As a corporate litigator, I have repeatedly seen instances where an alleged victim of corporate misconduct has come forward only after they have quit or have been terminated. The employer in such cases has often been denied an opportunity to informally remedy the alleged problems or even to properly investigate what is alleged to have gone on. The alleged victim may have suffered in silence longer than necessary. Thus, the ability of an employee not only to anonymously report alleged misconduct or problems, but also to seek guidance and correction of problems in a confidential manner significantly increases the likelihood of a speedy remedy for individuals concerned and corporate attention to these problems at an earlier stage.

While I understand that the Advisory Group did not want to dictate specific means by which an organization should accomplish the requirements proposed by the changes to the Guidelines, my work with the Ombuds groups noted above, and in practice, leads me to believe that, at the very least, the amendment should support confidential means for individuals to seek guidance and speedy correction of their problems in confidence without fear of retaliation.

Thank you for your attention to this matter.

Very truly yours,

Richard L. Steer

Richard L. Steer

RLS/ps

[2-207]

February 10, 2004

United States Sentencing Commission
One Columbus Circle, N.E.
Suite 2-500
Washington, D.C. 20002-8002

Attn: Public Affairs

Re: Response to request for public comment on effective compliance programs in Chapter Eight

On behalf of United Technologies Corporation (UTC), I appreciate this opportunity to comment on proposed changes to Chapter Eight Guidelines. My comments will be brief. They follow and build upon the written testimony and letter I provided on August 27, 2002 in the early days of the Ad Hoc Advisory Group's work in behalf of the Commission's review of Chapter Eight and my oral testimony during Breakout Session III on November 14, 2002.

The Commission is to be commended for its foresight in creating an advisory body to review Chapter Eight Guidelines a decade after their inception, and the Ad Hoc Advisory Group is to be commended for the depth, breadth and speed of its work. The Guidelines have done much to contribute to the broadening of interest in and commitment to effective compliance programs. Several specific recommendations in the Ad Hoc Advisory Group's report will strengthen the Guidelines' effectiveness even further.

Of special note are the Advisory Group's recommendations at §B2.1 for strengthening the role and cognizance of the governing authority; the assignment of high-level personnel assigned to assure the implementation and effectiveness of a compliance program; and the provision regarding adequate resources.

We also applaud the inclusion of the proposed language in §8B2.1(b)(5)(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.*" Research and experience teach us that a certain portion of a work force will not bring issues forward if they risk being identified because they fear retaliation.

Inclusion of the word "anonymous" in the language is a positive step because organizations would be required to think about mechanisms by which employees can raise issues without being identified. But aside from an office that accepts anonymous correspondence and assigns investigators, there are limits to how much information an organization can gain (including the

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probable need for follow-up questions to the source) (1) without some part of the organization's management structure somehow knowing the source's identity and (2) without risking the possibility the source could be identified by electronic tracking or retrieval of deleted email or toll free calls to a third party, etc.

We strongly recommend another positive step: inclusion of the word "confidential," not to replace but to complement the word "anonymous." The two are not interchangeable, and when used together as a requirement for an organization's reporting system they increase the likelihood that more employees will come forward. Thus we recommend that the proposed language in §8B2.1(b)(5)(C) be amended to read, in part, "...including mechanisms that allow for *confidential* and anonymous reporting."

As a reference point, the U.S. Sarbanes-Oxley Act of 2002 requires that "...each audit committee [of a board of directors] shall establish procedures for "the *confidential, anonymous* submission by employees...of concerns regarding questionable accounting or auditing matters."

Because of recent media attention to this far-reaching Act, the terms "confidential" and "anonymous" have been used frequently and, sometimes, carelessly. Sometimes they are even erroneously used interchangeably.

The Ad Hoc Advisory Group's October 7, 2003 report cited the independent, neutral ombudsman office at United Technologies as having been successful "in maintain[ing] the confidentiality of the information provided [by employee sources] against demand for external disclosures." (pp. 83-84)

Because a neutral, independent ombudsman office can offer a confidential as well as an anonymous outlet for employees, this model is available to organizations that strive to develop the most comprehensive and effective system for employee reporting. For this reason we strongly recommend that the word "confidential" be added to §8B2.1(b)(5)(C)'s language.

