cases, by debarring officials in deciding whether it is appropriate to impute individual misconduct to the organization, and by organizations seeking guidance in the development of or review of there own ethics and compliance programs. By adding the recommended language as to a culture of commitment, the revised guidelines will make stronger the expectation that a set of organizational compliance rules is not enough. What is really important is that the organization demonstrate what the EPA refers to as the "right corporate attitude".

Making explicit the expectation for fostering a culture of compliance also will harmonize the guidelines with the responses to the recent accounting and financial reporting scandals. The Sarbanes-Oxley Act of 2002[1] encourages companies to adopt codes of ethics which include "standards that are reasonably necessary to promote honest and ethical conduct". The Securities and Exchange Commission regulations[2] now recognize that codes of ethics should include written standards that are reasonably designed to deter wrongdoing and to promote honest and ethical conduct. Similarly, the New York Stock Exchange[3] emphasizes the importance of an ethical culture as a means of improving compliance. As far back as 1986, the defense industry, then in the midst of wide-spread fraud and abuse, established the Defense Industry Initiative on Business Ethics and Conduct (see www.dii.org) which binds that industry together with a common aspiration to the highest level of ethical conduct. In 1991, the Environmental Protection Agency published "Policies Regarding the Role of Corporate Attitude, Policies, Practices and Procedures, in Determining Whether to Remove a Facility From the EPA List of Violating Facilities Following a Criminal Conviction.", which characterizes the right "corporate attitude" as a significant factor for justifying removal from "the List"[4]. In the Deputy U. S. Attorney General's January 20, 2003 Memorandum, "Principles of Federal Prosecution of Business Organizations", the role of management is singled out as an important factor in determining whether to prosecute the organization: "...management is responsible for a corporate culture in which criminal conduct is either discouraged or tacitly encouraged." For the Guidelines not to give voice to this growing consensus would be to render the Guidelines discordant with the thrust of the legal policy applicable to organizational governance.

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[1] Pub. L. No. 107-204, 116 STAT. 745 (2002).

[2] 68 Fed. Reg. 5110, 5118, 5129 (January 31, 2003).

[3] <http://www.NYSE.com/pdfs/corp_gov_pro_b.pdf

[4] 56 F.R. 65785 (December 12, 1991).

The foregoing comments are my own, having been formed as a member of the Ad Hoc Advisory Group on Organization Sentencing Guidelines, and as the Coordinator, Defense Industry Initiative on Business Ethics and Conduct (DII). I do not purport to write on behalf of any individual signatory to the DII. I would be pleased to testify in support of the views offered in this letter.

Sincerely yours,

Richard J. Bednar

cc: Paula Desio , USSC (priority mail)

[2-45]

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February 27, 2004

United States Sentencing Commission
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Dear Commissioners:

The attached comments are submitted on behalf of the Business Roundtable, an association of chief executive officers of leading corporations with a combined workforce of more than 10 million employees in the United States and $3.7 trillion in annual revenues. Thank you for the opportunity to comment on the Commission's recently proposed revisions to the Federal Organizational Sentencing Guidelines as they apply to programs designed to ensure an organization's compliance with the law. As stated in our comments, the Roundtable strongly believes in the need to develop appropriate and effective sentencing guidelines. In our pursuit of the highest corporate ethical standards, we recognize the importance of clear direction for the establishment of effective corporate compliance programs.

Again, thank you for this opportunity. We look forward to working with you in the future.

Sincerely,

John J. Castellani

[2-46]

February 27, 2004

COMMENTS OF THE BUSINESS ROUNDTABLE
ON PROPOSED AMENDMENTS TO THE
ORGANIZATIONAL SENTENCING GUIDELINES
(U.S.S.G. § 8B2.1)

The Business Roundtable is pleased to comment on the United States Sentencing Commission's recently proposed revisions to the federal Organizational Sentencing Guidelines as they apply to programs designed to ensure an organization's compliance with the law. [1] The Roundtable has been an active participant in the process of developing appropriate and effective sentencing guidelines for corporations, previously addressing the unique aspects of corporate criminal liability in its comments on the proposed Guidelines in 1990, the *Discussion Materials on Organizational Sanctions* in 1988, and the *Preliminary Draft Guidelines* in 1986. [2]

Introduction

The Business Roundtable strongly supports effective organizational compliance programs. It seeks the continual improvement of corporate governance practices, and strives to promote the highest ethical standards among its members and the business community at large.

