Hoc Advisory Group. From our perspective, this is sentencing policy-making at its best, and it stands in unfortunate contrast to the process that has led to many of the recent amendments that have resulted from Congressional directive. We also wish to compliment the Ad Hoc Advisory Group on its excellent work product. It is refreshing to see sentencing policy formulated through a process that brings together experienced individuals from different backgrounds and ideological perspectives. Although we do not necessarily agree with all of the Group's recommendations, we hope that the Group's success can serve as a model for future policy-making in this arena. We do wish to provide input on the four issues for comment:

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[1] The PAG expresses its appreciation to Eugene Illovsky and Greg Smith for their assistance in preparing this portion of our submission.

A. Eliminate the Automatic Preclusion for Unreasonable Delay.

Under U.S.S.G. § 8C2.5(f), an organization cannot receive the three point culpability score reduction if it "unreasonably delayed reporting the offense to appropriate governmental authorities." The proposed amendment retains that prohibition in subsection (f)(2), even though the clear thrust of amended § 8C2.5(f) is the adequacy of the organization's compliance program.

The prohibition should be removed. An organization's delay in reporting is sufficiently considered in the guideline's subsection explicitly addressed to such self-reporting, U.S.S.G. § 8C2.5(g). Under that section, an organization cannot get the five point culpability score reduction for self-reporting and acceptance of responsibility if it does not "report[] the offense to appropriate government authorities" within a "reasonably prompt time."

An organization with an excellent compliance program may, for some reason, delay its self-reporting of the violation. That decision, if later deemed unreasonable, may not necessarily reflect on inefficacy of the organization's program to "prevent and detect violations of law." It is proper to have reporting delay be the subject of subsection (g) and remove it from subsection (f).

B. High-Level Personnel Involvement Should Create a Rebuttable Presumption.

If certain high-level personnel participated in, condoned, or were willfully blind to the offense, § 8C2.5(f) automatically precludes the three-point culpability score reduction for an effective compliance program. The proposed amendment changes the automatic preclusion to a rebuttable presumption that the organization's compliance program was not effective.

The PAG believes the proposed amendment, reflected in subsection(f)(3), correctly treats the issue of high-level employee involvement. The PAG believes the Commission should not try to distinguish further between 'large' and 'small' organizations for the purpose of leaving some version of the automatic preclusion in place. An "automatic" rule will invariably lead to unjust results in some cases.

An automatic preclusion also unnecessarily restricts judicial discretion. Removing it gives judges the discretion to consider each organization's circumstances, and the particulars of the higher-level employee involvement, on a case-by-case basis. The organization should have the opportunity to present its case to the judge as to how it can rebut the presumption in those particular circumstances. Judges will no doubt exercise that discretion in light of precisely those factors recognized to be important, such as the organization's size and the number and type of high-level employees involved in the offense.

[2-194]

C. Increase The Culpability Score Point Reduction.

The PAG supports increasing the culpability score reduction from three to four points. Awarding more points for an effective compliance program would not only appropriately reflect the heightened requirements of U.S.S.G. § 8B2.1, but would also create an incentive for organizations to examine the adequacy of their current programs.

D. Factors Relating to Small and Mid Size Organizations.

Chapter Eight's impact on small and mid-size companies requires further study. Historically, the great majority of sentenced companies are small, closely-held entities. And, as the Advisory Group's Report notes, since 1991 an overwhelming number of convicted organizations failed to receive effective compliance program sentencing credit for reasons related to their smaller size. The PAG seconds the Advisory Group's recommendation that the Commission devote resources to reaching and training small and mid-size companies about corporate compliance.

The PAG believes that many factors or considerations could be incorporated into Chapter Eight to encourage small and mid size organizations to develop and maintain compliance programs. There is likely, however, to be some spirited disagreement among business interests, the defense bar, and the Department of Justice as to which factors or considerations will likely be most effective or important. And, to say the issue is a difficult one may understate things. The Advisory Group Report noted the difficulties it had in getting feedback on the matter.

The PAG therefore proposes that the Commission convene a working group dedicated solely to the study of the specific issue of the guidelines' application to small and mid size companies. This working group will no doubt have the first, difficult task of even defining the best methodology for studying this issue. The PAG envisions that the working group would reflect the usual affected constituencies (e.g., business, defense bar, prosecutors), but also that it might fruitfully be broadened to include an economist and/or other academics who have studied these issues from a broader perspective. The interdisciplinary approach may be the most effective way to give the Commission the help it needs to tackle this complex yet exceedingly important guidelines matter.

II. Proposed Amendments relating to Public Corruption (Amendment #4)

The PAG is unaware of any data or even anecdotal examples suggesting a need for increased penalties under these guidelines. No such basis or justification is included in the materials accompanying the proposed amendments. Although the Synopsis of the proposed amendment states that it "aims at moving away from a guideline structure that relies heavily on monetary harm to determine the severity of the offense," it does not appear that the proposed amendment in fact does so (assuming there are policy reasons for such a change, which are not explained in the published materials). The new guidelines incorporate the §2B1.1 loss table in precisely the same fashion as the existing guidelines. Accordingly, the PAG does not believe any

increase to the base offense levels for bribery and gratuity cases has been demonstrated to be warranted. Indeed, these base offense levels could instead be *reduced* to achieve proportionality with 2B1.1, the guideline governing other similar economic crimes.

The PAG agrees that Guidelines 2C1.1 and 2C1.7 may readily be consolidated, but the 2-level enhancement for multiple incidents should be limited to those cases currently sentenced under 2C1.1 to avoid even further unwarranted disparity between cases involving intangible rather than tangible harm. Similarly, if guidelines 2C1.2 and 2C1.6 are consolidated, the 2-level enhancement for multiple incidents should be limited to cases currently sentenced under 2C1.2 to avoid unwarranted disparity between cases involving mere gratuities rather than actual theft.

