

language largely codifies the Department of Justice's position regarding waivers of the attorney client privilege.<sup>25</sup>

The Roundtable agrees with the first sentence of the proposed addition above, i.e., that the Sentencing Guidelines should include a clear statement that privilege waivers are not required to obtain credit for cooperation. Such a statement encourages aggressive internal investigations, which are an important component of the revised Guidelines' emphasis on promoting compliance programs that effectively detect violations of law. The statement also reflects the primary purpose of the attorney-client privilege, which is "to encourage full and frank communication between attorneys and their clients and thereby promote broader public interests in the observance of law and the administration of justice." *Swidler & Berlin v. United States*, 524 U.S. 399, 403 (1998).

However, the second sentence of proposed additions undermines the benefit of the first sentence by adding the qualifying sentence that waiver may be required in some circumstances. The Commission should reject such a statement for two reasons. First, it would have a chilling effect on internal investigations because it potentially implicates adverse criminal and civil consequences for the defendant. In most jurisdictions, a privilege waiver for DOJ would also apply to any potential civil litigation. Corporations facing a

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<sup>25</sup> See Larry D. Thompson, "Principles of Federal Prosecution of Business Organizations," Jan. 20, 2003, available at [http://www.usdoj.gov/dag/cftf/business\\_organizations.pdf](http://www.usdoj.gov/dag/cftf/business_organizations.pdf).

DOJ investigation may often also expect a potentially crippling class action civil lawsuit – where the resulting liability could dwarf any penalties assessed in a criminal proceeding – regarding the same conduct, as well as other parallel civil and/or administrative proceedings. Corporations in such situations may be forced into a Hobson’s choice of declining to cooperate with DOJ, even if it would otherwise be in the corporation’s best interests to do so, if cooperation requires the waiver of a privilege that would materially increase the chances of an adverse result in their civil case. Therefore, the proposed revisions would risk creating a disincentive for corporations seeking to avoid burdensome additional litigation to engage in internal investigations or cooperate with DOJ. Additionally, individual employees would be less likely to cooperate with the corporation’s internal investigation if they believed that their testimony would not be privileged.

Second, the proposed addition leaves open far more questions than it answers. Under what circumstances would a waiver be required to earn culpability score mitigation for cooperation? Who determines whether waiver is required? When, if ever, would a partial waiver be sufficient? Is there any benefit awarded for partial waiver in other circumstances? The Application Notes provide no answers to these questions. The vagueness in the revisions gives prosecutors undue leverage in pressing firms to waive the privilege in

order to obtain a recommendation for a reduction for cooperation.<sup>26</sup> The Commission should delete these proposed additions to the Application Notes under §§ 8C2.5 and 8C4.1.

### Conclusion

In summary, the Commission should reject the proposed amendments to the Sentencing Guidelines that (1) include non-criminal conduct in the definition of the phrase “violations of law,” (2) create an undefined additional requirement to “otherwise promote an organizational culture that encourages a commitment to compliance with the law,” (3) strictly require a compliance program to meet all seven criteria before any mitigation credit is awarded, and (4) require waiver of the attorney-client and work product privileges as a prerequisite to a reduction in culpability score.

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<sup>26</sup> As a former Deputy Attorney General recently said, “An aggressive policy of requests for privilege waivers as a component of cooperation can also be a wedge driven between the organization and its counsel. Such splintering of a relationship long recognized as crucial to the ability of organizations to make informed decisions in their own best interests – and, in the case of publicly traded entities, in the interests of their shareholders – deserves more than a passing nod from prosecutors and policy-makers.” See George J. Terwilliger III, *Privilege in Jeopardy*, NATIONAL LAW JOURNAL, Feb. 9, 2004.



