Recommendations: 1) The language that addresses the reporting particulars, e.g., Application Note 3(B) to §8B2.1, should state: a) that reports are due at least "quarterly," as opposed to "periodically"; and b) whenever necessary, the high-level personnel should have private access to the governing authority. (Dreilinger)
2) Clarify that senior personnel administering the compliance program have access to the governing authority. (EPIC/Johnson)
3) Clarify that access means the ability to report only and that governing authority need not supervise the compliance officer. (Chem)

Comment: The proposed language at §8B2.1(b)(2) suggests that the compliance officer, as opposed to the management of an organization, has the responsibility to "ensure the implementation and effectiveness of the program." The amendment overstates the role and authority of the compliance officer and absolves management of its responsibility. History and case precedent state that the corporation and its senior management are ultimately responsible, not the compliance officers. (CHW)(Pharm)(Prov)
Recommendations: 1) Change language in §8B2.1(b)(2) to "specific individuals within high-level personnel of the organization shall be assigned direct, overall responsibility to coordinate the design, oversee the implementation, and evaluate and report to management and the board on the effectiveness of the program to prevent and detect violations of laws." (CHW)
2) Clarify that the responsibility for implementation and effectiveness is an organization-wide commitment involving all of management. (Pharm)(Prov)

Comment: The language on "adequate resources and authority" is commendable. However, the implication of this section may be misleading. "High level personnel" frequently do not have a real role in daily operations, and it may be more effective to direct these resources to the true operational head(s). (Anon 1)(Chem)(Anon 2)
Recommendation: 1) Language should be introduced that makes it clear that the emphasis is on the operational head(s). (Anon 1)(Chem)
2) In proposed §8B2.1(b)(2), clarify that the operational head of the program should be at least a VP or there is little actual authority. (Anon 2)

C. Step Three--§8B2.1(b)(3): Substantial Authority Personnel

Comment: The proposed elimination of the current language, "propensity to engage in illegal conduct," is welcomed. However, the new language needs further clarification. (NACDL)(Anon 1)(Chem)
Recommendations: 1) Clarify that the mere fact that a person of substantial authority has a prior violation is not itself inconsistent with an effective compliance program. (NACDL)
2) Make it clear that prior violations are only relevant when they might affect one's ability to perform current duties or pose an impediment to an effective compliance program. (NACDL)
3) Provide more examples of what constitutes problematic prior "inconsistent" conduct. (Anon 1)(Chem) (Anon 2)

4) Since employees take their cues from management, shouldn't this rule be true for any person in management as well as those mentioned? (Anon 2)

Comment: The criteria set forth in Application Note 4 (C) to §8B2.1(b)(3) establishes that a criminal violation is not per se determinative of whether to hire or promote a person. This rule has collateral consequences that have not been adequately addressed. (NACDL)
Recommendation: The Commentary at Application Note 4 to §8C2.8 (Determining Fine Within Range) should be modified to eliminate the requirement that the court should consider any prior criminal record of an individual within the high-level personnel. Given the proposed language under §8B2.1(b)(3), these facts should not affect the determination of the organization's fine. (NACDL)

D. Step Four--§8B2.1(b)(4): Training

Comment: The proposed amendments could provide more explicit guidance about the nature and extent of the training obligation – for example, to provide senior management training. (Dreilinger)(HCCA)(EPIC/Johnson)
Recommendations: 1) Add to proposed §8B2.1(b)(4) language that makes it clear upper-level personnel are subject to comparable training. (Dreilinger)
2) Add a new Application Note 5 to §8B2.1 to clarify that, if a training obligation extends to independent contractors, this obligation can be met by the contractor through its own internal training program. (HCCA)
3) Add to proposed §8B2.1(b)(4) language examples of the organizational leadership engaging in appropriate communications to demonstrate commitment to the program. (EPIC/Johnson)

E. Step Five--§8B2.1(b)(5): Monitor, Audit, Evaluate & Report

1. §8B2.1(b)(5)(A)&(B): Monitor, Audit & Evaluate

No comments received.