Briberies and gratuities are purely economic crimes. While the acceptance of a bribe or gratuity by a public or bank official is a serious offense because it serves to undermine the public's confidence in government and banks, there is little reason to believe it does so to any greater degree than outright theft or embezzlement by such officials, particularly where the official's position does not involve high-level decision-making or other sensitive matters, and is not an elected office. Because the base offense level for economic crimes is either 6 or 7, depending on the statutory maximum sentence, the current base offense level of 10 for bribery offenses results in unwarranted disparity. Increasing the base offense level from 10 to 12 would exacerbate this unwarranted disparity rather than cure it, and result in sentences that are unjust.

Consider, for example, a typical bribery case in which a low-level public official accepts two $5,000 bribes to award a $100,000 contract on which the contractor makes a $20,000 profit.[2] Under the current version of 2C1.1, the base offense level would be 10, increased by 2 levels for multiple incidents, plus 4 levels under the 2B1.1 table reflecting the $20,000 "benefit received," resulting in an adjusted offense level of 16. If the base offense level is increased by two levels as proposed in the amendment, the adjusted offense level would be 18.

Contrast this $10,000 bribery scenario with a case in which a public official simply steals $10,000 outright from the public fisc. Assuming some use of the mails or wires, the base offense level would be 7, plus 4 levels for the loss, plus 2 levels for abuse of trust, resulting in an adjusted offense level of 13. Why should a low-level public official be sentenced 3 levels higher for accepting a $10,000 bribe from a third party than stealing the $10,000 directly from the public fisc? And if the proposed amendment were adopted, the disparity would be 5 levels. This means that the minor official who accepts the $10,000 bribe would be sentenced 1 level *higher* (18) than an official who outright steals up to $120,000 – *more than the entire value of the contract* (7+8+2=17).

The unwarranted disparity noted above would be further exacerbated by the consolidation of 2C1.7 with 2C1.1 if the 2-level increase for multiple incidents is applied across the board.

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[2] Obviously the numbers used in hypotheticals such as this are important. We believe the numbers above are quite reasonable, and further believe our overall point would be amplified by having the Commission Staff apply and contrast the fraud and bribery guidelines to randomly selected actual bribery cases.

Section 2C1.7 deals with acts of dishonesty by public officials that cause purely *intangible* harm. Section 2B1.1, coupled with a 2-level increase for abuse of trust, would presumably apply in non-bribery cases to acts of public officials which actually cause tangible harm, such as thefts or embezzlements. If the amendment were enacted as proposed, cases of *intangible* harm with multiple incidents would have an offense level of 14, while cases of *tangible* harm would be *5 levels lower* (7+2=9).

Similar disparities result from raising the base offense levels for mere gratuities – cases which by definition do not involve any *quid pro quo* and are largely misdemeanors. These disparities will be furthered amplified by consolidating the bank gratuity cases with 2C1.2 and applying the 2-level multiple incident adjustment across the board. A bank employee who accepts two $3,000 gratuities not causing loss to the bank will be sentenced at the same level (13) as a bank employee who embezzles up to $30,000 directly from the bank. (9+2+2=13 (proposed 2C1.2); 7+2+4=13 (existing 2B1.1)).

To be sure, there are bribery cases in which the harm is largely non-economic because of the impact on the public perception of and faith in governmental decision-making. But this characteristic is more than fully accounted for by the 8-level upward adjustment in cases involving elected officials or officials holding high-level decision-making or sensitive positions. In those cases, the disparity between the bribery guideline and theft guideline will be nothing short of dramatic. For example, if the amendment were enacted as proposed, an official in a high position of public trust involved in more than one incident who accepted $10,000 for the purpose of influencing an official act will be sentenced at the same level (12+2+2+(2 or 4)+(2 or 4)= 20 to 24) as if the official had embezzled from $400,000 to $2,500,000, depending on which options are selected from the proposed increases.

The existing bribery and gratuity guidelines are already out of proportion with the guidelines for economic offenses, and should be reduced by at least 2 levels to eliminated incongruous results. Raising the bribery and gratuity offense levels, particularly in conjunction with applying the 2-level multiple incident adjustment to intangible rights and bank gratuity cases, will lead to results that are intellectually indefensible.

III. Proposed Amendments relating to the Mitigating Role Cap (Amendment # 6)

The PAG will provide a supplemental submission addressing this issue.

IV. Proposed Amendment to Multiple Victim Rule in USSG §2B1.1, (comment.) n. 4(B)(ii) (Amendment #8b)[3]

The proposed amendment to U.S.S.G. §2B1.1, comment. (n. 4(B)(ii)) would expand a special rule to provide that offenses involving mail stolen from mailboxes serving multiple postal

[L 2-197]

[3] The PAG thanks Richard Crane for his assistance with this portion of our submission.

customers, such as those found in apartment complexes, would presumptively involve 50 or more victims.

Presently, the special rule provides that when United States mail is taken from a Postal Service relay box, collection box, delivery vehicle, satchel or cart, the offense is considered to have involved at least 50 victims. This rule was added to the guidelines in 2001 because of "(i) the unique proof problems often attendant with such offenses, (ii) the frequent significant, but difficult to quantity, non-monetary losses in such offenses, and (iii) the importance of maintaining the integrity of the United States Mail." U.S.S.G. Amend. 617 (Reason for Amendment). These reasons provide no support for the changes contemplated in Proposed Amendment 8(b).

A. Amendment Does Not Address Unique Proof Problems

Unique proof problems exist when mail is stolen from a Postal Service mailbox, vehicle, cart or satchel because there is usually no way to determine how many pieces of mail were in the container or conveyance at the time of the theft. Without knowing the number of pieces of mail, the scope of the theft and number of victims is impossible to ascertain.

