UNITED STATES SENTENCING COMMISSION

Public Hearing

Sentencing Guidelines for Organizational Defendants

February 14, 1990

United States Courthouse
3rd and Constitution Avenue, N.W.
Washington, D.C.

BEFORE:

William W. Wilkins, Jr., Chairman
Helen Corrothers, Commissioner
Irene H. Nagel, Commissioner
George E. MacKinnon, Commissioner
Stephen A. Saltzburg, Commissioner
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*PROCEEDINGS*

CHAIRMAN WILKINS: Good morning. Let me call this public hearing to order.

This is third in the series of public hearings the Sentencing Commission has held on the issue of Organizational Sanctions and we appreciate all of you who are in attendance today, as well as many individuals and organizations who submitted written testimony to us before today.

From the testimony that we have received and have reviewed, it appears that this will be a very informative and interesting session. We have a number of outstanding witnesses who will be appearing today.

Your testimony given today will be recorded and transcribed for the benefit of the Commission and I suggest to all of the witnesses that you consider limiting your opening remarks to the Commission to somewhere between 5 and 6 minutes perhaps, so that we will have ample opportunity to ask you questions and sort and identify issues that are on our minds and receive the benefit of your thoughts.

We have a number of witnesses who will be testifying and we have a very long day and, consequently, in order to give everyone an opportunity to participate and be heard,
we must ask you to assist us in keeping on schedule.

Our first witness today is Professor Carl Mayer from Hofstra Law School.

Professor, come around, please, sir.

Professor Mayer is appearing on behalf of Public Citizen, our first witness today.

We're delighted to have you with us, Professor.

I am informed that all of the furniture in this ceremonial courtroom has been removed to the other courtrooms because of various multi-defendant trials that are going on today and this table was brought in as a makeshift.

Professor and other witnesses, it's not real stable. So be careful not to lean on it too hard.

Go ahead.

STATEMENT OF PROFESSOR CARL J. MAYER, HOFSTRA LAW SCHOOL, PUBLIC CITIZEN

PROFESSOR MAYER: Thank you, Mr. Chairman, members of the Commission. My name is Carl Mayer. I'm an assistant professor at Hofstra Law School. I would like to thank you for the opportunity to comment on the proposed guidelines.

Ralph Nader had been invited today and had intended to testify jointly with me. Unfortunately, Mr. Nader had an
engagement in another city and therefore could not attend today. He requested that I convey his apologies and also that I commend the Commission on his behalf for considering new forms of sanctions on corporations beyond simply monetary fines.

In his absence, I will try to outline the impressions of public interest groups on the proposed sanctions as well as add my own more academic observations. Although, I should note that these comments should not be construed as representing that of any organization. They are my own.

If I could summarize my testimony briefly, I would say that on Valentine’s Day if I were to send something to these proposed guidelines it would be a nice card, but it would not be chocolate or flowers. It would be a nice card because these guidelines go a long way towards recognizing that monetary fines are not sufficient sanctions and that probation and community service are very important as deterrents to corporate crime.

Chocolate and flowers would not be forthcoming because the terms of probation could be much stiffer. In particular, as my testimony suggests, I think that three terms of probation would be quite important for the Commis-
sion to consider.

First, a debarment condition or suspension of Federal subsidies;

Second, a publicity sanction; and,

Thirdly, a consideration given to charter suspension or revocation in certain instances.

Now, I begin with the presumption that corporate crime is a serious problem that has not been adequately deterred.

In 1985, the *New York Times* survey of the American public found that Americans believe that corporations engage in white collar crime very often. They also believe that some white collar and corporate criminal activity is more serious, for example, hazardous dumping, than some forms of homicide by individuals.

Public Citizen and other public interest organizations spend a good deal of their time acting as shadow prosecutors. By that I mean they spend a good deal of their time prodding Federal regulators, Federal prosecutors, counseling whistleblowers, and other people interested in deterring corporate crime.

The cost to society of having public interest
groups spend their time on this time of shadow prosecutorial activity should be considered in the mix.

Perhaps the best example of this was Public Citizen's 2 year effort to have the Federal Government prosecute the Eli Lilly [ph.] Corporation for manufacturing Ora Flex [ph.], a drug that resulted ultimately in the deaths of 96 people.

Ultimately, there was a settlement in the case and the corporation was fined a mere $25,000, but this is precisely the type of activity that public interest organizations spend excessive time doing.

As a reflection of that public interest organizations around the country in a broad coalition with environmental and consumer groups have recently introduced into several State legislature the Corporate Decency Act.

The Corporate Decency Act, which is appended to my testimony, is an act which provides for much tougher sanctions, specifically the three that I will discuss today.

The first is contract debarment. Now a suspension of Federal subsidies can be very effective for large organizations, for example, the General Electric Corporation, which has been three times in the last decade convicted for
defrauding the Department of Defense on military contracts.

Now for large organizations that often are not
deterred by fines a suspension of Federal subsidies is a
uniquely important remedy.

In particular, if you analogize to the individual
situation, if Ivan Bolsky [ph.] can be placed on probation
and one of his probation conditions can be that he no longer
participate in the securities industry while he is on
probation, for a corporation it is very important that
Federal subsidies, which would be a much less harsh probation
condition than that imposed on Bolksky [ph.], that Federal
subsidies be removed for the duration of probation.

The second important point is publicity sanctions.
The literature on that is well known I believe to the
Commission. I would only add as far as publicity sanction
goes that business schools and business literature take very
seriously the concept of corporate cultures and to the extent
that publicity sanctions go a long way towards eliminating
criminality from a corporate culture, they serve an important
function.

I should also note that the Commission's guidelines
specifically indicate that as a term of probation that the
court may direct a convicted organization to notify its employees about the conviction and conditions imposed upon the corporation under probation.

If employees can be notified, I see no reason why other constituents of the corporation, namely communities, workers, and shareholders, and consumers, should not be notified by requiring a publicity sanction.

Finally, charter suspension is a extreme remedy, but on that, as my testimony indicates, could be very important in fighting criminal activity by organizations that are legitimate organizations, legitimate business organizations, but that are controlled by organized crime.

I point out in my testimony an example of this which is the recent prosecution in New York City by the Manhattan District Attorney’s Office of a trucking and garment industry corporations that are believed to be mob controlled, but that are still legitimate businesses.

In some instances, charter suspension would be an appropriate remedy.

Finally, I end with a note on theory. The corporations and their representatives have done much to tell the Commission that a corporation should only be considered an
economic entity and therefore cannot be subject to additional
sanctions such as probation, jail terms, charter revocation.

I will only point to the Commission that in many
other areas of the law, particularly constitutional law and
corporate law, the same advocates for corporations go before
the courts and ask that corporations be treated precisely
like persons.

For example, in the constitutional area, corporate
advocates often suggest that they can be treated like persons
for First Amendment purposes, for Fourth Amendment purposes,
for Fifth Amendment purposes, that corporations can speak
with a unified voice, have associational interest in speech,
have double jeopardy Fifth Amendment protections just like
persons.

If they can be treated like persons in other areas
of the law and if corporations and their advocates suggest
they can be treated as such, I see no reason for not extend-
ing that treatment to corporations in the criminal area and
considering the important sanctions as terms of probation
under the Commission's jurisdictional directive. I see no
reason that these conditions cannot be imposed.

CHAIRMAN WILKINS: Thank you very much, Professor.
Let me ask, to my right, any Commissioner have questions?

COMMISSIONER MacKINNON: Yes, I have a couple of questions.

You talked about General Electric being convicted of three crimes defrauding the Federal Government?

PROFESSOR MAYER: Yes, I'm basing that on my reading of the papers.

COMMISSIONER MacKINNON: What were the nature of those crimes so far as the higher management in the firm was concerned? How did they get up? Have you made any study of those offenses?

PROFESSOR MAYER: I haven't made any study. To my knowledge, they were convicted recently in U.S. District Court in Philadelphia. It does not appear in that instance that high management was involved, but I am not certain. In the other two--

COMMISSIONER MacKINNON: That's the extent of my question.

PROFESSOR MAYER: Yes.

COMMISSIONER MacKINNON: You also said that corporations ought to be subjected to jail terms.
PROFESSOR MAYER: I said charter suspension or revocation.

COMMISSIONER MacKINNON: You mentioned jail term like an individual. Did you mean that?

PROFESSOR MAYER: Well, only to the extent that you can analogize to charter suspension.

COMMISSIONER MacKINNON: Thank you.

PROFESSOR MAYER: Certainly.

CHAIRMAN WILKINS: To my left?

COMMISSIONER NAGEL: How you envision the debarment provision working? The Commission obviously cannot make a debarment decision. So how would you envision that working?

PROFESSOR MAYER: It would be a term of probation, a condition of probation, that during the course of probation, the corporation, for example, General Electric, would be barred from receiving, for example, Defense Department contracts.

This provision already works in many Federal statutes, statutes relating to nuclear power contracting, a licensing of broadcasting, and the terms of probation could be simply based on the mechanisms imposed in those statutes.

I believe it is fully within the authority of the
Commission to impose that as terms of probation.

CHAIRMAN WILKINS: Commissioner Saltzburg?

COMMISSIONER SALTZBURG: I just did not understand that last answer. You think that all of the statutes that govern Federal agencies are statutes that the Commission can use and draft regulations that would allow Federal judges to make decisions as to whether the FCC to grant licenses, as to whether the military would grant contracts?

PROFESSOR MAYER: No, no, not at all. The point is that as a term of probation, debarment provisions could be inserted by Federal judges under the terms of probation.

These terms of probation would simply be modeled on those provisions contained in statute or directed by statute. So it would be fully within the Commission's authority.

CHAIRMAN WILKINS: I assume that the publicity sanction would be a condition of probation under your proposal?

PROFESSOR MAYER: Absolutely. All of these proposals would be conditions of probation

CHAIRMAN WILKINS: When would the court order this sanction? Would it be a discretionary call by the court?

