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March 22, 2010

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Attention: Public Affairs

Delivered by electronic mail: pubaffairs@ussc.gov

Mr. Courlander:

Please find attached the comments of ARMA International in response to the request for comments of the United States Sentencing Commission regarding its proposed 2010 amendments to the U.S. Sentencing Guidelines.

With these comments, ARMA speaks to the proposed amendments to Chapter Eight of the Guidelines Manual regarding the sentencing of organizations and the responsibility suggested for high-level personnel and all employees regarding "document retention policies".

ARMA offers the use of more appropriate and less ambiguous terminology regarding recordkeeping expectations and urges the Commission to apply *generally accepted recordkeeping principles* to establish any parameters regarding records and information management responsibilities and expectations that may apply to organizations.

Sincerely,



DOUGLAS P. ALLEN, CRM, CDIA+



**COMMENTS OF ARMA INTERNATIONAL
REGARDING PROPOSED 2010 AMENDMENTS
TO THE U.S. SENTENCING GUIDELINES
SUBMITTED TO
THE UNITED STATES SENTENCING COMMISSION**

SUBMITTED BY E-MAIL: pubaffairs@ussc.gov

SUBJECT LINE: “Proposed Amendments to the Sentencing Guidelines per Federal Register Notice of January 21, 2010”

DATE: March 22, 2010

INTRODUCTION AND SUMMARY

ARMA International (ARMA) welcomes this opportunity to comment on the Commission’s proposed 2010 amendment to the U.S. Sentencing Guidelines.¹ Specifically, with these comments, ARMA speaks to proposed amendments to Chapter Eight of the Guidelines Manual regarding the sentencing of organizations. Below, we provide observations regarding the role that generally accepted recordkeeping principles can serve as guidance to organization, as well as guidance to the Commission.

Specifically, ARMA comments on the new paragraph that will clarify the responsibility of “high-level personnel” to be “aware of the organization’s document retention policies and conform any document retention policy to meet the goals of an effective compliance program under the guidelines and to avoid any liability under the law”.

In addition, the proposed amendment contains, in brackets, two proposed additions to the Commentary of §8B2.1. The first bracketed addition amends Application Note 3 to include a new paragraph which clarifies what is expected of high-level personnel and substantial authority personnel. Such personnel “**should be aware of the organization’s document retention policies**

¹ See 75 FR 3525 (January 21, 2010). Hereafter, reference to proposed amendments will be made to “Proposed Amendment to the Sentencing Guidelines (January 21, 2010)” found at:

http://www.ussc.gov/2010guid/20100121_Reader_Friendly_Proposed_Amendments.pdf.

and conform any document retention policy to meet the goals of an effective compliance program under the guidelines and to avoid any liability under the law” (emphasis added in bold).²

ARMA supports this overall effort to place appropriate responsibility on high-level personnel to know and communicate the policies and procedures of their organization relative to the management of records and information. It is imperative that the policies and procedures implementing a records and information management (recordkeeping) program be integrally informed by the organization’s overall compliance program. To this point ARMA strongly supports the Commission’s approach and effort.

However, ARMA would urge the Commission to consider the use of terminology more commonly employed in the field of records and information management.

First, ARMA recommends terminology broader than the word “document”. While a document is one form of a record, there are in today’s organization numerous other forms of records that the word “document” may not capture in the plain meaning of the word. More generally, a record will contain information or data of importance to the organization, and in many cases of interest to customers, consumers, business partners and regulators. In the case of organizations, information either critical to the business mission (whether public or private sector), legal obligations regarding private contractual relationships, or compliance obligations based on statutory or regulatory requirements should be captured in the Commission’s efforts in this proposal and the role of these guidelines.

Second, ARMA urges the Commission to consider using terminology more appropriate to an organization’s seriousness in implementing and ensuring compliance with policies and procedures that touch recordkeeping duties. Rather than using “aware” as the term to measure the level of expectation created by these guidelines, ARMA recommends terminology that speaks to the importance of high-level personnel communicating the imperative and value proposition of a records and information management program to all employees, and that all employees receive the appropriate training and oversight for purposes of ensuring compliance.

