

**SENTENCING TABLE**  
(in months of imprisonment)

Offense Level	Criminal History Category (Criminal History Points)						
	I (0 or 1)	II (2 or 3)	III (4, 5, 6)	IV (7, 8, 9)	V (10, 11, 12)	VI (13 or more)	
Zone A	1	0-6	0-6	0-6	0-6	0-6	
	2	0-6	0-6	0-6	0-6	0-6	
	3	0-6	0-6	0-6	0-6	0-6	
	4	0-6	0-6	0-6	2-8	4-10	6-12
	5	0-6	0-6	1-7	4-10	6-12	9-15
	6	0-6	1-7	2-8	6-12	9-15	12-18
	7	0-6	2-8	4-10	8-14	12-18	15-21
	8	0-6	4-10	6-12	10-16	15-21	18-24
Zone B	9	4-10	6-12	8-14	12-18	18-24	21-27
	10	6-12	8-14	10-16	15-21	21-27	24-30
	11	8-14	10-16	12-18	18-24	24-30	27-33
	12	10-16	12-18	15-21	21-27	27-33	30-37
Zone C	13	12-18	15-21	18-24	24-30	30-37	33-41
	14	15-21	18-24	21-27	27-33	33-41	37-46
	15	18-24	21-27	24-30	30-37	37-46	41-51
	16	21-27	24-30	27-33	33-41	41-51	46-57
	17	24-30	27-33	30-37	37-46	46-57	51-63
	18	27-33	30-37	33-41	41-51	51-63	57-71
	19	30-37	33-41	37-46	46-57	57-71	63-78
	20	33-41	37-46	41-51	51-63	63-78	70-87
	21	37-46	41-51	46-57	57-71	70-87	77-96
	22	41-51	46-57	51-63	63-78	77-96	84-105
	23	46-57	51-63	57-71	70-87	84-105	92-115
	24	51-63	57-71	63-78	77-96	92-115	100-125
	25	57-71	63-78	70-87	84-105	100-125	110-137
	26	63-78	70-87	78-97	92-115	110-137	120-150
	27	70-87	78-97	87-108	100-125	120-150	130-162
	28	78-97	87-108	97-121	110-137	130-162	140-175
	29	87-108	97-121	108-135	121-151	140-175	151-188
	30	97-121	108-135	121-151	135-168	151-188	168-210
	31	108-135	121-151	135-168	151-188	168-210	188-235
	32	121-151	135-168	151-188	168-210	188-235	210-262
	33	135-168	151-188	168-210	188-235	210-262	235-293
	34	151-188	168-210	188-235	210-262	235-293	262-327
	35	168-210	188-235	210-262	235-293	262-327	292-365
	36	188-235	210-262	235-293	262-327	292-365	324-405
	37	210-262	235-293	262-327	292-365	324-405	360-life
	38	235-293	262-327	292-365	324-405	360-life	360-life
	39	262-327	292-365	324-405	360-life	360-life	360-life
	40	292-365	324-405	360-life	360-life	360-life	360-life
	41	324-405	360-life	360-life	360-life	360-life	360-life
	42	360-life	360-life	360-life	360-life	360-life	360-life
	43	life	life	life	life	life	life

§5B1.1. Imposition of a Term of Probation

- (a) Subject to the statutory restrictions in subsection (b) below, a sentence of probation is authorized if:
- (1) the applicable guideline range is in Zone A of the Sentencing Table; or
  - (2) the applicable guideline range is in Zone B of the Sentencing Table and the court imposes a condition or combination of conditions requiring intermittent confinement, community confinement, or home detention as provided in subsection (c)(3) of §5C1.1 (Imposition of a Term of Imprisonment).

\* \* \*

Commentary

Application Notes:

1. *Except where prohibited by statute or by the guideline applicable to the offense in Chapter Two, the guidelines authorize, but do not require, a sentence of probation in the following circumstances:*

\* \* \*

~~(a)(A) Where in a case in the applicable guideline range is in Zone A of the Sentencing Table (i.e., the minimum term of imprisonment specified in the applicable guideline range is zero months). In such cases, a condition requiring a period of community confinement, home detention, or intermittent confinement may be imposed but is not required.~~

~~(b)(B) Where in a case in which the applicable guideline range is in Zone B of the Sentencing Table (i.e., the minimum term of imprisonment specified in the applicable guideline range is at least one but not more than six months).~~

- (i) *Except as provided in subdivision (ii) ~~in such cases~~, the court may impose probation only if it imposes a condition or combination of conditions requiring a period of community confinement, home detention, or intermittent confinement sufficient to satisfy the minimum term of imprisonment specified in the guideline range. For example, ~~wherein~~ a case in which the offense level is 7 and the criminal history category is II, the guideline range from the Sentencing Table is 2-8 months. In such a case, the court may impose a sentence of probation only if it imposes a condition or conditions requiring at least two months of community confinement, home detention, or intermittent confinement, or a combination of community confinement, home detention, and intermittent confinement totaling at least two months. The court, of course, may impose a sentence at a point within that 2-7 month range that is higher than the minimum sentence. For example, a sentence of probation with a condition requiring six months of community confinement or home detention (under subsection (c)(3)) would be sufficient to satisfy the requirements of this subdivision.*
- (ii) *The court may impose probation in a case in which the minimum term of the applicable guideline range is at least eight months, but only if the court imposes a*

condition (1) that the defendant shall serve a period of confinement sufficient to satisfy the minimum term of imprisonment specified in the applicable guideline range; except that at least one-half of that minimum term shall be served in a form of confinement other than home detention. For example, in a case in which the offense level is 11 and the criminal history category is I, the guideline range from the Sentencing Table is 8-14 months. In such a case, the court may impose a sentence of probation only if it imposes a condition or conditions requiring at least eight months of confinement, at least four months of which shall be in a form other than home detention (e.g., community confinement or intermittent confinement (or a combination of community confinement and intermittent confinement totaling at least four months)). The court, of course, may impose a sentence at a point within that 8-14 month range that is higher than the minimum sentence. For example, in a case in which the court imposes a sentence of 14 months, the court may impose a sentence of probation with any combination of community confinement, intermittent confinement, or home detention, as long as at least 4 of those months are served in a form of confinement other than home detention.

2. ~~Where~~In a case in which the applicable guideline range is in Zone C ~~or D~~ of the Sentencing Table (i.e., the minimum term of imprisonment specified in the applicable guideline range is eight months or more), the guidelines do not authorize a sentence of probation. See §5C1.1 (Imposition of a Term of Imprisonment).

\* \* \*

**§5C1.1. Imposition of a Term of Imprisonment**

\* \* \*

- (c) If the applicable guideline range is in Zone B of the Sentencing Table, the minimum term may be satisfied by --
- (1) a sentence of imprisonment; ~~or~~
  - (2) a sentence of imprisonment that includes a term of supervised release with a condition that substitutes community confinement or home detention according to the schedule in subsection (e), ~~provided~~except that (A) at least one month ~~is~~shall be satisfied by actual imprisonment; (B) the remainder of the minimum term specified in the guideline range must be satisfied by community confinement or home detention, except that if the minimum term of the applicable guideline range is at least eight months, at least one-half of that minimum term shall be served in a form of confinement other than home detention; or
  - (3) a sentence of probation that includes a condition or combination of conditions that substitute intermittent confinement, community confinement, or home detention for imprisonment according to the schedule in subsection (e) sufficient to satisfy the minimum term of imprisonment specified in the guideline range, except that if the minimum term of the applicable guideline range is at least eight months, at least one-half of that minimum term shall be

served in a form of confinement other than home detention.

~~(d) If the applicable guideline range is in Zone C of the Sentencing Table, the minimum term may be satisfied by--~~

~~(1) a sentence of imprisonment, or~~

~~(2) a sentence of imprisonment that includes a term of supervised release with a condition that substitutes community confinement or home detention according to the schedule in subsection (c), provided that at least one-half of the minimum term is satisfied by imprisonment.~~

\* \* \*

(ed) Schedule of Substitute Punishments:

\* \* \*

(fe) If the applicable guideline range is in Zone DC of the Sentencing Table, the minimum term shall be satisfied by a sentence of imprisonment.

#### Commentary

#### Application Notes:

\* \* \*

2. *Subsection (b) provides that where the applicable guideline range is in Zone A of the Sentencing Table (i.e., the minimum term of imprisonment specified in the applicable guideline range is zero months), the court is not required to impose a sentence of imprisonment unless a sentence of imprisonment or its equivalent is specifically required by the guideline applicable to the offense. ~~Where~~In a case in which imprisonment is not required, the court, for example, may impose a sentence of probation. In some cases, a fine appropriately may be imposed as the sole sanction.*
3. *Subsection (c) provides that where the applicable guideline range is in Zone B of the Sentencing Table (i.e., the minimum term of imprisonment specified in the applicable guideline range is at least one but not more than six months), the court has three options:*
  - (A) *It may impose a sentence of imprisonment.*
  - (B) (i) *Except as provided in subdivision (ii) ~~In such cases,~~ the court may impose probation only if it imposes a condition or combination of conditions requiring a period of community confinement, home detention, or intermittent confinement sufficient to satisfy the minimum term of imprisonment specified in the guideline range. For example, ~~wherein~~ a case in which the offense level is 7 and the criminal history category is II, the guideline range from the Sentencing Table is 2-8 months. In such a*

case, the court may impose a sentence of probation only if it imposes a condition or conditions requiring at least two months of community confinement, home detention, or intermittent confinement, or a combination of community confinement, home detention, and intermittent confinement totaling at least two months. The court, of course, may impose a sentence at a point within that 2-7 month range that is higher than the minimum sentence. For example, a sentence of probation with a condition requiring six months of community confinement or home detention (under subsection (c)(3)) would be sufficient to satisfy the requirements of this subdivision.

- (ii) *The court may impose probation in a case in which the minimum term of the applicable guideline range is at least eight months, but only if the court imposes a condition (I) that the defendant shall serve a period of confinement sufficient to satisfy the minimum term of imprisonment specified in the applicable guideline range; except that at least one-half of that minimum term shall be served in a form of confinement other than home detention. For example, in a case in which the offense level is 11 and the criminal history category is I, the guideline range from the Sentencing Table is 8-14 months. In such a case, the court may impose a sentence of probation only if it imposes a condition or conditions requiring at least eight months of confinement, at least four months of which shall be in a form other than home detention (e.g., community confinement or intermittent confinement (or a combination of community confinement and intermittent confinement totaling at least four months)). The court, of course, may impose a sentence at a point within that 8-14 month range that is higher than the minimum sentence. For example, in a case in which the court imposes a sentence of 14 months, the court may impose a sentence of probation with any combination of community confinement, intermittent confinement, or home detention, as long as at least 4 of those months are served in a form of confinement other than home detention.*
  
- (C) (i) *Except as provided in subdivision (ii),  $\Theta$ , it may impose a sentence of imprisonment that includes a term of supervised release with a condition that requires community confinement or home detention. In such case, at least one month ~~must~~ shall be satisfied by actual imprisonment and the remainder of the minimum term specified in the guideline range must be satisfied by community confinement or home detention. For example, ~~wherein~~ a case in which the guideline range is 4-10 months, a sentence of imprisonment of one month followed by a term of supervised release with a condition requiring three months of community confinement or home detention would satisfy the minimum term of imprisonment specified in the guideline range. The court, of course, may impose a sentence at a point within that 4-10 month range that is higher than the minimum sentence. For example, a sentence of two months of imprisonment followed by a term of supervised release with a condition requiring four months of community confinement or home detention (under subsection (c)(2)) would be within the guideline range.*

- (ii) *If the minimum term of the applicable guideline range is at least eight months, it may impose a sentence of imprisonment that includes a term of supervised release with a condition that requires community confinement or home detention. In such case, (I) at least one month shall be satisfied by actual imprisonment, (II) the remainder of the minimum term specified in the guideline range must be satisfied by community confinement or home detention, except that at least one-half of that minimum term shall be served in a form of confinement other than home detention. For example, in a case in which the applicable guideline range is 8-14 months, the court must impose a sentence of actual imprisonment of one month followed by a term of supervised release requiring a condition or conditions of at least seven months of confinement, at least four months of which shall be in a form other than home detention (e.g., community confinement). The court, of course, may impose a sentence at a point within that 8-14 month range that is higher than the minimum sentence. For example, in a case in which the court imposes a sentence of 14 months, the court must impose a sentence of actual imprisonment of at least one month followed by a term of supervised release requiring a condition or conditions of at least thirteen months of confinement, at least four months of which shall be in a form other than home detention (e.g., community confinement).*

~~The preceding examples illustrate sentences that satisfy the minimum term of imprisonment required by the guideline range. The court, of course, may impose a sentence at a higher point within the applicable guideline range. For example, where the guideline range is 4-10 months, both a sentence of probation with a condition requiring six months of community confinement or home detention (under subsection (c)(3)) and a sentence of two months imprisonment followed by a term of supervised release with a condition requiring four months of community confinement or home detention (under subsection (c)(2)) would be within the guideline range.~~

~~4. Subsection (d) provides that where the applicable guideline range is in Zone C of the Sentencing Table (i.e., the minimum term specified in the applicable guideline range is eight, nine, or ten months), the court has two options:~~

~~(A) It may impose a sentence of imprisonment.~~

~~(B) Or, it may impose a sentence of imprisonment that includes a term of supervised release with a condition requiring community confinement or home detention. In such case, at least one-half of the minimum term specified in the guideline range must be satisfied by imprisonment, and the remainder of the minimum term specified in the guideline range must be satisfied by community confinement or home detention. For example, where the guideline range is 8-14 months, a sentence of four months imprisonment followed by a term of supervised release with a condition requiring four months community confinement or home detention would satisfy the minimum term of imprisonment required by the guideline range.~~

~~The preceding example illustrates a sentence that satisfies the minimum term of imprisonment required by the guideline range. The court, of course, may impose a sentence at a higher point within the guideline range. For example, where the guideline range is 8-14 months, both a sentence of four months imprisonment followed by a term of supervised release with a condition requiring six~~

~~months of community confinement or home detention (under subsection (d)), and a sentence of five months imprisonment followed by a term of supervised release with a condition requiring four months of community confinement or home detention (also under subsection (d)) would be within the guideline range.~~

54. Subsection (ed) sets forth a schedule of imprisonment substitutes.

65. \* \* \*

76. ~~The use of substitutes for imprisonment as provided in subsections (c) and (d)~~ subsection (d) is not recommended for most defendants with a criminal history category of III or above. Generally, such defendants have failed to reform despite the use of such alternatives.

87. Subsection (fe) provides that, ~~wherein a case in which the applicable guideline range is in Zone DC of the Sentencing Table (i.e., the minimum term of imprisonment specified in the applicable guideline range is twelve months or more), the minimum term must be satisfied by a sentence of imprisonment without the use of any of the imprisonment substitutes in subsection (ed).~~

### Option Three:

#### §5B1.1. Imposition of a Term of Probation

(a) Subject to the statutory restrictions in subsection (b) below, a sentence of probation is authorized if:

- (1) the applicable guideline range is in Zone A of the Sentencing Table; or
- (2) the applicable guideline range is in Zone B, or in criminal history Category I of Zone C, of the Sentencing Table and the court imposes a condition or combination of conditions requiring intermittent confinement, community confinement, or home detention as provided in subsection (c)(3) of §5C1.1 (Imposition of a Term of Imprisonment).

\* \* \*

#### Commentary

#### Application Notes:

1. Except where prohibited by statute or by the guideline applicable to the offense in Chapter Two, the guidelines authorize, but do not require, a sentence of probation in the following circumstances:

(aA) Where in a case in which the applicable guideline range is in Zone A of the Sentencing Table (i.e., the minimum term of imprisonment specified in the applicable guideline range is zero months). In such cases, a condition requiring a period of community confinement, home detention, or intermittent confinement may be imposed but is not required.

(bB) ~~Where~~In a case in which the applicable guideline range is in Zone B, or in criminal history Category I of Zone C, of the Sentencing Table (i.e., the minimum term of imprisonment specified in the applicable guideline range is at least one but not more than six months). In such cases, the court may impose probation only if it imposes a condition or combination of conditions requiring a period of community confinement, home detention, or intermittent confinement sufficient to satisfy the minimum term of imprisonment specified in the guideline range. For example, ~~where~~ in a case in which the offense level is 7 and the criminal history category is II, the guideline range from the Sentencing Table is 2-8 months. In such a case, the court may impose a sentence of probation only if it imposes a condition or conditions requiring at least two months of community confinement, home detention, or intermittent confinement, or a combination of community confinement, home detention, and intermittent confinement totaling at least two months.

2. ~~Where~~In a case in which the applicable guideline range is in ~~Zone C or~~ criminal history Category II, III, IV, V, or VI of Zone C, or any criminal history category of Zone D of the Sentencing Table (i.e., the minimum term of imprisonment specified in the applicable guideline range is eight months or more), the guidelines do not authorize a sentence of probation. See §5C1.1 (Imposition of a Term of Imprisonment).

*Background:* This section provides for the imposition of a sentence of probation. The court may sentence a defendant to a term of probation in any case unless (1) prohibited by statute, or (2) where a term of imprisonment is required under §5C1.1 (Imposition of a Term of Imprisonment). Under 18 U.S.C. § 3561(a)(3), the imposition of a sentence of probation is prohibited where the defendant is sentenced at the same time to a sentence of imprisonment for the same or a different offense. Although this provision has effectively abolished the use of "split sentences" imposable pursuant to the former 18 U.S.C. § 3651, the drafters of the Sentencing Reform Act noted that the functional equivalent of the split sentence could be "achieved by a more direct and logically consistent route" by providing that a defendant serve a term of imprisonment followed by a period of supervised release. (S. Rep. No. 225, 98th Cong., 1st Sess. 89 (1983)). Section 5B1.1(a)(2) provides a transition between the circumstances under which a "straight" probationary term is authorized and those where probation is prohibited.

\* \* \*

#### **§5C1.1. Imposition of a Term of Imprisonment**

- (a) A sentence conforms with the guidelines for imprisonment if it is within the minimum and maximum terms of the applicable guideline range.
- (b) If the applicable guideline range is in Zone A of the Sentencing Table, a sentence of imprisonment is not required, unless the applicable guideline in Chapter Two expressly requires such a term.
- (c) If the applicable guideline range is in Zone B, or in criminal history Category I of Zone C, of the Sentencing Table, the minimum term may be satisfied by --
  - (1) a sentence of imprisonment; or
  - (2) a sentence of imprisonment that includes a term of supervised release with a

condition that substitutes community confinement or home detention according to the schedule in subsection (e), provided that at least one month is satisfied by imprisonment; or

- (3) a sentence of probation that includes a condition or combination of conditions that substitute intermittent confinement, community confinement, or home detention for imprisonment according to the schedule in subsection (e).
- (d) If the applicable guideline range is in criminal history Category II, III, IV, V, or VI of Zone C of the Sentencing Table, the minimum term may be satisfied by --
  - (1) a sentence of imprisonment; or
  - (2) a sentence of imprisonment that includes a term of supervised release with a condition that substitutes community confinement or home detention according to the schedule in subsection (e), provided that at least one-half of the minimum term is satisfied by imprisonment.

\* \* \*

#### Commentary

#### Application Notes:

1. *Subsection (a) provides that a sentence conforms with the guidelines for imprisonment if it is within the minimum and maximum terms of the applicable guideline range specified in the Sentencing Table in Part A of this Chapter. For example, if the defendant has an Offense Level of 20 and a Criminal History Category of I, the applicable guideline range is 33-41 months of imprisonment. Therefore, a sentence of imprisonment of at least thirty-three months, but not more than forty-one months, is within the applicable guideline range.*
2. *Subsection (b) provides that wherein a case in which the applicable guideline range is in Zone A of the Sentencing Table (i.e., the minimum term of imprisonment specified in the applicable guideline range is zero months), the court is not required to impose a sentence of imprisonment unless a sentence of imprisonment or its equivalent is specifically required by the guideline applicable to the offense. Wherein a case in which imprisonment is not required, the court, for example, may impose a sentence of probation. In some cases, a fine appropriately may be imposed as the sole sanction.*
3. *Subsection (c) provides that wherein a case in which the applicable guideline range is in Zone B, or in criminal history Category I of Zone C, of the Sentencing Table (i.e., the minimum term of imprisonment specified in the applicable guideline range is at least one but not more than six months), the court has three options:*
  - (A) *It may impose a sentence of imprisonment.*
  - (B) *It may impose a sentence of probation provided that it includes a condition of probation requiring a period of intermittent confinement, community confinement, or home detention, or combination of intermittent confinement, community*

confinement, and home detention, sufficient to satisfy the minimum period of imprisonment specified in the guideline range. For example, ~~wherein~~ a case in which the guideline range is 4-10 months, a sentence of probation with a condition requiring at least four months of intermittent confinement, community confinement, or home detention would satisfy the minimum term of imprisonment specified in the guideline range.

- (C) Or, it may impose a sentence of imprisonment that includes a term of supervised release with a condition that requires community confinement or home detention. In such case, at least one month must be satisfied by actual imprisonment and the remainder of the minimum term specified in the guideline range must be satisfied by community confinement or home detention. For example, ~~wherein~~ a case in which the guideline range is 4-10 months, a sentence of imprisonment of one month followed by a term of supervised release with a condition requiring three months of community confinement or home detention would satisfy the minimum term of imprisonment specified in the guideline range.

The preceding examples illustrate sentences that satisfy the minimum term of imprisonment required by the guideline range. The court, of course, may impose a sentence at a higher point within the applicable guideline range. For example, ~~wherein~~ a case in which the guideline range is 4-10 months, both a sentence of probation with a condition requiring six months of community confinement or home detention (under subsection (c)(3)) and a sentence of two months imprisonment followed by a term of supervised release with a condition requiring four months of community confinement or home detention (under subsection (c)(2)) would be within the guideline range.

4. Subsection (d) provides that ~~wherein~~ a case in which the applicable guideline range is in criminal history Category II, III, IV, V, or VI of Zone C of the Sentencing Table (~~i.e., the minimum term specified in the applicable guideline range is eight, nine, or ten months~~), the court has two options:

- (A) It may impose a sentence of imprisonment.
- (B) Or, it may impose a sentence of imprisonment that includes a term of supervised release with a condition requiring community confinement or home detention. In such case, at least one-half of the minimum term specified in the guideline range must be satisfied by imprisonment, and the remainder of the minimum term specified in the guideline range must be satisfied by community confinement or home detention. For example, ~~wherein~~ a case in which the guideline range is 8-14 months, a sentence of four months imprisonment followed by a term of supervised release with a condition requiring four months community confinement or home detention would satisfy the minimum term of imprisonment required by the guideline range.

The preceding example illustrates a sentence that satisfies the minimum term of imprisonment required by the guideline range. The court, of course, may impose a sentence at a higher point within the guideline range. For example, ~~wherein~~ a case in which the guideline range is 8-14 months, both a sentence of four months imprisonment followed by a term of supervised release with a condition requiring six months of community confinement or home detention (under subsection (d)), and a sentence of five months imprisonment followed by a term of supervised release with a condition requiring four months of community confinement or home detention (also under subsection

*(d)) would be within the guideline range.*

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6. *There may be cases in which a departure from the guidelines by substitution of a longer period of community confinement than otherwise authorized for an equivalent number of months of imprisonment is warranted to accomplish a specific treatment purpose (e.g., substitution of twelve months in an approved residential drug treatment program for twelve months of imprisonment). Such a substitution should be considered only in cases wherein which the defendant's criminality is related to the treatment problem to be addressed and there is a reasonable likelihood that successful completion of the treatment program will eliminate that problem.*

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8. *Subsection (f) provides that, wherein a case in which the applicable guideline range is in Zone D of the Sentencing Table (~~i.e., the minimum term of imprisonment specified in the applicable guideline range is twelve months or more~~), the minimum term must be satisfied by a sentence of imprisonment without the use of any of the imprisonment substitutes in subsection (e).*

**10. Proposed Amendment: Discharged Terms of Imprisonment**

**Issue for Comment:** *The Commission requests comment regarding whether subsections (b) and (c) of §5G1.3 (Imposition of a Sentence on a Defendant Subject to an Undischarged Term of Imprisonment) should be expanded to apply to discharged terms of imprisonment. If so, how should this be accomplished? Alternatively, should the Commission provide a structured downward departure in cases in which the discharged term of imprisonment resulted from offense conduct that has been taken into account in the determination of the offense level for the instant offense of conviction? If so, how should such a departure be structured? For example, should the extent of the departure be linked to the length of the discharged term of imprisonment?*

*The Commission further requests comment regarding any other issue that should be resolved pertaining to the overall application of §5G1.3*

# Summaries of Responses to Request for Public Comment

(Federal Register, Vol. 66, No. 182, Sept. 19, 2001)

## I. Issues Related to the Organizational Guidelines

### Practitioners' Advisory Group

Jim Felman & Barry Boss, Co-Chairs  
c/o Asbill, Junkin, Moffitt & Boss, Chartered  
Washington, DC 20009

PAG supports the formation of a group to review the organizational guidelines. The membership should be broad, representing as many perspectives as possible from a variety of organizations and industries. PAG includes among possible members: corporate officers and/or legal counsel responsible for their company's compliance programs, prosecutors, defense attorneys, compliance and ethics specialists from academia and the private sector, and senior executives from large and small corporations. PAG sees a particular need for including small companies in the membership of the advisory group as they face unique barriers in meeting the seven compliance criteria in §8A1.2 – criteria that were developed with large companies in mind. For instance, small companies often complain that they lack sufficient resources or expertise to implement effective compliance programs.

PAG believes that the organizational guidelines have been very effective and that major changes are not needed at this time. Although, the success of a company's compliance program rests largely upon the leadership's commitment to an ethical corporate culture, PAG questions whether objective criteria can adequately measure something as inherently subjective as a company's ethical culture. The advisory group should examine ideas such as integrity-based compliance, but PAG advises against replacing the current seven criteria with a substantially different scheme. Rather, the advisory group should focus on improving or clarifying the criteria that are in place and examining whether the fine ranges and culpability score values are in need of adjustment.

PAG suggests that the group consider whether the organizational guidelines should explicitly require companies to audit and test their compliance programs. The advisory group should also consider clarifying the language "propensity to engage in criminal activity" found in §8A1.2(k)(3), as it has caused confusion. PAG also suggests that the group consider clarifying what constitutes "cooperation" to qualify a company for a two or three point reduction in culpability score under §8C2.5(g)(1) or (2). Specifically, §8C2.5 could be clarified on whether a waiver of privilege is necessary in circumstances where it may be required by the Department of Justice.

PAG recommends that the group have a term of not more than two years in which to complete its review.

