In discussing this issue, the group had concerns with this concept. For example, a person who is publicizing the sale of drugs over the Internet in an attempt to create a larger distribution network is easier to factually distinguish from an individual who may be a lower level purchaser of the drugs but who then redistributes the drugs to a friend using the Internet. Potentially both could receive an increase for use of the Internet in the distribution drugs. It is suggested that a mass marketing approach may be more appropriate method to sanction distributors using the Internet to sell drugs. The definition and the resulting increase in offense levels could be similar to that found in §2B1.1.

Issue for Comment #3

In discussing this issue with staff, it appears these cases are minimal and POAG suggests an encouraged upward departure be added to include this conduct. This would allow the sentencing court discretion in imposing an appropriate sentence.

Issue for Comment #4

POAG encourages the Commission to resolve the circuit split regarding the interpretation of the last sentence in Application Note 12 of §2D1.1. The group did not reach consensus on this issue.

Proposed Amendment #6 - Mitigating Role

POAG generally agrees with the tiered approach to the mitigating role cap, however, we suggest unless the language is modified, application difficulties will result. Applying a Chapter Three adjustment based on a Chapter Two offense level may be confusing in itself. As currently proposed, §3B1.2(b) refers to "the defendant's Chapter Two offense level." This leaves open the possible application of the reduction after specific offense characteristics have been added or subtracted. POAG suggests that the language be explicit in that the reduction should be premised on the "base offense level" with clear instructions including an example to be added in the commentary at §3B1.2.

Currently, defendants sentenced using the §2D1.2 guideline receive the benefit of the mitigating role cap, however, under this new provision, they would not receive this reduction. Similar application problems might also be present at §§2D1.6, 2D1.7, 2D1.10, and 2D1.11. There may be other guidelines that also contain a cross reference instruction to the 2D1.1 guideline where this issue may arise. Perhaps if the word "pursuant" was changed to "using" this issue would be resolved. A separate issue was discussed whereby a defendant was a minor participant for behavior accounted for at §2D1.1, but a full participant for behavior accounted for at the original guideline. POAG requests some clarification regarding these application issues.

Historically, POAG has requested guidance and examples in application of role reductions. This also extends to the current mitigating role cap issue.

Proposed Amendment #7 - Homicide and Assault

The Chapter Two Homicide and Assault guidelines as written and the current proposals will produce appropriate punishment and pose little application difficulty. In fact, the group recognizes these guidelines along with the robbery guideline to be among the easiest to apply. As to the Chapter Three

issue for comment, POAG does not recommend a tiered approach in application of §3A1.2 as additional fact-finding issues would be required and could increase the number of contested sentencings.

Proposed Amendment #8 - Miscellaneous Amendment Package

(D) USSG §2X6.1 -Use of a Minor

POAG noted some concerns with the guideline as written in the January 13, 2004 version. In particular, a question arose as to how multiple counts of this offense would be grouped and suggest a commentary note be added regarding grouping instructions. In addition, POAG found the language in §2X6.1, comment. (n.1) to be confusing and we had difficulty interpreting the wording "the offense of which the defendant is convicted of using a minor." POAG noted a problem in applying role adjustments to this guideline absent additional instruction.

Proposed Amendment #12 - Immigration

Members of POAG suggest gathering the facts to warrant the proposed enhancements at §2L1.1(b)(4) may be difficult for the probation officer to obtain. This issue may be resolved if the language tracks the provisions found in 8 U.S.C. § 1327 wherein the charging document would outline the specifics of the conduct.

POAG supports an enhancement for multiple deaths noting there are certainly several cases in which more than one illegal alien has died while being smuggled into the United States. However, there would seem to be problems in applying a multiple count calculation from Chapter Three. Therefore, an encouraged upward departure either in the commentary at §2L1.1 or in §5K2.1 could address this issue.

The group found no application problems if the table for the number of aliens smuggled is amended.

POAG opposes an enhancement in the case of a fugitive from another country. Probation officers have a difficult time obtaining criminal record information within the United States and foresee greater difficulty in timely obtaining foreign arrest information. In addition, there are concerns about defendants who are fugitives from countries who are escaping political or religious persecution. There also seem to be inherent conflicts within the guideline structure in that a defendant is prohibited from receiving criminal history points for foreign convictions, but may receive an increase for a mere warrant. POAG takes no position with regard to fugitive status from a United States jurisdiction but notes a potential conflict with Chapter Four in that mere arrests cannot be considered in determining an upward departure in a defendant's criminal history category.

