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United States Sentencing Commission
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March 11, 2010

RE: *Proposed Revisions to Chapter Eight*

To the Honorable Members of the United States Sentencing Commission:

I very much appreciate the opportunity to submit comments to the Commission on proposed amendments to the organizational sentencing guidelines.

I served as Deputy General Counsel at the Commission between 1990 and 1996 and chaired the staff working group that developed the organizational guidelines for the Commission. I also served on the Advisory Group that made recommendations to the Commission on amending the organizational guidelines in 2003. Since leaving the Commission's staff in 1996, my work has focused entirely on advising companies, and in some instances the government (e.g., Department Justice, Securities and Exchange Commission, Air Force), on matters pertaining to effective corporate compliance/ethics ("C&E") programs.

I want to commend the Commission for considering amendments to the organizational guidelines. As the Commission knows, the provisions establishing the culpability score criteria, and especially those pertaining to the definition and impact of "an effective" C&E program, constitute keenly important public policy. Section 8B2.1, in particular, is closely watched by the business community because it has become the standard reference point for C&E programs in the U.S. today.

Because the organizational guidelines have become such an important reference point, I believe that amendments to the organizational guidelines should be adopted only to the extent that there is a high degree of confidence that they will improve the existing policy framework. Using this standard as a gauge on the proposals, my specific comments and recommendations on the proposed amendments follow. Again, I very much appreciate the opportunity to provide them.

- **Proposed Changes to §8D1.4 –Recommended Probation Conditions** – These changes appear logical, straightforward and useful.

  ▶ *Recommendation:* Adopt.

- **Proposed Changes to §8B2.1 Application Notes – Relating to "Document Retention" Policies** – The two proposed changes, to application notes 3 and 6 respectively, appear to me to effectively elevate one particular kind of corporate policy above all others. While I agree that document retention (or "records retention" – which I think is a better term

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given the prevalence of electronic, voice and other data in businesses today) policies are important, I do not think as a general matter that they are necessarily more important than, for example, antitrust, export compliance or FCPA policies.

Moreover, the priority given to a policy by any individual company should be determined based on an analysis of the risks associated with that company's unique business characteristics. This idea is already recognized in §8B2.1(c), and its associated application note, Note 6, especially subsection (A)(ii).

Applying this idea, a company that sells tobacco should assign to its policy on marketing to children the highest priority; in contrast, a company that manufactures industrial ball bearings does not even need a policy on marketing to children.
And with respect to a ball bearing company, I would contend that employees on the factory floor have a far greater need to be aware of policies relating to safety, the environment and mutual respect than they do of document retention policies. Yet, the proposed change to application note 6 would leapfrog other policies and require[1] that "all employees" – which would mean even factory floor workers – "should be aware of the organization's document retention policies."

Because the guidelines standards on C&E programs are so closely followed, many companies are already eyeing the proposed changes and considering whether they will need to readjust their 2010-2011 C&E planning to redirect resources toward generating workforce-wide awareness of their records retention policies. For the reasons laid out, I think this would not make sense in many cases, and I think the guidelines currently make clear that records management should be 1) part of a company's policy portfolio and 2) communicated to the right subset of employees, commensurate with actual business risk.

▶ *Recommendation:* Do not adopt.

- **Proposed Changes to §8B2.1 Application Notes – Expanding on "Responding Appropriately" to Misconduct** – Currently the guidelines have no application note that expands on this "seventh step" in the guidelines C&E framework, and having one in my view therefore makes sense. I also think that highlighting the need for a company to "respond" by remedying harm is both sensible and a logical extension of Part B of Chapter Eight as it currently exists.

  With respect to the language that a company "may take the additional step of retaining an independent monitor", I think the concept is sound but would suggest slightly different language. The term "monitor" is generally understood to refer to a third-party reviewer whose role is mandated by deferred prosecution agreements and other enforcement consent decrees. Here, the context would be quite different – a company's completely voluntary decision to bring in someone from the outside to provide additional perspective. To distinguish the concept here from that which applies in a more punitive, post-settlement context, I would use the term "independent third party" in lieu of "monitor" in the amendment.

  ▶ *Recommendation:* Adopt with suggested modification.

[1] While application notes do not have the same force as actual guideline language, I think it is fair to say that companies view such application notes as de facto requirements.