2. §8B2.1(b)(5)(C): Internal Reporting/Guidance

Comment: The proposed amendments introduce the phrase "anonymous reporting" to replace existing language that requires "reporting systems without fear of retribution." While Sarbanes-Oxley has similar language, it makes an important addition referencing "confidentiality." These concepts need not conflict in normal operations. For example, the combination of anonymous and confidential reporting can be effectively handled with the use of an ombudsman. The concept of privilege in these cases is generally referred to as the "ombudsman privilege." Thus, the guidelines could provide for this type of confidentiality without the risk of overextending confidentiality to other communications with the organization. However, the guidelines should be sufficiently flexible to allow organizations to develop internal reporting systems that are as successful as possible in obtaining information for organizations to detect wrongdoing and

prevent criminal conduct. The guidelines should accommodate this broader approach and give organizations the option to consider it.
(AmEx)(UTC)(Coke)(EPIC/Johnson)(Redmond)(ERC)(Steer)
Recommendations: 1) Add language to proposed §8B2.1(b)(5) language that guarantees "confidentiality" as well. (EPIC/Johnson)
2) Add language to proposed 8B2.1(b)(5)(c) that provides for "confidential and/or anonymous reporting mechanisms" and also separately allow for "seeking confidential guidance" on potential violations of law. (Am Ex)(UTC)(Coke)(EPIC/Johnson)(Redmond)(ERC)(Steer)

F. Step Six--§8B2.1(b)(6): Incentives and Discipline

Comment: It is difficult to provide "incentives" for legal compliance, and it does not make sense to most people to "reward" day-to-day legal or ethical conduct. Thus, this section should focus more on the messages sent by standards and procedures about what is rewarded and punished in the organization. (ERC)
Recommendation: Change §8B2.1(b)(6) to: "Compliance with the law ...shall be encouraged and supported consistently through standards and procedures that hold employees accountable for appropriate conduct and incorporates such accountability into regular promotion and compensation decisions. In addition, legal compliance should be enforced through appropriate disciplinary measures for engaging in violations of the law and for failing to take reasonable steps to prevent or detect violations of the law." (ERC)

Comment: If the proposed language that organizations should give employees "appropriate incentives to perform in accordance with [the compliance program]" is understood to mean mandated bonuses under the law and company policy, then this measure would undercut the flexibility inherent in the guidelines structure. (Pharm)
Recommendation: Ensure that this language is not understood as a requirement, but rather, it is optional and flexible. (Pharm)

Comment: It is important to include incentives as well as disciplinary measures. However, it is crucial that organizations retain flexibility in how they structure these. (Chem)
Recommendation: Clarify that "appropriate" modifies "disciplinary measures" as well as "incentives." Such a modification will ensure that the rules are not misconstrued in a way that would have adverse effects, e.g., sanctioning whistleblowers. (Chem)

G. Step Seven--§8B2.1(b)(7): Program Modification

No comments received.

IV. Addition of Risk Assessment--§8B2.1(c)

Comment: The addition of risk assessment is a positive development, but there needs to be further definition as to what is expected in this area. (EPIC/Johnson)
Recommendation: Add language to proposed §8B2.1(c) that requires an organization to translate risk assessment results into expected program outcomes. Also, move the program evaluation language in §8B2.1(b)(5) to 2.1(c). The scope of evaluation in (b)(5) should be limited to auditing the internal operations of the program, as opposed to overall program effectiveness. (EPIC/Johnson)

Comment: First, making "risk assessment" a requirement of an effective program is too broad in scope, especially if the concept of violation of laws is expanded, because it would be extremely difficult to evaluate all laws, both criminal and noncriminal. Second, the term "risk assessment" is too formal because it conjures up a very detailed and extensive analysis of every possible criminal and noncriminal risk. (ERC)(Chem)
Recommendations: 1) Eliminate §8B.2(c), and amend §8B2.1(b)(1) to state, "The organization shall assess the relevant risks, then establish compliance standards and procedures to prevent and detect violations of law." (ERC)
2) Instead of using the term "risk assessment," provide a full description of what is intended. (Chem)

V. Waiver --§8B2.1(g): Cooperation / §8C4.1: Substantial Assistance

DOJ Comment: The Advisory Group language on cooperation (two sentences) is generally acceptable, and the Commentary at Application Note 12 to §8C2.5 should be modified. However, the Department considers that it falls short in not recognizing that the government is in a unique position to assist the court in determining the extent of defendant's cooperation and whether waiver is necessary for full cooperation. Extra weight should be given to the government's assessment of the defendant's cooperation and its sufficiency.
DOJ Recommendation: In the second sentence proposed by the Advisory Group, change "in some circumstances" to "in other circumstances." In addition, insert a third sentence to the proposed commentary: "*Substantial weight should be given to the government's evaluation of the extent of the defendant's cooperation and whether waiver of either the privilege or work product protections is necessary to identify the nature and extent of the offense and the individual(s) responsible for the criminal conduct.*"