PAG would specifically nominate Gregory Wallace for membership in the group. Mr. Wallace is a litigation partner at Kaye Scholer LLP where he concentrates on internal investigations, corporate compliance, and white collar crime. He is a former Assistant United States Attorney for the Eastern district of New York, where he prosecuted white collar criminal cases. Mr. Wallace helped start and co-chaired the PLI's Seminar on Corporate Compliance and he has written and lectured on the organizational guidelines.

#### **Coalition for Ethics and Compliance Initiatives**

Jay Cohen

Vice Chairman of Compliance, Oxford Health Plans

Chair, CECI Oversight Committee

CECI supports the formation of an ad hoc advisory group to review the application and impact of the organizational guidelines and make recommendations for improving them. Over the past ten years, there have been numerous legal and regulatory developments outside the sentencing context that bear on the application and interpretation of the organizational guidelines. These include agency guidelines on compliance programs, voluntary disclosure programs, case law, False Claims Act cases, corporate integrity and consent decrees, Department of Justice guidelines for prosecution, and Supreme Court cases in the areas of sexual harassment and punitive damages. Because many of these sources build upon, go beyond, interpret, or even conflict with the organizational guidelines, the advisory group should take them into consideration. The advisory group should be given sufficient time to conduct a careful, thoughtful and extensive review of the impact of the organizational guidelines.

CECI suggests that the group include compliance and ethics officers, other experts on compliance and ethics, and members of the bar who represent corporations in criminal matters. These parties would be able to address the day-to-day implementation of compliance programs within a corporation as well as the impact of the other legal and regulatory developments discussed above.

CECI would welcome the challenge of participating in the advisory group process. A separate letter outlining CECI's mission, objectives, membership, and ability to assist the Commission is attached.

**Cindy R. Alexander, Ph.D.<sup>1</sup>**

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Department of Justice  
Washington, DC

Ms. Alexander highlights the importance of considering how the organizational guidelines's treatment of compliance programs affects the incentives for compliance on individuals within corporations. She refers the Commission to an article by William S. Laufer, *Corporate Liability, Risk Shifting, and the Paradox of Compliance*,<sup>2</sup> for a critical analysis of this issue. Additionally, she would be willing to discuss other sources with the Commission's staff that may be helpful in developing an agenda for the advisory group.

**Ethics and Policy Integration Center**

Kenneth W. Johnson  
Director  
Washington, DC

EPIC specifically endorses the comment submitted by the Ethics Resource Center (submitted June 4, 2001), the Coalition for Ethics and Compliance Initiatives, and Mr. Charles Howard. Additionally, EPIC suggests two issues that might be considered by the advisory group: (1) whether the organizational guidelines apply to Native American Tribal Government; and (2) the practical aspects of applying the organizational guidelines to Native American Tribal Governments and to micro/small to medium sized enterprises.

EPIC recommends that the ad hoc advisory group include members representing the views of Native American Tribal Government and small businesses. Mr. Johnson would be willing to serve as a member of the advisory group in that capacity. Mr. Johnson is a tribal member and an attorney. He has experience owning and running a small business, representing small business clients, and consulting in the ethics and compliance industry.

**Ethics Officer Association**

Edward S. Petry  
Executive Director  
Belmont, Massachusetts

EOA believes that the organizational guidelines have had a major impact in promoting ethical

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<sup>1</sup>Ms. Alexander's comments do not reflect any official views of the U.S. Department of Justice. Ms. Alexander is an economist whose past research has focused on corporate compliance and on the effect of the organizational guidelines.

<sup>2</sup>52 VAND. L. REV. 1343 (1999).

and law-abiding corporate conduct and it supports the formation of the ad hoc advisory group. EOA also expresses its desire to continue serving as a forum for discussing ethics and compliance programs and would welcome the opportunity to serve on the advisory group on the organizational guidelines or to assist the Commission in other ways.

**Alliance for Health Care Integrity**

Robert Olsen, Ph.D., M.P.H.

Executive Director

Corona, California

The Alliance for Health Care Integrity supports the formation of an ad hoc advisory group.

The Alliance proposes that the scope of the group's review include industry-wide issues, such as efficiency and effectiveness of existing ethics and compliance programs at preventing statutory and regulatory violations; best practices for organizing, implementing and evaluating such systems; background and training of staff; and policies related to the investigation and enforcement of legal and ethical violations. The Alliance believes that the focus should be on strategies to enhance the efficiency and effectiveness of the current, largely compliance-based, organizational guidelines. It also supports broadening compliance-based programs to include integrity-driven ones.

The Alliance recommends that the advisory group be given at least one year to complete its mission, but notes that two or three years would be a more realistic in light of the challenges that the advisory group will face. The advisory group should hold quarterly meetings with conference calls once or twice a quarter. Deadlines and expectations for the advisory group should be clear from the outset and could be decided by a steering committee comprised of Commission staff and initial group appointees.

The Alliance recommends membership of the advisory group include industry representatives (a mix of corporate officers, management, supervisors and line staff), scholars, experts in compliance and business ethics, representatives from governmental and quasi-governmental bodies, and other groups as appropriate. Because the Alliance is dedicated to integrating compliance, ethics, and corporate responsibility in the health care field, it would welcome the opportunity to participate in the advisory group. The Alliance attached the organization's prospectus and a copy of its letter of February 21, 2001 to the Commission which argues for a greater rule for integrity based programs.

### **Defense Industry Initiative**

Richard J. Brednar  
DII Coordinator  
Crowell & Moring, LLP  
Washington, DC

DII supports the formation of an ad hoc advisory group to review the organizational guidelines. DII is a private organization of nearly 50 defense contractors committed to practicing high levels of business ethics. It believes that it would bring an important perspective to the advisory group and would welcome the opportunity to serve as a member. A list of DII signatories is attached.

### **Lockheed Martin**

Nancy McCready Higgins  
Vice President, Ethics and Business Conduct  
Bethesda, Maryland

Ms. Higgins supports the formation of an ad hoc advisory group to review the organizational guidelines and to examine how they can be made even more effective in preventing criminal behavior and raising the standards of ethical business conduct. Ms. Higgins would be available to serve as a member of such a group. Ms. Higgins has been involved in the development and implementation of corporate ethics and compliance programs at Lockheed Martin Corporation and at Boeing Company, both original signatories to the Defense Industry Initiative Business Ethics and Conduct.

### **Compliance Systems Legal Group**

Win Swenson  
Partner  
Takoma Park, Maryland

Mr. Swenson supports the formation of an ad hoc advisory group on the organizational guidelines. He believes that the portions of Chapter Eight that generate the most public concern, and should form the primary focus of the advisory groups review, are those dealing with credit for corporate compliance programs. Mr. Swenson stresses that while there are relatively few cases dealing with Chapter Eight or credit for compliance systems, the impact of the pro-compliance policy is extensive. Mr. Swenson refers the Commission to his article, *A Call to Action – Creating a Voice (and Ears) for the Compliance Ethics Field*,<sup>3</sup> which summarizes some ways in which the current legal and enforcement environment is inimical to Chapter Eight's pro-compliance policy goals. He recommends that the advisory group's focus extend beyond

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<sup>3</sup>Joe Murphy & Win Swenson, *A Call to Action – Creating a Voice (and Ears) for the Compliance Ethics Field*, PREVENTION OF CORPORATE LIABILITY, July 2001, at 1 (see "The Need").

potential amendments to the definition of an effective program and examine the broader legal and enforcement environment in which the organizational guidelines's compliance provisions must operate. Mr. Swenson recommends that the advisory group look at these issues and present proposals on how to address them, either through dialogue with other agencies or legislation aimed at bringing greater rationality to existing inconsistencies. He also sees a strong need for an emphasis on "vetting" the potential issues so that the advisory group can identify the "true needs" of the community.

Mr Swenson believes that it is premature to comment on the past proposals made to the Commission on the organizational guidelines with one exception. He does not believe that data or experience generally support the need to heighten the importance of auditing or other evaluative techniques in the definition of "an effective" compliance program.

Mr. Swenson emphasizes the importance of including a broad cross-section of recognized experts in the field in the advisory group's membership, with a focus on practitioners instead of academic scholars. To ensure that the advisory group has a substantial linkage to the compliance and ethics field, Mr. Swenson recommends that one or more members be selected from the Coalition for Ethics Compliance Initiatives. Mr. Swenson recommends that the advisory group be given a time frame of at least two years.

Mr. Swenson recommends that the advisory group be "technically grounded" in the Commission's practices and statutory framework so as to avoid impractical and unrealistic recommendations and maximize the utility of such a group. This could be accomplished by dedicating a staff member to the group or providing a Commission liaison. Mr. Swenson would be pleased to serve the advisory group in that capacity, based upon his past experience at the Commission.

#### **St. Joseph's/Candler Health Systems**

Jane Adams Nangle  
Corporate Compliance Officer  
Savannah, Georgia

St. Joseph's/Candler Health Systems recognizes that the organizational guidelines have dramatically impacted business practices and supports the formation of an ad hoc advisory group. Such a group would foster open discussion with representatives of industry and government about the benefits and the burdens as well as the workable and difficult provisions of the organizational guidelines and to evaluate any potential changes.

St. Joseph's/Candler believes that membership should be large enough to represent a cross-section of industry. The health care industry is particularly interested in being represented on any advisory group considering new or revised guidelines. St. Joseph's/Candler sees a benefit in including in the group large and small health care providers who have either been sentenced under the organizational guidelines or settled to avoid sentencing. St. Joseph's/Candler also

recommends the inclusion of federal agencies and district court judges that administer the organizational guidelines.

St. Joseph's/Candler cautions that corporate compliance programs are not one size fits all. Although there are some calls to make the criteria more specific, the organizational guidelines should remain a general and flexible framework for measuring corporate culture. While non-ethical business practices may not be actionable under law, St. Joseph's/Candler believes that it should be weighed in at the sentencing stage.

St. Joseph's/Candler also suggests examining the impact of sanctions on tax-exempt organizations. Sentencing and fines effect share-holder owned corporations very differently than they effect non-profit entities. In the first instance, dividends and/or stocks fall. In the second, funds available to provide services to the community decrease. St. Joseph's/Candler suggests recognizing that substantial fines levied against a tax-exempt health care provider removes funds from the community that would otherwise be used to benefit the general public. Under §8C4.8, that defendant would qualify for a downward departure.

The advisory group should also reconsider whether early concerns about including environmental cases in Chapter Eight are still merited.

**IBJ Whitehall Financial Group**

Keith T. Darcy  
Executive Vice President  
New York, New York

Mr. Darcy supports the creation of an ad hoc advisory group in response to the proposed changes to Chapter Eight. Its creation would be consistent with the Commission's outreach to its various constituencies and openness to new ideas. Mr. Darcy suggests that the membership consist of serious-minded legal, ethics, and compliance professionals whose respect for the organizational guidelines has been established. It should represent a cross-section of leaders from business, nonprofit and the academic communities. Mr. Darcy would welcome the opportunity to be of service to the Commission in this regard.

**Shell Oil Company**

Jerome Adams  
Corporate Ethics and Compliance Officer  
Houston, Texas

Shell supports the formation of an ad hoc advisory group to review the organizational guidelines and recommends that the group include, among others, representatives from corporate ethics and compliance office. Shell would be willing to send a corporate representative to participate in this work.

Shell also recommends that the advisory group employ a rigorous process, such as an “after action review” which is used by the U.S. military and many U.S. corporations. This review process can be summarized in six steps:

1. What was the original intent of the action being reviewed?
2. What exactly happened and why?
3. What have we learned?
4. What do we know now and what actions should we take?
5. Take actions identified in 4.
6. Tell others who need to know what was learned.

### **PG&E Corporation**

Eric Pressler

Director, Legal Compliance and Business Ethics

San Francisco, California

Mr. Pressler believes that the organizational guidelines have achieved a great deal in promoting effective compliance management in corporations and he strongly supports the formation of an ad hoc advisory group to consider improvements on their operation. Mr. Pressler recommends that the advisory group look beyond the guidelines to the operation and impact in the corporate environment. Issues that the advisory group might consider would include (1) promotion of a more consistent approach to compliance and ethics between and across industries, and (2) improvement of compliance and ethics management in corporations that have established programs.

Mr. Pressler recommends that the membership include ethics officers and a representative from the Ethic Officer Association or the Coalition for Ethics and Compliance Initiatives.

Membership should not be exclusively a legal constituency. Mr. Pressler would be honored to serve as a member of the advisory group and attached information on his qualifications.

### **Charles L. Howard**

Partner

Shipman & Goodwin, LLP

Hartford, Connecticut

Mr. Howard supports the formation of an ad hoc group to study possible revisions to the organizational guidelines. He suggests that the group consist of no more than fifteen members and include prosecutors and judges, business ethics officers, private practitioners (both criminal defense counsel and counsel experienced in business ethics), and academicians. The group should focus on business ethics and compliance issues and should be given 18 months in which to complete its review. Mr. Howard also expresses his desire to serve on the advisory group and includes his credentials for the Commission’s review.

Mr. Howard includes his letter of April 3, 2001, in which he urges the Commission articulate

criteria that would constitute a presumptive “safe harbor” for a “reporting system whereby employees and other agents could report criminal conduct by others within the organization without fear of retribution.” §8A1.2, comment. (n.3(k)(5)).

**David F. Axelrod**

Partner

Vorys, Sater, Seymour, and Pease LLP  
Washington, DC

**Lisa A. Kuca**

Director of Corporate Compliance

H&K Investigative Solutions LLC  
Washington, DC

Mr. Axelrod and Ms. Kuca support the establishment of the ad hoc advisory group but recommend that its scope be limited to the criteria for an effective compliance program listed in §8A1.2, comment (n.3(k)). Providing more guidance as to what constitutes an effective compliance program will require a delicate balance. Compliance programs are not one size fits all and too much detail could easily be worse than too little. Corporate compliance is quantitatively different from other areas of the guidelines, in that its focus is more on corporate governance than punishment, and it deserves separate and detailed consideration.

Mr. Axelrod and Ms. Kuca suggest a smaller “executive” group be created, comprised of ten to twelve members which would work close with the Commission. The executive group could function as a liaison between a larger group of interested parties and the Commission. This would enable the group to consider a large number of proposals while only passing on the best and most viable for the Commission’s full consideration. Selection of the membership should focus on particular skill sets and experience in corporate compliance and corporate governance issues. Relevant skills may be possessed by in house and outside corporate counsel, compliance officers, compliance educators, risk managers, auditors, and internal investigators. The larger group would include representatives from a variety of industries.

Mr. Axelrod and Ms. Kuca suggest that the Commission should give the executive group a clear mission statement. It should identify “best practices” from a variety of sources and industries as well as cases and other authorities on the subject. The executive group should also seek to achieve consensus independently so as to minimize the burden on the Commission.

Both Mr. Axelrod and Ms. Kuca would be pleased to assist the Commission with this endeavor. Included is additional information about their credentials and backgrounds.

**American Chemistry Council and General Electric Company**

Sidley Austin Brown & Wood  
Washington, DC

The Council represents the leading companies (including GE) engaged in the business of chemistry. The Council believes that the organizational guidelines have had a tremendous impact on the implementation of compliance and business ethics programs over the past ten years and that there is no need to revise them at this time. Absent indications that the organizational

guidelines are deficient, there is no need to create an ad hoc advisory group to review proposed changes to the organizational guidelines. To the extent that the docket materials do raise issues for consideration, they appear to be outside of the Commission's charter and beyond the sentencing power of the Federal courts.

If an ad hoc advisory group is formed, the Council is interested in participating. It suggests that the membership should include a wide range of users with practical experience. Small businesses and other companies with limited resources for implementing compliance programs should be included.

**General Electric**

E. Scott Gilbert  
Fairfield, Connecticut

GE believes that the current definition of an effective compliance program has worked well and that there is no need for extensive modification. If an ad hoc advisory group is formed, GE would like to participate.

**Jennifer Arlen**

Visting Professor of Law, Yale Law School  
New Haven, Connecticut

Ms. Arlen supports the formation of the ad hoc advisory group and the proposals that have been made to date. She believes that the group should have nine to twelve members with staggered terms. Membership should be comprised primarily of disinterested parties, such as academics and scholars, but also include corporations, prosecutors, and judges.

Ms. Arlen would like to serve on this committee. She also recommends Renier Kraakman (Harvard Law School), Mark Cohen (Owen School of Management, Vanderbilt Law School), John Coffee (Columbia Law School), Kate Stith (Yale Law School), and Susan Rose-Ackerman (Yale Law School).

**Paul Fiorelli**

Director  
Xavier Center for Business Ethics and Social Responsibility  
Cincinnati, Ohio

Mr. Fiorelli supports the formation of a ad hoc advisory group comprised of outside practitioners and academics. He would be honored to assist in any capacity appropriate.

**Mark Cohen**

Director

Vanderbilt Center for Environmental Management Studies

Nashville, Tennessee

Mr. Cohen supports the formation of an ad hoc advisory group to review the organizational guidelines and suggests that the group include corporate managers, U.S. Attorneys, regulatory agencies, the defense bar, ethics officers, and scholars who study both corporate crime and punishment as well as organizational behavior and economics. Mr. Cohen specifically recommends Win Swenson for membership. He also suggests that the group should consider crimes that are not currently covered by Chapter Eight and begin the process of filling those holes.

**Linda K. Treviño**

Professor of Organizational Behavior

Chair, Department of Management and Organization

Cook Fellow in Business Ethics

Pennsylvania State University

University Park, Pennsylvania

Ms. Treviño encourages the Commission to form an ad hoc advisory group to review the organization guidelines. She recommends that the group include a wide array of representatives, including academics, ethics officers, and smaller companies. Ms. Treviño suggests that the group consider giving more attention to informal organizational characteristics, like a commitment to ethics by a company's executives.

**Richard Gruner**

Professor of Law

Whittier Law School

Costa Mesa, California

Mr. Gruner supports the formation of the ad hoc advisory group on the organizational guidelines. He suggests that the group begin by looking at past sentencing trends to identify patterns in organizational convictions. He also suggests looking into organizational probation as a useful sentencing tool. The group should look to the guidelines for compliance programs created by other agencies and consider giving more detailed grounds for evaluating the quality of compliance programs for sentencing purposes. The group should solicit public testimony about "best practices" and failure modes. Membership of the group should include a wide array of experienced parties, including prosecutors, probation officers, members of the defense bar, and academics.

**W. Michael Hoffman**  
Executive Director  
Bentley College  
Waltham, Massachusetts

Mr. Hoffman supports the formation of the ad hoc advisory group and proposed revisions to the organizational guidelines. He suggests that some of the larger academic associations, such as SBE, APPE, and ISBEE, could be helpful to the advisory group. Additionally, Mr. Hoffman would be pleased to serve on the group.

**Jayne W. Barnard**  
Cutler Professor of Law  
The College of William and Mary, School of Law  
Williamsburg, Virginia

Ms. Barnard supports the formation of the ad hoc advisory group. She suggests that the group include practitioners, academics, and members of the expert community and that membership should have ongoing informal contact with the Commission staff. She suggests that membership be by invitation only and that the group should be set up for three years.

Specifically, Ms. Barnard suggests that the group examine the “safe harbor” provision as the Department of Justice’s practices in this area seem to be “all over the place.” She is skeptical about extending the protections of the existing guidelines to “ethical” behavior as many of these programs are self-congratulatory and lack substance or impact.

**K&G**

*This comment was received via electronic mail and did not include a name.*

K&G recommends that the ad hoc advisory group consider the following changes: (1) require companies to have a separate and independent senior level compliance function; (2) recommend that companies change their board committees from “Audit Committees” to “Audit and Compliance Committees;” and (3) recommend that compliance functions go beyond simple technical regulatory compliance.

## **II. Issues Related to the Impact of Federal Sentencing Guidelines on Native Americans in Indian Country**

### **Ernest Mackel**

Ramah, New Mexico

States that Native Americans in Southwestern states have been subject for many years to harsher sentences than others who commit the same crime because of federal jurisdiction over Indian land. Asserts that offenders convicted in the state legal system usually receive parole for a first offence compared with Native Americans who usually receive the maximum penalty because they are sentenced under federal law.

Makes several observations regarding the drug trade on the Zuni Reservation and its apparent ability to operate free from the scrutiny of local law enforcement. Asserts that first time offenders should be granted some leniency in their sentences and asks that the ad hoc committee take this into consideration.

### **Kevin Washburn**

Member of Chickasaw Nation of Oklahoma  
Arlington, Virginia

Submits his resume through email via John P. Elwood. A former federal prosecutor who handled Indian country prosecutions in New Mexico.

### **Celia Rumann**

Assistant Professor  
University of St. Thomas School of Law  
Minneapolis, Minnesota

Volunteers her assistance to any ad hoc committee that is formed. Former Federal Public Defender for 10 years in Arizona.

### **Terry L. Pechota**

Viken, Viken, Pechota, Leach & Dewell, LLP  
Rapid City, S.D.

Supports idea of ad hoc committee and suggests that its membership include Indian people who are familiar with both traditional and tribal forms of government.

**Harold Gus Frank**

Chairman

Forest County Potawatomi Community  
Crandon, Wisconsin

Supports idea of an ad hoc committee. Suggests that the Commission go further and form a permanent formal group that would have authority and review responsibility over any sentencing changes. Suggests that membership be three to four years, and comprised of tribal members, scholars, representatives from civil rights organizations, the DOJ and Federal Judges. Suggests that the scope of the committee be broad.

**John V. Butcher**

Assistant Federal Public Defender, District of New Mexico

The Federal Public and Community Defenders, along with the Practitioners' Advisory Group, support the formation of a "broad based" ad hoc advisory committee. Cites a plethora of statistics regarding the impoverishment of Native American communities; states that this poverty gives rise to the high crime rate. Suggests that long incarceration periods have not curtailed Native American crime.

Suggests that the Commission seek broad based input in forming the committee and include the involvement of: Federal Public and Community defenders, the C.J.A. Panel attorneys (based on experience defending Native Americans), the National Congress of American Indians, the Hon. Robert Yazzie, Chief Judge of the Navajo Supreme Court, and Dr. Dewey J. Ertz of South Dakota. Suggests that the scope of the committee include possible amendments or downward departures concerning Indian Reservation cases.

**David C. Inglesias**

U.S. Attorney, District of New Mexico  
Albuquerque, New Mexico

Suggests that the scope of the ad hoc committee include a statistical review of sentences served by Native Americans in federal prison in comparison to sentencing in state courts for similar offenses. The study should include consideration of a defendant's criminal history and recidivism rates. Any study regarding the impact of the guidelines on Native Americans should take into consideration the 1993-1998 Violent Victimization and Race data released by the Bureau of Justice Statistics in March, 2001. A comparison of felony and misdemeanor conduct should be considered as well.

The committee should serve at least six months with its membership comprised of representatives from: federal prosecutors from non-280 states, New Mexico, the Attorney General's Native American Issues Subcommittee, victim/witness advocates, tribal, state and federal agencies and the tribal judiciary.

**The Honorable Lawrence L. Piersol**  
Chief Judge, United States District Court  
District of South Dakota  
Sioux Falls, South Dakota

Supports the formation of a broad based ad hoc committee with representation from interested persons in affected federal jurisdictions.

**Joe J. McKay**  
Attorney and member of Blackfeet Indian Tribe  
Browning, Montana

Supports the formation of an ad hoc committee. Suggests that the scope of the committee include consideration of the impact of the sentencing guidelines on Indians in Indian Country. In addition, he suggests that the committee look at sentences meted out to Indians vs. non-Indians in the Federal system as a way to gain insight into whether Indians are being treated consistently within the federal system as compared to other ethnicities as well as whether Indians are being impacted more or less disparately than whites. He suggests that the ad hoc committee be formed for a term of 12 to 18 months and submit a "white paper" to the Commission with its recommendations. Lists eight categories of individuals to make up the membership of the committee.

**William Kindle**  
President, Rosebud Sioux Tribe  
Rosebud, South Dakota

Raises four points regarding the impact of the guidelines on Native Americans: (1) suggests that the tribal courts should maintain control over some crimes; (2) suggests that court appointed attorneys do not serve their Native American clients well; (3) suggests that the availability of an interpreter for Native Americans who do not speak English is an essential and vital part of the federal court operations; and (4) give sentencing judges more discretion.

**Alfred Peone**  
Chairman, Spokane Tribe of Indians  
Wellpinit, Washington

Supports the idea of an ad hoc advisory group; suggests that applications from the members of both the National Council of American Indians and the Native American Rights Fund be solicited for membership in the committee.



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**(Federal Register, Vol. 66, No. 182, Sept. 19, 2001)**

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November 5, 2001

Honorable Diana E. Murphy, Chair  
United States Sentencing Commission  
One Columbus Circle, N.E.  
Suite 2-500, South Lobby  
Washington, D.C. 20002-8002

Re: Organizational Sentencing Guidelines Ad Hoc Advisory Group

Dear Judge Murphy:

The Practitioners' Advisory Group (the "PAG") to the United States Sentencing Commission submits this letter in response to the Commission's September 19 notice (66 Fed. Reg. 48306) for advice on the make-up and objectives of an ad hoc advisory group that the Commission is considering appointing to review the Organizational Sentencing Guidelines ("OSG"). As set forth below, the PAG supports the formation of such a group, which should have a well-defined mission and a broad-based membership.

At the outset, the PAG regards the OSG as a success for which the Commission deserves great credit. Viewed from the perspective of their tenth anniversary, the OSG began a nationwide, corporate compliance movement by combining an appeal to corporate self-interest - compliance programs - with the best good corporate citizenship instincts of American corporations.

The ten year mark in the life of the OSG is an appropriate time to ask what changes, if any, are needed, and an ad hoc advisory group could serve a useful purpose in suggesting improvements to the OSG. Such a group will best achieve its purpose if its membership includes as many perspectives as feasible. Among the possible members, therefore, are corporate compliance officers and/or in house legal counsel who are responsible for their company's compliance programs, prosecutors responsible for the Department of Justice's white collar corporate prosecution policy, defense attorneys who conduct internal investigations and/or represent companies in grand jury investigations, compliance and ethics specialists, both from academia and the private sector, and senior executives of both large and small companies.

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November 5, 2001  
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As to the small company representation, in certain respects the OSG - particularly the seven criteria for an effective compliance program - were written more for large companies than small ones. Small companies attempting to comply with the seven compliance criteria often complain that they lack resources and expertise to develop and implement effective compliance programs and therefore allowing their views to be expressed within the ad hoc advisory group's deliberations would be invaluable.

Overall, the private sector members should reflect or have experience with a variety of industries since the perspective on compliance of, for example, the health care industry may differ from that of the defense industry. The ad hoc advisory group should have a term of not more than two years, which is sufficient to analyze, discuss and formulate recommendations while setting a deadline for completion of the group's work.

