United States Sentencing Commission March 11, 2010
One Columbus Circle, N.E. Suite 2-500
Washington D.C. 20002-8002
Attn: Public Affairs

RE: Proposed Revisions to Chapter 8, US Sentencing Guidelines

Dear Honorable Members of the Sentencing Commission:

This letter and the attached comments are submitted in response to the Commission's issuance of proposed revisions to the Sentencing Guidelines, and specifically those relating to Chapter 8 dealing with organizations. The comments are based on my personal experience and research working with organizations in the field of compliance and ethics for over 30 years.[1] I submit these on my own behalf; they are not necessarily representative of the views of any organization with which I may be affiliated.

I wish to thank the Commission for the opportunity to provide these comments. I also wish to commend the Commission for the long-term leadership role it has played in compliance and ethics in the United States, and the model that the Chapter 8 standards for compliance and ethics programs has provided for governments, companies and NGOs around the world.

Respectfully submitted,

Joseph E. Murphy, Esq., CCEP
30 Tanner Street
Haddonfield, NJ 08033
1 (856) 429-5355
JEMurphy@voicenet.com

[1] Background provided in attached Note.

PROPOSED REVISIONS TO THE SENTENCING GUIDELINES STANDARDS FOR AN EFFECTIVE COMPLIANCE AND ETHICS PROGRAM

By Joseph E. Murphy, Esq., CCEP

All suggested revisions and additions are underlined. Explanations are in bold.

Revise item 1 to read:

(1) The organization shall establish standards of conduct and internal controls that are reasonably capable of reducing the likelihood of criminal conduct.

The current language refers to "standards and procedures"; only in the commentary is it explained that "procedures" means "internal controls." In general it appears that practitioners are not reading the commentary note which makes this important point, and tend to view adopting codes of conduct as all that is required. It would be more effective to drop the commentary note and incorporate the language regarding internal controls directly into item 1.

Revise item 2 to read:

(2) . . .

(C) Specific individual(s) within the organization shall be delegated day-to-day operational responsibility for the compliance and ethics program and shall have sufficient independence, empowerment and access to senior management decision making to be able to function effectively in the establishment, implementation and operation of the compliance and ethics program.
Individual(s) with operational responsibility shall report periodically to high-level personnel and, as appropriate, to the governing authority, or an appropriate subgroup of the governing authority, on the effectiveness of the compliance and ethics program. To carry out such operational responsibility, such individual(s) shall be given adequate resources including those necessary so that the program has an effective presence in all parts of the organization that are at risk, appropriate authority, and direct access to the governing authority or an appropriate subgroup of the governing authority.

The position and empowerment of the compliance officer is an essential element of an effective program. A groundbreaking study by the major compliance and ethics organizations underscores this point[2]. There needs to be sufficient

[2]See Leading Corporate Integrity: Defining the Role of the Chief Ethics and Compliance (Officer (August 2007)

independence so that the compliance officer can maintain some professional distance, yet the compliance officer also needs to be part of decision making in order to be effective. The compliance officer needs to be in a position to be able to go against the wishes of the rest of the management "team," and thus needs empowerment.

The second revision recognizes that in larger organizations simply having a program in headquarters will not effectively reach other business units. The program needs a presence everywhere an organization conducts its activities.

Revise item 3 to read:

(3) The organization shall use reasonable efforts:

(A) not to include within the substantial authority personnel of the organization any individual whom the organization knew, or should have known through the exercise of due diligence, has engaged in illegal activities or other conduct inconsistent with an effective compliance and ethics program; and

(B) to address the risks of dealing with agents and other third parties, including due diligence in retaining and monitoring such third parties, and encouraging such third parties, especially small organizations, to institute effective compliance and ethics programs.

With the growth of FCPA enforcement as well as other enforcement initiatives, it is becoming increasingly clear that the risks created for organizations by third parties need to be addressed in effective programs. One important aspect of this risk reduction activity is promoting compliance and ethics programs in third parties carrying on activities for the organization.

This proposal also addresses an important development affecting the US as a signatory to the OECD Convention addressing foreign bribery. The US, like the other treaty members, has been called upon in the OECD Recommendations issued in December 2009 to promote compliance programs among small and medium sized enterprises.[3] Currently the Sentencing Guidelines commentary contains language that is merely advisory, and from all indications has had no effect. By providing an incentive for companies to promote programs among those they deal with, the Sentencing Guidelines will go far both in reducing compliance risk in organizations, and in helping the US meet its treaty obligations.