Remaining Amendments

POAG takes no position on remaining amendments and relies on the expertise of the Commission staff and other working groups.

Closing

We trust you will find our comments and suggestions beneficial during your discussion of the proposed

amendments and appreciate the opportunity to provide our perspective on guideline sentencing issues. As always, should you have any questions or need clarifications, please do not hesitate to contact us.

Sincerely,

Cathy Battistelli

Cathy A. Battistelli
Chair

CHAPTER 8 OF THE SENTENCING GUIDELINES

PUBLIC COMMENT SUMMARY

ADDENDUM

as of 3/08/04

NOTE: New comments are indicated in bold.

I. Scope of Program--§8B2.1: "Violation of Law" vs. "Criminal Conduct"

No additional comment.

II. Effective Program--§8B2.1(a)&(b): Due Diligence, Culture, & Ethics

Comment: The proposed amendments fails to enunciate "any real measures of effectiveness." On the contrary, the amendments focus on due diligence criteria that could be met with a "paper" program. (Meta)(Mason) (Dreilinger)(Gruner)**(Michaelson)**
Recommendations: 1) Employ "ethics" in determinations of effectiveness: Check for a code of ethics; its application; and tested/observed changes in knowledge, attitudes, and practices. (Meta)(Mason)(Gruner)
2) Make sure that an evaluation of effectiveness measures both positive behavioral changes and thes sustainability of these changes. (Dreilinger)
3) To fully evaluate effectiveness, look at the seven minimum steps *and* other relevant characteristics. **(Michaelson)**

Comment: The absence of any new ethics requirement(s) is appropriate, for despite pressure to adopt one, it is clearly beyond the Commission's mandate. (Pharm)(Chem)**(Michaelson)**
Recommendation: Continue to leave ethics as an aspirational goal.
(Pharm)(Chem)**(Michaelson)**

III. Seven Minimum Steps--§8B2.1(b)(1-7)

A. Step One--§8B2.1(b)(1): Establish Compliance Standards and Procedures

No additional comment.

B. Step Two--§8B2.1(b)(2): Organizational Leadership

Comment: The "organizational leadership" should be given a more active role. (EPIC/Johnson)(HCCA)(ERC)**(HIPAA)**
Recommendations: 1) Add a requirement in proposed §8B2.1(b)(2) that obligates the leadership to demonstrate a commitment to the compliance program. (EPIC/Johnson)
2) §8B2.1(b)(2) language should be changed to: "The organizational leadership shall provide direction to and be knowledgeable of the content and operation of the program." (ERC)
3) Amend the language in §8B2.1(b)(2) to make it clear that the compliance officer "coordinates," "evaluates," and "reports" to, and for, the organizational leadership and governing authority–who share responsibility for implementation with them. (HCCA)**(HIPAA)**

Comment: The proposed language at §8B2.1(b)(2) suggests that the compliance officer, as opposed to the management of an organization, has the responsibility to "ensure the implementation and effectiveness of the program." The amendment overstates the role and authority of the compliance officer and absolves management of its responsibility. History and case precedent state that the corporation and its senior management are ultimately responsible, not the compliance officers. (CHW)(Pharm)(Prov)**(ALLINA)**
Recommendations: 1) Change language in §8B2.1(b)(2) to "specific individuals within high-level personnel of the organization shall be assigned direct, overall responsibility to coordinate the design, oversee the implementation, and evaluate and report to management and the board on the effectiveness of the program to prevent and detect violations of laws." (CHW)**(ALLINA)**
2) Clarify that the responsibility for implementation and effectiveness is an organization-wide commitment involving all of management. (Pharm)(Prov)

C. Step Three--§8B2.1(b)(3): Substantial Authority Personnel

No additional comment.

D. Step Four--§8B2.1(b)(4): Training

Comment: The proposed amendments could provide more explicit guidance about the nature and extent of the training obligation – for example, to provide senior management training. (Dreilinger)(HCCA)(EPIC/Johnson)**(HIPAA)**
Recommendations: 1) Add to proposed §8B2.1(b)(4) language that makes it clear upper-level personnel are subject to comparable training. (Dreilinger)
2) Add a new Application Note 5 to §8B2.1 to clarify that, if a training obligation extends to independent contractors, this obligation can be met by the contractor through its own internal training program. (HCCA)**(HIPAA)**
3) Add to proposed §8B2.1(b)(4) language examples of the organizational leadership engaging in appropriate communications to demonstrate commitment to the program. (EPIC/Johnson)

E. Step Five--§8B2.1(b)(5): Monitor, Audit, Evaluate & Report

1. §8B2.1(b)(5)(A)&(B): Monitor, Audit & Evaluate

Comment: The addition of periodic evaluations is a positive development, but there needs to be further definition as to what is expected in this area. **(ALLINA)**
Recommendation: Add clarifications that describe the "high-level requirements for this evaluation." **(ALLINA)**

2. §8B2.1(b)(5)(C): Internal Reporting/Guidance

No additional comment.

