Association of Corporate Counsel

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March 17, 2010

Re: **US Sentencing Guidelines – Chapter 8 Proposed Amendments**

Honorable Members of the United States Sentencing Commission and Staff:

The Association of Corporate Counsel (ACC) appreciates this opportunity to share our perspectives with the Commission on both their proposed amendments and the additional issue offered for comment on topics related to Chapter 8 of the Corporate Guidelines Manual.

ACC is the in-house bar association, with over 26,000 individual members working in over 10,000 public, private and non-profit organizations in over 70 countries. The vast majority of our members are in the US, or working in multinational companies often subject to US jurisdictional issues, and thus are very interested in the Guidelines/Manual. Our members represent the full gamut of industries and legal practices: ACC's ranks include representatives of more than 9,500 companies who aren't in the Fortune 500, and thus include a large slice of this country's thousands of private companies, non-profit organizations, and public companies with smaller legal staffs/budgets. Because of the extremely large number of companies and industries represented in our membership and the breadth and depth of our members' expertise across every substantive practice area, and within every aspect of a company's management and compliance leadership structures, ACC is a representative "voice" of the in-house bar and thus uniquely positioned to offer relevant perspectives on the Commission's proposals.

An Introduction to ACC's Comments and the Perspectives We Bring to the Commission

The primary distinction between in-house counsel and their brethren in outside firm practice is both the in-house counsel's unique status and positioning *within* their client organizations (and thus their institutional knowledge and penetration into the company's modes of doing business), and their over-arching concern with compliance and preventive practice (rather than the primary focus on remedial law that many law firms find is their specialty since they are called after a problem has surfaced). In-house counsel thus cover both sides of the equation that is so closely connected to the Commission's work in Chapter 8: they have both a laser-like focus on compliance-related issues, as well as responsibility for coordinating the defense of the company when compliance fails or was not able to prevent a corporate rogue's misbehavior. Thus, ACC would like to offer its members' perspectives as they relate both to the Sentencing

Commission's unique role in defining "effective corporate compliance programs" (which definition has tremendous relevance and impact outside the context of sentencing), as well as when the company finds itself before a court considering remedies, penalties and mitigating factors that determine the company's sentence.

The impact of the messages sent by the Commission on what ACC members do to implement effective compliance programs on a daily basis cannot be understated. It is thus important for the Commission to consider the impact of these proposals on either rewarding and incenting good results or frustrating compliance efforts in companies trying to do the right thing. ACC commends the Commission for its efforts in these and previous proposal processes in seeking to create guidelines that are both useful to the development of preventive compliance programs and to judges considering sentencing; in particular, we wish to commend the Commission in this round of proposals for seeking to respond to the ongoing concerns of many in the corporate community who believe that while the Guidelines are intended to offer incentives and rewards to companies which can prove they had effective compliance programs, that potential has not been realized very often. In practice, it is almost impossible to overcome the presumption that the failure that brought a company to the court for sentencing could take place in a company with an effective compliance program. We would like to take this opportunity to suggest how the Commission's proposals to address these and other issues might be improved to help companies looking to the Guidelines for guidance on how to establish and implement their own effective compliance initiatives.

In considering our comments below, we would like to offer the Commission the following contextual reference that underlies all of our suggestions on the Commission's proposals:

ACC believes that "best thinking" in corporate legal compliance and the methods by which companies can assure compliant behaviors are changing in important ways: previously, those with sole fiduciary and practical responsibility in the company for compliance were lawyers and most often in-house counsel who had to work hard to make sure that corporate leaders even considered the importance of preventive legal strategies; today, it is increasingly likely that compliance is a shared business and legal responsibility between in-house lawyers and many others in the company, at all levels of leadership – from the C-Suite to the line worker. In a growing number of more substantial public companies and in highly regulated industries, it is more common to see the growth of a separate compliance/ethics department that reports outside of the legal department's line of authority (and coordinates with legal to create innovative and more business-oriented teams focused on particular tasks or assuring particular behaviors).