These proof problems do not exist when dealing with banks of mailboxes. In fact, it is often easier to prove the number of victims when mail is stolen from apartment unit boxes than if it were stolen from individual residence mailboxes. For example, if the offender stole mail by entering an apartment unit box from the front,[4] the door to the mailbox will almost always show signs of tampering to overcome the box's locking mechanism. On the other hand, mail taken from individual home mailboxes would not show such tampering because these boxes are rarely locked. If the apartment mail was stolen via the back way, it would be more difficult to determine the number of victims, but no more so than determining the number of victims when mail is stolen from individual home mailboxes.

B. Quantifying Non-Monetary Losses Is No More Difficult Than In Other Cases

As noted above, we do not believe it is more difficult to quantify non-monetary losses resulting from theft of mail from apartment cluster mailboxes than single residence mailboxes.

C. Amendment Will Not Further the Purposes of the Guidelines

It may be important to protect the soundness of the United States Postal Service by providing greater penalties for those who would steal from a Postal Service vehicle or container. But we do not believe it is necessary to the soundness and integrity of the US mail to punish persons who steal from an apartment complex more harshly than those who steal mail from individual residences.

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[4]From the front" means that the mail was taken out of the box in the same manner as the recipient would have taken it. In some cases, mail can be accessed from the back by unlocking the entire bank of boxes or by approaching the boxes from the rear (as is done with the individual boxes located in a Post Office. [2-198]

On the other hand, the purposes of the guidelines will be frustrated if the proposed amendment is adopted. The basic objective of the guidelines is to provide reasonably uniform sentences for similar offenses committed by similar offenders. USSG Ch 1, Pt. A(3). Mandating longer sentences for offenders who steal a single welfare check from an apartment cluster of 50 boxes, than for those who steal the same check from a single mailbox on a street with fifty houses, will create sentencing disparity and undermine the objectives of the guidelines.

The proposed amendment will also create confusion as to the meaning of the term 'victim.' For purposes of mail theft, 'victim' is defined as "any person who sustained any part of the actual loss" or "any person who was the intended recipient or addressee" USSG §2B1.1 App. Note 4(B)(i). In either case, the definition requires an identifiable victim. The definition has been weakened, perhaps necessarily, by the present special rule that does away with the need to identify the victims when mail is stolen from a Postal Service container or conveyance. It should not be weakened further by adoption of an amendment where the identity of the victims is easily obtainable.

D. Placing Burden On Defendant to Prove Number of Victims is Unfair[5]

Requiring a defendant to prove that his mail theft offense involved less than fifty victims puts the burden on the party in the worst position to do so. The government is in a far superior position to prove the number of victims because it can obtain this information immediately upon discovery of the offense. It is one thing to ascertain how many apartments were vacant and how many people had already retrieved their mail when the question is asked the same day as the offense and another to get answers when the questions are asked months later. Additionally, government agents have the perceived authority to ask people if they have already retrieved their mail and, if not, whether they were expecting anything valuable or time-sensitive. An attorney or investigator representing the alleged thief would have a far more difficult time getting answers to these questions.

Additionally, the present rule reasonably assumes that a person who steals from a Postal Service box or conveyance intends to steal all the mail, while breaking into a single apartment mailbox does not evidence such an intent.

E. There Is No Demonstrated Need for the Amendment

Finally, we question the seriousness of the problem addressed by the proposed amendment. We can find only one case where a similar situation arose. In *U.S. v. Gray*, 71

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[5]As published, the amendment provides that any theft from a cluster of mailboxes would be considered to have involved 50 or more victims. This would result in a four level enhancement even if the apartment complex had less than 50 apartments. At the very least, this should be changed to read that where there are multiple boxes, there is a presumption that the number of victims corresponds to the number of boxes. But, even this refinement would not alter our opposition to the amendment for the reasons stated above.

Fed.Appx. 300 (5th Cir 2003), a two-level enhancement was imposed on the defendant for having more than ten and fewer than 50 victims because he pried off the mailbox panels in an apartment building, exposing 42 individual boxes. On appeal the enhancement was vacated because there was no proof that there were at least ten people who had mail in their boxes at the time of the offense. There was, however, no indication that it would have been difficult to obtain sufficient evidence proving the number of victims, especially considering the reduced degree of proof required at a sentencing hearing.

V. Issue for Comment regarding Aberrant Behavior (Amendment #10)

With regard to aberrant behavior, Issue for Comment 10, the PAG opposes as premature the elimination of the aberrant behavior downward departure provision, U.S.S.G. § 5K2.20. While we agree in principle that the mandate of 28 U.S.C. § 994(j) should be implemented and true first offenders should receive more lenient sentences and more opportunities for sentences that do not involve incarceration, it does not make sense to eliminate the aberrant behavior downward departure before proposing an amendment to U.S.S.G. § 4A1.1 designed to accomplish this objective. The Commission has been engaged in a two-year study of criminal history. The PAG suggests that the Commission formulate an appropriate amendment to U.S.S.G. § 4A1.1 based on the results of that study. At that point, but not before, it makes sense to consider whether or not the aberrant behavior downward departure remains necessary.

VI. Proposed Amendment to Immigration Guidelines (Proposed Amendment #12)

The PAG intends to comment on this proposed amendment but has not yet finalized its submission on his issue. A supplemental comment addressing this proposed amendment will be forthcoming in the next few days.

As always, we appreciate the opportunity to present our perspective on these important issues. We are available to provide further information or meet with the Commission if it would be useful.

Sincerely,

James Felman
Barry Boss
Co-chairs, Practitioners' Advisory Group

cc: Charles Tetzlaff, Esq.
Timothy McGrath, Esq.

