Lisa A. Rickard
President

March 22, 2010

United States Sentencing Commission
Attn: Office of Public Affairs
One Columbus Circle, N.E.
Suite 2-500
Washington, D.C. 20002-8002

Re: ***2010 Proposed Amendments to Chapter Eight of the* Guidelines Manual**

Dear Commissioners:

We write on behalf of the United States Chamber Institute for Law Reform ("ILR") to comment on the United States Sentencing Commission's (the "Commission") 2010 proposed amendments to Chapter Eight of its Guidelines Manual.[1] We applaud the Sentencing Commission's efforts and many of the proposed provisions. Although we have comments regarding the language and scope of the proposal, the amendment calling for mitigation under section 8C2.5(f)(3) to corporations with compliance programs that provide for reporting at the board level should encourage responsible corporate citizenship. This proposal represents a welcome step in the direction of recognizing that even corporations with effective compliance programs may not prevent every instance of misconduct. We suggest several modifications to this proposed amendment for your consideration. Additionally, we believe that it would be beneficial for the Commission to: provide guidance on the circumstances in which the appointment of an independent monitor would be an appropriate condition of probation under section 8D1.4; more precisely define the restitutionary obligations encompassed by an effective compliance program in the commentary to section 8B2.1(b)(7), and make other minor changes to that commentary; and correct an inconsistency between the commentaries to sections 8B2.1(b)(2) and 8B2.1(c) regarding the requirement that employees be aware of the organization's document retention policies.

[1] U.S. SENT'G COMM'N, PROPOSED AMENDMENTS TO THE SENTENCING GUIDELINES (Jan. 21, 2010) [hereinafter PROPOSED AMENDMENTS], *available at* http://www.ussc.gov/2010guid/20100121_Reader_Friendly_Proposed_Amendments.pdf.

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A. *Direct Reporting Proposal*

The ILR supports the Commission's proposal to amend section 8C2.5(f)(3) to permit mitigation for corporations that have effective compliance programs with direct reporting authority even when high-level personnel are involved in the offense.[2] The general direction of this proposal is a positive step for the Commission to take in that it elevates the importance of compliance structure and systems above the actions of any single wrongful individual -- who may have acted in complete contravention of even the best program -- in terms of corporate sentencing and punishment. But while this is a significant and important step, it suffers from imprecise language and undue restrictions in its proposed application.

1. *Requirement of Early Discovery*

First, the requirement in subsection (B) that the compliance program must have succeeded in "detecting the offense prior to discovery or a reasonable likelihood of discovery outside the organization"[3] is unwarranted. While it can be a factor that the errant behavior was detected by the compliance program, that should not be an absolute prerequisite to receiving this credit. For instance, there may be situations where the errant behavior was isolated and hard to detect, and yet the compliance program was robust. This proposed guideline if adopted would not permit mitigation in those circumstances even though it would be no more culpable (and indeed could be less culpable) than a company with a program that had detected the malfeasance because it was more flagrant. Indeed, both the DOJ and the SEC have specifically recognized that the mere fact of violative conduct by an employee is not tantamount to the compliance program being deficient.[4] Moreover, for smaller companies with less structured compliance programs, making this a prerequisite would put them at an unfair disadvantage.

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[2] *See* PROPOSED AMENDMENTS, *supra* note 1, at 39 (soliciting comment on proposal to "amend §8C2.5(f)(3) (Culpability Score) to allow an organization to receive the three level mitigation for an effective compliance program even when high-level personnel are involved in the offense if (A) the 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); (B) the compliance program was successful in detecting the offense prior to discovery or reasonable likelihood of discovery outside of the organization; and (C) the organization promptly reported the violation to the appropriate authorities").

[3] *Id.*

[4] *See* U.S. DEP'T OF JUSTICE, U.S. ATTORNEYS' MANUAL § 9-28.500 ("[I]t may not be appropriate to impose liability upon a corporation, particularly one with a robust compliance program in place, under a strict *respondeat superior* theory for the single isolated act of a rogue employee."); Report of Investigation Pursuant to Section 21(a) of the Securities Exchange Act of 1934, Exchange Act Release No. 44,969, Accounting and Auditing Enforcement Act Release No. 1470, 76 SEC Docket 220 (Oct 23, 2001) (declining to take action against a corporation which took prompt remedial action and implemented internal controls).

