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Comments on Proposed Changes to the U.S. Sentencing Guidelines

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Dear ESSC staff:

Please consider the following comments, which reflect our views on proposed changes to the Application Notes in §8B2.1 of the Sentencing Guidelines. Our comments are informed by years of experience helping mid-sized and large companies adhere to §8B2.1 requirements for an effective compliance and ethics program.

We support the Commission's proposal to add the following language to Note 3, which currently explains the responsibilities of management for the E&C program: "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...and to reduce the risk of liability under the law (e.g. 18 U.S.C. §1519; 18 U.S.C. §1512(c))." This addition rightly underscores management's duty to understand the company's document retention policy and align it with compliance objectives, which include mitigating legal risk.

We suggest revising the following proposed addition to Note 6A, which expands on risk-assessment requirements: "(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))."

While we understand the importance of document retention for compliance, legal discovery, etc., the proposed comment inappropriately tasks non-supervisory employees with what is essentially a management responsibility, in this case aligning document retention policies with the goals of a company's E&C program. The example would be more appropriate if worded as follows: "For example, all employees should be aware of the organization's document retention policies and procedures for reporting any potential or actual violations of such policies to the appropriate company representative."

With a few provisos, we support the proposed addition of a new Application Note 5, which would flesh out the requirements for responding to misconduct articulated in Subsection (b)(7)). The new Note 5 echoes the existing guideline while adding two concepts. First, it says that an "appropriate" response includes "reasonable steps to provide restitution and otherwise remedy the harm resulting from the criminal conduct." This clarifies what companies ought to do, as a matter of justice, when criminal conduct is detected. We suggest adding language here calling on companies also to perform a *root cause analysis* in order to prevent recurrences.

And second, to address the requirement that the E&C program be modified in light of the misconduct, the new Note 5 states: "The organization may take the additional step of retaining an independent monitor to ensure adequate assessment and implementation of the modifications." Here we recommend a terminological shift from "monitor" to "expert" in order to avoid unnecessary confusion with the now common assignment by DOJ of monitors as part of DPAs.

Regarding the Commission's Issue for Comment, in cases of misconduct we agree that companies should receive credit for their E&C program–even if high-level personnel are involved–provided the following three conditions the Commission lays out are met: (1) the individual(s) with operational responsibility for compliance in the organization have direct reporting authority to the board level (e.g., audit committee); (2) the compliance program was successful in detecting the offense prior to discovery or reasonable likelihood of discovery outside of the organization; and (3) the organization promptly reported the violation to the appropriate authorities. In our view, this approach reinforces the idea that the CCO function is, or should be, independent of the GC. It also removes a disincentive E&C officers now have to act on reports of high-level misconduct (since any criminal conduct by high-level personnel is a "credit blocker" under current law).

It has become clear to us and many others in the E&C field that CCOs need to be independent of GCs and have regular, direct access to the Board. We would welcome more discussion of changes to §8B2.1 that move further in that direction.

Finally, to continue the dialogue and improve the Guidelines, we want to encourage the Commission to consider adding a new Application Note commenting on Subsection (b)(6)(A), which deals with "appropriate incentives to perform in accordance with the compliance and ethics program." This is arguably the most ignored provision in §8B2.1, and we believe it's time to change that.

Recent research in behavioral economics points to the importance of setting up the right "choice architecture" within a group or organization. Businesses understand this well, which is why they have performance management systems that link KPIs to bonuses. What many companies have not done, however, is make the "good ethics is good business" and "compliance pays" messages clear to managers and employees by including ethics/integrity as a (serious, not token) KPI in evaluations. A new Note on Subsection (b)(6)(A) could clarify the kinds of "appropriate incentives" the Commission

has in mind, and specific mention of ethics/integrity KPIs would send a clear and potentially powerful message to corporate policymakers.