American Express Company
General Counsel's Office
200 Vesey Street
49th Floor
New York, NY 10285

February 24, 2004

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 respond to the request for public comment on the proposed amendments to Chapter Eight of the sentencing guidelines for organizations. I previously wrote to the Ad Hoc Advisory Group on October 4, 2002, to address the need for confidential reporting in any revision to the Commentary to the Organizational Guidelines and to discuss how we at the American Express Company accomplish that goal, in part, with our ombuds program.

In reviewing the recommendations and report from the Advisory Group, I note that while they have cited a great deal of authority on the need for confidentiality, the recommendation for a new section 8B2.1(b)(5)(c) does not contain any reference to confidentiality. I understand that the Advisory Group may have felt that referring to ombuds programs would be too restrictive, but such programs are responsive to the need for confidentiality cited by the Advisory Group. Moreover, they demonstrate that confidentiality can be achieved consistent with other legal requirements. I am enclosing the 2003 Annual Report of the American Express Office of the Ombudsperson to provide the Commission with a better sense of just how this type of program can be implemented to provide a confidential resource for employees who are concerned about misconduct. The composite scenarios included in the report are particularly revealing of how this program fits into our overall efforts to foster "an organizational culture that encourages commitment to compliance with the law."

Mr. Michael Courlander
Public Affairs Officer
February 24, 2004

Other organizations may have other good ways to permit employees to raise issues confidentiality. Even though one specific solution such as an ombuds program may not be appropriate for all organizations, some provision for confidentiality should be included in the new guidelines. The ideal answer would be to add the word "confidential" to the end of the section to require "...mechanisms to allow for *confidential* and anonymous reporting. This would be consistent with the language used in the Sarbanes-Oxley Act of 2002. Even if the Commission were not willing to make that change, it could amend the recommendation for the beginning of that section to provide that a system allow employees and other agents to "report or *confidentially* seek guidance...." Such an amendment also would be responsive to the need for confidentiality while steering clear of the legal tangle involving "confidential reporting."

Regardless of which of these two approaches the Commission may take, I urge the Commission to address the need for confidentiality in its final recommendations to Congress.

Very truly yours,

John E. Parauda

John Parauda
Managing Counsel

Enclosure

10 Year 1994-2004

OFFICE OF THE OMBUDSPERSONS

CONTENTS:

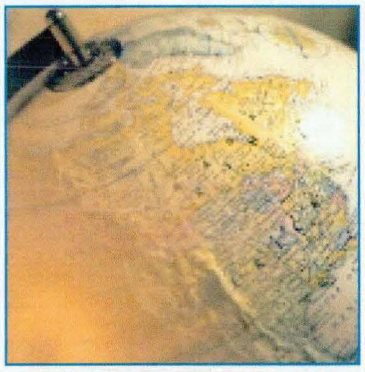
"We urge you to raise any issues that prevent us from achieving our employee, customer, and shareholder goals and from ultimately winning in the marketplace."

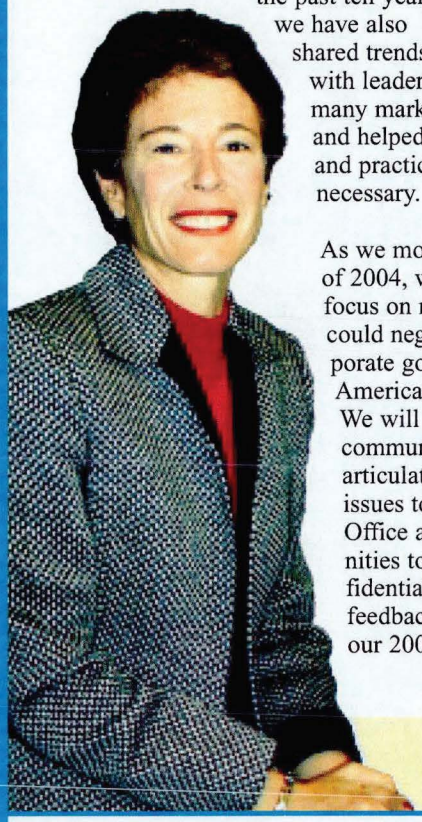
Ken Chenault

2004 REPORT TO EMPLOYEES

Dear Colleagues:

2004 marks the tenth year since the Office of the Ombudspersons was established at American Express. The Office was created in 1994 to meet a need for an alternative channel of communication where American Express people could discuss concerns in a confidential environment and without fear of retribution. Since that time, we have provided assistance to more than 25,000 people, helping to raise issues that might not have surfaced through the formal channels. Individuals were able to put aside their fears and consequently, the organization was able to appropriately address the concerns. In the past ten years, we have also shared trends with leaders in many markets and helped to influence policy and practice changes when necessary.





As we move through the rest of 2004, we will continue to focus on raising issues that could negatively impact corporate governance and the American Express brand. We will also ensure our communications clearly articulate the types of issues to bring to our Office and utilize opportunities to reinforce our confidentiality based on the feedback you gave us in our 2003 survey.

In the meantime, we encourage you to read the Code of Conduct, become familiar with the Company's policies and take responsibility to speak up when you become aware of unethical or inappropriate actions. Sometimes our culture and beliefs may go against speaking up, however American Express fosters a global work environment that encourages employees to voice concerns, and supports those who come forward. We each have a duty to report Code of Conduct and policy violations, so that the Company can take steps to rectify the problem and prevent recurrence. The formal resources in the organization, including management and Human Resources, are available to assist; however, you can also speak informally and confidentially with an Ombudsperson.