Connected with this proposal is the clarification regarding assessing risks of criminal conduct. In particular, ARMA comments on the assessment of risks relative to an organization’s document retention policy and on the proposal that “all employees should be aware of the organization’s document retention policy or policies and conform any document retention policy to meet the goals of an effective compliance program under the guidelines and to avoid any liability under the law”.

The second bracketed addition amends Application Note 6 to clarify that when an organization periodically assesses the risk that criminal conduct will occur, the “nature and operations of the organization with regard to

² See Proposed Amendments to the Sentencing Guidelines (January 21, 2010), page 33.

particular ethics and compliance functions” should be included among the other matters assessed. This bracketed addition also states, as an example, that “**all employees should be aware of the organization’s document retention policy or policies** and conform any document retention policy to meet the goals of an effective compliance program under the guidelines and to avoid any liability under the law” (emphasis added in bold).³

Imperative to any effective records and information management program, all personnel in the organization must be presented with and understand the policies and procedures expected of them and essential to the organization’s compliance with recordkeeping imperatives. Including “all employees” is essential in today’s information management environment, where electronic information makes an organization’s records highly susceptible to access, alteration, misappropriation and premature destruction.

As applicable to the proposed text regarding responsibilities of high-level personnel, ARMA urges the Commission to consider using terminology more appropriate to an organization’s policies and procedures that touch the activities and duties of employees on a daily basis – as do the policies and procedures of records and information management. Rather than using “aware” as the term to measure the level of expectation by these guidelines, ARMA recommends terminology that speaks to the importance of high-level personnel communicating the imperative and value proposition of a records and information management program to all employees, and that all employees receive the appropriate training and oversight for purposes of ensuring compliance.

GENERALLY ACCEPTED RECORDKEEPING PRINCIPLES

ARMA believes that eight *generally accepted recordkeeping principles* can provide effective and objective guidance for organizations subject to these guidelines relative to records and information management.

Organizations have historically been challenged to establish appropriate and effective recordkeeping regimes, intended to promote records and information management that meets vital business needs, supports contractual obligations, and ensures compliance with statutory and regulatory obligations. Too often, by organizations and by those with oversight responsibilities over regulated entities, records and information management has been defined solely by regulatory requirements (e.g. safeguarding and disposal responsibilities as recognized by the Federal Trade Commission for non-financial institutions). However, recordkeeping and the criminal activity that may be accomplished by the abuse of records and information in possession of organizations throughout our economy are much broader than simply complying with statutory and regulatory recordkeeping regimes (often referred to as “document retention”).

³ See Proposed Amendments to the Sentencing Guidelines (January 21, 2010), page 33.

ARMA believes that recordkeeping should be tailored to any organization that possesses and controls records and information. This makes it more likely that organizations will voluntarily develop and engage meaningful recordkeeping, and it also provide guidance to others looking to organizations to demonstrate the stewardship over records and information reasonably expected of them⁴.

Relative to the intent of these guidelines, ARMA further believes that a principles-based standard enables organizations to more likely mitigate known and unknown risks and creates a reasonable standard for purposes of determining liability under these guidelines.

As such, the policies and procedures that should be expected of these organizations are made most effective, with objectivity and reasonable levels of investment, by being based on the *generally accepted recordkeeping principles* set forth below – recognizing at the very least that no one size or format of any operational policies and procedures will fit all similarly situated entities.

For these reasons, ARMA recommends, as the foundation of any expectations that may be found in these guidelines regarding recordkeeping, that the guidelines look to by reference the principles used by an organization to establish its records and information management program suitable to demonstrate a acceptable compliance program.

The eight *generally accepted recordkeeping principles* are –

Accountability – An organization shall assign a senior executive who will oversee a recordkeeping program and delegate program responsibility to appropriate individuals, adopt policies and procedures to guide personnel, and ensure program auditability.

