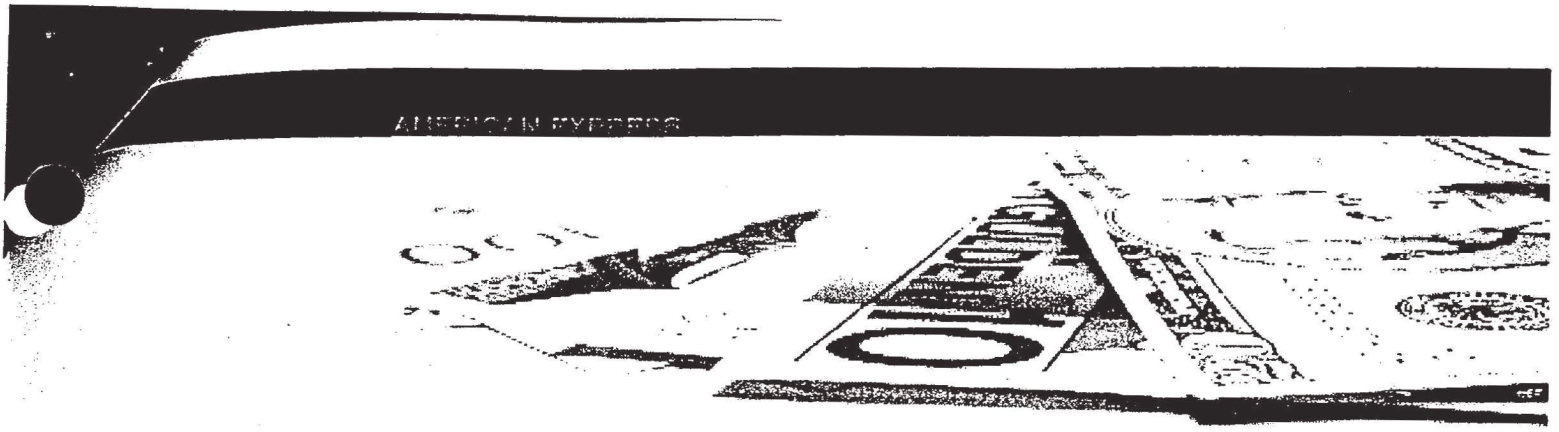


Scenarios

CORPORATE GOVERNANCE

Conflicts of interest, deceptive sales practices, harassment, and discrimination are just some of the practices that violate the Company's ethical standards and in some cases, break the law.

Effective corporate governance is critical to protecting the American Express Brand. It is every employee's responsibility to speak up when they become aware of unethical and inappropriate actions. However, fear of retribution and perceived lack of management support can cause people to be reluctant to act.

If you are in doubt about any situation or behavior, the formal resources of the organization, including management and HR, are available to all employees who wish to discuss their concerns. You can also speak informally and confidentially with an Ombudsperson.

YOU CAN'T LIE, ESPECIALLY TO AN AUDITOR

Muriel is a Senior Cashier at an International Operating Center where Cardmembers can pay their monthly Card statement and transact other services such as buying Travelers Cheques and Emergency Check Cashing. At a department staff meeting, her supervisor Robert announces that an audit of the department is starting. Robert tells all the cashiers that if the auditors ask them questions, they should just reply that they don't know, and will get back to them with the answer. When the meeting ended, Robert asked Muriel to stay for a minute. He told her not to say anything about the $20,000 cash Travelers Cheques purchased ten days before by the important restaurant owner, an Amex high spending Cardmember. The VP of Marketing had ordered the Travelers Cheque transaction be completed quickly, as the Cardmember had arrived with a suitcase full of cash. In the rush, the appropriate cash exception reports had not been prepared. He also told Muriel, "Be sure not to mention the backlog in the ledger account reconciliation either, but don't worry because the auditors may not detect anything and there is no risk since the VP of Marketing knows the Cardmember very well."