The mission of the ad hoc advisory group should be neither too broad nor too narrow. As the well-known but generally apt saying goes, "if it ain't broke, don't fix it." After ten years, corporate America has generally become comfortable with the OSG and radical changes might create confusion. In particular, we are skeptical that the OSG needs major rewriting, for example, to accommodate a sentencing scheme based on so called integrity based compliance in which a company's ethical culture is evaluated, along with its compliance programs, in considering the appropriate corporate sentence. We fully agree with integrity based compliance advocates that the success of a company's corporate compliance program is directly proportional to the commitment of its leadership to promoting an ethical company culture in which ethics is regarded as important a business objective as the company's earnings per share or annual revenue growth. But we question whether it is possible to establish objective, uniformly applicable criminal sentencing benchmarks for measuring a company's ethical culture that improve on the existing seven criteria for a compliance program that identify *objective* compliance activities - such as use of auditing and monitoring systems or hotlines - and generally do not depend on inherently subjective evaluations of a company's ethical culture. The ad hoc advisory group could usefully function as a think tank to examine ideas such as integrity based compliance, and conceivably the OSG commentary might refer to, and emphasize, the importance of an ethical culture to achieving the "due diligence" required of an effective compliance program, but the group should be cautious in advocating the replacement of the seven criteria with a substantially different scheme.

Rather, a principal focus of the ad hoc group advisory group should be to review the seven criteria for an effective compliance program for improvement and/or clarification and evaluate whether the fine ranges and culpability score values need adjustment in light of the past ten years experience with corporate sentences under the OSG. As one example, the ad hoc advisory group

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might consider whether the OSG should explicitly require companies to engage in ongoing efforts to audit and test compliance procedures to ensure that a compliance program is as effective in practice as it is on paper.

As another example, one of the criteria for an effective compliance program, that the company should not "delegate substantial discretionary authority to individuals with a propensity to engage in criminal activity," §8A1.2, Application Note 3 (k) (3), causes significant confusion. The ad hoc advisory group might consider just how a company can determine that a person has a "propensity" to engage in criminal activity and perhaps address whether this criteria should explicitly state whether or not due diligence obligates the company to institute background checks of all significant decision makers before they are hired.

Among the culpability score issues that might be considered by the ad hoc advisory group is clarification of what constitutes cooperation by a corporation that qualifies it for either a three point or two point reduction in culpability score pursuant to §8C2.5 (g) (1) or (2). These provisions require that the company, to qualify for the reduction, among other things, must have "fully cooperated in the investigation." In June 1999, the Department of Justice promulgated a guidance memorandum to federal prosecutors titled "Federal Prosecution of Corporations," which among matters, suggested that a company might not be considered by federal prosecutors to have fully cooperated unless its disclosure included, if necessary, "a waiver of the attorney-client and work product protections, both with respect to its internal investigation and with respect to communications between specific officers, directors, and employees and counsel." *Id.* at 7.

The guidance memorandum, which did not address cooperation pursuant §8C2.5 (g) (1) or (2), provoked significant comment and controversy. The ad hoc advisory group might consider whether §8C2.5 (g) can usefully be clarified to make clear whether or not a privilege waiver is a necessary prerequisite to a culpability score reduction based on cooperation.

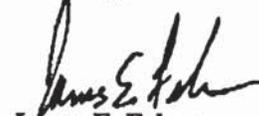
In addition to our thoughts regarding the mission of the advisory group, we would nominate Gregory Wallance for participation in the group. Mr. Wallance who is a litigation partner at Kaye Scholer LLP in New York. Mr. Wallace is a former Assistant United States Attorney in the Eastern District of New York, where he prosecuted white collar criminal cases. His practice concentrates on internal investigations, corporate compliance and white collar criminal representation. He was instrumental in helping to start and co-chaired for the past several years, the Practising Law Institute's multi-city Seminar on Corporate Compliance. Mr. Wallance has written and lectured widely on the Organizational Sentencing Guidelines. Although Mr. Wallance is a member of the

Honorable Diana E. Murphy, Chair  
November 5, 2001  
Page 4

Practitioners' Advisory Group, hopefully this would not disqualify him from consideration for the organizational group.

In sum, we support the creation of an ad hoc advisory group to review the OSG and their application in the past ten years to corporate offenses and, whether appropriate and feasible, recommend improvements to the commission.

Sincerely,



James E. Felman  
Barry Boss

JEF/h

# Coalition For Ethics And Compliance Initiatives

November 6, 2001

Chair Diana E. Murphy and  
Members of the United States Sentencing Commission  
Thurgood Marshall Judiciary Building  
1 Columbus Circle NE, Suite 2-500  
South Lobby  
Washington, DC 20002

Dear Chair Murphy and Commissioners:

I am writing on behalf of the Coalition for Ethics and Compliance Initiatives (CECI) in response to the Commission's September 19, 2001 request for comment regarding issues related to the organizational guidelines. I will address, in particular, the Commission's request for comment on the scope, duration and membership of any advisory group appointed to review the organizational guidelines and develop proposals on these guidelines for the Commission's consideration.

As noted in our May 30, 2001 letter to the Chair, CECI is a voluntary association of interested individuals and organizations dedicated to the implementation of more effective ethics and compliance programs in organizations. We aim to accomplish this mission by, among other means, facilitating communication among policy makers and members of the ethics and compliance community about significant issues of mutual interest and concern.

The organizational guidelines are unquestionably such an issue, and we are heartened by the Commission's request for comment in this area. In our view, the Commission would most benefit from an advisory group with the broadest possible scope, sufficient time to conduct a comprehensive and deliberate review, and membership that includes experienced ethics and compliance practitioners, as well as lawyers and scholars who have studied and helped apply the organizational guidelines.

As the Commission notes in its request for comment, the organizational guidelines have had an enormous influence on the development, shape and scope of ethics and compliance programs in many organizations. The impact has been the greatest from those portions of the organizational guidelines which detail the credit organizational defendants can receive for corporate compliance programs, as well as related provisions regarding cooperation with the authorities and voluntary disclosure of wrongdoing. As the Commission also recognizes, the impact of these provisions goes well beyond the relatively limited number of organizational sentencing cases that come before the courts each year.

These areas should be a focus of any advisory group review. Now is an appropriate time, 10 years after the organizational guidelines were implemented, to carefully review their application

and impact on organizational ethics and compliance programs and make recommendations for improvement. An advisory group is an excellent vehicle for undertaking this review and providing the Commission with the most thoughtful and comprehensive information and recommendations.

At the same time, perhaps in part because of the limited opportunities for the courts to interpret the organizational guidelines, there have been a substantial number of relevant legal and regulatory developments outside of the sentencing context. These include regulatory compliance guidance issued by federal agencies, voluntary disclosure programs, state and federal cases interpreting the compliance responsibilities of corporate boards of directors, False Claims Act cases, corporate integrity agreements and consent decrees. Also relevant are United States Department of Justice standards for the prosecution of organizations, self-audit and source privilege issues and recent United States Supreme Court civil cases in the areas of sexual harassment and punitive damages, as well as other litigation and enforcement activity.

We believe the advisory group should, consistent with the Commission's legal authority, have the ability and opportunity to review these related legal and regulatory developments. This is because these initiatives often interpret, enforce, apply, augment, support or even conflict with the principles, objectives and provisions of the organizational guidelines. In many cases, policymakers have moved beyond the Commission's elements in prescribing what it takes to establish and maintain an "effective" compliance program. In other cases, these efforts may offer helpful suggestions for improvements in the guidelines themselves, especially as regards the compliance program elements. A careful study of them is indispensable to any consideration of the success of the organizational guidelines, as now applied, at meeting the Commission's goal of defining "an effective program to prevent and detect violations of law" [see USSG §8A1.2, comment. (n.3 (k))].

For these and other reasons, we are convinced that an advisory group should be given sufficient time to conduct a careful, thoughtful and extensive review of the broad impact of the organizational guidelines and these related issues. By focusing exclusively on the organizational guidelines and taking the time to study the wide range of complex issues related to their application, the advisory group can best help lay the groundwork for any future efforts by the Commission to promote additional innovation and effectiveness in organizational ethics and compliance programs.

Finally, this advisory group should include ethics and compliance officers and other experts on organizational ethics and compliance, in addition to members of the bar who represent corporations in criminal matters. Ethics and compliance officers can describe the day-to-day impact in their organizations of the organizational guidelines and, especially, the practical value and application of the guidelines' elements of an effective compliance program. They can address the strengths and any weaknesses of the organizational guidelines as both written and applied. These experts can also detail the impact (both positive and negative) of the other legal

and regulatory developments discussed above on the ability of their organizations to meet the standards of corporate "good citizenship" contemplated by the Commission.

CECI would welcome the challenge of participating in this advisory group process. Members of CECI's Oversight Committee and its sponsors include compliance, ethics and ombuds professionals from a wide variety of companies and industries; corporations and professional organizations with vast experience at evaluating and applying the organizational guidelines; scholars in the field of business ethics and corporate compliance who have studied the effectiveness of the guidelines and specific provisions of them; legal experts and counsel who have helped organizations effectively implement compliance programs; and representatives of the Ethics Resource Center, the Ethics Resource Center's Fellows Program and the Ethics Officer Association. As you know, the Ethics Officer Association and the Sentencing Commission have conducted regional symposiums on the organizational guidelines. In addition, the Ethics Resource Center's Fellows Program has recently initiated an effort to bring researchers and practitioners together to study the impact of the organizational guidelines and offer recommendations for future initiatives, including possible changes to the guidelines.

The mission, objectives and membership of CECI, and our ability to assist the Commission, are explained in more detail in the May 30<sup>th</sup> letter (which is attached). The individuals and organizations within CECI bring diverse perspectives and a wide range of invaluable experiences, from organizations of varying size, industries, cultures, and complexity, to any consideration of the operation and impact of the organizational guidelines.

Thank you on behalf of CECI for the Commission's consideration of an advisory group to review the organizational guidelines. We firmly believe that an in-depth review of the organizational guidelines and related law and policy developments would best serve to advance the Commission's objectives. CECI and its members have a great interest in the proposed advisory group, and we stand ready to contribute to it.

Sincerely,



Jay Cohen  
Vice President of Compliance, Oxford Health Plans  
Chair, Oversight Committee  
Coalition for Ethics and Compliance Initiatives  
Tel. (203) 459-7773

# Coalition For Ethics And Compliance Initiatives

May 30, 2001

The Honorable Diana Murphy  
Chair  
United States Sentencing Commission  
Thurgood Marshall Judiciary Building  
1 Columbus Circle NE, Suite 2-500  
South Lobby  
Washington DC 20002

Dear Judge Murphy:

As chair, I am writing on behalf of the Oversight Committee of a voluntary association called the Coalition for Ethics and Compliance Initiatives (CECI). CECI is exploring ways to improve the climate for effective compliance and ethics programs through a greater dialogue with policy makers. We understand that Win Swenson recently met with you in Washington and had an opportunity to briefly discuss our work.

Based on public statements you and other Commissioners have made (and on your discussions with Mr. Swenson), we understand that the Commission is evaluating whether to undertake a review of the organizational sentencing guidelines – more specifically, portions of the organizational sentencing guidelines that deal with effective ethics/compliance programs. CECI has not, at this point, adopted a position on any particular outcomes we would like such a review to achieve. However, we agree that a review of the guidelines' impact, and possibly of the Commission's role in promoting the policy goals of the guidelines, would be well received by the ethics and compliance community.

Over the last decade, the organizational sentencing guidelines have had – and continue to have – an enormous influence on many organizations, providing an unprecedented catalyst for the development of comprehensive compliance programs. They have also helped shape enforcement policies outside of the Federal criminal sentencing context in critical ways.

Despite the guidelines' decade of impact, some of us affiliated with the CECI initiative, and others in the compliance and business ethics fields, have noted areas where the guidelines may not be entirely achieving their desired ends. Accordingly, a gradual look at possible reforms to improve the guidelines' performance (including ways to improve the interplay between the guidelines and laws and policies outside the Commission's immediate jurisdiction) would, in our view, be justified from a public policy perspective.

Our purpose in sending you this letter is to identify CECI as a potential resource to the Commission should it undertake a review of the organizational sentencing guidelines' impact on compliance/ethics programs. Specifically, we understand that the Commission's Deputy General Counsel, Paula Desio, has suggested convening an external advisory group – modeled on the existing Practitioners' Advisory Group but focusing exclusively on the organizational sentencing guidelines – to provide the Commission with useful input. We agree that forming a group of this kind makes a great deal of sense. It would allow for a gradual and careful evaluation of relevant issues, an approach that may fit best with the Commission's otherwise busy schedule and certainly would respect the complexities of this important topic. We also believe that CECI is ideally suited to directly support this kind of effort.

To explain why we believe CECI would be a natural fit for comprising an Organizational Practitioners Advisory Group (hereafter "OPAG"), additional background is undoubtedly useful. By some measures, CECI is still in a formative stage. However, our initial funding has come from organizations that have wanted to determine the feasibility of becoming involved in precisely the kind of initiative that OPAG would represent.

Specifically, CECI was formed to determine whether an ongoing organization (i.e., a permanent CECI) could be established to provide a "voice" for the compliance/ethics profession in policymaking settings (like OPAG) – a voice that has not previously existed across industries in any coordinated way. The catalyst for creating CECI came about when a group of compliance/ethics experts – working under the auspices of the Ethics Resource Center's Fellows Program – developed four model legislative proposals, each aimed at improving the legal environment for effective compliance/ethics programs. (For example, one proposal would provide "source protection" so that employees can feel comfortable reporting sensitive ethics/compliance concerns without fear of personal disclosure.)

The proposals were discussed within the ethics/compliance community, and this process led to two realizations. The first was that other potentially important issues that have an impact on the ethics/compliance field also deserve attention. The second was that no organization currently exists to discuss these issues with policymakers on behalf of the ethics/compliance field.

During the past three months, CECI has been studying the feasibility of becoming a permanent, non-profit entity. Our initial work focuses on identifying an appropriate governance structure, building a broad and representative membership, and securing sufficient resources. Based on our efforts to date, we are confident that if asked to take on the role of Organizational Practitioners Advisory Group, CECI would be able to carry out this function fully and effectively.

As might be surmised from the foregoing description of our history, CECI's mission, membership and transition staff fit extremely well with the OPAG concept.

CECI's official mission is:

To foster the implementation of more effective ethics and compliance programs by:

1. Educating and communicating with policy makers, legislators, government agencies and others who influence public policy,
2. Providing timely information and analysis to ethics and compliance practitioners and their organizations,
3. Serving as a voice and resource to ensure that the ethics and compliance communities are heard in the formulation of public policy, and
4. Identifying and advocating for relevant public and organizational policy issues of interest to our members.

CECI's Oversight Committee is diverse and reflects perspectives that we believe would be helpful to the Commission in assessing the organizational guidelines' operation and impact.

Members of the Committee are:

- Compliance, ethics and ombuds executives from major business entities (Lockheed Martin, Oxford Health Plans, and United Technologies);
- The Executive Director of the Ethics Officer Association {the largest association of cross-industry compliance and ethics professionals (approximately 720 members)};
- The President of the Ethics Resource Center (a nonprofit organization dedicated to promoting private and public sector ethics, and an advisor to leading businesses on ethics matters); and
- A scholar in the field of business ethics and corporate compliance (Xavier University) who served as a Supreme Court Judicial Fellow at the Sentencing Commission from 1998 -99.

Sponsors of CECI's efforts to date also include:

- Well known companies active in the compliance/ethics field (General Motors, PricewaterhouseCoopers and Weyerhaeuser)
- The Ethics Resource Center Fellows Program (a select group of corporate, government, nonprofit and education leaders who work to identify, examine and further understand critical business ethics challenges through research and other projects; currently chaired by the Honorable Steven Potts, former Director of the Office of Government Ethics under both the first Bush Administration and then, following reappointment, the Clinton Administration; Paula Desio has served as the Commission's representative to the Fellows Program since 1998); and
- The Center for Business Ethics at Bentley College (a nonprofit center which promotes ethical business conduct in contemporary society).

CECI activities are currently facilitated by two transition coordinators with uniquely relevant credentials, as well. Win Swenson served the Commission as Deputy General Counsel from 1990 to 1996 and, as you know, headed up the staff group that developed the organizational sentencing guidelines under the Commission's direction in 1991. He therefore contributes a strong knowledge of the guidelines' original policy objectives, and of institutional matters that would be critical to assessing the guidelines' operation and impact (e.g., technical aspects of the guidelines' system as a whole, the Commission's enabling statute and that statute's legislative history, the Commission's historical dealings with Congress and other governmental entities).

Our other transition coordinator is Joseph E. Murphy. Mr. Murphy has been a practitioner in the compliance field for twenty-five years and is widely recognized as one of the country's leading experts on corporate compliance. In 1994, he was a member of an advisory group that guided the development of the Commission's three national surveys on corporate compliance. In 1995, he was a speaker at the Commission's seminal symposium on corporate crime where, among other topics, he discussed the impact of the current legal environment on effective corporate compliance. He also has international experience in this area, including reviewing and commenting on the Australian standards on compliance programs (AS 3806).

CECI's Oversight Committee would be delighted to meet with you, other Commissioners and/or Commission staff to develop a plan for constituting the Organizational Practitioners Advisory Group at your earliest convenience.

We should note that CECI is a cross-industry coalition. Thus, those associated with CECI already comprise a broadly representative group (and we expect representation to continue to grow). Consistent with this, part of our role would be to develop, with your approval, bridges to others with an interest in this topic, including my colleagues in

May 30, 2001

Page 5

health care compliance. CECI's mission dovetails with the notion of providing a cross-industry umbrella for sharing points of views on compliance and ethics related policies.

Thank you for taking the time to review this letter. We very much look forward to working with the Commission in whatever capacity you deem most advantageous on this important public policy matter. Please feel free to contact me by telephone at (203) 459-7773. You may also contact either of our coordinators, Win Swenson and Joe Murphy, at (301) 270-3555 and (609) 429-5355, respectively.

Sincerely,



Jay Cohen  
Vice President Oxford Health Plans  
Chair, Oversight Committee  
Coalition for Ethics and Compliance initiatives

Cc: Timothy B. McGrath  
Staff Director



U.S. Department of Justice

Antitrust Division

Main Justice Building  
950 Pennsylvania Avenue, NW  
Washington, DC 20530-0001

November 6, 2001

Re: Federal Register Notice 9/19/01  
on "Issues Related to Organizational Guidelines"

Public Affairs Office  
United States Sentencing Commission  
One Columbus Circle, NE  
(Suite 2-500 South Lobby)  
Washington, DC 20002-8002

Dear Sentencing Commission:

This letter is in reply to your request for comments on "Issues Related to Organizational Guidelines" that appeared in the *Federal Register* on 9/19/01. Since I just last week learned of this request (from Mark Allenbaugh), I will unfortunately be able to offer you little in the way of substantive remarks by today, the last day of your official comment period. Yet this is an important topic, so I want to offer a few remarks and to thank you for calling this initiative to my attention. (Note that this does not reflect any official views of the Justice Department).

Your *Federal Register* notice indicates that the Commission's organizational guidelines have had a "tremendous impact on the implementation of compliance and business ethics programs over the past years." Indeed, people with a variety of perspectives will be interested in the future of these programs.

My perspective is that of an economist whose past research has focused on corporate compliance and, indeed, on the effect of the Federal Sentencing Guidelines for Organizations.

From that perspective, my suggestion is that you include within the scope of your advisory group's activities careful consideration of how the Guidelines' treatment of compliance programs – and, indeed, the presence of these programs – actually affects the *incentives* of individuals within corporations to comply. The incentive for corporate actors to comply has many sources, as an extensive economics literature on this subject recognizes. For a critical evaluation of this issue that usefully highlights some of the questions the advisory group might beneficially address, please see the 1999 article by William S. Laufer, "Corporate Liability, Risk Shifting, and the Paradox of Compliance," 52 *Vanderbilt Law Review* 1343.

I would be happy to discuss with your staff (with more advance notice) other sources that they may find helpful in developing an agenda for its advisory group, which appears to be an important and useful initiative for the Commission to pursue.

Best regards,

Cindy R. Alexander, PhD

*Kenneth W. Johnson*  
Ethics and Policy Integration  
103 G Street SW, Suite 720  
Post Office Box 28277  
Washington, DC 20038-8277  
(202) 479-4892

DELIVERED BY FACSIMILE

November 6, 2001

United States Sentencing Commission  
One Columbus Circle, N.E.  
Suite 2-500, South Lobby  
Washington DC 20002-8002  
Attn: Public Affairs

Subj: Response to USSC Federal Register Notice 9/19/01

Dear Sir or Madam:

I would like to take this opportunity to offer my encouragement and support for the United States Sentencing Commission to undertake a review of the Federal Sentencing Guidelines for Organizations (FSGO) as set forth in its Federal Register Notice 9/19/01. Rather than set forth another list of specific issues that the Commission might consider in its review, suffice to say that I endorse the specific issues raised in the letters before the Commission, specifically those of the Ethics Resource Center, the Coalition for Ethics and Compliance Initiatives, and Mr. Charles Howard.

The commission is well aware that it has created the *de facto* framework for what defines the minimum requirements for an effective compliance program in the ethics and compliance "industry." As such, the USSC's "Effective Program" elements [USSG §8A1.2, comment, (n 2(k))] provide a structure for discussing both organizational ethics and compliance issues. This structure is widely followed by governmental agencies, organizations and consultants in designing, implementing, enforcing, and assessing ethics and compliance programs.

While they provide the essential core of a developing framework for organizational ethics that addresses organizational behavior beyond compliance, the Commission Chair, Judge Diana Murphy, and others have recognized that more than the minimum framework is required for a compliance program to be truly effective. In our industry, truly effective programs are coming to be referred to as "ethics and compliance programs." But beyond the more robust framework that the letters referred to above suggest that the Commission consider, there are two aspects that an ad hoc advisory group might assist the Commission in understanding and addressing: the applicability of the provisions to Native American Tribal Government and the practical aspects of designing and implementing effective ethics and compliance programs for the micro/small to medium enterprise and the Native American Tribal Governments as well.

United States Sentencing Commission  
6 November 2001

If it is the intent of the Commission that the FSGO apply to Native American Tribal Governments, it might be wise to engage them in considering if there are not unique matters to consider as it sets forth its minimum requirements. As one who has had experience working with tribal governments and who sees the advantages of having effective ethics and compliance programs on a model that reflects the dynamics of today's tribes, I would welcome specific language addressing the tribes.

Another area of concern to those who care deeply about the public policy implications of effective ethics and compliance programs are the challenges to micro/small to medium enterprises in designing and implementing such programs. The experience and lessons learned to date have been largely confined to the larger or even largest organizations. However, a significant number of the enterprises that have problems before either the Federal Courts or Federal Agencies, such as the Department of Defense or Health and Human Services, are smaller enterprises.

In my view, an ad hoc advisory group to the Commission should have membership reflecting the two groups and their bodies of challenges and concerns. I would welcome the opportunity to serve as a member of the ad hoc advisory group as a voice for those two groups. I do not hold myself out as an expert on the challenges and concerns of the Native American Tribes. I think few would do so boldly, but as a tribal member (Cherokee) and one who has written on tribal governance as early as my law review days, I am intensely interested in them and would work to engage voices that are truly representative. I do feel that I can speak for the small to medium enterprise having been a small businessman and represented small businesses earlier in life. Moreover, as part of a program I am in the midst of developing, I will begin hosting within the month an international e-conference addressing these issues as the first step in developing an effective guide for the micro/small to medium enterprise to design and implement a truly effective ethics and compliance program to meet its needs within its organizational context and organizational culture.

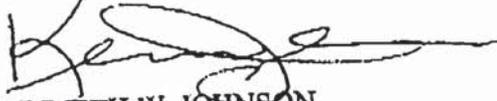
I will be pleased to make more information available to you upon request, but I bring a wealth of experience to such a group. In addition to being a lawyer who had largely small business clients in the 1980s, I have consulted in the ethics and compliance industry since 1993, was a principal proponent of the Coalition for Ethics and Compliance Initiatives by calling and arranging for its formative meetings in 2000, and have been an Ethics Resource Center Senior Fellow since its inception in 1997.

In sum, I wholeheartedly support such a review and pledge to support the Commission in its endeavors. Moreover, I see special value in the Commission staff's fostering a dialogue with industry and government regulators regarding the design, implementation, enforcement, and assessment of an effective program in order to lay a solid foundation for the Commission's review. In this regard, I believe that I offer unique value in working with the Commission in soliciting other experiences and learning.

United States Sentencing Commission  
6 November 2001

Please do not hesitate to contact me if I can offer any other support for this important endeavor.

Sincerely,



KENNETH W. JOHNSON  
Director, EPIC

# ETHICS OFFICER ASSOCIATION

*Dedicated to promoting ethical business practices*

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Advisor, W. Michael Hoffman  
Center for Business Ethics  
Bentley College

November 6, 2001

United States Sentencing Commission  
One Columbus Circle NE  
Suite 2-500, South Lobby  
Washington, DC 20002-8002  
Attention: Michael Courlander, Public Affairs

To Whom It May Concern:

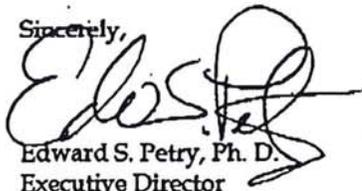
The following is in response to the request for comment on the possible formation of an ad hoc advisory group on the Organizational Sentencing Guidelines.

On this the tenth anniversary of the Organizational Guidelines, it is clear that they have had a major impact in promoting ethical and law-abiding conduct within corporations. One measure of this impact has been the growth of the Ethics Officer Association (EOA). The EOA was founded in 1992 - several months after the guidelines went into effect. It is the peer-to-peer, non-consulting association for managers of ethics and compliance programs. At its founding the EOA had only 12 members. Today, it has over 770 members, including more than one-half of the Fortune 100.

The impact of the Organizational Guidelines can also be seen in the attendance at a series of forums cosponsored by the U.S. Sentencing Commission and the EOA. The forums were designed to discuss the Guidelines, their impact, and suggestions to improve the implementation of corporate programs in response to the Guidelines. They have been held in Atlanta, Boston, Chicago, Columbus, New York, and San Francisco and have drawn over 500 attendees including ethics and compliance officers, senior executives, and representatives from the prosecutorial community.

The EOA has been, and can continue to be, a principal link between the Commission and those with the responsibility to develop and oversee ethics and compliance programs. It can also continue to serve as a forum for the exchange of information and best practices and provide opportunities for discussion among diverse parties. We welcome the opportunity to continue to serve in this capacity, to participate in the ad hoc advisory group on the Organizational Sentencing Guidelines and/or to assist the Commission in other appropriate ways.

