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

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

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

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

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

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

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

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

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

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

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

INSTITUTE OF
MAKERS OF
EXPLOSIVES

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

March 1, 2004

Via Hand-Delivery

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

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

Dear Sir or Madam:

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

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

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

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

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

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

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

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

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

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

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

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

[1-118]

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

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

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

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

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

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

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

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

[1-119]

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

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

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

* * *

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

Sincerely,

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

[1-120]

MEMORANDUM

To: Commissioners
Tim McGrath, Staff Director
From: Amy Schreiber, Assistant General Counsel
Scott Carlson, Supreme Court Fellow
Date: March 4, 2004
Subject: Proposed Amendment to Chapter Eight

In preparation for your March 17 public hearing on the Proposed Amendment to Chapter Eight, this Memo briefly lists the key issues that are likely to be addressed. Following this Memo is a comprehensive summary of the pubic comment, including the commentators' recommendations, an index of the 30 public comments received to date, and the public comment itself.

There are five major issues that likely will be a major focus of your March 17 hearing.

1) The Proposed Amendment changes the scope of a compliance program's objectives from prevention and detection of "criminal conduct" to prevention and detection of "violations of law," defined at Application Note 1 to §8B2.1 to include "violations of any law, whether criminal or noncriminal (including a regulation), for which the organization is, or would be, liable." Should the Commission adopt the proposed language or is it too broad for the guidelines' purposes?

2) The Proposed Amendment retains the requirement that an organization exercise due diligence to prevent and detect violations and adds at §8B2.1(a)(2) the requirement that an organization shall "otherwise promote an organizational culture that encourages a commitment to compliance with the law." Should the proposed language be adopted? Should the guidelines go further to include an explicit reference to organizational "ethics" and/or "values?"

3) The current guidelines preclude an organization from receiving the culpability score credit for an effective program if certain high-level individuals within the organization participated in, condoned or willfully ignored the offense. At §8C2.5(f), the Proposed Amendment changes that automatic preclusion to a rebuttable presumption that the organization did not have an effective program. The proposal is meant, in large part, to address the concern that smaller organizations often may be automatically precluded from compliance program credit under this subsection. Should the proposed rebuttable presumption be adopted? If a rebuttable presumption is adopted, should it apply only to smaller organizations?

The same subsection also precludes the compliance program credit if the organization unreasonably delayed reporting an offense to appropriate governmental authorities. The Proposed Amendment retains that prohibition. Should that prohibition be changed or eliminated because self-reporting is already considered for cooperation credit at §8C2.5(g)?

4) Could Chapter Eight incorporate certain factors or considerations to encourage small and mid-sized organizations to develop and maintain compliance programs?

5) The Proposed Amendment provides at Application Note 12 to §8C2.5(g) that, if the defendant has satisfied the requirements for cooperation, waiver of the attorney-client privilege and the work product protections "is not a prerequisite to a reduction in culpability score" but, in some circumstances "may be required in order to satisfy the requirements of cooperation." Should that language or some other language be adopted?

The Commission received substantial public comment on these five issues as well as a number of other issues. The documents that follow provide more detailed information about all of these issues.

Following this Memo is a summary of all of the comments and recommendations received to date. For ease of use, we organized the summary in order of the Proposed Amendment to Chapter Eight as it was published in the Federal Register, and we provided a table of contents by issue. Each comment is followed in parentheses by the abbreviated name of the commentators as well as the abbreviated names of other commentators who have made remarks supportive of the same opinion. The summaries also provide a synopsis of the commentator's specific recommendations for how to address the issues raised. The index of public comment (at the next tab) provides the abbreviation given each commentator.[1]

The last tab is a copy of the public comment itself. Although the range and nature of the comments varied considerably, the overall tone was positive and reflected substantial public support for the efforts of the Advisory Group and the Commission.

Attachments (3)

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[1]The index provides the name of the commentator and the date of his submission. In some cases, the commentator indicated that he was commenting on behalf of an organization, in which case the index provides the name of the organization and the name of the commentator. In other cases, the comment was made personally and not on behalf of an organization. The commentator abbreviation that we use throughout the summaries is listed in bold and parentheses after each name.