What we see resulting is an expansion of thinking in what constitutes the structure and format of effective compliance programs and best practices, creating a broader array of "leading" practices designed for particular purposes, rather than an assumption that there is any one "best practice" that can or should work in all settings. As companies respond to the complex and often treacherous path of assuring appropriate behaviors by all members of the corporate team and compliance with a wide variety of legal and ethical

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requirements, they no longer feel limited to employing "traditional" or uniform paths of activities that were previously implemented by the lawyers responsible for establishing and maintaining a compliance function: compliance teams made up of lawyers and business people are more and more likely to think outside the box to craft unique compliance initiatives and internal controls that are customized to their particular corporate profile and culture, as well as the needs of their company, leadership, and industry.

Compliance programs and leadership are thus as varied in their "format" and delivery methods as are the clients they serve. Therefore, the incentives and rewards the Commission wishes to offer to companies to "do the right thing" need to recognize that one-size or one-shape presumptions about how a compliance program should be structured will not fit all; in order for your efforts to have their intended prescriptive impact, the Commission should seek to formulate guidelines that articulate the *outcome* the Commission wishes to incent, rather than dictating the activities, methodology or means by which a company tries to reach that outcome. To do otherwise is to miss recognizing and rewarding the inventive and creative ways that companies currently and in the future are working to assure compliant cultures in different industries, with different managers, across many borders and with greater results.

To that end, you will see a repeated theme in our comments below, requesting the Commission to consider language or changes that will allow all kinds of companies with all kinds of effective compliance efforts to succeed because they can document that their programs were successful or appropriately framed to produce compliant behaviors in their particular setting; you will see us suggesting to the Commission that they should not punish companies that wish to develop initiatives that work well within their particular "space" because they did not employ particular practices that may work well somewhere, but have no relevance or value in their own structure or culture. We thus encourage the Commission in general to seek out ways to promote compliance "outcomes" the Commission finds important (and then let companies demonstrate how their compliance program succeeded in meeting that goal), rather than detailing specific "activities" as the only sanctioned path to getting there.

ACC's Specific Comments on the Commission's Proposals

1. Remediation efforts required to satisfy the seventh requirement of an Effective Compliance and Ethics Program.

The Commission proposes amending the Commentary to §8B2.1 to clarify the remediation efforts required for an Effective Compliance and Ethics Program. None of the existing commentary elaborates on the seventh requirement: that the organization "take[s] reasonable steps to respond appropriately" if criminal conduct has been detected,

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and "to prevent further similar criminal conduct, including making any necessary modifications to the organization's compliance and ethics program." § 8B2.1(b)(7).

Although our members have not reported to us any difficulties in understanding or applying this requirement, we are not protesting the Commission's proposed clarification that organizations should respond to detected criminal conduct by taking reasonable steps to remedy the resulting harm where there is one or more identifiable victim. We also agree that self-reporting and cooperation with authorities "may" be "appropriate responses." This language properly recognizes that one size does not fit all situations. But we would go one step further to make the point explicit: "The need for, method, or appropriate extent of, any of these measures will vary according to the circumstances and the relevant compliance challenges the company seeks to address."

ACC also agrees with the premise that when criminal conduct is uncovered, the organization should consider whether modifications to the program could make it more effective in detecting or preventing misconduct in the future. A responsible organization will want to explore whether lessons can be learned from such experiences and better practices going forward can result.

We do have a strong view, however, on one aspect of the proposed language. In reference to modifications that might follow reassessment of a compliance program, the proposal would add this sentence: "The organization may take the additional step of retaining an independent monitor to ensure adequate assessment and implementation of the modifications." ACC believes this language, while perhaps intentioned as merely the articulation of an option, may – by virtue of being singled out for recitation by the Commission – become a presumptive practice that companies are expected to consider or implement.

The appointment of a corporate monitor is a very extreme, intrusive, and expensive proposition for any company to consider. While a court may appropriately appoint a monitor in response to heinous criminal behavior permeated in a company that clearly requires ongoing outside supervision of the strongest sort, the Guidelines should not suggest that appointment of a monitor to address remediation going forward is some kind of common best practice that a company would choose, nor should it be a necessary consideration as a show of good faith in cases where such an extreme option is not warranted.