Sincerely,



Edward S. Petry, Ph. D.  
Executive Director

# Alliance for Health Care Integrity

A Health Care Industry Initiative to  
Integrate Compliance, Ethics, and Corporate Responsibility

November 1, 2001

U.S. Sentencing Commission  
One Columbus Circle, NE, Suite 2-500, South Lobby  
Washington DC 20002-8002  
ATTN: Public Affairs

SUBJECT: Federal Register Notice 9/19/01: BAC2210-40/2211-01

We're delighted that the Sentencing Commission is taking this 10<sup>th</sup> anniversary of the publication of the *Guidelines Manual* to address their impact on industry and consider possible improvements to them. As we suggested in our February 21, 2001 letter to the Sentencing Commission (please see enclosed letter), although their impact has been significant, there is still room to improve them—and enhance their impact—by broadening compliance-based systems to include integrity-driven ones.

It seems us that the ad hoc advisory group alluded to in the notice is the perfect vehicle to open a dialogue on these important issues. We would recommend the following organizational guidelines for this group:

- *Scope.* The advisory group should be charged with addressing industry-wide issues, such as the efficiency and effectiveness of existing compliance-based and/or ethics-based systems in preventing violations of statute and regulation; best practices in organizing, implementing, and evaluating such systems within individual corporations and across the industry; background and training of staff; and policies related to investigation and enforcement of legal and ethical violations.
- *Duration.* Because the scope of work for the advisory group is large (and will undoubtedly meet with some resistance and ownership struggles), the duration should be proportionate to the challenges it will face. We recommend at least one year though two or three years would probably be more realistic. Full meetings should occur quarterly with committee meetings and conference calls once or twice a quarter. Furthermore, the expectations of the Sentencing Commission for the advisory group, as well as the deadline for it to complete its work, should be clear from the start, perhaps negotiated by a steering committee comprised of Sentencing Commission staff and initial advisory group appointees.
- *Focus:* The focus of the ad hoc advisory group should be the consideration of strategies to enhance the efficiency and effectiveness of the current, largely compliance-based organizational guidelines.

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*and Professional Ethics*

Paul Schyve, MD  
*Joint Commission on*  
*Accreditation of Healthcare Organizations*

David C. Smith, PhD  
*Council for Ethics in Economics*

Matthew Wynia, MD, MPH  
*Institute for Ethics*  
*American Medical Association*

**Affiliations listed for identification purposes**

**Executive Director**

Robert Olson, PhD, MPH

*Membership:* The membership of the ad hoc advisory group should include, we believe, the following stakeholders:

- Industry representatives (a good mix of corporate officers [CEOs, ethics officers, compliance officers], management and supervisors, and line staff)
- Scholars (not only in general and industry-specific business/organizational compliance and ethics but also in organizational/management theory and behavioral research)
- Experts in compliance and business ethics, both general and industry-specific, particularly in strategies for integrating and institutionalizing related programs, as well as in development of standards and metrics for evaluating their impact.
- Representative from governmental and quasi-governmental bodies (Offices of Inspector General and Department of Justice, as well as particular departments, commissions, or boards charged with developing and/or enforcing regulations, such as HHS, FTC, SEC, FASB, and so on)
- Other groups as appropriate, such as professional and trade associations, consumer groups, and so on.

Because the Alliance for Health Care Integrity is dedicated to integrating compliance, ethics, and corporate responsibility (please see the enclosed prospectus), we would welcome an opportunity to participate on the ad hoc advisory group. While our mission is industry-specific, we believe the principles that drive our enterprise and the broad-based network that we have assembled are industry-wide in their application.

We wish you all the best in this bold initiative. If you would like to contact us, please call me at (714) 907-6400.

Sincerely,



Robert Olson, PhD, MPH  
Executive Director

# Alliance for Health Care Integrity

A Health Care Industry Initiative (HCII)  
on Organizational Ethics and Business Integrity

February 21, 2001

## Board of Directors (to date)

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The Darden School of Business  
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## Founding Members (selected)

Myra Christopher  
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Association for Practical  
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Joint Commission on  
Accreditation of Healthcare Organizations

David C. Smith, PhD  
Council for Ethics in Economics

Matthew Wynia, MD, MPH  
Institute for Ethics  
American Medical Association

## Affiliations listed for identification purposes

### Staff

Robert Olson, PhD, MPH  
Executive Director

Judge Diana E. Murphy, Chair  
United States Sentencing Commission  
One Columbus Circle, NE  
Washington, DC 20002-8002

Dear Commissioner Murphy,

On this 10<sup>th</sup> anniversary of the publication of the *Guidelines Manual*, we'd like to congratulate you for the impact they have had, in particular, on the health care industry.

More than any other public or private initiative, the Guidelines have motivated stakeholders in the health care industry to take seriously the importance of compliance with federal statutes and regulations, especially those related to the prevention of fraud, waste, and abuse. In particular, the seven steps outlined in Chapter Eight to meet due diligence requirements have resulted in the creation of compliance programs—and related trade and professional associations, as well as a burgeoning consultancy sector—in the majority of health care organizations.

Yet it has been difficult to document the success of these compliance programs—even those meeting all the steps required for due diligence—in preventing fraud, waste, and abuse in the industry. The Big 5 professional services firms and regulatory agencies that have studied compliance programs have learned that very few health care organizations (HCOs) attempt to measure whether their compliance programs really reduce fraud, waste, and abuse. As one recent report stated: "Is compliance having an effect impact on organizations? The answer is: It's too early to tell."<sup>1</sup> According to scholarly research, however, it's not too early to tell if the health care industry is like other industries in the corporate world: compliance programs, costly both to oversee and to implement, have little or no measurable impact in preventing fraud, waste, and abuse.

Indeed, according to scholarly research, only compliance programs that have been integrated into integrity-based programs begin to show demonstrably positive results. The classic

<sup>1</sup> Deloitte&Touche, "Compliance Hard to Measure—Study, *Modern Healthcare* December 18, 2000.

theoretical work in this area was done by Lynn Paine at Harvard Business School. In her contrast of compliance-based and integrity-based programs, she concludes that integrity-based programs—that is, programs focused on organizational ethics—in corporations will succeed, while compliance-based programs, because of their narrow focus and emphasis on external standards, will contribute little to preventing violations of federal and state regulations, as well as the public good (and may, in fact, be counter-productive).<sup>2</sup>

Recent research, based on Paine's theoretical frame, has provided empirical support to her conclusions. For example, Treviño et al conclude that a "values-based cultural approach to ethics/compliance management works best."<sup>3</sup> That is, their data indicates that compliance programs situated in the broader context of organizational integrity are significantly more effective than either stand-alone compliance programs or ethics programs. Our own market research confirms this conclusion: many of the compliance officers we spoke to, as well as staff in regulatory agencies, indicated that compliance simply does not go far enough. They asserted that, in the end, it is the *ethos* of the organization—the way it does business—that determines whether compliance initiatives are effective or not.

It turns out, then, that both compliance and integrity are necessary, *as long as* the focus of compliance-based programs is set within the broader, more systemic and long-term perspective of an integrity-based program. Integrity-based programs that emphasize organizational ethics and business integrity leverage the impact of compliance-based programs, resulting in significant reductions in fraud, waste, and abuse. Therefore, it is the shared values and purpose of the organization—the organization's ethic—that drive compliance.<sup>4</sup>

Our organization, an alliance of major stakeholders in the health care industry, drawing upon both the Defense Industry Initiative and public health models, with a vision of "responsible self-regulation," urges you to consider revising the influential guidelines you published ten years ago in light of the research related to compliance-based and integrity-based programs. In particular, we urge you to:

- Require that compliance be a component of a broader, integrity-based ethics program that emphasizes organizational ethics and business integrity.
- Require that the ethics officers in such programs have at least three university-level, full-term courses in ethics.
- Require that employee training uses whole system change technologies, involving cross-level and cross-function grouping of all employees, including executive management and board members.

<sup>2</sup> Lynn Sharp Paine, "Managing for Organizational Integrity," *Harvard Business Review* (March-April 1994) 106-117.

<sup>3</sup> Linda Klebe Treviño, Gary Weaver, David Gibson, Barbara Ley Toffler, "Managing Ethics and Legal Compliance: What Works and What Hurts," *California Management Review* 41:2 (Winter 1999) 149.

<sup>4</sup> As Porras and Collins point out in *Built to Last* (New York: HarperBusiness, 1994), they also drive the profitability and sustainability of the organization—good reason enough to pay attention to organizational ethics.

- Require that the standards for organizational ethics and business integrity have an industry-wide basis.
- Require that corporations evaluate both the impact (changes in knowledge, attitude/values, and behavior) and outcomes (reduction of fraud, waste, and abuse) of their integrated compliance-ethics programs annually—and compare their results to industry-specific benchmarks.
- Require that violations of ethical standards carry penalties similar to the violation of regulatory standards.

We applaud the guidelines the Commission developed ten years ago. They have revolutionized the corporate world. Now we ask the Commission to take the next step: move this world from “obeying the law because I have to” to “doing what is right because I want to.” It’s the difference—a profound one—between compliance and integrity.

If you should decide to enhance the 1991 guidelines, and there is anything we can do to assist you in this undertaking, please contact me at (714) 307-6400.

Sincerely,



Robert Olson, PhD, MPH  
Executive Director

# Alliance for Health Care Integrity

A Health Care Industry Initiative to  
Integrate Compliance, Ethics, and Corporate Responsibility

## Board of Directors (to date)

Mark Aulisio, PhD  
*Center for Biomedical Ethics  
Case Western Reserve University*

Louis Feuerstein  
*Ernst & Young LLP*

Andy Thurman, JD  
*West Penn Allegheny Health System*

Patricia Werhane, PhD  
*The Darden School of Business  
University of Virginia*

## Founding Members (selected)

Myra Christopher  
*Midwest Bioethics Center*

Tim C. Mazur, MBA  
*Ethical Advisory Services*

Brian Schrag, PhD  
*Association for Practical  
and Professional Ethics*

Paul Schyve, MD  
*Joint Commission on  
Accreditation of Healthcare Organizations*

David C. Smith, PhD  
*Council for Ethics in Economics*

Matthew Wynia, MD, MPH  
*Institute for Ethics  
American Medical Association*

*Affiliations listed for identification purposes*

## Executive Director

Robert Olson, PhD, MPH

## Mission

To assure the health care industry's commitment to integrity through an alliance of all major stakeholders that *designs, delivers, verifies, and certifies* its own model standards and metrics for compliance, ethics, and corporate responsibility.

## Goals

- To prevent fraud and abuse by managing their root causes
- To reduce regulatory pressure by a demonstrated commitment to core values *and* by the targeting of inspection and enforcement activities
- To decrease business costs by integrating—and leveraging—compliance, ethics, and corporate responsibility initiatives into a unified program that is both more effective and more efficient
- To enhance business performance by building trust and reciprocity between the industry and its stakeholders through redesigning the process of *responsible self-assessment and regulation*.

## Plan of Action

- Convene a summit of *independent, nonpartisan, and impartial alliance* of public and private stakeholders—professional, trade, consumer, regulatory, advocacy, payer, employer, accrediting, provider, union, shareholder, governmental, employer, academic, and ethics organizations—from across the industry.
- Develop model
  - √ *standards for integrity and ethical principles* that integrate compliance, ethics (research, clinical, and organizational), and corporate responsibility by aligning the core values that drive best-of-class integrity programs
  - √ *performance metrics by industry sector and function* that translate standards into specific and measurable process, impact and outcome objectives
  - √ *institutionalization strategies* that employ breakthrough, whole system change technologies to promote consensus and ownership of standards
  - √ *audit and assurance tools* that measure the breadth and depth of organizational commitment to standards through surveys, interviews, focus groups, document review, and observational techniques.
  - √ *certification program* for the health care industry
- Enroll signatories
- Retain an independent auditing firm to verify commitment to standards on an annual basis.

***Potential Benefits of Participation***

- ❑ Reduced legal *and* ethical exposure
- ❑ Demonstrated “good faith” commitment to compliance *and* ethics
- ❑ Increased morale and sharpened performance
- ❑ Strengthened assurance of a level playing field with competitors
- ❑ Enhanced commitment and ownership that results from *self-assessment and self-regulation*
- ❑ *Increased effectiveness and efficiency of compliance programs* achieved by integrating seamlessly with ethics program
- ❑ Technical assistance from *experts in health care and business ethics*
- ❑ Improved *competitive advantage*
- ❑ More *rigorous tools for evaluating program impact and outcome*
- ❑ Greater *patient trust and heightened public reputation*
- ❑ Lowered transaction costs
- ❑ Leveraged *bargaining power* of industry-wide group with multi-stakeholder support
- ❑ Bolstered evidence of attempt to meet *JCAHO standards on organizational ethics*
- ❑ *Decreased federal and state regulatory pressure.*

***For More Information***

***To Be Listed as a Supporter***

***To Become a Member***

***To Provide Corporate Sponsorship***

***For this Ground-Breaking Alliance***

**Contact Bob Olson at (714) 307-6400**



**DEFENSE  
INDUSTRY  
INITIATIVE**

ON BUSINESS ETHICS AND CONDUCT

Richard J. Bednar, DII Coordinator  
Crowell & Moring LLP  
1001 Pennsylvania Avenue, NW, Suite 1000  
Washington, DC 20004-2595  
202/624-2619; 202/628-5116 (Fax)  
[rbednar@crowell.com](mailto:rbednar@crowell.com)

October 30, 2001

United States Sentencing Commission  
Attn: Public Affairs  
One Columbus Circle, NE  
Suite 2-5400, South Lobby  
Washington, DC 20002-8002

**Re: Request for Comment on Possible Formation of an  
Ad Hoc Group on Organizational Sentencing  
Guidelines, 66 Fed. Reg. 48306 (Sep 11, 2001)**

Dear Sir/Madam:

On behalf of the Defense Industry Initiative on Business Ethics and Conduct ("DII"), I am submitting comment on the above-referenced matter. The DII, founded in 1986 as a result of the President's Blue Ribbon Commission on Defense Management (the Packard Commission), is a private organization of about 50 defense contractors who have voluntarily joined together to embrace and practice a high level of business ethics and conduct. A listing of the current DII Signatories is enclosed for your information.

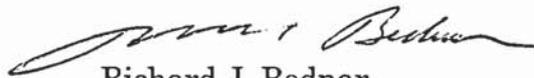
The public announcement of the prospective review of the organizational sentencing guidelines coincides with our own on-going review by our governing body - the Steering Committee - of the principles adopted and practiced over the past 15 years of the DII existence. This review is to assure that those original Principles remain vibrant and appropriate. Even if this review should result in no change, and conclude in the reaffirmation of these original Principles, the review process will have strengthened the commitment of the Signatory companies and will have given a fresh impetus to the faithful practice of those Principles.

The DII has studied the organizational sentencing guidelines over the years, and has noted the harmony of those guidelines with our own Principles and practices. The DII Principles were considered by the Sentencing Commission in its work in developing the organizational sentencing guidelines. We believe the DII would bring an important

United States Sentencing Commission  
Attn: Public Affairs  
October 30, 2001  
Page 2

perspective to the ad hoc Group not available from any other institution. We therefor support the formation of the Group and would welcome the opportunity to serve as a member of it.

Sincerely yours,



Richard J. Bednar  
DII Coordinator

Enclosure

1854267

DEFENSE INDUSTRY INITIATIVE  
JULY 2001 DII SIGNATORIES

Advanced Technical Products, Inc. (Marion Composites Division)  
Allfast Fastening Systems Inc.  
Alliant Aerospace Company  
AT&T -- Government Markets  
Bath Iron Works/General Dynamics  
BF Goodrich Aerospace/BF Goodrich Aerostructures  
The Boeing Company  
The CNA Corporation  
The CFM International, Inc.  
Computer Sciences Corp.  
Day & Zimmerman, Inc.  
DRS Technologies, Inc.  
Dyncorp  
Frequency Electronics, Inc.  
GE Aircraft Engines  
General Dynamics Corp.  
Georgia Tech Research Institute  
Harris Corporation  
Honeywell International  
Howmet Castings  
IBM Corporation  
ITT Defense  
Lear Siegler Services, Inc.  
L-3 Communications Corporation  
Lockheed Martin Corporation  
Newport News Shipbuilding  
Northrop Grumman Corporation  
Parker Hannifin Corp.  
Raytheon Company  
Rockwell-Collins  
SAIC  
Sequa Corporation  
Southwest Research Institute  
Stewart & Stevenson  
Teledyne Technologies Incorporated  
Textron, Inc.  
Thales, Inc.  
Thiokol Propulsion  
TRW Systems  
UNISYS Corporation  
United Defense LP  
United Space Alliance

United Technologies Corporation  
University of Dayton Research Institute  
Veridian Corporation  
Vought Aircraft Industries, Inc.  
Williams International

Total: 47

1824004

Lockheed Martin Corporation  
6801 Rockledge Drive, MP 210 Bethesda, MD 20817  
Telephone 301-897-6631 Facsimile 301-897-6442  
E-mail: nancy.higgins@lmco.com



**Nancy McCreedy Higgins**  
Vice President, Ethics and Business Conduct

November 5, 2001

United States Sentencing Commission  
One Columbus Circle NE  
Suite 2-500, South Lobby  
Washington, DC 20002-8002

Attention: Public Affairs

Re: Request for Comment on Possible Formation of an Ad Hoc Group on Organizational Sentencing Guidelines, 66 Fed. Reg. 48306 (September 11, 2001)

Dear Sir or Madam:

I am writing in response to the above-referenced Request for Comment to encourage the Sentencing Commission to form an ad hoc advisory group to review the organizational sentencing guidelines and to volunteer to serve as a member of such a group.

I have been involved in the development and implementation of corporate ethics and compliance programs for two companies: The Boeing Company and Lockheed Martin Corporation. Both companies were among the original signatories to the Defense Industry Initiative on Business Conduct and Ethics (DII), and thus already had strong self-governance programs at the time the guidelines were promulgated. Nonetheless, these companies and the other DII signatories had to reassess and fine-tune their programs in order to assure compliance with the standards set forth in the organizational sentencing guidelines.

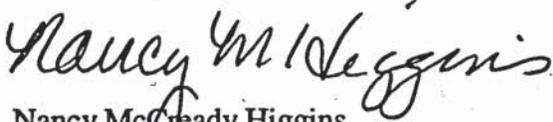
As an attorney in the Boeing law department when the draft guidelines were first published, it was my responsibility to lead a team to assess the Boeing Ethics and Business Conduct program to determine what changes would be needed to meet the due diligence requirements in the guidelines. This assessment project was a wonderful opportunity for the company to re-examine and improve its compliance processes. One of the outcomes of that project was the reorganization of the program to create a single company-wide Office of Ethics and Business Conduct. I left the law department to lead that organization.

In early 2001, I joined Lockheed Martin Corporation as Vice President of Ethics and Business Conduct, with responsibility for the company's Ethics and Business Conduct Program and related compliance activities. I have seen how the organizational sentencing guidelines also had a positive impact at Lockheed Martin. The due diligence requirements for an effective program to detect and prevent violations of the law, as set forth in the guidelines, provide a strong foundation for Lockheed Martin's state-of-the-art ethics and compliance program.

American business has now had 10 years of experience with the organizational guidelines and with corporate compliance programs designed to implement their requirements. These guidelines have had a profound impact on the way these companies do business. Although the DII signatory companies were already committed to formal compliance programs, the sentencing guidelines were the driving force in bringing these programs to the rest of corporate America.

Those of us who have helped organizations to develop programs with these guidelines in mind have had an opportunity to evaluate their strengths and weaknesses. I believe it is time to take a close look at the guidelines to see how they can be improved to be even more effective in preventing criminal behavior and raising the standards of ethical business conduct in the United States. I highly recommend the formation of an ad hoc advisory group to review the guidelines and recommend such improvements. I would also like to convey my availability to serve as a member of such a group.

Very truly yours,

  
Nancy McCready Higgins

Winthrop M. Swenson  
Partner,  
Compliance Systems Legal Group

D.C. Area Office  
7116 Poplar Avenue  
Takoma Park MD 20912  
Tel 301 270 3555  
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email wswenson@cslg.com

Chair Diana E. Murphy and  
Members of The United States Sentencing Commission  
Thurgood Marshall Judiciary Building  
1 Columbus Circle NE  
Washington DC 20002

November 2, 2001

Dear Chair Murphy and Commissioners:

I am writing in response to the September 19, 2001 Federal Register request for comment ("RFC") on the appointment of an organizational guidelines advisory group. The RFC states that comment is welcomed in three areas: 1) the scope, duration and composition of the group; 2) the merit of suggestions in letters submitted to date; and 3) any other issues related to the improvement of Chapter Eight. I will address my comments to these three areas.

*1) The Scope, Duration and Composition of the Advisory Group*

Chapter Eight contains much important detail, but I believe the portions of Chapter Eight that have had the greatest impact, generate the most public concern and therefore should be the advisory group's primary focus – at least initially – are the portions relating to the credit for corporate compliance programs. This includes the definition of "an effective program to prevent and detect violations of law" found at USSG §8A1.2, comment. (n.3(k)).

The implications of the guidelines' credit for compliance programs is difficult to overstate. Most major corporations operating in the U.S. today have been spurred by the guidelines' credit for compliance programs into establishing such programs, and virtually all of these companies have been guided by the guidelines' definition of "an effective program" in designing their programs. In addition, major cases and enforcement policies that have an impact on corporate behavior have drawn heavily on the guidelines' approach. Finally, newly proposed ISO standards for compliance programs that are working their way through the international approval process are based on the guidelines' definition of an effective program.

I therefore believe it is important that the Commission recognize, in weighing the scope of an advisory group (as well as the group's duration and purpose), that while the number of "cases" applying Chapter Eight or its credit for compliance programs is relatively low, the impact of the guidelines' pro-compliance policy – especially on our business organizations and, as a result, on the everyday lives of literally millions of employees – is extensive. I have worked with scores of companies over the last five years and have seen this impact first-hand. I would add finally, that the cost of failing to meet the guidelines' compliance standards is also very significant, with criminal fines now reaching into the hundreds of millions of dollars. In short, the guidelines' compliance standards and credit are exceedingly important and should therefore be, in my view, the starting point for the advisory group's work.

With respect to the question of what issues the advisory group should focus on, I would respectfully urge that the group address issues that go beyond potential amendments to the definition of an effective program. As partially summarized in the attached article, J. Murphy & W. Swenson, *A Call to Action – Creating a Voice (and Ears) for the Compliance and Ethics Field*, Prevention of Corporate Liability (July 2001) (see "The Need" section beginning on the first page of the article), the current legal and enforcement environment in which the guidelines must operate is, in many ways, inimical to the goals of Chapter Eight's policy of promoting effective compliance programs.

In other words, aspects of the legal and enforcement environment make it much more difficult for organizations to operate the kind of compliance programs the guidelines intend to encourage. As the article discusses, issues have arisen as a consequence of decisions by the National Relations Board, the Federal Trade Commission and certain court decisions. In addition, existing penalty schemes such as the treble damage provisions of the False Claims Act can be – and I believe are – applied in ways that undercut the guidelines' credit for compliance programs.

Accordingly, I would urge that the advisory group inventory these issues and present proposals to the Commission on how these issues might be addressed – either through 1) dialogue with other agencies or 2) legislation, aimed at coordinating and bringing greater rationality to the current inconsistencies. In my view, and I believe the view of most experts in the field, this is where the larger, more significant issues reside – not so much, in other words, in the guidelines themselves.

The suggestion that the advisory group examine the broader legal and enforcement environment in which the guidelines' compliance provisions operate is directly supported by the Commission's enabling statute. As the Commission recognizes, its enabling statute contemplates that the Commission will evaluate the effectiveness of sentencing policies on an ongoing basis and improve them where possible. See, e.g., 28 U.S.C. §§991(b)(1)(A) and (C), (b)(2), 994(o).

However, the Commission's authority goes beyond merely amending the guidelines themselves to improve their effectiveness. Congress was aware that the guidelines would not be able to function in a policy "stovepipe" – it knew that other agencies and laws

could affect the guidelines' effectiveness. Not wishing the Commission to ignore such effects, Congress empowered the Commission to:

- “[A]ssist and serv[e] in a consulting capacity to Federal courts, departments, and agencies in the development, maintenance and coordination of sound sentencing practices;” and
- “[M]ake recommendations to Congress concerning modification or enactment of statutes relating to sentencing, penal and correctional matters that the Commission finds necessary and advisable to carry out an effective ... and rational sentencing policy.”

28 U.S.C. §995(12)(B) and (20), respectively. These powers precisely coincide with the twin needs in this area – to advise and consult with other agencies and to weigh possible statutory changes as a way of strengthening the Chapter Eight’s core policies.

The need for the Commission to use its §995(12)(B) and (20) powers for the purposes described was forcefully recommended six years ago at the Commission’s 1995 symposium, “Corporate Crime in America – Strengthening the ‘Good Citizen’ Corporation”. There, Senator Edward M. Kennedy, an original sponsor of the Sentencing Reform Act of 1984, stated:

Government officials also have a duty to reduce red tape and coordinate multiple overlapping enforcement tools .... While the notion of coordinating these sanctions is not new, the guidelines make coordination all the more imperative. In effect, the guidelines make a basic promise to companies: “Act as good citizens and your penalty exposure will be reduced.” But the promise is false if companies face non-guideline penalties that take no account of these “good citizenship” efforts. I am pleased that tomorrow’s proceedings will consider these important coordination issues.

Symposium Proceedings at 120.

As Senator Kennedy noted, a panel the next day did discuss coordination issues at length. See *Carrots and Sticks Amid Overlapping Enforcement Schemes and Policies: Finding Government’s Message*, Symposium Proceedings at 265. A principal presenter on this panel was William B. Lytton (*The Case for Greater Governmental Coordination: Civil Sanctions and Third Party Actions, Symposium Proceedings*), who was recently elected Chair of the American Corporate Counsel Association.

An entirely separate second panel dealt with another critically important coordination issue – the fact that compliance activities can be used against an organization in non-sentencing contexts. See *Privilege Update: When Should Compliance Practices be Protected from Disclosure?*, Symposium Proceedings at 349.

Although 1) Congress has specifically empowered the Commission to discuss coordination issues with other agencies and identify areas where statutory changes could be constructive, and 2) important voices have for some time urged the Commission to use these powers, I certainly think expectations for the Commission's role in this area must be tempered and realistic. In my view, it is not the Commission's responsibility to actually effect any needed changes in the broader legal and enforcement environment. Rather, I believe the Commission's §995(12)(B) and (20) authorities imply a responsibility to see that relevant issues are identified and, to the extent possible, fairly considered by other policymakers.

With respect to the advisory group's membership, I think that it is essential that the group consist of a broadly representative cross-section of recognized experts in the field. This is not an area where academic study is particularly called for. There is a substantial reservoir of practical experience to draw from and there are known experts who have had a prominent role in representing the compliance/ethics field and can tap into this experience.

If the advisory group is comprised of recognized experts in the ethics/compliance field, the advisory group will be able to assist the Commission on both the "issue identification" and "dialogue with other agencies/Congress" fronts. Experts who are recognized in, and connected to, the ethics/compliance field will be able to identify true needs by "vetting" issues within the broad spectrum of compliance/ethics practitioners. In my view, this vetting process is critically important, as discussed in the next section of this letter, if the Commission's examination of Chapter Eight is to prove successful.