We invite you to read more about how our Office can help the people of American Express in the following pages.

As always, you have our commitment for continued assistance in a neutral, informal and confidential environment, utilizing our worldwide team of Ombudspersons.

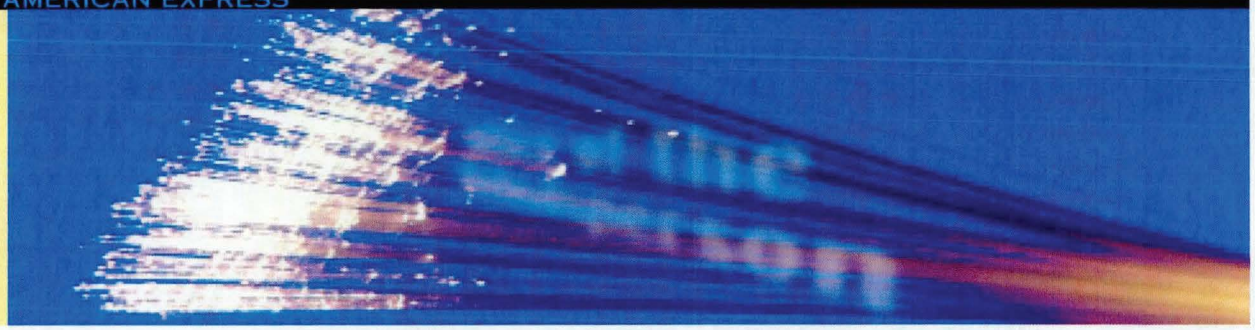
Cordially,

Wendy

Wendy E. Friede
Corporate Ombudsperson

For more information please visit: www.aexp.com/ombudsperson

Wendy Friede–Minneapolis



Office of the Ombudspersons Q&A

Tom Barnette
Greensboro

Beatriz Barciela Dale
Miami Lakes

Jan Sullivan-Chalmers
Brighton

Pradeep Chatterjee
Singapore

WHAT IS THE OFFICE OF THE OMBUDSPERSONS?

The Office of the Ombudspersons is a confidential, informal and neutral resource where you can air work-related issues with confidence that your concerns will remain off the record and without fear of retribution.

The Office is an alternative resource available to all American Express full time, part time and temporary employees; vendors; and independent contractors.

WHAT DOES THE OFFICE DO?

We listen, coach, and assist in developing options within the Company's processes and structures to help move issues to resolution. For example, an Ombudsperson can:

- Provide coaching on how to approach your leader or other formal channels within the company to resolve your issue.
- Help you pass on information to your leader or other formal channel while protecting your identity.
- Identify alternative options when you have already approached your leader or other formal channel with your issue but reached no resolution.

IS THE OFFICE AN ADVOCATE FOR EMPLOYEES?

An Ombudsperson does not take sides. We are a designated neutral; neither an advocate for the inquirer,* coworker, manager nor any other party involved. The Office is an advocate for a fair process.

The Ombudsperson listens without passing judgment, assists in identifying resolution options within the Company and does not take sides as to the outcome.

The Office is an independent function that reports to the Office of the Chairman and to the Audit Committee of the Board of Directors.

Our Office does not report to or form part of any business unit or staff function.

*Consistent with our commitment to neutrality, we call the persons who contact us "inquirers" rather than any other term that might suggest we are advocates for any party in an issue.

HOW IS THE OFFICE INFORMAL?

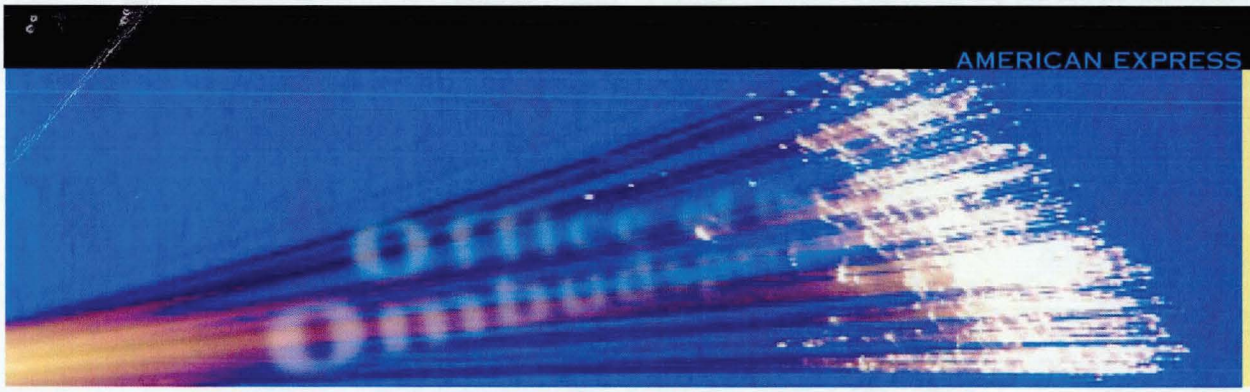
- The Office is not part of the Company's management structure and therefore does not make policy, make management decisions, or conduct formal investigations.
- Contacting the Ombudsperson does not put the Company on formal notice.
- Conversations with the Ombudsperson are confidential and considered off the record.

WHAT SHOULD I EXPECT WHEN I CONTACT THE OFFICE?