DOJ Comment: A motion for downward departure for substantial assistance to the authorities is triggered only by the government, and the district court has limited authority to review a prosecutor's refusal to file such a downward motion, e.g., only if it the refusal was based on an unconstitutional motive (citing *Wade v. United States*, 504 U.S. 181, 1850186(1992)).
DOJ Recommendation: Eliminate the proposed application note on waiver of privileges in 8C4.1.

Comment: The Advisory Group is to be commended for seeking to bolster the guidelines' respect for the importance of the attorney-client privilege. The Advisory Group offers a middle-of-the road position on the addition of commentary. This progress is laudable, but it falls short because it likens the importance of the attorney-client privilege to a bargaining chip. Language suggesting that waiver of the attorney/client privilege or work product protection may be necessary for cooperation or substantial assistance credit is problematic. Respect for these privileges is essential to ensure frank and candid determinations by an organization as to whether criminal conduct has occurred. (ACC)(Biz Rndtbl)(NACDL)(Chem)
Recommendations: 1) Recognize that the attorney-client privilege is the foundation of the attorney-client relationship as well as the foundation of trust by clients. Keep the first sentence of the proposed commentary and eliminate the second sentence. (ACC)(Biz Rndtbl)(NACDL)(Chem)
2) If the Commission concludes that deletion of only the second sentence is impossible, then delete the entire segment and leave defendants to make their arguments freely. (Chem)

Comment: The mere identification of the litigation dilemma, without ideas or plans to overcome it, is not enough. The organizational sentencing guidelines have already created an environment in which attorney-client privileged communications are more likely to be surrendered as part of a company's cooperation, and the Commission should help to rectify this difficult situation. If the point of compliance programs is to prevent wrongdoing and mitigate damage to others through self-reporting, companies that follow the guidelines should not be put at risk for third party litigation. (ACC)
Recommendation: The Commission should consider proposing a privilege to Congress that would allow privileged internal investigations to be shared only with the government and not constitute a waiver of applicable privileges as to third-party litigants. (ACC)

Comment: Statement in the proposed guidelines that waiver of privileges is not required for cooperation and substantial assistance credit constitutes a very helpful incentive for self-policing by organizations and effective compliance programs. (Pharm)
Recommendation: Accept the recommendation of the Advisory Group as to the commentary. (Pharm)

Comment: The Advisory Group recommendation that the Commission become a "fulcrum to advance the debate regarding the litigation dilemma among policy makers" is sound. (Pharm)(Chem)
Recommendation: The Commission should take the lead in advancing this debate because of the close connection between effective compliance, self-reporting and disclosure, and the litigation dilemma. (Pharm)(Chem)

Comment: The current proposal is sound, but it should emphasize remediation. (WCDI)
Recommendation: Add to the proposed waiver language the following for both cooperation and substantial assistance credit: ". . . only after considering the defendant's efforts relating to appropriate remedial action." (WCDI)

VI. Issues for Comment

A. Unreasonable Delay in Reporting: Issue One for Comment

Comment: Organizations and their staff respond to incentives and incremental punishment, and the proposed amendment and associated condition provide an incremental approach. (Dreilinger)
Recommendation: Adopt the proposed §8C2.5(f) language that makes it clear that an unreasonable delay in reporting an offense to governmental authorities can nullify the benefits of an effective program, but also allows the defendant the opportunity to make a case to the contrary based on the particulars of a given situation. (Dreilinger)

Comment: What constitutes "unreasonable delay" depends upon the context, and there are many circumstances where a substantial delay in reporting may in fact be reasonable. The only delays that should unequivocally be deemed unreasonable are those where organizational officials possessed clear evidence and declined to report to the appropriate authorities in a reasonable manner. (Gruner)
Recommendation: Maintain the existing guideline that characterizes compliance programs as deficient in cases of unreasonable delay. In cases of unreasonable delay, any relief should be limited to cooperation. (Gruner)