F. Step Six--§8B2.1(b)(6): Incentives and Discipline

No additional comment.

G. Step Seven--§8B2.1(b)(7): Program Modification

No additional comment.

IV. Addition of Risk Assessment--§8B2.1(c)

No additional comment.

V. Waiver --§8B2.1(g): Cooperation / §8C4.1: Substantial Assistance

Comment: The Advisory Group is to be commended for seeking to bolster the guidelines' respect for the importance of the attorney-client privilege. The Advisory Group offers a middle-of-the road position on the addition of commentary. This progress is laudable, but it falls short because it likens the importance of the attorney-client privilege to a bargaining chip. Language suggesting that waiver of the attorney/client privilege or work product protection may be necessary for cooperation or substantial assistance credit is problematic. Respect for these privileges is essential to ensure frank and candid determinations by an organization as to whether criminal conduct has occurred. (ACC)(Biz Rndtbl)(NACDL)(Chem)**(PAG)**
Recommendations: 1) Recognize that the attorney-client privilege is the foundation of the attorney-client relationship as well as the foundation of trust by clients. Keep the first sentence of the proposed commentary and eliminate the second sentence. (ACC)(Biz Rndtbl) (NACDL)(Chem)
2) If the Commission concludes that deletion of only the second sentence is impossible, then delete the entire segment and leave defendants to make their arguments freely. (Chem)**(PAG)**

VI. Issues for Comment

A. Unreasonable Delay in Reporting: Issue One for Comment

Comment: What constitutes "unreasonable delay" depends upon the context, and there are many circumstances where a substantial delay in reporting may in fact be reasonable. The only delays that should unequivocally be deemed unreasonable are those where organizational officials possessed clear evidence and declined to report to the appropriate authorities in a reasonable manner. (Gruner)**(CLC)**
Recommendation: Maintain the existing guideline that characterizes compliance programs as deficient in cases of unreasonable delay. In cases of unreasonable delay, any relief should be limited to cooperation. (Gruner)**(CLC)**

B. High-Level Involvement: Issue Two for Comment

Comment: The proposed rebuttable presumption for cases involving high-level personnel misses an opportunity to promote appropriate positive behavior in favor of sanctioning negative behavior. This approach maintains a disincentive to initiate an effective compliance program rather than providing a true incentive to implement one. (HCCA)(Pharm)**(ALLINA)(HIPAA)**
Recommendation: A rebuttable presumption in favor of effectiveness should be introduced in cases where a corporation discovers and self-reports. Introduction of this type of positive rule would promote investigation and disclosure. (HCCA)(Pharm)**(ALLINA)(HIPAA)**

C. More Credit for Effective Program: Issue Three for Comment

Comment: A greater culpability score reduction for an effective compliance program is an opportunity to give an incentive for companies to re-examine their compliance programs. (PAG)(Gruner)(Beacon)(Chem)**(CLC)**
Recommendations: 1) Increase the culpability score reduction from 3 to 4. (PAG)(Beacon)(NACDL)(Chem)**(CLC)**
2) Consider increasing benefit to 5 points and establishing a graduated scale based on how many of the required compliance program features have actually been adopted. (Gruner)

D. Small Business Considerations: Issue Four for Comment

No additional comment.

VII. Miscellaneous Issues

No additional comment.