The Office of the Ombudspersons will:

- Listen to your concerns with an open mind.
- Remain impartial to all individuals involved.
- Keep information confidential.
- Help you identify approaches in communicating the situation.
- Identify alternative resolutions within the Company.
- Assist in achieving outcomes consistent with fairness, the Blue Box Values, and the Code of Conduct.

For more information please visit: www.aexp.com/ombudsperson



Office of the Ombudspersons Q&A

HOW CAN I BE SURE THAT MY CONTACT WITH THE OFFICE IS CONFIDENTIAL?

Confidentiality is the cornerstone of our practice. Conversations with the Ombudsperson are privileged, off the record and made with the understanding that they will be kept confidential. This agreement to maintain confidentiality is what makes the Office so unique as an alternative channel of communication.

- The Ombudsperson will not use an individual's name or raise an issue on his or her behalf unless in the course of our discussions we are granted specific permission.
- Our telephones are separate from the Company's phone system and the phone numbers we contact are not accessible in the billing data provided to the Company.
- We maintain a private computer network separate from that of the Company's.
- The Office keeps no documents or permanent records that identify individuals; we retain only demographic statistics on people who contact us and the types of issues they raise, enabling us to identify trends or concerns within business units or geographic areas.
- We are available, by appointment, to speak with individuals when they are away from work, including evening calls if necessary.
- Individuals may contact the Office anonymously or work with an Ombudsperson to have an issue raised within the Company anonymously.

IS THE OFFICE THE ONLY PLACE I CAN RAISE WORK-RELATED ISSUES?

The Office complements but does not replace the formal issue resolution resources you are encouraged to use when raising issues or concerns at American Express. The primary resource is usually a direct one: your leader. Other resources include: Line management, Human Resources (Employee Online Services), Compliance, Audit, Employee Assistance Program, Employee Representative Bodies, Security, and the General Counsel's Office.

As a guideline, we are an informal and confidential place to go if you:

- Want to discuss suspicions of violations of the Code of Conduct
- Suspect fraud or improper business practices
- Want to discuss possible harassment or discrimination
- See something that presents a potential security risk or conflict of interest
- Want to discuss a concern about improper leadership behavior

10th Year 1994–2004

THE OMBUDSMAN CODE OF ETHICS

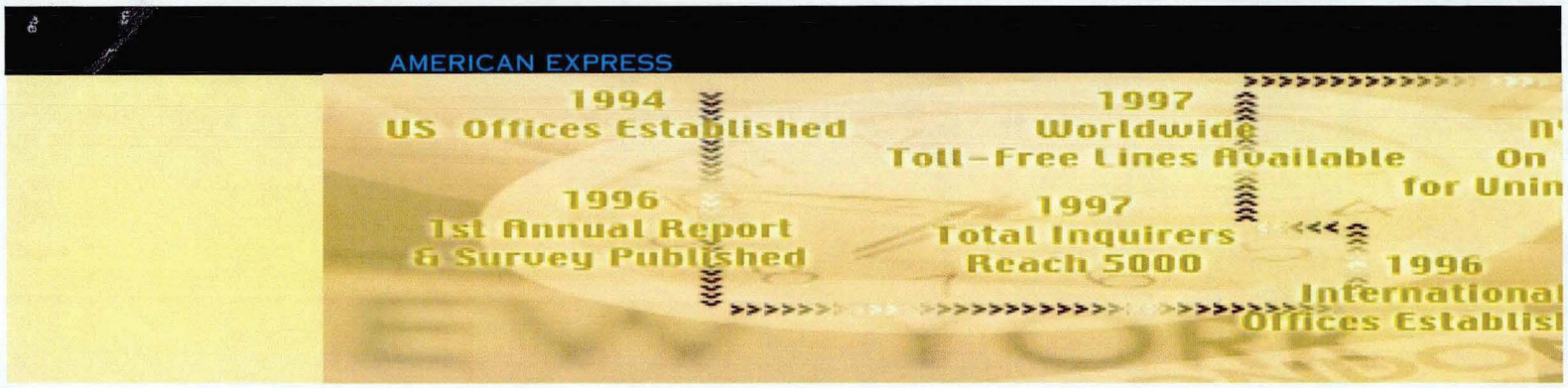
The Ombudsman, as a designated neutral, has the responsibility of maintaining strict confidentiality concerning matters that are brought to his/her attention unless given permission to do otherwise. The only exception, at the sole discretion of the Ombudsman, is where there appears to be imminent threat of serious harm.

The Ombudsman must take all reasonable steps to protect any records and files pertaining to confidential discussions from inspection by all other persons, including management.

The Ombudsman should not testify in any formal judicial or administrative hearing about concerns brought to his/her attention.

When making recommendations, the Ombudsman has the responsibility to suggest actions or policies that will be equitable to all parties.

For more information please visit: www.aexp.com/ombudsperson



Scenarios

ORIGIN OF SCENARIOS

While the Office cannot discuss specific cases, we can provide representative scenarios reflecting the kinds of situations we handle. These scenarios are composite examples and do not represent actual cases.

CHANGING TRENDS - THEN AND NOW

Below are the population demographics of people using the Office of the Ombudspersons:

	1994-1996	2003
Female	65%	64%
Male	35%	36%
Exempt	30%	46%
Non-Exempt	70%	64%

Following are the kinds of issues brought to the Office, expressed as a percentage of the total.

