internal reporting and more detailed oversight requirements;[6] provide compliance training;[7] periodically evaluate the effectiveness of their compliance programs;[8] provide incentives to employees to follow compliance policies,[9] in addition to enforcing compliance standards through disciplinary measures; and conduct ongoing risk assessments.[10]

These various changes reflect sound compliance principles that have crystallized since the initial adoption of the Organizational Guidelines, and we support their incorporation into the Guidelines.[11] At the same time, we hope the USSC will emphasize that - - within the parameters set by this new and more rigorous framework - - flexibility is still essential for companies to build compliance programs that are genuinely effective. As the USSC has explained previously, the Organizational Guidelines were designed "to encourage flexibility and independence by organizations in designing programs that are best suited to their particular circumstances."[12] Encouraging flexibility and independence is equally critical today. Without the freedom to use their best judgment - - to develop customized compliance programs tailored to their individual needs and circumstances, their past experience with compliance strategies that have proved successful or disappointing, and their insights on innovations likely to strengthen their compliance efforts - - companies would lack "ownership" of their compliance programs and may not feel empowered to design their programs for maximum effectiveness. The Organizational Guidelines have been "a real success story for the United States

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6 Proposed § 8B2.1(b)(2) requires that: (1) the organizational leadership be knowledgeable about the content and operation of the compliance program; (2) the organization's board of directors be knowledgeable about the content and operation of the program, and exercise reasonable oversight over implementation and effectiveness of the compliance program; (3) specific individuals within high-level personnel have overall responsibility to oversee the compliance program; and (4) these individuals provide periodic reports on compliance matters to the organization's board. The current Guideline commentary only requires (3).

7 Proposed § 8B2.1(b)(4) makes compliance training a requirement, as opposed to an option, and extends the training requirement to the organization's upper levels as well as its employees and agents.

8 See proposed § 8B2.1(b)(5).

9 See proposed § 8B2.1(b)(6).

10 See proposed § 8B2.1(c).

11 Recognizing that the amended Guidelines would create "heightened requirements" for an effective compliance program, the USSC asked whether the credit organizations receive for effective compliance programs should be increased from three to four points. 68 Fed. Reg. at 75359-60. Because these heightened requirements would "raise the bar" for effective compliance programs in a number of significant respects, we believe such a change is warranted. Coupling heightened requirements with a modest increase in the incentives for satisfying these requirements would be a useful step.

12 An Overview of the Organizational Guidelines, Paula Desio, Deputy General Counsel, United States Sentencing Commission, available on the USSC website, http://www.usc.gov.

Sentencing Commission in its work to deter crime and encourage compliance with the law,"[13] and the Guidelines' balance between structure and flexibility has been an important part of that success story. We believe the amended Guidelines can best stimulate ongoing improvements in companies' compliance practices if accompanied by commentary emphasizing that their revised criteria must be interpreted in the same flexible spirit that has characterized the Guidelines since their inception.

One example of why flexibility is important involves the proposed requirement to give employees "appropriate incentives to perform in accordance with [the compliance program]."[14] Companies must be able to implement this provision in a way that reinforces their efforts to make compliance an ingrained part of the organizational culture. We would be concerned with any interpretation of this requirement that mandated "bonuses" for adherence to the law and company policy, which should be a basic obligation of every company employee rather than something "above and beyond" employees' normal duties. Individual companies need the freedom to design incentive systems carefully, so as to ensure that their incentive systems do not inadvertently undermine or dilute the message that compliance with the law and company policy is expected of all employees as an ordinary part of their day-to-day responsibilities.

II. Encouraging Self-Policing

Vigorous self-policing by organizations - - the "first line of defense" in the effort to detect and prevent violations of the law - - is critical to achieving the goals of the Organizational Guidelines. The proposed amendments include two changes that would encourage self-policing, which we strongly support. We hope the USSC will also consider additional measures that would complement these changes: creating a presumption that a company that voluntarily discloses self-discovered violations has an effective compliance program; removing current Guideline language that reduces the incentive for effective compliance programs by tying the credit for an effective compliance program to a requirement for self-reporting; and working with stakeholders to address the "litigation dilemma" confronting companies that embrace self-policing.

Companies today face significant penalties for engaging in candid self-analysis and for reporting self-discovered improprieties to the Government. The USSC Ad Hoc Advisory Group's report on the Organizational Guidelines[15] provides a thoughtful analysis of this problem. According to the Advisory Group, "[a] central objective of the organizational sentencing guidelines is to deter criminal conduct by creating incentives

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[13] Diana E. Murphy, The Federal Sentencing Guidelines for Organizations: A Decade of Promoting Compliance and Ethics, 87 Iowa L. Rev. 697, 719 (Jan. 2002).

[14] Proposed § 8B2.1(b)(6).

[15] See Report of the Ad Hoc Advisory Group on the Organizational Sentencing Guidelines (Oct. 7, 2003), available on the USSC website, http://www.usc.gov.

for voluntary compliance and by rewarding organizations that help the government discover misconduct."[16] However, the "litigation dilemma" creates countervailing incentives that can discourage vigorous self-policing. As the Advisory Group explained:

> [T]he same information that an organization should use to improve its compliance and training efforts is also of potentially enormous value to those who may become involved in litigation with the organization, whether it be administrative, civil or criminal litigation. This gives rise to the "litigation dilemma" and often a justifiable reluctance by many organizations to "dig deep" for fear of creating a roadmap for litigants against it.[17]

In elaborating on the risks of effective compliance programs, the Advisory Group noted, for example, that "audits and investigative reports may become litigation roadmaps for potential adversaries" and even compliance training programs are "potentially riddled with peril because of the litigation dilemma."[18] Moreover, since "[u]nder present law, compliance program and audit materials are rarely confidential," they are often subject to disclosure. "[I]f such disclosures are routinely allowed," the Advisory Group warned, "they will undermine the law enforcement policies upon which the organizational sentencing guidelines . . . are premised: that corporate good citizenship can be induced through incentives that promote self-policing."[19] In short, the litigation dilemma "is recognized as one of the major greatest impediments to the institution or maintenance of truly effective compliance programs."[20]

A closely related problem addressed by the Advisory Group, which exacerbates the litigation dilemma, is that companies that voluntarily disclose suspected misconduct to the Government may be required to turn over privileged documents to the Government as a condition of cooperation. However, as the Advisory Group noted, voluntary disclosure of privileged documents may waive the privilege as to all parties who seek the disclosed documents.[21] Consequently, even otherwise-privileged documents generated by a company's voluntary self-policing efforts may become available to litigation adversaries and harm the company. All of these problems penalize companies for

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16 Id. at 92.

17 Id. at 109.

18 Id. at 108, 116.

19 Id. at 117.

20 Id. at 6.

21 Id. at 118.

building strong compliance programs and work against the USSC's goal of rewarding vigorous self-policing.

The USSC proposed two changes designed to help rectify these problems. First, the Guidelines currently require "disclosure of all pertinent information known by the organization" to obtain the 5-point credit for cooperation with authorities.[22] This "all pertinent information" standard requires disclosing enough information to allow law enforcement to identify the nature, extent, and individuals involved in criminal conduct. The proposed amendments clarify that meeting this standard does not necessarily require waiver of the attorney-client and work product privileges.[23] In addition, the proposed amendments would add a similar clarification concerning downward departures for providing substantial assistance to Government authorities.[24] We strongly support these proposals and hope the USSC will also take further steps to bolster the incentives for voluntary self-policing. As noted earlier, we have three specific suggestions in this regard.

First, the current and proposed Guidelines specify certain circumstances that create a presumption that an organization's compliance program is not effective, but do not specify any circumstances that create the opposite presumption. To provide stronger incentives for self-analysis and self-disclosure, we suggest adding a presumption that a compliance program is effective if the company voluntarily self-reports a violation of law to the Government. Where a violation by any company employee (including high-level personnel) is discovered by the company's own efforts and voluntarily disclosed to authorities, the company should benefit from a rebuttable presumption that its compliance program is effective.

Second, organizations that unreasonably delay reporting legal violations to the Government are now penalized, since they are prohibited from receiving credit for effective compliance programs.[25] The USSC noted that "elimination of this prohibition may be appropriate" in light of the fact that § 8C2.5(g) provides a credit for cooperation with Government authorities (including self-reporting), and requested comment on this issue.[26] We agree that self-reporting should be eliminated as a requirement to receive credit for an effective compliance program, and encourage the USSC to do so in the final amended Guidelines. Given the current disincentives for self-policing, fairness suggests that organizations should be rewarded for self-reporting, not denied credit for an effective compliance program if they fail to self-report. Moreover, the risks that may accompany

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22 See current § 8C2.5(g) and accompanying Commentary 12.

23 See proposed Commentary 12 to § 8C2.5(g).

24 See proposed Commentary 2 to § 8C4.1.

25 See current § 8C2.5(f).

26 68 Fed. Reg. at 75359.

self-reporting - - Government requests that the company turn over privileged documents, which may waive the privilege as to all potential litigation adversaries - - means that conditioning the credit for effective compliance programs on self-reporting diminishes the incentive for developing effective compliance programs that can prevent violations from occurring.