ADDENDUM INDEX

2004 Chapter Eight Public Comment & Testimony

COMMITTEE ON CRIMINAL LAW
of the
JUDICIAL CONFERENCE OF THE UNITED STATES
9535 Bob Casey United States Courthouse
515 Rusk Avenue
Houston, Texas 77002

Honorable Donetta W. Ambrose
Honorable William M. Catoe, Jr.
Honorable William F. Downes
Honorable Richard A. Enslen
Honorable David F. Hamilton
Honorable Henry M. Herlong, Jr.
Honorable James B. Loken
Honorable A. David Mazzone
Honorable William T. Moore, Jr.
Honorable Norman A. Mordue
Honorable Wm. Fremming Nielsen
Honorable Emmet G. Sullivan

Honorable Sim Lake, Chair

TELEPHONE
(713) 250-5177

FACSIMILE
(713) 250-5010

March 8, 2004

Members of the United States Sentencing Commission
Thurgood Marshall Federal Judiciary Building
One Columbus Circle, NE, Suite 2-500
Washington, DC 20002

Dear Sentencing Commissioners:

The Judicial Conference Committee on Criminal Law reviewed with great interest all of the proposed amendments to the sentencing guidelines published on January 13, 2004, for public comment. We offer the following general and specific comments to the amendment proposals.

The Committee fully supports the proposal to consolidate U.S.S.G. §2G2.2 (Trafficking in Material Involving the Sexual Exploitation of a Minor; Receiving, Transporting, Shipping, or Advertising Material Involving the Sexual Exploitation of a Minor; Possessing Material Involving the Sexual Exploitation of a Minor with Intent to Traffic) and §2G2.4 (Possession of Materials Depicting a Minor Engaged in Sexually Explicit Conduct). We also support the proposal to consolidate all four sections of U.S.S.G. §2C1.1 with §2C1.7, and §2C1.2 with §2C1.6. We believe such consolidation efforts may simplify sentencing guideline applications in these cases.

As you may know, in 1995, recognizing the complexity of the sentencing guideline system, the Committee urged the Commission to undertake an extensive assessment of the sentencing guidelines to determine how they might be streamlined or simplified. We understand this effort stalled after extensive Sentencing Commissioner turnover and a prolonged period of vacancies on the Commission. In any event, we support any new efforts in this regard.

With respect to whether the Commission should provide an enhancement in U.S.S.G. §2C1.1 for solicitation of a bribe, and in §2C1.2 for solicitation of a gratuity, the Committee believes that the Commission should not include such an enhancement because it is likely to invite protracted disputes at sentencing over which party initiated the solicitation, which we do not view as vital in terms of relative culpability.

The Committee also opposes any attempt to modify the mitigating role cap. As you know, in November of 2002, after receiving input from the Committee, the Commission created a sentencing cap at a base offense level 30 for drug traffickers who receive a mitigating role adjustment under U.S.S.G. §3B1.2. The Committee does not believe that the current application of this guideline is problematic, and we are unaware of any need to change it.

Likewise, the Committee opposes any attempt to further limit the courts' discretion with respect to aberrant behavior departures. As you may recall, in December of 1999 the Committee determined that the majority view of the circuits was correct that for this departure to apply there must be some element of abnormal or exceptional behavior: "[a] single act of aberrant behavior...generally contemplates a spontaneous and seemingly thoughtless act rather than one which was the result of substantial planning because an act which occurs suddenly and is not the result of a continued reflective process is one for which the defendant may be arguably less accountable."

United States v. Carey, 895 F.2d 318, 326 & n.4 (7th Cir. 1990). Responding to this circuit conflict, in November of 2000 the Commission amended the guidelines by attempting to slightly relax the "single act" rule in some respects and provide guidance and limitations regarding what can be considered aberrant behavior. The Commission also determined that this departure is available only in an extraordinary case.

On October 8, 2003, the Commission adopted emergency amendments, effective October 27, 2003, implementing a number of PROTECT Act directives. Included in these amendments were newly prohibited grounds for departure relative to aberrant behavior. For example, the Commission determined that an aberrant behavior downward departure is not warranted if the defendant has any significant prior criminal behavior, even if the prior behavior was not a federal or state felony conviction. The Commission also determined that an aberrant behavior downward departure is not warranted if the defendant is subject to a mandatory minimum term of imprisonment of five years or more for a drug trafficking offense, regardless of whether the defendant meets the "safety valve" criterial at §5C1.2. As you know, studies conducted after the enactment of the PROTECT Act show that judges are not abusing their departure authority. As a result, the Committee believes that further downward departure limitations are unwarranted.

The Committee recognizes the need to address proportionality concerns as a result of newly enacted mandatory minimum sentences or direct amendments to the sentencing guidelines by Congress. It appears that some of the proposed amendments, for example, the proposal to increase the offense levels for "date rape" drugs, second-degree murder, voluntary manslaughter, and involuntary manslaughter, are intended to address such concerns. Unfortunately, it appears that the Commission's remedy for these proportionality issues is to increase the penalties for these offenses.