With respect to promoting a dialogue with other interested policymakers, the advisory group can again be helpful if it has the necessary experiential stature. Many prominent organizations have mature compliance/ethics programs. Those who have substantial experience either working with these companies in an advisory capacity or running such programs directly can cogently inform discussions with policymakers in forums that the Commission could facilitate or create. This would allow a full consideration of relevant issues by policymakers but not, as would be appropriate, a guarantee of any particular results.

One particular way to ensure that the advisory group has a substantial linkage to the compliance/ethics field would be to select one or members from those affiliated with the newly formed Coalition for Ethics and Compliance Initiatives (CECI). I played an early role in helping this group become organized (a role that has now ended in a formal sense) and I understand that Jay Cohen, the current Chair of the CECI Oversight Committee is submitting comment directly on CECI's behalf.

With respect to the advisory group's duration, I would recommend a timeframe of not less than two years. The issues are complex, the issues need to be vetted among practitioners who are busy professionals, and the Commission has many other important matters on its agenda that, presumably, would limit the time it could devote to the advisory groups' activities.

## *2) The Merit of Suggestions in Letters Submitted to Date*

With one exception, I do not have comments on any of the proposals made to date. Indeed, consistent with the view that proposals such as the ones already submitted need to be fully vetted, I think it is premature to comment on them. At the Ethics Officer Association meeting in Nashville last month, I led a session in which I asked attendees to react to the proposals submitted so far. The attendees' response illustrates my concern over the need for vetting. Almost all the suggestions were viewed as well meaning, but several were viewed as ill-informed.

The one suggestion that I think data and experience do generally support at this point is the need to heighten the importance of auditing and other evaluative techniques in the definition of "an effective" compliance program. The Commission's policy interests here are, in my view, to ensure that only "real" and "effective" programs are credited under USSG §8C2.5(f). Organizations that fail to evaluate the effectiveness of their programs may not have effective programs – providing that only companies that do evaluate their programs can receive culpability score credit helps ensure that credit will only given where it is due.

Having said this, however, this point immediately raises the coordination issues discussed above. In today's litigation and enforcement environment, information gathered to assess and strengthen a compliance program can be used against a company in non-sentencing contexts. The Commission's possible policy interest here, in other words, conflicts with other laws and practices.

## *3) Other Issues*

The only additional issue I feel compelled to raise relates to the need for the advisory group to be what might be called "technically grounded" in the Commission's practices and statutory framework. It seems to me that the Commission has had varying success with advisory groups and one of the groups that was the least successful was a group convened to help the Commission further consider environmental guidelines for organizational offenses in the early 1990s. This group's members were able and expert, but because they lacked an understanding of the guidelines' structure, the guidelines' amendment process and the parameters of the Commission's enabling statute, I believe their expectations for what the Commission could consider doing were unrealistic. As a consequence, their recommendations were not nearly as useful as they might otherwise have been.

This kind of issue does not arise with the Practitioners Advisory Group because its members are accustomed to the guideline amendment process and used to working with the guidelines themselves. This will not be the case for most experts on compliance/ethics – the kinds of people who, in my view, should comprise the advisory group.

There appear to be two options for dealing with this issue – either having a dedicated staff member assigned to the group, which raises resource questions, or appointing a chief technical advisor among the group’s members. I think a staff and/or Commissioner liaison to the advisory group is a good idea in any case, but to ensure that the technical perspective is seen by the group as part of its own process and not an outside perspective, I favor the latter approach.

Let me conclude by saying that I would be pleased to serve in such a capacity drawing on my six years with the Commission, which included both legislative and organizational guidelines responsibilities, or in any other capacity the Commission would find helpful.

I strongly commend the Commission for undertaking the important inquiry raised by the RFC, am grateful for the opportunity to share these views and stand ready to assist however I can.

Sincerely,

A handwritten signature in black ink, appearing to read 'Win Swenson', with a long horizontal flourish extending to the right.

Win Swenson



**BNA, INC.**

# Prevention of Corporate Liability

## A Call to Action: Creating a Voice (And Ears) for the Compliance and Ethics Field

BY JOE MURPHY AND WIN SWENSON

Ten years ago, the Federal Sentencing Guidelines for Organizational Defendants became law, setting off a chain reaction that has helped make compliance and ethics programs a fixture on the American business landscape. The Guidelines created incentives for companies to establish such programs as a way of avoiding harsh penalties in the event of a criminal conviction for employee misconduct.

But they did much more than this—they catalyzed a transformation in the way that government and courts look at corporate responsibility for employee misdeeds. Under a range of pronouncements—from the Department of Justice's policy for charging corporations, to agency guidance and case law sorting out liability in the area of equal employment opportunity, to the standards of director and officer liability implied by the *Caremark* decision—a consensus has formed: The existence and strength of a company's compliance or ethics program should count when a company's responsibility for employee misconduct is being assessed.

This new perspective is welcome. It puts greater control of a company's potential liability in its own hands. And companies have responded. Today, more companies than ever have meaningful compliance/ethics programs. The Ethics Officer Association (EOA)—which did not even exist in 1991 when the Guidelines were promulgated—now has over 700 energetic members who regularly

gather to share and advance best practices.

But as the Guidelines' tenth anniversary nears, the compliance/ethics world is far from idyllic. The fact is, companies today must operate their compliance/ethics programs in a legal environment that is often hostile to the very practices that make these programs work best. Compounding the problem, policymakers regularly weigh proposals that can unnecessarily undermine the jobs of compliance and ethics officers—not because policymakers want to make these professionals' jobs harder, but because they often have little idea what compliance and ethics officers do.

And no wonder. While most professional groups have an association that can speak to a broad range of policymakers (legislatures, cross-industry regulatory groups, even courts) on their behalf, compliance/ethics officers have no such organizational voice. Perversely, as the government's policies have increasingly emphasized the need for corporate compliance and ethics, compliance and ethics officers have often had to swim hard against a legal current that is indifferent or even hostile to these same policies.

Organizations such as EOA and the industry-specific Health Care Compliance Association perform immensely valuable functions. But their missions do not include a mandate to systematically interact with the full range of policymakers to resolve issues on behalf of the compliance/ethics profession—let alone across industries. Up to now, no one has been

doing this for the ethics/compliance field.

Now, however, with seed money from leading compliance-oriented companies and not-for-profits (such as EOA, the Ethics Resource Center, the Center for Business Ethics, and the Ethics Resource Center's Fellows Program), an effort is underway to explore how and whether a permanent organization along these lines might be built—to be a voice (and ears) for compliance and ethics professionals, to help ensure that the legal environment supports effective programs.

This unprecedented new effort is flying under the banner of the "Coalition for Ethics and Compliance Initiatives" (CECI).

### CECI's Mission

The mission of CECI is straightforward—to foster the implementation of more effective ethics and compliance programs by:

- educating and communicating with policymakers, legislators, government agencies, and others who influence public policy,
- providing timely information and analysis to ethics and compliance practitioners and their organizations,
- serving as a voice and resource to ensure that the ethics and compliance communities are heard in the formulation of public policy, and
- identifying and advocating for relevant public and organizational policy issues of interest to CECI's members.

### The Need

The need for CECI is powerfully illustrated by examples depicting the troublingly uncertain legal environment in which compliance and ethics programs must operate.

(continued on page 78)

Joe Murphy ([jemurphy@cslg.com](mailto:jemurphy@cslg.com)) and Win Swenson ([wswenson@cslg.com](mailto:wswenson@cslg.com)) are Transition Coordinators for the Coalition for Ethics and Compliance Initiatives. Murphy is executive vice president of Compliance Systems Legal Group and Swenson is a partner with the firm.

(continued from page 80)

1. *The case of the unlucky stores:* A retail chain, concerned about preventing discrimination, hires an expert to conduct employee training sessions. To make sure employees truly understand the kind of conduct the training seeks to prevent, the instructor has employees describe biased comments they have heard in the stores. In a later discrimination lawsuit brought by employees, a federal judge provides the plaintiffs' lawyers with all the notes of the training course, whereupon the lawyers announce they have found "the smoking gun." In her opinion, the judge cites these very notes as a basis for allowing *punitive* damages claims. Shortly thereafter, the company settles the case for \$100 million—and the company's lawyers shut down the training.

*Message:* Addressing a compliance problem by openly recognizing that problem is legally risky.

2. *The case of the unfair labor practice:* A utility company wants its compliance and ethics message to reach all employees. Its program will not be just a paper program with unread materials locked away in a dusty storage room. The company will have every employee, even those doing the most mundane tasks, receive its new code of conduct. An act of a good corporate citizenship? No, an illegal unfair labor practice, according to the National Labor Relations Board. In the Board's view, law abidance and morality were not essential parts of the job at this company; the company had a duty to negotiate the "imposition" of the code with the employees' union.

*Message:* Think twice about including nonexempt employees in your ethics program.

3. *The case of the self-reporting polluter:* Government environmental agencies told brewers not to worry—their brewing processes did not release harmful pollutants. One brewery, acting as a good corporate citizen, conducted its own tests, however, and determined that pollutants, in fact, were being produced. It reported its findings to state environmental enforcement authorities. The result? State authorities announced they had caught this wrongdoing company and were imposing a \$1 million punitive fine.

*Message:* Think twice about initiating a proactive compliance review and disclosing issues; your acts of

good corporate citizenship could cost you dearly.

4. *The case of the wronged harasser:* A company receives a confidential hotline call reporting that a manager is flagrantly harassing female employees; the caller is one of these employees and fears for her well-being if her boss finds out. To ensure a full and independent investigation, the company hires an outside law firm to look into the matter. The firm's report, relying in part on confidential information from victims, demonstrates that the manager engaged in harassment and intimidation. The company terminates the manager but the manager sues, successfully recovering lost pay and damages because the company failed to follow the Fair Credit Reporting Act: It did not ask his *permission* to retain the outside law firm, and it did not disclose to him the report's full content, including the identity of every employee who complained about him.

*Message:* Diligent investigations, aimed at protecting victims, can come with a price.

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**Every day compliance and ethics practitioners confront impossible choices. Practices that may promote effective compliance and ethics are simultaneously discouraged by the law.**

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What makes these stories troubling is that they are not make-believe. The first is the *Lucky Stores* case from a federal district court in California. The second is the AEP case, a decision by the NLRB that was affirmed on appeal. The third story is what happened to Coors brewery in Colorado. The fourth case is based on a legal interpretation of the Fair Credit Reporting Act by the Federal Trade Commission.

## Chilling Effective Practices

The crux of the problem goes beyond clearly unfair but sporadic cases, however. Every day compliance and ethics practitioners confront impossible choices. Practices that may promote effective compli-

ance and ethics are simultaneously discouraged by the law. Two examples, among many, illustrate:

■ Studies regularly show that some employees in virtually all organizations are unwilling to report sensitive compliance or ethics issues out of fear—fear that coworkers may disapprove, that a manager may try to retaliate, and so on. Companies can reduce fear by instituting nonretaliation policies, but in the end a promise of confidentiality to reporting employees may be required to get some to overcome their fears and actually report an issue. The problem is, companies that make a promise of confidentiality may be *forced* to break that promise if litigation arises and third-party discovery is allowed. There is no clearly established legal doctrine that protects against disclosure of an internal whistleblower's identity—no matter how important confidentiality may be to the whistleblower's decision to report—if a private litigant or the government seeks the material in discovery.

■ Practitioners have developed excellent ways to evaluate the effectiveness of compliance and ethics programs, and using these techniques is an important step in developing the best programs. But when companies diligently seek to identify program weaknesses in order to correct them, they create information that a third party may use against them. The *Lucky Stores* case shows only too well that focusing on faults with the goal of self-improvement is risky. It may be possible to protect this type of information under privilege by running it through counsel, but betting on the attorney-client privilege is a risky business. Moreover, keeping a close hold on self-evaluative information, which reliance on the attorney-client privilege requires, diminishes its usefulness. To promote program effectiveness, distribution of this kind of information should be as wide and open as possible, and certainly should go beyond the lawyers.

## Positive Impact

It would be wrong, however, to suggest that legal and regulatory decisions always undercut effective compliance and ethics. The truth is, some excellent governmental initiatives have promoted voluntary compliance and ethics initiatives in the United States and even around the world.

The development of the Organizational Sentencing Guidelines took a positive, pro-compliance turn (away from an initial, exclusively punitive focus) when practitioners talked with the U.S. Sentencing Commission about the value of effective programs. Had companies familiar with compliance not undertaken such an active dialogue with the Commission, it is doubtful the result would have been so positive. CECI can create the same kind of dialogue with others in the legal and regulatory arenas.

## What Would CECI Do?

CECI's mission statement sets the stage for its activities.

### 1. Educating and communicating with policymakers, legislators, government agencies and others who influence public policy.

We have witnessed too many instances where it appeared that those in government were simply unaware of the existence and role of company compliance and ethics efforts. Whether it is an agency issuing interpretations or congressional committees considering new legislative proposals, the potential impact on voluntary compliance and ethics programs too often is not fully understood.

CECI will bring together the compliance and ethics community first to monitor issues and then to bring them to the attention of government actors. We will be there to explain that voluntary compliance and ethics efforts are valuable, and how government and the litigation system affect these initiatives. We will aim our educational efforts at Congress, enforcement and regulatory agencies, the executive branch, and the states.

We will also communicate this message in any other appropriate forum that will help mold public policy. This includes academia, the press, the bar, and other organizations and associations.

### 2. Providing timely information and analysis to ethics and compliance practitioners and their organizations.

Many in the compliance and ethics field are unaware of the surprisingly long list of risks to their programs (and to themselves) created by the legal system. See Murphy, *Examining the Legal and Business Risks of Compliance Programs*, 13 ETHIKOS 1 (Jan/Feb 2000). Moreover, busy practitioners find it hard to keep up with new developments that could add even more risk to their current compliance

and ethics efforts, especially in areas outside their expertise.

There is also a need to act quickly in the governmental and litigation environments. If an agency is conducting rulemaking, a congressional committee is marking up legislation, or a court has a key case on appeal, there is little time to organize positions on an ad hoc basis. In the compliance and ethics context, there is often not even an awareness that these things are happening.

CECI will provide this information-gathering and dissemination function—what we refer to as a “Paul Revere function.” Whether it is a court considering the application of *Caremark*, an agency's enforcement document requiring that companies waive any privileges relating to internal investigations, or a legislative proposal to penalize companies for “invading” employees' privacy (when another agency expects them to be monitoring employee communications for harassing conduct), CECI can spread the word.

## Compliance and ethics

professionals have a powerful story to tell, one that should resonate with policymakers.

### 3. Serving as a voice and resource to ensure that the ethics and compliance communities are heard in the formulation of public policy.

When agency and congressional staffs are considering new initiatives, where do they turn for input and fact-finding? If they know of a readily accessible source, it is easy for them to make that contact. We need to make sure they know there is a resource on compliance and ethics issues.

CECI will seek to play a constructive, consultative role with the Sentencing Commission if, as expected, the Commission begins its review of the Organizational Sentencing Guidelines. We expect to play a similar role with other agencies too. Among its other initiatives, CECI can hold roundtable, interactive sessions with policymakers so that they can see and hear what voluntary compliance is about.

### 4. Identifying and advocating for relevant public and organizational policy issues of interest to our members.

Compliance and ethics practitioners need to do more than be a passive resource, however. CECI can also monitor agencies, legislatures, and courts for proceedings that would affect compliance and ethics efforts. At the direction of our membership, we will act as advocates in each of these forums, to work to prevent creation of new risks for compliance and ethics, and to support and propose initiatives that promote compliance and ethics programs. In advancing the perspectives of compliance/ethics professionals, we will reach out to the many functions in organizations that play a role and have an interest in these issues, including legal departments, HR functions, and internal audit.

CECI will accomplish these goals by, for example:

- filing amicus briefs in litigation;
- conducting workshops for agency staff members;
- proposing legislation to address specific impediments to effective compliance;
- proposing agency solutions, such as rules or agency policies;
- serving as a resource for company counsel in dealing with an agency;
- helping develop executive branch policies to guide all agencies; and
- writing in influential journals in the field.

## Getting Off the Sidelines

The truth is, compliance and ethics professionals have a powerful story to tell, one that should resonate with policymakers. Theirs is not a narrow, “me first” goal—it is everyone's goal: promoting ethics and law-abidance in our country's institutions.

The effort has begun. Prominent organizations have launched the first, exploratory phase of CECI. But for CECI to fully achieve its enormous potential, you who practice in the compliance and ethics field need to resist the otherwise admirable tendency to be modest. We all need to get off the sidelines and let our stories be told. CECI will be as powerful as its members.

*Organizations and individuals interested in learning more about supporting CECI's mission should contact the authors at the e-mail addresses in the biographical material above.*



October 19, 2001

Hon. Diana E. Murphy, Chair  
United States Sentencing Commission  
One Columbus Circle, NE, Suite 2-500  
Washington, DC 20002-8002

Re: Issues related to the Organizational Guidelines  
Federal Register Notice 9/19/01

Dear Judge Murphy:

Please accept these comments in response to the Notice published in the Federal Register on September 19, 2001, requesting comments on the scope, potential membership and possible formation of an ad hoc advisory group on the organizational sentencing guidelines to consider any viable methods to improve the operation of these guidelines.

***Possible formation of an ad hoc advisory group.***

Forming an ad hoc advisory group to review the organizational sentencing guidelines after ten years of application is an excellent idea. During the last ten years, the organizational sentencing guidelines have dramatically impacted the way that business is conducted in America. Speaking for the health care industry – one of the most highly regulated industries in the world – I can say that no law has had a greater impact on this industry since the creation of the Medicare program in the 1960s. I feel certain the same is true for other industries as well. Ad hoc advisory groups assisted the Commission in developing the guidelines and would provide valuable insight to the Commission in reviewing them for viable opportunities for improvement after ten years of experience.

An ad hoc advisory group will provide a forum for the Commission to openly discuss with representatives of industry and government the benefits and burdens as well as the workable and difficult provisions of the guidelines and to evaluate the effect of any potential changes to the guidelines. The views of industry representatives in an organized forum are likely to be more balanced than those of advocates for organizational defendants facing sentencing under the guidelines. Organizations all too



often do not worry about the guidelines until they face sentencing. The comments submitted to the Commission under such circumstances are not likely to be as constructive as those made in a dispassionate ad hoc advisory group.

***Scope of review.***

The original organizational sentencing guidelines listed the seven components of an effective corporate compliance program in such general terms that each industry has been able to apply the seven components to its own unique industry practices. Based on the framework of the sentencing guidelines, the Office of Inspector General of the Department of Health and Human Services has issued ten final sets of guidelines for:

- hospitals
- clinical laboratories
- home health agencies
- voluntary disclosures of health care fraud
- third-party billing companies
- the durable medical equipment, prosthesis and orthotics supply industry
- hospices
- Medicare +Choice Organizations
- nursing facilities, and
- individual and small group practices.

Guidelines for the pharmaceutical industry are currently under development. More will surely follow.

With this many supplemental guidelines being released in only three years for just one industry, the Commission should exercise caution in responding to the many requests that the sentencing guidelines themselves be more specific. While everyone has a desire for certainty, this is not an area where one size fits all. The guidelines should remain a flexible and general framework for measuring corporate culture.

Nevertheless, there are questions or ideas about the guidelines that merit review and discussion. Certainly, extending the guidelines to cover ethical business practices is clearly the next step. Strict compliance with legal requirements is not sufficient to deter criminal behavior if an organization can find creative ways to circumvent the limitations imposed by the law. While such conduct may not be actionable under the law, it should be weighted in the sentencing guidelines. Many corporations have expanded their private compliance programs to include ethical business practices. However, this can place them at a disadvantage when their sole competitor is using every legal loophole.

Likewise, the Commission should consider the impact of sanctions on tax-exempt organizations. Since creation of the Medicare program, the federal government has become the nation's largest payor for health care services. Because hospitals were

paid under a "cost plus" reimbursement basis for nearly four decades, the Medicare program resulted in huge infusions of capital into the health care industry, creating the world's most advanced health care system. However, with the prosperity came the conversion of the hospital industry from a primarily non-profit, charitable industry to an increasingly publicly traded for-profit business. Tax-exempt and for-profit hospitals follow the same laws. Theoretically, the penalties for violating those laws should be the same. The guidelines currently make no distinction between the two.

The primary fiduciary duty of directors of a shareholder-owned corporation is to increase dividends and/or share value. The personal liability of directors for assuring corporate legal compliance established in *In re Caremark*<sup>1</sup> is one function of that primary duty. Conducting business lawfully reduces the risk of fines, penalties and negative publicity. By contrast, the primary fiduciary duty of directors of a tax-exempt organization is to provide designated services to the community. When large fines are assessed against a shareholder-owned entity, the dividends and/or stock values fall. When large fines are assessed against a non-profit entity, the funds available to provide services to the community decrease. Likewise, the personal reputations of shareholders are not damaged when a for-profit corporate entity is fined, but the personal reputations of non-profit trustees are often impacted when the reputation of the facility they govern is diminished by criminal sanctions. This is fact, not theory, and it is something the Commission should consider when evaluating the guidelines for areas of potential improvement.

There is a provision in the organizational sentencing guidelines that permits a downward departure if the members or beneficiaries, other than shareholders, of the organization are direct victims of the offense. This provision cites, as an example, labor unions convicted of embezzling pension funds.<sup>2</sup> There should be a similar recognition that the members of the community are the beneficiaries of a tax-exempt health care provider and substantial fines against tax-exempt health care providers remove funds from the community that would otherwise be spent to benefit the general public.

Serious consideration should be given to the suggestion that the guidelines be more specific about establishing standards and/or defining what constitutes an "effective" compliance program. The annual statistical reports of the Commission show that very few compliance programs have been found to be effective in preventing criminal conduct. The reason for this should be evaluated to see if the cause is lack of specificity in the guidelines or lack of commitment from the organizational defendants.

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<sup>1</sup> *In re Caremark Int'l, Inc.*, 698 A.2d 959 (Del. Ct. Chan. 1996).

<sup>2</sup> § 8C4.8 Guidelines Manual (November 1, 2001) 42

Finally, the ad hoc advisory group should evaluate the wide spectrum of cases in which Chapter Eight has been applied to see if the early concerns about including environmental cases in the general provisions of Chapter Eight are still merited. It may be that the range of activities to which Chapter Eight has already been applied is greater than the range of potential environmental offenses that originally led to excluding them from Chapter Eight.

### ***Potential Membership of Ad Hoc Advisory Group***

The size of an ad hoc advisory group is always a difficult decision. The larger a group becomes, the more difficult it is to coordinate schedules and reach consensus. However, the organizational sentencing guidelines impact the entire spectrum of business in America. Thus, any group considering potential changes to the guidelines should be large enough to represent a cross-section of the business community.

Application of the False Claims Act to health care claims has resulted in a situation where institutions that have traditionally been public charities operate under constant fear of enormous fines and penalties for technical violations of complex regulations that are frequently given retroactive interpretations by their issuing agencies. It is perhaps the only industry where businesses feel the need to seek formal advisory opinions from governmental agencies to continue decades of charitable work.<sup>3</sup> Thus, the health care industry is very interested in being represented on any committee or advisory group considering new or revised regulations or guidelines.

Changes in the guidelines, however, will not be limited to the health care industry. Thus, the members of the ad hoc advisory group should represent several of the most highly regulated industries that have a history of being subject to criminal penalties covered by Chapter Eight. If one industry is represented too heavily on the ad hoc advisory group, any recommendations made by the group may not take into consideration the impact of those recommendations on other industries.

Individual organizations are able to maintain anonymity when the ad hoc advisory group is composed of representatives from industry organizations such as the American Hospital Association, American Medical Association, Health Care Compliance Association and the Alliance for Health Care Integrity. However, there is genuine benefit to having the firsthand experience that can be provided by representatives from

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<sup>3</sup> *OIG Advisory Opinion No. 99-6 (St. Jude's Hospital may continue to waive co-payments and deductibles for pediatric cancer patients.)*

Hon. Diana E. Murphy, Chair  
United States Sentencing Commission  
October 19, 2001  
Page 5

large and small providers who have either been sentenced under the guidelines or have settled to avoid being sentenced under the guidelines.

The ad hoc advisory group should include representatives from the various federal agencies that administer the guidelines. The key consideration here is experience. There should be people on the ad hoc advisory group who have prepared the sentencing recommendations for organizational defendants and can share their experience in identifying places where they believe the guidelines did not permit allowance for either mitigating or aggravating circumstances.

And of course, district court judges who review the recommendations and impose the sentences must be on the ad hoc advisory group to share their experiences with cases in which they felt the guidelines were too restrictive.

I hope these comments are useful to the Commission and would be delighted to help in any additional capacity.

Sincerely,



Jane Adams Nangle  
Corporate Compliance Officer  
St. Joseph's/Candler Health System, Inc.  
912-692-5291

Keith T. Darcy *Executive Vice President*  
IBJ WHITEHALL BANK & TRUST COMPANY



October 23, 2001

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

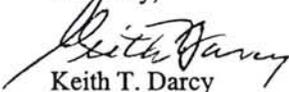
Dear Sir/Madam:

I am writing in response to the Federal Register Notice dated 9/19/01 (BAC2210-40/2211-01) regarding the possible formation of an ad hoc advisory group on organizational guidelines. Since its inception the Organizational Guidelines have generally stimulated an effective response from the business community. The formation and rapid development of the Ethics Officer Association, along with increased vigilance in all compliance areas, attest to the effectiveness of these guidelines.

Given that the Commission has received letters for proposed changes regarding Chapter Eight (Sentencing of Organizations), the creation of an ad hoc advisory group is a worthy recommendation. The formation of such a group would be consistent with the Commission's outreach to its various constituencies and its openness to new ideas. The membership of this group should consist of serious-minded legal, ethics and compliance professionals whose respect for the Organizational Guidelines is established. It should represent a cross-section of leaders from business, nonprofit and the academic communities.

I appreciate the opportunity to comment on this notice. For your information, I would welcome the opportunity to be of service to the Commission in this regard.

Sincerely,

  
Keith T. Darcy



Shell Oil Company  
Jerome Adams  
One Shell Plaza  
P. O. Box 2463  
Houston, TX 77252-2463  
Phone (713) 241-3678  
Fax (713) 241-0520

October 31, 2001

United States Sentencing Commission  
One Columbus Circle, N.E.  
Suite 2-500, South Lobby  
Washington, DC 20002-8002  
Attn.: Public Affairs

Re: Improvements to Organizational Guidelines

Shell Oil Company's Ethics and Compliance Office understands that you are considering appointing an advisory committee to develop proposals on the federal sentencing organizational guidelines for your consideration. We recommend that you form such an advisory committee, which would include, among others, representatives from corporate ethics and compliance offices.