Assuming that there's been widespread publicity already about
1. the indictment and conviction, would it really be necessary
2. that a publicity sanction be imposed?
3. PROFESSOR MAYER: Well, sometimes there is not
4. widespread publicity. For example, the General Electric
5. conviction just 2 weeks ago in District Court in Philadelphia
6. received only a column like this [gesturing] in the Wall
7. Street Journal.
8. CHAIRMAN WILKINS: You would suggest it would be a
9. discretionary call, but be an option available?
10. PROFESSOR MAYER: That is right, the same way that
11. the guidelines already direct that the judge require the
12. corporation to inform employees about the conviction and the
13. terms of probation.
14. CHAIRMAN WILKINS: Well, thank you very much,
15. Professor. We appreciate the thought and effort into your
16. testimony and your appearing today.
17. PROFESSOR MAYER: Thank you. Appreciate your time.
18. CHAIRMAN WILKINS: Our next witness is Morris
19. Silverstein, Assistant Inspector General, Criminal Investiga-
20. tions Policy and Oversight, Department of Defense.
21. General Silverstein is no stranger to the our
22. Commission. He has testified before the Commission before
and indeed I believe it was last April when we last you and
we were dealing with individual guidelines.

MR. SILVERSTEIN: That is correct, sir.

CHAIRMAN WILKINS: Delighted to see you again.

STATEMENT OF MR. MORRIS B. SILVERSTEIN, ASSISTANT INSPECTOR
GENERAL, CRIMINAL INVESTIGATIONS POLICY AND OVERSIGHT,
DEPARTMENT OF DEFENSE

MR. SILVERSTEIN: I am pleased to be here to
testify on the subject of organizational sanctions. We have
submitted our written testimony and based on my experience,
when a judge says 5 or 6 minutes, I will stick to 5 or 6
minutes.

The Department of Defense investigative organiza-
tions over the past several years have had much experience in
investigation and prosecution of corporations, prosecution
with the Department of Justice.

Since 1982, there have been 25 convictions of top
100 Department of Defense contractors and numerous convic-
tions of smaller or medium size contractors.

There has been two responses—or among the respon-
ses have been two to these efforts. One has been the
congressional enactment of statutes which increases the
criminal fines on Department of Defense violations.

In the Department of Defense Authorization Act of 1986, the maximum fine was increased to 1 million dollars on false claim cases. In the Major Fraud Act of 1988, the maximum fine was increased to 5 million dollars.

In reviewing the option--

CHAIRMAN WILKINS: To 5 million you said?

MR. SILVERSTEIN: Up to 5 million dollars.

There have also been other congressional statutes which I have referred to in my written submission.

In looking at the two options provided by the Commission, we believe Option 1, called the economic approach, is more appropriate in Department of Defense matters. There are three reasons why we say this.

First, it seems consistent with congressional enactment in the area of crimes involving the Department of Defense;

Secondly, in a relationship with the Department of Defense the crimes that occur are really crimes defrauding the Department of Defense of dollars and the Option 1, the economic approach, more appropriately makes the punishment fit the crime;
Thirdly, in doing various hypothetical calculations involving particular losses and particular types of situations involving crimes against the Department of Defense, we find that Option 1 offers a greater fine than Option 2 and seems more consistent with congressional intent and with what some of the courts have been doing in situations where they have been imposing a criminal fine, restitution, and settlements involving civil fraud also against the Department of Defense.

We do, however, find that one area, the Option 1 as presently constructed, does not really address the needs in terms of product substitution cases.

Product substitution cases losses are often difficult to determine. The loss is not just the value of the contract, but it may be the particular product that is being produced is caused by a latent defect or a latent defect causes it, it is part of a larger component, and then part of an even larger component.

In terms of losses, we believe that any computation of loss in product substitution cases should include the loss of identifying, retrieving, testing, replacing the parts. We mention on page 6 an example of our testimony involving
springs.

   In perpetrating the fraud, the contractor realized
   the relatively insignificant economic advantage, difference
   between qualities of the steel. The cost of qualities of
   steel was fairly low and the cost of performing a particular
   test was less than $50.

   However, there was dramatic effect on the contrac-
   tor’s customers and the defense industries. Customers
   incurred enormous costs in attempting to identify, rectify,
   and determine the extent of the fraud.

   One customer involved in the Space Shuttle incurred
   a cost of roughly 1 and a half million dollars to basically
   trace, examine, replace, and retest the particular springs in
   question.

   We also think that the product substitution area
   can be affected in two other ways.

   One, the aggravating factor for it is right now
   different, it appears, from that of an aggravating factor for
   a national security matter.

   In the prior amendments in individual sanctions,
   the Commission asked us to address whether or not the Major
   Fraud Act 2 year enhancement should be applied to all
individuals and not just to contracts under 1 million
dollars.

We believe that the enhancement or the aggravating
factor for product substitution cases where there is a risk
of serious personal injury should be increased from 20
percent to 50 percent to reflect the real nature of those
particular matters.

And thirdly, even though the prior to recommenda-
tions may involve an enhanced economic penalty, they are both
imposed based on a determination that there is economic loss
that can be determined. In some situations that is not going
to occur and for that we would suggest that the Commission
continue as it has suggested a departure in those particular
situations.

The other type of response that has occurred during
the last few years to the activities of the Department of
Defense investigative organizations and the Department of
Justice and Defense Procurement Fraud has been corporate
self-governance programs.

The Department of Defense has continually en-
couraged and supported it. Recommendations from the Packard
Commission, Secretary Cheney's new defense management review,
again talk about corporate self-governance.

If one starts from the proposition that one of the objectives of sentencing corporations is to cause them to modify their behavior to act in a way that we would like to have them act and to have that permeate through the corporate culture, then self-governance is one effective way of accomplishing that.

In looking at the aggravating and mitigating factors the Commission proposes, the Commission recommends that a higher weight of a mitigating factor 30 percent being given to voluntary disclosure of a particular incident than it does to the corporate efforts to prevent this activity from occurring in the first place, whether it be an isolated act which was done in violation of the corporate programs that were in effect.

The question, of course, is how does the judge evaluate what the corporation has done? I mean a voluntary disclosure has been made, that's fairly clear, but how does a court evaluate what actions the corporation has taken?

In the Department of Defense there is a mechanism called suspension and debarment. Over the last year, there were over a thousand suspensions and debarments. I do not
recall the number involving corporations. But suspension and
debarment in the Department of Defense and throughout the
Federal Government is really--is not a punitive sanction.

It is basically a business decision as to whether a
corporation is presently responsible, that is, whether the
Department of Defense should continue to do business with
this contractor.

And in looking at the suspension and debarment, the
appropriate officials will look at the corporation’s efforts
to prevent what occurred from occurring in the first place;
what level of management was involved; what training have
they provided the employees; is there a Code of Ethics in the
corporation; are employees trained on it; what happens when
people violate the standard of conduct; is the corporation
willing to make restitution? These are some of the factors
that are taken into consideration.

In looking at the Commission’s proposal for
probation, again, it looks like these are the same factors
that are being taken into consideration. And one suggestion
would be where a court is looking at these particular matters
if somebody in the Government had, for example, a suspension
debarring official has already evaluated these efforts, that
there might be some mechanism whereby the facts of what they
have uncovered can be provided to the court so the court can
take that into consideration.

From our experience in terms of evaluating what
internal efforts a corporation has done, it is a very large
effort and in those situations where corporations have been
indicted and as a result of that conduct we are looking at
situations of a suspension and debarment, it takes quite a
bit of review by individuals spending—going out looking at
the facility of the corporation that is involved. Suspension
and debarment, for example, we try and focus on the facility
that is involved, not the—to see if what occurred at the
facility is representative of the entire corporation. If
not, suspension and debarment will be focused on a particular
facility.

Those are the major remarks I have had regarding
the Sentencing Commission's preliminary draft and I would be
happy to answer any questions that you may have.

CHAIRMAN WILKINS: Thank you very much.

Judge MacKinnon, any questions?

COMMISSIONER MackINNON: Yes.

You talked about debarment. I recall that one of
the largest massive frauds that you had involved the sub-
marine program and they were the only manufacturer of 
submarines and you tried to debar them and you had to pull 
out.

What other sanctions were imposed, do you know?

MR. SILVERSTEIN: In that situation--I am not 
familiar with the particular case.

COMMISSIONER MacKINNON: Well, you are familiar 
with the New London situation. They had a massive fraud on 
over billing and the conversation around and the publicity 
was that they were going to be debarred. Instead, they could 
not debar them because they were the only one making these 
nuclear submarines and so they did not.

MR. SILVERSTEIN: In that situation, there was no 
indictment or conviction coming out it.

COMMISSIONER MacKINNON: Oh, I know.

MR. SILVERSTEIN: What the suspension debarring 
officials will do is, from an administrative standpoint, 
there will be a lot tighter controls being imposed and 
there are a variety of administrative contractual sanctions 
that can be taken. For example, progress payments can be 
withheld until the Government--
COMMISSIONER MacKINNON: Well, do you know what they did?

MR. SILVERSTEIN: In this particular case?

COMMISSIONER MacKINNON: Yes.

MR. SILVERSTEIN: No, sir, I do not know the details of all the—or what actions were taken.

COMMISSIONER MacKINNON: I was looking for some alternative to that situation.

MR. SILVERSTEIN: Where you only have a limited number of suppliers there basically is a—in terms of the Department of Defense dealing with it, there is an override to the suspension and debarring official. If there are only two manufacturers of submarines, we are not going to stop doing business with one or both of them and the only way to deal with it in that situation is through contractual oversight type of activities.

COMMISSIONER MacKINNON: Thank you.

COMMISSIONER CORROTHERS: One question.

In your written response to our question, I believe it was number 14 of the published specific issues for comment, you addressed the issue of whether directors should be removed by calling attention to the appropriate section of
1. Option 1, which provides for a fine reduction where the organization takes prompt disciplinary action against those involved in the offense conduct, which includes directors.

   My question is just for clarification of your meaning. Are you saying that some type of discipline short of removal is sufficient, or to repeat the published question, do you feel that removal of directors is ever an appropriate sanction?

   MR. SILVERSTEIN: Not in taking away the suspension debarment issue where the Department of Defense—if you have people involved who are in appropriate positions, we do not want them involved in doing business with us.

   From a punitive sentencing situation, I think there are going to be situations where directors might be removed.