The Judicial Conference has repeatedly expressed concern with the subversion of the sentencing guideline scheme caused by mandatory minimum sentences, which skew the calibration and continuum of the guidelines and prevent the Commission from maintaining system-wide proportionality in the sentencing ranges for all federal crimes. The Committee continues to believe that the honesty and truth in sentencing intended by the guidelines is compromised by mandatory minimum sentences. The Committee also believes that the goal of proportionality should not become a one-way ratchet for increasing sentences, especially in light of data showing that the majority of guideline sentences are imposed at the low end of the applicable guideline range. This data indicates that in most cases judges find the existing guidelines more than adequate to allow significant punishment.

The Committee takes no position in response to the directive to the Commission in the PROTECT Act to increase the penalty for child pornography offenses based on the number of images involved. With respect to defining the term "image" or how such images should be counted, the Committee has no position, but would be willing to review any proposals developed in this regard. Also, the Committee takes no position with respect to the appropriate guideline for a new offense that prohibits access to or use of a protected computer to transmit multiple commercial electronic messages (18 U.S.C. § 1037). Likewise, the Committee takes no position with respect to the proposals to provide greater penalties for offenses involving official victims.

With respect to immigration offenses, the Commission has already made revisions to U.S.S.G. §2L1.2 in 2001, 2002, and 2003. Since acts of terrorism can be separately charged by the government, we support the delay in any revisions to the immigration guidelines until a comprehensive package can be developed.

Finally, the Committee reviewed the proposed revisions to the organizational guidelines. The Committee opposes the elimination of the prohibition for the three-point reduction in the culpability score for an effective compliance program if the organization unreasonably delayed reporting an offense to appropriate governmental authorities after becoming aware of the offense. The Committee believes that the claim to have an effective compliance program is inconsistent with unreasonable delay in reporting the offense after its detection. The Committee generally supports the increase in the reduction of the culpability score under §8C.25(f) for an effective compliance program.

We appreciate the opportunity to present our views. If you need any additional information, please feel free to contact me at (713) 250-5177, or Judge William T. Moore, Jr., Chair of the Committee's Sentencing Guidelines Subcommittee, at (912) 650-4173.

Sincerely,

Sim Lake

February 25, 2004

U.S. Sentencing Commission
One Columbus Circle, NE
Suite 2-500
Washington, DC 20002-8002
Attention: Public Affairs

Dear Commissioners:

The California County Issues HIPAA Workgroup is a collaborative statewide focus group created as an information and resource sharing forum for California counties as we face the challenge of applying the HIPAA Administrative Simplification Rules to our complex community healthcare delivery systems. Our membership of over 1,000 strives to resolve the unique implementation issues and myriad compliance problems with which counties are confronted.

The purpose of this letter is to express our collective support of the comments and concerns submitted by the Health Care Compliance Association with regard to the proposed changes to the Federal Sentencing Guidelines.

Sincerely,

Cheri Huber

Cheri Huber
Co-Chair
California County Issues HIPAA Workgroup

Legal Studies Department
The Wharton School
University of Pennsylvania
600 Jon M. Huntsman Hall
3730 Walnut Street
Philadelphia, PA 19104.6340
215.898.7689 phone
215.573.2006 fax

Wharton

February 9, 2004

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

Re: Response to Request for Public Comment re: Proposed Amendments to the Sentencing Guidelines and Issues for Comment Published in the Federal Register on December 30, 2003, and January 14, 2004 (Proposal #2, "Effective Compliance Programs in Chapter 8")

To the United States Sentencing Commission:

Thank you for the opportunity to comment on the above-referenced proposal regarding the Federal Sentencing Guidelines for Organizations (FSGO). Before offering my commentary, I would like first to express my appreciation to the United States Sentencing Commission for creating an Ad Hoc Advisory Group that, from this outsider's perspective, appears to have conducted a focused and balanced review of the elements of an "effective program to prevent and detect violations of law" as set out in Chapter 8.