Finally, the USSC's Advisory Group recommended that the USSC become a "fulcrum to advance the debate [regarding the litigation dilemma] among policy makers."[27] Specifically, the "Sentencing Commission should consider how . . . it can advance and further the dialogue among the branches of government and interested members of the public," since "a dialogue seeking to resolve the litigation dilemma is fundamental to the full and effective operation of the organizational sentencing guidelines and public polices that they are intended to advance."[28] We endorse this recommendation and encourage the USSC to act on it.

III. Ethics-Based Approach to Compliance Programs

The proposed Guidelines would require that organizations exercise due diligence to prevent and detect violations of law and "otherwise promote an organizational culture that encourages a commitment to compliance with the law."[29] In its synopsis describing the amendments, the USSC explained that this proposal "is intended to reflect the emphasis on ethics and values incorporated into recent legislative and regulatory reforms, as well as the proposition that compliance with all laws is the expected behavior within organizations."[30] The companies in our group strongly support an ethics-based approach to compliance. Nevertheless, "ethics and values" are terms that might inject an unwarranted degree of subjectivity into Government determinations about whether a company's compliance program was effective; whether the company acted diligently to prevent and detect violations of announced legal standards is a more straightforward and objective inquiry. Consequently, we hope the USSC will emphasize the textual requirement that companies "promote an organizational culture that encourages a commitment to compliance with the law,"[31] and make clear that companies have the flexibility to incorporate ethics-based approaches into their compliance programs in a manner best suited to their individual circumstances.

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27 Advisory Group Report at 129.

28 Id.

29 Proposed § 8B2.1(a).

30 68 Fed. Reg. at 75355.

31 Proposed § 8B2.1(a) (emphasis added).

IV. Misconduct By High-Level Personnel

Under the proposed amendments, high-level personnel participating in, condoning, or being willfully ignorant of an offense would create a rebuttable presumption that the organization's compliance program was ineffective, instead of the current conclusive presumption.[32] We support this change. Organizations should be allowed to demonstrate that their compliance programs are effective, and to receive credit for the program if they do so, even in circumstances where an individual at a high level of the organization engaged in misconduct or malfeasance.

The USSC requested comment on: (1) whether the conclusive presumption should continue to apply in the context of large organizations; and (2) whether the rebuttable presumption should apply in the context of small organizations "in which high-level individuals within the organization almost necessarily will have been involved in the offense."[33] We believe it is unfair and counterproductive to apply the conclusive presumption to any organization. We understand the USSC's concern that even a rebuttable presumption can create special problems for small companies, and believe that eliminating the rebuttable presumption for small companies may be an appropriate step to address this concern.

V. Responsibility For Compliance Program Implementation

The proposed amendments add new language stating that "specific individual(s) within high-level personnel [i.e., the compliance officer] shall be assigned direct, overall responsibility to ensure the implementation and effectiveness" of the compliance program,[34] whereas the current Guidelines only require that "[s]pecific individuals within high-level personnel of the organization . . . have overall responsibility to oversee compliance."[35]

We are concerned that the proposed language could be misinterpreted to relieve company managers of their responsibilities for ensuring the implementation and effectiveness of the compliance program - - essentially making compliance efforts a discrete area that can be assigned exclusively to compliance professionals, rather than an integral part of the whole organization's culture. For a compliance program to succeed, all of the organization's operating management must embrace the program, feel a personal investment in its success, and assume accountability for its effective implementation. The compliance officer has critical duties - - providing leadership and

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32 See proposed and current § 8C2.5(f).

33 68 Fed. Reg. at 75359.

34 See proposed § 8B2.1(b)(2).

35 Current Commentary to § 8A1.2.

coordination of the compliance program, monitoring the program's performance, and keeping the company's management and board apprised of program implementation issues - - but cannot be held exclusively responsible for the overall success or failure of the program. We urge the USSC to clarify this point, emphasizing that effective compliance programs call for an organization-wide commitment involving all of the company's management.

VI. Proposed Language on "Model" Compliance Practices

The proposed amendments include language suggesting that organizations' compliance programs be measured against "model" practices. Specifically, a proposed commentary states that the precise actions required for an effective compliance program depend partly on "compliance practices and procedures that are generally accepted as standard or model practices for businesses similar to the organization."[36] By contrast, the current Guidelines provide that failure to follow "applicable industry practice" weighs against the finding of an effective compliance program.[37]

Measuring compliance programs against industry practice is an important means to assess effectiveness. However, since industry guidelines describing "model" practices are often aspirational documents purposely designed to go beyond applicable industry standards - - to promote new approaches that would advance the state of the art in the compliance arena - - requiring compliance with these models is an unwarranted step that could actually discourage their creation. These aspirational models provide an important impetus for improvements in industry compliance practices, and should not be discouraged by making them mandatory. Industry groups may hesitate to develop model guidelines if they fear that the guidelines will be transformed into legal requirements, and there is no basis for a presumption that a company's compliance program is not effective unless it represents a "model" program. Instead, a company's adoption of model compliance practices should create a presumption that its compliance program is effective. We believe the "model" language in the proposed commentary to § 8B2.1 could be counterproductive, and should therefore be deleted. To advance the USSC's goals, industry groups should be encouraged to develop guidelines describing and promoting model compliance practices, and companies that adopt these model practices should be affirmatively rewarded for doing so.

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[36] Proposed Commentary 2(A) to § 8B2.1 (emphasis added.)

[37] Current Commentary to § 8A1.2.

We hope that these comments will be useful to the USSC. We appreciate your consideration of these comments, and appreciate all of your efforts in this critical area.

Sincerely,

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February 27, 2004

VIA HAND DELIVERY

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

Re: 2004 Proposed Amendments and Issues for Comment

Dear Commissioners:

We write on behalf of the Practitioners Advisory Group to address the notice of proposed amendments and issues for comment published in the Federal Register notices of January 14, 2004. As always, we view our primary role as assisting the Commission by drawing on our expertise as defense attorneys to respond to the issues for comment and specific amendments proposed by the Commission.

I. Proposed Amendments to Chapter 8 (Amendment #2)[1]

Initially, the PAG applauds the Commission for the formation of this Ad Hoc Advisory Group. From our perspective, this is sentencing policy-making at its best, and it stands in unfortunate contrast to the process that has led to many of the recent amendments that have resulted from Congressional directive. We also wish to compliment the Ad Hoc Advisory Group on its excellent work product. It is refreshing to see sentencing policy formulated through a process that brings together experienced individuals from different backgrounds and ideological perspectives. Although we do not necessarily agree with all of the Group's recommendations, we hope that the Group's success can serve as a model for future policy-making in this arena. We do wish to provide input on the four issues for comment:

[1] The PAG expresses its appreciation to Eugene Illovsky and Greg Smith for their assistance in preparing this portion of our submission.

A. Eliminate the Automatic Preclusion for Unreasonable Delay.

Under U.S.S.G. § 8C2.5(f), an organization cannot receive the three point culpability score reduction if it "unreasonably delayed reporting the offense to appropriate governmental authorities." The proposed amendment retains that prohibition in subsection (f)(2), even though the clear thrust of amended § 8C2.5(f) is the adequacy of the organization's compliance program.

The prohibition should be removed. An organization's delay in reporting is sufficiently considered in the guideline's subsection explicitly addressed to such self-reporting, U.S.S.G. § 8C2.5(g). Under that section, an organization cannot get the five point culpability score reduction for self-reporting and acceptance of responsibility if it does not "report[] the offense to appropriate government authorities" within a "reasonably prompt time."

An organization with an excellent compliance program may, for some reason, delay its self-reporting of the violation. That decision, if later deemed unreasonable, may not necessarily reflect on inefficacy of the organization's program to "prevent and detect violations of law." It is proper to have reporting delay be the subject of subsection (g) and remove it from subsection (f).

B. High-Level Personnel Involvement Should Create a Rebuttable Presumption.

If certain high-level personnel participated in, condoned, or were willfully blind to the offense, § 8C2.5(f) automatically precludes the three-point culpability score reduction for an effective compliance program. The proposed amendment changes the automatic preclusion to a rebuttable presumption that the organization's compliance program was not effective.

The PAG believes the proposed amendment, reflected in subsection(f)(3), correctly treats the issue of high-level employee involvement. The PAG believes the Commission should not try to distinguish further between 'large' and 'small' organizations for the purpose of leaving some version of the automatic preclusion in place. An "automatic" rule will invariably lead to unjust results in some cases.

An automatic preclusion also unnecessarily restricts judicial discretion. Removing it gives judges the discretion to consider each organization's circumstances, and the particulars of the higher-level employee involvement, on a case-by-case basis. The organization should have the opportunity to present its case to the judge as to how it can rebut the presumption in those particular circumstances. Judges will no doubt exercise that discretion in light of precisely those factors recognized to be important, such as the organization's size and the number and type of high-level employees involved in the offense.

C. Increase The Culpability Score Point Reduction.

The PAG supports increasing the culpability score reduction from three to four points. Awarding more points for an effective compliance program would not only appropriately reflect the heightened requirements of U.S.S.G. § 8B2.1, but would also create an incentive for organizations to examine the adequacy of their current programs.

