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United States Sentencing Commission
One Columbus Circle, NE
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Attention: Public Affairs

Re: Comments of the Corporate Environmental Enforcement Council
Chapter Eight Organizational Guidelines
United States Sentencing Commission Notice of Proposed Amendments and Request for
Public Comment

Dear Docket Clerk:

On behalf of the Corporate Environmental Enforcement Council ("CEEC"), an organization of 26 major corporations that focuses exclusively on civil and criminal environmental enforcement issues, we appreciate the opportunity to submit these comments to the United States Sentencing Commission ("the Commission") regarding the Commission's proposed amendments to the United States Sentencing Guidelines ("the Guidelines") and request for public comment (75 Fed.Reg. 3525 (Jan. 21, 2010))("Notice and Request for Comment").

CEEC works extensively on all aspects of environmental enforcement, and has previously submitted comments to the Commission and to the Advisory Group on Organizational Guidelines and met with members and staff to address issues of concern, including specifically issues relating to Chapter Eight, the Organizational Sentencing Guidelines. CEEC has also worked on environmental enforcement issues closely with the United States Environmental Protection Agency, the United States Department of Justice, and state environmental agencies and enforcement officials.

CEEC's members have been at the forefront of the development and implementation of innovative environmental management systems and self-assessment by the regulated community over the past decade. CEEC's members have long recognized the substantial benefits that are realized when effective voluntary compliance programs are put in place – benefits including improved environmental performance, reduced risk to human health and the environment, and higher compliance levels.

To that end, CEEC has supported the inclusion of provisions in the Organizational Guidelines recognizing the importance of a program to prevent and detect criminal conduct. It is our experience that organizations look to Chapter 8, and specifically Section 8B2, for guidance as to what the government believes constitutes an effective compliance program.

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It is critical to recognize that most companies do not look for this guidance in the context of evaluating potential decreases in the culpability score in an ongoing governmental investigation or prosecution; rather, as companies set up internal compliance programs, including programs involving compliance with environmental laws and regulations, they look to a broad array of sources for information, and Chapter 8 of the Guidelines serves as one of the more important resources.

With respect to the Notice and Request for Comment, CEEC offers the following comments with respect to topic 6, the proposed amendments to Chapter Eight of the Guidelines Manual regarding the sentencing of organizations.

Initially, CEEC supports the concept that companies that maintain an effective compliance and ethics program ("C&E Program") should be eligible for reduced penalties for criminal conduct that occurred during the time when that program was in place. One of the seven components of an effective C&E Program relates to a company's efforts to take reasonable steps to respond to the detection of criminal conduct and prevent its recurrence. In the Notice and Request for Comment the Commission proposes to add new commentary regarding this component, specifically with respect to steps taken to "...provide restitution and otherwise remedy the harm resulting from the criminal conduct." *Amendments to Application Notes for Subsection (b)(7)*; 75 Fed.Reg. at 3535.

In the context of enforcement of environmental laws and regulations, companies frequently will implement activities to address or remedy environmental impacts resulting from the violative conduct. In many cases where there is no imminent or substantial endangerment or threat of endangerment arising from the conduct, these remedial activities will be proposed in the context of settlement negotiations with federal enforcement authorities, to be ultimately implemented upon resolution of the enforcement matter.

A strict reading of the proposed new commentary could lead a sentencing court to question whether a C&E Program was "effective" if the company implemented remedial actions not upon detection of the criminal conduct but rather as an offered settlement condition. CEEC does not believe that this "second-guessing" would be an appropriate basis for a determination that a C&E Program is effective under Subsection (b)(7), absent additional evidence of an otherwise ineffective C&E Program.

CEEC has a second, and somewhat related, concern with respect to this proposed new commentary. The proposed commentary includes provisions relating to steps to be taken to prevent further similar criminal conduct, including undertaking an "assessment" of the C&E Program to identify "modifications necessary to ensure the program is more effective." *Amendments to Application Notes for Subsection (b)(7)*; 75 Fed.Reg. at 3535. The proposed

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commentary further provides that the organization "may take the additional step of retaining an independent monitor to ensure adequate assessment and implementation of the modifications." *Id.*

CEEC is aware that independent monitors have frequently been the subject of settlement or sentencing conditions. We also understand that under certain circumstances (i.e., widespread criminal conduct, repeated similar violations, etc.), the inclusion of a provision calling for the voluntary appointment of an independent monitor might be an appropriate measuring stick for the effectiveness of a C&E Program. We are concerned, however, that for at least some types of violations in the environmental context, the appointment of such a monitor is neither necessary nor warranted.

