The Fellows Program does have some concern about the proposed §8B2.1, Application note 1 definition of the concept "violations of law". The proposal would expand the scope of violations of law to include, "criminal or noncriminal (including a regulation) for which the organization is or would be liable, or in the case of Application note 4(A), for which the individual would be liable."

Part of the rationale for expanding the definition is cited in the Ah Hoc Advisory Group's Report (pp.54):

> The consideration of an organization's prior efforts and success in preventing violations of law beyond just criminal offeses is consistent with existing provisions of the organizational sentencing guidelines that treat prior civil and administrative offenses (§8C2.5(c)) and prior misconduct leading to restrictive court orders (§8C2.5(d)) as relevant sentencing considerations justifying elevated organizational fines.

Closer inspection of these current Guideline provisions may not justify the expansion of violations of laws to include "violation of any law, whether criminal or noncriminal (including a regulation) for which the organization is or would be liable. §8C2.5(c)) currently states:

> If the organization (or separately managed line of business) committed any part of the instant offense less than ten years after (A) a criminal adjudication based on similar misconduct; or (B) civil or administrative adjudication(s) *based on two or separate instances of similar misconduct* (emphasis added by author) ...

§8C2.5(d)(1) Violation of an Order seems to provide even less of a rationale for expanding the definition of laws to include criminal and noncriminal. This section states:

> (A) If the commission of the instant offense violated a judicial order or injunction, other than a violation of a condition of probation; or (B) if the organization (or separately managed line of business) violated a condition of probation by engaging in *similar misconduct* (emphasis added by author) to that for which it was placed on probation.

While these sections do mention prior civil or administrative offenses, and violations of orders, they require separate instances of SIMILAR MISCONDUCT. This is potentially very different than the proposed expansion of violation of law to include any criminal or noncriminal violations.

Since the Sentencing Guidelines recognize that you can still have a violation when you have an effective program, it would be unfair for organizations to not receive credit for their program due to any civil compliance weakness. An organization could conceivably have an effective program to prevent and detect violations of the Foreign Corrupt Practices Act and still have an FCPA violation. Under the existing Guidelines, you would still be able to prove due diligence and gain the benefit of having a program. But

under the proposed amendments, you could lose that benefit if you did not also have a program for something as unrelated as appropriately training your groundskeepers to assure compliance with local regulations regarding interfering with wildfowl nesting areas. While this may be important, failure to conduct this type of training should not be an indictment of your compliance program, sufficient to affect the organization's sentencing for an FCPA violation.

Recommendation: Keep the status quo and do not expand the definition of "violation of law" to include noncriminal (including a regulation) offenses.

Risk Assessment:

The Fellows Program acknowledges that assessing risks for criminal violations is at least an implied part of the current guidelines, but has a concern about how "risk assessment" has become a formal requirement of an effective program to prevent and detect a violation of laws. This is especially true, if the concept of violation of laws would be expanded to include both criminal and noncriminal laws. §8B.2(c) states, "In implementing subsection (b), the organization shall conduct ongoing risk assessment and take appropriate steps to design, implement, or modify each step set forth in subsection (b) to reduce the risk of violations of law identified by the assessment."

The Fellows foresee two potential problems with the proposal: (1) scope, and (2) formality. Regarding scope, it would be extremely difficult to evaluate all laws, both criminal and noncriminal. The formality of the term "risk assessment" conjures up a very detailed and extensive analysis of every possible criminal and noncriminal risk. The Fellows would prefer the concept of "assessing the relevant risks" be used in place of the term risk assessment.

Recommendation: Eliminate §8B.2(c), and amend §8B2.1(b)(1) to state, "The organization shall assess the relevant risks, then establish compliance standards and procedures to prevent and detect violations of law."

