Testimony Before The United States Sentencing Commission

March 17, 2010

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Written Testimony Regarding Chapter 8 Proposals

I am pleased to have the chance to testify on behalf of the Sentencing Commission's Practitioners Advisory Group regarding the proposals and issue for comment that affect the organizational guidelines found in Chapter 8 of the Guidelines Manual. As one of the Commission's three standing advisory groups, the PAG strives to provide the perspective of those in the private sector who represent individuals and organizations investigated and charged under the federal criminal laws. We appreciate the Commission's willingness to listen to and consider our thoughts on various possible approaches to issues that arise under the guidelines.

Some context is important before getting to our particular comments on the Chapter 8 items under consideration. Chapter 8 of the Manual differs in a significant way from the provisions that govern sentencing of individual defendants. In contrast to the extensive body of caselaw interpreting and applying Chapters 1 through 7 of the Manual, there are almost no judicial decisions specific to Chapter 8.

There are three main reasons for this. First, the government investigates far fewer organizations than it does individuals. Second, even in those instances where the government takes action it often does so through non-prosecution or deferred prosecution agreements (NPAs and DPAs). In those cases there is no opportunity for a judge to determine the applicable guideline range or any other aspect of Chapter 8. Finally, even in cases that result in convictions of organizations, the parties usually negotiate a plea that avoids rulings on how to interpret or apply the Chapter 8 provisions. Although guilty pleas by individuals generate a large number of appeals, the same has not been true for organizations.

As a result, the Commission receives very little formal feedback on the operation of Chapter 8. In other words, the Commission speaks through the provisions it places in Chapter 8, but it hears very little—and almost nothing at all from judicial opinions—about how well it has spoken, including whether the provisions are easy to apply or result in appropriate sentence ranges. And practitioners are therefore left to apply those provisions without the benefit of caselaw that, by resolving ambiguities, might promote more consistent application. That reality makes it very important for the Commission to exercise care whenever it considers changing the language in Chapter 8.

The Commission has published proposals and an issue for comment that deal generally with two aspects of Chapter 8: (1) effective compliance and ethics programs; and (2) conditions of probation. These two aspects of Chapter 8, in turn, touch upon issues such as the appropriate role of monitors and document management policies.

Monitors

The Commission's proposals would have the Manual refer to monitors for the first time, and it would do so in two contexts. It would refer to retention of an independent monitor as a way to "ensure adequate assessment and implementation of the modifications" to a compliance program in the wake of detection of criminal conduct, and it would add appointment of a monitor as an available condition of probation.

The PAG recommends that the Commission not make these changes related to the use of monitors. They would serve no useful purpose, and they would insert the Commission in the middle of an ongoing dispute over the proper use of this controversial device.

Monitors can be very costly to a corporation, in large part because there is no effective way to restrict their scope once their work has begun. No corporation wants to be accused of interfering with a monitor's decisions, and the usual cost-benefit constraints operate very poorly in this context. Also, in our experience and in the experience of others in the private practitioners community, rarely is there a need to impose such a costly condition on a corporation. The desired results—usually implementing post-conviction remedial measures—can be achieved by having the organization pay for an expert who would help the probation department in its duties to supervise the corporation's compliance with conditions of probation.

Making explicit reference to monitors will also create pressure to include them as a prophylactic measure in NPAs and DPAs, lest prosecutors be accused of being too lenient or failing to exercise adequate care. That risk is heightened by the proposal to add a reference to monitors in the context of the seventh requirement for an effective compliance program. The proposal would mention that an organization may want to use monitors when it uncovers criminal conduct even in situations that presumably were not serious enough to lead to prosecution. Before the Commission makes references to monitors for the first time, it should first review carefully the available data to determine whether those references are worth the possible negative consequences. That course is especially warranted given that, to our knowledge, not a single court has concluded both that (a) appointment of a monitor was needed, and (b) it lacked the power to require one because the Manual is silent on the subject.[1]

Steps required in response to criminal conduct

As noted above, one of the references to monitors would come in the context of a new application note that addresses steps an organization should take after detection of criminal conduct. These steps are part of the seventh requirement of an effective compliance and ethics program.