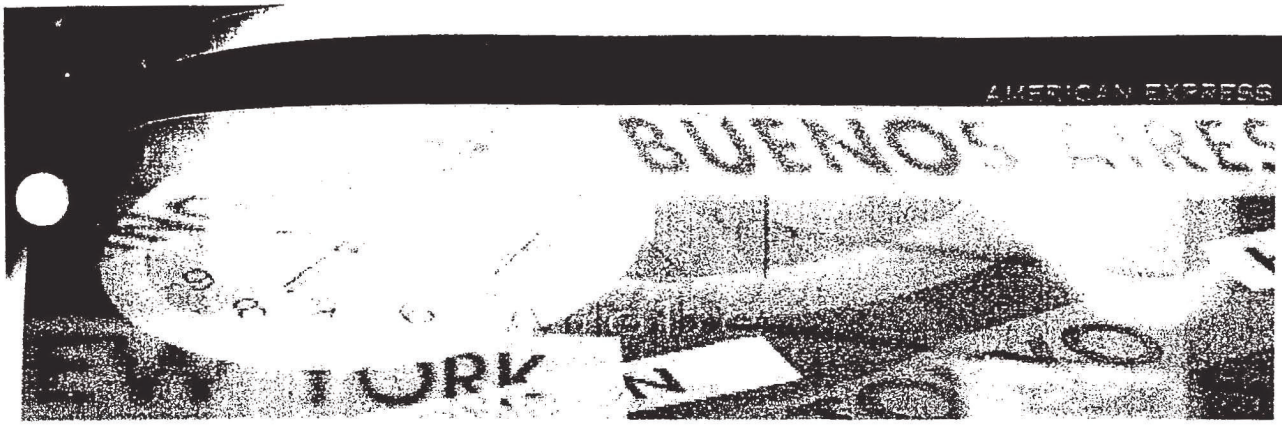
Muriel was surprised by the supervisor's message and became worried that the auditors might question her. She had recently attended the Code of Conduct Training session conducted by Compliance, and she decided to call the Ombudsperson to discuss the situation.

She explained her concerns to the Ombudsperson, and they discussed in detail each of the possible options available where Muriel could report this policy violation:

- Compliance
- Controller
- Audit
- Internal Control
- Human Resources
- Her Department's Boss' boss

Muriel decided that she would report the situation to the Controller. The Ombudsperson gave her the telephone number and email address, and Muriel sent an email reporting the incident. The Controller and the auditors investigated discreetly, and the appropriate actions were taken to correct the control weaknesses and to reinforce policy. It was soon announced that Robert was no longer with the Company. Muriel knew she had done the right thing by not keeping quiet.

[2-31]



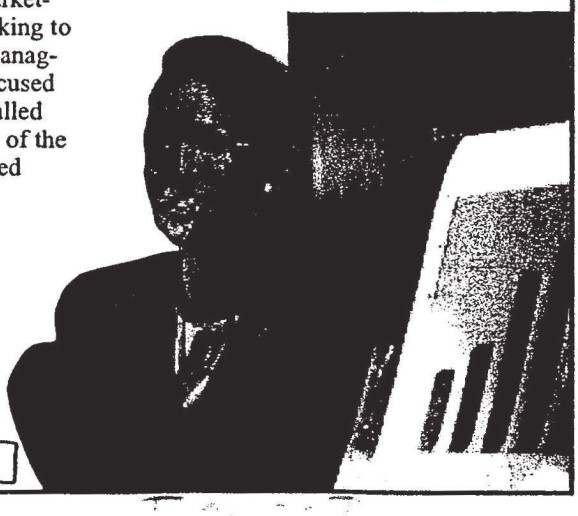
Scenarios

"DISCOUNTING" THE BRAND

Raul couldn't have been happier last month when his employer got a contract to handle a telephone sales function for American Express. He had a lot of industry experience and was convinced that the Company offered the best product in the marketplace. Now he and his colleagues had a chance to use their excellent sales skills to produce outstanding results for American Express and provide a quality product to customers.

But Raul was concerned about the sales technique of one of his colleagues, Sam, who was producing the most sales on the team. Raul noticed that his colleague was consistently departing from the standard sales script when speaking with customers. He overheard Sam using words like "deal", "discount" and "bargain" when making his sales presentation. Raul remembered from training that such language could damage the American Express brand in the marketplace. Raul wasn't comfortable talking to Sam directly or approaching his manager. The manager appeared to be focused entirely on closing sales. Raul recalled some information about the Office of the Ombudspersons that he had received during orientation to the Amex account. He decided to give the Office a call for an appointment.