Further, we believe for the same reason that the subsection should remove the reference to a "reasonable likelihood of discovery outside of the organization." This language unduly circumscribes the applicability of the proposed amendment. It would deny mitigation to a corporation with a direct-reporting compliance program that in fact detects the offense prior to its external discovery. A compliance program that in fact detects the offense and reports it to the authorities before its discovery should not be deemed per se ineffective or more culpable -- if anything, the fact that the compliance program in fact uncovered the offense before any authorities should be prima facie evidence of the program's effectiveness.

2. *Specification of Direct Reporting Structure*

Second, the proposal should clarify what "operational" responsibility for compliance means and what "direct" reporting can encompass. For instance, we assume that if the Chief Compliance Officer of a company reports directly to the General Counsel, but has dotted line reporting or access to the Board or the Chair of the Audit Committee, that would come within the proposal, but the language used in the proposal is not free from doubt. We do not believe the Commission intends to prescribe that a compliance officer may report directly only to the Board, as that is not a structure that is a necessary prerequisite to an effective compliance program, and many say that is not a preferred methodology.[5] For a proposed amendment to require one specific method of reporting -- when alternative approaches are routinely adopted as part of effective corporate compliance programs -- could amount to undue "regulation" by the Commission.

The ILR also suggests clarification of who may qualify as "individual(s) with operational responsibility for compliance," *i.e.*, whether such a person may be the Chief Compliance Officer, the General Counsel, or other individuals within the compliance function, as this may vary across corporations (particularly across corporations of different sizes). To avoid prescribing an unduly rigid template for direct reporting compliance programs, the Commission should make clear that persons holding a variety of different positions can qualify and would suggest removal of the term "operational" so as to make the text clearer (i.e.,"individual(s) with [operational] responsibility for compliance").

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[5] *See* ETHICS & COMPLIANCE OFFICER ASS'N FOUND., THE ETHICS AND COMPLIANCE HANDBOOK 29 (2008) ("[T]he precise structure of an ethics and compliance office will depend on many factors, including the organization's size, geographic dispersion, and industry. While there are considerations that all organizations should take into account, there is no single 'right' design for an ethics and compliance office."). *See also id.* at 36 ("Critics of this approach [i.e., direct reporting] counter that reporting directly to the board can prevent the CECO [Chief Ethics & Compliance Officer] from becoming a trusted member of the senior management team, resulting in the potential for isolation."). *See generally id.* at 29–41 (discussing wide variety of considerations and permissible approaches in structuring compliance programs).

3. *Further Mitigating Strict Organizational Liability*

Third, in expanding the protections available to conscientious corporations, the proposal highlights the importance of mitigating the harshness of the current legal standard for corporate criminal liability. The proposal should be viewed as a first step toward achieving these reforms, and the Commission should go further by increasing the mitigation points accorded corporations that are not criminally blameworthy. The current legal standard applicable in federal courts subjects a corporation to criminal liability -- with potentially dire consequences -- no matter how diligent that corporation may have been in putting in place strong internal controls and creating a strong culture of compliance. The proposal under consideration provides corporations with a better opportunity for a reduction in their culpability score, but it underscores that such an organization still faces severe sanctions under the Sentencing Guidelines notwithstanding the fact of having a "best practices" compliance program. The three-level reduction is inadequate to reflect the lack of organizational culpability in situations posited by the proposed amendment, namely, where the company has an exemplary compliance program and could not have undertaken other reasonable compliance efforts.

An increased recognition of the lack of culpability on the part of the organization in such situations would make the sentencing guidelines more consonant with the reasoning of a series of scholars, practitioners, and judges who have criticized the expansiveness of the current system of corporate criminal liability.[6] They have expressed strong support for modifications to the current regime of corporate criminal liability that would prevent the imposition of vicarious criminal liability in circumstances where the corporation already had a well-functioning "best practices" compliance program and had otherwise taken all reasonable steps to prevent the crime that took place.[7]