Catholic Healthcare West

CHW

February 20, 2004

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U.S. Sentencing Commission  
One Columbus Circle, NE  
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Washington, DC 20002-8002  
Attn: Public Affairs

Subject: United States Sentencing Commission Proposed Changes to the  
Federal Sentencing Guidelines

Dear Commissioners:

The purpose of this letter is to provide comment on the proposed changes to the Federal Sentencing Guidelines (Guidelines) related to compliance programs. I appreciate the increased emphasis on compliance programs contained in the proposed changes. It is my view that the proposed changes will improve and enhance compliance programs within organizations. However, I do have concerns with respect to two of the proposed changes. Those concerns are set forth below.

First, the proposed amendments suggest that the compliance officer of the organization is ultimately accountable for the effectiveness of the program. The proposed changes have added language to § 8B2.1(b)(2) which states that the high level person responsible for the program (the compliance officer) has the responsibility to "ensure the implementation and effectiveness of the program."

My concern is that this amendment overstates the role and authority of the compliance officer in most organizations and at the same time absolves management in the organization of its responsibility. As a practical matter, the role of the compliance officer is to develop a compliance program and a structure for implementing the program. The compliance officer should then provide necessary leadership and coordination of the program, monitor program performance, and report to management and the board regarding program implementation.

However, it is ultimately management of the organization which must embrace and assume accountability to ensure the program is effectively implemented. Few compliance officers are involved in the day-to-day management of employees, departments, divisions, business units or ultimately the organization itself. For a compliance program to be effective, each member of management, particularly those at high levels within the organization, must embrace the compliance program and ensure those whom they direct in the organization actively participate in and execute the program. The proposed amendments could be viewed as relieving management of its responsibility to ensure the organization is compliant. I believe that the guidelines should strengthen rather than weaken managements'

[2-67]

accountability for the organization's compliance efforts. Specifically, I would recommend that the proposed amendment be modified to read as follows:

“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.”

From a historical perspective, it is important to remember that since the Ninth Circuit decision in United States v. Hilton Hotels Corp. 467F.2d1000 (9th Circuit 1972), cert. denied 409 U.S. 1125(1973), corporations have been found liable for the criminal conduct of their agents. Such liability has been based on the courts findings that a corporation has a duty to supervise its employees. In the Hilton case, the courts sustained the jury's instruction that stated that “[a] corporation is responsible for the acts and statements of its agents, done or made within the scope of their employment, even though their conduct may be contrary to their actual instructions or contrary to the corporation's mission statement policy.” Id. at 1004. In short, given Hilton and the many cases that have followed that precedent, I'm troubled by the suggestion that “effectiveness” of the compliance program, which is heavily dependent on the acts of many in the organization, rests on the shoulder of the compliance officer. Consequently, I believe the guidelines should emphasize the role of management in the organization, particularly senior management, in ensuring the program is effectively implemented.

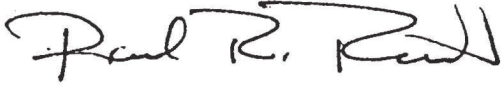
My second concern relates to the treatment of an organization which identifies problems even though the organization had a compliance program in place. While the proposed changes appear to be an improvement over the existing guidelines, it is my view that the proposed changes should do more to promote effective compliance programs.

As drafted, the proposed amendments create a rebuttable presumption that the compliance program was ineffective. However, I would propose a rebuttable presumption that the program is effective if it is the organization that discovers and brings the offense to the attention of the government. The rebuttable presumption of ineffectiveness creates a disincentive for organizations to thoroughly investigate and disclose wrongful conduct. Conversely, a rebuttable presumption that the program is effective (where the organization has uncovered and disclosed the wrongdoing) creates incentives to both investigate and disclose, an approach that is more consistent with the overall emphasis on compliance in Chapter 8 of the Guidelines.

[ 2 - 68 ]

I would encourage the Commission to consider the changes suggested above. Again, I would like to take the opportunity to express my appreciation for the work of the Commission and for the significant improvement the proposed amendments in Chapter 8 reflect.

Sincerely,

A handwritten signature in black ink that reads "Daniel R. Roach". The signature is written in a cursive style with a large, sweeping initial "D".