D. Factors Relating to Small and Mid Size Organizations.

Chapter Eight's impact on small and mid-size companies requires further study. Historically, the great majority of sentenced companies are small, closely-held entities. And, as the Advisory Group's Report notes, since 1991 an overwhelming number of convicted organizations failed to receive effective compliance program sentencing credit for reasons related to their smaller size. The PAG seconds the Advisory Group's recommendation that the Commission devote resources to reaching and training small and mid-size companies about corporate compliance.

The PAG believes that many factors or considerations could be incorporated into Chapter Eight to encourage small and mid size organizations to develop and maintain compliance programs. There is likely, however, to be some spirited disagreement among business interests, the defense bar, and the Department of Justice as to which factors or considerations will likely be most effective or important. And, to say the issue is a difficult one may understate things. The Advisory Group Report noted the difficulties it had in getting feedback on the matter.

The PAG therefore proposes that the Commission convene a working group dedicated solely to the study of the specific issue of the guidelines' application to small and mid size companies. This working group will no doubt have the first, difficult task of even defining the best methodology for studying this issue. The PAG envisions that the working group would reflect the usual affected constituencies (e.g., business, defense bar, prosecutors), but also that it might fruitfully be broadened to include an economist and/or other academics who have studied these issues from a broader perspective. The interdisciplinary approach may be the most effective way to give the Commission the help it needs to tackle this complex yet exceedingly important guidelines matter.

II. Proposed Amendments relating to Public Corruption (Amendment #4)

The PAG is unaware of any data or even anecdotal examples suggesting a need for increased penalties under these guidelines. No such basis or justification is included in the materials accompanying the proposed amendments. Although the Synopsis of the proposed amendment states that it "aims at moving away from a guideline structure that relies heavily on monetary harm to determine the severity of the offense," it does not appear that the proposed amendment in fact does so (assuming there are policy reasons for such a change, which are not explained in the published materials). The new guidelines incorporate the §2B1.1 loss table in precisely the same fashion as the existing guidelines. Accordingly, the PAG does not believe any

increase to the base offense levels for bribery and gratuity cases has been demonstrated to be warranted. Indeed, these base offense levels could instead be *reduced* to achieve proportionality with 2B1.1, the guideline governing other similar economic crimes.

The PAG agrees that Guidelines 2C1.1 and 2C1.7 may readily be consolidated, but the 2-level enhancement for multiple incidents should be limited to those cases currently sentenced under 2C1.1 to avoid even further unwarranted disparity between cases involving intangible rather than tangible harm. Similarly, if guidelines 2C1.2 and 2C1.6 are consolidated, the 2-level enhancement for multiple incidents should be limited to cases currently sentenced under 2C1.2 to avoid unwarranted disparity between cases involving mere gratuities rather than actual theft.

Briberies and gratuities are purely economic crimes. While the acceptance of a bribe or gratuity by a public or bank official is a serious offense because it serves to undermine the public's confidence in government and banks, there is little reason to believe it does so to any greater degree than outright theft or embezzlement by such officials, particularly where the official's position does not involve high-level decision-making or other sensitive matters, and is not an elected office. Because the base offense level for economic crimes is either 6 or 7, depending on the statutory maximum sentence, the current base offense level of 10 for bribery offenses results in unwarranted disparity. Increasing the base offense level from 10 to 12 would exacerbate this unwarranted disparity rather than cure it, and result in sentences that are unjust.

Consider, for example, a typical bribery case in which a low-level public official accepts two $5,000 bribes to award a $100,000 contract on which the contractor makes a $20,000 profit.[2] Under the current version of 2C1.1, the base offense level would be 10, increased by 2 levels for multiple incidents, plus 4 levels under the 2B1.1 table reflecting the $20,000 "benefit received," resulting in an adjusted offense level of 16. If the base offense level is increased by two levels as proposed in the amendment, the adjusted offense level would be 18.

Contrast this $10,000 bribery scenario with a case in which a public official simply steals $10,000 outright from the public fisc. Assuming some use of the mails or wires, the base offense level would be 7, plus 4 levels for the loss, plus 2 levels for abuse of trust, resulting in an adjusted offense level of 13. Why should a low-level public official be sentenced 3 levels higher for accepting a $10,000 bribe from a third party than stealing the $10,000 directly from the public fisc? And if the proposed amendment were adopted, the disparity would be *5* levels. This means that the minor official who accepts the $10,000 bribe would be sentenced 1 level *higher* (18) than an official who outright steals up to $120,000 – *more than the entire value of the contract* (7+8+2=17).

The unwarranted disparity noted above would be further exacerbated by the consolidation of 2C1.7 with 2C1.1 if the 2-level increase for multiple incidents is applied across the board.

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[2] Obviously the numbers used in hypotheticals such as this are important. We believe the numbers above are quite reasonable, and further believe our overall point would be amplified by having the Commission Staff apply and contrast the fraud and bribery guidelines to randomly selected actual bribery cases.

Section 2C1.7 deals with acts of dishonesty by public officials that cause purely *intangible* harm. Section 2B1.1, coupled with a 2-level increase for abuse of trust, would presumably apply in non-bribery cases to acts of public officials which actually cause tangible harm, such as thefts or embezzlements. If the amendment were enacted as proposed, cases of *intangible* harm with multiple incidents would have an offense level of 14, while cases of *tangible* harm would be *5 levels lower* (7+2=9).

Similar disparities result from raising the base offense levels for mere gratuities – cases which by definition do not involve any *quid pro quo* and are largely misdemeanors. These disparities will be furthered amplified by consolidating the bank gratuity cases with 2C1.2 and applying the 2-level multiple incident adjustment across the board. A bank employee who accepts two $3,000 gratuities not causing loss to the bank will be sentenced at the same level (13) as a bank employee who embezzles up to $30,000 directly from the bank. (9+2+2=13 (proposed 2C1.2); 7+2+4=13 (existing 2B1.1)).

To be sure, there are bribery cases in which the harm is largely non-economic because of the impact on the public perception of and faith in governmental decision-making. But this characteristic is more than fully accounted for by the 8-level upward adjustment in cases involving elected officials or officials holding high-level decision-making or sensitive positions. In those cases, the disparity between the bribery guideline and theft guideline will be nothing short of dramatic. For example, if the amendment were enacted as proposed, an official in a high position of public trust involved in more than one incident who accepted $10,000 for the purpose of influencing an official act will be sentenced at the same level (12+2+2+(2 or 4)+(2 or 4)= 20 to 24) as if the official had embezzled from $400,000 to $2,500,000, depending on which options are selected from the proposed increases.

The existing bribery and gratuity guidelines are already out of proportion with the guidelines for economic offenses, and should be reduced by at least 2 levels to eliminated incongruous results. Raising the bribery and gratuity offense levels, particularly in conjunction with applying the 2-level multiple incident adjustment to intangible rights and bank gratuity cases, will lead to results that are intellectually indefensible.

III. Proposed Amendments relating to the Mitigating Role Cap (Amendment # 6)

The PAG will provide a supplemental submission addressing this issue.

IV. Proposed Amendment to Multiple Victim Rule in USSG §2B1.1, (comment.) n. 4(B)(ii) (Amendment #8b)[3]

The proposed amendment to U.S.S.G. §2B1.1, comment. (n. 4(B)(ii)) would expand a special rule to provide that offenses involving mail stolen from mailboxes serving multiple postal

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[3] The PAG thanks Richard Crane for his assistance with this portion of our submission.

customers, such as those found in apartment complexes, would presumptively involve 50 or more victims.

Presently, the special rule provides that when United States mail is taken from a Postal Service relay box, collection box, delivery vehicle, satchel or cart, the offense is considered to have involved at least 50 victims. This rule was added to the guidelines in 2001 because of "(i) the unique proof problems often attendant with such offenses, (ii) the frequent significant, but difficult to quantity, non-monetary losses in such offenses, and (iii) the importance of maintaining the integrity of the United States Mail." U.S.S.G. Amend. 617 (Reason for Amendment). These reasons provide no support for the changes contemplated in Proposed Amendment 8(b).

A. Amendment Does Not Address Unique Proof Problems

Unique proof problems exist when mail is stolen from a Postal Service mailbox, vehicle, cart or satchel because there is usually no way to determine how many pieces of mail were in the container or conveyance at the time of the theft. Without knowing the number of pieces of mail, the scope of the theft and number of victims is impossible to ascertain.

These proof problems do not exist when dealing with banks of mailboxes. In fact, it is often easier to prove the number of victims when mail is stolen from apartment unit boxes than if it were stolen from individual residence mailboxes. For example, if the offender stole mail by entering an apartment unit box from the front,[4] the door to the mailbox will almost always show signs of tampering to overcome the box's locking mechanism. On the other hand, mail taken from individual home mailboxes would not show such tampering because these boxes are rarely locked. If the apartment mail was stolen via the back way, it would be more difficult to determine the number of victims, but no more so than determining the number of victims when mail is stolen from individual home mailboxes.

B. Quantifying Non-Monetary Losses Is No More Difficult Than In Other Cases

As noted above, we do not believe it is more difficult to quantify non-monetary losses resulting from theft of mail from apartment cluster mailboxes than single residence mailboxes.

