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**Via E-mail and U.S. Mail**
United States Sentencing Commission
One Columbus Circle, N.E.
Suite 2-500
Washington, D.C. 20002-8002
Attn: Public Affairs

**Re: Comments on Proposed Amendments to Chapter Eight Organizational Guidelines: 75 Fed. Reg. 3525 (Jan. 21, 2010).**

Dear Commissioners:

Washington Legal Foundation hereby submits these comments to the U.S. Sentencing Commission on Proposed Amendments to the Sentencing Guidelines, Policy Statements, and Commentary: 75 Fed. Reg. 3525 (Jan. 21 2010). In short, WLF objects to the expansion of the possible conditions for probation under Section 8D1.4. At the same time, WLF favors greater flexibility in the guidelines with respect to reducing an organization's culpability score.

## I. *Interests of WLF*

Washington Legal Foundation (WLF) is a non-profit, public interest law and policy center based in Washington, D.C., with supporters in all fifty states. WLF regularly appears before federal and state courts and administrative agencies to promote economic liberty, free enterprise, and a limited and accountable government. WLF has a longstanding interest in the work of the Sentencing Commission and its determination of the appropriate sentences that should be established for various categories of offenses.

Since the Commission's formation over twenty-five years ago, WLF has regularly submitted written comments and testified before the Commission on various substantive issues. WLF has supported strict sentences for certain violent *malum in se* crimes, but more lenient sentences for others, particularly *malum prohibitum* violations such as minor environmental regulatory infractions. For minor regulatory offenses, the underlying conduct is subject to myriad and often confusing rules and regulations, and would best be remedied by administrative and civil enforcement rather than the heavy hand of criminal prosecution.

In earlier comments to the Commission, WLF has argued that the prison sentences mandated by the guidelines for environmental offenses are often draconian, arbitrary, flawed, and the result of double-counting the offense characteristics. WLF has previously represented

U.S. seafood dealers who were sentenced as first offenders under the guidelines to a draconian 97 months in prison for importing seafood in violation of the Lacey Act, merely because the seafood was shipped in plastic bags instead of cardboard boxes. A Honduran seafood exporter also received a 97-month sentence. *See McNab v. United States*, 331 F.3d 1228 (11th Cir. 2003), *cert. denied*, 540 U.S. 1177 (2004); s*ee also* Tony Mauro, *Lawyers Seeing Red Over Lobster Case*, LEGAL TIMES (Feb. 16, 2004).

WLF has frequently litigated cases raising corporate criminal liability issues, particularly the growing and disturbing trend by the Justice Department to prosecute corporate employees and officers under the so-called "responsible corporate officer" doctrine, which impermissibly allows the *mens rea* requirement to be diluted or ignored altogether. *See, e.g., Hansen v. United States*, 262 F.3d 1217 (11th Cir. 2001), *cert. denied*, 535 U.S. 1111 (2002); *United States v. Hanousek*, 176 F.3d 1116 (9th Cir. 1999), *cert. denied*, 528 U.S. 1102 (2000); *United States v. Ahmad*, 101 F.3d 386 (5th Cir. 1996); *United States v. Weitzenhoff*, 35 F.3d 1275 (9th Cir. 1993), *cert. denied,* 513 U.S. 1128 (1995). WLF has also consistently urged the Commission and its advisory committees to operate in a transparent manner when formulating Commission policy and has taken the Commission to task (and to court) for failing to do so. *See Wash. Legal Found. v. U.S. Sentencing Comm'n*, 89 F.3d 897 (D.C. Cir. 1996); *Wash. Legal Found. v. U.S. Sentencing Comm'n*, 17 F.3d 1446 (D.C. Cir. 1993).

More pertinently, WLF submitted comments to the Advisory Group on Organizational Guidelines on March 12, 2004, outlining our general concerns about the organizational guidelines, and further noting our concerns that the Advisory Group did not include any in-house counsel or other corporate officer with first-hand experience with the operation of corporate compliance programs. Instead, the group consisted primarily of those professionals who, although knowledgeable of compliance programs, may have different interests or perspectives in evaluating such programs.