Revise item 7 to read:

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http://www.corporatecompliance.org/Content/NavigationMenu/Resources/Surveys/CECO_Definition_8-13-072.pdf

[3] http://www.oecd.org/dataoecd/11/40/44176910.pdf , item X.C.ii)

(7) After criminal conduct has been detected, the organization shall take reasonable steps to respond appropriately to the criminal conduct and to prevent further similar criminal conduct, including conducting investigations professionally and making any necessary modifications to the organization's compliance and ethics program.

Item 7 of the Guidelines addresses what to do if a violation is found, yet oddly did not address the most fundamental step – conducting an investigation. When companies do investigations poorly this can result in interference in law enforcement activities and result in greatly enhanced risk and liability for the company. This can also send the message throughout an organization that compliance is not taken seriously by management. Investigations of potential federal crimes need to be done professionally, and not on a haphazard basis.

Revise the Commentary, note 1, first definition, to read:

Application Notes:
1. Definitions.—For purposes of this guideline:
'Compliance and ethics program' means a program designed to prevent and detect criminal conduct. An effective compliance and ethics program should be sufficiently documented to demonstrate the organization's diligence.

In practical terms programs need to be documented, so it is helpful for the Commission to acknowledge this. This is also a much better way to address issues that relate to compliance and ethics program documentation than by the proposed revisions to the commentary, addressed *infra*, which seem out of place. An example of such a reference in government-issued guidance materials on compliance programs can be seen in the Bulletin on compliance programs issued in 2008 by the Canadian Competition Bureau.[4]

Revise the Commentary, note 5 to read:

Commentary

5. Application of Subsection (b)(6).—Adequate discipline of individuals responsible for an offense is a necessary component of enforcement; however, the form of discipline that will be appropriate will be case specific. Providing appropriate incentives (for instance, compliance could be considered for the purposes of employee, management and officer evaluations, promotions and bonuses) for

[4] http://www.competitionbureau.gc.ca/eic/site/cb-bc.nsf/vwapj/Compliance-Bulletin-090808-Final-e.pdf/$FILE/Compliance-Bulletin-090808-Final-e.pdf, page 15.

performing in accordance with the compliance and ethics program can play an important role in fostering a culture of compliance and ethics. Incentives can work as effective tools for an organization that wishes to promote compliance and ethics by employing concrete actions.

Although the reference to incentives was added into the standards in 2004, application of this element has been limited. In fact, when the Federal Acquisition Regulation was recently revised to require compliance programs among contractors handling government contracts above a certain size, the significance of this point was so poorly understood that the reference was completely missed in the mandatory standards. Yet incentives are clearly drivers in organizational conduct and are included in a variety of other compliance and ethics program standards around the world. It is likely that just having the one word reference in the Sentencing Guidelines item 6, "incentives," is not sufficient to explain what is intended or to assist organizations in implementing this element. The Canadian Competition Bureau in its 2008 Compliance Program Bulletin (page 15) covered this issue very well. The suggested language here has adapted the Competition Bureau's language to this Guidelines commentary to provide additional, specific guidance to practitioners.

New proposed language on "document retention"
Application Notes:

[The Commentary to §8B2.1 captioned "Application Notes" is amended in Note 3 by adding at the end the following:

"Both high-level personnel and substantial authority personnel should be aware of the organization's document retention policies 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))."";

and in Note 6(A) by adding at the end 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 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)).]"

These proposed revisions should be omitted. These insertions of references to "document retention" unfortunately could easily be interpreted to signal that

form matters over substance. Why elevate document retention over antitrust, FCPA, money-laundering, fraud, etc?

On its own terms the revision also does not appear to be workable. Why would a company want every employee to focus on the document retention policy? Why, for example, would that come before the company's code of conduct? And why would production workers need to know the company's document retention policy? Remembering the lesson of the risk assessment provisions in the Guidelines, not all issues can be priorities. If the Sentencing Commission signals that document retention is now a priority, resources will be inappropriately diverted from other compliance areas to this narrow one. This approach conflicts with the very message intended by the risk assessment language.

There is also a concern that this will send companies in exactly the wrong direction, emphasizing paper over people, and form over substance. There are many things that companies do that may threaten the public wellbeing: bribery, dangerous products, cartel behavior, etc. But document retention, as a general matter, is not one of them. In fact, document retention typically only matters when it is associated with an issue of real importance, such as prosecution for an offense that causes actual harm.