Confidentiality:

§8B2.1(b)(5) states that the 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 that allow for *anonymous reporting*." The Fellows Program commends the Sentencing Commission for recognizing the importance of anonymous reporting, but would encourage the Commission to follow the Sarbanes-Oxley Act of 2002 in its call for reporting which is either confidential or anonymous. §301 (m)(4) of the Sarbanes-Oxley Act of 2002, defines an audit committee's duty to include, "Complaints – Each audit committee shall establish procedures for ...(B) the confidential, anonymous submission by employees of the issuer of concerns regarding questionable accounting or auditing matters."

In this section of the Sarbanes-Oxley Act of 2002, Congress saw the wisdom in requiring either "confidential" or "anonymous" submissions. These terms may appear identical, but in reality could have a very different meaning. "Anonymous" reporting typically means that a company can not disclose the identity of reporting sources, because they do not know their identity. "Confidential" usually means that a company does know the identity of reporting sources, and tries to protect their identity. This could be done by removing all information from a report that would identify the reporting source. All of the remaining information would be available for review by other parties, both within and outside the organization.

It may be preferable to have "confidential" reporting because the person receiving the information (e.g. ombuds, ethics officer, human resources, legal, or compliance officer) can use the face to face conversations to establish a trusting relationship, address misconceptions and gather additional information. It is also much easier to have follow-up conversations with the reporting source when their identity is known. This type of program has effectively been implemented at major corporations like United Technologies and they have successfully protected the reporting source's identity, even when sought through litigation.

Recommendation: To be consistent with the Sarbanes-Oxley Act of 2002, the Fellows would request that the Sentencing Commission change proposed §8B2.1(5)(C) to read "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 that allow for *confidential,* anonymous reporting.

Managerial Oversight:

The Proposed Guidelines §8B2.1(b) (2) states, "The organizational leadership shall be knowledgeable about the content and operation of the program..." Given the importance of ethical leadership, the statement that "the organizational leadership shall be knowledgeable about the content and operation of the program" could be much stronger. Simply sending a report to the executive team once a year could be seen as satisfying that requirement.

Recommendation: §8B2.1(b)(2) language should be changed to: "The organizational leadership shall provide direction to and be knowledgeable of the content and operation of the program."

Consistent Discipline:

Proposed §8B2.1 (b)(6) focuses on incentives and disciplinary measures. First, it is difficult to provide "incentives" for legal compliance. It does not make sense to most people to "reward" day to day legal or ethical conduct. Rather, this section should focus more on the messages sent by standards and procedures about what is rewarded and punished in the organization.

Recommendation: §8B2.1(b)(6) language should be changed to: "Compliance with the law ...shall be encouraged and supported consistently through standards and procedures that holds employees accountable for appropriate conduct and incorporates such accountability into regular promotion and compensation decisions. In addition, legal compliance should be enforced through appropriate disciplinary measures for engaging in violations of the law and for failing to take reasonable steps to prevent or detect violations of the law."

Internal Controls:

§8B2.1 Application note 1 defines compliance standards and procedures as "standards of conduct and internal control systems that are reasonably capable of reducing the likelihood of violations of law." The Fellows Program believes that effective internal controls can be an important part of a program to prevent and detect violations of law for large and small organizations. Instead of referring to "internal controls systems", the Commission should consider the more generic term of "internal controls" as a process. Many small organizations may not have adopted a formal internal control system (such as COSO), but still need effective internal controls (e.g. segregation of duties or requiring two signatures to authorize a check).

Recommendation: §8B2.1, Application Note 1, should change the words "internal controls systems" to "internal controls".

One final request would be that the United States Sentencing Commission work with the Department of Justice to make information available to the business community about what, if any, credit is given to organizations with an effective program to prevent and detect violations of law in charging decisions and criminal settlements. Most large corporations that have violations settle before trial. This information could be extremely helpful to ethics and compliance officers in demonstrating the positive impact their programs had with their discussions with the Department of Justice.

The ERC Fellows Program understands that the US Sentencing Commission is considering a public hearing on the proposed changes on March 17, 2004. The Fellows Program would be very happy to have a representative testify at that hearing.