It is possible and even likely that a company considering remediation options will seek to enlist top talent to help them live up to their future challenges in moving beyond their sentence; but the expertise they call upon may not be best embodied by a corporate monitor. Indeed, monitors in many situations could be more disruptive than helpful, and inserting an outsider's often uninformed judgments on how to best run the company should be reserved for those rare occasions when it is clear that the judgment of the remaining leaders in the company is so impaired or corrupt that it must be displaced.

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Further, the expertise the company requires may not be the skill sets of simple oversight, supervision, and replacement of judgment that most monitors are associated with bringing to a convicted company: the company may be better served by those who can help re-train the workforce to avoid problems in the future, or develop new systems of controls and monitoring; often these kinds of hands-on, practical skills are not part of the repertoire of those who would be considered for the post of a monitor.

We thus ask the Commission to remove the monitor reference from this section, and allow judges who identify a specific need in the company before them to discuss the kinds of specialized expertise needed by the company going forward, and to work with the company to identify leaders and solutions that will inform and improve its remediation.

2. Conduct expected from high level and substantial-authority personnel in judging whether a company has an effective compliance and ethics program.

The Commission's proposals include two instances of "bracketed" language to clarify what is expected of high-level and substantial authority personnel. ACC is particularly concerned about new references to "document retention policies" in the bracketed language. The proposed language would require that high-level personnel and substantial authority personnel "be aware of the organization's document retention policies and conform any such policy to meet the goals of an effective compliance program under the guidelines and to reduce the risk of liability under the law." A second proposed paragraph would state that the periodic assessment requirements for programs include assessing "[t]he nature and operations of the organization with regard to particular ethics and compliance functions." The sole example proposed is that "all employees should be aware of the organization's document retention policies and conform any such policy to meet the goals of an effective compliance program under the guidelines and to reduce the risk of liability under the law."

ACC believes that most organizations involve some of their high-level and substantial authority personnel in considering various aspects of the nature and operations of their ethics and compliance functions. But we worry that Section 8B2.1 is too specific in its dictates to connect executive leadership's responsibility and understanding of ethics and compliance to the operation of the company's document retention policies. This is particularly of concern since the proposals offers a sole reference to "document retention policies" as the example cited to show effective behavior in compliance officials and leaders.

ACC believes that this approach places too much emphasis on one specific part of a corporation's operations, and chooses for that emphasis a corporate function – records management – that is not even primarily related to corporate compliance initiatives. Further, casting the topic of records management with the wording "document retention" creates an implicit belief that the Commission is interested in strong document retention

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policies rather than good records management (which includes setting policies for that which is to be retained, as well as what is to be destroyed, archived, retrieved, and managed); "document retention" is not necessarily reflective of either corporate best practices or the company's best interests in records management: taken to its logical conclusion, one could infer from the Commission's proposed language that the Commission believes that the company that is engaged in effective compliance keeps everything forever.

ACC believes that most sophisticated companies will have some form of records management system, but we would take this opportunity to remind the Commission that records management policies and practices are created by companies to serve business functions; they are often modified in some specific ways to enable the company to follow legal requirements to produce files as a result of a failure or litigation, but they are created with more universal business needs in mind. Records managers who are trained business (as opposed to legal or ethics) professionals are often hired by companies to manage these policies and are responsible for their administration. Indeed, many records managers are hired to help companies deal with the plethora and complexity of not only knowing what to keep, how to keep it, and where to find it again, but also to assure that the vast majority of records that are not needed going forward are destroyed.

Document destruction is an incredibly important and necessary component of every company records policy. Companies would otherwise be tied in a "tail-wag-dog" fashion to retention policies that require warehouses to stack the stuff and huge expenditures on technologies and their supervision to catalog and maintain mountains of e-files. Companies that keep "everything forever" also open themselves to additional problems beyond the logistics of housing the records: there is the extremely expensive need to sift or review everything ever created in order to find any one thing, the increased likelihood that such searches will miss vital responsive documents as the mounds to be sifted grow, as well as exposure to unnecessary exploration of e-rooms of non-responsive data by folks who wish to go "fishing" in the company's archives for material that could be re-purposed to their own interests.