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1 *See* 68 Fed. Reg. 249 (Dec. 30, 2003).

2 *Comments of the Business Roundtable* (Feb. 14, 1990) ("1990 Comments"); *Comments of the Business Roundtable* (Dec. 1, 1988) ("1988 Comments"); *Comments of the Business Roundtable* (Dec. 3, 1986) ("1986 Comments").

The Roundtable applauds the Sentencing Commission's efforts to provide greater guidance regarding the criteria for an effective compliance program in its proposed revisions to the Organizational Sentencing Guidelines. The Roundtable has four areas of concern regarding the proposed revisions.

- First, the Sentencing Commission should reject the proposed revisions to the extent that they would increase judicial subjectivity in the event that a corporation's compliance program did not effectively prevent and detect *non-criminal* violations of law entirely unrelated to those charged in the pending criminal proceeding.
- Second, the proposed inclusion of a new, additional requirement for mitigation – that the organization otherwise "promote an organizational culture that encourages a commitment to compliance with the law" – should be eliminated because it is undefined, vague, and introduces an element of judicial subjectivity that the Guidelines were intended to eliminate.
- Third, the Commission should reject the proposed provision stipulating that a judge may not award mitigation unless the corporation's compliance program precisely meets all seven of the enumerated criteria.

- Finally, the proposed revision regarding waiver of the attorney-client and work-product privilege protections should be modified so that waiver is not a prerequisite for a reduction in culpability score if the defendant has otherwise cooperated.

These comments are predicated on the fact that, as the Organizational Sentencing Guidelines recognize, business organizations have special characteristics that affect the appropriate sentence in a given case.

1. A corporation may be convicted of a crime even though the individual who committed the offense acted contrary to the corporation's policies and the express instructions of her superiors, and corporate management may have no knowledge of the offenses. If the individual's conduct was taken in contravention of express corporate policy, the corporation may be a victim of its employee's conduct rather than a participant in it.
2. The people who bear the financial burden of corporate criminal sanctions – shareholders, other employees, suppliers and customers – are usually innocent of any wrongdoing. Furthermore, many of the innocent people who suffer when the organization is punished may not have had any connection with the organization when the offenses were committed.

3. Many criminal statutes are regulatory in nature and not intuitively obvious. They may be obscure or difficult to interpret, so violations may not involve moral culpability by the individual actors in the usual sense.
4. The deterrent effects of criminal penalties on organizations are not necessarily commensurate with the effects on individuals because the people who should be deterred – the actual wrongdoers – are not the people who actually pay the corporate fines. These wrongdoers can – and should – be deterred by individual penalties, but additional corporate penalties typically do not deter the individuals responsible for the criminal conduct.

I. The Business Roundtable Actively Supports Effective Corporate Governance and Organizational Compliance Programs

The Business Roundtable, which is comprised of the chief executive officers of approximately 150 major U.S. corporations, has taken a leading role in developing programs to promote corporate adherence both to the law and to the highest ethical standards. Our previous comments have consistently advocated that the Guidelines should consider effective corporate compliance programs to be a mitigating factor in the district court's culpability assessment. [3] We have also suggested that district courts should

[3] *See, e.g.*, 1990 Comments at 16.

consider the adoption and implementation of a compliance program to mitigate a sentence for a corporate criminal defendant. [4]

The Roundtable also has consistently advocated rigorous governance standards. Beginning as far back as 1978, it issued a statement on "The Role and Composition of the Board of Directors of the Large Publicly Owned Corporation." In 1997, the Roundtable issued a "Statement on Corporate Governance" recommending best practices regarding the structure and operations of the Board of Directors. [5] The Statement's underlying premise was that effective compliance policies are in the best interests of the corporation's shareholders. Since then, many of the practices suggested in the Roundtable's Statement have become commonly accepted in the business community.