   If the situation is such that the corporate culture that caused a particular fraud is such that there are no internal controls that the top corporate management were aware of it, more or less acquiesced in it, and although did not participate directly in the criminal conduct, and you cannot prove criminal intent on their part, their recklessness and carelessness gave rise to the underlying environment, which gave rise to this criminal intent.
COMMISSIONER CORROTHERS: Thank you.

COMMISSIONER NAGEL: Mr. Silverstein, in an instance where you have a corporation that is the only corporation that makes a particular part of value for the Department and for those reasons either a fine or debarment are not viable options or a fine sufficient to the harm, what is the Department's view as to the viability of corporate probation where the corporation would come forward with a compliance plan of sort?

Is that something the Department would endorse? Is that something the Department finds problematic?

MR. SILVERSTEIN: That occurs in suspension debarment situations where a corporation will say, "We're presently responsible", or in terms where there has been a conviction and will agree with the debarment of authorities that it will undergo the following types of activities for a period of years.

So to that extent, we already have in some instances that sort of corporate probation, although, I hesitate in calling it probation in suspension debarment, but the same sort of review a corporate remedial action is reviewed after the particular event has occurred.
COMMISSIONER NAGEL: And what is your experience with that effort? Or perhaps you could provide us with some written documents detailing your experience with those programs because there is some concern that this would involve the courts in sort of overreaching into running the corporation.

If it is worked in the Department of Defense context, perhaps you could share with us at later time some of your experiences. Is that possible?

MR. SILVERSTEIN: Yes, I can do that.

COMMISSIONER NAGEL: Thank you.

CHAIRMAN WILKINS: Commissioner Saltzburg?

COMMISSIONER SALTZBURG: I have three fast questions. First, on debarment, the previous witness suggested debarment might be a condition of probation. Your written testimony on page 10 suggests that you would like to call the debarment investigation to the court's attention for use in sentencing.

Am I right in assuming that DOD would prefer for reasons, as Judge MacKinnon suggested, having to make decisions about whether you need a particular contractor to have the final say whether than the courts about whether
MR. SILVERSTEIN: Well, we have the decision as to whether or not we want to do business with this person in the future, which is a separate decision from a court, I believe, in setting forth conditions of probation although the same factors are taken into consideration.

COMMISSIONER SALTZBURG: Second, you mentioned in your written testimony that you preferred Option 1 rather than Option 2 and you indicated on a hypothetical as you have run that Option 1 produces higher fines.

MR. SILVERSTEIN: That is right.

COMMISSIONER SALTZBURG: Are those fines in your judgment too high? Is there any threat that they would drive businesses out of the bidding process? Are you worried about that at all?

MR. SILVERSTEIN: Well, we are always worried why firms leave the Defense industrial base. However, on the other hand, if somebody is not going to follow the law, we do not want them as a contractor.

In looking at the fines, and I tried to do some comparison between what has occurred in some convictions of major contractors, I cannot draw a good enough parallel...
between--for the following reasons: In settlements that occur the total amount is sometimes called criminal fine, sometimes it is cost of investigations, sometimes it is civil fraud under False Claim Act, it is sometimes administrative recovery, it is sometimes restitution. So we have been getting back a significant amount of money. Two to three times the fine range, which is what Option 1 is, is a parallel like the False Claims Act for civil fraud in that it is two to three times depending on whether a company cooperates and brings a matter to the Government's attention. So I do not think the two to three times is going to drive those contractors out who should not be out in the first place.

COMMISSIONER MacKINNON: Billy?

CHAIRMAN WILKINS: Judge MacKinnon?

COMMISSIONER MacKINNON: Could you give me a letter on that electric boat fraud, what happened and whether or not they were indicted and so on? I would appreciate it.

MR. SILVERSTEIN: Yes, sir, I can.

CHAIRMAN WILKINS: Could I follow up on the debarment issue? Are you suggesting that from DOD standpoint you would want the Commission to write a guideline that gives
the judge debarment authority, of course, you retaining that
authority to do business or not?

What I am concerned about, you may make the
decision that because of the particular nature of the work,
even though the criminal activity occurred, that you would
not think debarment would be in the best interest of national
security, and yet, the judge having the authority to order
debarment might do that contrary even to the wishes of the
Department.

I am trying to figure out do you want us to give
the authority to the judge or do you want to leave it with
you? Of course, you will always have it, but--

MR. SILVERSTEIN: In terms of a--if this were only
Department of Defense contractors, what I am suggesting is
that the information be provided to the judge so he can--you
know, if we are going to have corporate probation, he can
make that evaluation because often there will be matters
outside the Department of Defense’s jurisdiction which
involve the crime.

We would hope that there would be sensitivity to
the contractual needs of the Government. I really have not
thought out the answer to the question. There could be
serious problem if a judge decided to take actions and say that the Government shall no longer deal with a particular contractor. I do not think that is an appropriate role.

But for corporate probation in terms of imposing certain sanctions that the corporation should follow and certain remedial actions, I think something could be done in that regard.

CHAIRMAN WILKINS: Thank you. If you have any more thoughts on this debarment issue, I would appreciate you dropping us a line. Thank you, again.

Our next witness is Earlyn Church.

Ms. Church, please come around.

Also--well, first of all, Ms. Church is with Superior Technical Ceramics Corporation of St. Albans, Vermont, here representing the National Association of Manufacturers. With her is James P. Carty. Jim Carty is Vice President of the National Association of Manufacturers.

Jim, I think, knows all of us and we know Jim. He is no stranger to the Commission. Indeed, we share office space with NAM at the building down the street and we appreciate Jim's assistance in notifying people around the country about this issue and the hearing and we received a
lot of response from your colleagues.

We appreciate both of you being here today. We are glad to hear from you.

STATEMENT OF MS. EARLYN CHURCH, SUPERIOR TECHNICAL CERAMICS, CORPORATION, ST ALBANS, VERMONT, NATIONAL ASSOCIATION OF MANUFACTURERS, ACCOMPANIED BY MR. JAMES CARTY, VICE PRESIDENT, NATIONAL ASSOCIATION OF MANUFACTURERS

MS. CHURCH: Mr. Chairman and fellow Commission members, I am secretary and treasurer of Superior Technical Ceramics, Corporation of St. Albans, Vermont. We manufacture industrial ceramic components for high technology.

STC employs 95 people, but I am also on the board of the National Association of Manufacturers. My testimony is given on behalf of NAM, in which I will stress four fundamental points.

One, we strongly urge postponement of the issuance guidelines;

Two, we feel that the fines under both Options 1 and 2 are flawed;

Three, probation of a organization is a potential death sentence for small to medium size companies;

Four, restitution first should offset other
Turning to our first point, our members vigorously support enforcement of our criminal and civil laws at all levels of society. We all endeavor to be good neighbors and citizens.

It is a fact of our complex society, however, that laws are broken by well meaning, but sometimes careless and negligent persons who work for businesses.

If one of our employees breaks a law, even if it is against all our policies and training, our companies can be indicted. The business community accepts responsibility for its employees' actions even when committed in violation of a company policy.

The proposed guidelines, however, are extremely harsh, punitive, unwarranted and will place many businesses on the threshold of insolvency, an unintended result, I am sure.

To quote Chairman Wilkins in a recent Law Review article, The Commission was required by the congressional mandate to determine past sentencing practicing by adopting an empirical starting point for its decisions which would allow for the exercise of informed and independent judgment,
end of quote.

Unfortunately, the data to date reveals Commission findings are based on a very narrow statistic analysis of less than 1400 cases coming under old sentencing laws. Also, only 340 cases have been reviewed to date by the Commission using the new sentencing laws. This is in stark contrast to the 110,000 cases reviewed for the individual guidelines.

Eighty-five to ninety percent of this limited sample involves small, privately held businesses, not a representative cost section of American business.

The data to date has not turned up any significant variations in the sentences being given, nor patterns of violation that will support the proposed guidelines. These are compelling reasons not to issue a proposal at this time.

My second point deals with the penalty fines. My company’s personal experience may give you some insight into how a business could effect by the ever changing legal landscape and our attempt to comply.

We currently have seven professional engineers who work on filling out forms and tracking regulatory developments. We estimate that in 1989, 900 hours were spent filling out Government forms. This represents lost profes-
sional time that affects our business operation. A company with 100 employees can little afford this. Yet, if a mistake is made in this paperwork process or if an employee does not follow regulations, we would be subject to fines.

We do have training programs dealing with hazardous waste, safety, and OSHA regulations. Unfortunately, human error is often with us. We find that Government inspectors come in varying degrees expertise, but almost universally with an adversarial attitude.

Let me tell you a war story. Our company uses a very pure form of talc as a rough material in highly technical ceramics. We had an OSHA inspector who fined the company $5,000 because talc was present in the air in the mixing room. He claimed that the talc contained asbestos. We pointed out that respirators were required and were worn in that room and that there had been no instances of asbestosis in our industry.

On the day he issued the fine, I asked if he had children. He replied that he did. I asked if he had diapered those children and if so, with what powder. He replied talcum powder. I pointed out that the only difference between Johnson and Johnson’s and the talc in our
rooms was that Johnson and Johnson's contains perfume. He replied that the powder was applied to the other end of the baby. We won the appeal.

Another example for you to savor, we accumulate three 55 gallon drums of dirty oil each year from machinery, the same type of oil used in your cars. Our barrels of dirty oil must be handled and disposed of at great cost as a hazardous waste, yet hundreds of local garages in the State of Vermont recycle their spent oil as heating fuel. Apparently, the size of the company affects whether or not a material is hazardous or not.

The point of this litany is to demonstrate that compliance with our laws is not always a simple and precise task and violations may take place that are not deserving of the measures proposed in these guidelines.

The huge variation in possible fines, $500 to 25 million in Option 1, and $250 to 374 million in Option 2, is difficult to comprehend and very disturbing to small businesses whose total sales are often substantially less than the fines contemplated in either proposal at even their mid-level ranges.

For example, a recordkeeping or reporting violation
concerning pesticides could incur fines of $3,000 to $4,000 per violation. Failure to navigate the complexity of our Tax Code could expose businesses to fines ranging from $3,000 to 68 million. The environmental crime of knowing endangerment by mishandling hazardous substances could result in a fine starting at $700,000 even if no bodily injury occurs.