Of course, the ability to produce all responsive and relevant documents related to a legal or compliance problem is certainly very important. And e-discovery and other kinds of modern litigation requirements have transformed many corporate records management systems from their previous focus on business needs to accommodate the legal and compliance need to evidence corporate actions or retrieve material necessary to a case; they also have been re-fashioned to allow lawyers to establish a litigation hold when a suit is anticipated or filed. But those needs and the responsibility for corporate records management sit on top of a larger corporate interest in managing data and records generally, and are thus ancillary to the company's overall document requirements and burdens. Thus, it is unlikely that most folks in the corporate world would consider records management and responsibility to be so closely linked in terms of overall supervision by legal, compliance or executive management.

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The records policies adopted by a company are of course the concern of everyone in the company's leadership generally, but the Commission's language may unnecessarily tie records management inappropriately to the definition of effective compliance programs and to the compliance and legal leaders who are responsible for assuring successful compliance efforts, when such is just not the case. We would suggest that these concepts be de-coupled and reference to document retention policies be removed.

If the Commission decides there is a need to reference records management issues in the Guidelines, ACC requests that it not be so closely tied specifically to retention, and that your focus should be properly placed – not on defining appropriate record management tactics, but rather – on sound and enforceable document hold policies that could be more appropriately related to legal or compliance efforts.

3. Probation conditions.

Our sole comment to the proposal addressing conditions of probation is that the new reference to monitors has some of the same drawbacks as those mentioned previously in our comments above. Arguably, there is less of a concern here, because the Commission is merely stating options available to the Court. But the casualness of such references (now repeated again in this section) is exactly our concern: the proposed language regarding monitors may over time create the impression that use of a monitor is standard and routine in cases involving corporate criminal conduct, instead of a most rare and extreme remedy with hugely disruptive impacts within the company and to its stakeholders.

Further, our experience with such lists of options is that some reading them will be encouraged to consider them a list of criteria that should each be considered, weighed, and met, rather than just a list of unconnected "possibles": in other words, such a list of options could become a checklist of "to do's" over time, requiring a judge to go down the list and tick each item off in turn. And we do not think that the extreme measure of installing a monitor is at all appropriate to a list of common considerations that a judge is encouraged to ruminate on with every sentence she administers.

ACC thus requests the Commission to delete the reference to monitors as unnecessary. We are aware of no case where a court has thought it appropriate to appoint a monitor but found itself without the ability to do so because the option was not mentioned in the Guidelines. At a minimum, we believe the Commission should be clear not to make the use of monitors appear to be a Guidelines-suggested "best practice" or an option that should be considered in every matter.

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4. Issue for comment regarding method for encouraging self-reporting.

Finally, the Commission proposes an issue for comment: they ask interested parties to address whether the Commission should allow an organization to receive a three-level mitigation for an effective compliance program even when high-level personnel are involved in the offense. The draft offered for comment proposes three conditions for this receiving this credit.

First, let us say that ACC supports efforts by the Commission to make the three-level reduction available in more cases. In the history of Chapter 8, very few organizations have received the three-level reduction for having an effective compliance and ethics program. Anecdotal evidence suggests that the disqualifier for involvement of high-level personnel is part of the explanation. That disqualification is harsh, because it takes just one highly placed individual, acting contrary to every policy and practice of the organization, to prevent the company from receiving credit for even the best compliance and ethics program. Just as no compliance program can prevent every crime, no compliance program can detect every employee or officer who might someday violate company policy. Some might suggest that those with the greatest ability to understand how to defy the company's best efforts might be the very folks at the top of the ladder with big brains, a world view, unfettered access, and more opportunity to engage in hidden practices. Denying the three-level credit on this ground alone, therefore, results in comparable treatment of an organization with the best possible compliance program with one that has no redeemable compliance efforts at all.

As to the proposed Guideline conditions that companies must meet to qualify for this mitigation:

a. The condition that the company must be able to evidence direct reporting authority to the board for "the individual(s) with operational responsibility for compliance in the organization."

The requirement that "individual(s) with operational responsibility for compliance in the organization" have a direct reporting relationship with the board creates language in the Guidelines that could do great mischief and creates confusion.