C. Amendment Will Not Further the Purposes of the Guidelines

It may be important to protect the soundness of the United States Postal Service by providing greater penalties for those who would steal from a Postal Service vehicle or container. But we do not believe it is necessary to the soundness and integrity of the US mail to punish persons who steal from an apartment complex more harshly than those who steal mail from individual residences.

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[4]From the front" means that the mail was taken out of the box in the same manner as the recipient would have taken it. In some cases, mail can be accessed from the back by unlocking the entire bank of boxes or by approaching the boxes from the rear (as is done with the individual boxes located in a Post Office.

On the other hand, the purposes of the guidelines will be frustrated if the proposed amendment is adopted. The basic objective of the guidelines is to provide reasonably uniform sentences for similar offenses committed by similar offenders. USSG Ch 1, Pt. A(3). Mandating longer sentences for offenders who steal a single welfare check from an apartment cluster of 50 boxes, than for those who steal the same check from a single mailbox on a street with fifty houses, will create sentencing disparity and undermine the objectives of the guidelines.

The proposed amendment will also create confusion as to the meaning of the term 'victim.' For purposes of mail theft, 'victim' is defined as "any person who sustained any part of the actual loss" or "any person who was the intended recipient or addressee" USSG §2B1.1 App. Note 4(B)(i). In either case, the definition requires an identifiable victim. The definition has been weakened, perhaps necessarily, by the present special rule that does away with the need to identify the victims when mail is stolen from a Postal Service container or conveyance. It should not be weakened further by adoption of an amendment where the identity of the victims is easily obtainable.

D. Placing Burden On Defendant to Prove Number of Victims is Unfair[5]

Requiring a defendant to prove that his mail theft offense involved less than fifty victims puts the burden on the party in the worst position to do so. The government is in a far superior position to prove the number of victims because it can obtain this information immediately upon discovery of the offense. It is one thing to ascertain how many apartments were vacant and how many people had already retrieved their mail when the question is asked the same day as the offense and another to get answers when the questions are asked months later. Additionally, government agents have the perceived authority to ask people if they have already retrieved their mail and, if not, whether they were expecting anything valuable or time-sensitive. An attorney or investigator representing the alleged thief would have a far more difficult time getting answers to these questions.

Additionally, the present rule reasonably assumes that a person who steals from a Postal Service box or conveyance intends to steal all the mail, while breaking into a single apartment mailbox does not evidence such an intent.

E. There Is No Demonstrated Need for the Amendment

Finally, we question the seriousness of the problem addressed by the proposed amendment. We can find only one case where a similar situation arose. In *U.S. v. Gray*, 71

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[5]As published, the amendment provides that any theft from a cluster of mailboxes would be considered to have involved 50 or more victims. This would result in a four level enhancement even if the apartment complex had less than 50 apartments. At the very least, this should be changed to read that where there are multiple boxes, there is a presumption that the number of victims corresponds to the number of boxes. But, even this refinement would not alter our opposition to the amendment for the reasons stated above.

Fed.Appx. 300 (5th Cir 2003), a two-level enhancement was imposed on the defendant for having more than ten and fewer than 50 victims because he pried off the mailbox panels in an apartment building, exposing 42 individual boxes. On appeal the enhancement was vacated because there was no proof that there were at least ten people who had mail in their boxes at the time of the offense. There was, however, no indication that it would have been difficult to obtain sufficient evidence proving the number of victims, especially considering the reduced degree of proof required at a sentencing hearing.

V. Issue for Comment regarding Aberrant Behavior (Amendment #10)

With regard to aberrant behavior, Issue for Comment 10, the PAG opposes as premature the elimination of the aberrant behavior downward departure provision, U.S.S.G. § 5K2.20. While we agree in principle that the mandate of 28 U.S.C. § 994(j) should be implemented and true first offenders should receive more lenient sentences and more opportunities for sentences that do not involve incarceration, it does not make sense to eliminate the aberrant behavior downward departure before proposing an amendment to U.S.S.G. § 4A1.1 designed to accomplish this objective. The Commission has been engaged in a two-year study of criminal history. The PAG suggests that the Commission formulate an appropriate amendment to U.S.S.G. § 4A1.1 based on the results of that study. At that point, but not before, it makes sense to consider whether or not the aberrant behavior downward departure remains necessary.

VI. Proposed Amendment to Immigration Guidelines (Proposed Amendment #12)

The PAG intends to comment on this proposed amendment but has not yet finalized its submission on his issue. A supplemental comment addressing this proposed amendment will be forthcoming in the next few days.

As always, we appreciate the opportunity to present our perspective on these important issues. We are available to provide further information or meet with the Commission if it would be useful.

Sincerely,

James Felman
Barry Boss
Co-chairs, Practitioners' Advisory Group

cc: Charles Tetzlaff, Esq.
Timothy McGrath, Esq.

March 1, 2004

Ms. Diana E. Murphy, Chair
United States Sentencing Commission
Attn: Public Affairs
One Columbus Circle, NE, Suite 2-500
Washington, D.C., 20002-8002

RE: Proposed Amendments to the U.S. Sentencing Guidelines
Chapter Eight: Sentencing of Organizations and Compliance Programs

Dear Ms. Murphy:

On behalf of the Providence Health System, I want to offer our formal comments to the United States Sentencing Commission's notice of proposed amendments to the Sentencing Guidelines that was published in the December 30, 2003 Federal Register. We wish to specifically address the second proposed amendment that establishes criteria for an effective program to prevent and detect violations of the law ("compliance programs").

The Providence Health System is a not-for-profit, Catholic health system that includes 18 acute care hospitals, 18 freestanding long term care facilities, clinics and physician groups, a health plan and home health agencies serving communities in Alaska, Washington, Oregon and California. Providence seeks to fulfill its mission of continuing the healing ministry of Jesus in the world of today, with special concern for those who are poor and vulnerable. Working with others in a spirit of loving service, we strive to meet the health needs of people as they journey through life. At the same time, like other health care providers, Providence must strive to achieve this mission while addressing a myriad of state and federal laws and regulations. Having operated a compliance program since 1997, it has been Providence's experience that an effective compliance program is a valuable tool for demonstrating its commitment to these mandates. Furthermore, as we have recently been evaluating the effectiveness of our past efforts, we are pleased that many of the changes that Providence is making to strengthen its program are consistent with the direction recommended by the Commission. The comments that follow are indicative of the support for the Commission's general direction as well as some specific observations.

Establishing Required Elements for What Constitutes an Effective Compliance Program

When the organizational sentencing guidelines first became effective on November 1, 1991 they created a set of voluntary incentives for adoption. Since that time, industry has gained experience with the seven elements of an effective compliance program. This

approach – while perhaps more theoretical when first posited over ten years ago – has now proven to be an effective management tool in fostering compliance and detecting violations of the law. Providence finds that the implementation specifications enumerated in the proposal for what constitutes an effective program are consistent with this experience and indicative of good industry practice. Given this perspective, it is hard to contemplate how an organization would justify a decision not to implement such a program. The duty that governance and management alike have to their stockholders, or in the case of a non-profit organization to their mission, suggests that the maturation of organization compliance as an established management practice provides a basis for making this a required approach. In short, compliance programs should not be voluntary. The work of the Ad Hoc Advisory Group on the Organizational Sentencing Guidelines and the proposed amendments supports this position as well.

Promotion of an Organizational Culture that Encourages a Commitment to Compliance With the Law

We want applaud in the strongest terms possible the direction taken by the Commission in recognizing the inseparable connection between an organization's culture and the effectiveness of its compliance program. It is true that education, policies, and audits are all part of an effective compliance program. However, it has been our experience that the most important deterrents to non-compliance are the values and culture that underlie the organization. For that reason, the compliance program within Providence has been known as the "Integrity Initiative." We have sought to stress the responsibility that each individual has to be accountable for the integrity of the decisions we make and the actions that we take. Our training materials have sought to position legal requirements within this context of business and organizational ethics and our core values. It has been our experience that the behavior of individuals and the organization as a whole is more properly motivated through this approach as opposed to exclusively relying on the more narrow rationale of regulatory requirements. As the Commission gains more experience in this regard we would hope that this might be an area of further development in subsequent revisions to the guidelines. For now, Providence believes the Commission's approach represents a positive and much-needed first step.

Expansion of the Scope of a Compliance Program

Under the current guidelines the objective of a compliance program is directed only to violations of criminal law and prevention of criminal conduct. The Commission proposes to expand the scope by defining the term "violations of law" to include non-criminal violations and regulatory violations. Providence supports this proposed expansion: Many of the areas in our program – while including those which constitute criminal actions – are addressing non-criminal actions. Furthermore, to the extent that the hurdle for reporting violations is set unnecessarily high (i.e., criminal behavior) it will serve only to limit reporting and the reach of an effective compliance program.

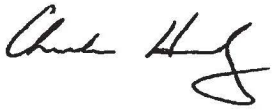
Establishing Program Responsibility

Much of the Commission's proposed direction represents what might be thought of as a "structural" approach to management: To the extent that certain structures are in place – policies, personnel, practices, and resources – it is assumed that a program will produce positive outcomes. Obviously, in the case of a compliance program these expected outcomes are the prevention and detection of violations of law. Consequently, it is important that authority for a compliance program be vested in a highly-placed individual within the organization and that they enjoy the support of and access to senior management and as appropriate governance bodies. Assuring that governance plays an active role in program oversight is another critical structural element in establishing an effective program.