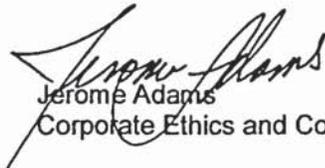
If an advisory committee is formed, then we would also recommend that you instruct the committee to use a rigorous process, such as an "after action review" to structure its work. As you probably know, the after action review process is used widely by the United States military and is gaining support among corporations. The after action review process can be summarized in six steps:

1. What was the original intent of the action being reviewed?
2. What exactly happened and why?
3. What have we learned?
4. What do we know now and what actions should we take? The actions would include short-term, mid-term and long-term actions.
5. Take actions identified in 4.
6. Tell others who need to know what was learned.

We think following such a process will allow for better focus for the advisory group and will result in improved guidelines for corporations to use when developing their compliance programs.

Shell would be willing to send a corporate representative to participate in this important work.

Best regards,

  
Jerome Adams  
Corporate Ethics and Compliance Officer

November 1, 2001

United States Sentencing Commission  
Attention: Public Affairs  
One Columbus Circle, NE  
Suite 2-500, South Lobby  
Washington, D.C. 2002-8002

Commissioners of the United States Sentencing Commission:

Since the Organizational Sentencing Guidelines were promulgated in 1991, they have had an immense cross-industry impact on corporations. The organizational guidelines have refocused corporate management and Boards on the obligation to prevent violations, while concurrently implementing meaningful incentives and defining actions that corporations should take in managing compliance. The organizational guidelines and decisions such as the *Caremark* case have helped corporate America converge on a commonly understood and accepted standard for compliance management. As a result, many corporations have established high-level compliance and ethics programs to prevent violations and have voluntarily come together in organizations such as the Ethics Officer Association to facilitate the exchange of ideas and information.

Although the organizational guidelines have achieved a great deal in promoting effective compliance management in corporations, I strongly support the proposal that the Commission has put forth to establish an ad hoc advisory group to consider viable methods to improve the operation of the organizational guidelines. If such an advisory group is established, the scope of issues addressed should extend beyond the sentencing of organizations to include discussion on the operation and impact of the Guidelines in the corporate environment. Issues identified by corporate ethics officers could provide insight on how the Commission could move to enhance the effectiveness of the organizational guidelines 1) to promote a more consistent approach to compliance and ethics management between and across industries, and 2) to improve compliance and ethics management in corporations that have established programs.

Commissioners of the United States Sentencing Commission  
Page 2  
November 1, 2001



If an ad hoc advisory group is established and the scope of work for that group includes the operation and impact of the organizational guidelines in the corporate environment, I recommend that membership of the advisory group include ethics officers and a representative from the Ethics Officer Association or the Coalition for Ethics and Compliance Initiatives. Membership should not be exclusively a legal constituency. Ethics officers have first hand experience in applying the organizational guidelines, especially in terms of criminal conduct, which is the primary aspect of the Commission's emphasis on deterrence in Chapter Eight.

If the Commission decides to form an ad hoc advisory group that includes ethics officers, I would be honored to serve as a member of that advisory group. Attached is information on my qualifications to serve in this capacity.

Thank you for the opportunity to comment on the establishment of an ad hoc advisory group on the Organization Sentencing Guidelines.

Sincerely,

A handwritten signature in black ink, appearing to read 'Eric Pressler'. The signature is fluid and cursive, with a long, sweeping underline that extends to the right.

Eric Pressler  
Director, Legal Compliance and Business Ethics  
PG&E Corporation  
Phone: (415) 973-6607  
eric.pressler@pge-corp.com

EP:mb

Enclosure

## Eric Pressler - Qualifications for USSC Advisory Group

**Ethics Officer Experience:** I have served as the Director of Legal Compliance and Business Ethics at PG&E Corporation for more than 5 years. PG&E Corporation is one of the largest utility and energy services companies in the United States, with over 23,000 employees and over \$20 Billion in annual revenues. The PG&E Corporation compliance and ethics program was designed in accordance with the requirements of the Organizational Sentencing Guidelines. I have worked for the Corporation for 22 years.

**Ethics Officer Association (EOA):** I have been the EOA Sponsoring Partner Representative for PG&E Corporation since 1996. In 2000, I was elected to serve a three-year term as a member of the EOA Board of Directors. I have made numerous presentations at EOA conferences on compliance and ethics topics and will be teaching the session on compliance risk assessment in the EOA course, Managing Ethics in Organizations.

**Bay Area Compliance Association (BACA):** BACA is a regional organization in the San Francisco Bay Area focused on enhancing compliance management activities for BACA member companies. BACA currently has 20 corporate members and meets bi-monthly. I co-founded this organization in May 2000 with another local EOA member and was elected by the BACA membership as the BACA Chairperson for 2000 and 2001.

**USSC Regional Forum:** PG&E Corporation co-sponsored and helped organize the USSC Regional Forum in San Francisco in September 1999.

**Education:** I hold a B.S. in Business and a MBA in Management from the University of California, Berkeley.

Charles L. Howard  
Phone: (860) 251-5616  
Fax: (860) 251-5699  
choward@goodwin.com

October 25, 2001

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

RE: Federal Register Notice of September 19, 2001

Dear Chair Murphy and Commissioners:

I am writing in response to the Commission's Federal Register Notice of September 19, 2001 requesting comment on issues relating to the Organizational Guidelines.

I think that the Commission should appoint an ad hoc advisory group to study possible revisions to the Organizational Guidelines and Commentary. I would suggest that such a group have no more than 15 members and include federal prosecutors and judges, business ethics officers, private practitioners (both criminal defense counsel and counsel experienced in business ethics and related matters), and academicians. Despite the broad scope of Chapter 8 of the Guidelines, I think that this ad hoc advisory group should be asked to concentrate on business ethics and compliance issues. If there are other areas in Chapter 8 of concern to the Commission, another ad hoc group could be appointed with a membership related to those issues. The ethics and compliance ad hoc group should be asked to report back to the Commission within 18 months of its appointment.

I would like to express my desire to serve on such an advisory group. I practice law with a large Connecticut firm and have a broad civil litigation practice that includes substantial experience in ERISA and intellectual property litigation matters and appeals in a variety of areas. I also have for many years represented public clients such as the City of Hartford and the State of Connecticut in various matters. In addition, for over ten years, I have been independent counsel for organizational ombuds programs, including several at national and international corporations. This experience has given me insight into the operation of corporate ethics programs and the dynamics of

employee reporting and dispute resolution at major organizations. I have been a co-author of booklets published by The Ombudsman Association (TOA) on both the ombudsman confidentiality privilege and on the impact of the Commission's Organizational Guidelines on corporations and how ombuds programs can be of assistance in creating an "effective program to prevent and detect violations of law." As a frequent presenter at annual conferences of The Ombudsmen Association and as an author of articles for the TOA newsletter, I have had many opportunities to become familiar with the role of ombuds programs in a variety of institutions. The TOA is the nation's leading trade association for corporate and organizational ombuds programs, and I believe that I would be able to draw upon the collective experience of its members as well as my own experience in serving on such an ad hoc advisory group.

My experience in representing corporate ombuds offices lead to my being asked to assist in an Ethics Resource Center (ERC) Fellows Program, where I was a contributor and a draftsman of a legislative model contained in the ERC's Resolution and Report: Employee Confidentiality and Non-Retaliating Reporting Systems, dated May 7, 1999. In the course of my representation of corporate ombuds offices and my participation in the ERC Fellows Program, I developed an idea for possible revisions of the Commentary to the Guidelines that I presented in the enclosed letter to Judge Murphy this past April.

While my principal experience is in civil litigation, I have long been familiar with criminal law issues. I began my career as an assistant attorney general in Missouri handling state court criminal appeals. In the course of my practice in Connecticut, I have handled corporate internal investigations in matters involving alleged federal procurement fraud and State Ethics Commission violations. In addition, I have served since 1995 as a Commissioner on the Connecticut Criminal Justice Commission, which is responsible for hiring all state prosecutors in Connecticut. A copy of my resume is attached. If any Commissioners have questions concerning my background or experience, I would be happy to furnish whatever additional information is necessary.

United States Sentencing Commission  
October 25, 2001  
Page Three

I hope that the Commission appoints an ad hoc advisory group on possible revisions to the business ethics and compliance issues. I would be honored to be appointed to such a group and would devote whatever time is necessary to its work.

Very truly yours,

A handwritten signature in black ink, appearing to read "Charles L. Howard". The signature is written in a cursive style with a large, stylized initial "C".

Charles L. Howard

CLH:trb  
Enclosures

**CHARLES L. HOWARD**

Shipman & Goodwin LLP  
One American Row  
Hartford, Connecticut 06103-2819  
(860) 251-5616  
FAX (860) 251-5699  
E-mail: [choward@goodwin.com](mailto:choward@goodwin.com)

**EDUCATION:** University of Virginia School of Law, J.D. (1975)  
Princeton University, A.B. (cum laude) (1972)  
(Woodrow Wilson School for Public and International Affairs)

**EMPLOYMENT:** Shipman & Goodwin, Partner (1984-present)  
Chair, Litigation Department (1985-2000)  
Member, Management Committee (1990-96), (1998-2000)  
Chair, Practice Committee (1994-95) and Practice Oversight  
Committee (1995-97); Member (1997-98, 1999-present)  
Practice areas: General civil litigation in state and federal courts,  
with significant experience in appeals; ERISA, municipal, and  
intellectual property litigation; and representation of corporate  
ombuds.

Associate, Robinson, Robinson & Cole (1977-81)

Assistant Attorney General of Missouri for Attorney General John C.  
Danforth (1975-76)

**ADMITTED TO BAR:** Connecticut, 1977; Missouri, 1975; United States District Courts for  
the Western District of Missouri, District of Connecticut, District  
of Vermont, and District of Arizona; United States Courts of  
Appeals for the Second, Eleventh, and Federal Circuits; United  
States Tax Court; United States Supreme Court.

**PROFESSIONAL  
ACTIVITIES:**

**Present:** Commissioner, Connecticut Criminal Justice Commission  
(1995 to present); Guest Lecturer on ERISA Litigation, University of  
Connecticut School of Law; Trustee appointed pursuant to Practice  
Book §2-64 by the Connecticut Superior Court as attorney to protect  
clients' interests in connection with disbarment of an attorney;  
Lawyers for Children America. **Prior:** Commissioner, Connecticut  
Judicial Selection Commission (1992-95); Commissioner,  
Connecticut Commission on the Compensation of Elected State  
Officials and Judges (1983-91); Chair, Hartford County Bar  
Association Ethics Committee; Board of Directors, Connecticut  
Association of Municipal Attorneys; Member, Civil Action Victims

Task Force (appointed by General Assembly pursuant to Special Act 87-52); Special Public Defender for pro bono criminal appeals; Connecticut Bar Association Executive Committees: Sections on Administrative Law, Civil Justice, Municipal Law, and Professional Ethics. Speaker: numerous bar association and professional seminars.

Member: American, Connecticut, and The Hartford County Bar Associations; National Health Lawyers' Association; and Defense Research Institute.

**COMMUNITY  
ACTIVITIES:**

**Present:** Board of Trustees of the Connecticut Policy and Economic Council; Local Government Committee, Hartford Downtown Council; Board of Directors, Terry's Plain Homeowners' Association. **Prior:** President, First Church of Christ, Simsbury; Board of Directors, Connecticut World Trade Association (1983-90); Board of Directors, Simsbury Historical Society; Regional Strategy Implementation/Retreat Committee, Greater Hartford Chamber of Commerce; Member, Connecticut District Export Council; Board of Directors, Bushnell Park Foundation; Treasurer, Jim Fleming for State Representative; Board of Directors, Simsbury Public Library (1981-85; elected); Treasurer, Chair of Personnel and Finance Committees, and Member of Stewardship Committee, First Church of Christ, Simsbury; Transportation Committee, Town of Simsbury (1981-87); Member of task forces of the Greater Hartford Chamber of Commerce for the establishment of Connecticut World Trade Association and for study of water resources for the Greater Hartford area; Board of Directors, Spring Grove Cemetery Association; Board of Trustees, Simsbury Land Conservation Trust; and Volunteer Tutor, Fred D. Wish School, Hartford.

**HONORS:**

Chosen as one of five men from Central Connecticut and Western Massachusetts in 1979 by the Rotary Foundation International to participate in a five-week cultural exchange program in Hokkaido, Japan.

Invited participant on Connecticut-Shandong Trade Mission to China with Governor William O'Neill in 1987.

Martindale-Hubbell rating - AV

**PERSONAL:**

Born in Alamogordo, New Mexico; April 15, 1950  
Married to Joan Wunderlich Howard; two children  
Resident of Simsbury, Connecticut, since 1977

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April 3, 2001

The Honorable Diana E. Murphy  
Chair  
United States Sentencing Commission  
Suite 2-500 South Lobby  
One Columbus Circle Northeast  
Washington, D.C. 20002

Re: Suggestion for Additional Commentary to the Organizational Sentencing Guidelines

Dear Judge Murphy:

I am writing to urge the Commission to amplify the commentary to Section 8A-1.2 of the Organizational Sentencing Guidelines to articulate criteria that would constitute a presumptive "safe harbor" for a "reporting system whereby employees and other agents could report criminal conduct by others within the organization without fear of retribution," as that phrase is currently used in Commentary §3(k)(5).

The premise of my proposal is that ethics officers, alone, cannot create an environment for reporting wrongdoing without fear of retribution. Since ethics officers must investigate and, if necessary, initiate appropriate action on matters brought to their attention, their position has inherent barriers to alleviating employee reluctance to report wrongdoing or fear of retribution. Consequently, organizations must often look for additional ways to reduce fear of retribution and encourage employee reporting of wrongdoing.

For over ten years, I have represented organizational ombuds offices, including several at national and international corporations. During this time, I have repeatedly seen how organizational ombuds offices work cooperatively with and yet separately from business practice or ethics officers for their organizations to facilitate reporting of wrongdoing by employees while reducing the fear of retribution. My clients have found that enabling an employee first to go to a neutral office with an assurance of confidentiality enables many people to feel comfortable enough to later come forward to

April 3, 2001

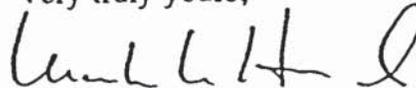
the compliance officer or other official company channels. In many other instances, the ombuds and the employee have found ways of reporting alleged violations while still preserving the confidentiality of the employee's identity. Because these offices attempt to preserve the confidentiality of their communications with reporting employees and are not official reporting channels for the organization (and thus do not "investigate" wrongdoing), they are able to reduce the fear of retribution while fostering reporting of wrongdoing. Indeed, the benefits of such a neutral office, whether called an ombuds office or by some other name, go to the very heart of creating a reporting system that allows wrongdoing to be reported without fear of retribution.

The Commission would provide strong support to organizations that want to comply with the Sentencing Guidelines if it were to identify in further commentary the essential characteristics of a program that presumptively would constitute a "reporting system whereby employees and other agents could report criminal conduct by others within the organization without fear of retribution." Among these characteristics would be the creation of a neutral office within the organization, separate and distinct from the compliance or any formal function, that would encourage and facilitate employee reporting of concerns in the workplace, including violations of law. Such a neutral office must be designed and operated so that it is neutral, independent, and has the ability to assure employees or others within the organization that their communications with the office will remain confidential. Likewise, it would be important both for such an office to have direct access to senior management and compliance officers and for the office to be adequately funded in order to publicize its presence as an alternative channel of communication within the organization.

The initial Commentary in Section 3(k) helped create and standardize the role of organizational ethics officers in a wide variety of organizations. Now that their role is well established, I believe the Commission has the opportunity to address ways that organizations can break down the barriers to reporting. By distilling and articulating the essential characteristics of such a neutral office in a nonexclusive way, the Commission would both promote greater corporate and organizational responsibility for compliance with the law as well as help create more uniform standards.

Thank you for your consideration.

Very truly yours,



Charles L. Howard

CLH:ems

cc: Timothy B. McGrath, Staff Director

Paula J. Desio, Esq., Deputy General Counsel

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November 6, 2001

United States Sentencing Commission  
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Washington, D.C. 20002-8002

## ATTENTION: PUBLIC AFFAIRS

Dear Commission Members:

I submit this letter on behalf of Lisa A. Kuca and myself, in response to the Commission's request for comments regarding the establishment of an advisory group on the organizational sentencing guidelines. The Commission has requested comments regarding the composition, scope and operation of such a group.

By way of introduction, I am a partner in Vorys, Sater's White Collar Defense Group and concentrate my practice on corporate compliance matters and white collar criminal defense. Lisa is the Director of Corporate Compliance for H & K Investigative Solutions LLC, which is a subsidiary of Holland & Knight LLP, and devotes her practice exclusively to the creation and implementation of corporate compliance programs. I was formerly an Assistant U.S. Attorney for the Southern District of Florida, and Lisa was formerly a U.S. Probation Officer in the same district. We are both members of the Practitioners Advisory Group.

Lisa and I have both worked extensively with the organizational guidelines. In addition to practicing in the area, we have together written on the subject, and participated in CLE panel discussions of compliance issues with Commission members and industry representatives. Most recently, in August of this year, we participated with Judge Castillo in a program entitled "Corporate Compliance Programs: A Pound of Prevention" at the ABA Annual Meeting in

United States Sentencing Commission

Chicago. Earlier in the year, we participated with Commissioner Steer in a similar program at the ABA National Institute on White Collar Crime in San Francisco.

It is based on this experience that we offer the following thoughts:

**Need for Greater Guidance**

We strongly support the establishment of the proposed advisory group, but for reasons discussed later in this letter, suggest that its purview be limited to the criteria for an effective compliance program (U.S.S.G. § 8K1.2, Application Note 3.(k)). Our experience in working with corporations to establish “effective program[s] to prevent and detect violations of the law” teaches that the organizational guidelines provide insufficient guidance regarding precisely what constitutes such a program. We have found virtual unanimity that more help is needed.

Revising this portion of the guidelines requires a delicate balance, because too much detail could easily be worse than too little. In this area, one size truly does not fit all. Furthermore, the Commission’s authority in this area is somewhat limited. The Commission is in the business of establishing sentencing guidelines, and not prescribing detailed rules for corporate governance. Its challenge – and a challenge for any advisory group – is to reconcile these limitations with the public’s exaggerated view of the Commission’s role as the arbiter of the federal sentencing process.

**Purview**

As noted above, we suggest a discrete focus on compliance programs and related issues. A broad focus on the entirety of Chapter 8 is too ambitious. We note that the areas covered by Chapter 8 include, to cite just a few, diverse examples, potential departures for threats to national security (§8C4.3), the environment (§8C4.4) and the market (§8C4.5), as well as detailed rules for calculating organizational sentences. To consider this multiplicity of areas would require either a group comprised entirely of generalists, or a group so large as to be at least cumbersome.

Moreover – and perhaps most important – **corporate compliance is qualitatively different from other areas covered by the guidelines, in that its focus is more on corporate governance than punishment.** This important difference warrants separate and detailed consideration of whether and how the seven elements of a compliance program should be amended.

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**Composition**

We suggest a smaller "executive" group – with possibly ten to twelve members – that would work closely with the Commission and its staff. The executive group could then form a liaison relationship with a larger advisory group, and possibly with other interested groups as well. This arrangement would facilitate consideration of a large number of proposals, while enabling the executive group and Commission staff to present only the best proposals for consideration by the Commission itself.

The executive group should include individuals with experience in corporate compliance and corporate governance issues. The emphasis in selecting group members should be on skill sets. Relevant skills may be possessed by, among others, in house and outside corporate counsel, compliance officers, compliance educators, risk managers, auditors and internal investigators.

There are important reasons for our emphasis on sophistication in corporate governance and compliance skills, rather than law enforcement experience. First, as noted above, the compliance guidelines uniquely involve corporate governance more than punishment. Additionally, it is imperative that the Commission focus on the sorts of programs that can actually be implemented without unfairly burdening industry and commerce, and without unreasonable cost. We are mindful that the views of the law enforcement community must also be considered, but believe there are sufficient other opportunities for those views to be presented.

The function of the larger group would be to promote consideration of the needs of a broad range of parties affected by the sentencing guidelines, including the law enforcement community. Such a group should also include representatives of large and small companies, heavily and less regulated industries, manufacturing, retail, service and other kinds of businesses. The Commission may also wish to streamline the process by having the executive group liaison with other existing groups, such as the Ethics Officers Association, the Department of Justice and various industry groups, rather than forming a separate, larger advisory group.

**Executive Group Operation**

The goal must be to form a group that can work for the Commission rather than burden it with unworkable proposals. The group must strive to accommodate a variety of conflicting interests, including the need for effective self-regulation versus avoiding exorbitant cost. Its imperative should be to assist

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the Commission's review of experience in the field, and to recommend the narrowest revisions necessary to achieve the desired result.

To function effectively, the executive group should have a clear mission statement, either created by the Commission or subject to Commission approval. It should coordinate with the larger group or groups for the purpose of data gathering and formulating recommendations. As noted above, this should include consultation with representatives of organizations that may be affected by the compliance guidelines.

The group should review existing compliance programs to identify so-called "best practices." This should include programs established to satisfy the guidelines, court-ordered programs, corporate integrity agreements, consent decrees and programs established pursuant to administrative regulations, such as environmental and health care programs. The group should also study reported cases and other authorities on the subject.

Group members should endeavor to achieve consensus independently, before seeking involvement of the Commission staff. In this way, the group can minimize the burden on the staff, while still having the benefit of the staff's views before approaching the Commission itself. Our hope is that through this process, such an advisory group will present the Commission with workable proposals that balance the legitimate concerns of all interested parties.

Lisa and I would, of course, be pleased to do anything possible to assist the Commission with this project, and believe that we can make a substantial contribution to it. We bring to the table significant "hands-on" experience working with corporate counsel, compliance officers, auditors and other corporate officials to draft and implement compliance programs in a variety of settings, ranging from customs to health care compliance. Additionally, our experiences in law enforcement and with the Practitioners Advisory Group have sensitized us to the kinds of proposals that can, and cannot, be implemented through the sentencing guidelines. (We enclose separate biographical summaries, in case the Commission should want additional information about our backgrounds.)

I can be reached in our Columbus, Ohio office at the following address:

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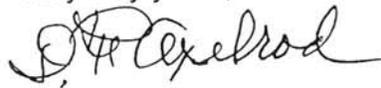
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Lisa can be reached at:

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Thank you for your consideration.

Very truly yours,



David F. Axelrod

**DAVID FREEMAN AXELROD**

*University of Cincinnati, B.A., 1975*

*American University Washington College of Law, J.D., 1978*

Mr. Axelrod is a partner in our Columbus office where he practices in the areas of corporate compliance, and the representation of corporations and individuals in federal and state criminal cases. He advises public and private corporations in compliance matters, including both specific transactions and the establishment of formal compliance programs, and has been intimately involved in the establishment and implementation of such programs.

Mr. Axelrod has defended cases involving allegations of, among other things, securities fraud, health care fraud, customs violations, defense procurement fraud, tax fraud and money laundering, and claims for civil and criminal forfeiture. Recently, he served as a Special Prosecutor for the State of Ohio in the largest securities fraud case in the history of the state.

Mr. Axelrod is a former Assistant United States Attorney for the Southern District of Florida, and a former Trial Attorney for the Tax Division of the United States Department of Justice. Before joining the Department of Justice, Mr. Axelrod practiced in New York City, where he represented clients in both civil and criminal matters. Immediately following graduation from law school, he served as a law clerk for United States District Judge David S. Porter in Cincinnati, Ohio.

A member of the Practitioners Advisory Group to the United States Sentencing Commission, Mr. Axelrod has testified before the Sentencing Commission, and was a group leader at the Commission's Symposium on Federal Sentencing Policy for Economic Crimes and New Technology Offenses. He is also the immediate past chair of the ABA Tax Section Committee on Civil and Criminal Tax Penalties.

Mr. Axelrod has frequently served on the faculties of the American Bar Association National Institutes on Criminal Tax, White Collar Crime and Asset Forfeitures, and regularly speaks at other CLE programs. As an Assistant United States Attorney, he trained prosecutors from around the country in various aspects of the investigation and prosecution of financial cases. He is the author of many published articles on topics related to his practice, and is listed in *Who's Who in American Law*.

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Mr. Axelrod is admitted to practice before the courts of Ohio, New York and New Jersey, as well as many federal trial and appeals courts.

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*Lisa A. Kuca* is the Director of Corporate Compliance for H&K Investigative Solutions LLC. She is responsible for the design and implementation of the firm's comprehensive system of compliance solutions, called "Compliance Management Systems." Compliance Management Systems assists organizations with the development of a corporate compliance programs that will satisfy the Federal Sentencing Guidelines through an integrated approach of traditional legal, training and investigative services. She is responsible for the development of compliance programs, compliance software and web-based compliance solutions. Additionally, she coordinates and manages compliance-related audits, reviews and internal investigations. Due to her extensive experience with the Federal Sentencing Guidelines, she also assists white-collar defense lawyers with criminal sentencing matters.

Prior to joining H&K Investigative Solutions, Ms. Kuca was a Manager in Ernst & Young's Litigation Advisory Services, where she specialized in the development and implementation of corporate compliance programs. She also conducted traditional litigation support services, including internal investigations. Before joining Ernst & Young, she was a United States Probation Officer in the Southern District of Florida for nearly a decade. As a probation officer, she acquired comprehensive knowledge of the Federal Sentencing Guidelines, which impose stringent corporate compliance requirements that apply to every industry. Ms. Kuca has applied the Federal Sentencing Guidelines in over 400 cases, including complex cases involving bank, securities and tax fraud.

After leaving the Probation Office, Ms. Kuca was the President of Sentencing Specialists, Inc., a firm offering consulting services on the Federal Sentencing Guidelines to white collar defense attorneys. With Sentencing Specialists, Ms. Kuca consulted with white collar defense attorneys on federal sentencing and post-conviction matters. She provided services including analyzing the application of the Federal Sentencing Guidelines to specific cases, reviewing pre-sentence investigation reports and drafting objections to them, preparing sentencing memoranda, identifying mitigating circumstances and arguing in favor of leniency, preparing and analyzing defendants' financial histories for presentation to federal courts, and preparing clients for interviews by probation officers.

Ms. Kuca has been involved in many kinds of fraud cases, including health care, securities, insurance, bank, government procurement and tax fraud. She has also participated in cases involving antitrust and environmental offenses, as well as money laundering and public corruption. Additionally, she has experience with criminal violations of the customs and labor laws.

Ms. Kuca served on the faculties of the American Bar Association's 2000 and 2001 National Institutes on White Collar Crime, participated in programs dealing with corporate compliance, and co-authored a related article about the Organizational Guidelines. She has also served as a faculty member for other ABA programs regarding the Federal Sentencing Guidelines and post-conviction matters, including the 1997 National Institute on White Collar Crime.