The Roundtable more recently issued follow-up guidance entitled "Principles of Corporate Governance" in 2002. [6] These Principles stress the critical role of the Chief Executive Officer and senior management in operating the corporation in an ethical manner. [7] Moreover, the Principles highlight the role of the Board of Directors in ensuring that effective compliance programs are in place and are periodically reviewed by the Board. For example, one key aspect of the Board's role is seeing that the corporation

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[4] *See* 1988 Comments at 19.

[5] The Business Roundtable, "Statement on Corporate Governance," Sept. 1, 1997, *available at* http://www.businessroundtable.org/pdf/11.pdf.

[6] The Business Roundtable, "Principles of Corporate Governance," May 14, 2002, *available at* http://www.businessroundtable.org/pdf/704.pdf.

[7] *Id.* at 8.

has appropriate "mechanisms for employees to alert management and the board to allegations of misconduct without fear of retribution."[8] The Audit Committee often takes a lead with respect to this Board responsibility, and the Principles advocate a regular review by the Audit Committee of "the corporation's procedures addressing compliance with the law and important corporate policies, including the corporation's code of ethics or code of conduct."[9]

Finally, the Roundtable recently established and funded the Institute for Corporate Ethics at the Darden Graduate School of Business Administration at the University of Virginia. The Institute will create a cutting-edge business ethics curriculum and develop best practices in the area of corporate and business ethics. The Institute is an ambitious program designed to bring together business leaders and business school students with the best educators in the field to strengthen ethical business practices among current and future business leaders. In addition to teaching current business students, the Institute will offer executive-level training sessions for current CEOs and other senior members of corporate leadership teams to incorporate the latest business ethics education into existing corporate structures. The Roundtable believes that providing practical, hands-on ethics

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[8] *Id.* at 27. This concept was ultimately incorporated into the Sarbanes-Oxley Act of 2002, which requires Audit Committees to establish procedures for "the confidential, anonymous submission by employees of the issuer of concerns regarding questionable accounting or auditing matters." Sarbanes-Oxley Act of 2002, Pub. L. 107-204, § 301.

[9] *Id.* at 18.

training to both current and emerging business leaders is an effective method of shaping corporate culture.

In light of our experience in advocating adherence to best practices for corporate governance and compliance, we applaud the Sentencing Commission's efforts to provide additional guidance on what is required to establish an effective program to prevent and detect violations of law. However, we also recognize that different organizations may need different practices for effective compliance programs, depending on factors such as the size of the organization and its industry. Certain aspects of the proposed revisions may undercut their effectiveness, and it is to these particular provisions that we now turn.

II. The Sentencing Commission Should Reject a Definition of the Phrase "Violations of Law" That Includes Non-Criminal Conduct

The proposal to revise the definition of the phrase "violations of law" to include non-criminal conduct within the scope of compliance programs for the purpose of evaluating mitigation of sentence is inconsistent with the Sentencing Commission's statutory purpose and past practices. The Commission was created by the Sentencing Reform Act of 1984, which stated that one of the Commission's purposes was to "establish sentencing policies and practices [that] ... assure the meeting of the purposes of sentencing as

set forth in section 3553(a)(2) of title 18, United States Code."[10] It is clear from the Commission's enabling legislation that the Commission must focus on *criminal* conduct. 18 U.S.C. § 3553(a)(2) lists four factors for the Commission to consider in assessing appropriate sentences: (A) provide "just punishment" for the offense; (B) provide "adequate deterrence to criminal conduct"; (C) "protect the public from further crimes" by the defendant; and (D) provide rehabilitation. None of these factors include non-criminal law violations, and two of them – deterrence and prevention – are expressly limited to criminal conduct.