We urge that mandatory fines should not be imposed on an organization that has done everything reasonably possible to prevent a crime.

We are concerned, not because organizations that float the law would be punished under the guidelines, but because prudent organizations that have taken every reasonable step to assure compliance with the law could also be severely punished.

A substantial compliance program should receive a substantial reduction in fines. The present proposal is inadequate.

Thirdly, we have distinct problems with prospective probation requirements. We question the ability, training, and time available for the courts to run a commercial enterprise as proposed.

The Commission has not documented any past cases
that would have called for this type of over-reaching and
strict supervision.

Such restrictions will lead to loss of jobs and the
eventual demise of manufacturing companies. We can only
observe that the present system is operating effectively and
is extremely dangerous to suggest to the courts a radical
solution to a non-problem. As we say in Vermont, if it ain't
broke, don't fix it.

We are also concerned about other problems arising
from probation. We do not take issue per se with the concept
that courts should retain jurisdiction over an organization
that has not made full restitution or payment of the fine at
the time of sentencing. However, if a company has not paid
its fine by the day of sentencing, it is mandatory that it be
placed on probation. The phenomena will occur with some
regularity since many times through no fault of the organiza-
tion all victims will not have been found or all of the clean
up can not have been completed by the sentencing date.

Additionally, the organization will have to
authorize funds for payment after learning at sentencing the
exact amount to be paid.

What happens to the organization that appeals its
conviction? Because of the potentially huge fines and the non-deductibility of restitution paid, NAM foresees many companies, both small and large, being placed in a probationary status for failing to pay such fines and restitution before the day of sentencing. This status could last from 1 to 5 years and would have an absolutely devastating impact on the continued viability of a company. Credit would dry up. Suppliers would cease deliveries and employees would feel insecure in their jobs.

My fourth point deals with the mandatory restitution and the ability to offset it. The Commission's proposals go too far in adding situations not specifically authorized by law.

In the case of an accidental spill, restoring water quality by requiring restitution will probably cost hundreds of thousands of dollars. We feel there is a difference between restitution for an environmental accident and the ability to offset this amount against the eventual penalty as opposed to a situation where a defendant is unjustly enriched by its criminal activity, such as acquiring a contract by bribery where an offset is not called for.

The doubling or trebling of the restitution loss at
the final fines will surely tax the financial stability of any company. To compound the problem a defendant who has made restitution will not be allowed to offset the amounts spent in restitution against the final fine.

In conclusion, we strongly urge the Commission not to forward its present recommendations to Congress, but to reconsider its proposal in its entirety due to the questionable factual basis for its action.

Changes in Federal criminal law during the past 5 years have presented a completely different factual basis for comparison purposes. The historical basis for establishing guidelines for individual sentencing is sorely lacking for the sentencing of organizations.

The Commission acknowledges a dearth of data regarding organizational sentencing, but makes it, in quote, far more difficult to view past practices as representing any kind of norm, end of quote.

No statistics exist showing the similarity in sentencing organizations for the same conduct, nor are there any statistics demonstrating that the penalties for organizations are lower than they should be under the new increased penalties enacted in and since 1984. In fact, data under
these new statutes is just beginning to be collected. The figures that have been compiled show an increase in fines for organizations, but do not reflect any judicial consensus approaching the punitive levels that the Commission's guidelines would impose.

However, if even a face of these serious defects, the Commission persists in taking some action. We urge that it issue non-binding, general policy statements, but only after a complete rewriting of the proposal, taking into consideration these criticisms.

This procedure will be most prudent in the light of the meager, non-representative record and the effects that statutory changes will have on future sentencing practices. We appreciate this opportunity to address NAM's concerns to this Commission and I will be pleased to answer any questions at this time.

CHAIRMAN WILKINS: Thank you, Ms. Church. Jim, are you going to offer testimony?

MR. CARTY: No.

CHAIRMAN WILKINS: All right. Thank you. Judge MacKinnon.

COMMISSIONER MacKINNON: Ms. Church, you said that
the small businesses were not representative?

MS. CHURCH: Well, the cases that I have been made
aware of were primarily cases that dealt with mail fraud, fly
by night corporations, pornographic literature, similar
cases. They were what you might call extremely closely held
corporations that didn’t live very long.

COMMISSIONER MacKINNON: Well, our statistics show
that most of the cases involving corporations do involve
small businesses.

MS. CHURCH: That’s what I agree with, but when you
break it down it shows that it’s--I said it does involve
small business and I’m saying it involves a very small
segment of small business.

COMMISSIONER MacKINNON: But we’re writing
guidelines for the people that commit the violations and
those are mainly small businesses. Now we are not exclusive
in that respect, but they are the ones that are the largest
offenders, according to our statistics.

How do you cut that?

Do you think we ought to write them for small corporations
and then a separate one for large corporations?

MS. CHURCH: No, I think that all the penalties
should be reviewed in the light that mitigating circumstances have not been applied to a sufficient degree.

COMMISSIONER MacKINNON: Of course, we're never going to get any better mix of data than we have now because there aren't just too many Federal crimes that involve corporations in a year. They run about 3 or 4 hundred. That isn't going to increase, I don't think.

So your argument could be made at any time with respect to corporate sentences or corporate involvement.

MS. CHURCH: It is a difficult set of guidelines to be operating a business under, however, if you're looking that what the penalties are if some how or other your company in all well meaningness slips up.

MR. CARTY: Judge, can I make a point, please?

COMMISSIONER MacKINNON: Yes.

MR. CARTY: I think that what we are trying to get on our statement is the fact that you're absolutely right there are fewer cases versus the individuals I mean by a magnitude of hundreds and you're not going to get a lot more cases, but you have differences in that since 1984, there have been many statutes passed by the Congress which increases the fines that businesses will face. Those cases are
just coming to the courts because, as you realize, there are all perspective. So it takes a time to investigate them.

Commissioner MacKinnon: We're aware of that.

Mr. Carty: Okay. You also have to realize if you have such a few limited number of cases, obviously the system that was in place in the past was doing its job. The American business community realized if they violated the law they would be charged as criminals, they would fined, and they would be put in a situation that would threaten their business. I think that accounts for why you have such few cases.

I think that the Commission—I personally think that the Commission has gone much too far. When I read that statute, the statute talks about 99 percent of the time individuals. I see very few references to corporations.

Chairman Wilkins: Helen?

Commissioner Corrothers: Ms. Church, you've stated and indicated on page 9 of your written testimony that we should simply reconsider the whole idea of the issuance of guidelines primarily due to limited past practice data. You've maintained in fact that it's not broken and we need not fix it.
I'd like to note that we've also been presented with information that evidence shows, and I'm quoting a respondent, beyond a reasonable doubt, quote, that the level of illegal conduct by major American corporations is high. For example, in 1985, a study of 500 leading U.S. industrial corporations revealed that nearly two-thirds were involved in illegal conduct. The opinion is presented that the high level of illegal conduct indicates that the wagon is broken, that it's a clear indication of under prosecution and under deterrence.

Now this morning, Professor Mayer cited studies from I guess 1949, 1979, 1982, 1975, and 1985, all of these studies indicating a high level of criminal conduct.

I guess my question is, does this information have any impact on your opinion concerning whether the wagon is broken or whether there is a need for guidelines?

MS. CHURCH: I think I should refer back to what Mr. Carty has just said that there are new statutes and new penalties that post date any of the studies that you are referring to.

CHAIRMAN WILKINS: Questions?

[Negative responses.]
CHAIRMAN WILKINS: Well, let me say, we’ve always had an excellent relationship with NAM and I’m sure we will continue to have one. NAM writes that these proposed guidelines are extremely harsh, punitive, unwarranted, place many businesses on the threshold of insolvency.

Ms. Church and Jim, the next time y’all come, I wish you’d be a little more direct and not hold back on your opinions about what you think about what we’re doing.

[Laughter.]

MR. CARTY: We’ll try, Mr. Chairman.

CHAIRMAN WILKINS: Thank you very much.

Let me ask you this now, can Federal judges put corporations on probation today?

MR. CARTY: Yes, they can.

CHAIRMAN WILKINS: And if we wrote guidelines that were non-binding that addressed this issue of corporate probation, would that be acceptable to NAM?

MR. CARTY: Under the present circumstances, we’d think that would be the last thing that you should do. You should start from scratch.

We think that it's very important that the sentences being handed out by judges under the new statutes and I
think that you'll have a much better factual basis to
determine whether or not there is any inconsistency, that
there is any pattern.

I think, you know, when you look at your statute
the obvious reason why the Congress created the Commission
was that they felt that there was inconsistency, that there
was no norm for the type of sentences that were being handed
out. Basically, they were talking about individuals. They
weren't talking about corporations.

So I think in this case you must really take a lot
more time than you have taken and gather a lot more facts
before you go forward.

CHAIRMAN WILKINS: What if we wrote non-binding
policy statements, the judge can take or leave it and there
would be no appeal, no one can tell him to do it?

MR. CARTY: I understand that. Again--

CHAIRMAN WILKINS: You would not favor that?

MR. CARTY: That is a last resort. If you feel--

CHAIRMAN WILKINS: What's the first resort then, do
nothing?

MR. CARTY: Do nothing, restudy, wait for an
appropriate period of time to discover the errors or the
problems in the sentencing of corporations. I don’t think you have done that.

Now, however, if you feel that it is necessary that you have done it, then I’d say do it with general principles and not with the mandatory guidelines.

CHAIRMAN WILKINS: That’s what I said, non-binding.

MR. CARTY: Yes.

CHAIRMAN WILKINS: Okay. Of course, I don’t know how long—you are right, we don’t have much data on these cases since the major fraud, but it’s not because we didn’t look for them.

MR. CARTY: I understand.

CHAIRMAN WILKINS: It’s because they are just not there and the question is do we wait several years or 4 or 5 years out before we do anything or not.

MR. CARTY: Doesn’t that indicate to you that there may not be a problem?

CHAIRMAN WILKINS: No, it just means there hasn’t been many prosecuted.

MR. CARTY: But getting back to Ms. Corrothers’ comment, it seems to me that all of these studies should have been based upon indictments. If you don’t have an indict-
ment, anyone can charge--anyone can make up allegations. It
seems to me that if you have an indictment and you have
prosecution, then you’ve got actual cases on which to base
those studies. I don’t think they were based on indictments
and prosecutions.