However, as critical as these elements are – and as we have argued elsewhere, they should be required – they cannot in themselves "ensure the effectiveness of the program" as stated in § 8B2.1(b)(2). Operational management needs to be equally committed and this responsibility needs to be given equal attention in the proposed guidelines. Simply stated, the job of ensuring compliance is not the sole responsibility of the Compliance Officer. Even the language set forth by the Commission in establishing a rebuttable presumption concerning a program's effectiveness is an acknowledgement that violations of law can occur despite the existence of an effective compliance program. The Compliance Officer should have an affirmative obligation to establish a program that meets the required elements and review its effectiveness through comprehensive risk assessments and audits. To the extent that implementation is not effective then the Compliance Officer has a duty to inform both management and the Board. The Commission should not hold the Compliance Officer accountable for more than these responsibilities. Doing so is to fail to recognize the indispensable role of operational management in implementation. We would encourage the Commission to add language stressing this role that goes beyond that of the Compliance function.

Again, Providence appreciates the opportunity to share our perspectives with the Commission as it considers these important changes to the Sentencing Guidelines.

Sincerely,



Charles Hawley, Vice President
Government Affairs
Providence Health System

REDMOND, WILLIAMS & ASSOCIATES
website: www.redmondwilliamsassoc.com e-mail: rwa2002@msn.com

February 23, 2004

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

Dear Mr. Courlander:

We appreciate the opportunity to respond to the Ad Hoc Advisory Group's recommended modifications to the United States Sentencing Guidelines.

Our comments are in regard to §8B2.1(b)(5)(c). We support the addition of "promotion of an organizational culture" and "anonymous reporting" and the change from "retribution" to "retaliation." We also support the addition of "seek guidance regarding potential or actual violation of law." However, we strongly recommend that "confidential" be added. We propose that the guideline read: "seek **confidential** guidance."

Redmond, Williams & Associates is a firm that helps organizations set up systems to ensure that issues are surfaced and handled appropriately. We base our recommendation on multiple research studies that have recently been published, the many interviews we have conducted over the last year with institutional leaders, and our experience in establishing, enhancing and expanding issue management systems.

Perhaps the most germane study is the 2003 Ethics Resource Center survey which is referenced in the report. It demonstrated that 35% of the employees who actually observe misconduct do not report it. Their reasons are that they believe no corrective action would be taken, they fear that their report would not be kept *confidential*, they fear retaliation, they do not know to whom they should speak.

Our interviews have shown that leaders who are actively strengthening their governance processes understand the value of providing constituents a confidential, informal channel in addition to formal channels that promise anonymity within limits. On the other hand, executives who do not understand the value of a channel where employees can feel very safe—a confidential, informal, off-the-record, independent channel—are maintaining status quo in how they manage governance and risk.

Our experience in setting up, expanding and enhancing issue management systems has shown that organizations that offer informal, confidential guidance for their constituents, and also have effective formal reporting channels, benefit by:

- The surfacing of potential malfeasance that might not have otherwise been brought forward
- Having issues brought to the most appropriate resolution resource in a timely manner.

Constituents in an organization will seek guidance that is confidential if they do not know where to take potential malfeasance, need coaching and guidance about how to take it forward, want to explore the full scope of the concern and potential resolutions options before coming forward, or want to remain anonymous. Confidentiality is critical to providing constituents with a safe haven where they can discuss their concerns and consider the potential resources for resolution.

We appreciate your consideration of our recommendation.

Respectfully,

Arlene Redmond, Partner

Arlene Redmond

Randy Williams, Partner

Randy Williams

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February 27, 2004

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

Re: Sentencing Guidelines

Dear Mr. Courlander:

I am writing to comment on the report recommendations of the Ad Hoc Advisory Group on Organizational Guidelines for amendment of Chapter 8 of the sentencing guidelines for organizations. I am an attorney in private practice and an adjunct law professor. As a principal in my firm, I represent public and closely held corporations in employment discrimination and labor cases. In addition, I act as outside counsel to the Ombuds Association and University and College Ombudsman Association although, this letter is written in my individual capacity not as a representative of any party or of my firm.

As an attorney rendering advice to corporations regarding compliance with federal laws, I am aware of the federal sentencing guidelines and the positive role they have in encouraging corporate compliance with the law. There is one suggestion I would like to make, however, regarding proposed Section 8B2.1(b)(5)(c) which 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 that without fear of retaliation, including mechanisms to allow for anonymous reporting." While at first glance this amendment is clearly worthwhile, I would suggest that it should go further.

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

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

Thank you for your attention to this matter.

Very truly yours,

Richard L. Steer

Richard L. Steer

RLS/ps

United Technologies Corporation
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Patrick J. Gnazzo
Vice President
Business Practices

February 10, 2004

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

Attn: Public Affairs

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

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

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

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

We also applaud the inclusion of the proposed language in §8B2.1(b)(5)(C): "to have a system whereby the organization's employees and agents may report or seek guidance regarding potential or actual violations of law without fear of retaliation, *including mechanisms that allow for anonymous reporting.*" Research and experience teach us that a certain portion of a work force will not bring issues forward if they risk being identified because they fear retaliation.

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

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

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

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

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

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

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

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

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

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

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

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

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

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

Sincerely,

Patrick Gruggo

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

UOP LLC • 25 East Algonquin Road • Des Plaines, Illinois 60017-5017 • Tel: 847.391.2000 • Fax: 847.391.2253

January 14, 2004

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

Attention: Public Affairs

Re: Proposed Amendments to
Sentencing Guidelines/Compliance Programs

Ladies and Gentlemen:

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

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

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

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

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

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

Sincerely,

John T. Lucking
Vice President & General Counsel

JTL/ao

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February 27, 2004

SENT BY EMAIL AND UNITED STATES MAIL

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

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

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

Dear Commission:

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

Public Comment Overview

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

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

Section 8C2.5(f):

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

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

AMENDED TO READ

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

Commentary to 8C2.5(Application Notes):

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

AMENDED TO READ

If the defendant has satisfied the requirements for cooperation set forth in this note, waiver of the attorney-client privilege and of work product is not a prerequisite to a reduction in culpability score under subsection (g). However, in some circumstances, waiver of the attorney-client privilege and of work product protections may be required in order to satisfy the requirements of cooperation ONLY after considering the defendant's efforts relating to appropriate remedial action.

Commentary to 8C4.1(Note 2):

"2. Waiver of Certain Privileges and Protections.--If the defendant has satisfied the requirements for substantial assistance set forth in subsection (b)(2), waiver of the attorney-client privilege and of work product protections is not a prerequisite to a motion for a downward departure by the government under this section. However, the 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."

AMENDED TO READ

2. Waiver of Certain Privileges and Protections.--If the defendant has satisfied the requirements for substantial assistance set forth in subsection (b)(2), waiver of the attorney-client privilege and of work product protections is not a prerequisite to a motion for a downward departure by the government under this section. However, the 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 downward departure ONLY after considering the defendant's efforts relating to appropriate remedial action.

Thank you very much for the opportunity to have provided the above Public Comments.

Sincerely,

/s/

L.A. Wright
Legal Criminalist/Consulting Expert

/law

U.S. Sentencing Commission
One Columbus Circle, N.E.,
Suite 2-500
Washington, D.C. 20002-8002
Attention: Public Affairs
VIA FAX: 202/502-4699

PUBLIC COMMENT ON PROPOSED CHANGES TO ORGANIZATIONAL SENTENCING GUIDELINES

I appreciate the opportunity to provide comments on the proposed amendments to the Guidelines. I am choosing to send these anonymously, with your indulgence.

First, I commend the Advisory Group on delivering such a well thought-out, well-researched, well-articulated fine instrument. It was actually a pleasure to read. The effort that went into its production is evident in the quality of all details, throughout.

I am a compliance/ethics professional and would like to share just briefly my thoughts on the proposals.

1. Sec. 8B2.1(b)(2) The proposal draws in DOJ's call for resources and authority, which is excellent. I respectfully submit, however, that the distinction between the day-to-day designer and manager of an organization's compliance program, and the 'high-level personnel' assigned to ensure implementation, is worth a closer look. In my experience, the latter is often a member of the organization's executive team who has taken on compliance as a secondary function, and is often quite disengaged from the actual on-the-ground challenges involved in the program's implementation.

a. I suggest that the proposal's call for adequate authority and resources should be directed at the individual at the operational helm of the program, rather than at the executive, who generally has easier access and larger discretionary funding. To the extent that granting "authority" and "resources" is intended to facilitate the practical success of the program, it would make sense to clarify that it is the operational head that should have the authority and resources, since that is where the majority of the program challenges lie. The operational head of the program is the person who is the 'face' of the program throughout the organization on a daily basis, the one who must persuade others to support the various initiatives in the cross-functional implementation of the program. On the other hand, the 'high level personnel' typically oversee the results, which the operational head is charged with achieving. In fact, much of the operational head's time may often be spent competing for bandwidth of the necessary support functions (e.g., HR, Security, Training, I.T.), among those functions' other primary initiatives, for which they are measured. For example, if the operational head, the 'brains and brawn' behind the program, is a mid-level manager, consider the increased difficulty in getting a share of the often very limited time of other functions, as opposed to a VP seeking that same interdepartmental assistance. As a practical matter this makes program implementation more difficult (difficult to get meetings with senior management, difficult to get other functions to spend their limited time supporting compliance initiatives, etc.) and less efficient. It seems to me if the on-the-ground compliance lead is less than a VP, there is little appearance of, or actual, authority.

b. In some organizations where the operational head currently reports to the governing authority, requiring the high level personnel to do so separately may have the effect of the governing authority receiving less practical detailed info, from seeing the operational head less.