Regards,
Mr. Stephen D. Potts, Esq.
Chairman
ERC Fellows Program

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WHITTIER LAW SCHOOL
Faculty Offices

February 26, 2004

Michael Courlander
Public Affairs Officer
United States Sentencing Commission
One Columbus Circle, NE., Suite 2-500
Washington, DC 20002-8002

Dear Mr. Courlander,

I am writing to submit several brief comments on the Sentencing Commission's proposals for revisions to Chapter 8 of the federal sentencing guidelines which were published in the Federal Register edition of December 30, 2003. As a member of the Ad Hoc Advisory Group on the Organizational Sentencing Guidelines, it was my pleasure to have participated in the detailed review of Chapter 8 of the sentencing guidelines conducted by the Advisory Group over the past year and to have contributed to the recommendations of the Advisory Group which were delivered to the Sentencing Commission in the Advisory Group's report of October 7, 2003. To the extent that many of the Advisory Group's recommendations are reflected in the Sentencing Commission's proposed guideline changes, the Advisory Group's report amply describes the justifications for these changes. I fully support the Advisory Group's recommendations and statements of rationales for its proposed changes in the sentencing guidelines and write here only to comment on those aspects of the Sentencing Commission's proposals that concern issues not considered and addressed by the Advisory Group and its report.

These additional issues were raised in the Sentencing Commission's description of issues for comment in the portion of the above federal register notice dealing with organizational sentencing. Each of the issues for comment raised in this portion of the notice is addressed below.

Compliance Program Characterization in Cases of Unreasonable Reporting Delay

The first issue for comment concerns whether the guidelines' current bar to a three-point culpability score reduction for an effective compliance program should be retained for a convicted organization which unreasonably delays in reporting a detected offense. In essence, this current standard indicates that a

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compliance program in an organization which unreasonably delays reporting should never be deemed an effective program for purposes of determining organizational culpability and the appropriate level of a corresponding sentence reduction.

I believe that, so long as the nature of an unreasonable delay is assessed carefully, the present standard characterizing a compliance program as deficient in these circumstances should be retained. It is important to realize in assessing the impact of this standard that a mere delay in reporting will not always preclude a finding of an effective program. Indeed, there are a wide variety of circumstances in which a substantial delay in reporting may be deemed reasonable and, consequently, not an adequate basis to preclude a finding that a program was generally effective.

For example, if there were substantial reasons that a company did not detect an offense for a long period -- such as unusually effective efforts by an individual offender to conceal his or her misconduct -- then a long delay in reporting would not be an unreasonable delay. Likewise, a delay necessary to complete a reasonable investigation of evidence of an offense should not make a resulting reporting delay unreasonable. About the only circumstance in which an organization's delay should be deemed unreasonable is where organizational officials have clear evidence which would convince a reasonable party that an offense has been committed and the officials fail over a substantial period to act on that information by reporting it to public authorities.

While this type of reporting delay may not be illegal of itself, it does indicate a lesser degree of public service and organizational responsibility than would prompt self-reporting of the misconduct. In the context of characterizing a compliance program, such a reporting failure by top organizational officials calls into question the degree of support of those officials for law compliance and for the just punishment those who engage in apparent misconduct in the course of organizational activities. Absent this support for law compliance and just punishment, it is unlikely that corporate officials have diligently pursued the sort of compliance program that will be generally effective in detecting and preventing organizational violations of law.

Even if a sentence reduction for its compliance program is not available to an organization following an unreasonable delay in reporting an offense, there are still ample incentives in the guidelines for offense reporting even after an initial period of delay. Organizational self-reporting, coupled with an exceptional degree of subsequent cooperation with public authorities, can justify an extensive sentence reduction under subsection (g) of § 8C2.5 of the sentencing guidelines.