COMMISSIONER MacKINNON: Well, we’ve got 300 that
we’re basing it on.

COMMISSIONER CORROTHERS: And do you think that the
fine levels back in those days were sufficient to make it
worthwhile for the prosecutor to in fact prosecute? I mean,
do you think that had any impact, the low level of fines
authorized?

MR. CARTY: The prosecutor has immense discretion
and I assume that the prosecutor looks at all the facts and
they come to the conclusion that a case is worthwhile or a
case is not worthwhile, obviously. They have to make a
judgement. You can’t prosecute every crime that comes down
the street. If you did, you couldn’t be using this courtroom
this morning.

CHAIRMAN WILKINS: Let me ask either one, Ms.
Church, assume there’s a corporation, not yours, but one like
yours, that the four top vice presidents get together and
through a decision making process they comment a fraud in the name of the corporation that amounts to a gain of $500,000 to the corporation. What should the fine level be you think?

MS. CHURCH: I don’t believe that I’m qualified to answer that; (a) you haven’t give the parameters or the size of the corporation, but if they have attempted to give—to make a fraudulent act, then they are violating our basic legal system and, of course, they should be dealt with in the courts.

CHAIRMAN WILKINS: We don’t even play--our guidelines don’t come into play until they go into court and are convicted. In one case that you suggested that there was an appeal and you won the appeal, I mean the guidelines would never apply. It’s only after convictions. I’m just trying to get an idea of what--this is what we are wrestling with. What should that fine level be? You’ve got a half a million dollar fraud committed by a corporation that’s about the size of yours. What do we do?

MS. CHURCH: Well, a half million dollar fraud commitment to our corporation, we’d have to go out and borrow the money and if we were not able to borrow the money because we were on probation, I don’t see how we’d ever get off
CHAIRMAN WILKINS: Okay. You just need more
information before you could suggest what the level of fine
should be, and you're probably right.

Well, again, thank you very much. We'll see you in
the hallway, Jim, and I'm sure we'll be talking about this.
We really appreciate the hard hitting testimony that you've
given us and I hope you understand the difficult respon-
sibilities that we're about. Thank you very much.

COMMISSIONER MacKINNON: Let me add something.

CHAIRMAN WILKINS: Yes.

COMMISSIONER MacKINNON: I'm not just exactly a
newcomer in this field. I've been—it's 60 years since I
started working for what today is one the largest mutual
funds in the world and eventually was general counsel for it.

I've been a United States Attorney, been on the
court for 20 years, and we know a lot about corporate crime.
We're not—I'm not legislating in the dark and we might know
even more than the National Manufacturers know about it.

I remember when the National Manufacturers was
first elaborated and built up in 1932 and 1933—1933 actual-
ly. I know all about them.
CHAIRMAN WILKINS: Thank you very much. We will see you all.

Assistant Administrator for Enforcement of the Environmental Protection Agency, James Strock is here to testify. The Commission has worked closely with EPA in the past, especially Mr. Paul Thompson and Bruce Bellon and we look forward to continued cooperation.

Thank you very much. We'd be glad to hear a summary of your testimony and any other comments you wish to make.

STATEMENT OF MR. JAMES STROCK, ASSISTANT ADMINISTRATOR FOR ENFORCEMENT, ENVIRONMENT PROTECTION AGENCY; ACCOMPANIED BY MR. BRUCE BELLAN

MR. STROCK: Thank you very much, Mr. Chairman. I am James Strock, Assistant Administrator Enforcement at the U.S. EPA and with me is Mr. Bruce Bellan, who is a continuing expert in this field.

As you referred to, among the various Federal regulatory agencies, few, if any, have worked more closely than EPA in the development of sentencing guidelines, first, for individual defendants, and then with regard to organization defendants.
We are particularly pleased to be following up. I know that our Deputy Assistant Administrator for Criminal Enforcement, Paul Thompson, testified before you on December 2nd in California.

And we are also pleased that environmental offenses are one of the key types of crimes that the Commission will use to monitor application of the guidelines.

In furtherance of our cooperation in this area, we have asked a staff representative of the Commission to attend our agency's National Criminal Enforcement Conference in California next month. And in particular, we hope to exchange further information on this question.

Finally, I would add in a prefatory comment that the agency has submitted extensive written comments to the Commission on February 9th.

I would like to say up front that the agency does endorse the overall approach of the draft sentencing guidelines and we recognize the tremendous complexity you have in developing these corporate sanctions.

We are particularly pleased again that environmental enforcement offenses represent one of the key indicators you use in monitoring the progress in this area.
We are very hopeful that the Commission will continue to support the view that Federal courts should be encouraged to use their probationary powers to carefully structure conditions in this area to guarantee future compliance both by the offender in question and with a strong deterrent message to other members of the regulatory community.

And, also, we are hopeful that through appropriate forms of restitution, community service, and other remedial measures, probation will also serve to rectify the harm caused by criminal wrongdoing.

At the same time, there are several aspects of the proposed guidelines that we would ask consideration for modification prior to submittal to the Congress.

I would like to focus at this time on several specific areas. Two areas which require--well, the first would be reference to restitution and remedial orders in the forms of community service.

The present proposal for Federal judges under the guidelines to issue restitution and remedial orders raises the concern that it does not appear that judges would be bound by EPA procedures and policies governing response to
remedial need.

Nationwide we have seen sentencing judges getting directly involved, rolling up their sleeves to fix environmental problems. Our concern would be that remedial orders might inadvertently impose limits on civil and administrative remedies that EPA could be able to obtain.

Likewise, the guideline section dealing with restitution only indirectly requires that the court disclose to both the attorney for the Government and defendant matters pertaining to restitution.

Similarly, the sections concerning remedial orders and community service, both of which could as a practical matter be far more comprehensive than a restitution order, include no requirement either directly or indirectly of review and input from the Government concerning the scope of potential remedial orders.

The agency recommends that the procedures for ordering restitution and/or remedial measures be amended pursuant to Chapter 6 of the Sentencing Guidelines now in effect which sets out a process for the Government and defense to make known to the court their positions with respect to sentencing factors.
Restitution matters and remedial measures aimed at rectifying environmental harm and protecting public safety and compliance plans intended to prevent organizational recidivism are of a nature, especially in the environmental arena, to warrant adoption of such procedures in the sentencing of organization defendants.

The second area where Government input is necessary relates to the structure and adherence to court ordered compliance plans and audits.

The agency endorses the concept set up in the probation section of requiring compliance plans as a condition of probation to increase the likelihood of future compliance with the law.

However, the agency would again urge the Commission to adopt procedures perhaps similar to those in Chapter 6 of the existing guidelines which allow the agency, through Government counsel, to apply its expertise to both evaluating the plans and audits and assessing adherence to them in the future.

This will assure that plans that do not receive judicial certification when the plan or audit recommendations might otherwise be inconsistent with applicable statutory or
regulatory requirements. We would also urge that the State environmental authorities be involved in this process as well.

Finally, there are three areas which in the agency's judgment should be expanded because of their effect on the scope of remedial order and community service.

First, the commentary to the section dealing with remedial orders limits the purpose of such orders to preventing future harm to victims. This could well be too narrow a focus.

A remedial order should be able to require that the harm already caused by a violation be corrected in addition to eliminating or reducing possible future harm.

Thus, for example, in the hazardous waste context, the court should be able to order that all waste already improperly disposed of be cleaned up without making a determination that such a waste necessary creates the potential for a future harm.

Second, the commentary to the community service section states that such service as a means of preventative or corrective action must be, quote, directly related to the offense, end quote, and offers the example of research to
develop new anti-pollution or clean up techniques related to
the underlying emphasis instant offense.

The agency understands that the Commission's
concern that community service not be a vehicle for compul-

sory, unstructured, or standardless do good deeds conceived
by a court, defendant, or Government is a real concern.

However, we urge some additional consideration
because in the environmental realm one type of environmental
violation can have multi-various consequences.

For example, a pesticide violation in the food
chain could well have an affect all the way up to infants who
are breast fed by mothers who consumed contaminated foods.

Accordingly, we recommend that the present more
narrow concept of relatedness language be expanded and
perhaps reworded to state that community service be related
to, quote, the nature and circumstances of the offense.

Third, there is a need to recognize in guidelines
or in commentary that trust funds constitute an appropriate
form of remedial relief.

The agency believes it is important that a sentenc-
ing court be made aware that the harm inflicted with
reference to an environmental offense may well extend beyond
that which is presently understood or correctable.

In these situations, the guidelines should specifically advise a sentencing court to consider the formation of a trust fund or a similar future reaching device to allow potential correction of future ills not immediately ascertainable.

And I might add, this is a very common part of various environmental statutes already in the sense that, for example, super fund has very clear language that limits the potential of releases on coverage not to sue to make sure that future releases or consequences not now understood can be taken into effect.

Lastly, two final recommendations concerning fine calculations; the agency, as we indicated in our written comments, does not strongly prefer one fine option over the other.

Other either option fines will be greatly increased. The agency in addition attaches greater importance to probation and restitution and remedial orders in the sentencing process.

At the same time, we would offer two comments. We believe that the final fine calculation formula should
provide for the doubling of fine amounts for second of-
fenders. This would be consistent with criminal penalty
provisions in existing environmental statutes administered by
the agency.

Secondly, we urge that the concept of pecuniary
gain also be expanded. Under both fine options presently
offered by the Commission the pecuniary gain is to be
factored into the fine formula. What this appears to
envisio is the prototype of illegal sales where one fines
illegal profits or explicit gross gain even if no profits can
be demonstrated.

The difficulty for us is that in the environmental
field there is the concept of economic benefits throughout
our statutes for non-compliers, which gives them a harder to
quantify but very clear competitive advantage from delayed or
avoided compliance. This concept is also familiar in the
health and safety statutes, consumer product safety statutes
as well.

So those are my prepared comments and I would be
pleased to answer with Mr. Bellan any questions you might
have at this time.

CHAIRMAN WILKINS: Thank you very much.
Judge MacKinnon?