Firstly, what does "direct reporting relationship" mean? That individuals with operational responsibility have a solid line reporting authority that bypasses the CEO and runs directly to the board? Or simply that they can somehow make a report to the board or have access to the board, even if they report in the chain of command to other leaders in management? Does it mean that all compliance-vested employees must have some kind of access to corporate whistle-blowing systems such as hotlines that report concerns to the audit committee after being vetted by the compliance team? Or that all compliance-vested employees have some kind of dotted line communication track that allows them to directly communicate with the board whatever and whenever they think appropriate?

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And secondly, what does "operational responsibility for compliance" mean? Who are the individuals who have operational responsibility for compliance? Does this mean persons with some / any level of compliance responsibility in their jobs or on their team? Is this person the Chief Compliance Officer? How does one define who the persons with operational responsibility are in a company that does not have an internal office or function labeled "The Compliance Department" or an executive whose title include the words "Ethics" or "Compliance Officer"?

Consistent with our earlier suggestions that the Commission should focus on outcomes rather than on designating specific activities or directives to drive the definition of an effective compliance program, ACC suggests that in this clause, the Commission should only require that there be access available to whomever is functionally responsible for directing the company's compliance efforts and therefore ultimately responsible for compliance initiatives or failures. It is not reasonable to dictate that a company create a direct line of supervisory authority specifically answerable to the board or its audit committee that bypasses the CEO or other executive management leaders; perhaps some companies would easily adopt such a reporting relationship based on their size and how the board "works," but others would not. It is not yet common in the majority of companies for anyone other than the CEO to have a direct reporting line to the Board – even if many people have the ability to otherwise communicate with board leaders. The use of the word "reporting" could cause confusion between an understanding of how company organizational charts draw reporting lines between employees and their supervisors, and "reporting" a problem to the ultimate authority responsible for its remediation: the board.

What is important is that the board has access to reports from concerned employees and that concerned employees can assure that their concerns will reach the board if they are valid. Thus, alternatively or additionally, the Commission could assert that an effective compliance program must be able to evidence some kind of effective communication procedure in place that allows reports from any employee in the company with concerns about compliance to reach the Board after vetting by the system's process or leaders. The Guidelines should not dictate reporting details or whom the appropriate and responsible leader must be, but rather should seek to assure there are available reporting lines and that the board has confidence that the company's systems will allow the Board to hear concerns from employees with important stories to tell.

b. The last of the three requirements is also of concern to ACC: that the organization seeking credit promptly reported the violation to the appropriate authorities.

This criterion is an appropriate consideration in general, but as written, the language may cause confusion or impede the ability of a company that has done what it should to prove that it now should receive the credit for its efforts.

The guidelines already provide credit elsewhere for self-reporting. Thus, this suggested criteria not only replicates that factor, but also subjects it to a new standard that sits on

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top of that factor and that could create confusion. The new criteria is to focus on "prompt" reporting, a term that will likely be subject to the interpretation of officials who have the benefit of 20/20 hindsight to inform their judgment.

A legal or compliance failure rarely arrives on a responsible compliance individual's desk in a folder full of facts that are clearly documented; it is rarely clear when a problem surfaces whether the company has a problem or not. It is far more likely that "something" is overheard by "someone," or doesn't look right in a report. Maybe in a few days or a few weeks someone with whom that irregularity has been shared (likely someplace like the proverbial water cooler) makes a decision to raise the issue to his superior. Then it takes time to get the issue from the superior to a responsible person with compliance or legal responsibilities who can consider how to investigate the concern and respond the person who raised the concern.

It will not be clear at this stage whether the company has a problem or not, and the same holds true when the concern surfaces through the company's hotlines or other portals for "anonymous" reporting. The reality is that the vast majority of complaints made to compliance leaders do not pan out to be legitimate failures. Mixed in with important reports of real wrongdoing are requests for the company to address arguments between employees who disagree over policy or process, those with personal "axes" to grind, reports based on false information or misunderstandings, or tattles on a peer's sub par performance, none of which constitute negligent, nonetheless criminal activity.