The legislative history of the Act demonstrates that the "just punishment" for an offense should not depend on having an effective compliance program to prevent and detect unrelated non-criminal conduct. The Senate Judiciary Committee Report on the Act stated that the "just punishment" factor "is another way of saying that the sentence should reflect the gravity of the defendant's conduct."[11] The adequacy of a compliance program to prevent and deter unrelated civil or regulatory violations has little, if anything, to do with the "gravity" of a criminal offense. Similarly, these unrelated non-criminal law violations have no bearing on the rehabilitation goal in the Guidelines. Therefore, including compliance programs to prevent and deter unrelated non-criminal conduct as a factor in

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[10] 28 U.S.C. § 991(b)(1)(A).

[11] S. Rep. No. 225, 98th Cong., 1st Sess. at 75 (1983), reprinted in 1984 U.S.C.C.A.N. 3182.

a court's determination of criminal liability is not consistent with the statutory purposes of the Guidelines.

Moreover, the Sentencing Commission's mandate is to ensure that the sentencing process supports the objectives of the criminal justice system: to deter and punish violations of *criminal* law. Corporate criminal liability is vicarious – it results from the criminal conduct of individual corporate agents – and it is much broader than civil concepts of respondeat superior. When individual criminal conduct is imputed to the corporation and punishment is meted out, many thousands of innocent individuals – employees, shareholders and customers – may suffer as a result.

To avoid needlessly inflicting harm on innocent shareholders and employees, mitigation of corporate criminal punishment under the Sentencing Guidelines is appropriate where the corporation has taken proper steps to prevent and detect violations of criminal law. While the Roundtable believes that all corporations should have effective programs to prevent and detect *all violations of law*, that is not relevant to the Guidelines and should not be included as a condition for mitigation.

The current Guidelines allow a court to reduce a corporation's culpability score where an effective compliance program demonstrates that the corporation did not intend its employees to engage in the alleged criminal

conduct and took reasonable steps to prevent them from doing so. [12] We support this view. For example, a corporation should not be denied mitigation for a criminal fraud by one of its employees because it lacks an effective program to prevent and detect an entirely unrelated civil or regulatory violation of law – such as a violation of OSHA's record-keeping regulations – that has no bearing on the corporation's efforts to prevent and detect the criminal fraud at issue.

The proposed revision would also have significant adverse – and, we believe, unintended – effects on a corporation's incentives for resolving claims of violations of civil or administrative law. For example, in an environmental case, a corporation may compromise with a regulatory agency because (1) the corporation is trying to avoid the expense of protracted litigation, and (2) the regulatory standards may be vague and difficult to resolve. Rather than reach an efficient compromise, the proposed revision could give the corporation an incentive to litigate each alleged non-criminal violation in order to avoid the possibility of reducing the mitigation potential of its corporate compliance program in future criminal litigation. The Sentencing Guidelines should not establish such a perverse incentive, which will lead to increased enforcement and litigation costs without improving corporations' commitment to preventing and detecting violations of law.

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[12] *See, e.g.*, U.S. Sentencing Comm'n, "An Overview of the United States Sentencing Commission and the Organizational Guidelines," *available at* http://www.ussc.gov/TRAINING/corpover.PDF.

III. The Proposed "Organizational Culture" Provision is too Vague and Undefined to be Administrable and is Inconsistent with the Purposes of the Sentencing Guidelines

The proposed amendments also include a new provision stating that, in addition to "exercis[ing] due diligence to prevent and detect violations of law" by implementing an effective corporate compliance program, corporations must also "otherwise promote an organizational culture that encourages a commitment to compliance with the law." [13] According to the proposed changes, promotion of such an organizational culture "*minimally* require[s]" following the seven enumerated steps. [14]

The Roundtable agrees that organizational culture can play an important role in effective corporate compliance. Our 2002 Principles of Corporate Governance emphasize the important role of a corporation's Chief Executive Officer and senior management in "setting a tone at the top that establishes a culture of integrity and legal compliance communicated to personnel at all levels of the corporation." Further, the Roundtable's Institute for Corporate Ethics is designed to foster organizational cultures built on ethical principles by inculcating the highest standards of business ethics in both the current crop of corporate leaders and business school students who will soon join these corporations in more junior positions. One

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[13] § 8B2.1(a).