- **Issue for Comment** – I strongly endorse the idea at the center of the proposed comment – that in certain circumstances the current, ironclad barrier to credit for a company's C&E program, when high-level personnel are involved, be modified. I also believe that the proposal has identified the three circumstances under which this C&E program "credit blocker" can appropriately be set aside.

  The current credit blocker is too sweeping. Currently, if a company employee in a leadership position in a business unit with 200 or more employees – say a local finance manager in a geographically isolated (perhaps even foreign) sales office – is involved in an offense, the company can't get credit for its program. §8C2.5(f)(3). This means that for a large company with a workforce in the tens or even hundreds of thousands, all of its efforts in establishing a rigorous C&E program company-wide are treated the same as if it had done nothing at all even though the offense was isolated within a tiny fraction of its overall business.

  Moreover, in my experience, the odds that someone who meets the high-level personnel definition of a 200 person business unit being involved in an offense by a large company are high – even if that company had an effective C&E program.

  The question should be then, when such a person is involved, under what circumstances should the company still receive credit for its C&E program? Here, I think the proposal published for comment is on the right track. The proposal puts forward the idea that credit should still be available if:

  (1) "[T]he individual(s) with operational responsibility for compliance in the organization have direct reporting authority to the board level (e.g. an audit committee of the board);

  (2) The compliance program was successful in detecting the offense prior to discovery or reasonable likelihood of discovery outside of the organization; and

  (3) The organization promptly reported the violation to the appropriate authorities."

  The second and third requirements are demanding but fair and appropriate under the circumstances we are imagining – a high-level person being involved. They insist that if credit for the C&E program is going to apply, the company must have had in place strong systems to detect an offense, especially by more senior personnel. These requirements would also help ensure that while the company may receive a mitigated penalty because, overall, it has instituted a strong C&E program, the individuals involved in the offense will be held fully accountable as a result of the company's disclosure.

  The first requirement also makes sense in broad concept, but in my view needs some refinement. To begin with, the term "direct reporting authority" historically has generated confusion within the C&E field – does it mean that the operational compliance person is providing reports to the board, or does it mean that the operational person functionally reports to the board, meaning that the board hires, fires, reviews the performance of, and

sets compensation for the compliance person?

I believe the sentiment behind the proposal that there should be a strong and direct relationship between the operational compliance person and the board is dead-on, especially in a case where credit for the C&E program is being weighed against involvement in an offense by a senior person. However, I do not think there is consensus that the best organizational arrangement is for the operational compliance person to report functionally to the board (the second meaning above). Such an approach is controversial within the C&E field primarily because managing a member of management, which the operational compliance person is, is not a traditional board role. What is a best practice is for the operational compliance person to have access to, and receive protection from, the board. This is especially so in the case we are imagining here – involvement in an offense by a potentially very senior person.

My understanding is that Joseph E. Murphy has submitted to the Commission comments that address this point. Specifically, Mr. Murphy has suggested that the term "direct reporting authority" be defined in the application notes as follows:

> a) Has the unfettered right to report any matter to the highest governing authority without any form of filtering and without fear of retaliation;
> b) Meets in person with the highest governing authority periodically and no less than quarterly;
>
> c) Is obligated by the highest governing authority to report promptly any allegation of a violation of the organization's compliance and ethics standards involving high-level personnel; and
>
> d) Cannot be removed from office or have responsibilities or compensation diminished except by the highest governing authority.

I agree completely Mr. Murphy's approach, though I would modify his proposed language to read as follows, which I believe is more compatible with the guidelines current language, general approach of not being unduly prescriptive, and drafting style:

> a) Is authorized to bring matters of concern, without retaliation, to the attention of the organization's governing authority;
>
> b) Regularly meets with the organization's governing authority, including periodically without other members of management;
>
> c) Is obligated by the organization's governing authority to report promptly any allegation of a violation of the organization's compliance and ethics standards by high-level personnel; and
>
> d) Cannot be removed from office or have responsibilities or compensation diminished except with the express agreement of the organization's governing authority.

These protections are not only generally desirable in any organization to

strengthen the C&E function, but they are precisely the kind that are needed in an instance when a member of the management team – i.e., "high level personnel – is involved in an offense, which is the circumstance in which the Commission is considering removing the barrier to credit for the C&E program.

▶ *Recommendation:* Adopt as suggested.

Sincerely,

Win Swenson