If there is a legitimate concern to be raised, whoever is investigating the issue needs to put together something that is credible and sufficiently documented to allow the company's leaders to decide if this is an offense to be reported to the government. The process takes time – there will not be a response and a report to the government within a day of the infraction except in the most unusual and extreme cases (as in, "the plant's nerve center blew up and a toxic mess is making it's way toward the city"). Taking adequate time to investigate a concern raised should not suggest a "cover-up" or "foot-dragging": but time does pass, and when the infraction ends up being criminal in nature, even normal diligence involved in reporting might suggest to the someone sitting in judgment years later that the company was not "prompt" in responding. From the 20/20 hindsight perspective of someone who knows now that a failure did occur, the actions of the person who didn't know if a problem existed some months back may not seem expeditious.

ACC encourages the Commission to refrain from adding any additional descriptors to self-reporting (deferring to the other sections of the manual that already cover this issue), or if it wishes to expand on the concept further, perhaps alternative language such as "responsible" or "diligent" or "reasonable" reporting might create greater confidence that the company won't be precluded from receiving credit simply because it took the time to make a considered determination that there *was* a reportable violation before reporting it.

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Conclusion

ACC thanks the Commission for the opportunity to present our members' views and hopes that the Commissioners or staff will let us know if we can in any way assist them in their continuing work to improve Chapter 8 of the Guidelines Manual.

On behalf of ACC's members, submitted by:

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cc: Frederick Krebs, ACC's President
Patricia Hatler, ACC's Chairman of the Board
ACC's Advocacy Committee, and Advocacy Chairman, Brad Smith

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March 17, 2010

Re: **US Sentencing Guidelines Manual –**

Proposed Amendments to Chapter 8

Testimony of Susan Hackett,

Senior Vice President and General Counsel

Honorable Members of the United States Sentencing Commission and Staff:

ACC appreciates this opportunity to share our perspectives with the Commission on both their proposed amendments and the additional issue offered for comment on topics related to Chapter 8 of the Corporate Guidelines Manual.

For those of you less familiar with my organization, ACC is the bar association for in-house lawyers. Our membership is limited to those who are employed to provide legal services within their client organization. We were founded in 1982 as the American Corporate Counsel Association or ACCA, and changed our name to Association of Corporate Counsel several years ago as the increasingly international interests of our members (from both within and without the US) became a stronger unifying force than our identification with any one country's jurisdiction. It is our members' unique status and concerns as in-house counsel that defines their interest in our organization and what we provide for them. We currently have over 26,000 individual members working in over 10,000 public, private and non-profit organizations in more than 70 countries.

The vast majority of our members are in the US, or working in multinational companies often subject to US jurisdictional issues, and thus are very interested in the Guidelines' Manual. Many have direct responsibility for (and the rest have indirect responsibility for) their company's compliance programs and their company's defense in the event of a compliance failure. Because of the extremely large number of companies and industries represented in our membership and the breadth and depth of our members' expertise across every substantive practice area and within every aspect of a company's management and compliance leadership structures, ACC is a representative "voice" of the in-house bar and thus uniquely positioned to offer relevant perspectives on the Commission's proposals.

An Introduction to ACC's Comments and the Perspectives We Bring to the Commission

The impact of the messages sent by the Commission on what ACC members do to implement effective compliance programs on a daily basis cannot be understated. ACC is thus most interested in addressing the Commission's important work in seeking to create guidelines that are useful to the development of effective corporate compliance programs. In our written statement, we detail our concerns with the proposals before you today that we would like the Commission to address in the interest of assuring the success of companies looking to the Guidelines for guidance on how to establish and implement their own effective compliance initiatives.

I will allow you to read our statement's concerns with the corresponding support for our positions that I've laid out in writing. But to offer you a verbal summary here, we are asking the Commission to:

1. Consider adding additional detail to the Commission's requirement that the organization "take[s] reasonable steps to respond appropriately if criminal conduct

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[is] detected, and "to prevent further similar criminal conduct, including making any necessary modifications to the organization's compliance and ethics program." In § 8B2.1(b)(7) we suggest the Commission consider adding the following language: "The need for, method, or appropriate extent of, any of these measures will vary according to the circumstances and the relevant compliance challenges the company seeks to address."