In addition, WLF's Legal Studies Division has published numerous studies, reports, and analyses on corporate criminal liability and related issues. *See, e.g.*, Dick Thornburgh, Eric Grannon, et al., *SPECIAL REPORT: FEDERAL EROSION OF CIVIL BUSINESS LIBERTIES* (WLF Report, March 2010); Joe D. Whitley, *et al.*, *The Case For Reevaluating DOJ Policies On Prosecuting White Collar Crime* (WLF Working Paper, May 2002); George J. Terwilliger, III, *Corporate Criminal Liability: A Handbook For Protection Against Statutory Violations* (WLF Monograph, 1998); William C. Hendricks, III and J. Sedwick Sollers, III, *Corporate Vicarious Criminal Liability* (WLF Contemporary Legal Note, April 1993); Alan Yuspeh, *Developing Compliance Programs Under The U.S. Corporate Sentencing Guidelines* (WLF Contemporary Legal Note, July 1992); Irvin B. Nathan and Arthur N. Levine, *Understanding And Complying With The U.S. Corporate Sentencing Guidelines* (Contemporary Legal Note, May 1992); Joseph R. Creighton, *New Corporate Sentencing Guidelines Are Vulnerable To Constitutional And Statutory Non-Compliance Challenges* (WLF Legal Backgrounder, March 6, 1992).

## *WLF Comments*

### 1. Proposed Amendment of Commentary to Section 8B2.1 (Effective Compliance and Ethics Program).

Section 8B2.1 of the Guidelines lists the required steps that an organization must take to have an "effective compliance and ethics program," which entitles the organization to mitigation under the Guidelines. The proposed amendments attempt to clarify subsection (b)(7), which provides that "[a]fter criminal conduct has been detected, the organization shall take reasonable steps to respond appropriately to the criminal conduct and to prevent further criminal conduct, including making any necessary modifications to the organization's compliance and ethics program." U.S. Sentencing Guidelines Manual § 8B2.1(b)(7). Specifically, the proposed amendments would add an Application Note to provide guidance on what actions constitute "reasonable steps" for purposes of subsection (b)(7).

The proposed Application Note provides that if 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." It further provides that other "reasonable steps" in response to criminal conduct include self-reporting and cooperation with the authorities. WLF believes that the Commission should clarify further a company's obligation for restitution by taking into account the variety of contexts in which a company might discover criminal conduct. Often, the government has better information that the company, which is unable (even with an internal investigation) to uncover the wrongdoing. In any event, the Commission should clarify that a company's obligation to offer restitution will not be triggered until the company has had a chance to fully investigate the scope of wrongdoing in order to identify all potential victims and calculate the extent of any loss. Moreover, a company should not be penalized for making reasonable but unsuccessful attempts at restitution. In those instances where a company's good faith efforts at restitution are rejected by the victims or the government, it should receive credit for those efforts.

The proposed Application Note states that an organization should assess and, if necessary, modify its compliance program to ensure that the program is more effective. As proposed, if an organization chooses to modify its compliance program, it can take the additional step of retaining an independent monitor to ensure adequate assessment and implementation of the modifications. Because many companies look to Chapter 8 of the Guidelines for guidance in developing their compliance and ethics programs, WLF believes that inclusion of the language regarding independent monitors in the commentary, without further context or clarification, would effectively obligate companies to include such a provision. The Commission should clarify in the comments that, for many violations, an independent monitor is often unnecessary and unwarranted. For example, a company that discovers an administrative regulatory violation, timely self-reports that violation, and implements internal protocols to prevent recurrence under its compliance and ethics program should not have to incur the additional expense of an

independent monitor to administer that program. The use of independent monitors is not presumptively necessary, and the Commission should ensure that it does not leave that impression.