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[6] *See* Edwin Meese III, *Closing Commentary on Corporate Criminal Liability: Legal, Ethical, and Managerial Implications*, 44 AM. CRIM. L. REV. 1545 (2007); George J. Terwilliger III, *Under-Breaded Shrimp and Other High-Crimes: Addressing the Over-Criminalization of Commercial Regulation*, 44 AM. CRIM. L. REV. 1417 (2007); Dick Thornburgh, *The Dangers of Over-Criminalization and the Need for Real Reform: The Dilemma of Artificial Entities and Artificial Crimes*, 44 AM. CRIM. L. REV. 1279 (2007); Andrew Weissmann with David Newman, *Rethinking Criminal Corporate Liability*, 82 IND. L.J. 411, 421–27 (2007); John C. Coffee, Jr., *Does "Unlawful" Mean "Criminal"?: Reflections on the Disappearing Tort/Crime Distinction in American Law*, 71 B.U. L. REV. 193 (1991); Preet Bharara, *Corporations Cry Uncle and their Employees Cry Foul: Rethinking Prosecutorial Pressure on Corporate Defendants*, 44 AM. CRIM. L. REV. 53 (2007); Hon. Lewis A. Kaplan, Remarks to the New York State Bar Association: Should We Reconsider Corporate Criminal Liability? (Jan. 24, 2007), *available at* http://nysbar.com/blogs/comfed/2007/06/should_we_reconsider_corporate.html.

[7] *See generally* Pamela H. Bucy, *Corporate Ethos: A Standard for Imposing Corporate Criminal Liability*,75 MINN. L. REV. 1095, 1102-05 (1991); Ellen S. Podgor, *A New Corporate World Mandates a*

The deterrence and punishment of culpable conduct are the core principles behind our criminal justice system and the ILR supports these goals. But the current standard for entity liability does not serve these interests. By imposing *de facto* strict liability on corporate entities, the current legal regime deviates significantly from the core principles of deterrence and retribution underlying the criminal law. Punishing an organization that is already taking all reasonable and appropriate efforts to comply with the law is needless from a deterrence perspective, and—by essentially requiring an unattainable standard of perfection—imposes punishment for actions the defendant could not avoid. According corporations with an effective compliance program additional mitigation points will serve to ameliorate this unduly harsh legal standard.

B. *Proposed Amendments Relating to Independent Monitors*

The ILR is concerned that, unless the Commission includes further discussion in the commentary, the proposed amendment regarding the appointment of an independent monitor as a recommended condition of probation under section 8D1.4(b)(3)[8] will lead to blanket appointment of independent monitors even in circumstances where the corporation can adequately police itself.

1. *Costs of Independent Monitoring*

The proposed amendment has an implicit assumption that the inclusion of a monitor as a recommended condition of probation for all organizations is always beneficial and appropriate. Independent monitors, if used judiciously, can help reform organizations that are unable or unwilling to reform themselves, but there can be no doubt that they are extremely burdensome and prone to gradual "scope creep" in their operation.[9] Moreover, if the Guidelines do not note the factors that should be considered in appointing a monitor a court may believe there are no downsides or simply defer to the government in this area. Imposition of an independent monitor requires a company to incur substantial costs to pay for the monitor and his or her staff -- costs that may be truly inordinate for smaller companies. In addition, a

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"Good Faith" Affirmative Defense, 44 AM. CRIM. L. REV. 1537 (2007); Weissmann & Newman, *supra* note 6 ("Where nothing more can be expected of a corporation than actions it has already undertaken, the goals of the criminal law are satisfied.").

[8] *See* PROPOSED AMENDMENTS, *supra* note 1, at 37 (recommending, as condition of probation, "The organization shall be required to retain an independent corporate monitor agreed on by the parties or, in the absence of such an agreement, selected by the court. The independent corporate monitor must have appropriate qualifications and no conflict of interest in the case. The scope of the independent corporate monitor's role shall be approved by the court. Compensation to and costs of any independent corporate monitor shall be paid by the organization."); *see also id.* (requiring corporation to allow independent monitor to inspect its books and records).

[9] *See* Kathleen M. Boozang & Simone Handler-Hutchinson, *"Monitoring" Corporate Corruption: DOJ's Use of Deferred Prosecution Agreements in Health Care*, 35 AM. J. L. & MED. 89, 94 (2009).

monitorship imposes the cost in flexibility, independence, and competitiveness as a result of the process of justifying its operations to an outsider, typically with little or no background in the industry, whose obligations do not necessarily align with those who are managing and operating a company and who, thus, may not be focused upon factors such operational issues, efficiency, or maximizing shareholder value. As a result, it is recognized in the legal literature that the costs of a federal monitorship to the target company are tremendous.[10] Against these costs, the benefits of independent monitorship are often difficult to measure, such that it cannot be assumed that a monitor will always be an efficient means of assuring future compliance; indeed, monitors may often be counterproductive.[11]