That same night, Raul spoke anonymously with the Ombudsperson. After listening carefully to his concern, the Ombudsperson offered to encourage the Amex Vendor Relationship leader to partner with Raul's management team to do some joint quality control monitoring. Raul gave his permission for the Ombudsperson to proceed and within a few days he noted a decidedly positive change in Sam's approach to potential customers.



[2-32]

AMERICAN EXPRESS' BLUE BOX VALUES

Customer Commitment
We develop relationships that make a positive difference in our customers' lives.

Quality
We provide outstanding products and unsurpassed service that, together, deliver premium value to our customers.

Integrity
We uphold the highest standards of integrity in all of our actions.

Teamwork
We work together, across boundaries, to meet the needs of our customers and to help the company win.

Respect for People
We value our people, encourage their development and reward their performance.

Good Citizenship
We are good citizens in the communities in which we live and work.

A Will to Win
We exhibit a strong will to win in the marketplace and in every aspect of our business.

Personal Accountability
We are personally accountable for delivering on our commitments.

AMERICAN EXPRESS

Contacting the Office of the Ombudspersons

To arrange a confidential discussion with an Ombudsperson, dial the secure and toll free number listed for your country. Once connected and if you are comfortable doing so, you will be asked by an assistant to provide the following information:

1. Your name (can be fictional if you don't wish to be identified).
2. Your location and business unit.
3. A home or work telephone number where the Ombudsperson can call you.
4. A convenient time for the Ombudsperson to phone - this can be during or after normal working hours, Monday through Friday.
5. The general nature of your issue - this will help the Assistant determine if the Ombudsperson is the most appropriate channel to help you.

The Assistant can also arrange an interpreter if required.

Alternatively, you may request an appointment via fax or e-mail*.

* Because of limitations of current technology, confidentiality cannot be assured when using e-mail. As a matter of prudent practice, an Ombudsperson does not discuss issues via e-mail. However, you may contact us via e-mail to request an appointment.

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AT&T Direct Services work from home or public phone. The toll-free number is not available from American Express office locations that have satellite connection to the U.S.

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*Your call will initially be answered by an operator or a recorded message – please follow the instructions below for quick connection to the Office:

- Operator – ask for connection to "MTF 6298 0555".
- Recorded Message – select 2 for Enhanced International Toll Free Service and then enter this number: 6298-0555#.

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February 10, 2004

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Submitted via email:
pubaffairs@ussc.gov

Attn: Public Affairs

Re: Comments of the Association of Corporate Counsel on The Report of the Ad Hoc Advisory Group on the Organizational Sentencing Guidelines (Proposed Amendments to Chapter Eight, United States Sentencing Guidelines)

Ladies and Gentlemen:

On behalf of the 16,000 individual in-house counsel members of the Association of Corporate Counsel (ACC) (formerly known as the American Corporate Counsel Association), we thank you for the opportunity to submit comments for your consideration as you review and consider the incorporation of the proposed amendments of the Advisory Group on the Organizational Sentencing Guidelines to the US Sentencing Guidelines, Chapter 8.1

Founded in 1982 as the "in-house bar association," ACC provides its members with networks, resources, education, and advocacy, all of it by corporate counsel, and for corporate counsel. ACC members, who work in over 7,000 separate private sector organizations, are particularly well positioned to comment on the practical impact of the guidelines' compliance requirements and on contemplated changes to the guidelines proposed under these amendments. Our members design preventive compliance programs, train corporate employees on how to comply with the laws, assist senior executives and the board in the creation of initiatives to promote an ethical corporate culture, advise line management on emerging legal responsibilities, and maintain, evaluate, and continuously improve their clients' legal compliance efforts. ACC members are often the top corporate compliance officials within their companies, and when not so formally vested, they are nonetheless considered key players in supporting the chief compliance officer and other managers with whatever legal guidance and practical resources are necessary to ensure preventive compliance and ethical behavior.

