REPORT OF THE AD HOC ADVISORY GROUP ON THE ORGANIZATIONAL GUIDELINES – OCTOBER 7, 2003

II. EXECUTIVE SUMMARY

A. OVERVIEW

The Advisory Group's review of the operation and impact of the organizational sentencing guidelines, detailed in Part III of this Report, compelled the conclusion that the organizational sentencing guidelines have been successful in inducing many organizations, both directly and indirectly, to focus on compliance and to create programs to prevent and detect violations of law. The Advisory Group also concluded, however, that changes can and should be made to give organizations greater guidance regarding the factors that are likely to result in *effective* programs to prevent and detect violations of law. Two circumstances were particularly influential in shaping the Advisory Group's efforts in this respect.

First, the Advisory Group concluded that recent revelations of widespread misconduct in some of the nation's largest publicly held companies – misconduct perpetrated at the highest levels of corporate leadership that went undetected despite the existence of compliance programs – required evaluation of whether the compliance efforts precipitated by the organizational sentencing guidelines could be made more effective in preventing and detecting violations of law. The Advisory Group drew a variety of lessons from the legislative and regulatory responses to the organizational misconduct revealed over the last several years. For example, the Advisory Group concluded that the guidelines should better address the role of organizational leadership in ensuring that compliance programs are valued, supported, periodically re-evaluated, and operate for their intended purpose. Further, the recent emphasis by Congress and regulators on a number of additional factors, including organizational culture, improved internal reporting systems, adequate training, auditing and monitoring, and periodic risk assessments, also influenced the Advisory Group's analysis and final recommendations.

Second, much has changed in the field of organizational compliance since the advent of the organizational sentencing guidelines in November 1991. Over the last twelve years legal standards in a remarkably diverse range of fields have recognized organizational law compliance programs as important features of responsible organizational conduct. The legal standards which have emerged are often built upon the original organizational sentencing guidelines model. However, these standards have increasingly articulated more detailed and sophisticated criteria for identifying 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.

B. SEPARATE GUIDELINE FOR EFFECTIVE PROGRAMS

The Advisory Group proposes that the Sentencing Commission consider several specific

revisions to the current organizational sentencing guidelines to reflect these developments. The Advisory Group recommends that the Sentencing Commission promulgate a stand-alone guideline at §8B2.1 defining an "effective program to prevent and detect violations of law." (*See* Appendix B). Many of the concepts detailed in the proposed guideline provision are well recognized and are currently reflected in Application Note 3(k) to §8A1.2.

Within the proposed new guideline that is accompanied by a section-by-section analysis in Part IV, the Advisory Group recommends that the Sentencing Commission make the following modifications and additions:

- Emphasize the importance within the guidelines of an organizational culture that encourages a commitment to compliance with the law
- Provide a definition of "compliance standards and procedures"
- Specify the responsibilities of an organization's governing authority and organizational leadership for compliance
- Emphasize the importance of adequate resources and authority for individuals within organizations with the responsibility for the implementation of the effective program
- Replace the current terminology of "propensity to engage in violations of law" with language that defines the nature of an organization's efforts to determine when an individual has a reason to know, or history of engaging in, violations of law
- Include training and the dissemination of training materials and information within the definition of an "effective program"
- Add "periodic evaluation of the effectiveness of a program" to the requirement for monitoring and auditing systems
- Require a mechanism for anonymous reporting
- Include the phrase "seek guidance about potential or actual violations of law" within the criteria in order to more specifically encourage prevention and deterrence of violations of law as part of compliance programs
- Provide for the conduct of ongoing risk assessments as part of the implementation of an "effective program"

These proposed changes are intended to eliminate ambiguities revealed by twelve years of

sentencing experience and to describe more fully those essential attributes of successful compliance programs revealed by many years of program development and testing. They are also designed to respond to the lessons learned through the experience of national corporate scandals over the last two years and to synchronize the organizational sentencing guidelines with new federal legislation and emerging public and private regulatory requirements.

C. ROLE OF WAIVER IN COOPERATION

The Advisory Group also evaluated whether the current organizational sentencing guidelines adequately define self-reporting and cooperation, and whether the guidelines sufficiently encourage organizations to self-report their own illegal conduct and cooperate with federal law enforcement. The Advisory Group also examined whether the guidelines should provide commentary on role of the waiver of the attorney-client privilege and the work product protection doctrine in receiving credit for cooperation under the guidelines. These issues, particularly the question of whether the guidelines should be amended to provide some commentary on the role of waivers, are of great interest and concern to both the U.S. Department of Justice and to members of the defense bar.