Focus of my commentary

My commentary in this letter focuses on §8B2.1.a.2 as designated in the proposal (the italicized portion of the quotation below), which (more than the original FSGO) seems formally to acknowledge the benefits that ethics can bring to compliance management:

> To have an effective program to prevent and detect violations of law, for purposes of subsection (f) of §8C2.5 (Culpability Score) and subsection (c)(1) of §8D1.4 (Recommended Conditions of Probation - Organizations), an organization shall –
> 1) exercise due diligence to prevent and detect violations of law; and
> 2) *otherwise promote an organizational culture that encourages a commitment to compliance with the law.*

The proposal's restrained reference to ethics is implied by the words, "promote an organizational culture," recalling the Advisory Group's August 21, 2002 "Request for Additional Public Comment" in which commentators were asked to remark on whether the revised FSGO should "encourage organizations to foster ethical cultures to ensure compliance." Indeed, the "Synopsis of Proposed Amendment" confirms that the implied

connection to ethics is intentional: "This proposed addition is intended to reflect the emphasis on ethics and values incorporated into recent legislative and regulatory reforms, as well as the proposition that compliance with all laws is the expected behavior within organizations" (p. 58). Much of the testimony before the Advisory Group in favor of incorporating ethics into the revised FSGO implied a claim that a "values-based" approach to business conduct management is in some way preferable to a "compliance-based" approach.

Perspective of my commentary

As a scholar-practitioner of organizational ethics and compliance, I have carefully studied the commentary, public hearings transcripts, and report that came out of the Ad Hoc Advisory Group's work. Currently, I teach undergraduate and graduate students in a business school (full-time) and am employed by a professional services firm as a business advisor (part-time) to mainly large, publicly held corporations. In both contexts, I have been a "user" of compliance programs, subject to the compliance program provisions of my two employers. In the business advisory context, I have shared responsibility for compliance program management as a member of enterprise-wide compliance committees. I should note that I am solely responsible for the views expressed in this letter, and that they do not necessarily reflect the views of my employers.

My academic training is in philosophical ethics, and it therefore may not be surprising that I believe strongly in the importance of ethics to compliance management. However, as my commentary will reflect, I am quite cautious about the claim that a values-based approach is preferable to a compliance-based approach. The reasons for my cautiousness are that I think that, in practice, values-based compliance programs are vulnerable to 1) management-driven moral absolutism that can lead to management inflexibility regarding internal control, and 2) board and management moral complacency that arises from the belief that a values-based compliance program is sufficient to accomplish the objectives of law compliance or ethical conduct.

Recommendations for your consideration

As you are undoubtedly aware, the scope of the USSC's responsibility for crime and sentencing policy is only a small part of its scope of influence on day-to-day business conduct management – as manifested by the unexpectedly widespread impact of the original FSGO on corporate compliance programs. Therefore, my recommendations to the USSC recognize that the USSC's active influence on business practice transcends its formal responsibilities as a governmental agency. Neither recommendation contemplates any revision to the language of the proposal. Both recommendations pertain to the manner in which the USSC communicates about, educates on, and otherwise implements, the revised FSGO, within and beyond the formal scope of its responsibility.

First recommendation: Encourage the consideration of ethics in compliance management, but discourage the presumption that a values-based approach necessarily improves upon a compliance-based approach.

There is a widespread attitude that compliance is *needed*, while values are *nice to have*. This attitude belies the truth that values can be bad as well as nice, but it also suggests that law compliance is enough. The proposal seems to want to discourage organizations from gravitating toward a lowest common denominator, although by offering the distinction between the objective of law compliance and the promotion of ethical culture, it may instead reinforce undesirable attitudes.

The success of the original FSGO has been attributed in part to their brevity and resultant flexibility. The breadth of implementation possibilities allowed by the "effectiveness" criteria suggests that what will be a suitable compliance program for a given organization will have much to do with its particular situation: size, industry, history, location, structure, function, personnel, etc. This flexibility should similarly apply to whether a values-based approach is appropriate to the situation. Large organizations – meaning those with thousands of employees in multiple locations, possibly internationally – simply cannot claim with any credibility to share a finite set of core values, and should not be rewarded or have punishment mitigated for having the audacity to claim the impractical and impossible. Small organizations may lay a more credible claim to shared values, but the translation of those shared values into upholding the USSC's objective of law compliance depends on who is in charge, the industry environment, the dynamic nature of law, and numerous other factors that need to be uniquely assessed relative to the situation. With its positive affirmation of the absolute importance of ethics, the USSC should continue to exercise a relative standard of compliance program "effectiveness" that is appropriate to the particulars of the situation.

Second recommendation: Look within <u>and outside</u> the seven criteria for effectiveness measures.