Daniel R. Roach  
VP Compliance and Audit  
Catholic Healthcare West

[2-69]

February 23, 2004

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

Dear Mr. Courlander:

I am writing to comment on the report and recommendations of the Ad Hoc Advisory Group on Organizational Guidelines for amendment of Chapter Eight of the sentencing guidelines for organizations.

As of January 28, 2004, I am the West Central Region Vice President and General Manager for Coca-Cola Enterprises, and, for several years prior, I was its Senior Vice President and General Counsel. As General Counsel, I was aware of the federal sentencing guidelines and the positive impact they have had on the development of the role of ethics and compliance officers in corporations. I applaud the Advisory Group's recommendations to amend the guidelines to further promote efforts by corporations to "exercise due diligence to prevent and detect violations of law" and to "otherwise promote an organizational culture that encourages a commitment to comply with the law."

I would, however, like to make one suggestion for improving upon the recommendations made by the Ad Hoc Advisory Group. Proposed § 8B2.1(b)(5)(c) provides that an "organization shall take reasonable steps - ... (C) to have a system whereby the organization's employees and agents may report or seek guidance regarding potential or actual violations of law without fear of retaliation, including mechanisms to allow for anonymous reporting." This proposed amendment is a worthwhile improvement, but it does not go far enough in addressing what, in my view, is the single most important inhibitor to employee reporting -- lack of confidentiality in seeking guidance about how and where to report.

The text of the report's discussion relating to this proposed amendment makes it clear that confidentiality is an extremely important consideration for employees and others who may want to report misconduct and violations of law to the corporation. The report also describes the "litigation dilemma" that prevents confidentiality from being guaranteed in connection with "reporting" misconduct. A good solution to this impasse

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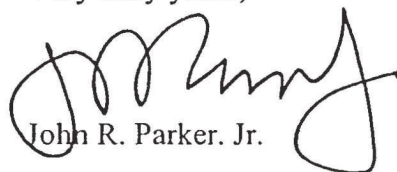
would be to require that, as part of an organization's "system," it have a means whereby employees and agents may "confidentially seek guidance regarding potential or actual violations of law without fear of retaliation ... ."

Such a modification of the proposed amendment would help those who need more guidance and reassurance on how and where to report violations to receive it, and allow them to become familiar with what the process may be and what action they may expect from the corporation. The proposed amendment, as it currently reads, does provide for anonymous reporting, and this is clearly an important component of any system. Anonymous reporting, however, is not a substitute for receiving confidential guidance, and often is too passive or not responsive to an employee's legitimate concern over what may happen if something is reported. I believe that helplines and hotlines are good and should be encouraged, but they are not enough. Having a confidential mechanism to seek guidance would strongly promote the culture of compliance that the proposed amendments are trying to encourage.

My experience at Coca-Cola Enterprises has lead me to believe that a confidential means of providing guidance can be very effective in resolving workplace disputes and in encouraging a culture of compliance with the law. We accomplish this mission with our Office of the Ombuds. It operates just as I have outlined. It is a confidential place where employees can go to ask questions, seek guidance, learn about reporting channels, or just get a better understanding of the process. Ombuds help employees find the most appropriate way to report, consistent with their comfort level; they are not themselves a reporting channel, since they are not part of management, do not do investigations, and do not accept notice of claims on behalf of the company. Under these circumstances, there is no inherent inconsistency between their informational and informal assistance function they serve and the more formal role served by our compliance officers. The ombuds, therefore, act as a supplement and complement to our compliance officers, not in lieu of them.

I understand that the Advisory Group did not want to dictate specific means by which organizations can accomplish the requirements imposed by the proposed amendments. This is as it should be. While I believe that an ombuds program is an ideal way in which to provide this confidential guidance, each organization should be allowed to find a way that is appropriate for it. The important thing is to provide a confidential means to seek guidance.

Very truly yours,



John R. Parker, Jr.