As described at length in Part V of this Report, there is a significant divergence of opinion and perceptions among practitioners within the defense bar and the U.S. Department of Justice as to this important issue. Several of the critical issues examined by the Advisory Group include: (1) the appropriate use of, or need for, waivers of privilege as a part of the cooperation process; (2) the level of communication and understanding of the U.S. Department of Justice policies and practices, and whether there is consistency within various U.S. Attorney's Offices; and, (3) the value of suggesting that the organizational sentencing guidelines address the role of waivers in obtaining credit for cooperation. Following significant analysis and discussion, including a field survey of a number of United States Attorney's Offices, the Advisory Group has identified a possible approach to modifying the organizational sentencing guidelines in this regard.

Accordingly, the Advisory Group recommends adding clarifying language regarding the role of waiver of such privileges and protections for purposes of receiving sentencing credit based on cooperation with the government during the investigation and prosecution of an organization. In particular, it suggests amending the Commentary to §8C2.5 and adding Commentary to §8C4.1 as follows:

- Amend the Commentary at Application Note 12 of existing Section 8C2.5 by adding the following sentence:

> **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.

- Amend the Commentary at existing Section 8C4.1 by adding an Application Note 2 as follows:

> **<u>Waiver of Certain Privileges and Protections</u>. – 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, in some circumstances, 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.**

D. THE LITIGATION DILEMMA

The Advisory Group also studied whether the effectiveness of compliance programs could be enhanced, not only by focusing on internal organizational efforts, but also by addressing the exogenous pressures that temper the clear benefits of proactive structures. There is substantial evidence demonstrating that, as strong as the guidelines' compliance incentives are, equally weighty incentives created by forces *outside* the organization may persuade organizations to pursue less than optimal, and in some cases, ineffective compliance programs.

Specifically, as is explored at length in Part VI of this Report, the institution of truly effective programs, the auditing and monitoring that such programs require, and the training and internal reporting systems that such programs contemplate, all create a real risk that information generated by these admirable practices will be used by other potential litigants to harm the organization. This situation is often referred to as the "litigation dilemma," and it is recognized as one of the major greatest impediments to the institution or maintenance of truly effective compliance programs.

The litigation dilemma, and the related issue of waivers of attorney-client privilege and the work product protection doctrine, also have a potential negative impact on organizational incentives to self-report misconduct and cooperate in the investigation and rededication of that wrongdoing. Recognizing that the litigation dilemma cannot be resolved within the organizational sentencing guidelines themselves, the Advisory Group is compelled by practicality to signal the pivotal role that the organizational sentencing guidelines play in this dilemma. Consequently, the Advisory Group recommends that the Sentencing Commission initiate and foster further dialogue toward a resolution of the "litigation

dilemma" with appropriate policy makers, including Congress, based on the preliminary observations outlined by the Advisory Group in Part VI.

E. FAILURE TO IMPLEMENT A COMPLIANCE PROGRAM

The Advisory Group considered the recommendation received in the public comment for an increase in the culpability score of sentenced organizations for the absence of an "effective program." The Advisory Group recommends against such an increase because of the disparate impact that such an increase may have on small organizations, as is discussed more extensively at Part VII.

F. OTHER ASPECTS OF ORGANIZATIONAL SENTENCING

Finally, in the course of its work, the Advisory Group identified a number of areas relating to the sentencing of organizations that are beyond the scope of its mandate and term, but that are in strong need of further study and evaluation. Accordingly, as set forth more fully in Part VII, the Advisory Group recommends that the Sentencing Commission:

- Study the supervision of organizations on probation, particularly with respect to implementing compliance programs, and consider whether the statutory maximum of five years is too limiting for this and other purposes of probation

- Study the relationship of the fine table to the statutory maximum fine

- Evaluate the revised definitions of "loss" at §2B1.1 in the context of Chapter Eight and the impact upon organizational defendants

- Focus on training and outreach to small business organizations

The members of the Advisory Group wish to thank the Sentencing Commission for this opportunity to serve the public through its service these past eighteen months, and individual members stand ready to assist the Commission and other policy makers if called upon for further assistance.