We are aware of no problems in applying this part of the Manual—certainly none that would warrant adding an application note on the seventh requirement. If the Commission elects to adopt something in this area, though, we would make changes to the proposed language, as indicated here:

> The seventh minimal requirement for an effective compliance and ethics program provides guidance on the reasonable steps that an organization should

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[1] Similarly, it is not clear that a court's power to require a monitor could turn on whether the Manual mentions them. The authority to impose conditions of probation is statutorily derived. If judges can order use of a monitor over a defendant's objection, it is because that remedy is within the scope of 18 U.S.C. § 3563(b). In any event, because we are unaware of any case where the power to impose a monitor condition was questioned, there is no imminent need for the Commission to act in this area.

take if, after a reasonable opportunity to investigate, it determines that ~~detection of~~ criminal conduct has occurred. First, the organization should respond appropriately to the criminal conduct. In the event the criminal conduct has an identifiable victim or victims the organization should take reasonable steps, as warranted under the circumstances, to remedy the harm resulting from the criminal conduct including, where appropriate, ~~to provide~~ providing restitution to the victims ~~and otherwise remedy the harm resulting from the criminal conduct~~. Other appropriate responses may include self-reporting, cooperation with authorities, and other forms of remediation. Second, to prevent further similar criminal conduct, the organization should assess the compliance and ethics program and make modifications necessary to ensure the program is more effective.

These changes would accomplish two things. First, they would ensure that organizations are given a reasonable opportunity to investigate whether suspicions or reports of criminal conduct are corroborated by the facts, which usually requires an opportunity to investigate. Application note 10 to Section 8C2.5 recognizes this in a comparable context. Second, they would provide needed flexibility in assessing whether remedial steps, including restitution, are appropriate to the particular circumstances. For example, there may well be instances involving identifiable victims in which restitution is inappropriate (*e.g.*, because of the nature of the harm, liability issues, or other sources of remedy).

Records maintenance

Two proposed additions to the Manual would address document retention policies. As is the case with monitors, many in the private practitioner community have found it troubling that the Commission would propose new language where, to our knowledge, there has been no apparent problem that would prompt the addition.

The Manual sets forth the attributes of an effective compliance and ethics program. Organizations receive credit for such a program only under certain circumstances. We are unaware of any organizations that, while able to earn credit for such a program, had deficient document retention policies. In the absence of such cases, we oppose a proposal that singles out this type of policy over all others for special mention.

The Supreme Court has recognized legitimate reasons for corporations to have policies that govern the orderly management of electronic and paper data. *See Arthur Andersen v. United States*, 544 U.S. 696, 704 (2005) (noting that such policies "are created in part to keep certain information from getting into the hands of others, including the Government," and "are common in business"; "[i]t is, of course, not wrongful for a manager to instruct his employees to comply with a valid document retention policy under ordinary circumstances"). The wording of the proposal could give the impression that such policies are inherently nefarious and therefore must be carefully restricted. There is no basis for applying that presumption. Moreover, requiring that the policy be conformed to "reduce the risk of liability under the law," as proposed, puts the corporation in the position of having to err on the side of keeping data, because surely that is less risky from a liability standpoint than allowing data to be destroyed.

Finally, there is an odd phrasing in the second bracketed language (proposed application note 7(A)(iv)) that would seem to require "all employees" to "conform any such [document retention] policy to meet the goals of an effective compliance program under the guidelines and to reduce the risk of liability under the law." Presumably not every employee in a corporation is expected to implement changes to its document retention policy—only those who have responsibility for the policy.

Issue for comment regarding method for encouraging self reporting

The Commission also seeks comment on whether it should amend the Manual to allow an organization to receive the three-point reduction in its culpability score for an effective compliance program even if high-level personnel were involved in the offense. Three conditions would apply: (1) "the individual(s) with operational responsibility for compliance in the organization" must "have direct reporting authority to the board level (*e.g.*, an audit committee of the board)"; (2) the compliance program must have been "successful in detecting the offense prior to discovery or reasonable likelihood of discovery outside of the organization"; and (3) the organization must have "promptly reported the violation to the appropriate authorities."

We applaud the Commission for its efforts to make this three-point reduction in the culpability score available in more cases. The Commission's data for FY 1995 through FY 2008 show that ***only three*** organizations have ***ever*** received this reduction. It is not possible to tell from the publicly available data what accounts for the extreme rarity of this credit. Anecdotally, we understand that the automatic disqualifier for high-level personnel being involved in, aware of, or willfully ignorant of the offense frequently stops the analysis from going any further.

The effect of this disqualification is felt well beyond the sentencing context. In negotiating NPAs and DPAs, the government frequently requires the payment of hefty fines, which it calculates starting with the Chapter 8 fine range. That range becomes a benchmark for gauging the final fine that is imposed under such agreements. An organization that has earned a lower culpability score will see its fine in such a case reduced accordingly.

The disqualifier based on the role of high-level personnel can do violence to proportionate sentencing. Imagine two large corporations in a particular industry—corporation A and corporation B—whose employees collude to fix the prices they charge customers. Assume that they are equally culpable in all respects but two:

> First, the employee who engages in the crime at corporation A is able to carry out the scheme without the awareness or willful ignorance of anyone who is deemed high-level personnel or substantial authority personnel. At corporation B, however, a single high-level person (the price-fixer's manager) ignores warning signs of his subordinate's criminal conduct.
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> Second, the leadership at corporation A has steadfastly resisted putting ***any*** sort of compliance program in place despite frequent urging by outside counsel. Corporation B, on the other hand, has implemented a state-of-the-art compliance program, investing millions of dollars and thousands of person-hours into making it as effective as possible. In fact, it was because of systems that

corporation B put in place under the program that the wrongdoer's unit manager received warning signs of trouble.