Additionally, proposed language in that same section includes the following statement: "The organization may take the additional step of retaining an independent monitor to ensure adequate assessment and implementation of the modifications." ACC believes this language, while perhaps intentioned as merely the articulation of an option, may – by virtue of being singled out for recitation by the Commission – become a presumptive practice that companies are expected to consider or implement. We suggest the monitor reference be removed, for the reasons we articulate fully in our written submission and that have also been so eloquently outlined by David DeBold during his testimony on behalf of the Practitioner's Advisory Group.

We also request that the references to monitors in the Probation proposals likewise be removed. We believe that repeated insertion of a "monitor option" into the Guidelines' Manual suggests that the Commission sees the practice as some kind of "best" or common practice that judges should consider routinely, rather than the nuclear option that most folks who've ever worked in a monitor situation perceive it to be.

2. **Reconsider the proposal's suggestion that "document retention" policies are a good indicator of a specific conduct that evidence compliance commitment in high level and substantial-authority personnel when judging whether a company has an effective compliance and ethics program.**

The Commission's proposals include two instances of "bracketed" language to clarify what is expected of high-level and substantial authority personnel. ACC is particularly concerned about new references to "document retention policies" in the bracketed language. Our comments focus on two concerns with these proposals: whether it is appropriate to judge the efficacy of a company's compliance efforts by whether its senior managers are responsible for the company's records management programs (is that really what an effective compliance program is primarily about?), and whether the Commission, if it truly thinks that records management is the bell weather of effective complianc programs, truly meant to focus its attention on document retention as the sole cited factor.

Essentially, ACC believes that Section 8B2.1 places too much emphasis on one specific element of a corporation's operations, and chooses for that emphasis a corporate function – records management – that is not even primarily related to corporate compliance initiatives. Further, casting the topic of records management with the wording "document retention" creates an implicit belief that the Commission is interested in strong document retention policies rather than good records management (which includes setting policies for that which is to be retained, as well as what is to be destroyed, archived, retrieved, and managed); one could infer from the Commission's proposed

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language that the Commission believes that the company that is engaged in effective compliance keeps everything forever.

Of course, the ability to produce all responsive and relevant documents related to a legal or compliance problem is certainly very important. But those needs sit on top of a larger corporate interest in managing data and records generally, and are thus ancillary to the company's overall document requirements and burdens. It is unlikely that most folks in the corporate world would consider records management and responsibility to be so closely linked in terms of overall supervision by legal, compliance or executive management. We would suggest that these concepts be de-coupled and reference to document retention policies be removed.

If the Commission decides there is a need to reference records management issues in the Guidelines, ACC requests that it not be so closely tied specifically to retention, and that your focus should be properly placed – not on defining appropriate record management tactics, but rather – on sound and enforceable document hold policies that could be more appropriately related to legal or compliance efforts.

3. Consider our thoughts on the issue set out by the Commission for comment regarding methods for encouraging self-reporting.

The Commission asked interested parties to address whether the Commission should allow an organization to receive a three-level mitigation for an effective compliance program even when high-level personnel are involved in the offense. The draft offered for comment proposes three conditions for this receiving this credit.

First, let us say that ACC supports efforts by the Commission to make the three-level mitigation available in more cases.

As to the **condition for that the company must be able to evidence direct reporting authority to the board for "the individual(s) with operational responsibility for compliance in the organization,"** we think the concept has merit, but the wording is flawed. The term "direct reporting relationship" is not well-defined and is subject to broad misinterpretations if we're understanding the Commission's intent to be that they want to make sure that employees with concerns to share get access to the board if they're not getting action in the company. But within a company, a reporting authority has to do with the companies organizational chart and who supervises whom, as in, to whom do you report?

The term describing the targets of this proposal as those with "operational responsibility for compliance" also is ill-defined and could lead to problems. Who are the individuals who have operational responsibility for compliance? Does this mean persons with some / any level of compliance responsibility in their jobs or on their team? Is this person the Chief Compliance Officer? How does one define who the persons with operational responsibility are in a company that does not have a formal compliance function.