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**John W. Dienhart**  
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February 12, 2004

The Honorable Judge Diana M. Murphy, Chair  
U.S. Sentencing Commission  
One Columbus Circle NE, Suite 2-500  
Washington DC 20002-8002

Dear Judge Murphy,

I have reviewed the suggestions that my colleagues Michael Hoffman, Robert J. Olson and Stuart Gilman drafted regarding the Proposed Amendments to the U.S. Sentencing Commission and strongly agree with their comments.

We know that the process of drafting the Proposed amendments and making them available for public comment has involved considerable time and resources. The result, however, has been amendments to the Guidelines that will make them more relevant to the new millennium.

Yet we're concerned that they are not as germane and significant as they could be. Indeed, if the goal was to go "beyond compliance," they disappoint by not going as far as numerous other governmental bodies, such as the SEC and Congress, have done already. As they stand now, the Proposed Amendments:

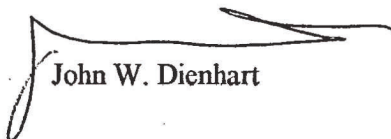
- fail to support the integration of "ethics" into compliance programs,
- sidestep an opportunity to re-define "effectiveness" in a substantive way, and
- neglect to reconsider the purview of an ethics and compliance program in the current environment of corporate malfeasance.

In our opinion, the Proposed Amendments need to reflect the proposition that ethics is the heart of law.

We respectfully offer our suggested changes to the Proposed Amendments with an accompanying justification (please see enclosures). It is our hope that you will consider them in the spirit in which they are offered—a mutual concern for enhancing the public good. We will also be contacting members of Congress in the same spirit. If there's anything we can do to assist the Commission in further understanding these suggested changes—or obtaining documents in support of them—please do not hesitate to contact us.

This process for amending the Federal Sentencing Guidelines for Organizations presents an exciting opportunity, one that will probably not come again for another ten years. We urge the Sentencing Commission to retain its *leadership role* in preventing corporate malfeasance by including the changes we've suggested in the final amendments.

Sincerely,

  
John W. Dienhart

[ 2-72 ]

**PART B – REMEDYING HARM FROM CRIMINAL CONDUCT, AND  
PREVENTING AND DETECTING VIOLATIONS OF THE LAW**

**1. REMEDYING HARM FROM CRIMINAL CONDUCT**

\* \* \*

**2. PREVENTING AND DETECTING VIOLATIONS OF LAW**

**§8B2.1 Effective Programs to Prevent and Detect Violations of Law**

(a) To have an effective program to prevent and detect violations of law, for purposed of subsection (f) of §8C2.5 (Culpability Score) and subsection (c)(1) of §8D1.4 (Recommended Conditions of Probation – Organizations), an organization shall—

(1) Exercise due diligence to prevent and detect violations of law; and

(2) otherwise promote and organizational culture that encourages a commitment to the ethical principles that inform, law

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Such program shall be reasonably designed, implemented, and enforced so that the program is generally effective in preventing and detecting violations of law, as well as promoting an organizaitonal culture committed to ethical principles, that is, one that demonstrates commitment to ethical principles and compliance with law. The failure to prevent or detect instant offense leading to sentencing does not necessarily mean that the program is not generally effective in preventing and detecting violations of law, as well as in promoting an organizational culture committed to ethical principles.

(b) Due diligence and the promotion of an organizational culture that encourages a commitment to compliance with law and the ethical principles that inform law within the meaning of subsection (a) minimally require the following steps:

(1) The organization shall establish ethics and compliance standards and procedures to prevent and detect violations of law, as well as to promote an organizational culture committed to ethical principles.

(2) The organizational leadership shall be knowledgeable about the content, operation, and effectiveness of the program to prevent and detect violations of law, as well as to promote an organizational culture committed to ethical principles.

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The organization's governing authority shall be knowledgeable about the content, operation, and effectiveness of the program to prevent and detect violations of law, as well as to promote an organizational culture committed to ethical principles, and shall exercise reasonable oversight with respect to the implementation and effectiveness of the program to prevent and detect violations of the law, as well as to promote an organizational culture committed to ethical principles.