Integrity – A recordkeeping program shall be constructed so the records and information generated or managed by or for the organization have a reasonable and suitable guarantee of authenticity and reliability.

Protection – A recordkeeping program shall be constructed to ensure a reasonable level of protection to records and information that are private, confidential, privileged, secret, or essential to business continuity.

Compliance – A recordkeeping program shall be constructed to comply with the applicable laws and other binding authorities, as well as the organization's policies.

⁴ We note the expectations of customers and consumers that their personally identifiable information be appropriately safeguarded. As such, the most effective safeguards are those that are made systemic to the entire organization through known policies and procedures.

Availability – An organization shall maintain records in a manner that ensures timely, efficient, and accurate retrieval of needed information.

Retention – An organization shall maintain its records and information for an appropriate time, taking into account legal, regulatory, fiscal, operational, and historical requirements.

Disposition – An organization shall provide secure and appropriate disposition for records that are no longer required to be maintained by applicable laws and the organization’s policies.

Transparency – The processes and activities of an organization’s recordkeeping program shall be documented in an understandable manner and be available to all personnel and appropriate interested parties.

RECOMMENDATIONS TO PROPOSED AMENDMENTS

ARMA offers the following changes to the Commission’s proposal to amend Note 3 to the commentary to section 8B2.1 by adding the following –

“Both high-level personnel and substantial authority personnel should ~~be aware of the organization’s document retention policies~~ **know, endorse and be responsible for communicating to all employees the organization’s generally accepted recordkeeping principles and those policies and procedures established by these principles** 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 (e.g. 18 U.S.C. § 1519; 18 U.S.C. § 1512(c)).”⁵

ARMA offers the following changes to the Commission’s proposal to amend Note 6(A) to the commentary to section 8B2.1 by adding the following –

“(iv) The nature and operations of the organization with regard to particular ethics and compliance functions. For example, all employees should ~~be aware of the organization’s document retention policies~~ **understand and be expected to follow recordkeeping policies and procedures established by generally accepted recordkeeping principles** 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 (e.g. 18 U.S.C. § 1519; 18 U.S.C. § 1512(c)).”⁶

⁵ See Proposed Amendments to the Sentencing Guidelines (January 21, 2010), page 35.

⁶ See Proposed Amendments to the Sentencing Guidelines (January 21, 2010), page 36.

ARMA offers the following changes to the Commission's proposal to add a new Note 6, which would read as follows⁷ –

“6. Application of Subsection (b)(7).—The seventh minimal requirement for an effective compliance and ethics program provides guidance on the reasonable steps that an organization should take after detection of criminal conduct. 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 to provide restitution 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. **Regarding an organization's records and information management program, policies and procedures should be based on generally accepted recordkeeping principles.** The organization may take the additional step of retaining an independent monitor to ensure adequate assessment and implementation of the modifications.”

Consistent with our recommendation immediately above, ARMA further recommends the use of *generally accepted recordkeeping principles* as a tool or sanction by the court (as suggested in the proposed Note Application language below) –

In determining the conditions to be imposed when probation is ordered under §8D1.1(a)(3) through (6), the court should consider the views of any governmental regulatory body that oversees conduct of the organization relating to the instant offense. To assess the efficacy of a compliance and ethics program submitted by the organization, the court may employ appropriate experts or require retention of an independent corporate monitor who shall be afforded access to all material possessed by the organization that is necessary for a comprehensive assessment of the proposed program. **In the case of a lack of policies and procedures governing an organizations records and information management program, the court may require the organization to develop such a program of policies and procedures based on generally accepted recordkeeping principles.** The court should approve any program that appears reasonably calculated to prevent and detect criminal conduct, as long as it is consistent with §8B2.1 (Effective Compliance and Ethics Program), and any applicable statutory and regulatory requirements.⁸

⁷ The Commentary to §8B2.1 captioned "Application Notes" is amended by redesignating Note 6 as Note 7.

⁸ See Proposed Amendments to the Sentencing Guidelines (January 21, 2010), page 39.