For example, we believe that a company that discovers that one of its discharge monitoring reports filed with the government contained false information and then self-reports the violation, corrects it in a timely fashion, and implements changes in the protocol to prevent future similar occurrences, all pursuant to its C&E Program, should not have to also appoint an independent monitor to oversee the C&E Program review – the C&E Program in fact worked as intended.

While we concur that under certain conditions such a program might be warranted, we are concerned that including this language in the commentary, without additional clarification, will in effect require that companies include such a provision such that it becomes, in practice mandatory, not voluntary, because as indicated above many companies look to Chapter 8 provisions, including the commentaries, for guidance in establishing C&E Programs.

With respect to the proposed changes to Section 8D1.4 regarding Recommended Conditions of Probation, CEEC understands that the majority of the proposed changes are designed to "augment and simplify" the existing recommended conditions, eliminating the distinction between probation imposed solely to enforce a monetary penalty and probation imposed for other reasons. 75 Fed.Reg. at 3534. The Notice and Request for Comment would also add a provision pertaining to the retention of an independent corporate monitor with the authority to conduct regular or unannounced examinations of a company's books/records and of its facilities. *Id.*

CEEC believes that it is critically important to recognize that these provisions are included in Section 8D1.4(b), which provides that "If probation is imposed under §8D1.1, the following conditions [which include the independent corporate monitor] *may* be appropriate" (emphasis added). Each of the underlying 7 conditions, however, include the word "shall." We recognize that the use of the term "shall" is intended to establish the underlying requirements for

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each condition if the sentencing court makes the initial determination that it is appropriate to impose one or more of the seven potential conditions.

We are concerned, however, that sentencing courts that are somewhat less familiar with the Guidelines may view them as mandatory, or may not be open to offers of settlement that would require the implementation of one or more, but not all, of the conditions. We believe it is critical that sentencing courts retain and exercise their discretion to apply none, one, more than one, or all of the conditions, depending on the facts and circumstances of the case, including in the context of settlement discussions. If the facts and circumstances warrant probation but do not, for example, warrant that probation include the appointment of an independent corporate monitor, the court must be free to so rule. If, however, the judge finds that one or more of the conditions are appropriate, then the "shall" language in the conditions should be used in the context of the language that goes into the sentencing report.

Finally, the Notice and Request for Comment requests comment on whether the Commission should amend the Guidelines to allow an organization to receive a reduced sentence for an effective C&E Program even if high-level personnel are involved in the offense if three conditions are met, including if "...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." *Issue for Comment*, 75 Fed.Reg. at 3535.

CEEC has two main concerns with this proposal. First, the proposed amendment seeks to apply the reporting authority provisions to "individual(s) with operational responsibility for compliance," which is both vague and overly broad. In many organizations, individuals at the plant or facility level have operational responsibility for compliance with environmental, health and safety requirements, in addition to individuals at the corporate officer level who may have broader compliance responsibilities. Larger organizations with many separate facilities could have hundreds of individuals that could arguably fall into the category of having "operational responsibility for compliance." CEEC suggests that the Commission further evaluate the purpose of the proposed amendment in an effort to more clearly define the universe of individuals that it is seeking to cover in the amendment.

Assuming that the Commission re-evaluates the scope of this provision to more precisely identify the individual(s) to be covered, CEEC also believes that the language as proposed could be misinterpreted as requiring the board (or a board committee) to exercise direct, day-to-day operational decision-making responsibility with respect to the organization's compliance with applicable requirements. This is fundamentally inconsistent with general principles of corporate governance, where it is not the board but company management that is responsible for operational decision-making on a day-to-day basis. To the extent that a "direct reporting"

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provision would imply an operational role for the board, implementing that provision would put the board in a place that it should not be – potentially responsible for operational decisions.

CEEC suggests that the goal of this provision could be met where it is clear that the covered individual(s) has a direct line of communication to the board that can be utilized as appropriate, rather than an operational reporting obligation. This could be accomplished with a minor language change to the proposed provision: “the individual(s) with operational authority for compliance in the organization has **a direct line of communication** to the board level.” With this minor change this element would be consistent with corporate governance principles, retaining responsibility for operational compliance at the company management level while ensuring that the compliance program has procedures to ensure that the board can and does exercise its oversight responsibility.

CEEC appreciates the opportunity to submit these comments to the Commission, and looks forward to continuing to work with the Commission on issues relating to the Guidelines. Please do not hesitate to call me if you have any questions with respect to these comments or would like any additional information.

Sincerely,



Kenneth R. Meade
Counsel to the Corporate Environmental Enforcement Council

cc: Steven B. Hellem