In sum, where an unreasonable delay in reporting known misconduct is present, this delay suggests that corporate leaders do not possess the sort of strong law compliance values and support for law enforcement that are also needed to conduct an effective compliance program involving ongoing efforts to prevent illegal activities. Hence, no sentence reduction should be granted under the provisions of subsection (f) of § 8C2.5 which are primarily concerned with the adequacy of organizational actions taken prior to an offense to prevent illegal misconduct. However, even where such preventive actions are missing or of questionable quality, an organization can qualify for special sentence reductions even after an unreasonable delay in reporting where the organization finally takes the initiative, makes an offense report to public authorities, and cooperates in some particularly extensive or helpful way with subsequent investigations and prosecutions by public officials. This type of assistance -- so long as it entails significant aid to law enforcement efforts -- stands on its own as a basis for recognizing responsible organizational action and making corresponding reductions in recommended sentences.

Compliance Program Characterization Following Involvement of a High-Level Organizational Official in an Offense

The issues for comment section raises the question of whether the proposed presumption of inadequacy of a compliance program is appropriate where a high-level manager of an organization has participated in, condoned, or was willfully ignorant of a violation of law. This section also questions whether this type of presumption should apply in assessing compliance programs in small organizations where, because of the size of the organizations, high-level managers may frequently be in contact with and, hence, be involved in or condone illegal conduct undertaken by other organizational employees.

The proposed change to a presumption of inadequacy of a compliance program in these situations strikes the right balance between an outright bar to a favorable compliance program characterization in this type of situation and a standard that would overlook the implications of high level misconduct in characterizing a compliance program. The key issue with respect to the meaning of high level misconduct in determining the likely effectiveness of a compliance program is whether the presence of that misconduct indicates a lack of core values supporting law compliance in the organization at hand or a likelihood that persons holding those values would be intimidated in following through on them by seeking law compliance in the organization. In general, the presence of misconduct at high organization levels indicates a lack of such values or a high likelihood of the sort of intimidation that will undercut effective compliance efforts. Hence, it is appropriate to presume that a compliance program is ineffective when such misconduct is present.

However, there are circumstances where the misconduct of a particular high level party is isolated in some way from other corporate value setting functions and compliance program activities. If this is the situation, the presence of high-level misconduct in an organization would not indicate the likelihood of widespread disregard for law compliance or intimidation in carrying out law compliance tasks. Where an organization can make a convincing case that these sorts of circumstances isolating high-level misconduct from the general operation of the organization's compliance program are present, the organization should be able to avoid the normal implications of high-level misconduct and overcome the presumption of compliance program ineffectiveness that will otherwise preclude a recommended sentence reduction.

Enhancing the Sentencing Benefits of an Effective Compliance Program

The issues for comment section raises the question of whether the culpability score benefit for organizations with effective compliance programs should be increased from 3 to 4 culpability score points. I believe that this is a valuable change. The altered compliance program standards in the Commission's proposed guideline changes demand more of organizations in order for their programs to be considered to be effective compliance programs and it is appropriate to give greater benefits and rewards to organizations that undertake these greater efforts. Indeed, the Commission may wish to increase the benefit associated with an effective compliance program to a 5 point reduction in an organization's culpability score.

Along with these increases in the benefits that organizations receive for effective compliance programs meeting all of the tests stated in the revised sentencing guidelines, the Commission may wish to authorize a lesser degree of sentence reduction for organizations that have adopted compliance programs with most, but not all of the required features of an effective compliance program. Such a change would transform the present "all or nothing" system of compliance program rewards and incentives into a more graded approach with partial credit for meaningful, but less than complete compliance program efforts.

For example, the guidelines might authorize a 1 or 2 point reduction in an organization's culpability scope if the organization had, at the time an offense was committed, adopted a compliance program with most of the seven types of features addressed in the guidelines' standards for an effective compliance program, but which lacked a few of these features. Such a partial reward for a compliance program could be limited to circumstances where a convicted organization had adopted a

compliance program which was likely to have a substantial impact on law compliance, but which lacked a few of the required features necessary to qualify the program as a generally effective compliance program under the guidelines.