ARMA offers the following changes to the Commission’s proposal to amend subsection (b) and (c) Of Section 8D1.4 to read as follows –

“(b) If probation is imposed under §8D1.1, the following conditions may be appropriate:

(1) The organization shall develop and submit to the court an effective compliance and ethics program consistent with §8B2.1 (Effective Compliance and Ethics Program). The organization shall include in its submission a schedule for implementation of the compliance and ethics program. **Any records and information management program shall be based on *generally accepted recordkeeping principles*.**⁹

ABOUT ARMA

ARMA is the professional association of records and information managers and administrators, whose 11,000 members include records and information managers, imaging specialists, archivists, librarians, and educators in both the public and private sectors. ARMA is also host to the community of service providers and manufacturers who support the records and information management functions in public and private sector organizations.

ARMA serves as an international forum for establishing policies, processes and technology standards to ensure responsible records and information management. Our members are responsible for the efficient maintenance, retrieval, and preservation of vital information created in public and private organizations in all sectors of the economy.

ARMA has long supported policies that provide for the efficient and appropriate management of records and information in all forms and in all settings. ARMA endorses the adoption and implementation of policies and procedures, based on *generally accepted recordkeeping principles*, by organizations to create an enterprise-wide regime for organizing, retaining, preserving, and appropriately destroying records. Acknowledgement of the importance of records and information management by an organization’s leadership and a commitment of resources to support a records and information management program serve as effective internal controls for compliance with business practices as well as statutory and regulatory requirements.

ARMA is a recognized standards developer for the American National Standards Institute (ANSI) towards the development of records and information management standards. ARMA International has developed two ANSI/ARMA Standards, three

⁹ See Proposed Amendments to the Sentencing Guidelines (January 21, 2010), page 37.

ANSI/ARMA Technical Reports, and eight ARMA Best Practices Publications on Records and Information Management.¹⁰

ARMA is a charter member of International Organization for Standardization (ISO) Technical Committee ISO/TC 46, Information and documentation, Subcommittee SC 11, Archives/records management, and ARMA contributed towards the development of the ISO International Standard, “Information and documentation – records management – Part 1: General” (ISO 15489-1:2001).¹¹

10 The two ANSI/ARMA Standards are: (1) “The Digital Records Conversion Process: Program Planning, Requirements, Procedures” (ANSI/ARMA 16-2007); (2) “Vital Records Programs: Identifying, Managing, and Recovering Business-Critical Records” (ANSI/ARMA 5-2003).

The three ANSI/ARMA Technical Reports are: (1) “Framework for the Integration of Electronic Document Management Systems and Electronic Records Management Systems Technical Reports” (ANSI/AIIM/ARMA TR48-2004); (2) “Procedures and Issues for Managing Electronic Messages as Records” (ANSI/ARMA TR-02-2007); (3) “Records Center Operations” (ANSI/ARMA TR-01-2002).

The eight Best Practices Publications are: (1) “Controlled Language in Records and Information Management”; (2) “Establishing Alphabetic, Numeric and Subject Filing Systems”; (3) “Glossary of Records and Information Management Terms”; (4) “Guideline for Evaluating Offsite Records Storage Facilities”; (5) “Guideline for Outsourcing Electronic Records Storage and Disposition”; (6) “Records Management Responsibility in Litigation Support”; (7) “Retention Management for Records and Information”; (8) “Requirements for Managing Electronic Messages and Records”.

11 The ISO Standard on “Information and documentation – records management” is published in two parts. ISO 15489-1:2001, “Information and documentation – records management – Part 1: General”, contains the International Standard, and ISO/TR 15489-2:2001, “Information and documentation – records management – Part 2: Guidelines”, contains the Technical Report. All references and citations in these comments refer to the International Standards of ISO 15489-1:2001 (hereafter referred to as “ISO Standard”).

Respectfully submitted,

ARMA INTERNATIONAL

By its President,

A handwritten signature in black ink, appearing to read "Douglas P. Allen". The signature is written in a cursive style with a large initial "D".

DOUGLAS P. ALLEN, CRM, CDIA+