The FSGO – original and revised – provide a deceptively clear standard for compliance program effectiveness. In theory, the seven criteria can be checked off as either having or not having been met. In practice, because of their implementation flexibility, the criteria do not lend themselves to a scientific approach to program evaluation. Assessors must interpret whether a given practice or combination of practices fulfills one or more criteria, because the criteria are markedly general in relation to the specific potential practices being evaluated. The resistance of some who testified before the Advisory Group to incorporating reference to ethics in the FSGO was in some cases due to a practical concern that the introduction of ethics would obfuscate effectiveness measurement even further.

Ethical behavior is a function of intentions that may not be manifest in observable, measurable consequences. While the values-based approach emphasizes "self-chosen" standards, theoretically it is unclear whether the "self" in question is each individual within an organization, or each organization. In practice, however, it is clear that organizational values cannot be codified if they are specific to each individual self, meaning that core values are, out of necessity, constructions of management. Vain though attempts to understand management "intent" may be, the USSC must emphasize the

indispensability of human, non-scientific judgment in ascertaining the credibility – and therefore the effectiveness – of organizational compliance initiatives.

Conclusion

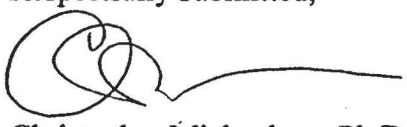
The values-based approach that receives implied attention in the proposal has had considerable success dissuading practitioners from the incorrect impression that, "If it's legal, it's ethical." However, values-based management rhetoric today is likely to sound like, "If it's values-based, or if we call it 'ethics,' it's ethical." Moreover, "If it's ethical, it's compliant." Neither rhetorical claim is always true. Sometimes, the wrong spin on values may work against law compliance, while other times, law compliance may be inconsistent with ethical intent.

The USSC's formal responsibility includes promoting law compliance, while its influence seems destined to continue to foster the perception that values-based approaches to compliance management are superior to compliance-based approaches. The real strength of values-based compliance management is its potential for promoting openness and supporting human judgment – strengths which have been attributed to the original FSGO and which I hope will apply equally to the revised FSGO.

* * *

Thank you again for your request for public comment and for your anticipated careful consideration thereof. A paper version of these remarks is currently under development, and I would be pleased to share it with you at some future date, if requested. Please do not hesitate to contact me should you wish to discuss this commentary.

Respectfully submitted,



Christopher Michaelson, Ph.D.
Lecturer, Legal Studies Department
The Wharton School of the University of Pennsylvania
650 Jon M. Huntsman Hall
3730 Walnut Street
Philadelphia, PA 19104-6340
(215) 573-4864
chrismic@wharton.upenn.edu

Mailing Address:
P.O. Box 1469
Minneapolis, MN 55440-1469

ALLINA
Hospitals & Clinics

February 25, 2004

U.S. Sentencing Commission
One Columbus Circle, NE.
Suite 2-500
Washington, DC 20002-8002
Attention: Public Affairs

Subject: United States Sentencing Commission Proposed Changes

Dear Commissioners:

Thank you for offering this opportunity to respond to the proposed changes in the Federal Sentencing Guidelines. Allina Hospitals & Clinics, a family of hospitals, clinics and care services, believes the most valuable asset people can have is their good health. We provide a continuum of care, from disease prevention programs, to technically advanced inpatient and outpatient care, medical transportation, pharmacy and hospice services. Allina serves communities throughout Minnesota and western Wisconsin. We are a mission-driven organization with a solid commitment to compliance.

I appreciate that the Commission is placing an increased emphasis on the importance of compliance programs and the role of the Compliance Officer as a member of senior leadership. I completely support this effort. As the Compliance Officer at Allina, I am part of the Allina Leadership Team and report directly to our Chief Executive Officer. This structure permits me to be effective in my position.

Moreover, I agree with the many changes proposed by the Commission to provide additional guidance and direction to organizations regarding compliance programs and to emphasize the need for Compliance Officers to have sufficient authority and resources to oversee the organization's compliance program. While Allina supports the proposed changes to the Guidelines, we do have the following three concerns.

First, the proposed amendments suggest that the Compliance Officer of the organization is accountable for the effectiveness of the program. The proposed changes have added language to § 8B2.1(b)(2) which states that the high-level person responsible for the program (the Compliance Officer) has the responsibility to "ensure the implementation and effectiveness of

the program." This amendment does not recognize that a Compliance Officer cannot truly be responsible for the effectiveness of the program. Implementing and maintaining a compliance program is an integral part of running an effective organization. Operating leadership of an organization must embrace the program and assume accountability to ensure that the compliance program is working.