Incentives for Compliance Programs in Small and Mid-Size Organizations

The last issue raised for comment concerns the proper means to encourage the adoption of compliance programs by small and mid-size organizations. The commentary proposed to be included in Application Note 2(B)(ii) following new § 8B2.1 addresses the key considerations in encouraging small and mid-sized organizations to adopt meaningful compliance programs. This commentary correctly indicates that, for small organizations, an adequate compliance program must address the types of functional activities specified in the guidelines' tests for a generally effective compliance program, but may do so in the course of business activities conducted for other purposes and without the need for any special compliance organization or significant set of separate practices related to law compliance. If the leaders of a small organization regularly address law compliance in their directions to employees, regularly monitor whether those employees are complying with applicable law compliance instructions, and follow up affirmatively on evidence of specific incidents of illegal conduct with appropriate investigations and reforms, the leaders will have adopted an adequate compliance programs for a firm of their small size.

The general principle at work here is that operational methods and organizational structures devoted to law compliance in a small organization should be no more or less extensive than the measures that an organization of the same size generally devotes to other significant features of organizational performance. The same principle would suggest the types of methods and resources that a mid-size company should devote to law compliance. If, for example, mid-size companies in the same industry would typically devote a separate organizational unit (or even part of the time of a particular corporate employee) to securing the integrity and completeness of corporate financial reports or the quality of corporate products, corporate law compliance should receive similar attention with management methods and organizational units of similar scope and nature.

In general, however, small organizations will not need any compliance staff or organization and can adequately address compliance through systematic efforts within existing management structures and practices. In order to clarify this point and specify at what size an organization should be concerned about its lack of a separate compliance staff or compliance organization, it might be useful to include a specific size figure in the guidelines' commentary as a general threshold size

below which an organization would generally not be required to have a separate compliance officer or organization in order to have a generally effective compliance program. For example, a statement might be included at the end of Application Note 2(B)(ii) following new § 8B2.1 that: "In most organizations having 100 or fewer employees, an effective compliance organization can be implemented through management processes undertaken for other purposes and no separate compliance staff will be necessary."

I appreciate the chance to address these issues related to the Sentencing Commission's proposed changes in the organizational sentencing guidelines. If I can be of any further assistance, please do not hesitate to contact me by phone (714-444-4141 ex. 228) or email (rgruner@law.whittier.edu).

Sincerely,

Richard S. Gruner

Richard S. Gruner
Professor of Law

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February 16, 2004

U.S. Sentencing Commission
One Columbus Circle, NE.
Suite 2-500
Washington, DC 20002-8002
Attention: Public Affairs

Dear Commissioners:

The Health Care Compliance Association (HCCA), established in 1996, is the only national, nonprofit organization dedicated solely to improving the quality of compliance. Its membership is made up of over 3,000 compliance professionals who oversee the compliance efforts of thousands of organizations both in and outside of health care. The HCCA has a rich history of facilitating the development and maintenance of compliance programs, providing a forum for understanding complicated regulatory environments, and collaborating with enforcement agencies to provide tools, resources, and educational opportunities for those involved with compliance. Its mission is to "champion ethical practice and compliance standards in the health care community and to provide the necessary resources for compliance professionals and others who share these principles."

HCCA Website: http://www.hcca-info.org/

The Executive Committee of the Health Care Compliance Association offers the following comments on the proposed changes to the US Sentencing Guidelines – See attached.

Sincerely,

Al Josephs
President
Health Care Compliance Association

[2-123]

HCCA
HEALTH CARE COMPLIANCE ASSOCIATION

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February 16, 2004

U.S. Sentencing Commission
One Columbus Circle, NE.
Suite 2-500
Washington, DC 20002-8002
Attention: Public Affairs

Subject: United States Sentencing Commission Proposed Changes

Dear Commissioners:

The purpose of this letter is to comment on the proposed changes to the Federal Sentencing Guidelines (Guidelines) relating to compliance programs. At the outset I would note that the Commission appears to be placing increased emphasis on the importance of compliance programs and the role of the compliance officer as a member of senior management. We completely support this effort. Moreover, we agree with the many changes proposed by the Commission to provide additional guidance and direction to organizations regarding compliance programs and to emphasize the need for compliance officers to have sufficient authority and resources to be able to perform effectively. While the board of directors of the Health Care Compliance Association supports virtually all of the proposed changes to the Guidelines, it does have concerns with two of the proposed changes. Those concerns are outlined below.