ACC members believe that whatever the original presumptions were of the Organizational

1 The complete US Sentencing Guidelines for Organizations, first adopted in 1991, can be found on the webpages of the US Sentencing Commission at http://www.ussc.gov/orgguide.htm; the report of the Ad Hoc Advisory Group to update and amend the organizational guidelines is provided at http://www.ussc.gov/corp/advgrprpt/advgrprpt.htm,

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Sentencing Guidelines (as adopted in 1991), the resulting impact has been far greater than most might have anticipated. Beyond the obvious intent to standardize the sentencing process for corporate defendants, the guidelines have done a great deal to change the way that companies focus on preventive compliance.

Certainly much of the focus of the Advisory Group is on fine-tuning the current standards and definitions to reflect the experience of the last 12-13 years. Indeed, corporations will continue to use the Guidelines as a prescription for appropriate and reasonable efforts that would help them prove that the actions of errant employees are not condoned by, representative of, or anticipated behaviors; if the guidelines are not operating in a manner that connects this desired outcome with the guidelines prescribed requirements, then the guidelines should be reconsidered.

ACC and its members are deeply cognizant that the field of corporate compliance is one that is subject to increasing scrutiny (by shareholders, regulators, the public and media, and the courts), as well as increasing regulation (by Congress and the regulatory agencies of the federal government, as well as the states and local governments within whose domains corporations reside and bear responsibilities as members of the community). While the regulatory environment of 1991 was sophisticated and extensive, in the Post-Enron,/Sarbanes-Oxley world of today, companies are more than mindful of not only their compliance obligations, but the increasing number of stakeholders, prosecutors, plaintiff's counsel, and regulators who will scrutinize and judge their efforts, sometimes at counter-purposes with each other.

In this letter, we wish to both recognize the Advisory Group's achievements in proposing amendments to help make the Guidelines better, but to also bring to your attention some concerns and larger policy questions that we believe are still not addressed adequately by the existing Guidelines or the Advisory Group's proposal to amend them, especially as we see these proposed amendments in the light of other regulatory guidance that our members are seeking to implement under the prescriptions of Sarbanes Oxley and related regulations.

There is a flaw in the presumption that compliance and deterrence are tightly connected concepts in addressing corporate criminal behavior.

Recent highly publicized and significant failures at several public companies (some with highly regarded compliance programs in place that simply were focused on the wrong kinds of misconduct), coupled with a ten-fold increase in the number of prosecutions in the 1990's (as compared to the 1980's), shows us that the Sentencing Guidelines' prescriptions by themselves have not been effective in eliminating wrongdoing at companies by employees who are intent to break the law. Rather than immediately presuming that the Guidelines need to be strengthened, it might be wise re-examine the relationship between compliance and deterrence outside a purely punitive context.

Perhaps the Sentencing Commission and the Sentencing Guidelines as applied by courts are well-positioned to help control outcomes flowing from those who agree with the precept that compliance is desirable, but some suggest that the Guidelines are poorly-situated to address

[2-35]

deterrence of those who are intent on acting outside of the preventive law systems established within the company. Heaping greater punitive standards and increased accountability on the corporation as a whole for the undeterred criminal intent of the few may not do anything to stop or deter that which we all agree is most damaging to the company's legal health. It is difficult to legislate morality in any fashion, so we should not respond to an increase in high visibility corporate crimes and prosecutions by immediately presuming that more legislation with greater sanctions will solve our problems.

What will? We have no answer, except to note that the Advisory Group, while well-intended, continues to try to fashion a remedy from a cloth that has proven insufficient to cover the task. None of us has spent sufficient time looking at the necessary connection between compliance and deterrence, nor at the entities that may be better positioned than the Sentencing Commission to take on such new initiatives. Before adopting stricture requirements in the Guidelines, we encourage the Commission to think about this link.

Resist the temptation to expand the Guidelines to attach criminal liability and sanctions to all violations of law, including non-criminal violations of regulations.

Relatedly, we are concerned that the changes proposed in Application Notes 1 and 4(A) to Section 8B2.1 are well-intended, but are moving in the wrong direction. Rather than helping companies understand where to focus their efforts, the Advisory Group has suggested that compliance programs which were once focused on preventing criminal violations must now also be created to detect and prevent violations of *any* law, criminal or non-criminal, including regulatory violations; violations of *any* laws or regulations will be dealt with as criminal violations, with criminal sanctions.