2. *Need for Guidance Regarding Appointment of Monitors*

The Commission should make clear that the appointment of an independent monitor is not an automatic condition of organizational probation, and should instead provide guidance on when monitorship is appropriate. There is currently very little transparency regarding the DOJ's practices in seeking monitorships in deferred prosecution (or non-prosecution) agreements. The DOJ's policy statement regarding the question of whether to appoint a monitor provides little guidance besides instructing a prosecutor to "be mindful of both: (1) the potential benefits that employing a monitor may have for the corporation and the public, and (2) the cost of a monitor and its impact on the operations of a corporation."[12] This unenforceable advice leaves a tremendous amount of discretion in the hands of prosecutors, resulting in substantial uncertainty and the potential for overuse of monitors.[13]

The Commission should provide guidance by adding the following as commentary to proposed section 8D1.4(b)(3):

> *Application of Subsection (b)(3): Although an independent monitor can help ensure compliance in the case of organizations that cannot reasonably be expected to do so themselves, monitors are not otherwise necessary. The costs of the appointment should be carefully weighed against the benefits on a case-by-case basis before a monitorship is imposed as a condition of probation. In determining whether to impose a monitorship condition, the court should consider the following factors:*

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[10] *Id.* at 101.

[11] *See, e.g.*, Brendan Pierson, *Attorneys Fear Return of Outside Compliance Monitors*, LAW360: THE NEWSWIRE FOR BUSINESS LAWYERS (Mar. 4, 2010), http://securities.law360.com/articles/148680.

[12] Craig S. Morford, *Memorandum for Heads of Department Components, United States Attorneys*, in U.S. DEP'T OF JUSTICE, U.S. ATTORNEYS' CRIMINAL RESOURCE MANUAL § 163, *available at* http://www.justice.gov/usao/eousa/foia_reading_room/usam/title9/crm00163.htm.

[13] *See* Boozang & Handler-Hutchinson, *supra* note 9, at 114 ("[T]he supposed guidance offered by the Morford Memo still affords prosecutors potentially unchecked discretionary power throughout the pre-trial diversion process which, again, reduces predictability for targets of investigation.").

A. the nature and seriousness of the offense;
B. the pervasiveness and duration of illegal behavior in the organization;
C. the involvement of high-level personnel of the organization;
D. the existence of an effective compliance and ethics program at the organization at the time of sentencing;
E. the likelihood of further offenses absent a monitor;
F. the willingness and ability of the organization to prevent further offenses; and
G. the direct and indirect cost to the organization of the monitorship.

This or similar language would give courts the flexibility to impose monitorship where warranted but would provide needed guidance both for courts, for the government, and for the organizations as to the circumstances where monitorships are appropriate.

C. *Proposed Commentary to Section 8B2.1(b)(7)*

1. *Requirement of Presentence Restitution*

The Commission's requirement that organizations with effective compliance programs "take reasonable steps to provide restitution and otherwise remedy the harm resulting from the criminal conduct"[14] may result in obligating organizations that discover wrongdoing to take action on the basis of incomplete information. It must be remembered that often a corporation has access to far less evidence than the government from which to determine that a crime has occurred or who the victims are. Among other risks, the emphasis on presentence restitution may place corporations who detect potential wrongdoing in a difficult position: If a company waits to perform a thorough internal investigation into the matter (sometimes at the request of a government regulator or prosecutor), it may be found not to have an effective compliance program under section 8B2.1 and thus deprived of the mitigation afforded by section 8C2.5(f); but by moving forward on restitution on the basis of incomplete information, it risks incurring unwarranted exposure and liability. At the very least, the amendment should state that it does not require a corporation to report activity or offer restitution until it has undertaken a full internal investigation into the matter and can reasonably make the assessment that there was a fraud, identify victims, and ascertain loss.

Moreover, the requirement to take reasonable steps to provide "restitution" is ill-defined, as restitution for certain offenses is at the discretion of the court, which an organization cannot anticipate in advance.[15] If an organization is to be required to

[14] PROPOSED AMENDMENTS, *supra* note 1, at 35.
[15] *See* 18 U.S.C. § 3663(a)(1) (allowing discretionary award of restitution for certain offenses based upon the judge's consideration of certain factors).