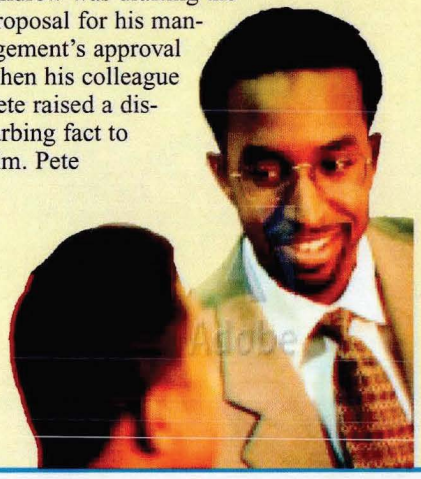
Leadership	48%	35%
Communication		
Respectfulness		
Change Management		
Collaboration & Influence		
Job Itself	21%	32%
Counseling		
Company Practices		
Meritocracy	16%	11%
Compensation		
Severance		
Company Assets	15%	22%
Business Process Control		
Financial Control		
Legal Compliance		
Workplace Policy		
Safe & Healthy Workplace		
Fraud		
Theft & Embezzlement		

ALLIANCES CAN BE TRICKY

Andrew had recently been assigned to a project team for developing a new alliance partner in the rich but emerging market of Zoukais. This market had recently gained independence and the country was at a stage where its constitution and governance structures were still evolving. There were however, many wealthy business groups who had built their businesses through traditional trading of commodities for which their country was famous.

Andrew met several of these potential partners who wined and dined him very well. They were more than willing to provide personal favors to establish an alliance with American Express. After several rounds of meetings, Andrew zeroed in on one firm: Zebbellin Pte. They had a strong balance sheet, excellent connections with government regulators, the resources to deal with difficult market situations or competitors, and a history of over 25 consecutive years in profitable businesses.

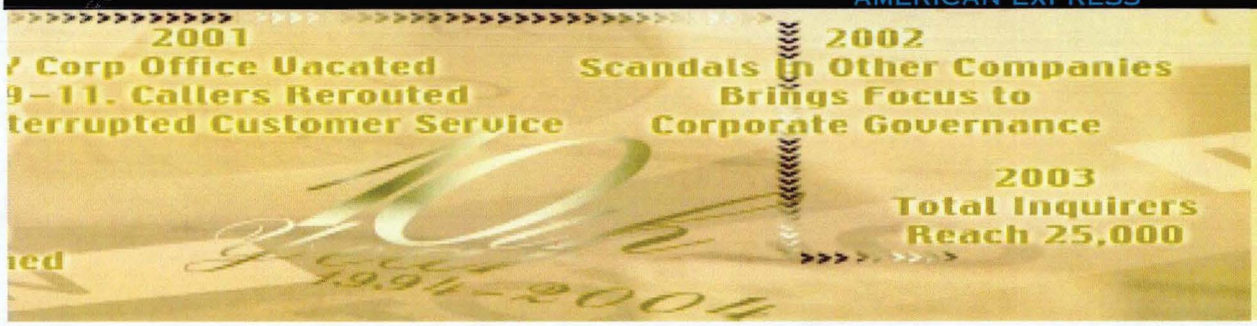
Andrew was drafting the proposal for his management's approval when his colleague Pete raised a disturbing fact to him. Pete informed Andrew he had heard from his connections in Zoukais and that this group's real source of cash flow was drugs, narcotics, and gambling. The hotels, designer boutiques, spas, fine dining restaurants, and finance companies were nothing but a front to cover up their real activities. Andrew was distressed upon hearing this information but felt nonetheless that he could still form a strong, profitable alliance with Zebbelin Pte.



Pete was concerned with Andrew's decision to pursue this proposal and decided to talk confidentially with an Ombudsperson. Pete explained that he was aware of a proposal for alliance with a potential business partner that should not be acceptable under Amex's standards and values. He wanted to report the matter, but was unsure as to who could investigate it. The Ombudsperson and Pete reviewed several options for Pete to report his concerns. Pete decided to give permission to the Ombudsperson to anonymously alert the Head of Business Alliance and the General Counsel's Office. The Ombudsperson relayed the information that Pete had provided.

An independent investigation established that Pete's information was correct. Andrew's proposal was not approved. Andrew was counseled by his leader and scheduled for Brand Training. Pete was very satisfied that no one ever knew that he had reported the issue.

For more information please visit: www.aexp.com/ombudsperson



Scenarios

"CAN'T LOOK THE OTHER WAY"

When Max finally worked up the courage to call the Ombudsperson he still wasn't sure he had a legitimate issue. Several weeks earlier, Max had observed some behavior at a social event for his work unit that made him very uncomfortable. It was well known within the group that two colleagues, Alan and Samantha had been involved with each other but Samantha had recently broken off the relationship. Alan and others had been drinking at this event and began rating their co-workers based on their bodies and sex appeal. The group became loud and boisterous and Max became quite disturbed by the comments being made. At one point Alan said very negative personal things about Samantha as well as about her work performance. Samantha heard these comments and left the event, obviously upset. The tough part of this for Max was that Alan and Max's boss, Henry, had heard the whole thing and did nothing.

When Max brought these events to the attention of the Ombudsperson, they discussed options for escalating Max's concerns. They discussed either going to Human Resources, to Henry's boss or to Henry himself. After discussing the pros and cons of each option, Max decided that the fair thing to do was to let Henry know how uncomfortable he was with these events. Max hoped Henry would take appropriate action. Max understood that if Henry didn't address the events, he still had the option of going to Human Resources or to Henry's boss. Max agreed to follow up with the Ombudsperson after his discussion with Henry.