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ACC suggests that what is important is that the board has access to reports from concerned employees and that concerned employees can assure that their concerns will reach the board if they are valid. Thus, the Commission might better assert that an effective compliance program must be able to evidence some kind of effective communication procedure – the Guidelines should not dictate reporting details or whom the appropriate and responsible leader must be, but rather should seek to assure there are accessible lines of communication established that allow both the concerned employee and the board the confidence that the company's systems will ensure that the board hears concerns from employees with important stories to tell.

The last of the three requirements is also of concern to ACC: that the organization seeking credit promptly reported the violation to the appropriate authorities. This criterion is an appropriate consideration in theory, but as written, this language may impede the ability of a company that has done what it should to prove that it now should receive the credit for its efforts. It is rarely clear when a problem surfaces whether the company has a problem or not. It is far more likely that "something" is overheard by "someone," or doesn't look right in a report. Maybe in a few days or a few weeks someone with whom this peculiar irregularity has been shared (likely someplace like the proverbial water cooler) makes a decision to raise the issue to his superior. Then it takes time to get the issue from the superior to a responsible person with compliance or legal responsibilities who can consider how to investigate the concern and respond the person who raised the concern. If there is a legitimate concern to be raised, whoever is investigating the issue needs to put together something that is credible and sufficiently documented to allow the company's leaders to decide if this is an offense to be reported to the government, and that process takes time.

Taking adequate time to investigate a concern raised should not be punished. From the 20/20 hindsight perspective of a judge who knows now that a failure did occur, the actions of the person who didn't know if a problem existed some months back may not seem expeditious in review. Perhaps the Commission might better focus on not adding any additional descriptors to self-reporting (deferring to the other sections of the manual that already cover this issue), or if they do wish to expand on the concept further, perhaps alternative language such as "responsible" or "diligent" or "reasonable" reporting might create greater confidence that the company won't be precluded from receiving credit simply because it took the time to make a considered determination that there *was* a reportable violation before reporting it.

Conclusion:

ACC believes that "best thinking" in corporate legal compliance and the methods by which companies can assure compliant behaviors are changing in important ways: today, it is increasingly likely that compliance is a shared business and legal responsibility between in-house lawyers and many others in the company, at all levels of leadership – from the C-Suite to the line worker. In a growing number of more substantial public companies and in highly regulated industries, it is more common to see the growth of a separate compliance/ethics department that reports outside of the legal department's line

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of authority (and coordinates with legal to create innovative and more business-oriented teams focused on particular tasks or assuring particular behaviors). In other smaller companies or companies with smaller internal management groups, compliance programs may still be implemented the "old fashioned way."

What we see as a necessary result is an expansion of thinking in what constitutes the structure and format of effective compliance programs and best practices, creating a broader array of "leading" practices designed for particular purposes, rather than an assumption that there is any one "best practice" that can or should work in all settings. As companies respond to the complex and often treacherous path of assuring appropriate behaviors by all members of the corporate team and compliance with a wide variety of legal and ethical requirements, they no longer feel limited to employing "traditional" or uniform paths of activities that were previously implemented by the lawyers responsible for establishing and maintaining a traditional compliance function: compliance teams made up of lawyers and business people are more and more likely to think outside the box to craft unique compliance initiatives and internal controls that are customized to their particular corporate profile and culture, as well as the needs of their company, leadership, and industry.

Thus, modern compliance programs and leadership are as varied in their "format" and delivery methods as are the clients they serve. Therefore, the incentives and rewards the Commission wishes to offer to companies to "do the right thing" need to recognize that one-size or one-shape presumptions about how a compliance program should be structured will not fit all; in order for your efforts to have their intended prescriptive impact, the Commission should seek to formulate guidelines that articulate the *outcome* the Commission wishes to incent, rather than dictating the activities, methodology or means by which a company tries to reach that outcome. To do otherwise is to miss recognizing and rewarding the inventive and creative ways that companies currently and in the future are working to assure compliant cultures in different industries, with different managers, across many borders and with greater results.

ACC thanks the Commission for the opportunity to present our members' views and hopes that the Commissioners or staff will let us know if we can in any way assist them in their continuing work to improve Chapter 8 of the Guidelines Manual.

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