2. Sec 8C2.5 (f) (3): consider changing the rebuttable presumption that a compliance program is not effective if "an individual within high-level personnel of the organization" is the offender to 'two or more' high-level personnel. The rationale behind this is that a program cannot necessarily prevent every instance of misconduct, particularly if it is well hidden; however, if more than one person is involved, there is at least one additional person beyond the main perpetrator who is aware of the malfeasance. If the second person does nothing it is likely a symptom that that program is not working.

3. General comment: there is some disagreement in the regulated community as to whether the compliance program is responsible for ensuring reasonable response steps to misconduct throughout the organization or just in relation to what comes directly to the attention of the compliance program through the hotline. It seems more appropriate that the program should have visibility into, and the ability

to become involved in further preventing, all illegal/unethical conduct.

4. Consider defining what 'other conduct inconsistent' with an effective program means. Does it include failure to discuss the code of conduct with subordinates? Failing to report a violation to management? Ignoring evidence of misconduct? These clarifications would give teeth to compliance programs. Should this screening also apply to promotions or just to hiring new substantial authority personnel? Finally, since employees take their cues from their immediate managers as well as from those at the top, shouldn't this be true of any person in management as well as those at the high levels of the organization?

Thank you for your consideration of these thoughts -

U.S. Sentencing Commission
One Columbus Circle, N.E.,
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Attention: Public Affairs
VIA FAX: 202/502-4699

PUBLIC COMMENT ON PROPOSED CHANGES TO ORGANIZATIONAL SENTENCING GUIDELINES

articulated the instrument. It was actually a pleasure to read. The effort that went into its production is evident in the quality of all details, throughout.

I am a compliance/ethics professional and would like to share just briefly my thoughts on the proposals.

1. Sec. 8B2.1(b)(2) The proposal draws in DOJ's call for resources and authority, which is excellent. I respectfully submit, however, that the distinction between the day-to-day designer and manager of an organization's compliance program, and the 'high-level personnel' assigned to ensure implementation, is worth a closer look. In my experience, the latter is often a member of the organization's executive team who has taken on compliance as a secondary function, and is often quite disengaged from the actual on-the-ground challenges involved in the program's implementation.

a. I suggest that the proposal's call for adequate authority and resources should be directed at the individual at the operational helm of the program, rather than at the executive, who generally has easier access and larger discretionary funding. To the extent that granting "authority" and "resources" is intended to facilitate the practical success of the program, it would make sense to clarify that it is the operational head that should have the authority and resources, since that is where the majority of the program challenges lie. The operational head of the program is the person who is the 'face' of the program throughout the organization on a daily basis, the one who must persuade others to support the various initiatives in the cross-functional implementation of the program. On the other hand, the 'high level personnel' typically oversee the results, which the operational head is charged with achieving. In fact, much of the operational head's time may often be spent competing for bandwidth of the necessary support functions (e.g., HR, Security, Training, I.T.), among those functions' other primary initiatives, for which they are measured. For example, if the operational head, the 'brains and brawn' behind the program, is a mid-level manager, consider the increased difficulty in getting a share of the often very limited time of other functions, as opposed to a VP seeking that same interdepartmental assistance. As a practical matter this makes program implementation more difficult (difficult to get meetings with senior management, difficult to get other functions to spend their limited time supporting compliance initiatives, etc.) and less efficient. It seems to me if the on-the-ground compliance lead is less than a VP, there is little appearance of, or actual, authority.

b. In some organizations where the operational head currently reports to the governing authority, requiring the high level personnel to do so separately may have the effect of the governing authority receiving less practical detailed info, from seeing the operational head less.

2. Sec 8C2.5 (f) (3): consider changing the rebuttable presumption that a compliance program is not effective if "an individual within high-level personnel of the organization" is the offender to 'two or more' high-level personnel. The rationale behind this is that a program cannot necessarily prevent every instance of misconduct, particularly if it is well hidden; however, if more than one person is involved,

U.S. Sentencing Commission
One Columbus Circle, N.E., Suite 2-500
Washington, D.C. 20002-8002
Attention: Public Affairs

VIA FAX: 202/502-4699

PUBLIC COMMENT ON PROPOSED CHANGES TO ORGANIZATIONAL SENTENCING GUIDELINES

I appreciate the chance to provide the following comments on the proposed amendments to the Guidelines. Let me begin by thanking the Sentencing Commission for your efforts at thoughtfully reviewing these vital areas of ethics, law and policy. If recent events have taught us anything, it is that ethics and compliance issues are important to individual, corporate and our country's economic success. Corporate conduct sets an important example for all our citizens – and is a vital influence on the leaders of tomorrow.

As Francis Fukuyama has recently noted, "economic life reflects, shapes and underpins modern life itself." He goes on to note that "a nation's well-being, as well as its ability to compete, is conditioned by a single, pervasive cultural characteristic: the level of trust in society." To the extent that the proposed changes to the Organizational Sentencing Guidelines can help each of us – all of us – increase the level of trust we place in corporations - and the other significant elements of our economy - we will all be the better for it.

I have been a passionate ethics and compliance professional, advisor and teacher for many years and appreciate the opportunity to say a few words concerning the proposed amendments. The comments below are based on a colleague's thoughtful reflections already submitted to you....I have incorporated them herein by my colleague's express permission:

1. Sec. 8B2.1(b)(2) The proposal draws in DOJ's call for resources and authority, which is excellent. We respectfully submit, however, that the distinction between the day-to-day designer and manager of an organization's compliance program, and the 'high-level personnel' assigned to ensure implementation, is worth a closer look. In our experience, the latter is often a member of the organization's executive team who has taken on compliance as a secondary function, and is often quite disengaged from the actual on-the-ground challenges involved in the program's implementation. We suggest that the proposal's call for adequate authority and resources should be directed at the individual at the operational helm of the program, rather than at the executive, who generally has easier access and larger discretionary funding. To the extent that granting "authority" and "resources" is intended to facilitate the practical success of the program, it would make sense to clarify that it is the operational head that should have the authority and resources, since that is where the majority of the program challenges lie. The operational head of the program is the person who is the 'face' of the program throughout the organization on a daily basis, the one who must persuade others to

support the various initiatives in the cross-functional implementation of the program. On the other hand, the 'high level personnel' typically oversee the results, which the operational head is charged with achieving. In fact, much of the operational head's time may often be spent competing for bandwidth of the necessary support functions (e.g., HR, Security, Training, I.T.), among those functions' other primary initiatives, for which they are measured. For example, if the operational head, the 'brains and brawn' behind the program, is a mid-level manager, consider the increased difficulty in getting a share of the often very limited time of other functions, as opposed to a VP seeking that same interdepartmental assistance. As a practical matter this makes program implementation more difficult (difficult to get meetings with senior management, difficult to get other functions to spend their limited time supporting compliance initiatives, etc.) and less efficient. It seems to us that if the on-the-ground compliance leader is less than a VP, there is little appearance of, or actual, authority.

2. Sec 8C2.5 (f) (3): consider changing the rebuttable presumption that a compliance program is not effective if "an individual within high-level personnel of the organization" is the offender to 'two or more' high-level personnel. The rationale behind this is that a program cannot necessarily prevent every instance of misconduct, particularly if it is well hidden; however, if more than one person is involved, there is at least one additional person beyond the main perpetrator who is aware of the malfeasance. If the second person does nothing it is likely a symptom that that program is not working.

3. General comment: there is some disagreement in the regulated community as to whether the compliance program is responsible for ensuring reasonable response steps to misconduct throughout the organization or just in relation to what comes directly to the attention of the compliance program through the hotline. It seems more appropriate that the program should have the ability to become involved in preventing, all illegal/unethical conduct.

4. Consider defining what 'other conduct inconsistent' with an effective program means. Does it include failure to discuss the code of conduct with subordinates? Failing to report a violation to management? Ignoring evidence of misconduct? These clarifications would give teeth to compliance programs. Should this screening also apply to promotions or just to hiring new substantial authority personnel? Finally, since employees often take their cues from their immediate managers as well as from those at the top, shouldn't this be true of any person in management as well as those at the high levels of the organization?

5. Lastly – give corporations credit for going beyond the minimum requirements of a "compliance program." The most successful programs are those that combine the best elements of an ethics and a compliance program into a coherent and consistent organizational culture. If people are convinced that ethics are truly important to an organization, then they are all-the-more likely to both comply

with law and go beyond the minimum requirements of the law to create positive corporate culture and a strong civil society.

Thank You!