COMMISSIONER MacKINNON: You said that community service should be restricted to more or less the nature of
the offense and the circumstances involved.

Don't you think it ought to also be used as a
punishment in some cases?

I mean we can't write it for you alone.

MR. STROCK: Well, Judge, unlike others, I will
certainly defer to your wisdom and experience without
question.

Our concern is, and we find this in other areas,
for example, penalty mitigation policy both administrative
and judicial, that we in those cases for statutory reasons
and here for prudential reasons believe there should be a
nexus between the violation and the service that follows
partly because in the environmental area, being a newer area
than most, and one that by necessity expands over a series of
existing areas of endeavor, there is frankly a need for an
educational function as well and we would hope that that
would be served at the same time as the other functions are
being served.

COMMISSIONER MacKINNON: Well, offenses vary so
much. It seems to me that that is going to be a hard objective to accomplish. If you're going to restrict it to the nature and circumstances of the offense, community service, that's an awfully close restriction.

MR. STROCK: Judge, I'd appreciate the opportunity to work further with you on that because I believe it could be somewhat of a question of a matter of definition. I would think there well could be a number of forms of community service that we could envision and provide examples of that would be meeting both our needs, particularly again in the education type realm where we have done some work already.

COMMISSIONER MacKINNON: You've also said about creating a trust fund for future offenses. Isn't that more or less a civil function? Isn't that a little hard to work into a criminal case?

MR. STROCK: It's one we've had to do by necessity and there is precedent for it given the nature of the harms that take place because the fact is it is simply too difficult at times otherwise to fight between two competing interest; one is the interest of the criminal system in having a clearly defined hopefully somewhat rapid adjudication of responsibility combined with the fact that in many of
these violations it can take quite a long time to get the full scope of damage properly assessed. And this strikes us as a good way to balance those competing considerations.

MR. BELLAN: If I may, in our written comments I actually provided two or three examples of environmental trusts and I wanted to set those out because that only required two paragraphs in the orders of probation to establish these trust funds. They are not cumbersome to establish. Basically, setting aside a certain amount for the purpose of the trust fund, appointing a trustee, and setting forth the purpose of the trust. And as you will see in our written comments, that there was not a complex procedure.

COMMISSIONER MacKINNON: I have another question which doesn't cover your testimony, but gets to some of my background and experience.

I was wondering what you're doing with these mine dumps that are a hundred years old that have a lot of cyanide in them and things of that character? They are all strung out through the mountains in my home--former home State of Colorado.

MR. STROCK: Mine too.

COMMISSIONER MacKINNON: And I wonder what you do
with them?

MR. STROCK: Well, a couple of things. As you would know--

COMMISSIONER MacKINNON: They don't involve any present crime, do they, or don't they?

MR. STROCK: No, not usually.

The mining sites present some very difficult jurisdictional questions for the Government as well as actual clean up questions.

At the present time, EPA is involved in a number of sites in your home State of Colorado. Generally, once the risk is assessed, because sometimes these sites are located far away from existing communities, then work does begin as with any other site.

The potential though for criminal liability is usually very limited because the activities which led to the contamination are in many cases at best were not illegal in any way at the time they occurred. So those present a different but very hard set of questions for us.

COMMISSIONER MacKINNON: Are you doing anything on them?

MR. STROCK: Yes.
COMMISSIONER MacKINNON: Thanks.

MR. STROCK: I have worked on both sides of those.

COMMISSIONER MacKINNON: Thank you.

MR. STROCK: Thank you.

CHAIRMAN WILKINS: Commissioner Corrothers?

COMMISSIONER CORROTHERS: I just have a comment, not really a question. The comment is included in the written response that savings are a major motivation for environmental offenses.

MR. STROCK: Yes.

COMMISSIONER CORROTHERS: And I would simply like to thank you for calling our attention to the fact that our draft guidelines do not reflect the cost savings as an economic gain. I think we will be looking at that.

MR. STROCK: Thank you for emphasizing that, Commissioner, and I would particularly draw your attention to Section 120 of the Clean Air Act that lays out in a very succinct form one approach the agency has taken.

Also, I would suggest that in the various penalty policies, some based on statutory language, others not, that factor is explicitly taken into account across the board. It is absolutely essential in the environmental area.
COMMISSIONER CORROTHERS: Thank you.

CHAIRMAN WILKINS: Commissioner Nagel?

COMMISSIONER NAGEL: Yes, you made reference in both your written and your oral statement to a concern for our proposed tying of community service to a direct relationship with the instant offense.

And the concern that prompted us to do that was voiced earlier, I think probably 2 or 3 years ago, at public hearings by the both the Anti-Trust Division and I think EPA where in previous cases the sentences was either a rodeo or setting of an endowed charity university in an environmental case, et cetera.

As I recall, the problem expressed was that such a sentence resulted in almost honor being bestowed upon the defendant rather than a punitive sanction. And so we were encouraged to try to formulate a community service provision that would not permit that to occur. And yet, I am sympathetic to your point.

Is there some way you see that we could do both, or is that really not a major concern anymore? Is that something that was so unusual, the rodeo, the endowed charity, that we really need not to response to that, or perhaps we
overreacted? Could you comment on that?

MR. STROCK: No, I think the answer is clearly it is a very important concern and particularly in a program that is so decentralized as much of environmental enforcement is, it is very important that strong and clear signals be sent.

Clearly, again, if the nexus becomes too at-tenuated, you could have the perverse effects you mentioned and I would again suggest we work rapidly with the same problem in penalty mitigation situations.

What I would propose to do, if it's agreeable to the Commissioners, is to work with you and provide specific examples for your consideration you might include in your next draft.

COMMISSIONER NAGEL: In addition, it would be helpful if you would actually propose some alternative to language to that which we used to wrestle with the same problem because I think we share the concern, it's just we need to find an appropriate solution.

MR. STROCK: Thank you. We will do so.

COMMISSIONER NAGEL: Thank you.

CHAIRMAN WILKINS: Thank you both.
MR. STROCK: Thank you and I appreciate your patience with my cold as well.

CHAIRMAN WILKINS: You wrote me a letter a couple of weeks ago and I am replying today. I just want to let you know, it's been several weeks, but I have been doing some other things.

Thank you very much.

Our next witness is Joe E. diGenova, practicing attorney with Bishop, Cook, Purcell, and Reynolds here in the District. Joe is the chairman of Defense Attorney's Advisory Group on Organizational Sanctions, which the Commission put together a few months ago, and I would might add that this group, under Mr. diGenova's leadership, worked tirelessly and provided a great deal of assistance to the Commission without any compensation.

And we are indebted to you and your group, Mr. diGenova, and we look forward to your testimony today.

STATEMENT OF MR. JOSEPH E. diGENOVA, DEFENSE ATTORNEY'S ADVISORY GROUP ON ORGANIZATIONAL SANCTIONS

MR. diGENOVA: Thank you, Mr. Chairman, members of the Commission. I am pleased to be here this morning.

As I indicated in my written statement, I obviously
do so in a representative capacity on behalf of the other members of the Attorney Working Group who labored for 9 months to try and make written recommendations to the Commission in an area which when we began our process we thought would be relatively simple and when we ended our process we realized it was anything but.

We are, therefore, sympathetic to what the Commission has gone through and is sympathetic with the product it has produced as a result of its own labors in this sometimes rather drought ridden vineyard.

As noted, the Attorney's Working Group's recommendations to you say far better than I could in any form of reconstituted testimony what we believed and what we believe now to be a proper and recognizable theoretical basis for proceeding in the area of organizational sanctions, particularly in the absence of sufficient, empirical data on the subject, a matter which has been discussed somewhat this morning both pro and con.

Rather than discuss in greater detail the specific findings and recommendations, which I am delighted to respond to questions about, however, I think it more appropriate that focus be placed on what we believe to be the most important
part of this process and that is the question of whether or not there exists a sufficient historical and factual basis upon which to base organizational sanctions at this time. And I am well aware of the exchange which has already occurred this morning between Judge MacKinnon and others of the panel with other witnesses.

We have recommended in our letter of May 19th, quote, that the Commission for the time being promulgate flexible policy statements rather than rigid and binding guidelines.

We do not recommend that the Commission do nothing. Let me make that clear at this point. Let me digress by just saying that we believe that there ought to be--ultimately there ought to be guidelines. We do not have any doubt about that. The question of how you get to that point is another matter and we are extremely sympathetic to the plight in which the Commission finds itself with an apparent mandate to do something in this area, but with, also, I think, good faith concerns expressed by reasonable people to it about whether or not there is a base to do that and whether or not by waiting a reasonable period of time some additional data can be accumulated which would be helpful, not necessarily
dispositive, but nonetheless helpful through the passage of time.

We particularly want to emphasize—and I am going to be very brief so that we can have an exchange on this—that we take great comfort in the fact that the Commission did an extensive amount of research in dealing with individual guidelines obviously because there were more cases available to deal with and much more to study.

We also are confronted with the new historical reality which is that only recently has Congress enacted new legislation upping fine levels which answer Commissioner Corrothers’ question earlier of why prosecutors didn’t approach these cases in the first place historically, because it wasn’t worth the candle.

I, like Judge MacKinnon, have been a prosecutor, a United States Attorney, an Assistant United States Attorney. I have worked for an Attorney General. I have investigated corporations. I have investigated them as a Chief Counsel of the Committee in the United States Senate and I have represented them in private practice.

I tend to take the view that as a group in our society, corporations are an extraordinarily law abiding
group of citizens. I tend to disagree rather markedly with the description of them presented by Professor Mayer earlier here today which seems to draw out a litany of studies, none of which, I might add, for my knowledge, are based on the notion of convictions, but rather the analysis of corporate data and then a judgment and an opinion being rendered as to whether or not that data describes these individuals as engaged in illegal conduct.

I think to promulgate guidelines on the basis of that kind of, for want of a better word, misinformation, disinformation, I think would be extremely unwise and I applaud the Commission for not having done so. And I assume obviously that it will not do so in the future because to do so, I think, would be a mistake.

I think that any responsible person from the outside looking at the extremely difficult job that the Commission has would say that it has obviously made a noble effort in this preliminary draft of organizational sanctions.