[2-200]

March 1, 2004

Ms. Diana E. Murphy, Chair
United States Sentencing Commission
Attn: Public Affairs
One Columbus Circle, NE, Suite 2-500
Washington, D.C., 20002-8002

RE: Proposed Amendments to the U.S. Sentencing Guidelines
Chapter Eight: Sentencing of Organizations and Compliance Programs

Dear Ms. Murphy:

On behalf of the Providence Health System, I want to offer our formal comments to the United States Sentencing Commission's notice of proposed amendments to the Sentencing Guidelines that was published in the December 30, 2003 Federal Register. We wish to specifically address the second proposed amendment that establishes criteria for an effective program to prevent and detect violations of the law ("compliance programs").

The Providence Health System is a not-for-profit, Catholic health system that includes 18 acute care hospitals, 18 freestanding long term care facilities, clinics and physician groups, a health plan and home health agencies serving communities in Alaska, Washington, Oregon and California. Providence seeks to fulfill its mission of continuing the healing ministry of Jesus in the world of today, with special concern for those who are poor and vulnerable. Working with others in a spirit of loving service, we strive to meet the health needs of people as they journey through life. At the same time, like other health care providers, Providence must strive to achieve this mission while addressing a myriad of state and federal laws and regulations. Having operated a compliance program since 1997, it has been Providence's experience that an effective compliance program is a valuable tool for demonstrating its commitment to these mandates. Furthermore, as we have recently been evaluating the effectiveness of our past efforts, we are pleased that many of the changes that Providence is making to strengthen its program are consistent with the direction recommended by the Commission. The comments that follow are indicative of the support for the Commission's general direction as well as some specific observations.

Establishing Required Elements for What Constitutes an Effective Compliance Program

When the organizational sentencing guidelines first became effective on November 1, 1991 they created a set of voluntary incentives for adoption. Since that time, industry has gained experience with the seven elements of an effective compliance program. This

approach – while perhaps more theoretical when first posited over ten years ago – has now proven to be an effective management tool in fostering compliance and detecting violations of the law. Providence finds that the implementation specifications enumerated in the proposal for what constitutes an effective program are consistent with this experience and indicative of good industry practice. Given this perspective, it is hard to contemplate how an organization would justify a decision not to implement such a program. The duty that governance and management alike have to their stockholders, or in the case of a non-profit organization to their mission, suggests that the maturation of organization compliance as an established management practice provides a basis for making this a required approach. In short, compliance programs should not be voluntary. The work of the Ad Hoc Advisory Group on the Organizational Sentencing Guidelines and the proposed amendments supports this position as well.

Promotion of an Organizational Culture that Encourages a Commitment to Compliance With the Law

We want applaud in the strongest terms possible the direction taken by the Commission in recognizing the inseparable connection between an organization's culture and the effectiveness of its compliance program. It is true that education, policies, and audits are all part of an effective compliance program. However, it has been our experience that the most important deterrents to non-compliance are the values and culture that underlie the organization. For that reason, the compliance program within Providence has been known as the "Integrity Initiative." We have sought to stress the responsibility that each individual has to be accountable for the integrity of the decisions we make and the actions that we take. Our training materials have sought to position legal requirements within this context of business and organizational ethics and our core values. It has been our experience that the behavior of individuals and the organization as a whole is more properly motivated through this approach as opposed to exclusively relying on the more narrow rationale of regulatory requirements. As the Commission gains more experience in this regard we would hope that this might be an area of further development in subsequent revisions to the guidelines. For now, Providence believes the Commission's approach represents a positive and much-needed first step.

Expansion of the Scope of a Compliance Program

Under the current guidelines the objective of a compliance program is directed only to violations of criminal law and prevention of criminal conduct. The Commission proposes to expand the scope by defining the term "violations of law" to include non-criminal violations and regulatory violations. Providence supports this proposed expansion: Many of the areas in our program – while including those which constitute criminal actions – are addressing non-criminal actions. Furthermore, to the extent that the hurdle for reporting violations is set unnecessarily high (i.e., criminal behavior) it will serve only to limit reporting and the reach of an effective compliance program.

[2-202]

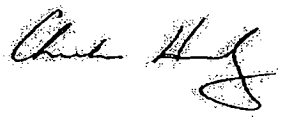
Establishing Program Responsibility

Much of the Commission's proposed direction represents what might be thought of as a "structural" approach to management: To the extent that certain structures are in place – policies, personnel, practices, and resources – it is assumed that a program will produce positive outcomes. Obviously, in the case of a compliance program these expected outcomes are the prevention and detection of violations of law. Consequently, it is important that authority for a compliance program be vested in a highly-placed individual within the organization and that they enjoy the support of and access to senior management and as appropriate governance bodies. Assuring that governance plays an active role in program oversight is another critical structural element in establishing an effective program.

However, as critical as these elements are – and as we have argued elsewhere, they should be required – they cannot in themselves "ensure the effectiveness of the program" as stated in § 8B2.1(b)(2). Operational management needs to be equally committed and this responsibility needs to be given equal attention in the proposed guidelines. Simply stated, the job of ensuring compliance is not the sole responsibility of the Compliance Officer. Even the language set forth by the Commission in establishing a rebuttable presumption concerning a program's effectiveness is an acknowledgement that violations of law can occur despite the existence of an effective compliance program. The Compliance Officer should have an affirmative obligation to establish a program that meets the required elements and review its effectiveness through comprehensive risk assessments and audits. To the extent that implementation is not effective then the Compliance Officer has a duty to inform both management and the Board. The Commission should not hold the Compliance Officer accountable for more than these responsibilities. Doing so is to fail to recognize the indispensable role of operational management in implementation. We would encourage the Commission to add language stressing this role that goes beyond that of the Compliance function.

Again, Providence appreciates the opportunity to share our perspectives with the Commission as it considers these important changes to the Sentencing Guidelines.