CHAPTER 8 OF THE SENTENCING GUIDELINES

PUBLIC COMMENT SUMMARY

CONTENTS

CHAPTER 8 OF THE SENTENCING GUIDELINES

PUBLIC COMMENT SUMMARY

as of 3/03/04

This summary is organized in a manner consistent with the structure of the proposed amendment to Chapter 8 as it was published in the Federal Register on December 30, 2003. Each comment summary is followed in parentheses by the abbreviated names of all commentators that have made remarks supportive of that particular opinion. This summary also gives a synopsis of the recommendations that relate to the various comments. Where the Department of Justice has submitted remarks, its entry appears first within a subsection. Although a number of quotations are employed below, please refer to the actual submissions themselves for a complete understanding of the specifics of referenced comments and recommendations.

I. Scope of Program--§8B2.1: "Violation of Law" vs. "Criminal Conduct"

Comment: "Violation of law" is too broad and vague. The phrase could be construed to encompass all aspects of civil law compliance, and the guidelines should be limited to matters of criminal law. If "violation of law" were to be given an expansive meaning, it could overwhelm corporations, leading them to conclude compliance programming is too onerous a burden. Moreover, the proposed expansion is arguably inconsistent with other sections of the guidelines. While some sections do mention prior civil or administrative offenses, and violations of orders, they require separate instances of "similar misconduct." This standard is very different from the proposed expansion to violation of law, which would include any criminal or noncriminal violations. (ERC)(UOP)(Biz Rndtbl)(NACDL)(ACC)(Chem)

Recommendations: 1) Use "criminal conduct," which is currently in the guidelines, instead of "violation of law,"and do not expand the scope to include noncriminal (including regulatory) offenses. (ERC) (UOP)(Biz Rndtbl)(NACDL)(Chem)

2) Eliminate proposed Application Note 2 (c) that references "applicable government regulations." (NACDL)

3) Do not expand responsibility of corporate compliance officers to anticipate all possible violations of all laws, rather, work more with prosecutors and companies to define areas of weakness. The Department of Justice and the Commission should join with organizations in their risk-assessment before expanding the scope of compliance programs to the prevention of violations of all laws. (ACC)

Comment: The "violation of law" language is appropriate because many program areas address non-criminal actions and because the reporting of violations should go beyond criminal behavior. (Prov)
Recommendation: Adopt the proposed amendment's broader language. (Prov)

II. Effective Program--§8B2.1(a)&(b): Due Diligence, Culture, & Ethics

Comment: The absence of the term "ethics" is particularly notable given its widespread use in the recent SEC, Sarbanes-Oxley, and NYSE initiatives. Programs that address both law and ethics foster cultures where "employees appreciate the gravity of their decisions and the actions they take." The Advisory Group portrays an overly limited role for ethics and mistakenly supposes that courts will not be able to evaluate the application of ethical standards. (Meta)(Mason)(Gruner)(LRN/Seidman)
Recommendations: 1) A reference to ethics should be included explicitly. (Meta)(Mason)(Gruner)(Prov)
2) Add to proposed §8B2.1(a)(2) so it reads in pertinent part "otherwise promote an organizational culture that encourages a commitment to ethics and the law." (LRN/Seidman)
3) Add to proposed §8B2.1(b) so it reads in pertinent part "Due diligence and the promotion of an organizational culture that encourages a commitment to ethics and compliance with the law." (LRN/Seidman)

Comment: The proposed amendments fails to enunciate "any real measures of effectiveness." On the contrary, the amendments focus on due diligence criteria that could be met with a "paper" program. (Meta)(Mason) (Dreilinger)(Gruner)
Recommendations: 1) Employ "ethics" in determinations of effectiveness: Check for a code of ethics; its application; and tested/observed changes in knowledge, attitudes, and practices. (Meta)(Mason)(Gruner)
2) Make sure that an evaluation of effectiveness measures both positive behavioral changes and thes sustainability of these changes. (Dreilinger)

Comment: The proposed amendment appropriately emphasizes a culture of compliance. This change would be consistent with recent legislative and regulatory developments. (DII)
Recommendations: 1) Retain proposed language referencing and defining the "culture of compliance." (DII)
2) Provide additional guidance on the definition of culture. (Biz Rndtbl)
3) If "ethics and values" are not to be mentioned in the guidelines. Make clear that companies have the flexibility to incorporate ethics-based approaches in their compliance programs, and they are not precluded from a broader approach, which goes beyond a minimal threshold of compliance with the law. (Pharm)

Comment: Cultural change requires that compliance programs be operational at all levels of the corporate structure–particularly, at the officer and director level. This type of approach

presupposes participation of staff at all levels in design, implementation, and evaluation. (Meta)(Mason)
Recommendations: 1) Make the Ethics and Compliance Officer a "real" corporate officer with the accompanying rights and responsibilities; require these officers to have training in law and ethics; and establish a requirement that organizations conduct "ethical impact reports" for all major financial and strategic decisions. (Meta)(Mason)
2) Where culture is discussed insert the phrase "and shared accountability" so that overall phrase reads "'...promotion of organizational culture that encourages a commitment to and shared accountability for compliance throughout the organization.'" (Dreilinger)