While companies should try to prevent all wrongdoing and most make every effort to do so, the Sentencing Guidelines were written to address criminal behaviors by meting out consistent criminal penalties and remedies. It is wrong to impose criminal liability and penalties on companies whose employees have committed less than criminal acts. To do so is not only a blurring of the Commission's charter, but a dangerous move toward eliminating any meaningful gradation of punishment that that is consistent and appropriate to the underlying allegations. The Guidelines should not become a blunt instrument that attempts to bludgeon companies for every kind of misdeed – however minor or even unrelated to the larger allegations that we are most concerned about – that a corporate employee could conceive or commit.

There are over 300,000 federal regulations that subject companies to criminal liability. That does not include state statutes and non-criminal regulations and violations which companies must try to contemplate when designing compliance initiatives. If the Commission is concerned about the increase in corporate wrongdoing and prosecutions in recent years, it should be doing more to work with prosecutors and companies to define those areas of weakness in the corporate armor and focus laser-like attention to those issues. The Commission should not expand the responsibility of corporate compliance officials to anticipate every conceivable violation possible (and then risk assess it, train for compliance with it, and measure results and adjust the system to

[2-36]

respond to anything less than 100% success). Exponential expansion of the number of laws and regulations that could subject a company to entity-threatening penalties and criminal liabilities will only succeed in "dummying down" the most important compliance activities that companies should be focusing on implementing in an effort to cover every base, no matter how minor or unlikely it might be to cause problems of a material nature.

There just isn't enough time or money or focus to contemplate training and detailed compliance systems designed to address every violation of law that the company could imagine; to admit that is not a cop-out by companies who don't want to live up to their responsibilities of good corporate citizenship … it is just a fact of business. The Commission and the Department of Justice need to join companies in the risk-assessment exercises the Commission is considering prescribing for companies in the Advisory Group's proposed reforms; by doing so, it might succeed in identifying and more meaningfully identifying those compliance failures that plague us most so that we can all work to eradicate them. We ask the Commission to resist the temptation to believe that they will do more to stymie crime by identifying every violation of law as a crime and creating a criminal liability to attach to it; indeed, we ask you to contemplate how much more effective we can be in addressing those crimes which hurt us most by focusing more attention (including carrots and sticks) on them through the Guidelines.

Mere identification of the litigation dilemma, without ideas or plans to overcome it, is not enough.

We commend the Advisory Group's recognition of the so-called "litigation dilemma": this has long concerned corporate legal leaders as a burdensome counterweight to the establishment of meaningful compliance initiatives and self-reporting initiatives. The Litigation Dilemma refers to the recognition that no significant enterprise in the history of mankind has been 100% free of mistakes or failures: when companies establish meaningful compliance initiatives, they create documents, education and training programs, systems of reporting, and even stakeholder expectations, all of which are "evidence" that will be used against the company by the government and, of greater concern, the plaintiff's bar, should (or should we say "when") a compliance failure occurs.

Thus, while the Advisory Group's decision to address this issue in their report is a tremendous step forward and long overdue, recognition of the issue without proposing any solutions to address the problem does nothing to solve an increasingly impossible situation for corporate America. If businesses are to remain competitive, they must be able to meet the legal obligations of Sarbanes Oxley and other compliance expectations without putting themselves at risk of attack by the plaintiff's bars' privateers.

Given that the Guidelines have already created an environment in which attorney-client privileged communications and information are already more likely to be surrendered to the government as a part of a company's cooperation with an investigation (see below for additional comments on this subject), ACC suggests that the Commission consider proposal of a self-evaluative privilege to be recognized by Congress which would allow privileged investigations to be shared with the government and the government only. If the point of the Guidelines and the compliance systems they are intended to stimulate is to prevent wrongdoing and mitigate its damage to others through self-reporting and remedial actions, companies that take this responsibility seriously and seek to follow the Guidelines' directives in good faith should not be put at risk of bankruptcy or crippling litigation by third parties who seek to profit from the company's attempts to do the right thing.

Value the attorney-client privilege, since it does more to encourage compliance than to frustrate the efforts of prosecutors seeking information about company misdeeds.