Sincerely,



Charles Hawley, Vice President
Government Affairs
Providence Health System

[2-203]

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February 23, 2004

United State Sentencing Commission
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Suite 2-500
Washington, DC 20002-8002
Attention: Public Affairs

Dear Mr. Courlander:

We appreciate the opportunity to respond to the Ad Hoc Advisory Group's recommended modifications to the United States Sentencing Guidelines.

Our comments are in regard to §8B2.1(b)(5)(c). We support the addition of "promotion of an organizational culture" and "anonymous reporting" and the change from "retribution" to "retaliation." We also support the addition of "seek guidance regarding potential or actual violation of law." However, we strongly recommend that "confidential" be added. We propose that the guideline read: "seek **confidential** guidance."

Redmond, Williams & Associates is a firm that helps organizations set up systems to ensure that issues are surfaced and handled appropriately. We base our recommendation on multiple research studies that have recently been published, the many interviews we have conducted over the last year with institutional leaders, and our experience in establishing, enhancing and expanding issue management systems.

Perhaps the most germane study is the 2003 Ethics Resource Center survey which is referenced in the report. It demonstrated that 35% of the employees who actually observe misconduct do not report it. Their reasons are that they believe no corrective action would be taken, they fear that their report would not be kept *confidential*, they fear retaliation, they do not know to whom they should speak.

[2-204]

Our interviews have shown that leaders who are actively strengthening their governance processes understand the value of providing constituents a confidential, informal channel in addition to formal channels that promise anonymity within limits. On the other hand, executives who do not understand the value of a channel where employees can feel very safe—a confidential, informal, off-the-record, independent channel—are maintaining status quo in how they manage governance and risk.

Our experience in setting up, expanding and enhancing issue management systems has shown that organizations that offer informal, confidential guidance for their constituents, and also have effective formal reporting channels, benefit by:

- The surfacing of potential malfeasance that might not have otherwise been brought forward
- Having issues brought to the most appropriate resolution resource in a timely manner.

Constituents in an organization will seek guidance that is confidential if they do not know where to take potential malfeasance, need coaching and guidance about how to take it forward, want to explore the full scope of the concern and potential resolutions options before coming forward, or want to remain anonymous. Confidentiality is critical to providing constituents with a safe haven where they can discuss their concerns and consider the potential resources for resolution.

We appreciate your consideration of our recommendation.

Respectfully,

Arlene Redmond, Partner

Randy Williams, Partner

[2-205]

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WRITER'S EMAIL

Richard L. Steer
Principal

WRITER'S DIRECT
DIAL NUMBER

(212)527-1339

February 27, 2004

VIA FEDERAL EXPRESS
Mr. Michael Courlander
Public Affairs Officer
United States Sentencing Commission
1 Columbus Circle, N.E.
Suite- 2-500, South Lobby
Washington, DC 20002-8002

Re: Sentencing Guidelines

Dear Mr. Courlander:

I am writing to comment on the report recommendations of the Ad Hoc Advisory Group on Organizational Guidelines for amendment of Chapter 8 of the sentencing guidelines for organizations. I am an attorney in private practice and an adjunct law professor. As a principal in my firm, I represent public and closely held corporations in employment discrimination and labor cases. In addition, I act as outside counsel to the Ombuds Association and University and College Ombudsman Association although, this letter is written in my individual capacity not as a representative of any party or of my firm.

As an attorney rendering advice to corporations regarding compliance with federal laws, I am aware of the federal sentencing guidelines and the positive role they have in encouraging corporate compliance with the law. There is one suggestion I would like to make, however, regarding proposed Section 8B2.1(b)(5)(c) which provides that an "organization shall take reasonable steps... (C) to have a system whereby the organization's employees and agents may report or seek guidance regarding potential or actual violations of law that without fear of retaliation, including mechanisms to allow for anonymous reporting." While at first glance this amendment is clearly worthwhile, I would suggest that it should go further.

[2-206]

As a corporate litigator, I have repeatedly seen instances where an alleged victim of corporate misconduct has come forward only after they have quit or have been terminated. The employer in such cases has often been denied an opportunity to informally remedy the alleged problems or even to properly investigate what is alleged to have gone on. The alleged victim may have suffered in silence longer than necessary. Thus, the ability of an employee not only to anonymously report alleged misconduct or problems, but also to seek guidance and correction of problems in a confidential manner significantly increases the likelihood of a speedy remedy for individuals concerned and corporate attention to these problems at an earlier stage.

While I understand that the Advisory Group did not want to dictate specific means by which an organization should accomplish the requirements proposed by the changes to the Guidelines, my work with the Ombuds groups noted above, and in practice, leads me to believe that, at the very least, the amendment should support confidential means for individuals to seek guidance and speedy correction of their problems in confidence without fear of retaliation.

Thank you for your attention to this matter.

Very truly yours,

Richard L. Steer

Richard L. Steer

RLS/ps

[2-207]

February 10, 2004

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

Attn: Public Affairs

Re: Response to request for public comment on effective compliance programs in Chapter Eight

On behalf of United Technologies Corporation (UTC), I appreciate this opportunity to comment on proposed changes to Chapter Eight Guidelines. My comments will be brief. They follow and build upon the written testimony and letter I provided on August 27, 2002 in the early days of the Ad Hoc Advisory Group's work in behalf of the Commission's review of Chapter Eight and my oral testimony during Breakout Session III on November 14, 2002.

The Commission is to be commended for its foresight in creating an advisory body to review Chapter Eight Guidelines a decade after their inception, and the Ad Hoc Advisory Group is to be commended for the depth, breadth and speed of its work. The Guidelines have done much to contribute to the broadening of interest in and commitment to effective compliance programs. Several specific recommendations in the Ad Hoc Advisory Group's report will strengthen the Guidelines' effectiveness even further.

Of special note are the Advisory Group's recommendations at §B2.1 for strengthening the role and cognizance of the governing authority; the assignment of high-level personnel assigned to assure the implementation and effectiveness of a compliance program; and the provision regarding adequate resources.