Comment: No compliance program is foolproof, and no organization can guarantee all of the conduct of all of its employees. An organization that attempts to comply may nevertheless fall short of one or two of the seven minimum steps, and they should still be given some consideration and credit. (Biz Rndtbl)
Recommendation: Replace "minimally requires" in §8B2.1(a) with "usually requires" or "generally requires." (Biz Rndtbl)

Comment: The proposed amendments include language that requires an organization's compliance program be measured against "compliance practices and procedures that are generally accepted as standard or model practices for businesses similar to the organization." See Application Note 2(A)(iii) to §8B2.1. Model practices are often aspirational documents designed to go beyond applicable industry standards in order to advance the state of compliance. Requiring compliance with these aspirational goals is an unwarranted step that could discourage creation of programs. (Pharm)
Recommendation: Delete language in Application Note 2(A) as a requirement. If these aspirational standards are to be employed, they should be used to grant a positive presumption in favor of effectiveness. (Pharm)

Comment: The absence of any new ethics requirement(s) is appropriate, for despite pressure to adopt one, it is clearly beyond the Commission's mandate. (Pharm)(Chem)
Recommendation: Continue to leave ethics as an aspirational goal. (Pharm)(Chem)

III. Seven Minimum Steps--§8B2.1(b)(1-7)

A. Step One--§8B2.1(b)(1): Establish Compliance Standards and Procedures

Comment: Since an organization must establish adequate "compliance standards and procedures" to "prevent and detect violations of law," the emphasis in the body of the guidelines should be on the former. The Proposed amendments could be more expansive in prescribing the obligation to draft and adopt appropriate policies. (EPIC/Johnson)
Recommendation: Add to proposed §8B2.1(b)(1) the term "governing policies" to ensure that compliance duty extends to all aspects of management, not simply the compliance section. After

using the language to "prevent and detect violations of law" in §8B2.1(b)(1), all subsequent references in (b) should be modified to "compliance standards and procedures" and generally program references should be further distilled to "compliance program." (EPIC/Johnson)

***Comment*:** Application Note 1 to §8B2.1 defines compliance standards and procedures as "standards of conduct and internal control systems that are reasonably capable of reducing the likelihood of violations of law." Instead of referring to "internal controls systems," the Commission should consider the more generic term "internal controls" to address the concerns of smaller organizations that may not have adopted a formal internal control system but still need effective internal controls. (ERC)
Recommendation: §8B2.1, Application Note 1, should change the words "internal controls systems" to "internal controls." (ERC)

Comment: "Compliance standards and procedures" does not go far enough to deal with meaningful cultural change. Ethics is noticeably absent. (LRN/Seidman)
Recommendation: Modify proposed §8B2.1(b)(1) so it reads, "The organization shall establish ethics and compliance standards and procedures to prevent and detect violations of law." (LRN/Seidman)

Comment: Give corporations more credit where they have combined "the best elements of an ethics and a compliance program into a coherent and consistent organizational culture." (Anon 2) ***Recommendation:*** Give extra credit for going beyond the minimum steps. (Anon 2)

B. Step Two--§8B2.1(b)(2): Organizational Leadership

Comment: The role of the "governing authority" should be emphasized over the "organizational leadership." (EPIC/Johnson)
Recommendation: In proposed §8B2.1(b)(2), "governing authority" should be moved in front of the "organizational leadership" language. (EPIC/Johnson)

Comment: The "organizational leadership" should be given a more active role. (EPIC/Johnson)(HCCA)(ERC)
Recommendations: 1) Add a requirement in proposed §8B2.1(b)(2) that obligates the leadership to demonstrate a commitment to the compliance program. (EPIC/Johnson)
2) §8B2.1(b)(2) language should be changed to: "The organizational leadership shall provide direction to and be knowledgeable of the content and operation of the program." (ERC)
3) Amend the language in §8B2.1(b)(2) to make it clear that the compliance officer "coordinates," "evaluates," and "reports" to, and for, the organizational leadership and governing authority–who share responsibility for implementation with them. (HCCA)

Comment: While the proposed "high-level personnel" in charge of compliance are supposed to have access to the "governing authority," the particulars of this access are not entirely clear. (Dreilinger)(EPIC/Johnson)(Chem)