[14] § 8B2.1(b) (emphasis added).

of the Institute's stated goals is to enable business leaders to create and maintain a "cutting-edge culture of ethical business practices" within their organizations. [15]

But we believe that the proposed revision related to organizational culture should be rejected because it provides no substantive criteria by which to evaluate a corporation's performance other than the seven enumerated features of a corporate compliance program. District courts and corporations will have no formal guidance as to what constitutes an "organizational culture that encourages a commitment to compliance with the law."

This new requirement is also inconsistent with the underlying goals of the Guidelines for two primary reasons: (1) it introduces an element of subjectivity for district courts that could lead to unwarranted sentencing disparities, and (2) it denies mitigation where the corporation has taken all appropriate steps to detect and prevent violations of criminal law. Absent extraordinary circumstances, a corporation that implements and adheres to the seven enumerated criteria in the Guidelines should be entitled to receive the mitigating credit for having an effective program to prevent and detect violations of law.

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[15] "Business Roundtable Unveils First-of-its-kind Initiative On Ethics," Jan. 14, 2004, *available at* http://www.thebusinessroundtable.org/newsroom/Document.aspx?qs=55F6BF807822B0F13D1459167F75A70478252.

The phrases "minimally requires" in § 8B2.1(b) and "promote an organizational culture that encourages a commitment to compliance with the law" in § 8B2.1(a) reduce the clarity of the Guidelines. The Advisory Group Report indicates that its proposed revisions were intended to "eliminate ambiguities ... and to define more precisely the essential attributes of successful compliance programs." [16]

The proposed revised Guidelines state that an effective compliance program will "minimally require" the seven enumerated steps, which implies that creating an "organizational culture of compliance" entails something more. But the Application Notes accompanying the proposed revisions provide no definition of this term. The Notes simply state "[e]ach of the requirements set forth in subsections (a) and (b) shall be met by an organization." [17]

This ambiguity will produce uncertainty for district courts applying the Guidelines. Is adherence to the seven enumerated steps for a compliance program sufficient? If not, what more must be done to produce an acceptable organizational culture? Without answers to these questions, district courts will have to rely on their own subjective interpretations of "organizational culture" in sentencing. For example, a district court could be forced to determine whether, despite implementing a compliance program that meets

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[16] *Report of the Ad Hoc Advisory Group on the Organizational Sentencing Guidelines*, Oct. 7, 2003, at 49, *available at* http://www.ussc.gov/corp/advgrprpt/ advgrprpt.htm.

[17] 68 Fed. Reg. at 75,357.

the seven enumerated criteria, a corporation's internal memoranda and the Chief Executive Officer's speeches to employees sufficiently promoted honest and ethical conduct for the corporation to receive mitigation. This subjectivity could well ultimately lead to disparate criminal penalties for corporate defendants engaging in similar conduct, which undermines one of the basic purposes of the Guidelines. [18]

This is markedly different from the approach suggested by the Advisory Group. While it recommended "adding to the Organizational Sentencing Guidelines a specific requirement that organizations seek to develop a culture in which compliance with the law is the expected behavior," the Group made clear its intention that this requirement

> not impose upon organizations anything more than the law requires, nor will it conflict with industry-specific regulatory requirements. It is also intended to avoid requiring prosecutors to litigate and judges to determine whether an organization has a good "set of values" or appropriate "ethical standards," *subjects which are very difficult, if not impossible, to evaluate in an objective, consistent manner.* [19]

The Roundtable recommends that, to avoid permitting prosecutors and district courts to engage in the very inquiry about which the Advisory Group warned, the Commission should make clear that substantial fulfillment of the seven enumerated criteria for an effective program to deter and prevent

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[18] *See* 28 U.S.C. § 991(b)(1)(B) (Commission's guidelines should "avoid[ ] unwarranted sentencing disparities among defendants with similar records who have been found guilty of similar criminal conduct").