A few days later, Samantha also called the Ombudsperson to discuss the event she witnessed. The Ombudsperson did not reveal that she already knew about the situation because she had to maintain the confidentiality of the discussion with Max. After reviewing her options, Samantha decided she would directly report the incident to Human Resources who investigated the incident. Alan was given a final warning and Henry was reprimanded, as the Senior Leader, for not taking action to stop the inappropriate behaviors. The Amex Code of Conduct document was also re-distributed to the unit.

2003 RESULTS

- Increased percentage of issues that were high impact/company asset related from 13% in 2001 to 21% in 2003
- Implemented initial stages of a global servicing model
- Visited over twenty Amex locations to build awareness of the Office, listen to concerns and share trends with business leaders
- Implemented first stages of a plan to build awareness of the Office within third party vendors
- Directed inquirers with concerns around harassment and discrimination to appropriate formal resources
- Helped surface issues about:
  - Travel and expense violations
  - Leadership span of control issues
  - Behaviors of joint venture leaders inconsistent with the Blue Box Values
  - Overspending on consultants
  - Security concerns in handling cash
  - Privacy and confidentiality of employee & customer data
  - Improper sales practices
  - Conflicts of interest with external vendors

For more information please visit: www.aexp.com/ombudsperson

Scenarios

CORPORATE GOVERNANCE

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

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

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

YOU CAN'T LIE, ESPECIALLY TO AN AUDITOR

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

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

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

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

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

For more information please visit: www.aexp.com/ombudsperson

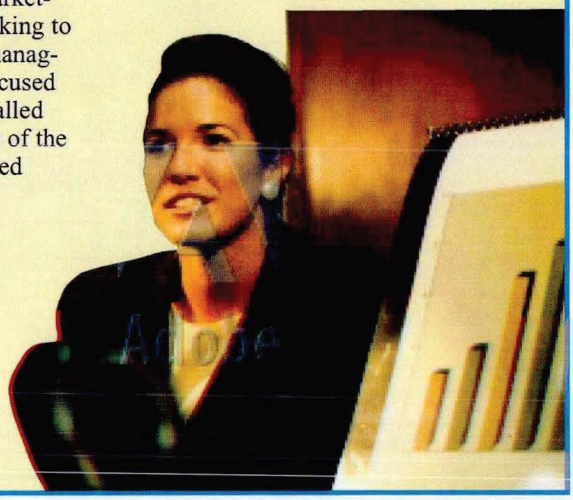
Scenarios

"DISCOUNTING" THE BRAND

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

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

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



AMERICAN EXPRESS' BLUE BOX VALUES

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

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

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

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

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

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

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

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

For more information please visit: www.aexp.com/ombudsperson

Contacting the Office of the Ombudspersons

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

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

The Assistant can also arrange an interpreter if required.

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

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

U.S. & CANADA

Toll Free:
1-800-297-1010

Confidential Fax:
1-212-267-1626

E-mail: amexombud@aol.com

LATIN AMERICA

Toll-free numbers:
Argentina 0 800 5554 288 + 888 231 0373
Brazil 0 800 890 0288 + 888 231 0373
Chile 123 00 312 + 888 231 0373
Mexico 001 800 658 5454 + 888 231 0373
Uruguay 000 410 + 888 231 0373
USA (including Puerto Rico) 888 231 0373

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

Confidential Fax:
1-305-231-0372

E-mail Address:
ombudspersonLAC@aexp.com

EUROPE, MIDDLE EAST, AFRICA

Freefone Numbers:
Austria 0800 201 821
Bahrain* 8000 44
Belgium 00 800 297 12345
Czech Republic* 00 42 00 44 01
Denmark* 800 1 02 90
Egypt* 365 36 44 (Cairo)
02 365 36 44 (Elsewhere)
Finland 0800 11 0440
France 00 800 297 12345
Germany 00 800 297 12345
Greece 00 800 4412 0013
Hungary 00 800 12630
Ireland 00 800 297 12345
Italy 800 780045
Lebanon* 425 044
Luxembourg 00 800 3496
Netherlands 00 800 297 12345
Norway 00 800 297 12345
Poland 00 800 441 1269
Russia 737 08283
Slovakia* 08000 044 01
South Africa* 0800 99 0144
Spain 900 99 8913 (Spanish speaking Ombudsperson 900 99 00 11/888 231 0373)
Sweden* 00 800 297 12345
Switzerland 00 800 297 12345
Turkey* 00 800 44 1177
U.A.E.* 800 11 44
UK 00 800 297 12345
For all other countries: +44 1273 577000

*To contact our office, dial the access code as quoted for the country you are in. When prompted by a recorded message OR when asked by an Operator for account number and pin, use this number 235 965 916 386, and you will be connected to the Office of the Ombudspersons.