First, the proposed amendments suggest that the compliance officer of the organization is 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."

Our concern is that this amendment may not reflect the fact that compliance can only be achieved if the operating management of an organization (at all levels) performs the roles and responsibilities assigned to it through the compliance program. 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 leadership and coordination of the program, as well as monitoring program performance and reporting to management and the board on program implementation.

Ultimately, however, the operating management of the organization must embrace, the program and assume accountability to ensure that the compliance program is effectively implemented. It is not realistic to hold the compliance officer alone responsible for the overall success or failure of the compliance program. If there are failures, the responsibility may reside with the compliance officer or may reside with any number of other leaders in an organization. The proposed amendments could be read as relieving management of the job of ensuring the organization is compliant. We believe that the guidelines should strengthen rather than weaken managements' accountability for the

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organization's compliance efforts. For the reasons stated above, we would recommend that the proposed amendment be modified to read as follows:

"Specific individuals(s) 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."

Our second concern relates to the treatment of organizations which encounter trouble even though the organization had a compliance program in place. While the proposed changes are an improvement over the existing guidelines, it is our view that the proposed changes could do more to promote effective compliance programs.

As drafted, the proposed amendments create a rebuttable presumption that the compliance program was ineffective. However, we 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.

In summary, we support most of the proposed changes to the Guidelines and applaud the work of the Commission. The changes proposed by the Commission will help us strengthen organizational compliance programs and the role of the compliance officer. However, we would strongly encourage the Commission to revise the proposed Guidelines on the two very important points discussed above.

Sincerely,

Executive Committee
Health Care Compliance Association
5780 Lincoln Drive, Suite 120
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[2-125]

March 1, 2004

United States Sentencing Commission
One Columbus Circle, N.E.
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Washington, D.C. 20002-8002

Attn: Public Affairs

LRN is pleased to have the opportunity to respond to the United States Sentencing Commission's request for public comment on its proposed amendments to Chapter Eight of the United States Sentencing Guidelines regarding effective compliance programs. LRN commends the Ad Hoc Advisory Group on the Organizational Sentencing Guidelines for its insightful report and recommendations. We further commend the Commission for addressing in the proposed amendments the important issues raised by the Advisory Group.

For over ten years, it has been LRN's privilege to work with hundreds of organizations, both large and small, on legal, compliance, and ethics issues. During this time, we have gained a better understanding of the relationship between ethics and compliance, and more broadly, the relationship between corporate cultures and compliance. We have also gained insight into how organizations best communicate not only the legal and regulatory requirements of their business, but also respect for the law more broadly, as well as their values and standards. And we have had the opportunity to witness and participate in what we believe could well turn out to be a sea change in the approach to addressing these critical issues.

We are observing an emerging trend in the development of effective compliance programs, and we believe this trend is a positive one. In particular we are observing that in communicating their values and providing employees with the knowledge and information they need to succeed and thrive, they are emphasizing both ethics and legal compliance. Indeed, attention to ethics within organizations now takes many forms, from bringing to life codes of conduct through education and other means by which they are woven into the very fabric of the organization, to structuring education curricula in which law and the ethics are taught together. The goal of such programs is to not only comply with the law, but to instill in the organization's members an atmosphere of trust and a sense of mutual respect and benefit.

We offer the following comments to provide context to the current corporate environment – one characterized by what we observe to be intense skepticism and a lack of trust from the public. It is our belief that the Commission has a historic opportunity to do more than dictate prescriptive