We established the confidential, neutral ombudsman program in 1986 as a means for employees to raise issues in confidence while remaining anonymous to the rest of the organization and even to the Ombudsman if the employee chooses. Within the context of the ombudsman program at UTC, this is why we believe the word "confidential" should be used with "anonymous" in the Guidelines.

Because the Program was created to be neutral, separate and independent of formal management structures, the Program promises that information employees raise through the program will kept confidential and that employees may remain anonymous to the rest of the organization and even to the Ombudsman.

When an employee contacts the Ombudsperson, the corporation promises that no one except the Ombudsperson who processes the inquiry will know that an employee is in the process of using the Program to communicate an issue. The fact of the communication will be kept confidential.

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The Ombudsperson who handles an employee's issue promises the employee that her or his name will not be given to management [or anyone else] without the employee's specific permission. That is, the Ombuds will keep the employee *anonymous* to the organization. (UTC has used the legal process a half dozen times to successfully defend this concept, which is generally known as *Ombudsman privilege.*)

The advantages to having this kind of structure are numerous. Because an organization can offer both confidentiality and anonymity, we believe more employees are likely to come forward. Note: if an employee chooses to raise an issue through the compliance office, which is part of the management structure, the compliance officer can advise the employee that while he or she will do everything possible to keep the employee's identity anonymous to the organization, should the issue end up in a third-party lawsuit, the compliance officer may be subpoenaed and have to reveal the employee's identity.

I would like to conclude with two points. As we mentioned in our 2002 comments, it would be very helpful if the Commission were to ask U.S. Attorneys to share data resulting from settlements negotiated under the Guidelines so others can learn the results of compliance with or avoidance of the Guidelines.

Finally, I understand there might be the opportunity to testify regarding the Ad Hoc Advisory Group's proposals. If that opportunity does arise, I would be grateful for the opportunity to provide oral comment.

Sincerely,

Pat

P.S. I have mailed a paper copy of this letter in addition to this email transmission.

[2-210]

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January 14, 2004

United States Sentencing Commission
One Columbus Circle, N.E.
Suite 2-500
Washington, DC 20002-8002

Attention: Public Affairs

Re: Proposed Amendments to
Sentencing Guidelines/Compliance Programs

Ladies and Gentlemen:

I just read with interest your proposed amendment to Chapter 8 relating to the required indicia for Compliance Programs as a mitigating factor in the sentencing of organizational defendants.

The Commission's proposed expansion of the compliance program litmus test from coverage of "criminal conduct" to all "violations of law" will substantially increase the complexity of review. The proper goal of the mitigation factor should be to encourage companies to have compliance programs at least in those areas of highest risk to society (i.e., where criminal penalties are imposed). The Commission's expansion to all areas of law might effectively do away with the compliance program mitigation factor by allowing sufficient leeway to always find something insufficient with the defendant's program. In effect, this well intentioned effort may cause organizations to ignore this mitigation factor.

The proposed amendment goes far beyond the role of the Sentencing Commission to develop guidelines with respect to sentencing for criminal conduct. Adoption of the proposed amendment will have a significant impact on establishing minimum "standards of care" relevant in the civil law (particularly tort) context which is not what was envisioned when the Sentencing Commission was established. Is the Sentencing Commission equipped to fully understand the civil law ramification of its actions?

[2-211]

The term "violation of law" is defined as including a "non-criminal law" for which an organization would be liable. This clearly includes all Federal, State and local statutes, regulations, ordinances, decrees, etc. However the word "law" is so ambiguous in its usage, it could be construed to cover non-criminal "law" promulgated by means other than legislative authority (e.g., court decisions, executive decrees, etc.). This ambiguity will lead to inconsistent results and further unpredictability in our criminal legal system. The focus for organizational compliance programs should be on criminal behavior. It is not the role of the Sentencing Commission to establish incentives for civil law compliance. If anything, the Sentencing Commission should be helping to prioritize compliance program activity by keeping the focus on society's most egregious conduct. Instead, the Sentencing Commission will be diluting that focus by making the standards potentially overwhelming. If the Sentencing Commission would like to criminalize certain civil law non-compliance, I recommend they write their elected representatives.

Once it becomes standard operating procedure for all organizations to have appropriate criminal law compliance programs in place (which is by no means certain at the present time), then we can assemble a panel of civil law experts to review the merits of legislation on having civil damages reduced by effective civil law compliance programs.

I urge you to retain the reference to "criminal conduct" in Chapter 8.