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THE SECRETARY OF STATE
WASHINGTON

200403878

February 25, 2004

To the Sentencing Commission:

I want to thank you for considering the proposal to enhance sentencing guidelines for violations of our passport and visa fraud laws. Ensuring the security of our borders and protecting the safety and security of American citizens at home and abroad are the highest priorities for the Department of State. Maintaining the integrity of U.S. passports and visas is a critical component of our global effort to fight terrorism, in addition to ensuring that our immigration policies and laws are enforced.

A U.S. passport establishes U.S. citizenship and identity, making it the most widely accepted and versatile identity document in the country. It is considered the "gold standard" of all passports and is used by our citizens not only to visit foreign countries and enter the United States, but also domestically to establish bank and credit card accounts, cash checks, apply for a driver's license, apply for welfare or unemployment, and to conduct activities that require proof of U.S. citizenship. Similarly, visas are highly sought after because they allow the bearer to request legal entry into the United States.

Investigations of passport and visa fraud are a vital part of strong border and homeland security procedures. I believe these new guidelines will be a clear signal that the United States Government recognizes the severity of passport and visa fraud and the importance of maintaining our border security. Ambassador Francis Taylor, Assistant Secretary for Diplomatic Security, will address our specific proposal with you in a separate letter. Thank you for your consideration on this important matter.

Sincerely,

Colin L. Powell

FEB 26 PM 4 40

The U.S. Sentencing Commission,
One Columbus Circle, N.E.,
Suite 2-500, South Lobby,
Washington, D.C. 20002-8002.

March 1, 2004

Advance copy by electronic mail
United States Sentencing Commission
One Columbus Circle, N.E.
Washington, D.C. 20002-8002

Re: Proposed Amendment 6 to the Sentencing Guidelines and Issue for Comment 10.

Dear Commissioners:

I write on behalf of Families Against Mandatory Minimums Foundation (FAMM) to urge that you leave undisturbed for now the mitigating role cap and the aberrant conduct departure. Both provide necessary relief for the very small number of people who qualify. Morever, both the cap and changes to the aberrant conduct departure are so recent that it is too soon to tell if the concerns that motivated them have been addressed or how well they are presently working. Finally, built-in mechanisms ensure correct sentences when the operation of the guidelines fails to properly account for culpability: upward departure in the case of a capped sentence that is too low and either denial of the aberrant conduct departure or, in the case it is invoked, appellate review of the aberrant conduct departure if it is used inappropriately.

Proposed Amendment 6: Mitigating Role

The guidelines overemphasize drug quantity as a measure of blameworthiness and frequently cannot adequately account for role in the offense. FAMM's case files are filled with defendants serving unconscionably long sentences for drug offenses. Many are first-time, non-violent offenders. The relevant conduct rules and severe mandatory minimums drive these low-level participants' sentences well beyond those warranted. Many of their stories are truly disturbing. The mitigating role cap provides some limited relief to defendants like them. Below are a few examples of defendants who received mitigating role reductions. They are meant to illustrate the kinds of defendants this cap is designed to assist.[1]

Lori Gibson's boyfriend, Larry Copeland, was a drug dealer. Ms. Gibson had heard that Mr. Copeland dealt drugs but had never discussed his business with him. He had never included her in his illegal activities and had never, to her knowledge, brought the drug trade home with him. He was also alcoholic and abusive. She was used to doing as she was told. Once, while out

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[1] None of these defendants received the cap as it was instituted after they were sentenced and has not been made retroactive.

of town, Mr. Copeland called Ms. Gibson and asked her to pick up something from a man named Eric McKinnon. Unaware of what she was picking up or why, Ms. Gibson did as she was asked. She met Mr. McKinnon, who she did not know, in a parking lot and received $3,600 from him. She did not know that the money was intended to settle a debt from a sale by Larry Copeland of 113 grams of cocaine base. At Mr. McKinnon's direction, she called Mr. Copeland, told him she had the money, and gave the telephone to Mr. McKinnon. They arranged another drug deal, but in coded language that Ms. Gibson did not understand. Mr. McKinnon was an informant and Ms. Gibson was arrested within minutes of leaving her meeting with him.

Ms. Gibson went to trial and was found not guilty of conspiracy but guilty of one count of possession with intent to distribute cocaine base. She was originally sentenced at level 34 to 151 months (for the crack cocaine from the prior sale as well as that arranged while she was in the car) and did not receive a mitigating role adjustment despite counsel's arguments. Her case was affirmed but remanded for resentencing by the Eleventh Circuit Court of Appeals. In 1998, she was resentenced to 126 months, receiving a reduction of 2 levels in recognition of her minor role in the offense. Ms. Gibson has two children, now 11 and 18 years old. Their 66-year-old grandmother cares for them. Ms. Gibson will be released in early 2005.

Tammi Bloom's husband of 15 years distributed cocaine from an apartment that he shared with his mistress in Ocala, Florida. Ms. Bloom testified at her trial that she was unaware of her husband's affair or the sales in Ocala. A confidential informant said that she was present for other sales at her own home with Mr. Bloom in Miami and counted money for him.

After Ronald Bloom and his mistress were arrested, the police searched the home he shared with Ms. Bloom and discovered cocaine, cocaine base, 3 firearms and drug ledgers. Besides a small bag of cocaine on her husband's nightstand, she did not know about the other evidence as it was hidden, even from her, in a septic tank and in a part of the house used primarily by her husband.

The PSI identified Mr. Bloom as the most culpable defendant in the case because he exercised decision-making authority over his wife and others. Ms. Bloom was held accountable for drugs distributed from the home in Miami on three occasions for a total of 2.41 kilograms of cocaine and 510.05 grams of cocaine base. She received a two-level enhancement for the guns and a two-level obstruction of justice enhancement for testifying, allegedly falsely, to her innocence at trial. While she received a two-level reduction for minor participant, she still received the longest sentence of anyone convicted in the conspiracy: 235 months or19 years and seven months. Her husband received 210 months, or 17.5 years, his mistress 78 months and another asociate, 168 months.

Ms. Bloom has two children, 16 and 18, who are being raised by their maternal grandmother. Ms. Bloom's father died in 2002 and her mother is struggling to keep the family

going without him.

Tammi Bloom will leave prison in late 2015.

In October 1990, **Daisy Diaz** accompanied her husband and others on a boat trip to several Caribbean islands. She believed the trip was for pleasure. After 41 kilograms of cocaine were discovered on an island the boat had just departed, the boat was searched by Bahamian police. The party was arrested and a gun found in a bag carried by Ms. Diaz. She and the boat's captain, Antonio Mateau, said he placed the gun there as he anticipated being arrested. (Mr. Mateau later provided an affidavit to that effect after he was finally captured, years later.) The party was released but later detained again. The vessel was searched and found to contain 176.1 kilograms of cocaine hidden near the fuel tank. Ms. Diaz denied knowledge of the drugs, which were so well hidden it took more than a day to locate them. She was considered, even by the prosecuting attorney, to be merely a decoy to make the trip appear not a drug smuggling run but a family vacation. She was charged with the amount of drugs found on the boat as well as the 41 kilograms found on the island. Ms. Diaz was convicted and sentenced to 235 months, a base offense level of 38, with an enhancement for Mr. Mateau's gun.

The two-level downward adjustment was warranted, according to the Probation Officer, who agreed with the AUSA that she was merely a decoy.

Ms. Diaz, who had no criminal history, received the longest sentence of the party -- with the exception of Mateau who died in prison -- including that of her husband, who received 12 years. She maintains her innocence to this day. She will not be released in September 2008.

The mitigating role cap is an effort to account for a defendant's minor or mitigating role by establishing a realistic base offense level. It is an explicit recognition that quantity alone is relied on to such an extent in the guideline drug calculations that the least culpable end up with sentences that well exceed the dangerousness or harm of their conduct. Some even exceed the sentences of the most culpable defendants, even after credit for mitigating role.

Senator Jeff Sessions (R-Al), speaking for himself and Senator Orrin Hatch (R-UT), recognized and attempted to fix the problem when he introduced S. 1874, the Drug Sentencing Reform Act of 2001. The bill was designed to more appropriately account for role by increasing sentences for certain kinds of conduct and reducing them for the least involved.

He remarked, when introducing the bill that "the primary focus of the mandatory minimums and the Sentencing Guidelines on quantity has resulted in a blunt instrument that data now shows is in need of refinement." 178 Cong. Rec. S13962 (daily ed. Dec. 20, 2001). First-time, non-violent offenders were least likely to be rearrested and the presence of violence or a dangerous weapon, he concluded, were better predictors of recidivism than drug quantity.

Sen. Sessions called for a cap on base offense levels of down to level 30 for those receiving minimal role adjustments:

> This is very significant because couriers, who are often low-level participants in a drug organization, can have disproprotionate sentences of 20 or 30 years simply because they are caught with a large amount of drugs in their possession. By capping the impact of drug quantity on the minimal role offenders, the bill allows a greater role for the criminality, or lack of criminality, of their conduct in determining their ultimate sentences.
>
> For example, the bill provides a decrease for the super-mitigating factor of the girlfriend or child who plays a minimal role in the offense. These are often the most abused victims of the drug trade, and we should not punish them as harshly as the drug dealer who used them.