The proposed Amendments also add two Application Notes that offer further guidance on the necessary actions that an organization must take to have a satisfactory compliance and ethics program. The first, which pertains to the obligations of high-level and substantial-authority personnel, states that they "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 guidance and to reduce the risk of liability under the law." Another proposed Application Note attempts to clarify subsection (c), which requires an organization to "periodically assess the risk of criminal conduct [within it] and . . . take reasonable steps to design, implement, or modify its compliance and ethics program." U.S. Sentencing Guidelines Manual § 8B2.1(c). The Application Note would require an organization, as part of this assessment, to monitor "the nature and operations of the organization with regard to particular ethics and compliance functions" and offers, as an example, that "all employees" (not simply high-level or substantial-authority personnel) should be "aware of the organization's document retention policies."

WLF questions the need for these proposed amendments, since document retention programs are now such an integral part of organizational compliance programs. Importantly, the Commission should clarify what it means by "awareness" so that employees are provided the necessary information to satisfy the guidelines. This proposed amendment should clarify, for example, that high-level employees are not required to know every minute detail of the company's document retention policy. Employees need only be made aware that the organization has a document retention policy and how to apply it for that employee's job performance. The Commission should not be in the business of micromanaging internal policies of organizations.

**2. Proposed Amendment of Section 8D1.4 (Recommended Conditions of Organizational Probation).**

Section 8D1.4 contains provisions regarding recommended conditions of probation for organizations. The proposed amendments to Section 8D1.4 would simplify these recommended conditions and provide courts with greater discretion in deciding probation conditions. The Guidelines currently distinguish between conditions of probation that are appropriate to ensure that an organization is able to pay an order of restitution, fine, or assessment and conditions of probation that are appropriate for any other reason. *See* U.S. Sentencing Guidelines Manual § 8D1.4. The proposed amendments would eliminate this distinction and provide courts with greater flexibility to impose any of the available conditions of probation on an organization. Although WLF generally welcomes greater flexibility for courts desiring to utilize probation in sentencing, WLF opposes the creation of additional, overly burdensome conditions for probation.

The proposed amendments seek to expand the current possible conditions of probation. First, they would allow court to require an organization to submit to examinations of its books and records by an independent corporate monitor rather than a probation officer. Second, they would allow a court to require an organization to regularly submit to unannounced examinations of facilities subject to probation supervision. Under the current Guidelines, a court may require an organization to submit to examinations of only its books and records as a condition of probation. These amendments drastically enlarge a sentencing court's authority to impose conditions on probation.

WLF opposes the adoption of these proposals. The implicit premise of the Commission's proposed amendments is that the examination of facilities and imposition of an independent monitor are necessary (but presently unavailable) conditions of organizational probation. But there is no reason to presume that an organization, once it has identified and disciplined those responsible, cannot effectively monitor its own compliance. The Commission offers no explanation why the imposition of these invasive conditions is suddenly a necessary condition of probation and articulates no rationale for imposing such strict requirements in any given case. In any event, courts already have the authority to monitor compliance where necessary, and WLF is aware of no shortcoming in the way probation is currently being administered.

WLF recognizes that the proposed amendments would be included in Section 8D1.4(b), which provides that the following conditions for probation *may* be appropriate. But the use of the term "shall" in each of the proposed conditions could be misconstrued as mandatory by a sentencing court unfamiliar with the organizational guidelines. It is absolutely imperative that sentencing courts retain their broad discretion in imposing any or none of the enumerated requirements as conditions of probation. Accordingly, the Commission should at least clarify that imposition of an independent monitor and examination of premises are not mandatory prerequisites for probation, but rather are part of an overall menu of options available to the sentencing judge. If the facts and circumstances warrant probation but do not require the imposition of a corporate monitor or mandatory inspections, the sentencing judge should be free to impose such a sentence.

Further, the Commission should offer criteria for a sentencing court to use in determining whether these conditions are appropriate for probation in a given case. Indeed, the proposed amendments purportedly would allow a court to require an independent monitor and examination of facilities as a condition for probation without regard to the nature of the criminal conduct for which the company was convicted. Although these drastic measures may conceivably be appropriate for certain significant financial crimes, they are neither relevant nor appropriate for myriad other non-financial crimes for which an organization may be sentenced. Presumably, a court would be free to impose these requirements equally to first-time offenders as they would to repeat offenders. An organization whose liability stems solely from the misconduct of a low-level employee that is unlikely to recur should not be subject to such invasive conditions.