Having raised the subject of the privilege, we wish to take time to commend the Advisory Group for seeking to bolster the Guidelines' respect for the importance of the attorney-client privilege. The Guidelines currently punish companies who do not offer to waive the privilege (as a sign of uncooperative behavior) and offer credit to companies that do waive he privilege. The Advisory Group acknowledges that the issue of attorney-client privilege is of concern and offers a middle road, proposing that the following comment be added to the guidelines:

If the defendant has satisfied the requirements for cooperation . . ., wavier of

[2-38]

> **the attorney-client privilege and of work product protections is not a prerequisite to a reduction in culpability score . . .. However, in some circumstances, waiver of the attorney-client privilege and of work product protections may be required in order to satisfy the requirements of cooperation. (Advisory Committee Report, pages 105-106)**

While this progress is laudable, it still likens the importance attorney-client privilege to a bargaining chip. The attorney-client privilege exists because it is recognized as an important element of the lawyer-client relationship. Lawyers need clients to talk openly with them; clients need reassurance from their lawyers that their decision to seek guidance from a lawyer will not be used against them. If clients don't believe that lawyers can be trusted in even the most delicate of situations, they are not likely to either seek out a lawyer, or to provide that lawyer with all the information necessary to assess the necessary response. Indeed, it bears repeating that clients don't have to consult with lawyers at all if they don't choose to do so. They certainly are under no obligation to have to hire lawyers to join every company strategic team to make sure the teams receive ongoing advice and counsel. And they don't have to form the respectful relationship with lawyers that strengthen their tendencies to listen to legal counsel and pursue recommended legal strategies.

The Advisory Group's middle road solution fails in that it still subjugates the privilege to the needs of prosecutors, which is antithetical to the purposes of the privilege in the first place. The Advisory Group suggests that the privilege does not have to be waived in order to get credit for the company's compliance initiatives, but if the prosecutor needs privileged information, the prosecutor can have it. It is hard to conceive of a prosecutor who won't claim a need for privileged information; it could be argued as germane and even crucial to proving the facts of virtually any case. We would never suggest in the individual criminal defense context that the mere fact that the prosecutor would find his case easier to prove if he could discover what the client told his lawyer would override the client's right to counsel and confidentiality; why is it that in the corporate context we find it easier to suggest that clients shouldn't have the same privileges? The penalties are still stiff and the liabilities are entity threatening. And the reasoning behind the privilege – encouraging the client to seek out competent and meaningful representation – remains the same in either context.

ACC believes that the diminution of the privilege is inappropriate and defeats the larger compliance goals of the Sentencing Guidelines. We should encourage clients to spend time consulting openly and honestly with lawyers; we should not punish them for having done so by allowing prosecutors to rummage through their conversations with counsel. Added to the concerns raised above about the plaintiff's bar and the litigation dilemma, this issue has double impact in that under current rules, that which is divulged that was privileged cannot be protected from discovery by subsequent third parties. Once revealed to the government (either voluntarily or under duress), the privilege cannot be applied against others who wish to make the same foray into confidential files.

If the Commission believes that in-house lawyers can have an important role in the creation, development, maintenance, and reporting of compliance initiatives, then we encourage the

Commission to recognize that the attorney-client privilege is the foundation of the attorney-client relationship, as well as the foundation of the trust that clients have in the counsel that their lawyers provide them.

Other Issues Before the Commission

ACC does not wish to repeat arguments that have already been made so well to the Commission by others, but we wish to note our support for purposes of your consideration.

We commend to you the comments of United Technologies regarding their concerns with the use of the term "anonymous" (versus "confidential") when considering appropriate employee reporting mechanisms in Section 8B2.1(b)(5)(C).

We also commend to you the comments of the National Association of Criminal Defense Lawyers (NACDL) generally, and especially their praise for the improvements proposed by the Advisory Group to subsection (f) of Section 8C2.5 regarding the report's proposals for increased flexibility of judges to consider the participation (or lack thereof) of high level officials in the organization.

ACC also commends the thoughtful comments of the Ethics Resource Centers Fellows Program in general, and in specific, their suggestions regarding risk assessment under Section 8B.2(c).

We thank you for your consideration of our comments, and offer our assistance if we can be of any help to you in the process of amending and updating the Guidelines.