178 Cong. Rec. S13964 (daily ed. Dec. 20, 2001).

Defendants receive reductions for minor or minimal participation in fewer than 15 percent of drug distribution cases. In 2001 for example, only 2.3 percent of defendants received a minimal role reduction, 10 percent received a minor role reduction and .9 percent received one in between. No data is publicly available since the institution of the cap, but these numbers do not suggest an excess of leniency on the part of sentencing judges prior to its adoption.

It is particularly disturbing that the Commission chooses to revisit the cap, which it passed unanimously, so soon after it was instituted. There is simply no basis to judge whether and how it is affecting sentences, whether mitigating role adjustments are being invoked more or less frequently, and whether the government is appealing the adjustments. Furthermore, it is unclear how judges are handling cases where they believe a defendant warrants a mitigating role adjustment but may not warrant a reduction to level 30. Presumably, those sentences are subject to upward departure where the weight attached to the mitigating role adjustment is excessive. The better course would be to study how the cap is working before eliminating it or reducing its impact.

In light of the terrible outcomes that quantity-driven guideline sentencing guarantee, the recency of the amendment, and the few sentences it affects, we urge you to exercise restraint and neither eliminate nor adjust the role cap for the time being. Of course, if you choose to go forward with an amendment, we strongly encourage you to do so in a way that preserves as much flexibility in achieving sentencing relief for the less culpable who must suffer the brunt of quantity-driven sentences.

Issue for Comment 10 Regarding Aberrant Behavior

FAMM urges that the Commission not eliminate or amend the ability of courts to depart on the basis of aberrant conduct at this time. Not only was the departure significantly amended and its use restricted recently, the Commission has not completed its study and recommendations concerning criminal history. It strikes us as at least premature to remove an entire ground for downward departure on limited information The Commission can make a significant contribution to understanding the place that criminal history plays and should play at sentencing by staying its hand and studying the impact of the various changes to the departure made so far.

Departures from the guidelines were fashioned in part to provide feedback on the operation of the guidelines. That a departure is invoked teaches that judges feel the need to account for a factor or feature not provided for in the guidelines. That the departure is invoked, should never lead to the conclusion that it ought to be eliminated, even in this post-Feeney era.

We urge you to wait until you have complete information before you eliminate this important ground for departure.

Thank you for considering our views.

Sincerely,

Mary Price
General Counsel

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March 1, 2004

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

Dear Commissioners:

This letter is respectfully submitted in response to the Commission's request for public comment, BAC2210-40/2211-01. In particular, my comments relate to Issues for Comment 11: Hazardous Materials.

I am a partner in the law firm of Ballard Spahr Andrews & Ingersoll, LLP, practicing in the Government Enforcement/White Collar Crime Group and the Environmental Group. I was formerly Chief of the Environmental Crimes Section of the U.S. Department of Justice. Before that, I was an assistant United States attorney and Chief of Major Crimes in the United States Attorney's Office in the Eastern District of Pennsylvania, where I supervised all the environmental crimes prosecutions in the district.

In its annual submission to the Commission dated August 1, 2003, the Justice Department asked the Commission to consider revising the guidelines for offenses involving the illegal transportation of hazardous materials. In essence, the Department argued that the specific offense characteristics of the applicable sentencing guideline, § 2Q1.2, often do not apply to these "hazmat" offenses and therefore the guidelines are too low. Among other things, the Commission's request for comments lists eighteen possible aggravating factors, (A) through (R), that might be incorporated into the guidelines as specific offense characteristics (hereinafter the "proposed S.O.C.'s"). I suggest the following framework to help simplify and clarify the analysis of these issues.

Crimes involving illegal transportation of hazardous materials can be broken into three categories. The first category consists of acts of terrorism, that is, transportation offenses where the actors intend there to be releases of hazardous materials to the environment. The

second category consists of other, non-terrorist related hazmat offenses that also result in releases to the environment. These releases are usually accidental. Unlike more typical pollution offenses, which often involve the intentional discharge, release or dumping of waste to avoid the costs of proper disposal, hazardous materials regulations generally involve transportation of valuable products. The release and loss of valuable product into the environment is an unintended result of a hazmat offense. The third category consists of hazmat transportation offenses where there are no releases. As explained below, the sentencing guidelines already address the first two categories of offenses.

As for the first category, terrorist acts, the Department's letter of August 1, 2003 highlights the relevance of hazardous material transportation to acts of terrorism. (see, e.g., Justice Department letter dated August 1, 2003, p. 14: "Illegal transportation of hazardous materials has emerged as a significant terrorist vulnerability. . . ."). Certainly, a guideline calculation should be subject to enhancement if a hazmat transportation offense involves a terrorist act. However, § 3A1.4 already provides for an increase in offense level for any offenses involving or intending to promote a federal crime of terrorism. Specifically, it provides for an increase either of 12 levels, or an increase to level 32, whichever results in a higher offense level. Thus, there is no need to modify § 2Q1.2 or Part Q to take into account terrorism since it is already covered in chapter 3, and adding a specific offense characteristic for "a terrorist motive" (item (O) in the proposed S.O.C.'s) appears duplicative of § 3A1.4.

Similarly, with respect to the second category, hazmat offenses resulting in accidental releases, the presence of the releases brings these offenses into the "heartland" of other more typical pollution offenses covered by § 2Q1.2. In particular, the existing specific offense characteristics of § 2Q1.2 already provide a series of cumulative enhancements corresponding to the severity of any releases to the environment. These specific offense characteristics adequately reflect the varying seriousness of offenses that include environmental releases.

Indeed, I am not aware of the Justice Department taking the position that § 2Q1.2 results in sentencing that is in any way inadequate for such environmental crimes. For example, in July 2002, I had the opportunity to testify before a subcommittee of the Senate Committee on the Judiciary on the topic: "Criminal and Civil Enforcement of Environmental Laws: Do We Have All the Tools We Need?" Representatives of the Justice Department, the Environmental Protection Agency and others also testified. While many different "tools" for stronger enforcement were discussed, there was no suggestion that tougher sentences were needed for environmental crimes involving actual releases.

Many of the possible specific offense characteristics listed by the Commission in the Issues for Comment 11 simply repeat ones already included in § 2Q1.2, including the one-time release of hazardous material (§ 2Q1.2(b)(1)(B) – increase of 4 levels), the evacuation of a community (§ 2Q1.2(b)(3) – increase of 4), a substantial expenditure for remediation (id. – increase of 4 levels), and the substantial likelihood of death or serious injury (§ 2Q1.2(b)(2) – increase of 9) (items (D), (G), (K), (I) in the proposed S.O.C.'s).

That leaves the third and final category of hazmat transportation offenses – those that are not related to any environmental release, whether intentional or accidental. This is the only category that arguably is not already addressed under the guidelines, since the enhancements to § 2Q1.2 assume a release or a permit violation. Therefore, the evaluation of the need for additional enhancements and the assessment of what such enhancements might be should be focused on this category. However, the analysis of specific offense characteristics for these non-release cases is especially challenging. In the more typical environmental offenses involving releases, the specific offense characteristics reflect the egregiousness of the offenses based on the actual results caused by the offenses -- the repetition and impact of the release or releases of the harmful material into the environment. These impacts are empirically observable and measurable. By contrast, there is no actual harm associated with this third category of hazmat offenses since there are no releases into the environment. Instead, the severity of these offenses arise from the relative risk of harm to the public. The guidelines presently address risk with a departure for offenses that significantly endanger public safety. See § 5K2.14. However, rather than this departure, the Department seeks to add new specific offense characteristics. Accordingly, the specific offense characteristics that might be relevant are ones that serve as surrogates for measuring relative risk to the public. Possible examples of these from the list of proposed S.O.C.'s include the transportation of a hazardous material on a passenger-carrying or other aircraft (item A), the transportation of a hazardous material on any passenger-carrying mode of mass transportation (item B), the concealment of the hazardous material during its transportation (item C), the transportation of radioactive or explosive material (item N), and the failure to properly train transporters (item Q).

The difficulty in assessing these proposals is increased not only by the added difficulty in measuring risk as compared to the impact of actual releases, but also by the absence of a significant body of criminal cases or sentencing experience for hazmat transportation offenses. There are relatively few cases on which to evaluate whether or to what extent current sentencing of hazmat cases is inadequate.

In summary, the analysis of hazardous materials transportation offenses should focus on cases which do not involve an environmental release, because this is the only category that may be outside the "heartland" of environmental crimes cases already adequately addressed by the guidelines. Since the existing specific offense characteristics for cases involving actual environment releases are widely viewed as being adequate, there is no justification for adding new specific offense characteristics that relate to the impact of actual releases. Instead, the justification for any enhanced sentencing would have to be that the current guidelines do not adequately reflect the increased risk to public safety caused by hazmat offenses that do not include environmental releases. Therefore, the only S.O.C.'s relevant to the analysis are those that may reflect increased risk in such cases. Such analysis is made more challenging by the inherent difficulty in basing guidelines calculations on risk, rather than impact, and the small pool of relevant criminal experience on which to draw.

There are certainly hazmat offenses that can cause very signif icant risks to public safety, but the trick is to stri ke a proper balance that avoids painting with too broad a brush.

Respectfully,

Ronald A. Sarachan

RAS/km