Even though corporation B is plainly less culpable given all of its efforts to put an effective compliance and ethics program in place, it would get no credit for those efforts. Its fine range would be calculated as if it had no compliance program at all, just like corporation A. And it would suffer that fate solely because of the willful ignorance of a single high-level person. Worse yet, it would get an ***aggravating*** adjustment to the fine because the compliance program alerted the high-level person to the offense, while corporation A would avoid the increase. The result would be a significantly higher sentence for the corporation that did the right thing.

The issue for comment suggests a revision that would help to avoid that anomaly. We endorse adopting that revision, with two changes. First, we would not automatically disqualify corporations whose compliance programs vest a portion of the direct reporting authority with someone other than the person with "operational responsibility" for the program. We believe that the Commission's current direct-report requirements for an effective compliance and ethics program are sufficient. The Manual reserves the effective compliance and ethics program credit for those organizations where the individual(s) with operational responsibility "report periodically" to high-level personnel and, as appropriate, to the governing authority," which includes an audit committee of the board. § 8B2.1(b)(2)(C). The application notes state that "typically" such reporting by the individual(s) with operational responsibility should occur "no less than annually." *Id.*, n. 3.

In our view, the Manual already strikes a fair balance on the direct-report issue. Rather than create rigid dictates, it sets general requirements containing the flexibility needed to account for the wide variations between the smallest of companies and the largest of multinational corporations. Details of a compliance program that work well for a single-site manufacturing facility with fewer than 50 employees are not necessarily the right fit for AT&T or Exxon Mobil.

We are aware of no data showing that organizations following the reporting requirements in the current Manual are failing in their responsibilities. Nor have we seen assessments of the advantages and disadvantages of changing this reporting requirement. If the concern is that compliance programs meeting the current requirements are deficient, a better solution would be to create a ***presumption*** that the proposed new requirement suffices, and then allow defendants to establish that it is unlikely the new requirement would have produced a meaningfully different result under the circumstances. This would prevent *per se* disqualification of organizations that acted appropriately and for which greater direct reporting by an individual with operational authority for compliance would not have mattered.

The second and third proposed requirements in the issue for comment deal with detection and self-reporting of the underlying offense conduct. The danger with this requirement is that it would further exaggerate the value of the self-reporting factor in comparison to other mitigating and aggravating factors. The Manual already provides what is, in effect, a three-point credit for self-reporting. (Section 8C2.5(g)(3) gives a one-point credit for acceptance of responsibility. Section 8C2.5(g)(2) gives a two-point credit for acceptance of responsibility plus full cooperation. Section 8C2.5(g)(1) gives a five-point credit if timely self-reporting is added to cooperation and acceptance of responsibility.) It is fair to ask whether self-reporting (three

additional points) is really three times as valuable as full cooperation (one additional point if the organization also accepts responsibility). Under the approach suggested in the issue for comment, a corporation with an effective compliance and ethics program would lose a total of ***six*** points—on a scale that runs only from 0 to 10—if an imminent threat of the disclosure of the conduct arises before the corporation finds itself capable of self-reporting.

There is no reason to place that much weight on a single factor, especially where the difference between a corporation that qualifies and one that does not can be as insignificant as waiting an extra day to marshal the relevant facts. Indeed, a corporation could have the best compliance program and still not find out about an offense, or find out about it after an investigation was already underway because a person with knowledge elected to take that information to the authorities. It is also significant that such a restriction would likely frustrate the purpose of making effective compliance and ethics program credit more available. Of the more than 1,400 organizations sentenced between 1995 and 2008, ***only 22*** received credit for self-reporting. If anything, the Commission should reconsider whether self-reporting credit is too restrictive, rather than expand that restrictiveness to limit the operation of other credits.

If some aspect of self-reporting is incorporated into the three-point adjustment, it would be better to focus on whether the corporation engaged in conduct ***inconsistent*** with the compliance program credit at issue. For example, the three-point effective compliance and ethics program credit could be disallowed if management learned of the criminal conduct yet failed, without a valid basis, to report the conduct. Such a formulation would correctly place attention on whether the corporation's culpable conduct undermines its case for receiving credit, rather than whether some ***other*** mitigating (or even fortuitous) circumstance was present.

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As I noted at the outset, the PAG appreciates the chance to offer our input, not only on the Chapter 8 proposals but also on those affecting the rest of the Manual. Our group looks forward to working with the Commission on these and other issues in the coming months and years.