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Specific individual(s) within executive-level personnel of the organization shall be assigned direct, full-time, overall responsibility to ensure implementation and effectiveness of the program to prevent and detect violations of law, as well as to promote an organizational culture committed to ethical principles. Such individual(s) shall be given adequate resources and authority to carry out such responsibility, including full participation in all major executive decisions, and shall report on the implementation and effectiveness of the program to prevent and detect violations of law, as well as in promoting an organizational culture committed to ethical principles, directly to the governing authority or an appropriate subgroup of the governing authority.

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(3) The organization shall use reasonable efforts not to include within the substantial authority personnel of the organization any individual whom the organization knew, or should have known through exercise of due diligence, has a history of engaging in violations of law or other conduct inconsistent with an effective program to prevent and detect violations of law, as well as to promote an organizational culture committed to ethical principles.

(4)(A) The organization shall take reasonable steps to institutionalize its ethics and compliance program by

(i) using model practices in organizational and systems change and

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(ii) communicating, in a practical manner its ethics and compliance standards and procedures, and other aspects of the program to prevent and detect violations of law, as well as to promote an organizational culture committed to ethical principles, to the individuals referred to in subdivision (B) by conducting effective training programs that include but are not limited to subjects such as ethical and legal decision making, and otherwise disseminating information, appropriate to such individual's respective roles and responsibilities, with special emphasis on the organization's executive team.

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(B) The individuals referred to in subdivision (A) are the members of the governing authority, the organizational leadership, the organization's employees, and, as appropriate, the organization's agent.

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(5) The organization shall take reasonable steps—

(A) to ensure that the organization's program to prevent and detect violations of law, as well as to promote an organizational culture committed to ethical principles, is followed, including use of monitoring and auditing systems that

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(i) are designed to prevent and detect violations of law and ethical principles that inform law, and

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(ii) function at all levels and in all functions of the organization, including, but not limited to, the executive and governing authority level;

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(B) to evaluate at least annually, the effectiveness of the organization's program to prevent and detect violations of law, as well as to promote an organizational culture committed to ethical principles; and

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(C) to have a system whereby the organization's employees and agents may report or seek guidance regarding potential or actual violations of law without fear of retaliation, including mechanisms to allow for anonymous reporting.

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(6) The organization's program to prevent and detect violations of law, as well as to promote an organizational culture committed to ethical principles, shall be promoted and enforced consistently through appropriate incentives, such as including compliance with law and commitment to ethical principles as a major component in performance reviews, to perform in accordance with such program and disciplinary measures for engaging in violations of law and for failing to take reasonable steps to prevent or detect violations of law, as well as to promote an organizational culture committed to ethical principles.

(7) After a violation of law or ethical principles that inform law has been detected, the organization shall take reasonable steps to respond appropriately to the violation of law or ethical principles that inform law and to prevent further similar violations of law or ethical principles that inform law, including making any necessary modifications to the organization's program to prevent and detect violations of law, as well as to promote an organizational culture committed to ethical principles, and to the organization's business practices, as necessary.

(c) In implementing subsection (b), the organization shall conduct at least annually ongoing risk assessment and take appropriate steps to design, implement, or modify each step set for the in subsection (b) to reduce violations of law or ethical principles that inform law identified by the risk assessment.

[ 2 - 75 ]

Commentary

Application Notes:

1. Definitions. For purposes of this guideline:

"Ethics and compliance standards and procedures" means standards of conduct, such as a code of ethics or statement of values, and internal control systems that are reasonably capable of reducing the likelihood of violations of law and ethical principles that inform law.

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"Governing authority" means (A) the Board of Directors, or (B) if the organization does not have a Board of Directors, the highest level governing body of the organization.

"Organizational leadership" means (A) executive-level personnel of the organization; (B) executive-level personnel of a unit of the organization; and (C) substantial authority personnel. The terms "executive-level personnel of the organization" and "substantial authority personnel" have the meaning given those terms in the Commentary to §8A1.2 (Application Instructions – Organizations). The term "executive-level personnel of a unit of the organization" has the meaning given that term in the Commentary to §8C2.5 (Culpability Score).