Confidential Fax:
+44 1273 600392

E-mail Address:
ombudsperson.emea@aexp.com

JAPAN, ASIA, PACIFIC, AUSTRALIA

Direct Phone:
+65 6392 8390

Confidential Fax:
+65 6298 0640

Toll Free Numbers
Australia 1800 999 616
PR China 00 800 297 12345**
(Shanghai, Beijing Guangzhou, Shenzhen)
108 650* (other cities)
Hong Kong 001 800 297 12345**
Indonesia 0800 178 1234
India 1600 33 0555
(BSNL and MTNL lines only)
Japan 00531 61 0004 (English speaking only)
0044 2261 2122 (Japanese voicemail)
Malaysia 00 800 297 12345**
New Zealand 00 800 297 12345
Pakistan 00 800 11065*
Phillippines 00 800 297 12345**
South Korea 00368 610 0001
Sri Lanka 430 800* (Colombo metropolitan area)
01 430 800* (Outside Colombo metropolitan area)
Taiwan 00 800 297 12345**
Thailand 001 800 297 12345**

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

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

**Service may only be available from phones with International Direct Dial facility (IDD).

E-mail Addresses:
ombudsperson.japa@aexp.com
ombudsperson_japa@hotmail.com
ombud-mailhub1

Printing provided by IKON at American Express Service Center – Greensboro

1025 Connecticut Avenue, NW, Suite 200
Washington, DC 20036-5425

tel 202.293.4103
fax 202.293.4701

www.ACCA.COM

February 10, 2004

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

Submitted via email:
pubaffairs@ussc.gov

Attn: Public Affairs

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

Ladies and Gentlemen:

On behalf of the 16,000 individual in-house counsel members of the Association of Corporate Counsel (ACC) (formerly known as the American Corporate Counsel Association), we thank you for the opportunity to submit comments for your consideration as you review and consider the incorporation of the proposed amendments of the Advisory Group on the Organizational Sentencing Guidelines to the US Sentencing Guidelines, Chapter 8.[1]

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

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

behavior.

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

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

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

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

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

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

relationship between compliance and deterrence outside a purely punitive context.

Perhaps the Sentencing Commission and the Sentencing Guidelines as applied by courts are well-positioned to help control outcomes flowing from those who agree with the precept that compliance is desirable, but some suggest that the Guidelines are poorly-situated to address deterrence of those who are intent on acting outside of the preventive law systems established within the company. Heaping greater punitive standards and increased accountability on the corporation as a whole for the undeterred criminal intent of the few may not do anything to stop or deter that which we all agree is most damaging to the company's legal health. It is difficult to legislate morality in any fashion, so we should not respond to an increase in high visibility corporate crimes and prosecutions by immediately presuming that more legislation with greater sanctions will solve our problems.

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

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

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

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

There are over 300,000 federal regulations that subject companies to criminal liability.

That does not include state statutes and non-criminal regulations and violations which companies must try to contemplate when designing compliance initiatives. If the Commission is concerned about the increase in corporate wrongdoing and prosecutions in recent years, it should be doing more to work with prosecutors and companies to define those areas of weakness in the corporate armor and focus laser-like attention to those issues. The Commission should not expand the responsibility of corporate compliance officials to anticipate every conceivable violation possible (and then risk assess it, train for compliance with it, and measure results and adjust the system to respond to anything less than 100% success). Exponential expansion of the number of laws and regulations that could subject a company to entity-threatening penalties and criminal liabilities will only succeed in "dummying down" the most important compliance activities that companies should be focusing on implementing in an effort to cover every base, no matter how minor or unlikely it might be to cause problems of a material nature.

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

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

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

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

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

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

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

comment be added to the guidelines:

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

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

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

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

revealed to the government (either voluntarily or under duress), the privilege cannot be applied against others who wish to make the same foray into confidential files.

If the Commission believes that in-house lawyers can have an important role in the creation, development, maintenance, and reporting of compliance initiatives, then we encourage the Commission to recognize that the attorney-client privilege is the foundation of the attorney-client relationship, as well as the foundation of the trust that clients have in the counsel that their lawyers provide them.

Other Issues Before the Commission

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

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

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

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

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

Sincerely,

Susan Hackett
Senior Vice President and General Counsel

Comments of the Association of Corporate Counsel
United Sates Sentencing Commission
March 1, 2004

BEACON COMPLIANCE SERVICES, LLC

P.O. Box 2484
Stafford, TX 77497-2484
713-298-5384

February 27, 2004

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

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

Dear Commissioners:

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

Comment 2 regarding high-level individuals.

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

Comment 3 regarding increasing reduction to 4 points.

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

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

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

Final comments.

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

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

Deanna Parmenter

Beacon Compliance Services, LLC

deannaparmenter@yahoo.com

713-298-5384

DEFENSE
INDUSTRY
INITIATIVE

ON BUSINESS ETHICS AND CONDUCT

Richard J. Bednar, DII Coordinator
Crowell & Moring LLP
1001 Pennsylvania Avenue NW, Suite 1000
Washington, DC 20004-2595
202/624-2619; Facsimile 202/628-5116
rbednar@crowell.com

February 10, 2004

0358:dar
022365.0000012

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

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

Dear Commissioners:

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

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

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

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

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

---

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

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

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

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

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

Sincerely yours,

Richard J. Bednar

cc: Paula Desio , USSC (priority mail)

Business Roundtable

1615 L Street NW
Suite 1100
Washington, DC 20036-5610

Telephone 202.872.1260
Facsimile 202.466.3509
Website businessroundtable.org

February 27, 2004

United States Sentencing Commission
1 Columbus Circle, NE
Suite 2-500
Washington, DC 20002-8002

Dear Commissioners:

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

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

Sincerely,

John J. Castellani

February 27, 2004

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

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

Introduction

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

---

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

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

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

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

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

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

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

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

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

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

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

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

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

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

---

[4] *See* 1988 Comments at 19.

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

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

[7] *Id.* at 8.

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

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

---

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

[9] *Id.* at 18.