Sincerely,

John T. Lucking
Vice President & General Counsel

JTL/ao

[2-212]

U.S. Department of Justice

Criminal Division

Office of the Assistant Attorney General *Washington, DC 20530-0001*

March 1, 2004

Members of the
U.S. Sentencing Commission
One Columbus Circle, NE
Suite 2-500, South Lobby
Washington, DC 20002-8002

Commissioners:

On behalf of the Department of Justice, I submit the following comments regarding the proposed amendments to the federal sentencing guidelines and issues for comment published in the Federal Register on December 30, 2003, and January 14, 2004. We thank the members of the Commission – and the Commission staff – for being responsive to many of the Department's sentencing policy priorities this amendment year and for working extremely hard with us to develop proposed amendments to implement these priorities. We look forward to continuing to work with the Commission during the remainder of this amendment year on all of the published amendment proposals.

* * * * *

CHILD PORNOGRAPHY AND SEXUAL ABUSE OF MINORS

The proposed guideline amendments for child pornography and the sexual abuse of minors largely implement provisions of the Prosecutorial Remedies and Other Tools to end the Exploitation of Children Today Act of 2003, (the "PROTECT Act"), Pub. L. 108–21. Child pornography and the sexual abuse of minors involve many complicated statutory and guideline issues, and the Commission and staff have methodically and diligently worked to both faithfully implement the new law and at the same time strive to make sentencing policy in this area as easy as possible to apply. We support most of the published proposed amendments and offer a host of comments below.

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EFFECTIVE COMPLIANCE PROGRAMS IN CHAPTER EIGHT

I. Introduction

We commend the Commission for having had the foresight to convene the Advisory Group on Organizational Sentencing Guidelines and in so doing fulfilling the Commission's ongoing statutory responsibility to regularly review the sentencing guidelines, including the guidelines for organizational crime. We also want once again publicly to thank the members of the Advisory Group for their service and for the thoughtful and comprehensive report the Group prepared.

The proposed amendments to the sentencing guidelines for organizational defendants, recommended by the Advisory Group and published by the Commission, are intended primarily to give greater guidance to organizations and courts regarding the criteria for an effective program to prevent and detect violations of the law ("compliance programs"). The proposed amendments add to Chapter Eight, Part B, a new guideline, §8B2.1 (Effective Program to Prevent and Detect Violations of Law), that identifies for the first time in the body of the sentencing guidelines the purposes of an effective compliance program, sets forth more clearly the seven minimum steps for such a program, and provides greater guidance for their implementation. We strongly support these amendments. We believe compliance programs are key to reducing crime within organizations and that the sentencing guidelines for organizations have been not only a real innovation but also a great success in providing incentives for organizations to develop and operationalize these programs. The proposed amendments will communicate to the corporate community, with greater emphasis and clarity, the federal policy of encouraging self-policing through effective compliance programs and self-reporting if violations of law are detected. Moreover, the continuing policy of ascribing a benefit to having such programs will, we believe, likely lead to better compliance programs and practices and increased information to corporations about monitoring their own conduct and self-reporting any misconduct.

Despite our general support for these amendments, we do have concerns about a few specific provisions of the proposed amendments.

II. Rebuttable Presumption When High-Level Personnel Are Involved In Crime

Currently, there is a provision in §8C2.5(f) that prohibits an organization from receiving a three level downward adjustment to its culpability score for having an effective compliance program if an individual within high-level personnel of the organization, or a person within high-level personnel of a unit having more than 200 employees and within which the offense was committed, or an individual responsible for the administration or enforcement of a compliance program participated in, condoned, or was willfully ignorant of the offense; and there is a rebuttable presumption against receiving the adjustment if an individual within substantial-

authority personnel participated in the offense. The Commission proposes to delete this provision in its entirety and replace it with one that creates a rebuttable presumption against receiving the adjustment where high-level personnel of the organization participated in, condoned, or were willfully ignorant of the offense. The synopsis to the proposed amendment indicates that "this modification is intended to assist smaller organizations that currently may be automatically precluded, because of their size, from arguing for a culpability score reduction for their compliance efforts under §8C2.5(f)." In its issues for comment, the Commission "requests comment regarding whether the automatic preclusion should continue to apply in the context of large organizations. Moreover, should the rebuttable presumption apply in the context of small organizations, in which high-level individuals within the organization almost necessarily will have been involved in the offense?"