Ms. Kuca's published articles include:

"The Sentencing Guidelines for Organizations: Writing on a Clean Slate" (co-author), *White Collar Crime 2000*, a publication of the American Bar Association Center for Continuing Legal Education and the Criminal Justice Section, March 2000 (updated and republished, March 2001).

A three-part series entitled, "Criminal Law in the Boardroom" (co-author), published in *Corporate Counsel* magazine, September, October and November, 2000.

"White Collar Offenders' Most Frequently Asked Questions [Or, 'You Can't Win Them All']" (co-author), *White Collar Crime 1997*, a publication of the American Bar Association Center for Continuing Legal Education and the Criminal Justice Section, March 1997 (republished in *The Champion*, National Association of Criminal Defense Attorneys, April 1998).

Ms. Kuca is an associate member of the National Association of Criminal Defense Attorneys and the American Bar Association.

Ms. Kuca received a bachelor's in sociology from Villanova University in 1987. She also has a concentration and certificate in criminal justice. She is the recipient of the 1987 U.S. Achievement Academy Leadership Award.

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November 6, 2001

Honorable Diana E. Murphy  
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One Columbus Circle, N.E.  
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Re: Request for comment on forming an ad hoc advisory group on the Organizational Sentencing Guidelines, 66 Fed. Reg. 48306 (September 19, 2001)

Dear Judge Murphy:

On behalf of the American Chemistry Council ("Council") and the General Electric Company ("GE"), we appreciate the opportunity to respond to the United States Sentencing Commission's request for comments on the possible formation of an "ad hoc advisory group" on Chapter Eight ("Sentencing of Organizations") of the U.S. Sentencing Guidelines ("*Organizational Guidelines*").

The Council represents the leading companies (including GE) 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 Council is committed to improved environmental, health and safety performance through Responsible Care<sup>®</sup>, common sense advocacy designed to address major public policy issues, and extensive health and environmental research and product testing. The business of chemistry is a \$460 billion-a-year enterprise and a key element 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.

Honorable Diana E. Murphy  
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Page 2

I. The Organizational Sentencing Guidelines Have Been Effective in Fostering the Implementation of Programs to Prevent and Detect Violations of Law and Do Not Need to be Revised

As the Commission noted in the Federal Register notice, the “organizational guidelines have had a tremendous impact on the implementation of compliance and business ethics programs over the past ten years.” 66 Fed. Reg. at 48307. In fact, we are unaware of evidence in the docket created for this matter, Congressional testimony, or judicial opinions, that indicates that there are any deficiencies in the *Organizational Guidelines* that need to be corrected. There is also nothing in the docket from Congress, the Judiciary or the Executive Branch criticizing the *Organizational Guidelines*. The letters that the Commission refers to in the Federal Register notice do not identify any deficiencies in the *Organizational Guidelines*, or any difficulties that courts or organizations have had in implementing them. Absent any such evidence that there is a problem to be solved, we do not see a reason for convening an ad hoc committee to consider proposals to revise the *Organizational Guidelines*. Material changes to the *Organizational Guidelines* should only be considered after a showing that the *Organizational Guidelines* are flawed or defective. To the extent that the docket materials do raise issues for consideration, they appear to be outside of the Commission’s charter and beyond the sentencing power of the Federal courts.

Not only is there no evidence that the *Organizational Guidelines* are flawed, the evidence is to the contrary. It is a testament to the importance of the *Organizational Guidelines* that, beyond their direct role as guidance for sentencing, they have also encouraged organizations to implement compliance programs. Since the *Organizational Guidelines* were published, numerous organizations have upgraded their compliance programs to be consistent with the *Organizational Guidelines’* criteria. The letters in the docket illustrate the extent to which some of those compliance programs have now independently advanced to encompass broader issues of ethics. This does not mean, however, that those efforts should now be mapped back onto the *Organizational Guidelines* themselves, in the hope that the *Organizational Guidelines* will have the effect of spreading those ethical programs more widely. This is particularly because the most direct consequence of amending the *Organizational Guidelines* as the letters recommend would be to punish more severely organizations with effective compliance systems but that do not include broader ethics or integrity programs.

II. The Organizational Guidelines Should Continue To Focus On Criminal Conduct

The principal purpose of the Commission is to promulgate “detailed guidelines prescribing the appropriate sentences for offenders convicted of federal crimes.” U.S. Sentencing Commission, Guidelines Manual, Ch. 1 Pt. A p. 1 (November 2000). The purpose of the *Organizational Guidelines* is to “further the basic purposes of criminal punishment: deterrence, incapacitation, just punishment, and rehabilitation.” *Id.* In particular, the *Organizational Guidelines* are “designed so that the sanctions imposed upon organizations and their agents, taken together, will

Honorable Diana E. Murphy  
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provide just punishment, adequate deterrence, and incentives for organizations to maintain internal mechanisms for preventing, detecting, and reporting criminal conduct.” USSG Ch.8 intro. comment. Therefore, the function of the *Organizational Guidelines* is to address the specific issue of criminal noncompliance with legal requirements and not to expand into general issues of corporate social responsibility or ethics that are not directly regulated by criminal law.

Some of the suggestions raised in the letters submitted to the Commission and referred to in the Federal Register notice would have the Commission expand its charter beyond its authority to address violations of criminal law. For example, requiring an “integrity and ethics based system,” however admirable, is not specifically related to preventing, detecting or reporting criminal conduct. Some commenters are beginning to refer to “ethics and compliance programs” as if the two concepts are interchangeable or identical. However, they are not. Criminal conduct is defined in countless federal statutes. Individuals and organizations are convicted and sentenced because of specific violations of specific statutory provisions, not because they may in some manner be unethical or lack integrity. The focus of the Commission should remain on systems that assure compliance with legal requirements, not ethics programs which focus on important questions in a wider domain. This is particularly true when, unlike the defined realm of criminal offenses, there is no agreed-upon set of ethical criteria against which organizations can be measured.

The letter to the Commission with the most specific suggestions urges that the *Organizational Guidelines* be revised to “move this world from ‘obeying the law because I have to’ to ‘doing what is right because I want to.’”<sup>1</sup> This letter also asks that the Commission “require that violations of ethical standards carry penalties similar to the violation of regulatory standards.” The suggestion that the Commission impose punishments for “violations of ethical standards” appears to imply that the Commission has the authority to punish for acts which have not violated the law. If that is what is meant, the author is asking the Commission to go beyond its mandate and do what only Congress can do. Issues raised by other commenters also go beyond the legal authority of the Commission, such as evaluating the impact of “qui tam” legislation on compliance assurance systems.

The *Organizational Guidelines* are used by courts to sentence those convicted of crimes. Therefore, proposed changes to the *Organizational Guidelines* should always be assessed in terms of how they would be used in the sentencing context. However, almost all of the comments submitted to the Commission thus far treat the *Organizational Guidelines* as a guidance manual or educational tool on how to implement effective compliance systems and do not discuss how these changes would be implemented in the sentencing context. For example, drawing upon some of the suggestions in the letters referred to by the Commission, should an organization’s criminal sentence be adjusted if it:

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<sup>1</sup> February 21, 2001 letter from Alliance for Health Care Integrity to Judge Diana E. Murphy, Chair, U.S. Sentencing Commission.

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- has a compliance assurance system that focuses on preventing, detecting and correcting criminal conduct, but does not address “ethics” generally;
- has a compliance officer, but does not have an “ethics officer” who does not have “at least three university level, full – term courses in ethics;” or
- has a system for confidential internal reporting of potential or actual misconduct (e.g., a 1-800 “hotline”), but does not have a “neutral ombudsman?”

In each case, we believe the answer is “no.” The current *Organizational Guidelines* properly focus on effective systems directed at preventing criminal behavior. Encouraging organizations to create an “ethics infrastructure” that goes beyond compliance with criminal law may be a laudable goal. However, the presence or absence of such an ethical infrastructure should not have consequences in the very serious context of sentencing those convicted of crimes.

There is no evidence that organizations need more government incentives through directions on criminal sentencing in order to implement compliance assurance programs. The threat of increased criminal penalties should not be used to “encourage” organizations to upgrade their compliance assurance systems into “ethics programs.” The *Organizational Guidelines* have considerable consequences in criminal sentencing. Therefore, it is appropriate that they set out general principles and be free of unnecessary detail so that they are adaptable to a wide range of organizations. They should also avoid vague aspirational directions that are not directly related to detecting and preventing crime.

### III. There Is Already Sufficient Guidance On How To Implement Effective Compliance Assurance Systems

There is no apparent need to expand on the existing provisions on compliance assurance systems contained in the *Organizational Guidelines*. Chapter 8, comment 3(k) properly sets forth the minimum steps that any organization must take to have an “effective program to prevent and detect violations of law.” Such criteria should be applicable to all organizations, public or private, large or small, in all industrial and service sectors. Given the diversity of organizations and subject matter covered by compliance programs, the Commission should not attempt to prescribe additional criteria for compliance programs which are not at the same level of general applicability as the current *Organizational Guidelines*.

Many federal agencies have been developing guidance on compliance assurance systems tailored to specific legislative programs. For example, the Department of Health and Human Services (“HHS”) has launched a number of compliance assurance program initiatives, including:

- *Model Compliance Plan for Clinical Laboratories*, 62 Fed. Reg. 9435 (March 3, 1997).

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Page 5

- *Compliance Program Guidance For Medicare+Choice Organizations*, 64 Fed. Reg. 61893 (November 15, 1999).
- *Draft Compliance Program for Individual and Small Group Physician Practices*, 65 Fed. Reg. 36818 (June 12, 2000).

In all, HHS has issued compliance program guidance for nine healthcare industry sectors. 66 Fed. Reg. 31246, 31247, n.3 (June 11, 2001). HHS bases these programs on the Sentencing Guidelines, but tailors them to specific sectors because it “recognizes that there is no ‘one size fits all’ compliance program.” 65 Fed. Reg. at 36819. HHS continues to develop tailored compliance program guidance, recently soliciting comments on compliance programs for the ambulance (65 Fed. Reg. 50204, August 17, 2000) and pharmaceutical industries (66 Fed. Reg. 31246, June 11, 2001).

HHS is not alone in developing detailed guidance. For example:

- The Securities and Exchange Commission recently announced a list of factors, including the existence of internal compliance programs and procedures, that it will take into account in deciding whether to prosecute a matter. *Report of Investigation Pursuant to Section 21(a) of the Securities Exchange Act of 1934 and Commission Statement on the Relationship of Cooperation to Agency Enforcement Decisions*, (SEC, October 23, 2001).
- The U.S. Department of Justice has developed general prosecutorial policies that take into account an organization’s compliance assurance systems and has also developed such policies for particular types of crimes. *Federal Prosecution of Corporations* (U.S. DoJ, June 16, 1999); *Factors in Decisions on Criminal Prosecutions for Environmental Violations in the Context of Significant Voluntary Compliance* (U.S. DoJ, July, 1991).
- The U.S. Customs Service has established compliance programs, such as one encouraging those engaged in international trade to implement programs to comply with the so-called “drawback” customs requirements, 19 C.F.R. § 191.191 *et. seq.*, and an “importer compliance monitoring program,” 66 Fed. Reg. 38344 (July 23, 2001).
- The Occupational Safety and Health Administration (“OSHA”) has devoted considerable resources to compliance programs, issuing sector-specific guidance such as the *Framework for a Comprehensive Health and Safety Program in Nursing Homes* (U.S. Dept. of Labor/OSHA, January 3, 2001).
- Though the *Organizational Guidelines* do not cover environmental crimes, the U.S. Environmental Protection Agency has provided guidance on what constitutes an effective environmental management system aimed at complying with the law. *See, e.g., Compliance – Focused Environmental Management Systems – Enforcement Agreement Guidance* (U.S. EPA, January 2000); *Incentives for Self – Policing, Discovery, Correction and Prevention of Violations*, 65 Fed. Reg. 19618 (April 11, 2000); *Code of Environmental Management Principles for Federal Agencies*, 61 Fed. Reg. 54062 (October 16, 1996).

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In some situations, guidance established by federal agencies has extended to enforceable regulations on compliance assurance systems, such as the detailed, systems-oriented, process safety management regulations promulgated by OSHA. 29 C.F.R. § 1910.119.

The private sector has also produced prodigious guidance on designing, evaluating and implementing compliance assurance systems. The past decade has seen an explosion of literature, trade press, conferences, guidance and educational material on not only compliance assurance systems, but also on the more general topic of ethics and integrity programs. This is reflected in the letters that the Commission recently received from organizations such as the Coalition for Ethics and Compliance Initiatives, the Ethics Resource Center and the Alliance for Health Care Integrity.

The growth of interest in compliance assurance systems and ethics programs has not been limited to the United States. For example:

- In 2000, the Organization of Economic Cooperation and Development (“OECD”), to which the U.S. belongs, published its revised *OECD Guidelines for Multinational Organizations*, which establish a “code of conduct” on a range of issues, including labor, bribery, occupational safety and environmental.
- A coalition of private sector and non-governmental organizations has created *Social Accountability 8000*, which applies management systems principles to labor and social issues and is typically implemented in conjunction with accredited third-party auditors to verify conformance.
- The International Labor Organization (“ILO”) this year published its *Guidelines on Occupational Health and Safety Management Systems*.
- A number of guidance documents have been developed on implementing systems to identify and meet environmental obligations. These include the International Organization for Standardization’s ISO 14001 environmental management systems standard (which has been implemented by over a 1,000 facilities in the U.S. and 30,000 world-wide) and a number of sector-specific guidance documents such as the American Chemistry Council’s Responsible Care<sup>®</sup> program and the American Forest & Paper Association’s Sustainable Forestry Initiative.

Multi-national organizations that wish to achieve consistent and acceptable levels of conduct world-wide are looking to these and other documents to assist them implement systems that will be effective in the U.S. and abroad.

This brief review of the landscape on compliance assurance systems reveals that the “user community” does not suffer from an absence of guidance on implementing effective compliance assurance programs. Therefore, there is no “market need” for the Commission to provide even more. Indeed, increasing the level of detail contained in the *Organizational Guidelines* could be counter-productive. More specific guidance on compliance programs has already been devel-

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oped and continues to be refined in public and private fora more tailored to the needs and interests of specific areas of regulation. Adding detail to the *Organizational Guidelines* could create conflicts with these other efforts, particularly for multi-national organizations that are developing comprehensive world-wide compliance assurance systems.

Increasing the requirements of the *Organizational Guidelines* might also disadvantage the small and medium-sized organizations that constitute the vast majority of U.S. businesses. The current *Organizational Guidelines* offer the flexibility needed to allow organizations of all sizes and types to implement effective compliance programs. This is not a theoretical concern. The Commission's own statistics reveal that in fiscal year 2000, approximately 87% of organizations sentenced under Chapter 8 employed fewer than 200 persons, a figure that was 94% in fiscal year 1999. *Sourcebook of Federal Sentencing Statistics*, Table 54 (U.S. Sentencing Commission 1999 and 2000). In fiscal year 2000, approximately 65% of the sentenced organizations employed fewer than 50 individuals, a value that was almost 80% in fiscal year 1999. *Id.* Narrowing the description of what is acceptable and increasing the number of requirements may create a model that simply cannot be practically implemented by most small and medium-sized organizations. For example, most organizations are not likely to have the resources to have an "ethics officer," a "compliance officer," and a "neutral ombudsman." The "best practices" of the most sophisticated companies should not become the model for what all organizations, no matter how small or limited in resources, must do to avoid serious consequences in the criminal justice system.

#### IV. The Scope, Membership and Goals Of Any Ad Hoc Group Should Be Carefully Defined

If the Commission decides to create an ad hoc advisory group, the American Chemistry Council is interested in participating. It will be important that the membership of such a group be carefully developed to cover a wide range of users. It will be particularly important to include those with practical experience implementing systems in a wide range of organizations, particularly small and medium-sized organizations and other organizations that may have limited resources. It will be very important that the advisory group not become a "best practices" effort or one oriented toward furthering professional interests. The "leading edge" organizations that have already implemented "best practices" do not need changes to the *Organizational Guidelines* to continue down that path. On the other hand, organizations with fewer resources should be implementing effective compliance assurance systems based on the principles in the existing *Organizational Guidelines*, but should not be potentially subject to increased criminal penalties if they cannot attain a "best practices" level. Indeed, "raising the bar" might have the undesirable effect of discouraging many organizations from implementing effective compliance assurance systems.

Honorable Diana E. Murphy  
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Thank you again for this opportunity to comment on the *Organizational Guidelines*. We look forward to continuing to work with the Commission on these issues. If you have any questions about these comments, you may contact me at 202-736-8111.

Sincerely

A handwritten signature in black ink, appearing to read 'David T. Buente', written over the typed name below.

David T. Buente

cc: James W. Conrad, Jr. (American Chemistry Council)  
Larry Boggs (General Electric Company)



*E. Scott Gilbert  
Counsel-Litigation and Legal Policy*

*General Electric Company  
3135 Easton Turnpike W3E, Fairfield, CT 06431  
203 373-2592 Fax 203 373-2523  
Dial Comm: 8\*229-2592 Fax 8\*229-2523  
E-Mail: scott.gilbert@corporate.ge.com*

November 6, 2001

By Hand  
Honorable Diana E. Murphy  
Chair  
United States Sentencing Commission  
One Columbus Circle, N.E.  
Suite 2 –500  
South Lobby  
Washington, D.C. 20002-8002

Re: Organizational Guidelines – Ad Hoc Advisory Group

Dear Judge Murphy:

On behalf of the General Electric Company, I write in response to the Commission's request for comment on the proposal to form an "ad hoc advisory group" to consider whether any changes are warranted in the organizational sentencing guidelines.

Over the last ten years, the definition of an "effective program to prevent and detect" violations of law, incorporated into the organizational guidelines, has been an excellent framework to guide organizations in the development of comprehensive compliance programs. The elements are detailed enough to ensure that corporations adopt comprehensive multi – faceted programs and are sufficiently flexible to permit organizations to adapt their processes to different regulatory requirements in the many different countries in which global enterprises typically do business.

We think the current definition has worked well, and there is no need for extensive modification. Indeed, organizations have already invested considerable resources in the existing structure, and we would urge against making major changes in the definition of an effective compliance program without compelling reasons.

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A number of ideas have been submitted to the Commission to modify some elements of the definition of an effective compliance program. We believe it is premature to express a view on particular ideas until they are developed and presented in greater detail. We would be glad, however, to assist any review which is undertaken, and to participate in an advisory group in that connection.

GE has had extensive experience with the implementation of ethics and compliance programs in a wide variety of industries, ranging from financial services (such as insurance, consumer finance, commercial finance, banking) to manufacturing (including products such as power systems, medical systems, lighting products, appliances, and locomotives). We conduct business with government customers – GE was one of the founding members of the Defense Industry Initiative – as well as customers in the private sector. More than 300,000 employees work in over 100 countries around the world.

To offer the Commission a glimpse at how one large company has managed the process of introducing compliance and ethics programs around the world, I am enclosing a copy of our core policy guide *Integrity: The Spirit and the Letter of Our Commitment*, which we publish in 25 languages, as well as an 18-minute video, which introduces our worldwide employees to GE's approach to what we call Integrity.

Thank you for this opportunity to express our views.

Very truly yours

A handwritten signature in cursive script that reads "E. Scott Gilbert". The signature is written in dark ink and is positioned to the right of the typed name "E. Scott Gilbert".

Enclosure



# Yale Law School

November 6, 2001

United States Sentencing Commission  
One Columbus Circle, NE, Suite 2-500  
South Lobby  
Washington, DC 20002-8002  
FAX (202) 502-4699

Attn: Public Affairs

Re: Ad Hoc Advisory Group on Organizational Guidelines

To Whom It May Concern:

I strongly favor both amending the organizational sentencing guidelines as well as proposals for form an ad hoc advisory group. It is critical that a majority of this group be informed but disinterested parties, e.g., academics and scholars, although affected corporations, prosecutors and judges would also be valuable members of the group.

As for the nature of the group, ideally it would be composed of no more than 9-12 persons with staggered terms (so that the group always includes members who have served before). Three year staggered terms (with a third of the group rotating off in any given year) might be advisable (and would be consistent with the protocol of many corporate boards of directors).

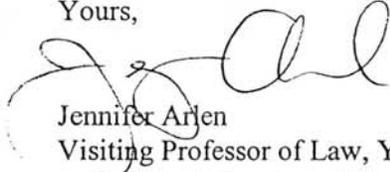
As to the identity of person, I would like to serve on this committee. Additional people who I recommend include:

Reinier Kraakman (Harvard Law School)  
Mark Cohen (Owen School of Management, Vanderbilt Law School)  
John Coffee (Columbia Law School)  
Kate Stith (Yale Law School).  
Susan Rose-Ackerman (Yale Law School)

As to the merits of certain suggestions, I am attaching copies of my own work in this area. I am not FAXing the articles along with this letter because that would be too long. I will include them in the hard copy mailing that follows.

Thank you for contacting me about this proposal. I look forward to speaking to you about  
it.

Yours,

A handwritten signature in black ink, appearing to read 'Jennifer Arlen', written in a cursive style.

Jennifer Arlen

Visiting Professor of Law, Yale Law School

Ivadelle and Theodore Johnson Professor of Law and Business, USC Law School

Judge Diana E. Murphy, Chair  
United States Sentencing Commission  
One Columbus Circle, NE  
Suite 2-500  
Washington, DC 20002-8002

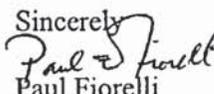
Dear Judge Murphy:

Thank you for the opportunity to comment on the proposed ad hoc advisory group regarding the Organizational Sentencing Guidelines. I think this is an excellent idea. I was the Supreme Court Judicial Fellow at the United States Sentencing Commission from August 1998 to August 1999, and I worked with Paula Desio, almost exclusively on Chapter 8 questions. I have written a number of law reviews, business articles and one book focusing on the Organizational Guidelines. I have maintained my relationship with the Commission as a guest speaker at your jointly sponsored regional workshops with the Ethics Officer Association, and yesterday I was named as the first director of Xavier University's Williams College of Business' newly established Ethics Center.

My research and work on Chapter 8 has confirmed the impact they have had on the business world. November 1, 1991 will be remembered as the day that corporate America could truly say "Good Ethics is Good Business". Prior to the Guidelines, there was tremendous pressure at all levels of business to do whatever it took (regardless of law or ethics) to maximize profits. Executives may have been sending this message explicitly or implicitly because the probability of detection was low, and the punishment, even if detected, seemed worth the risk. After the Guidelines were introduced, top executives saw the business value of "values". Of course they still need to maximize profits, but now the message is sent to only use legal and ethical means to accomplish this goal. This corporate commitment to compliance and ethics programs has been clearly demonstrated by the exponential growth in the Ethics Officer Association, a group that did not exist before the 1991, but now has over 750 members.

The ten year anniversary of the Guidelines seems to be an appropriate time to reflect back on the accomplishments, and review possible changes to make them even more useful in the future. An ad hoc advisory committee can help in this regards. Outside practitioners and academics can lend their talent to surface potential issues and suggest possible solutions. I for one, would be honored to help in any capacity that was appropriate.

Please let me know if there is anything I can do in this endeavor.

Sincerely  
  
Paul E. Fiorelli  
Director,  
Xavier Center for Business Ethics and Social Responsibility

Owen Graduate School of Management  
VANDERBILT UNIVERSITY



NASHVILLE, TENNESSEE 37203

TELEPHONE (615) 322-2554  
FAX (615) 343-7177

November 5, 2001

The Honorable Diana E. Murphy  
Chair, U.S. Sentencing Commission  
One Columbus Circle, N.E.  
Suite 2-500, South Lobby  
Washington, DC 20002

Dear Judge Murphy:

I am responding to your September 19, 2001 notice in the Federal Register requesting comments on the advisability of beginning a dialogue on revising the organizational guidelines. By way of background, as a former staff member, I served as a consultant to the Commission during the development of the organizational guidelines. My analysis of past sentencing practice served as a focal point for discussions and ultimately informed the development of the guidelines.<sup>1</sup> I have since studied and published empirical research on the implementation of the guidelines.<sup>2</sup> My research continues to focus on corporate crime and punishment and the effect of the guidelines on organizations.

In theory, I applaud the effort to revisit the organizational guidelines after 10 years. Moreover, there is potential merit to having a longer-term advisory board continually monitor the organizational guidelines and to develop some expertise and perspective that would assist the Commission in adapting to new issues that ultimately will arise. A well-balanced advisory group should consist of corporate managers, U.S. Attorneys, regulatory agencies, the defense bar, ethics officers, and scholars who study both corporate crime and punishment as well as organizational behavior and economics. Note that my vision of this advisory board differs substantially from what I read in the letters you have received to date. For example, the "Coalition for Ethics and Compliance The Initiatives" (CECI) appears to be a well-organized association of stakeholders interested in corporate ethics. For that matter, Win Swenson would be a natural candidate for membership in such an advisory group, and he would no doubt be a valuable contributor.

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<sup>1</sup> See Cohen, "Corporate Crime and Punishment: A Study of Social Harm and Sentencing Practice in the Federal Courts, 1984-1987," 26 American Criminal Law Review 605-660 (1989); Cohen, Ho, Jones, and Schleich, "Organizations as Defendants in Federal Court: A Preliminary Analysis of Prosecutions, Convictions and Sanctions, 1984-1987," 10 Whittier Law Review 103-124 (1988); and Cohen, "Corporate Crime and Punishment: An Update on Sentencing Practice in the Federal Courts, 1988-1990," 71 Boston University Law Review 247-80 (1991).

<sup>2</sup> See Alexander, Arlen, and Cohen, "Regulating Corporate Criminal Sanctions: Evidence on the Effect of the U.S. Sentencing Guidelines," 42 Journal of Law and Economics 271-300 (1999) and "The Effect of Federal Sentencing Guidelines on Penalties for Public Corporations," 12 Federal Sentencing Reporter 20-6 (1999).

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Having said that, I am concerned that CECI is too narrow a group focusing on ethics and compliance - with a predetermined agenda - to be given the role of organizing and spearheading any such advisory group. The same could be said for some of the other organizations that have written you. These groups should be represented and be a large part of any advisory group - but they should not control it.