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

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

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

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

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

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

---

[10] 28 U.S.C. § 991(b)(1)(A).

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

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

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

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

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

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

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

---

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

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

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

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

---

[13] § 8B2.1(a).

[14] § 8B2.1(b) (emphasis added).

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

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

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

---

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

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

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

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

---

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

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

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

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

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

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

---

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

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

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

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

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

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

---

[20] § 8A1.2, Application Note 3(k).

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

---

[21] Advisory Group Report at 70.

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

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

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

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

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

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

---

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

[24] *Id.*

language largely codifies the Department of Justice's position regarding waivers of the attorney client privilege. [25]

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

---

[25] *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.

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. [26] 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.

---

[26] 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

185 Berry Street
Suite 300
San Francisco, CA 94107-1739
(415) 438-5500 *telephone*
(415) 438-5724 *facsimile*

February 20, 2004

U.S. Sentencing Commission
One Columbus Circle, NE
Suite 2-500
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'

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."

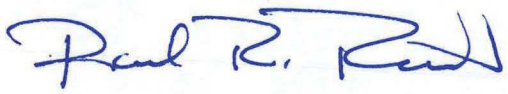
From a historical perspective, it is important to remember that since the Ninth Circuit decision in United States v. Hilton Hotels Corp. 467F.2d1000 (9th Circuit 1972), cert. denied 409 U.S. 1125(1973), corporations have been found liable for the criminal conduct of their agents. Such liability has been 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.

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,



Daniel R. Roach
VP Compliance and Audit
Catholic Healthcare West

Coca-Cola Enterprises

NORTH AMERICAN GROUP

13727 Noel Rd.
Dallas, TX 75240
214·253·5600
www.cokecce.com

February 23, 2004

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

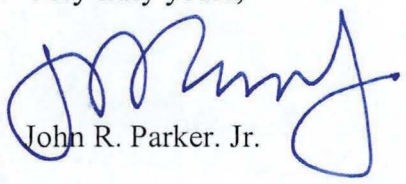
would be to require that, as part of an organization's "system," it have a means whereby employees and agents may "confidentially seek guidance regarding potential or actual violations of law without fear of retaliation … ."

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.

Seattle University
FOUNDED 1891

John W. Dienhart
The Frank Shrontz Chair for Business Ethics
Albers Business Ethics Initiative, Director
Northwest Ethics Network, Director

Albers School of Business and Economics
900 Broadway
Seattle, Washington 98122-4340
U.S.A.
Phone: (206) 296-5714
Fax: (206) 296-2083
dienharj@seattleu.edu

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

JUSTIFICATION
for
Suggested Changes to Proposed Amendments to FSGO

It is questionable whether a compliance program can be truly effective if it does not have an ethics component.
- - - Diana E. Murphy[i]

The changes we have suggested to the Proposed Amendments to the FSGO can be divided into three general categories: Omission of Ethics, Expansion of Ethics and Compliance Program Purview, and Measurement of Program Effectiveness. For each of these categories, we will provide a justification for the suggested changes.

Omission of Ethics

There is no mention of "ethics" in the Proposed Amendments *even though*

- ethics was discussed extensively in the Advisory Group's Recommendations for Proposed Amendments, primarily in relation to the new developments in the arenas of compliance, ethics, and corporate governance with which the Advisory Group was trying to "synchronize" its recommendations (though *not* in the amendments and commentary it actually recommended);
- ethics figures largely in the "new developments" mentioned by the Advisory Group. For example, the SEC, Sarbanes-Oxley Act of 2002, and the NYSE all encourage or require their constituents to move beyond a compliance-based program to an ethics/values/ integrity-based program for the prevention of fraud, waste, and abuse. In addition, the FASB has recently proposed a rule that would change its approach from rule-based to principle-based. All of these "new developments," although they preceded the Proposed Amendments, are bolder, more innovative, and consistent with best practices, than the Proposed Amendments;
- ethics is the real tenor of "organizational culture" as enunciated in the Proposed Amendments. The concept of "organizational culture" that is apparently substituted for "ethics" simply begs the question of how an organization gets "beyond compliance" and how it measures whether its culture "promotes compliance with law." An organization can strengthen its compliance program by enforcing more compliance with law ever more rigorously (and penalties for noncompliance), but in doing so it risks turning itself into a police state. Alternatively, it can situate compliance in ethics inasmuch as the laws that are the object of compliance are already grounded in ethical principles. To do otherwise only reinforces what William Widen in a recent article in *The Business Lawyer* refers to as "technical compliance"[ii]—or the Office of the Inspector General calls a "paper program";
- ethics is no more "fuzzy" than the law. Both require interpretation, ethics within the organization as business decisions are made, and law in the judicial system by attorneys (and at much greater cost to the organization and public). Furthermore, the reluctance to refer to ethics in the Proposed Amendments seems to be based, in part, on the mistaken notion that by doing so they obviate the need for "...prosecutors to litigate and judges to determine whether an organization has a 'good set of values' or 'appropriate ethical standards.'[ii] This is simply not the case. Prosecutors and judges would still have to make

a separate determination about the effectiveness of the organizational culture in promoting compliance with law. In contrast, they could determine the effectiveness of the organization's *ethics- compliance program* based on

1) the existence of a statement of ethical principles and the integrated ethics-compliance interventions taken by the organization to realize them (and, thus, achieve compliance with the letter *and* the spirit of the law) and/or
2) the resulting, tested/ observed changes in knowledge, attitudes/ values/beliefs/norms, and short-term practices among employees and, consequently, the organization.