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"Effective" means not only the count resulting from specific program activities, but also (A) the impact (measured changes in knowledge, attitudes/values/beliefs, and/or short-term practice) of those activities and (B) the outcome of those activities (actual reductions in violations of law or ethical principles that inform law—or well-documented proxies for those violations).

Except as provided in Application Note 4(A), "violations of law" means violations of any law, criminal or noncriminal (including a regulation), for which the organization is, or would be, liable.

2. Factors to Consider in Meeting Requirements of Subsections (a) and (b).—

(A) In General.—Each of the requirements set forth in subsections (a) and (b) shall be met by an organization; however, in determining what specific actions are necessary to meet those requirements, the organization shall consider factors that include (i) the size of the organization, (ii) applicable government regulations, and (iii) any ethics and compliance practices and procedures that are well-documented as standard or model practices for businesses similar to the organization.

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(B) The Size of the Organization.—

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violations of law, as well as to promote an organizational culture committed to ethical principles, is assigned to specific individuals within executive-level personnel of the organization, it is incumbent upon all individuals within the organizational leadership to be knowledgeable about the content, operation, and effectiveness of the program to detect and prevent violations of law, as well as to promote an organizational culture committed to ethical principles, pursuant to subsection (b)(2), and to perform their assigned duties consistent with the exercise of due diligence, and the promotion of an organizational culture that encourages a commitment to ethical principles that inform the law, under subsection (a).

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4. Application of Subsection (b)(3).—

(A) Violations of Law.—Notwithstanding Application Note 1, “violations of law,” for purposes of subsection (b)(3), means any official determination of a violation or violations of any law, whether criminal or noncriminal (including a regulation).

(B) Consistency with Other Law.—Nothing in subsection (b)(3) is intended to require conduct inconsistent with any Federal, State, or local law, including any law governing employment or hiring practices.

(C) Implementation.—In implementing subsection (b)(3), the organization shall hire and promote individuals consistent with Application Note 3(C) so as to ensure that all individuals with the organizational leadership will perform their assigned duties with the exercise of due diligence, and the promotion of an organizational culture that encourages a commitment to ethical principles that inform law, under subsection (a). With respect to the hiring or promotion of any specific individual within the substantial authority personnel of the organization, an organization shall consider factors such as: (i) the individual’s combined academic and certificated training in ethics and/or law, as well as training in organizational change strategies and behavioral training methodologies (ii) the recency of the individual’s violations of law and other misconduct (i.e., the individual’s other conduct inconsistent with an effective program to prevent and detect violations of law, as well as to promote an organizational culture committed to ethical principles); (iii) the relatedness of the individual’s violations of law and other misconduct to the specific responsibilities the individual is anticipated to be assigned as part of the substantial authority personnel of the organization; and (iii) whether the individual has engaged in a pattern of such violations of law and other misconduct.

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5. Risk Assessments under Subsection(c).—Risk assessments required under subsection (c) shall include the following:

(A) Assessing periodically the risk that violations of law or commitment to ethical principles that inform law will occur, including an assessment of the following:

- (i) *The nature and seriousness of such violations of law.*
- (ii) *The likelihood that certain violations of law or commitment to ethical principles that inform law may occur because of the nature of the organization's business. If, because of the nature of an organization's business, there is a substantial risk that certain types of violations of law or ethical principles that inform law may occur, the organization shall take reasonable steps to prevent and detect those types of violations of law or ethical principles that inform law. For example, an organization that, due to the nature of its business, handles toxic substances shall establish ethics and compliance standards and procedures designed to ensure that those substances are always handled properly. An organization that, due to the nature of its business, employs sales personnel who have flexibility to set prices shall establish ethics and compliance standards and procedures designed to prevent and detect price-fixing. An organization that, due to the nature of its business, employs sales personnel who have the flexibility to represent the material characteristics of a product shall establish ethics and compliance standards and procedures designed to prevent fraud. Furthermore, an organization shall establish ethics and compliance standards and procedures designed to prevent corporate malfeasance that may result from the decisions of executive management and governing authority.*
- (iii) *The prior history of an organization. The prior history of an organization may indicate types of violations of law or ethical principles that inform law that it shall take actions to prevent and detect. Recurrence of similar violations of law or ethical principles that inform law creates doubt regarding whether the organization took reasonable steps to prevent and detect violations of law or ethical principles that inform the law.*
- (B) *Prioritizing, periodically as appropriate, the actions taken under each step set forth in subsection (b), in order to focus on preventing and detecting the violations of law or ethical principles that inform law identified under subdivision (A) as most likely to occur and most serious.*
- (C) *Modifying, as appropriate, the actions taken under any step set forth in subsection (b) to reduce the risk of violations of law or ethical principles that inform law identified in the risk assessment.*
- (D) *Assessing at least annually one or more of these characteristics of organizational culture: executive decision making process, impact and/or outcome of this process through use of an "ethics impact report," level of organizational trust, public image, relative disparity in employee compensation, bottom-line mentality and others that are well-documented in the literature.*

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*Background: This section sets forth the requirements for an effective program to prevent and detect violations of law. This section responds to section 805(a)(2)(5) of the Sarbanes-Oxley Act of 2002, Public Law 107-204, which directed the Commission to review and amend, as appropriate, the guidelines and related policy statements to ensure that the guidelines that apply to organizations in this Chapter "are sufficient to deter and punish organizational criminal misconduct."*

*The requirements set forth in this guideline are intended to achieve reasonable prevention and detection of violations of law, both criminal and noncriminal, for which the organization would be vicariously liable, as well as to promote an organizational culture committed to ethical principles. The prior diligence of an organization in seeking to detect and prevent violations of law, as well as to promote an organizational culture committed to ethical principles, has a direct bearing on the appropriate penalties and probation for the organization if it is convicted and sentenced for a criminal offense.*

\* \* \*

[2-79]



January 25, 2004

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

RE: Proposed Chapter 8 Amendments to the United States Sentencing  
Commission

Dear Commissioners:

I write in response to the Commission's request for comments regarding the proposed amendments to Chapter 8 of the Federal Sentencing Guidelines and very much appreciate the opportunity to do so. I am a licensed clinical and consulting psychologist whose practice focuses on assisting organizations to introduce and implement significant changes at the workplace. I am also the cofounder of the Ethics Officer Association, which currently has more than 800 members, and have worked for 19 years as a consultant to organizations engaged in introducing, implementing, and evaluating broad-based ethics and compliance initiatives.

The Commission has proposed a new guideline at §8B2.1 Effective Program to Prevent and Detect Violations of Law, and, as part of that, has established two obligations of an effective compliance program—i.e., the exercise of due diligence and the promotion of an organizational culture that encourages a commitment to compliance. My experience is that culture always trumps specific rules or guidelines that aim to influence behavior in organizations. Therefore, this enormously significant addition will directly contribute to the efforts of ethics and compliance officers throughout the United States. I would, however, urge that the Commission add the phrase "and shared accountability," so that the final wording reads, ". . . promotion of organizational culture that encourages a commitment to and shared accountability for compliance throughout the organization." Taken even further, this phrase might read, ". . . that promotes an organizational culture that encourages a commitment to compliance and that expects all employees to hold themselves and one another personally accountable for ethical and legal conduct." The benefit of incorporating accountability into the wording is that it will provide specific direction to the construct of organizational culture. It will, in effect, tell ethics and compliance officers and, more significantly, their superiors and other organizational stakeholders that a commitment to compliance is one in which all employees hold themselves and each other accountable for specific types of behavior. Organizational culture is much more than what senior management "says." In its truest form, it is a reflection of what employees actually "do."

United States Sentencing Commission  
January 25, 2004

[2-80]