But I continue to return to the notion that I think—and the other members of the Working Group agree with me and they are both former prosecutors and long time defense attorneys, corporate representatives, we have some people who
actually teach in law schools in that group and who take a
different view of it philosophically--nonetheless, we all
came to a consensus position that we felt we needed more
information and we felt that the Commission could benefit
from even a window of opportunity of a couple of years
dealing with these massive new fine levels that are now
available to Federal prosecutors.

We only have to look at Drexel Burnham Lambeer’s
predicament as of today to see exactly what the ultimate
consequences of massive fines can be to any organization good
or bad. Drexel Burnham obviously deserved what it got.

The number of companies that find themselves in
that position, however, I think are few in number. And I
think what we need to do and what we are recommending
respectfully to the Commission today is that the Commission
do take--walk that extra mile for that camel at the end, that
it take some additional time to look at some new data being
generated with these massive new fines that are now available
to Federal prosecutors so that it can have something more
akin to a reasonable empirical basis upon which to base
fines.

I will tell you that I blanched when I read that
374 million dollar figure in Option 2. It really is a
corker. I have to admit. I had notions of--from old tax
studies of things being confiscatory and perhaps excessive
under the Eight Amendment, cruel and unusual punishment
clause and the excessive fines clause. But notwithstanding
that, I understand and we do as a group understand the
necessity for the Commission to address this area and to
eventually promulgate very serious fine levels beyond
restitution.

We would only hope, however, that the Commission,
although we know it wants to move and it has obviously
demonstrated a willingness to move as quickly as it can and
indeed responsibly, as it has, wait a little bit longer, take
a little bit more time, allow these new fine statutes since
'84 and thereafter to be used by prosecutors. Let's see the
kinds of corporations that are convicted. Let's see how many
corporate officials along with those corporations are
convicted in those cases and do some comparisons. And then
let's try to get a better view of what reasonable fines might
look like for both the Scavlow [ph.] corporation, the
criminal enterprise, which exists for no other reason other
than to commit crime and make illegal profits, or the good
law abiding corporation which does voluntary disclosure, has compliance programs, educates its employees, punishes those who break the law, and decides that it wants to do what it should do is good for society.

I think a little bit more time isn’t going to hurt and I’m delighted to answer any questions, Mr. Chairman.

CHAIRMAN WILKINS: Thank you very much.

Judge MacKinnon?

COMMISSIONER MacKINNON: What were the details of any fine leveled against Drexel Burnham; do you know that?

MR. diGENOVA: That was an agreed upon disposition, Your Honor. There were multiple counts under the new Federal statutes. I think ultimate fine, I think, is 625 million. I could be wrong. It could be 650.

They agreed to multiple mail fraud counts in exchange for the Government dropping RICO, which would have led ultimately probably to the forfeiture of the enterprise, which was Drexel Burnham Lambeer, the enterprise as defined in the information to which they pled.

But the Government agreed not to use RICO. Of course, the senior corporate entity has filed for bankruptcy. So I think ultimately the RICO occurred without RICO.
COMMISSIONER MacKINNON: That's a big fine, of course, it's a mirror pittance so far as the magnitude of the operations that they were engaged in.

MR. diGENOVA: I think you will find no friends in our group with regards to the methodology employed by some of the people at Drexel Burnham Lambeek, Your Honor.

COMMISSIONER MacKINNON: In getting to an individual comparison, wasn't Bolsky's [ph.] fine around 300 million dollars, or the restitution that he gave?

MR. diGENOVA: It was substantial, Your Honor. I don't remember the specifics of Mr. Bolsky [ph.], but, as you know, he entered into a plea agreement the Government, did a pretty good job in terms allegedly of cooperating and has, from which some cases have come. But his fine was substantial in restitution, yes, Your Honor.

COMMISSIONER MacKINNON: Three hundred million stuck in my mind.

MR. diGENOVA: I think you may be right, sir.

COMMISSIONER MacKINNON: Or more.

MR. diGENOVA: Yes. But he had a lot left over, I understand, as well--

COMMISSIONER MacKINNON: Yes, I think so.
CHAIRMAN WILKINS: Commission Corrothers?

COMMISSIONER CORROTHERS: I would just like to thank you for your work that you’ve done on behalf of the Commission as Chair of the Attorney Working Group to bring us recommendations in this area.

It requires a great commitment of both time and effort and we appreciate it.

MR. diGENOVA: I thank my partners for allowing me to do it, Commissioner Corrothers.

CHAIRMAN WILKINS: Commissioner Nagel?

COMMISSIONER NAGEL: I want to start by echoing the same sentiment, Mr. diGenova. You have not only been an enormous help to the Commission in the context of organizational sanctions, but you have been with us from the beginning and that came after your own experience on the D.C. Sentencing Commission and you were kind enough to share with us your experience there. And I would like to take this opportunity to thank you again.

Let me ask you a question that comes out of your testimony and somewhat out of your written statement and in part it follows up on some testimony by the people from NAM this morning.
It turns out that I think there is a slight
mischaracterization about the use of past sentencing practice
data. In the individual context, as you recall, we examined
a sample of data on 10,000 cases for which we actually
augmented data initially collected on 40,000, but that,
nonetheless, was a sample.

In the context of the organizational sentencing
practices of the past, we actually did better than that
because we took the full population of cases. Because there
were a smaller number by definition, we didn’t take a sample.
We actually studied all of the decisions.

And so statistically, those data are actually more
reliable than the sampling. That aside, those data are based
on pre-guideline periods as were the individual data and on
pre-Congressional changes in the fine levels.

And from that perspective they are just as useful
to the Commission as were the individual data.

The question then is, what kinds of new data would
you think would be informative to the Commission in that you
urge us to sort of, as you say, go the extra mile? What kind
of data would we collect to help us determine what normative-
ly should be sentences for corporations?
I think NAM may be correct in pointing to the fact that disparity may not be the key issue when you are looking at organizational sanctions. And I think the public perception, if you look at public opinion data, which Professor Mayer made reference to, is not really that disparity is the key issue, but rather some perception about leniency, insufficient fines, et cetera.

So if we’re not looking to disparity, but rather we’re looking to inadequacy, what kind of data are we going to get now that will somehow tell us ultimately what those fine levels should be?

And that’s the problem I have with the call for more time based on more data. I don’t know what the data are going to tell us.

MR. diGENOVA: Commissioner Nagel, I think the answer to that is something which I have said about guidelines in general. And it is this, when I was the United States Attorney over a 5 year period, I was perfectly satisfied with the sentencing that was going on in this courthouse, whether it was fines or prison terms. And the reason was very simple. Congress had enacted new laws, all kinds of new statutes that Federal prosecutors didn’t have 25
years ago.

You could go in any prosecutor’s office a number of years ago and the number of statutes he or she had available were literally miniscule. Today they are legion.

During that period of time before individual guidelines, sentencing in white collar criminal cases, which is what the guidelines were all about, everybody screaming and yelling that white collar criminals weren’t getting enough time, the sentences in this courthouse and around the country were, as far as I was concerned, were terrific. People who should be getting slam dunked were getting slam dunked. People who weren’t, weren’t. Corporations, you couldn’t get them because you didn’t have enough money to fine them. The fine structure simply wasn’t worth the candle to go prosecute the corporation unless you could throw it into a package and do it.

We learned a lot during that period of time about what judges were willing to do when they had--when prosecutors had legal tools and sentencing awareness, for want of a better word, was being imposed upon Federal judges around the country.

I was very happy with white collar crime sentences.
Drug sentences could have been a little better, but that's--
Congress has seen fit that now is improved even better than
what it ought to be.

With regard to corporate sentencing or organizational sentencing, I find myself in a position of saying I am
quite sure that if given a year or 2 with new fine structures, the Commission will find that Federal judges will
impose severe sentences where required, given some guidance
from the Commission in policy statement about what it wants
to look for and what it expects, that where law permits it,
restitution for organizations will be what it should, given
the public awareness of this issue, given the sensitivity of
the Federal bench to the way people look at the way they do
their jobs.

I think that just as we learned that individual
sentencing can improve, pre-guideline, and it certainly did.
There is no question about that--that the same thing will
happen and that you will in fact get a base of information.
What kind of information? The level of fines, the kinds of
restitution creative or otherwise that judges deem ap-
propriate.

And, if the Commission were to go so far as to
require a supervisory probation, which I think respectfully is extremely unwise, given the incredible workload that Federal judges have and the aversion of the Department of Justice, I might add, to using masters in view of its own policy statements against the use of masters and their refusal indeed to agree that masters are even legal people in the court system, I think that would be thrusting upon the Federal judiciary at this time too much.

I would like to give Federal judges a chance over the next year or two to sentence some corporations under guidance from the Commission by way of policy statements. Again, I am not saying that the Commission should do nothing. I do not agree with that. I think the Commission should do something.

I think it should say what it thinks judges ought to do in this area, but I really believe that the empirical base needs to be built a little bit and I think the Commission can learn from that. Now it may not be the kind of data that the Commission will say, "Well, that's dispositive and it tells us what we ought to do." I don't see how, however, it can be anything less than informative.

Now that may be overly simplistic and it may not
even answer as well as you would like the question you have asked, which is a good one a fair one. Maybe much of what I feel about this is visceral because I learned how Federal judges learned pre-guideline about sentencing white collar criminals. They learned from United States Attorneys telling them that they wanted sentences. They learned from newspapers telling them they wanted sentences in these cases. And they learned that economic crime had consequences beyond that of what might have been immediately discernable to the average Federal judge.

I think in the case of sentencing organizations you will the same thing. And the Commission might very well learn something from the behavior of Federal judges during this training period, to call it a training period, when the Commission gives them policy guidance.

You know and I know that some judges will fight that guidance because they do not like guidelines at all and they will not follow it. Others will follow it, they will use it, they will try to be creative with it within the bounds of the law, given their limited power, and they will try to use them and to assist the Commission in its work.

I just, I guess viscerally looking at the record,
feel I would like to have more than 300 and some cases to
look at before I write fines going up to 374 million dollars
a count.

COMMISSIONER NAGEL: Thank you.

CHAIRMAN WILKINS: Commissioner Saltzburg?

COMMISSIONER SALTZBURG: I have got two questions.

One of them, Joe, is just to clarify your testimony versus
National Association of Manufacturers.