The latter is preferable, of course, because due diligence is only a tenth of the battle—the proof is in the pudding. Furthermore, prosecutors and judges would have to do no more than they are already doing with regard to evaluating an compliance programs. That is, they would simply

1) ask for documentation that explains the program,
2) compare the program against existing model standards, and
3) then assess the extent to which the organization has effectively implemented its program.

Each of these steps fits with current and proposed approaches to measuring compliance program effectiveness.

- ethics could be integrated into the Proposed Amendments *without breaking new ground* for the Sentencing Commission, thereby raising questions about its mission. That ground was broken with the original, 1991 guidelines when the Sentencing Commission shifted its attention from looking solely at the crime, its perpetrators, and the organization as a whole—to looking at ways to prevent the occurrence of crime. Compliance programs went part of the way (but, given the epidemic of corporate in the last several years, clearly not far enough); ethics goes the rest of the way. The integration of ethics into compliance programs only enhances those programs and increases their effectiveness.

The time is ripe for the Sentencing Commission to maintain its leadership in the prevention of corporate crime by giving ethics its rightful place in the Proposed Amendments.

Expansion of Ethics and Compliance Program's Purview

If we've learned anything in the last several years about prevention of corporate crime, it is that ethics and compliance programs need to drill deeper and climb higher in the organization. When they do not, the result is often what Widen describes with respect to Enron:

> The cultural problem revealed by Enron ultimately is not subject to correction by teaching lawyers more accounting, fine tuning rules governing the use of "gatekeepers" in corporate matters, or requiring and expecting more from independent directors, though all these measures would help in a small way. The problem is that corporate and legal culture has lost all sense of right and wrong. Norms and business behavior have evolved so that compliance with the positive law is the so-called standard of ethical conduct—a role for which positive law is ill-suited.[iv]

For this reason, we have suggested changes to the Proposed Amendments that expand the ethics and compliance program into all levels and functions of the organization (total internal market penetration, if you will), particularly the decisions made by officers and directors.

For example, we recommend that

- the Ethics and Compliance Officer be a *real* officer of the corporation with full rights and responsibilities in all executive decisions.
- this individual have academic and/or certificated training in both ethics and law (though she need not have a PhD in ethics or a JD in law).
- the Sentencing Commission consider including language in the commentary to the proposed "auditing and monitoring amendment" that suggests an "ethical impact report" for all major strategy and financial decisions. Many an Enron could have been prevented if an ethical impact report would have laid bare *in a documented fashion* the potential violations of ethical principles and law *before* a decision was made to go forward.

Finally, the effectiveness of an ethics and compliance program is not only measured in terms of the channels and messages it uses for communicating with employees; it is also effective in terms of the ways and extent to which it institutionalizes itself. In fact, it the literature is right, the latter may be much more significant than the former. One way to institutionalize itself is the command-and-control structure that sets up the program, designs its policies and procedures, and communicates them to the organization. The other—and far more effective—is the participatory structure that seeks the participation of employees, managers, officers, and directors (and other stakeholders, as appropriate) in the design, implementation, and evaluation of the program. Models for this latter structure include The Conference Model, Future Search, and Whole System Change. Thus, if an ethics and compliance program is going to be truly effective, it will need to become simply the way the organization goes about its business.

Measurement of Program Effectiveness

- The Proposed Amendments fail to enunciate any real measures of program effectiveness. Instead, they add more due diligence criteria, which, in the final analysis, cannot distinguish between a "paper program" and a truly effective program (one that follows the letter of the law and one that captures its spirit). Even the highlighting of the Health Care Compliance Association's criteria[v] does little to advance the discussion since these criteria simply measure more refined aspects of due diligence. Knowing whether something occurred or how many of it occurred, however, is not the same as knowing the impact and outcome of that occurrence.
- The Proposed Amendments, then, ignore written and verbal testimony that delineated strategies for measuring impact, that is, changes in knowledge, attitudes/values/ beliefs/norms, and short-term practices. At the very least, these might include pre-and post-testing of training sessions and periodic, self-reported surveys of all employees on key, organizational risk and protective factors for fraud, waste, and abuse. It would not be sufficient, for example, to know that a self-described attorney went to law school (or, to represent another common measure, liked it a lot); we'd want to know that she had passed both law school and the bar exam.
- There are methodologically sound ways, contrary to the opinions expressed in the document,[vi] to measure the effectiveness of ethics-compliance intervention—and even to relate these impact measures to the desired outcomes, namely, the prevention of fraud, waste, and abuse. Program evaluators and behavioral scientists would prove very helpful in this endeavor. At the very least, they could identify proxy measures that are strongly correlated with the incidence of various types of corporate corruption. It is never enough to say that just because we provided compliance training to 3,000 employees that the training

had any impact on them—or achieved the organizational goals of preventing violations of law.

---

[i] Diana E. Murphy, "The Federal Sentencing Guidelines for Organizations: A Decade of Promoting Compliance and Ethics," *Iowa Law Review* 87 (2002): 716.
[ii] William H. Widen, "Enron at the Margin," *The Business Lawyer* 58 (May 2003): *passim*.
[iii] Advisory Group on Organizational Guidelines (AGOG), "Recommendations for Proposed Amendments for Federal Sentencing Guidelines for Organizations" (October 27, 2003): 54.
[iv] Widen 962-3.
[v] AGGO 76ff.
[vi] AGOG 35ff.