Sincerely,

Susan Hackett
Senior Vice President and General Counsel

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February 27, 2004

Commissioners
United States Sentencing Commission
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Washington, DC 20002

Re: Proposed Amendments to Chapter 8 / Focus on Smaller Businesses

Dear Commissioners:

In response to your request for responses to the Proposed Amendment 2: Effective Compliance Programs in Chapter Eight, I would like to add the following comments:

Comment 2 regarding high-level individuals.

I agree with the Commission's position that the three-point reduction be changed to a rebuttal presumption if certain high-level individuals were involved or willfully ignorant. With the passage of Sarbanes-Oxley and stricter SEC regulations, all officers, directors, and senior managers of large organizations are well aware of the higher standards to which they are held and of the well-publicized examples of those organizations that did not conform to these standards. However, to automatically preclude the reduction without giving the defendant organization an opportunity to provide facts in rebuttal could place an undue burden on the organization. This is particularly true with small organizations. As stated in your Issue, by their very nature small organizations almost necessarily will have high-level individuals involved in the offense. To automatically preclude the reduction does not allow the prosecutor leeway in determining the ultimate score and, by extension, increases the maximum of the range within which the prosecutor can set fines. Because smaller organizations are only now beginning to address their compliance program needs, they should be allowed, in effect, a "grace period" of time wherein prosecutors could levy smaller fines and penalties. As compliance programs within smaller organizations mature, small defendants would have to present a stronger rebuttal argument in order to be granted the reduction. But the flexibility should be available while these programs are developed. The Commission could use this "grace period" as an incentive to small organizations to institute their compliance programs earlier rather than later.

Comment 3 regarding increasing reduction to 4 points.

As stated in Issue 3, requirements for an effective compliance program under the proposed amendment are more stringent than in the existing Guidelines. Given the additional requirements and expectations, and the associated cost and use of resources involved, recognition of an organization's efforts should be recognized and rewarded by providing a greater reduction for an effective program. Again, increasing the reduction for a good program should provide an incentive to all organizations, large and small, to implement an effective program sooner rather than later.

[2-41]

Comment 4 regarding other factors to provide incentives to small and mid-size organizations.

Consideration should be given to the progress being made in establishing a program given fewer resources than that available to large organizations. If a small organization is spending a proportionately larger portion of its revenues than larger organizations in order to comply with the Guidelines, it should be given credit for this, not necessarily with a reduction in the Culpability Score, but with the fine or penalty ultimately selected by the prosecutor within the determined range.

Final comments.

Finally, many smaller organizations are unaware of their requirements under the Guidelines. In my initial interviews with very small organizations, some did not even know that they fit within the definition of "organization". Educating the public at events such as the annual EOA conference, management forums and the like is an excellent way to publish your message, but the audience at these events usually consists of representatives of larger organizations. An outreach program that educates small and mid-size organizations, either through advertising or speaking at functions where representatives of these smaller organizations attend, would greatly enhance the awareness of and receptiveness to the Guidelines.

I would appreciate the opportunity to work with the Commission on such an outreach program.

Deanna Parmenter

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February 10, 2004

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Re: Chapter Eight Amendment – "Organizations shall otherwise promote an organizational culture that encourages a commitment to compliance with the law"

Dear Commissioners:

This recommendation is, by far, the most important of the several significant recommendations offered by the Advisory Group at the conclusion of its 18 months-long review of the Organizational Guidelines. There are three key reasons supporting its adoption:

The underlying predicate for Chapter Eight of the Guidelines is the recognition that, in imputing the wrongdoing of its people to the organization, there are gradations of organizational culpability. Hence, for the organization that evidences an effective compliance program, the guidelines authorize a lesser penalty than for the organization which does not have an effective program. Having an effective program signals reduced culpability. The Guidelines recognize that no organization can achieve "effectiveness" through a compliance-based litany of "shall nots". To the contrary, the Guidelines contemplate at least seven positive steps. By virtue of faithful implementation of these positive measures, the organization does manifest a culture encouraging compliance. Hence, this change to the Guidelines makes explicit what has been implicit in an effective compliance program.

While the sentencing guidelines nominally are for application in sentencing a convicted organization, the application of the guidelines is much broader. The guidelines are consulted by prosecutors in reaching a charging decision in criminal