Comment: The elimination of the prohibition for unreasonable delay could serve to encourage companies to initiate programs without having to finalize their position on self-reporting. In view of the controversy around the litigation dilemma, this concern will likely remain significant. (EPIC/Johnson)(PAG)(CHW)(NACDL)(Pharm)(Chem)
Recommendations: 1) The prohibition for unreasonable delay should be eliminated, and the link between "effective programming" and "self reporting" should be limited to those cases where the self-reporting issue clearly impairs effectiveness. If this recommendation is followed, the reduction in culpability should be limited to three points. (EPIC/Johnson)
2) The prohibition for unreasonable delay should be eliminated. The issue of delay is more appropriately addressed in 8C2.5 (g) where a reduction in the culpability score is conditioned on prompt reporting. (PAG)(NACDL)(Pharm)
3) The prohibition for unreasonable delay should be eliminated and changed to a rebuttable presumption that the program *is effective* if it is the organization that discovers and brings the offense to the government's attention. (CHW)
4) The proposed rebuttable presumption should replace the current prohibition. (Chem)

B. High-Level Involvement: Issue Two for Comment

DOJ Comment: The proposed rebuttable presumption for high-level involvement is problematic for several reasons. First, the proposal does not logically follow from the Advisory Group study and report. There is no justification for how small businesses will benefit from the proposed change, and the Advisory Group makes no recommendations about small businesses other than to have more outreach and training. Second, it is not good public policy to create a litigation issue merely in order to make it easier for small organizations to qualify for the mitigation credit. Finally, even if the small business rationale is compelling to the Commission, the proposal is overbroad because it would extend the rebuttable presumption to large and small organizations.
DOJ Recommendation: Maintain the existing automatic preclusion and reach small businesses by increased education and outreach, as well as include the proposed commentary to make it clear that small businesses have less formal obligations than larger organizations.

Comment: To automatically preclude the reduction without giving the defendant organization an opportunity to provide facts in rebuttal could place an undue burden on the organization, especially in the case of a small organization. In cases involving high-level personnel, the key determination is whether the involvement "indicates a lack of core values supporting law compliance." Because high-level involvement generally indicates a lack of these values, it is appropriate to presume that the compliance program is ineffective in such circumstances. The exception would be where the high-level misconduct is isolated in some way from the other "corporate value setting functions and compliance program." Rogue employees can be found at all levels, and if only one of a number of high-level employees acts contra to the program, the entire program should not be discounted.
(ERC)(Gruner)(PAG)(Beacon)(NACDL)(Chem)(Pharm)
Recommendation: Add the proposed language regarding a rebuttable presumption changing the automatic preclusion for high-level involvement to a rebuttable presumption in §8C2.5(f)(3).
(ERC)(Gruner)(PAG)(Beacon)(NACDL)(Chem)(Pharm)

Comment: The proposed rebuttable presumption for cases involving high-level personnel misses an opportunity to promote appropriate positive behavior in favor of sanctioning negative behavior. This approach maintains a disincentive to initiate an effective compliance program rather than providing a true incentive to implement one. (HCCA)(Pharm)
Recommendation: A rebuttable presumption in favor of effectiveness should be introduced in cases where a corporation discovers and self-reports. Introduction of this type of positive rule would promote investigation and disclosure. (HCCA)(Pharm)

Comment: The rogue employee is a hazard of doing business. However, when more than one employee is involved in misconduct, the system itself becomes increasingly implicated. A rebuttable presumption that is connected with multiple malefactors might be more effective. (Anon 1)(Anon 2)

Recommendation: Change the trigger language in §8C2.5(f)(3) to "two or more high-level personnel." (Anon 1)(Anon 2)

C. More Credit for Effective Program: Issue Three for Comment

Comment: A greater culpability score reduction for an effective compliance program is an opportunity to give an incentive for companies to re-examine their compliance programs. (PAG)(Gruner)(Beacon)(Chem)
Recommendations: 1) Increase the culpability score reduction from 3 to 4. (PAG)(Beacon)(NACDL)(Chem)
2) Consider increasing benefit to 5 points and establishing a graduated scale based on how many of the required compliance program features have actually been adopted. (Gruner)