anticipate a restitutionary award to be determined by the court later, that obligation should be clearly defined and reasonably practicable. Accordingly, the Commission should make clear that the "restitution" required of an effective compliance program is the mandatory restitution imposed by 18 U.S.C. § 3663A. It should furthermore make explicit that, just as under section 3663A(c)(3), restitution for property crimes need not be made where "the number of identifiable victims is so large as to make restitution impracticable" or where "determining complex issues of fact related to the cause or amount of the victim's losses would complicate or prolong the sentencing process to a degree that the need to provide restitution to any victim is outweighed by the burden on the sentencing process." In circumstances where the court would find payment of restitution impracticable or the calculation of restitution too complex to perform, an organization should not be forced to make such payments or perform such calculations on pain of having its compliance program deemed ineffective. If, for example, it is almost impossible to identify the victims in a wide-spread securities fraud by an employee, and/or the individual losses were negligible, the current proposal would -- contrary to the restitution statute -- seemingly require a company to spend vast resources to accomplish a remedy that would not be called for by a court.[16] In such a situation, an organization should not be put to the burden of making such payments, when it would be under no obligation to make them at sentencing. Accordingly, the Commission should replace the third sentence in the proposed application note with the following two sentences:

> In the event the criminal conduct has an identifiable victim or victims the organization should take reasonable steps to provide the restitution which would be mandated under 18 U.S.C. § 3663A(a)(1) at sentencing and otherwise remedy the harm resulting from the criminal conduct. In circumstances where no restitution would be required under § 3663A, including in cases where the number of identifiable victims is so large as to make restitution impracticable or where determining complex issues of fact related to the cause or amount of the victim's losses would complicate or prolong the sentencing process to a degree that the need to provide restitution to any victim is outweighed by the burden on the sentencing process, *see* § 3663A(c)(3), the payment of restitution is not a minimal requirement for an effective compliance and ethics program.

This modification would provide guidance for organizations attempting to calculate their prospective restitution obligations, and would make clear that organizations are not forced to provide prospective restitution where no restitution would be ordered at sentencing.

[16] § 3663A(c)(3)(B).

2. *Other Suggestions*

The ILR also suggests that the Commission replace the term "independent monitor" in this proposed commentary[17] with "independent consultant" or "independent auditor" in this commentary to avoid stigmatizing organizations which voluntarily seek out independent compliance assistance with a term suggestive of a court-imposed sanction.

Additionally, we suggest the Commission remove this proposed commentary's reference to self-reporting.[18] The emphasis on self-reporting to the government risks depriving corporations of legally viable defenses to what has occurred -- and deviates from our nation's traditional approach toward criminal justice by shifting the burden of law enforcement away from the Government and toward the organization. Notably, there is no parallel requirement in the Sentencing Guidelines that an individual who commits an offense be required to promptly self-report it. Moreover, the self-reporting language should also be modified to clarify that it does not require waiver of the attorney client or work product doctrine, so that it conforms with DOJ guidance in this area.

D. *Proposed Amendments Related to Document Retention Policies*

Finally, the ILR notes the potential overbredth of this proposed amendment and an inconsistency between the proposed amendments to the application notes for section 8B2.1(b)(2) and section 8B2.1(c). The proposed amendment to the application note for section 8B2.1(b)(2) correctly states in our view that "Both *high-level personnel and substantial authority personnel* 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."[19] However, the proposed amendment to the application note for section 8B2.1(c) states, "For example, *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."[20]

The Commission should correct the reference to "all employees" in the proposed amendment to the application note for section 8B2.1(c). This change

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[17] *See* PROPOSED AMENDMENTS, *supra* note 1, at 35 ("The organization may take the additional step of retaining an independent monitor to ensure adequate assessment and implementation of the modifications.").
[18] *See id.* ("Other appropriate responses may include self-reporting . . . .").
[19] *Id.* (emphasis added).
[20] *Id.* at 36 (emphasis added).

would eliminate the inconsistency between the two provisions and avoid the anomalous result where employees with no possible connection to an organization's document retention policies are required to familiarize themselves with such policies. For instance, an international company that has thousands of factory workers who rarely if ever create documents would be required by the proposed amendment to train these individuals in one particular compliance policy that may, in fact, be irrelevant to their positions. Effective compliance programs tailor training to the proper audience in the company. For such factory workers, a company would have a far better compliance program by training such workers in safety protocols or workplace behavior and reporting rules, than document retention policies. We thus do not believe the Commission intended to regulate training to all employees of any company, regardless of the industry or the utility of the training to the employee.

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With the suggestions expressed above, the ILR supports the Commission's ongoing efforts to strive for fairness and rationality in its organizational sentencing guidelines, and generally welcomes the recent proposed amendments as a promising step toward those goals.

Respectfully submitted,

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