Some of the letters you have received suggest that answers are already known and that there is a demonstrated need to tighten the guidelines. I wish it were that simple. For example, one writer urges you to adopt specific recommendations including that compliance programs be of a certain type and "requiring that the ethics officers in such programs have at least three university-level, full-term courses in ethics." Other recommendations are equally detailed and go so far as to require that violations of corporate "ethical standards" be criminalized. Although I have an open mind to all such suggestions, as a researcher and a business school professor, I would caution the Commission not to entertain such notions without careful study by an unbiased, representative advisory group that includes significant representation from rigorous empirical researchers. One of the lessons that was learned early on when drafting the organizational guidelines was that the guidelines do not just affect "offenders" or corporations that are willfully violating the law. Instead, the organizational guidelines have the potential to affect all corporations - including those that otherwise have well functioning compliance programs and whose top managers are good citizens. The guidelines need to be written with this in mind, and with the fact that it is important not to turn the courts and probation officers into corporate managers - except in the most egregious cases. The type of recommendations I read in the letters you have on file appear to want to micro-manage the nature of compliance programs and ultimately tell corporations how to run their businesses. That is a very risky proposition that could ultimately lead to law-abiding corporations losing their competitiveness and, worse yet, unintended consequences that go beyond any potential crime control benefit.

In addition to calling for a broadly representative - and research focused - advisory group, I have a few suggestions in terms of the scope of work of any such advisory group you ultimately decide to convene. First, I would note that the penalty portion of the guidelines fail to cover a substantial number of crimes - including environmental, worker safety, and food and drug violations. Several years ago, I gave a presentation to a working group of the Commission that was tasked with drafting guidelines for environmental crimes.<sup>3</sup>

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<sup>3</sup> See for example, Cohen, "Environmental Crime and Punishment: Legal/Economic Theory and Empirical Evidence on Enforcement of Federal Environmental Statutes," 82 *Journal of Criminal Law and Criminology* 1054-1108 (1992) and Cohen "Environmental Sentencing Guidelines or Environmental Management Guidelines: You Can't Have Your Cake and Eat it Too!" 8 *Federal Sentencing Reporter*, 225-9 (February 1996).

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Although that working group did issue some draft proposals for discussion purposes, the issue has been on the back burner for quite a few years. It would be appropriate for any new advisory group to consider the crimes not currently covered by the organizational guidelines and to begin the process of filling in those holes if they deem it to be appropriate.

My second recommendation is that any advisory group considers what data the Commission should collect on organizations sanctioned under the guidelines, in order to instruct future proposals for changing them. As a researcher who originally coded and analyzed pre-guideline cases and who has spent considerable time with the Commission data, I have found that basic questions about the impact of the guidelines on corporate sanctions cannot be answered.<sup>4</sup> This might seem surprising and it is certainly not meant to be a criticism of the Commission or its staff. The primary reason for this deficiency appears to be the switch from a "research" mode in the pre-guideline era to more of a "monitoring" mode in the post-guideline period. Thus, the Commission has collected data on the guideline factors themselves so that it can evaluate how those factors are being applied, and not on a larger set of questions that would assist researchers and policy makers in identifying the strengths and weaknesses of applying the guidelines to actual cases.

I hope these suggestions are taken as constructive as that is their intent. As a researcher, I pride myself on not prejudging the outcome of any new research project I embark upon. As an important governmental institution, I believe the Commission should adopt the same principle and take care in appointing advisory groups that share that same vision.

Please do not hesitate to contact me if I can further elaborate on any of these points or otherwise be of assistance.

Sincerely,



Mark A. Cohen  
Associate Professor of Management and  
Director, Vanderbilt Center for Environmental Management Studies

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<sup>4</sup> See Alexander, Arlen, and Cohen, "Evaluating Trends in Corporate Sentencing: How Reliable are the U.S. Sentencing Commission's Data?" 13 Federal Sentencing Reporter 108 (September/October 2000).

[BETTER COPY REQUESTED]

To: U.S. Sentencing Commission  
Fax Number: (202) 502-4699  
Attn: Public Affairs.

From: Linda K. Treviño  
Professor of Organizational Behavior  
Chair, Department of Management and Organization  
Cook Fellow in Business Ethics  
The Pennsylvania State University  
University Park, PA 16802

Re: Issues Related to Formation of an Advisory Group on the Organizational Sentencing Guidelines

Date: October 30, 2001

I have been asked to provide input regarding the "scope, potential membership, and possible formation of an ad hoc advisory group on the organizational sentencing guidelines to consider any viable methods to improve the operation of these guidelines."

Based upon my work in this area for fifteen years, my interaction with ethics and compliance officers in corporations, and my own research, I would encourage the Commission to establish such an advisory group. Many knowledgeable people now have a decade of experience with the guidelines and their effects. Their input would be extremely valuable as the Commission considers any changes. Potential members could include seasoned corporate ethics/compliance officers, legal counsel, consultants, governmental regulatory agency representatives, and academics who have studied ethics/compliance program effectiveness. In addition, representatives from smaller organizations should be included because they tend to address these issues in a different and less formal manner.

My research has found that awareness of the guidelines' existence has clearly influenced the development of formal ethics/compliance programs in organizations. However, the extent to which those programs are values-based and integrated into the organization's daily operations is influenced more by senior executive commitment to ethics than by awareness of the guidelines. Further, ethics/compliance program effectiveness depends less on the formal characteristics of these programs (as guided by the Sentencing Commission Guidelines) and more on informal organizational culture characteristics such as executive and supervisory commitment to ethics, perceived fair treatment by employees, and management follow through when ethics problems are brought to its attention. Therefore, more attention to these informal organizational characteristics should be considered as the Commission considers changes.

Below, I have included a list of my publications that are relevant to ethics/compliance program management and effectiveness.

## Articles

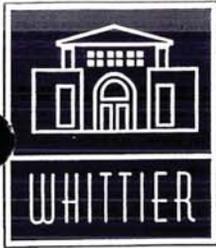
- Treviño, L.K. & Weaver, G.R. Organizational justice and ethics program follow through: Influences on employees' helpful and harmful behavior, Business Ethics Quarterly, 11 (4): 651-671, 2001.
- Weaver, G.R. & Treviño, L.K. The role of human resources in ethics/compliance management: a fairness perspective. Human Resource Management Review, 11: 1-22, 2001.
- Treviño, L.K., Hartman, L.P., Brown, M. Moral person and moral manager: How executives develop a reputation for ethical leadership. California Management Review, 42(4): Summer, 2000, 128-142.
- Butterfield, K., Treviño, L.K., & Weaver, G.R. Moral awareness in business organizations: Influences of issue-related and social context factors. Human Relations, 53(7): 981-1018, 2000.
- Treviño, L.K., Webster, J., & Stein, E. Making connections: Complementary influences on communication media choices, attitudes, and use. Organization Science, 11 (2): 163-182, 2000.
- Treviño, L.K. & Weaver, G. The stakeholder research tradition: Converging theorists, not convergent theory. Academy of Management Review, 24 (2): 222-227, 1999.
- Weaver, G.R., Treviño, L.K. & Cochran, P. Integrated and decoupled corporate social performance: Management commitments, external pressures, and corporate ethics practices. Academy of Management Journal, 42: 539-552, 1999.
- Weaver, G.R. & Treviño, L.K. Compliance and values oriented ethics programs: Influences on employees' attitudes and behavior. Business Ethics Quarterly, 9 (2): 325-345, 1999.
- Weaver, G., Treviño, L.K., & Cochran, P. Corporate ethics practices in the mid-1990s: An empirical study of the Fortune 1000, Journal of Business Ethics, 18 (3), 283-294, 1999.
- Weaver, G.R., Treviño, L.K., & Cochran, P. 1999. Corporate ethics programs as control systems: Influences of executive commitment and environmental factors, Academy of Management Journal, 42(1): 41-57, 1999.
- Treviño, L.K., Weaver, G., Gibson, D., & Toffler, B. Managing ethics and legal compliance: What works and what hurts. California Management Review, 41 (2): 131-151, 1999, reprinted in L.P. Hartman. Perspectives in business ethics. 2<sup>nd</sup> Ed. NY: McGraw-Hill.

Treviño, L.K., Butterfield, K. & McCabe, D. The ethical context in organizations: Influences on employee attitudes and behaviors, Business Ethics Quarterly, 8 (3): 447-476, 1998, reprinted with permission in J.A. Worthley. Organizational Ethics in the Compliance Context. Chicago, Illinois: Health Administration Press, 1999; reprinted with permission in J. Dierhart. The Next Phase of Business Ethics, Elsevier, 2001, pgs. 301-337.

McCabe, D., Treviño, L.K. & Butterfield, K. The influence of collegiate and corporate codes of conduct on ethics-related behavior in the workplace, Business Ethics Quarterly, 6: 441-460, 1996.

#### Books

Treviño, L.K. & Nelson, K. Managing business ethics: straight talk about how to do it right. 2<sup>nd</sup> ed. NY: John Wiley & Sons, Inc. 1999.



WHITTIER LAW SCHOOL

3333 Harbor Boulevard  
Costa Mesa, CA 92626-1501

Tel. 714.444.4141

November 1, 2001

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

Dear Mr. Courlander,

I am writing in response to the Sentencing Commission's request for public comments on the advisability of forming an ad hoc advisory group concerning the organizational sentencing guidelines. I believe that such an advisory group could perform several valuable functions at this time and I am happy to support its formation.

The initial section of this letter details my thoughts on recent developments in the fields of organizational sentencing and law compliance that make this a particularly favorable time for the formation of the advisory group. This section reviews the changes in these fields which give rise to needs for studies by the advisory group. It also offers a few suggestions about the types of studies that the advisory group might wish to pursue. The last portion of this letter contains comments regarding the possible composition of the advisory group and the ways that its work might be structured.

### **Developments Supporting the Need for an Advisory Group**

#### Accumulated History of Sentencing Evaluations

The accumulated history of sentencing evaluations under the organizational guidelines to date makes possible several types of studies of organizational crime and sentencing. An initial round of studies might address the types of organizational offenses that are most frequently sentenced and the types of organizational defendants convicted of those crimes. A variety of further studies might examine the most commonly applied bases for sentencing enhancements and the grounds for criminal history adjustments. These studies might also explore cases where grounds for sentencing adjustments are asserted, but rejected by probation officers and sentencing courts to determine if these rejections seem sound and if the sentencing guidelines need

to provide more guidance in similar cases.

These types of studies will be valuable in that they will provide a picture of recent patterns in organizational convictions and sentencing that may not have been taken into account when the original organizational sentencing guidelines were issued. At the time the organizational sentencing guidelines were adopted, the Sentencing Commission had a very limited history of organizational prosecutions to look to for guidance as to the types of offenses and offender characteristics that would fall within the guidelines. The emergence of the guidelines has changed this, resulting in a much more substantial number of organizational prosecutions and sentences. This new body of experience deserves further analysis as a basis for informed debate about organizational crime and sentencing.

Evaluations of past sentencing may be capable of identifying patterns of misconduct in corporate offenses that have previously been overlooked. These studies may also identify features of past offenses that have been improperly emphasized in recommended corporate sentences or sentencing guidelines criteria that have been applied incorrectly or unevenly.

The results of these studies could be very valuable, not only to the Commission, but also to members of the business community and others who are interested in preventing organizational crimes. The Commission will be able to use these studies to determine how the present organizational guidelines are working, whether more or less attention is needed to the various sentencing criteria presently reflected in the guidelines, and whether new criteria should be addressed in the guidelines. Organizational managers who are concerned with efficiently and effectively applying resources to crime prevention will gain from a better understanding of the types of organizational offenses that are particularly prevalent and the features of those offenses that typically lead to particularly severe penalties. Scholars in business schools who are concerned with law compliance management techniques can use greater insights into present organizational crime patterns to offer better analyses of the sources of organizational offenses and the types of management measures that can prevent the same sources from resulting in further offenses. Legal academics can use the same studies to analyze and suggest improvements for standards encouraging corporations and other organizations to take preventive measures towards criminal misconduct.

#### Lessons from New Types of Sentences

Another type of valuable study that the advisory group might perform concerns the experience of sentencing courts in applying several of the innovative forms of organizational sentences that were authorized in the organizational guidelines. Organizational probation, in particular, is deserving of special attention in this regard in that it has been seen by several courts as a highly useful tool in ensuring that sources of misconduct are fully understood by offenders and that corresponding organizational changes are implemented and maintained.

For example, the corporate probation sentence imposed on the Consolidated Edison Company of New York (Con Edison) in 1995 following a serious environmental offense would be a valuable target for a detailed study. This sentence entailed the appointment of a probation monitor who was given extensive powers to oversee Con Edison's environmental law compliance practices during the company's three-year probation period. The monitor conducted a number of reviews of those practices, revealing and helping the company to reform a variety of compliance problems far removed from the asbestos handling and discharge reporting practices that were the source of its offense. For further information about the Con Edison probation sentence and its impact on the company, see Gruner, *How Compliance Programs Fail: Lessons from the Con Edison Probation Sentence*, in **Advanced Corporate Compliance Workshop Program Materials** 171 (PLI 2000).

Because they promise to be valuable tools for reforming convicted organizations that may otherwise tend to return to "business as usual" following offenses, organizational probation sentences like that in the Con Edison case may warrant greater attention by federal courts. The circumstances justifying the imposition of sentences like that imposed on Con Edison and the proper scope of probation monitoring and oversight under these sentences would be valuable topics for study by the advisory group.

#### Development of Increasingly Sophisticated Standards in Other Legal Areas

A further reason that studies of organizational sentencing standards by the advisory group are timely is that other governmental bodies have recently developed a series of sophisticated standards for evaluating compliance programs that may serve as valuable models for changes or extensions of the compliance program standards presently included in the organizational sentencing guidelines.

At least four independently developed sets of standards will provide guidance to the advisory group in this regard:

- 1) Tests for identifying responsible compliance programs in corporate prosecution guidelines developed by the Department of Justice, *see* U.S. Department of Justice, *Guidance on Prosecutions of Corporations* (June 16, 1999) (memorandum from Eric H. Holder, Jr., Deputy Attorney General, to Heads of Department Components and All United States Attorneys);
- 2) Standards for compliance programs in the health care industry developed by the Office of Inspector General, Department of Health and Human Services, Department of Health and Human Services, *see, e.g.*, 65 Fed. Reg. 14289 (March 16, 2000)(compliance program guidelines for nursing

facilities); 63 Fed. Reg. 45076 (August 24, 1998)(compliance program guidelines for clinical laboratories); 63 Fed. Reg. 8987 (February 23, 1998)(compliance program guidelines for hospitals).

- 3) Definitions of a "compliance management system" and an "environmental audit" articulated by the Environmental Protection Agency, *see* Environmental Protection Agency, Incentives for Self-Policing: Discovery, Disclosure, Correction and Prevention, 65 Fed. Reg. 19618-01 (April 11, 2000); and
- 4) Criteria for assessing an organization's good faith efforts to comply with equal opportunity laws as articulated in a series of recent federal court decisions dealing with sexual harassment liability, *see, e.g.*, Romano v. U-Haul International, 233 F.3d 655 (1st Cir. 2000); Passantino v. Johnson & Johnson, 212 F.3d 493 (9th Cir. 2000); Lowery v. Circuit City Stores, Inc., 206 F.3d 431 (4th Cir. 2000); Jaudon v. Elder Health, Inc., 2000 WL 1918691 (D. Maryland 2000).

Each of these standards addresses the features of effective organizational programs for monitoring, detecting, disclosing and preventing offenses or other misconduct. By carefully studying the strengths of these standards issued since the emergence of the organizational sentencing guidelines, the advisory committee can capitalize on the efforts and expertise of the originators of these various standards.

Based on studies of these other governmental standards, the advisory group may produce an enhanced set of guideline commentaries describing new standards for identifying an effective compliance program. These new commentaries may be improvements over the present standards in several respects.

First, by capturing more of the relevant features of compliance programs that distinguish effective programs from less successful ones, these improved standards may be more thorough in scaling the size of corporate penalties to the quality of law compliance efforts.

Second, by adding more detailed grounds for evaluating the quality of compliance programs, the new standards may produce more consistent evaluations of this quality by courts, probation officers, prosecutors, attorneys and corporate managers.

Finally, new standards modeled after these other governmental standards will help to ensure that compliance program evaluations under the guidelines are conducted consistently with evaluations of the same compliance programs under other governmental criteria.

## Successes Of Related Government Policies

In addition to the above standards for evaluating compliance programs, a number of other recently developed governmental standards and policies may provide useful guidance for the advisory group. In particular, the exceptionally important success of the corporate amnesty standards now observed by the Antitrust Division of the Department of Justice suggest possible two lines of study for the advisory group.

First, the success of these standards in generating revelations of corporate misconduct and making possible prosecutions of non-cooperating parties suggests that similar standards calling for the complete avoidance of penalties by certain self-reporting companies may be valuable additions to the organizational sentencing guidelines.

Second, the specific criteria used in the Antitrust Division's amnesty standards for identifying corporate self-reporting meriting amnesty may serve as a useful model for expanded standards in the organizational sentencing guidelines identifying post-offense self-reporting and cooperation that merits sentence reductions.

For a complete description of the Antitrust Division's amnesty program, profiles of the highly important corporate convictions it has generated, and some suggestions concerning how it may be used as a model for broader amnesty arrangements, see Gruner, *Avoiding Fines Through Offense Monitoring, Detection, and Disclosure: The Race for Amnesty*, in *Advanced Corporate Compliance Workshop Program Materials 77* (PLI 2001).

## Increased Sophistication in the Business Community Regarding Compliance Techniques

Increased understanding and sophistication among business executives about how to evaluate and operate compliance programs has created a wealth of expertise that can be tapped by the advisory group to produce new standards for evaluating effective compliance programs.

Spurred by the potential rewards for compliance programs articulated in the original organizational sentencing guidelines and other governmental standards, various businesses have given extensive attention to compliance programs in the last decade. Their expertise about both the strengths and weaknesses of various compliance program techniques and features have been shared at numerous business conferences and in numerous published articles. In addition, consultants assisting companies in establishing and maintaining effective compliance programs have developed additional insights into compliance program techniques. Finally, academics in both law and business schools have evaluated a variety of present compliance program techniques and needed changes.

The work of the advisory group can rely upon this significant body of new understanding regarding compliance programs that was not available to the Sentencing Commission when the original organizational sentencing guidelines were promulgated. Put simply, better, more complete guidelines, are possible because, with the benefit of experience, we know more about effective organizational management techniques to prevent and stop offenses. Expanded expertise in the business community and elsewhere about how to construct effective compliance programs and how to identify post-offense conduct meriting sentence reductions, This new expertise can be gathered by the advisory group and applied to the drafting of "second generation" compliance program standards that build on the standards that went before, but which also reflect today's state of the art knowledge about compliance techniques.

### Composition and Work of the Advisory Group

In the remainder of this memorandum, I would like to offer a few thoughts on the composition and work of the advisory group. In order to gather and apply the full range of new knowledge that exists about organizational law compliance and related sentencing issues, it would be desirable for the following constituencies to be represented among the members of the advisory group:

- 1) Agency Specialists: Federal agency officials (e.g., EPA or HHS officials) experienced in evaluating compliance programs in civil or criminal enforcement contexts;
- 2) Prosecutors of Organizational Defendants: Prosecutors having developed complex corporate or organizational cases;
- 3) Probation Officers With Organizational Experience: Probation officers who have experience with the special demands of evaluating organizational offenders for sentencing;
- 4) Corporate Compliance Managers: Compliance officers or other corporate managers who are experienced in establishing and maintaining law compliance programs;
- 5) Corporate In-House Counsel: In-house counsel who are experienced in evaluating corporate compliance practices under governing legal standards;
- 6) Corporate Defense Counsel: Corporate defense attorneys experienced in defending compliance efforts;
- 7) Legal Academics: Legal academics with expertise in organizational crime and compliance program standards;

- 8) Business School Academics: Business school analysts concerned with means for operating effective compliance programs; and
- 9) Specialized Consultants: Industry consultants specializing in evaluating and developing business methods for ensuring law compliance.

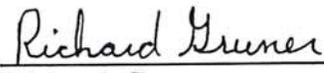
The work of the advisory group might best be conducted through a combination of public hearings and commissioned studies.

Testimony presented at public hearings could be a quick means to gather a wide range of information for consideration by the advisory group and the Commission itself. In addition, if captured in printed volumes similar to the symposium text on organizational sentencing issued by the Sentencing Commission in 1995, testimony about compliance program "best practices" and failure modes could serve as a valuable resource for the business community regardless of whether guideline changes later emerge from the Commission.

Commissioned studies of focused issues (such as a detailed study of possible patterns in the accumulated history of organizational sentencing by federal courts) might also provide important information for consideration by the advisory group and the Commission. These studies might be completed either within the government or by independent analysts such as law or business school faculty members. The expertise of the advisory group members regarding the nature of outstanding organizational sentencing issues and sources of related information will allow the group to effectively target and assign needed studies to ensure that critical pieces of the organizational sentencing picture are developed.

It has been my pleasure to offer these comments on the potential work and composition of an advisory group to study the organizational sentencing guidelines. If I can provide any further assistance, please do not hesitate to contact me by phone (714-444-4141 ex. 228) or email ([rgruner@law.whittier.edu](mailto:rgruner@law.whittier.edu)).

Sincerely,

  
Richard Gruner  
Professor of Law



October 19, 2001

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First Light Capital

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

To Whom It May Concern:

I am writing to express my support for the formation of an Organizational Guidelines Advisory Group. I was not only made aware of this proposal group by reading the Federal Register, but also from talking to a number of people, including Paula Desio of the U.S. Sentencing Commission. I briefly served on an advisory group of the USSC as it related to the Sentencing Guidelines. My role then was to bring out the importance of ethics to compliance in the communication and enforcement of the Guidelines. This advisory group was rather short-lived, and I see this proposal as a rebirth of such a group almost a decade later.

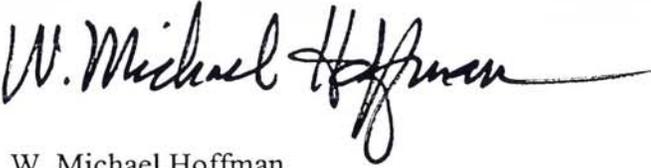
In reading the Prevention of Corporate Liability (Vol. 9, No. 9, October 15, 2001), I agree with the suggestions that have already been sent for improving the Guidelines, especially the effort to view compliance as an element of a broader integrity-based ethics program, and an effort to promote programs that reward ethical behavior. There is no doubt that the Sentencing Guidelines have played a major role in furthering the business ethics and compliance movement in corporate America and are playing a role in influencing similar efforts in other countries around the world. The USSC should be and is praised for these efforts, and the formation of a follow-up advisory group to strengthen the Guidelines should be seen as timely and important.

I would be pleased to serve on such a group if you think I could contribute. I have a lot of relationships in the business ethics academic community both here and abroad, and I have been working with corporations and other organizations in the area of business ethics for many years. Attached is my resume for your review.

Some of the largely academic associations, such as SBE, APPE, ISBEE, etc., could be very helpful and should be included as a source of ideas and support. I am also contacted by the media frequently, which could be helpful to the efforts of an advisory group, and I work with numerous laws firms in an expert witness/consulting capacity, which is another source of useful information with regard to what corporations are doing, or as is more often the case, not doing. I also serve as the Advisor to the Board of the Ethics Officer Association, an association which I helped to establish and served as the Executive Director of for its first five years.

I was encouraged to write to you with my offer to serve on this proposed advisory group by Paula Desio; however, whether I serve on the committee or not, I will be pleased to help the effort in whatever way I can.

Sincerely,

A handwritten signature in black ink that reads "W. Michael Hoffman". The signature is written in a cursive style with a long horizontal flourish extending to the right.

W. Michael Hoffman  
Executive Director



## PROFESSIONAL RESUME

### BIOGRAPHICAL SUMMARY

#### W. Michael Hoffman, Ph.D.

W. Michael Hoffman is the founding Executive Director of the Center for Business Ethics at Bentley College in Waltham, Massachusetts, a 25 year-old research and consulting institute and an educational forum for the exchange of ideas and information in business ethics.

Dr. Hoffman received his Ph.D. in Philosophy at the University of Massachusetts at Amherst in 1972. He is a Professor of Philosophy and was Chair of the Department of Philosophy for 17 years at Bentley. Dr. Hoffman has authored or edited 16 books, including Business Ethics: Readings and Cases in Corporate Morality (now in its 4<sup>th</sup> edition), The Ethical Edge: Tales of Organizations that Have Faced Moral Crises (1995), and Ethics Matters: How to Implement Values-Driven Management (2000). He also has published over 60 articles.

Dr. Hoffman has consulted on business ethics for universities, government agencies, and corporations, including The Ayco Company, Bath Iron Works, Cablevision Systems, CBS, Congress' Office of Technology Assessment, Coopers & Lybrand (now PricewaterhouseCoopers), Exelon Corporation, Fidelity Investments, GTE, General Electric, Glaxo (now Glaxo SmithKline), Hill and Knowlton, Junior Achievement, Johnson & Johnson, KPMG Peat Marwick, Long Island Lighting Company (now KeySpan Energy), Massachusetts Bay Transportation Authority, Niagara Mohawk Power Corporation, Northeast Utilities System, Northrop (now Northrop Grumman), NYNEX (now Verizon), Orange and Rockland Utilities, and TRW Systems. He has been a National Endowment for the Humanities Fellow and Consultant, a lecturer at universities and conferences around the world, and an expert witness on business ethics in numerous legal cases. He is on the board of editors of many business ethics journals, was a founding member and President of the Society for Business Ethics, and served on the advisory board of the U.S. Sentencing Commission. He was the founding Executive Director (1991-1995) and later a member of the Board of Directors (1995 - 1997) of the Ethics Officer Association; he is presently the Association's Advisor to the Board. He has been quoted extensively on business ethics in newspapers and magazines, including the Boston Globe, Business Week, Industry Standard, Los Angeles Times, New York Times, USA Today, U.S. News and World Report, Wall Street Journal, and Washington Post and is interviewed frequently for television and radio programs around the country.

Dr. Hoffman resides in West Newton, Massachusetts with his wife, Bliss Read Hoffman.



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October 30, 2001

United States Sentencing Commission  
One Columbus Circle, N.E.  
Suite 2-500  
South Lobby  
Washington, D.C. 200062-8002

Attention: Public Affairs

VIA FAX : (202) 502-4699

re: Federal Register notice  
September 19, 2001  
Request for Comment

Ladies and Gentlemen:

You have asked for comment on the desirability of creating an ad hoc advisory group on the subject of the Organizational Sentencing Guidelines.

It certainly makes sense to revisit the Organizational Guidelines in light of extensive experience with legal compliance programs – both successful and unsuccessful – since the Guidelines were adopted in 1991. It also makes sense to consider the academic, practitioner, and expert commentary that has emerged from this experience. Most of all, it makes sense for the academics, practitioners, and experts who have a strong interest in and experience with the Sentencing Guidelines to have regular and sustained – yet informal – contact with the Sentencing Commission staff. This kind of ongoing exchange has certainly proven to be useful at the Securities and Exchange Commission. Dialog of this sort makes all parties more aware of the problems involved in administering the Guidelines as written, can accelerate the transmission of useful information, and can dispense quickly with ideas that have no practical utility.