

March 22, 2010

VIA HAND DELIVERY

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

Re: Proposed Amendments to the Sentencing Guidelines,  
75 Fed. Reg. 3525 (Jan. 21, 2010)

Dear Mr. Courlander:

On behalf of the Defense Industry Initiative on Business Ethics and Conduct (“DII”), I am submitting comments on the above-referenced proposed amendments to the Sentencing Guidelines for United States Courts (the “Guidelines”). DII is a nonpartisan, non-profit association of responsible U.S. defense companies committed to conducting business affairs at the highest ethical level and in full compliance with the law. Our members are the professional ethics officers, CEOs and senior officials of 85 top defense and security companies serving the United States military.

DII endorses the United States Sentencing Commission’s (the “Commission’s”) continued efforts to incorporate compliance and ethics program requirements into the Guidelines, and believes the proposed amendments further that goal. Subject to the minor clarifications below, DII supports the proposed amendments.

### Suggestions for Clarifications

#### **A. Clarifications to the document-retention policy requirements**

Among other changes, the proposed amendments add knowledge of an organization’s document retention policy to the requirements needed to show that an organizational culture encourages ethical conduct and a commitment to

compliance with the law. Specifically, the amendments propose adding a paragraph to the application notes for subsection (b)(2) of Effective Compliance and Ethics Program, section 8B2.1, which states that in order for “high level personnel” and “substantial authority personnel” to be knowledgeable about the content and operation of the compliance and ethics program, they must be aware of the organization’s document retention policies and conform the policies to meet the goals of an effective compliance program and to limit the risk of liability. In addition, the proposed amendments would insert language in the application notes for subsection (c) of section 8B2.1 that would require that an organization periodically assess the nature and operations of the organization with regard to particular ethics and compliance functions, including ensuring all employees are aware of the document retention policies and conform such policies to meet the goals of an effective compliance program and limit the risk of liability.

We have two comments in response to these document-retention amendments. First, while a well-run organization should have a robust document retention program, the proposed amendments fail to articulate the connection between such a policy and an effective compliance program. The proposed amendments would benefit from an explanation of this connection, if any.

Second, assuming record-retention requirements are appropriate, the requirement in the application note to 8B2.1(c) that “all employees” within an organization be aware of the policy is overly broad. Our members have tens of thousands of employees who do not have responsibility for document retention, and requiring that those employees be trained in such policies would be of little benefit. Instead, we recommend that the Commission consider adding limiting language such as “all employees with responsibility for document creation, maintenance and/or retention.” Further, it is unreasonable to expect that “all employees” will play a role in conforming document retention policies to meet the goals of an effective compliance program and limit the risk of liability. We suggest that requirement be limited to “high level personnel” and “substantial authority personnel” as currently proposed in the new paragraph to the application note for subsection (b)(2).

**B. Response after criminal conduct has been detected should be tailored to the scope of the problem.**

The proposed amendments also add an application note explaining what steps an organization must take to respond after criminal conduct has been detected in order to be found to have an effective compliance and ethics program. Among other measures, the application note to subsection (b)(7) of section 8B2.1

states that an organization should assess its ethics and compliance program and make modifications to ensure the program is more effective, and “may take the additional step of retaining an independent monitor to ensure an adequate assessment and implementation of the modifications.”

While DII agrees that an ethics-and-compliance-program evaluation may be a reasonable step after detection of criminal conduct, in some circumstances criminal conduct by one person may be due to that individual’s simple malfeasance rather than to any failure of an organization’s ethics and compliance program. For this reason, we recommend that sentence regarding compliance program assessment be revised as follows:

*Second, to prevent further similar criminal conduct, an appropriate response may require that the organization assess its compliance and ethics program ...*

Further, to clarify that an independent monitor is not warranted in all circumstances, we suggest that the last sentence of the new application note to subsection (b)(7) be revised to read:

*If major revisions to an organization’s ethics and compliance programs are found to be necessary, the organization may take the additional step of retaining an independent monitor to ensure assessment and implementation of the modifications.*

**C. DII supports mitigation for effective compliance programs where certain conditions are met**

Finally, DII welcomes the Commission’s invitation for comments regarding whether organizations should receive credit for having an effective compliance program even where high-level personnel are involved in the offense if certain conditions are met. Those proposed conditions are: (a) the person with operational responsibility for compliance has direct reporting authority to the board level (e.g., an audit committee of the board); (b) the compliance program detected the offense “prior to discovery or reasonable likelihood of discovery outside the organization”; and (c) the organization promptly reported the violation to the authorities. While DII agrees with the general proposition that section 8C2.5(f)(3) should be amended to allow an organization to receive the three level mitigation for an effective compliance program in such circumstances, we believe the proposed conditions would benefit from two clarifications.

First, it is not clear whether the requirement that the compliance officer have direct reporting authority to the board means the compliance officer must report directly to the board or must have direct access to the board. As the Commission is no doubt aware, in many companies with robust ethics and compliance programs the compliance officer reports to the general counsel or CEO and periodic reports are then made to the board by the compliance officer. While there may be limited circumstances in which a compliance officer must report to the board where a high-level executive to whom the compliance officer ordinarily reports has committed an offense, such circumstances could be effectively dealt with where the compliance officer simply has access to the board, as opposed to reporting directly to the board. For these reasons, we recommend that "direct reporting authority" be revised to read "direct access."

Second, while the requirement that the organization be the first to detect the offense is reasonable, the provision is muddled by the language "or reasonable likelihood of discovery." It is not clear how the government would determine at what point it was reasonably likely that an offense would be discovered by someone outside the organization, or even if such a determination would be possible. We recommend that this provision be simplified by dropping the "or reasonable likelihood of discovery" language.

### Conclusion

DII supports the Commission's continued efforts to strengthen requirements that organizations maintain effective compliance programs. We appreciate the opportunity to provide these comments, and are available to provide additional information or assistance as you may require.

Sincerely,

A handwritten signature in black ink, appearing to read "Angela B. Styles". The signature is fluid and cursive, with a large initial "A" and "S".

Angela B. Styles

Coordinator, Defense Industry Initiative on  
Business Ethics and Conduct