[19] Advisory Group Report at 53 (emphasis added).

violations of law should entitle a corporate defendant to the mitigating credit provided under the Guidelines without regard to whether the defendant otherwise had an "organizational culture" that promoted compliance with the law.

IV. Absent Extraordinary Circumstances, Corporate Compliance Programs That Substantially Adhere to the Seven Enumerated Criteria Should Receive Some Mitigation Credit

The Advisory Notes of the current Guidelines provide some guidance regarding the seven "types of steps" that comprise an effective compliance program.[20] The proposed revisions replace these more general provisions with detailed requirements regarding the minimum acceptable components of a corporation's compliance program. This is very helpful guidance for which the Commission deserves recognition. But the usefulness of the guidance is undercut by unduly strict and all or nothing language in the proposed Guidelines indicating that an effective compliance program would "*minimally* require[ ]" satisfying the seven criteria listed in § 8B2.1(b).

The Roundtable believes that this proposed change would produce unintended negative consequences. As we have stated in previous comments to the Commission, the Guidelines must recognize that no corporate compliance program is foolproof, and that corporations do not ignore laws just because the likely penalties are small. The proposed change would unduly

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[20] § 8A1.2, Application Note 3(k).

harm corporations – and innocent shareholders and employees – that make a good faith effort to employ an effective compliance program, but are deemed by the court to have fallen just short of meeting one of the criteria. For example, if the court determines that the corporation's compliance training program is not sufficiently "effective" under § 8B2.1(b)(4)(A) – which, according to the Advisory Group Report, could simply mean, for example, that the program adequately educated the employees but was insufficiently "motivating,"[21] – the corporation loses the entire reduction in the culpability score. It is treated as if it had never implemented any compliance program at all.[22] With no flexibility to award a culpability score reduction unless all seven criteria are strictly met, district courts cannot adequately address cases where the corporation has made a good faith effort to implement an effective compliance program, but falls short in one minor respect. Rather than adopting such a rigid requirement, the Guidelines should take into account the effort that corporate management has exerted to foster compliance with the law, recognizing that large organizations cannot guarantee the honesty or competence of all their employees.

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[21] Advisory Group Report at 70.

[22] The proposed revisions would not eliminate the ambiguity in the required aspects of an effective compliance program; the ambiguity would merely shift from what the list of requirements includes to the details of the individual requirements themselves. Moreover, the Advisory Group Report notes that the "burden would ... remain on the organization to explain what training occurred and why it was effective." Advisory Group Report at 72.

The Commission should alter the proposed revisions in one of several ways. First, the Commission could replace the phrase "minimally requires" in § 8B2.1(a) with the phrase "usually requires" or "generally requires." Alternatively, § 8C2.5(f)(1) could be amended to provide a smaller reduction in the culpability score where the corporation substantially complies with the seven steps or meets most of the seven criteria.

V. The Privilege Waiver Revisions Should be Modified to Eliminate Vagueness

Finally, the proposed revisions to the Guidelines include an addition to the Application Notes under § 8C2.5 stating that:

> If the defendant has satisfied the requirements for cooperation set forth in this note, waiver of the attorney-client privilege and of work product protections is not a prerequisite to a reduction in culpability score under subsection (g). However, in some circumstances, waiver of the attorney-client privilege and of work product protections may be required in order to satisfy the requirements of cooperation. [23]

The revisions would also add a similar statement to the Application Notes under § 8C4.1 regarding the relationship between waiver and downward departures: "[T]he government may determine that waiver of the attorney-client privilege and of work product protections is necessary to ensure substantial assistance sufficient to warrant a motion for departure." [24] This

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[23] 68 Fed. Reg. 249 at 75,359.

[24] *Id.*