We also applaud the inclusion of the proposed language in §8B2.1(b)(5)(C): "to have a system whereby the organization's employees and agents may report or seek guidance regarding potential or actual violations of law without fear of retaliation, *including mechanisms that allow for anonymous reporting.*" Research and experience teach us that a certain portion of a work force will not bring issues forward if they risk being identified because they fear retaliation.

Inclusion of the word "anonymous" in the language is a positive step because organizations would be required to think about mechanisms by which employees can raise issues without being identified. But aside from an office that accepts anonymous correspondence and assigns investigators, there are limits to how much information an organization can gain (including the

[2-208]

probable need for follow-up questions to the source) (1) without some part of the organization's management structure somehow knowing the source's identity and (2) without risking the possibility the source could be identified by electronic tracking or retrieval of deleted email or toll free calls to a third party, etc.

We strongly recommend another positive step: inclusion of the word "confidential," not to replace but to complement the word "anonymous." The two are not interchangeable, and when used together as a requirement for an organization's reporting system they increase the likelihood that more employees will come forward. Thus we recommend that the proposed language in §8B2.1(b)(5)(C) be amended to read, in part, "...including mechanisms that allow for *confidential* and anonymous reporting."

As a reference point, the U.S. Sarbanes-Oxley Act of 2002 requires that "...each audit committee [of a board of directors] shall establish procedures for "the *confidential, anonymous* submission by employees...of concerns regarding questionable accounting or auditing matters."

Because of recent media attention to this far-reaching Act, the terms "confidential" and "anonymous" have been used frequently and, sometimes, carelessly. Sometimes they are even erroneously used interchangeably.

The Ad Hoc Advisory Group's October 7, 2003 report cited the independent, neutral ombudsman office at United Technologies as having been successful "in maintain[ing] the confidentiality of the information provided [by employee sources] against demand for external disclosures." (pp. 83-84)

Because a neutral, independent ombudsman office can offer a confidential as well as an anonymous outlet for employees, this model is available to organizations that strive to develop the most comprehensive and effective system for employee reporting. For this reason we strongly recommend that the word "confidential" be added to §8B2.1(b)(5)(C)'s language.

We established the confidential, neutral ombudsman program in 1986 as a means for employees to raise issues in confidence while remaining anonymous to the rest of the organization and even to the Ombudsman if the employee chooses. Within the context of the ombudsman program at UTC, this is why we believe the word "confidential" should be used with "anonymous" in the Guidelines.

Because the Program was created to be neutral, separate and independent of formal management structures, the Program promises that information employees raise through the program will kept confidential and that employees may remain anonymous to the rest of the organization and even to the Ombudsman.

When an employee contacts the Ombudsperson, the corporation promises that no one except the Ombudsperson who processes the inquiry will know that an employee is in the process of using the Program to communicate an issue. The fact of the communication will be kept confidential.

[2-209]

The Ombudsperson who handles an employee's issue promises the employee that her or his name will not be given to management [or anyone else] without the employee's specific permission. That is, the Ombuds will keep the employee *anonymous* to the organization. (UTC has used the legal process a half dozen times to successfully defend this concept, which is generally known as *Ombudsman privilege.*)

The advantages to having this kind of structure are numerous. Because an organization can offer both confidentiality and anonymity, we believe more employees are likely to come forward. Note: if an employee chooses to raise an issue through the compliance office, which is part of the management structure, the compliance officer can advise the employee that while he or she will do everything possible to keep the employee's identity anonymous to the organization, should the issue end up in a third-party lawsuit, the compliance officer may be subpoenaed and have to reveal the employee's identity.

I would like to conclude with two points. As we mentioned in our 2002 comments, it would be very helpful if the Commission were to ask U.S. Attorneys to share data resulting from settlements negotiated under the Guidelines so others can learn the results of compliance with or avoidance of the Guidelines.

Finally, I understand there might be the opportunity to testify regarding the Ad Hoc Advisory Group's proposals. If that opportunity does arise, I would be grateful for the opportunity to provide oral comment.

Sincerely,

Pat

P.S. I have mailed a paper copy of this letter in addition to this email transmission.

[2-210]

UOP LLC • 25 East Algonquin Road • Des Plaines, Illinois 60017-5017 • Tel: 847.391.2000 • Fax: 847.391.2253

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?

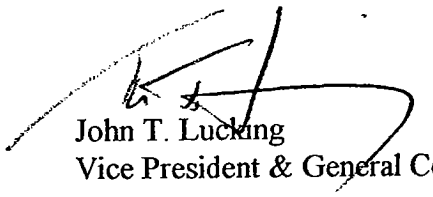
[2-211]

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

[2-212]

U.S. Department of Justice

Criminal Division

Office of the Assistant Attorney General *Washington, DC 20530-0001*

March 1, 2004

Members of the
U.S. Sentencing Commission
One Columbus Circle, NE
Suite 2-500, South Lobby
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.

* * * * *

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.

[2-213]

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 if 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 morion "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.

WORKPLACE CRIMINALISTICS AND DEFENSE INTERNATIONAL
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Website – firms.findlaw.com/workplacecriminalist

February 27, 2004

SENT BY EMAIL AND UNITED STATES MAIL

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

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

Re: Public Comment Regarding Proposed Amendments to Chapter Eight (Sentencing of Organizations)

Dear Commission:

The following sets forth our Public Comment relating to Proposed Amendment 2: Effective Compliance Programs in Chapter Eight.

Public Comment Overview

After carefully reviewing the Public Comments I have submitted over the past years relating to Chapter Eight, the Ad Hoc Advisory Group on the Organizational Sentencing Guidelines' Report and Proposed Amendment 2, organizations will now have greater guidance for the design, implementation and enforcement of organizational compliance programs. With that said, I must still express my concerns surrounding the amendments relating to ***reduction with effective program*** AND ***waiver of the attorney-client privilege***.