We oppose this proposed change for several reasons. First, we do not believe the proposed amendment logically is suggested by or flows from the Advisory Group study, report, or recommendations. The Advisory Group report notes that small organizations rarely qualify for the three level downward adjustment to their culpability score for having an effective compliance program. Two causes are mentioned: one, small organizations frequently fail to establish effective compliance programs, and two, the involvement of high-level officials in the commission of an offense is likely in the case of the small, closely-held organizations that are in fact prosecuted in federal court and that do make up the majority of organizations sentenced under Chapter 8. Report at 131-32. The only recommendation related to small organizations made by the Advisory Group is that "the Sentencing Commission devote resources to reaching and training this target audience (small organizations), perhaps through coordinating with the Small Business Administration and other appropriate policy makers." Report at 133. The Report provides little or no support for the proposed amendment beyond the language already quoted.

Second, we do not believe simply making it easier for small organizations to qualify for the adjustment for having an effective compliance program by creating a litigatable issue is good public policy. By definition, it is more likely that crime involving small organizations (as compared to larger organizations) will involve high-level personnel. But whether in a small organization or large, when high-level personnel are involved in crime, there can be no effective organizational self-policing and therefore no downward adjustment for an effective compliance program is warranted.

Yet, even if the Commission found the small business rationale compelling, the proposed amendment is considerably overbroad. It sweeps away the current automatic preclusions on receiving the adjustment for high-level personnel involvement in the offense, as well as the rebuttable presumption against receiving the adjustment for substantial-authority personnel involvement in the offense, for all organizations, large and small. There is no discussion in the Report concerning the need to make it easier for large organizations to qualify for the adjustment despite high-level or substantial-authority personnel involvement in the offense of conviction. In

fact, such a change would be directly contrary to the thrust of the Report, which is to increase the involvement of governing authorities and organizational leadership both in the oversight of compliance programs and, more significantly, in creating law-abiding organizational cultures.

> [T]he corporate scandals that exploded shortly following the tenth anniversary of the adoption of the organizational sentencing guidelines demonstrated that the involvement of officers and directors in corporate crime was not confined to small businesses. The corporate scandals of 2002 greatly contributed to the public's lack of confidence in the capital markets. In virtually all of the scandals, the alleged malfeasance occurred at the senior management and/or governing authority level. Where there was no actual malfeasance by members of the governing authority, there were often instances of negligence.

Report at 57.

As a result of this finding, the amendments now under consideration would require higher levels of awareness of, and involvement in, compliance programs by governing authorities and organizational leaders in order for those programs to be considered to be effective. They also propose that to be considered effective a compliance program must not only be designed to prevent and detect violations of law, but it must also "promote an organizational culture that encourages a commitment to compliance with the law." Proposal at 60. We believe to propose, at the same time, an amendment that would make it easier to qualify for the adjustment where there is actual involvement in (or willful negligence of) the instant offense by high-level and substantial-authority personnel is inconsistent at best. The involvement of these personnel in compliance programs is the clearest indication of a law-abiding organizational culture and their involvement in criminal activity the clearest indication that the organization's compliance program is ineffective. That was the reason that the limitations on receiving the adjustment were originally imposed, and the spectacular failure of the leadership of numerous large organizations in recent years to obey the law is the strongest possible argument in favor of retaining them.

For example, in many recent major international antitrust/cartel prosecutions, including the prosecutions of Archer Daniels Midland Company, UCAR International Inc., and F. Hoffmann-La Roche Ltd. and BASF Aktiengesellschaft, high-level personnel participated in and, in fact, were among the leaders of the cartels. It is impossible, as many of the proposed amendments put forward by the Advisory Group and the Commission recognize, to create a law-abiding organizational culture from the bottom up; respect for the law must begin at the top and permeate downward by means of an effective compliance program. If an organization is rotten at the top it cannot be the good corporate citizen that the adjustment for having an effective compliance program was designed to reward.

This is true to an equal, if not greater, extent in small organizations as in large. Clearly, there should be distinctions between what large and small organizations must do to establish effective compliance programs. An effective compliance program in a small organization may be much less formal than in a large organization. The Commission proposes to add commentary to the guidelines making this plain, and we support this commentary. "For example, in a small business, the manager or proprietor, as opposed to independent compliance personnel, might perform routine audits with a simple checklist, train employees through informal staff meetings, and perform compliance monitoring through daily "walk-arounds" or continuous observation while managing the business." This proposal recognizes that in a small organization the personal involvement of an owner/manager is the key element to creating an effective compliance program. Yet how can personal involvement create a law-abiding organizational culture when the manager or proprietor is engaged in unlawful activity?