The one reference that has appeared in other compliance program standards that does relate to records and documentation is a statement about documenting the program. Such a reference is suggested here as an addition to the Commentary's definition section.

Eliminating inconsistent loopholes

The Sentencing Guidelines standards for compliance and ethics programs have been working for almost 20 years. It is time to remove the quibbles and qualifications. There should be no exemptions and no carve-outs in the struggle to prevent federal crimes; all offenses should be covered by these carefully crafted compliance and ethics program standards. For example the odd qualification for antitrust compliance programs needs to be removed. There is nothing special about this one class of crime that makes compliance any less necessary. In fact, a good argument could be made that antitrust compliance programs are one of the highest priorities, and should be strongly promoted. The trend of ever greater cartels with massive fines suggests that the experiment in minimizing the role of antitrust compliance programs has failed miserably. The existence of a compliance program should have at least as much value in antitrust cases as it has in money laundering or FCPA. Other exemptions from sentencing credit such as for export and environmental violations, should also be removed. Recruiting companies into the fight against business crime needs to be a serious, consistent effort. Compliance and ethics programs are the way a

company does this. It is an effort that is needed in all areas of corporate crime. It should not be discouraged in any areas.

Question for comment:

1. Should the Commission amend §8C2.5(f)(3) (Culpability Score) to allow an organization to receive the three level mitigation for an effective compliance program even when a limited number of high-level personnel are involved in the offense if (A) 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); (B) the compliance program was successful in detecting the offense prior to discovery or reasonable likelihood of discovery outside of the organization; and (C) the organization promptly reported the violation to the appropriate authorities?

This is an excellent and important change. It recognizes that the involvement in an offense by one manager, whatever the position, is not the same as involvement by "senior management." This change would conform the Sentencing Guidelines to actual practice. Corporations today may employ dozens if not hundreds of managers in positions of high responsibility. It is not only possible but unfortunately likely that there will be infractions involving at least a limited number of such persons. No program can prevent all such violations, but an effective program should be able to achieve the steps called for in this proposed change. A company that has fully empowered its compliance officer and that at some point discovers and reports a violation involving a senior manager has gone quite far in qualifying as a good citizen corporation. However, it would be advisable to add the words "a limited number of" before the reference to high-level personnel to emphasize the limited nature of this provision.

The reference to the compliance officer's "reporting authority" also needs to be clarified and enhanced. In the business context the word "reporting" can mean two very different things. It could mean sending reports to the board, which may be more or less detailed and informative (and more or less censored by senior management), and it can mean having a supervisor/subordinate relationship. If the compliance officer is to be positioned so that he or she can stand up to a senior manager or managers determined to engage in illegal conduct, both types of reporting relationship to the board are important. It requires empowerment and independence for a compliance officer to do this. It is therefore suggested that the following commentary be added to guide the interpretation of this new provision:

Add commentary:

"direct reporting authority" means the following:

a) has the unfettered right to report any matter to the highest governing authority without any form of filtering and without fear of retaliation;
b) meets in person with the highest governing authority periodically and no less than quarterly;
c) is obligated by the highest governing authority to report promptly any allegation of a violation of the organization's compliance and ethics standards involving high-level personnel; and
d) cannot be removed from office or have responsibilities or compensation diminished except by the highest governing authority.

Respectfully submitted March 11, 2010

Joseph E. Murphy, Esq., CCEP
30 Tanner Street
Haddonfield, NJ 08033
(856) 429-5355
JEMurphy@voicenet.com

Biographical Note on Joe Murphy

Joe Murphy, CCEP, of counsel to Compliance Systems Legal Group, and co-founder of Integrity Interactive Corporation, has worked in the organizational compliance and ethics area for over thirty years. Before joining Compliance Systems Legal Group, Joe was Senior Attorney, Corporate Compliance, at Bell Atlantic Corporation, where he was the lawyer for Bell Atlantic's worldwide corporate compliance program. Joe is Co-Editor of ethikos, a bi-monthly publication on corporate compliance and ethics. He has lectured and written extensively on corporate compliance and ethics issues, is on the board of the Society of Corporate Compliance and Ethics (SCCE), and is the SCCE's Director of Public Policy. His most recent book is "501 Ideas for Your Compliance and Ethics Program," published by SCCE. He is co-editor, with Jeffrey Kaplan and Winthrop Swenson, of "Compliance Programs and the Corporate Sentencing Guidelines" (Thomson). He is a graduate of the University of Pennsylvania Law School.