[2-220]

My extensive professional experience in corporate criminal liability compliance stems from years and years of involvement in all angles of corporate compliance even BEFORE the Organizational Guidelines were implemented in 1991, excluding prosecutorial enforcement. Having this practical experience and expertise BOTH internally and externally with employers, employees and administrative agencies alike provides me a broader view of the EFFECT of regulations within organizations. INTERNAL DETECTION AND APPROPRIATE REMEDIAL ACTION are KEY components in any organizational compliance program. Therefore, I must urge the Commission to reevaluate Amendment 2 as follows:

Section 8C2.5(f):

"(f) Effective Program to Prevent and Detect Violations of Law

(1) If the offense occurred even though the organization had in place, at the time of the offense, an effective program to prevent and detect violations of law, as provided in §8B2.1 (Effective Program to Prevent and Detect Violations of Law), subtract 3 points."

AMENDED TO READ

(1) If the offense occurred even though the organization had in place, at the time of the offense, an effective program to prevent and detect violations of law, as provided in §8B2.1 (Effective Program to Prevent and Detect Violations of Law), subtract 3 points ONLY if the organization took appropriate remedial action once the offense was discovered.

Commentary to 8C2.5(Application Notes):

"If the defendant has satisfied the requirements for cooperation set forth in this note, waiver of the attorney-client privilege and of work product is not a prerequisite to a reduction in culpability score under subsection (g). However, in some circumstances, waiver of the attorney-client privilege and of work product protections may be required in order to satisfy the requirements of cooperation."

AMENDED TO READ

If the defendant has satisfied the requirements for cooperation set forth in this note, waiver of the attorney-client privilege and of work product is not a prerequisite to a reduction in culpability score under subsection (g). However, in some circumstances, waiver of the attorney-client privilege and of work product protections may be required in order to satisfy the requirements of cooperation ONLY after considering the defendant's efforts relating to appropriate remedial action.

[2-221]

Commentary to 8C4.1(Note 2):

"2. Waiver of Certain Privileges and Protections.--If the defendant has satisfied the requirements for substantial assistance set forth in subsection (b)(2), waiver of the attorney-client privilege and of work product protections is not a prerequisite to a motion for a downward departure by the government under this section. However, the government may determine that waiver of the attorney-client privilege and of work product protections is necessary to ensure substantial assistance sufficient to warrant a motion for departure."

AMENDED TO READ

2. Waiver of Certain Privileges and Protections.--If the defendant has satisfied the requirements for substantial assistance set forth in subsection (b)(2), waiver of the attorney-client privilege and of work product protections is not a prerequisite to a motion for a downward departure by the government under this section. However, the government may determine that waiver of the attorney-client privilege and of work product protections is necessary to ensure substantial assistance sufficient to warrant a motion for downward departure ONLY after considering the defendant's efforts relating to appropriate remedial action.

Thank you very much for the opportunity to have provided the above Public Comments.

Sincerely,

/s/

L.A. Wright
Legal Criminalist/Consulting Expert

/law

[2-222]

U.S. Sentencing Commission
One Columbus Circle, N.E.,
Suite 2-500
Washington, D.C. 20002-8002
Attention: Public Affairs
VIA FAX: 202/502-4699

PUBLIC COMMENT ON PROPOSED CHANGES TO ORGANIZATIONAL SENTENCING GUIDELINES

I appreciate the opportunity to provide comments on the proposed amendments to the Guidelines. I am choosing to send these anonymously, with your indulgence.

First, I commend the Advisory Group on delivering such a well thought-out, well-researched, well-articulated fine instrument. It was actually a pleasure to read. The effort that went into its production is evident in the quality of all details, throughout.

I am a compliance/ethics professional and would like to share just briefly my thoughts on the proposals.

1. Sec. 8B2.1(b)(2) The proposal draws in DOJ's call for resources and authority, which is excellent. I respectfully submit, however, that the distinction between the day-to-day designer and manager of an organization's compliance program, and the 'high-level personnel' assigned to ensure implementation, is worth a closer look. In my experience, the latter is often a member of the organization's executive team who has taken on compliance as a secondary function, and is often quite disengaged from the actual on-the-ground challenges involved in the program's implementation.

a. I suggest that the proposal's call for adequate authority and resources should be directed at the individual at the operational helm of the program, rather than at the executive, who generally has easier access and larger discretionary funding. To the extent that granting "authority" and "resources" is intended to facilitate the practical success of the program, it would make sense to clarify that it is the operational head that should have the authority and resources, since that is where the majority of the program challenges lie. The operational head of the program is the person who is the 'face' of the program throughout the organization on a daily basis, the one who must persuade others to support the various initiatives in the cross-functional implementation of the program. On the other hand, the 'high level personnel' typically oversee the results, which the operational head is charged with achieving. In fact, much of the operational head's time may often be spent competing for bandwidth of the necessary support functions (e.g., HR, Security, Training, I.T.), among those functions' other primary initiatives, for which they are measured. For example, if the operational head, the 'brains and brawn' behind the program, is a mid-level manager, consider the increased difficulty in getting a share of the often very limited time of other functions, as opposed to a VP seeking that same interdepartmental assistance. As a practical matter this makes program implementation more difficult (difficult to get meetings with senior management, difficult to get other functions to spend their limited time supporting compliance initiatives, etc.) and less efficient. It seems to me if the on-the-ground compliance lead is less than a VP, there is little appearance of, or actual, authority.

b. In some organizations where the operational head currently reports to the governing authority, requiring the high level personnel to do so separately may have the effect of the governing authority receiving less practical detailed info, from seeing the operational head less.