To the extent that small organizations are not receiving credit for having effective compliance programs, the better solution is the one identified by the Advisory Group: making greater efforts to educate small companies on their obligations under the law and working with them to establish effective compliance programs, rather than giving them credit for compliance programs despite the participation of their owners and high-level managers in criminal activity. Adopting the proposed amendment, even revised to apply only to small organizations, would send exactly the opposite message to the one being sent by virtually every other change being proposed by the Commission regarding compliance programs.

III. Waiver of Attorney-Client Privilege and Work Product Protections

There has been considerable debate – within the Advisory Group and beyond – about the circumstances under which an organization ought to be asked to waive the attorney-client privilege or its work product protections in order to receive a reduction in its culpability score for cooperation with the government or to receive a downward departure for providing substantial assistance in the investigation or prosecution of another. The Department's position on this has been, and continues to be that what is required to receive these reductions is simply cooperation and substantial assistance; and that neither waiver of the attorney-client privilege nor waiver of the work product protections are prerequisites to receiving these reductions. We recognize and the Advisory Group recognized, however, that in many cases, cooperation and substantial assistance will not be fully achieved unless there is a waiver of some kind. It comes down to a case-by-case analysis, depending on the particular circumstances of the investigation.

It is for these reasons that we accept the proposed new language in §8C2.5, Application Note 12, that clearly indicates that in certain circumstances, but not all cases, a waiver will be necessary to receive the reduction in the culpability score for cooperation. Where we believe the Application Note falls a bit short is in recognizing that the government is in a unique position to assist the court in determining whether the defendant has effectively cooperated and whether a waiver if the privilege or work product protection is necessary for full cooperation.

The current guideline Application Note 12 correctly points out that "[a] prime test of whether an organization has disclosed all pertinent information is whether the information is sufficient for law enforcement personnel to identify the nature and extent of the offense and the individual(s) responsible for the criminal conduct." We believe that in determining whether sufficient cooperation has occurred, the sentencing court should consider all evidence but should give extra weight to the government's assessment of the defendant's cooperation and the government's assessment of the sufficiency of the cooperation in identifying the nature and extent of the crime and those responsible. We think the language of the proposed Application Note would be improved with the following:

> 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 other circumstances, waiver of the attorney-client privilege and of work product protections may be required in order to satisfy the requirements of cooperation. Substantial weight should be given to the government's evaluation of the extent of the defendant's cooperation and whether waiver of either the privilege or work product protections is necessary to identify the nature and extent of the offense and the individual(s) responsible for the criminal conduct.

IV. Substantial Assistance

These same principles surrounding the waiver of the attorney-client privilege and the work product protections apply in the context of substantial assistance motions. However, one critical difference between substantial assistance departures and reductions in culpability score for cooperation is that under existing statutes and guidelines, the availability of a substantial assistance departure is triggered only by the government. Simply put, departures for substantial assistance pursuant to 18 U.S.C. § 3553(e), §5K1.1, or §8C4.1 may not be made absent a motion by the government. In Wade v. United States, 504 U.S. 181, 185-86 (1992), the Supreme Court clearly held that the making of a substantial motion is the sole prerogative of the government. The only authority a district court has to review a prosecutor's refusal to file such a motion and the only authority a court has to grant a remedy is if the court finds "that the refusal was based on an unconstitutional motive." Id. The Court gave as an example of an unconstitutional violation the refusal to file the morion "because of the defendant's race or religion." Id.

We believe that proposed Application Note 2 in §8C4.1, which mirrors Application Note 12 in §8C2.5, suggests that the government's determination of whether or not to file a substantial assistance motion is reviewable, at least to the extent that the government's determination may hinge on a waiver of the privilege or waiver of the work product protections. We think this

suggestion is at best confusing and at worst contrary law. We strongly urge that this proposed application note be eliminated.