The role of the Compliance Officer is to create compliance strategies that, if implemented by operational leaders, will lead to an effective and efficient compliance program. It is not realistic to hold the Compliance Officer alone responsible for the overall success or failure of the compliance program. If there are failures, the responsibility may reside with the Compliance Officer or may reside with any number of other leaders within the organization. The proposed amendments could be interpreted as relieving operational leaders of their responsibility to ensure the organization is compliant.

We believe that the Guidelines should strengthen rather than weaken leadership accountability for an organization's compliance efforts. For the reasons stated above, we would recommend that the proposed amendment be modified as follows:

"Specific individuals(s) within high-level positions in the organization shall be assigned direct, overall responsibility to coordinate the design, oversee the implementation, and evaluate and report to management and the board on the effectiveness of the program to prevent and detect violations of laws."

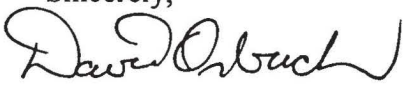
Our second concern relates to the treatment of organizations that encounter trouble even though the organization has a compliance program in place. While the proposed changes are an improvement over the existing Guidelines, it is our view that the proposed changes could do more to promote effective compliance programs.

As drafted, the proposed amendments create a rebuttable presumption that the compliance program was ineffective. However, we would propose that a program is effective when an organization discovers and brings the offense to the attention of the government. The rebuttable presumption of ineffectiveness creates a disincentive for organizations to thoroughly investigate and disclose wrongful conduct. Conversely, a rebuttable presumption that the program is effective (where the organization has uncovered and disclosed the wrongdoing) creates incentives to both investigate and disclose – an approach that is more consistent with the overall emphasis on compliance in Chapter 8 of the Guidelines.

Finally, although we fully support the proposed amendment that requires the organization to take reasonable steps to "evaluate periodically the effectiveness of the organization's program," more guidance is needed to understand this requirement. The Commission should add clarifying language to indicate the high-level requirements for this evaluation.

In summary, Allina supports the proposed changes to the Guidelines and applauds the hard work of the Commission. The changes proposed by the Commission will help strengthen organizational compliance programs and the role of the Compliance Officer. We would strongly encourage the Commission, however, to revise the proposed Guidelines on the three important points discussed above.

Sincerely,



DAVID B. ORBUCH
Executive Vice President
Compliance and Public Policy
612-775-5819

ChevronTexaco Corporation
Law Department
6001 Bollinger Canyon Road, T3000
San Ramon, CA 94583-2324
Tel 925 842 1298
Fax 925 842 2022
WGDU@chevrontexaco.com

William G. Duck
Chief Corporate Counsel

March 1, 2004

ChevronTexaco

Michael Courlander
Public Affairs Officer
United States Sentencing Commission
One Columbus Circle, N.E., Suite 2-500
Washington, DC 20002-8002

Re: Response to Request for Public Comment on Proposed Modifications to United States Sentencing Guidelines

Dear Mr. Courlander:

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

We support the Ad Hoc Advisory Group's recommended modifications to §8B2.1(b)(5)(c). We believe the emphasis on promoting an "organizational culture" that encourages commitment to compliance and mechanisms that allow for "anonymous" reporting is well placed and appropriate. In addition, we would like to recognize the invaluable role Ombudspersons can play as part of a comprehensive approach to crime prevention and detection.

Chevron Texaco has numerous programs and processes in place to ensure legal compliance, including an Office of Ombuds that provides a confidential environment outside of formal reporting channels. Our Ombudspersons are neither an employee advocate nor member of management, but rather independent neutrals who can discuss matters informally and off the record.

Ombudspersons can play a critical role in encouraging employees to step forward and report violations that might otherwise go undetected. Our experience has shown that an essential "first step" for many employees is a confidential discussion with a trusted neutral advisor. For this reason, Ombudspersons in conjunction with other programs and processes can ensure that employees have a safe environment for discussing options without fear of retaliation.

We recognize the difficulty of keeping confidentiality under a formal reporting process and believe the Commission has correctly placed the emphasis on "anonymity" rather than "confidentiality" in the recommended modifications.

We appreciate the opportunity to provide these comments.

Yours truly,

Wm. G. Duck

cc: Broderick W. Hill

Michael:
The Supplemental
Public Comment
Package.
Chandler

Included in
MARCH 1, 2004
P.C.

In ORMS