2. Sec 8C2.5 (f) (3): consider changing the rebuttable presumption that a compliance program is not effective if "an individual within high-level personnel of the organization" is the offender to 'two or more' high-level personnel. The rationale behind this is that a program cannot necessarily prevent every instance of misconduct, particularly if it is well hidden; however, if more than one person is involved, there is at least one additional person beyond the main perpetrator who is aware of the malfeasance. If the second person does nothing it is likely a symptom that that program is not working.

3. General comment: there is some disagreement in the regulated community as to whether the compliance program is responsible for ensuring reasonable response steps to misconduct throughout the organization or just in relation to what comes directly to the attention of the compliance program through the hotline. It seems more appropriate that the program should have visibility into, and the ability

to become involved in further preventing, all illegal/unethical conduct.

4. Consider defining what 'other conduct inconsistent' with an effective program means. Does it include failure to discuss the code of conduct with subordinates? Failing to report a violation to management? Ignoring evidence of misconduct? These clarifications would give teeth to compliance programs. Should this screening also apply to promotions or just to hiring new substantial authority personnel? Finally, since employees take their cues from their immediate managers as well as from those at the top, shouldn't this be true of any person in management as well as those at the high levels of the organization?

Thank you for your consideration of these thoughts -

U.S. Sentencing Commission
One Columbus Circle, N.E., Suite 2-500
Washington, D.C. 20002-8002
Attention: Public Affairs

VIA FAX: 202/502-4699

PUBLIC COMMENT ON PROPOSED CHANGES TO ORGANIZATIONAL SENTENCING GUIDELINES

I appreciate the chance to provide the following comments on the proposed amendments to the Guidelines. Let me begin by thanking the Sentencing Commission for your efforts at thoughtfully reviewing these vital areas of ethics, law and policy. If recent events have taught us anything, it is that ethics and compliance issues are important to individual, corporate and our country's economic success. Corporate conduct sets an important example for all our citizens – and is a vital influence on the leaders of tomorrow.

As Francis Fukuyama has recently noted, "economic life reflects, shapes and underpins modern life itself." He goes on to note that "a nation's well-being, as well as its ability to compete, is conditioned by a single, pervasive cultural characteristic: the level of trust in society." To the extent that the proposed changes to the Organizational Sentencing Guidelines can help each of us – all of us – increase the level of trust we place in corporations - and the other significant elements of our economy - we will all be the better for it.

I have been a passionate ethics and compliance professional, advisor and teacher for many years and appreciate the opportunity to say a few words concerning the proposed amendments. The comments below are based on a colleague's thoughtful reflections already submitted to you....I have incorporated them herein by my colleague's express permission:

1. Sec. 8B2.1(b)(2) The proposal draws in DOJ's call for resources and authority, which is excellent. We respectfully submit, however, that the distinction between the day-to-day designer and manager of an organization's compliance program, and the 'high-level personnel' assigned to ensure implementation, is worth a closer look. In our experience, the latter is often a member of the organization's executive team who has taken on compliance as a secondary function, and is often quite disengaged from the actual on-the-ground challenges involved in the program's implementation. We suggest that the proposal's call for adequate authority and resources should be directed at the individual at the operational helm of the program, rather than at the executive, who generally has easier access and larger discretionary funding. To the extent that granting "authority" and "resources" is intended to facilitate the practical success of the program, it would make sense to clarify that it is the operational head that should have the authority and resources, since that is where the majority of the program challenges lie. The operational head of the program is the person who is the 'face' of the program throughout the organization on a daily basis, the one who must persuade others to

support the various initiatives in the cross-functional implementation of the program. On the other hand, the 'high level personnel' typically oversee the results, which the operational head is charged with achieving. In fact, much of the operational head's time may often be spent competing for bandwidth of the necessary support functions (e.g., HR, Security, Training, I.T.), among those functions' other primary initiatives, for which they are measured. For example, if the operational head, the 'brains and brawn' behind the program, is a mid-level manager, consider the increased difficulty in getting a share of the often very limited time of other functions, as opposed to a VP seeking that same interdepartmental assistance. As a practical matter this makes program implementation more difficult (difficult to get meetings with senior management, difficult to get other functions to spend their limited time supporting compliance initiatives, etc.) and less efficient. It seems to us that if the on-the-ground compliance leader is less than a VP, there is little appearance of, or actual, authority.

2. Sec 8C2.5 (f) (3): consider changing the rebuttable presumption that a compliance program is not effective if "an individual within high-level personnel of the organization" is the offender to 'two or more' high-level personnel. The rationale behind this is that a program cannot necessarily prevent every instance of misconduct, particularly if it is well hidden; however, if more than one person is involved, there is at least one additional person beyond the main perpetrator who is aware of the malfeasance. If the second person does nothing it is likely a symptom that that program is not working.

3. General comment: there is some disagreement in the regulated community as to whether the compliance program is responsible for ensuring reasonable response steps to misconduct throughout the organization or just in relation to what comes directly to the attention of the compliance program through the hotline. It seems more appropriate that the program should have the ability to become involved in preventing, all illegal/unethical conduct.

4. Consider defining what 'other conduct inconsistent' with an effective program means. Does it include failure to discuss the code of conduct with subordinates? Failing to report a violation to management? Ignoring evidence of misconduct? These clarifications would give teeth to compliance programs. Should this screening also apply to promotions or just to hiring new substantial authority personnel? Finally, since employees often take their cues from their immediate managers as well as from those at the top, shouldn't this be true of any person in management as well as those at the high levels of the organization?

5. Lastly – give corporations credit for going beyond the minimum requirements of a "compliance program." The most successful programs are those that combine the best elements of an ethics and a compliance program into a coherent and consistent organizational culture. If people are convinced that ethics are truly important to an organization, then they are all-the-more likely to both comply

with law and go beyond the minimum requirements of the law to create positive corporate culture and a strong civil society.

Thank You!