BODY ARMOR

We support the Commission proposal to create a new guideline, at §2K2.6, to cover the new offense of possessing, purchasing, or owning body armor by a violent felon – 18 U.S.C. § 931. We believe that a base level of 12 is appropriate for the new guideline, which would provide a sentence of 8-14 months for a typical offender in Criminal History Category II, well below the three year statutory maximum penalty. In creating this new crime, Congress found that body armor enables armed criminals to both cause more harm and be more difficult to apprehend. The congressional findings specifically cite three separate incidents of law enforcement officers who were killed during shootouts with armed criminals shielded by body armor. We share Congress's belief that armed criminals protected by body armor are an extremely serious threat and believe that a base offense level of 12 properly reflects that threat.

We further believe that if a violent felon uses body armor in the commission of any offense, that a sentence at the statutory maximum would be appropriate, irrespective of the offender's criminal history score. We therefore recommend that a four level enhancement be provided for such conduct.

PUBLIC CORRUPTION

I. Introduction

We support the majority of the proposed changes to the public corruption guidelines, and, in particular, agree with the effort to reduce the emphasis on the dollar amounts involved in the crime in calculating the offense level under the primary corruption guideline, §2C1.1. We appreciate the opportunity over the course of the last several months to work with the Commission to develop a workable and effective sentencing policy for corruption cases. We recognize, however, many of the technical difficulties related to sentencing policy for these cases. For example, we have been working with the Commission closely on the proposed consolidation of the guideline for bribery offenses (§2C1.1) with that for honest services fraud (§2C1.7). In our view, the consolidation is not necessary and raises issues stemming from the special nature of honest services fraud cases. Several of our specific comments are designed to address these issues and insure that no substantive change in the coverage or scope of the guidelines results from the consolidation. For example, we do not think it is the intent of the Commission – and we oppose – any amendments that will have the effect of reducing the number of defendants who will receive an enhancement as a result of holding a high-level decision-making or sensitive position. We have included, at the end of this section of the letter, a draft of the applicable guidelines which include revisions along the lines of our comments below.

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February 27, 2004

SENT BY EMAIL AND UNITED STATES MAIL

United States Sentencing Commission
Attention: Public Affairs
One Columbus Circle, N.E.
Suite 2-500, South Lobby
Washington, DC 20002-8002

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

Re: Public Comment Regarding Proposed Amendments to Chapter Eight (Sentencing of Organizations)

Dear Commission:

The following sets forth our Public Comment relating to Proposed Amendment 2: Effective Compliance Programs in Chapter Eight.

Public Comment Overview

After carefully reviewing the Public Comments I have submitted over the past years relating to Chapter Eight, the Ad Hoc Advisory Group on the Organizational Sentencing Guidelines' Report and Proposed Amendment 2, organizations will now have greater guidance for the design, implementation and enforcement of organizational compliance programs. With that said, I must still express my concerns surrounding the amendments relating to ***reduction with effective program*** AND ***waiver of the attorney-client privilege***.

[2-220]

My extensive professional experience in corporate criminal liability compliance stems from years and years of involvement in all angles of corporate compliance even BEFORE the Organizational Guidelines were implemented in 1991, excluding prosecutorial enforcement. Having this practical experience and expertise BOTH internally and externally with employers, employees and administrative agencies alike provides me a broader view of the EFFECT of regulations within organizations. INTERNAL DETECTION AND APPROPRIATE REMEDIAL ACTION are KEY components in any organizational compliance program. Therefore, I must urge the Commission to reevaluate Amendment 2 as follows:

Section 8C2.5(f):

"(f) Effective Program to Prevent and Detect Violations of Law

(1) If the offense occurred even though the organization had in place, at the time of the offense, an effective program to prevent and detect violations of law, as provided in §8B2.1 (Effective Program to Prevent and Detect Violations of Law), subtract 3 points."

AMENDED TO READ

(1) If the offense occurred even though the organization had in place, at the time of the offense, an effective program to prevent and detect violations of law, as provided in §8B2.1 (Effective Program to Prevent and Detect Violations of Law), subtract 3 points ONLY if the organization took appropriate remedial action once the offense was discovered.

Commentary to 8C2.5(Application Notes):

"If the defendant has satisfied the requirements for cooperation set forth in this note, waiver of the attorney-client privilege and of work product 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."

AMENDED TO READ

If the defendant has satisfied the requirements for cooperation set forth in this note, waiver of the attorney-client privilege and of work product 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 ONLY after considering the defendant's efforts relating to appropriate remedial action.

[2-221]