Likewise, monitoring is unnecessary where the company's compliance program helped detect the wrongdoing, and the company took swift, appropriate corrective action by firing the culpable employee. And many environmental regulatory schemes already require agency monitoring and access to facilities, such that the proposed conditions of probation would be completely superfluous in such cases.

**3. Mitigation Credit Under Guideline 8C2.5(f)(3).**

Along with seeking comment on the proposed amendments discussed above, the Sentencing Commission also seeks comment on "whether to encourage direct reporting to the board by responsible corporate compliance personnel by allowing an organization with such a structure" to receive mitigation of its ultimate punishment even if high-level personnel are involved in the criminal conduct. This proposal would permit an organization to benefit from Section 8C2.5(f)'s three-point reduction, even if high-level personnel were involved in the offense, but only if the organization's compliance program satisfies three conditions: (1) "the individual(s) with operational responsibility for compliance in the organization" must "have direct reporting authority to the board level"; (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 must have "promptly reported the violation to the appropriate authorities."

By rewarding efforts at corporate compliance in sentencing (irrespective of the misconduct of any single individual), this proposal is a welcome departure from the recent trend towards strict liability for organizations. WLF agrees that mitigation credit should be available to an organization in many more cases, including those where high-level personnel are implicated in criminal conduct. Indeed, it should be noted that mitigation under 8C2.5(f) has only rarely been given, largely because the involvement of high-level personnel has disqualified the organization from receiving any reduction under current guidelines and practice. A business organization should not be subjected to an excessive fine or a harsh sentence merely based on the willful ignorance of a single high-level person.

WLF disagrees, however, with the Commission's proposed automatic disqualification of an organization whose compliance program vests a portion of the direct reporting authority with someone other than the person with "operational responsibility" for the program. WLF encourages the Commission to consider a more flexible approach that takes into account the wide variations between small, closely-held companies on the one hand and large, multinational corporations on the other. A one-size-fits-all reporting requirement does not reflect the reality of many modern organizational structures. In many organizations, different compliance officers are responsible for complying with specific legal areas, such as safety, health, securities, or environmental, such that each director arguably has "operational responsibility" for compliance. In large corporations, several compliance officers enjoy overlapping functions, such as the general counsel, the chief compliance officer, the risk management officer, etc. To this end,

WLF believes that the Commission's current direct-reporting requirements for effective compliance and ethics program are sufficient.

Further, although WLF agrees that a compliance program's effectiveness is often a relevant factor in determining whether an organization should be entitled to mitigation, prior detection of misconduct should not be a rigid prerequisite for obtaining a three-point reduction. The mere fact that misconduct by an employee was not detected in a given case does not render a company's compliance program deficient. Many instances arise where misconduct is isolated or impossible to discover despite the existence of a robust and aggressive compliance policy. In such instances, a company should not be unfairly penalized or otherwise denied the benefit of mitigation. Likewise, the requirement that the organization "promptly report[] the violation to the appropriate authorities" should allow a reasonable amount of time for the company to conduct a thorough internal investigation of wrongdoing. Punishing an organization that has taken all reasonable and appropriate efforts to comply with the law and detect wrongdoing does nothing to further the stated goal of deterrence in criminal sentencing.

Finally, several ambiguous portions of the language used in the proposed amendment could benefit from clarification. As alluded to above, it remains unclear precisely who may qualify as an "individual[] with operational responsibility for compliance" within the corporate hierarchy. The Commission could also provide further guidance and clarity on the "directness" requirement of the reporting authority condition. It is also unclear what is meant by "reasonable likelihood of discovery" or how this standard would be applied. The Commission should clarify its primary objectives and propose more precise language to accomplish its goals.

***Conclusion***

WLF appreciates the opportunity to provide these comments and urges the Commission to carefully consider the full impact that its guidelines and the proposed amendments would have on organizations before proposing them to Congress.

Respectfully submitted,

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