D. Small Business Considerations: Issue Four for Comment

Comment: Small businesses generally do not focus on compliance issues to the extent of larger companies because short-term survival is the more pressing demand. In contrast, larger, more stable companies generally devote more resources to compliance to minimize litigation exposure. However, even some established organizations, e.g., large law firms, do not maintain compliance programs. Additional incentives are necessary to encourage appropriate incremental gains in small business compliance programming. (Murphy)
Recommendation: Add some provisions at Application Notes 1 or 4 to §8B2.1 that: a) require large companies to factor in whether suppliers in sensitive areas, e.g., hazardous waste, have effective compliance programs; and b) require large companies to inquire about the presence of compliance programs regardless of area. (Murphy)

Comment: Without further clarification, the training requirements in §8B2.1(b)(4) may be construed to impose on small businesses an onerous burden with little impact. (EPIC/Johnson)
Recommendation: In proposed §8B2.1(b)(4), more emphasis should be placed on the organizational leadership communicating commitment and support of the program, as opposed to simply engaging in additional training. (EPIC/Johnson)

Comment: The special concerns of small and medium enterprises (SMEs) are substantial and varied, warranting an entirely separate section. (EPIC/Johnson)
Recommendations: 1) A new §8B2.1(d) should be added that addresses the following: a) SMEs are so varied that generalizations are problematic; b) compliance is proportionately more burdensome to SMEs; c) SMEs need not duplicate practice of large corporations, but rather come up with tailored solutions; d) provide incentives for SMEs to work together on these issues to achieve economies of scale; and e) recognize that the process of tailoring the practice of large corporations to SMEs can employ informal mechanisms. (EPIC/Johnson)
2) The Commission should devote more resources to the training of small and medium enterprises. (PAG)(Beacon)

Comment: The size and specifics of a compliance program may vary with size, but the overall goals and principles should be the same. To determine whether adequate resources are available for compliance programming, consider whether comparably sized corporations within the industry have adopted similar features, e.g., production quality control, for other departments. If they have, then compliance should presumptively be entitled to a similar commitment. To avoid having this inquiry become too burdensome, it may be useful to exempt the smallest organizations from being obligated to establish separate compliance departments or staff positions. (Gruner)
Recommendation: Insert language in the new Application Note following 8B2.1 that states organizations with "100 or fewer employees" will not need "separate compliance staff." (Gruner)

Comment: Because smaller organizations are only now beginning to address their compliance program needs, prosecutors should be allowed to ask for smaller fines and penalties. Consideration should be given to the progress of smaller organizations in establishing programs given fewer resources than those available to large organizations. (Beacon)
Recommendation: A fine in the low end of the range should be imposed in order to give credit to those small organizations that spend a proportionately larger portion of their revenues on compliance than larger organizations. (Beacon)

Comment: Because smaller organizations convicted of criminal activities will almost always have high-level personnel involved, it may be appropriate to craft a different standard sensitive to this reality. (Pharm)
Recommendation: Eliminate the automatic preclusion for small companies with high-level involvement, through an exemption for small businesses. (Pharm)

VII. Miscellaneous Issues

Comment: The Advisory Group noted in their report that an overwhelming number of convicted corporate defendants have failed to get credit for an effective compliance program. The causes of this phenomena warrant special measures and additional research. (PAG)(Beacon)
Recommendation: The Commission should convene an interdisciplinary working group to study this subject. (PAG)

Comment: There is no proven link between increased penalties or compliance efforts and the prevention of corporate crimes. (ACC)
Recommendation: Commission should consider whether increasing compliance requirements is justified. (ACC)

Comment: Internal detection and remediation are key. (WCDI)
Recommendation: Provide that the compliance reduction applies only "if the organization took appropriate remedial action once the offense was discovered." (WCDI)

Comment: The Department of Justice could be more transparent about how it factors in compliance programs when making litigation decisions. (Murphy)(UTC)
Recommendations: 1) The Sentencing Commission should foster a dialogue among the appropriate personnel at the Department of Justice. (Murphy)
2) The Commission should request the Department of Justice to provide data as to the impact of compliance programs in negotiated settlements. (UTC)

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2004 Chapter Eight Public Comment & Testimony

American Chemistry Council
Good Chemistry Makes It Possible

March 1, 2004

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

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

Dear Sir or Madam:

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

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

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

Executive Summary

Effective Compliance Programs

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

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

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

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

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

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

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

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