Not everybody has had a chance, sitting out there, to read your testimony. We all did. But it's fair, isn't it, to say that your recommendation, that your group to the Commission is not to do nothing? It's to issue non-binding policy statements that would urge courts, as I understand it, is this a fair statement, to impose upon corporations—all corporations and organizations convicted of criminal ac-
tivity, one, the full cost of the—in terms of gain or loss of the illegal behavior, plus restitution, plus an enhance-
ment if it's an environmental or other case in which non-
pecuniary losses or gains are not adequately reflected in the pecuniary numbers?

MR. diGENOVA: Yes.

COMMISSIONER SALTZBURG: And to leave to U.S.
Attorneys, as you put it--this is a follow-up--the argument that in some instances that even ought to be increased. The judges ought to go higher because of problems of detecting and punishing certain kinds of behavior.

MR. DiGENOVA: Yes.

COMMISSIONER SALTZBURG: Let me ask you one other question, if I can, and this is based on your experience when you were U.S. Attorney because it's one that has bothered a lot of people who have put forward proposals for the Department, and that is, right now, as a number of people probably point out in their written statements, any corporation can be held responsible virtually for any act of its agents even where it has policies in place that prohibit the very act that the agents have committed, and even where they have made efforts to police.

A number of proposals, including the one by you group, suggested that there ought to be understandably some reduction in punishment where corporations have policies and do police.

The question I have is, did you give any thought when you were U.S. Attorney or have you given any sense to whether the Department of Justice or the Department of
Defense, or both, and EPA ought to have some policies in
place as to whom they ought to prosecute, I mean, when they
ought to go after a corporation as opposed to individuals?

MR. diGENOVA: Yes, I do. I did then and I have
since for different reasons.

I do think there ought to be guidelines for that.
I think the Department of Justice and all Federal agencies
should not be frightened. I'm not talking about sentencing
guidelines. I'm talking about prosecution and enforcement
guidelines.

I don't think the Department of Justice ought to be
frightened about prosecutorial guidelines. We had them. We
had them internally, when I was United States Attorney.
Before I was United States Attorney, there were guidelines.

Guidelines internally for prosecution and in
determining when an organization should be held accountable,
I think are very important.

I think that the Department, for example, ought to
have internal guidelines for judging the culpability of an
organization pre-indictment in making that decision.

If an organization, for example--and I want to talk
about debarment for a minute. If I forget, I respectfully
request that somebody remind me. If an organization spends a lot of time and money on prevention, on education, on good faith policy, they have programs to advise their employees about what new regulations are, as was testified earlier to by Earlyn Church about the seven engineers who spend their time filling out forms and dealing with compliance, if companies do that and they are not criminal enterprises, in other words, they are not set up merely to commit crimes, and they have shareholders either closely held or publicly held, and they do business, whether they are on a stock exchange or not, some consideration must, and I underscore "must" as a matter of fundamental fairness, given imputed liability, given the fact that corporate criminal liability is almost automatic regardless of the level of the employee, regardless legally whether or not the corporation has in fact done all these good things, as a matter of prosecutorial discretion, the Department, particularly now, given what I believe to be not the Commission's level of fines, but the potentially confiscatory and excessive levels of fines that are potentially legally available to a court now, regardless of guidelines, the Department of Justice owes it to the American business community to establish internal guidelines which say...
if you do these things, and I'll say within the complete
discretion of the Department of Justice to determine whether
or not it is good faith, you do X, Y, and Z, you have done X,
Y, and Z, we're going to give you a pass under certain
circumstances and we can define those and talk about those
and they will become as difficult as writing the guidelines
themselves.

I think if you do not do that you are going to run
into such issues as fundamental unfairness, given the levels
of fines that are now available that I think you run the risk
of having Congress take a second look at the whole process,
not the guidelines, but fines, everything.

The Department owes it to itself to do that. It's
a fair thing to do. Not all the corporations who run
businesses in this country are criminals, contrary to what
you may have heard earlier today.

I think it is just the opposite. I think the
corporations in this country do a tremendous job. I think
they try to be law abiding. They try to educate their
employees. They are obviously bad actors. We see them
everyday, particularly in the environmental area.

But the Department needs to pay attention to that
difference between good actors and bad actors and people who
are in the business and running corporations with thousands
of employees need to be treated fairly because chances are we
are all going to decide eventually that they do make some
sort of contribution to the society by employing people,
paying taxes, and producing a good product perhaps once in a
while that some of us buy, use, or hope that our armed forces
buy and use.

I am not suggesting that scaflaws get away with
anything. We all realize that people ought to be prosecuted
for product substitution and defective products and all of
that, if they sell a weapon that blows up in a soldier's
hand, you know, they ought to be sent to jail for the rest of
their natural lives. But beyond that and getting into the
area of whether the Department ought to have guidelines, that
is such an easy one to call, the answer is clearly yes. I
think the Department owes it not only to the business
community and the Congress, the Department owes it to itself
so it knows what it is doing because many times it does not.

COMMISSIONER SALTZBURG: I am supposed to remind
you about debarment.

MR. diGENOVA: Oh, debarment. I think if you get a
Federal judge involved in debarment that is the worst possible thing. I think judges should stay out of debarment. I think that's a job for the executive branch.

I can see it now, the Department of Defense has a sole source on an intelligence related piece of technological data, information gathering mechanism, NSA, the Department says, "We're not going to debar you." The Federal judge says, "Oh, yeah. I've got news for you. I'm going to debar them." And then you get into an incredible inter-branch conflict over who decides what is in the interest of United States intelligence.

I think debarment ought to be kept out of this process of sentencing completely.

CHAIRMAN WILKINS: Thank you.

Ilene?

COMMISSIONER NAGEL: Yes. Just one quick follow-up question. I want to use your experience, having been in our position once before.

Suppose we're persuaded by your argument and the argument of others that we should proceed more slowly with corporate defendants, organizational defendants than with individual defendants, suppose we were to say that we will
promulgate for some initial period of time policy statements rather than binding guidelines, suppose at that point the Federal defenders come forward and say, "Ha, for corporations you decide to use great caution and you promulgate voluntary policy statements, but for the indigents of America you are busy sending them off to prison in truckloads. How come we didn't get voluntary guidelines and they get voluntary guidelines?" And they make an equity argument. I am making it more crass, but suppose that point is made, what is your answer?

MR. diGENOVA: Well, the answer is it is apples and oranges. Corporate officials are going to prison everyday in Federal courts in this country. And if it were a question of people versus people, they would have a good argument.

If you were saying that under a certain type of theft a person who steals out of a mail box in an apartment building a Social Security check and gets a minimum of six months under the guidelines and a corporate official who steals $175,000 from a company or bilks in a penny stock fraud case, gets no time under the guidelines are they are announced, I would say they have a great argument, but that is not the law.
The law as the Commission has enunciated is, is that human beings sentenced under the guidelines are treated equally. A corporation is not a human being. It is an entity. It employs people. The consequences of its disillusion or its confiscation or its evisceration by a sentence are completely different to questions like that.

Those same people who might be sentenced under the guidelines might very well work for that corporation, some of those same four people. It is apples and oranges. It is a very emotional argument. They may very well make it. I think legally and constitutionally it makes no sense whatsoever. This Commission has been very brave and courageous in the past and I am sure will ignore it.

CHAIRMAN WILKINS: Thank you very much, Mr. diGenova. We appreciate your testimony and your assistance in the past.

Our next witness is Sheldon H. Elsen. Mr. Elsen is an attorney with Orans, Elsen & Lupert, New York. He is no stranger to the Commission. In fact, Mr. Elsen testified at our hearing last year in California.

I understand you are also a former Assistant United States Attorney and an adjunct Professor of Law. We are
delighted to have you with us.

STATEMENT OF MR. SHELDON H. ELSEN, ORANS, ELSEN & LUPERT, NEW YORK, NEW YORK

MR. ELSEN: Thank you, Judge Wilkins and members of the Commission. Professor Saltzburg, good to see you here.

As Judge Wilkins said, I have had legs in all camps. I have been an Assistant United States Attorney in the Southern District of New York. I have served as a defense lawyer and I have taught criminal law, as well as other things, at Columbia Law School. So I have sufficient biases that I trust that they will all cancel out, I hope.

What I am going to do, I think—and I wanted to thank you for inviting me again to participate with you in what appears to be, I think, a very constructive continuing dialogue—is to start within the framework of the assumptions upon which the Commission is proceeding and to comment upon technical questions, and to save the broader policy questions for just a brief note at the end.

And in so doing, I am going somewhat beyond this memorandum that I submitted to you because I reviewed your draft again and I have a few more remarks to make.

I think that there is a considerable improvement in
this draft from the one that I saw in October of 1988 at the
previous hearings, and I think that the--much of the practi-
cal improvement comes from reducing the emphasis upon precise
calculations of economic quantities which are not in practice
readily computable except at a cost which itself interferes
with the process.

I refer particularly to the question of calculating
pecuniary loss or pecuniary gain. And you may recall, in our
last discussion the concern that I and others expressed that
the United States Attorney's office, during a grand jury
investigation of complex crimes, normally does not have such
a figure and the requirement of producing such a figure can
add so much time to the investigative process that it creates
a disincentive to allocate scarce resources to the prosecu-
tion of corporations because you are going to have to come up
with a figure of that sort. Whereas, in your other
guidelines you have much more general numbers.

Now you have indeed responded to them by giving
them under Option 1 an alternative method of calculating and
under Option 2, basically as I understand what were you
saying, you are moving to offense levels and guidelines on
that basis so that the requirement of these calculations is
much less rigid and I think that is a step forward, a big step forward.

I would like to point out that I do think there is one technical problem that I would like to call to your attention and I trust I read it correctly. Where you point out--where you talk about restitution you expressly deal with the problem of extensive hearings, which may be burdensome. And you point out that if restitution is going to take too long or going to be to cumbersome that you perhaps will defer to the civil remedies and pass on beyond that.

But as I understand it, in both Options 1 and 2, you have a requirement that the judge must take into account pecuniary loss or gain not subject to restitution or disgour-gement. That has to be automatically tacked on to the number obtained from the tables with the multiple.

The problem with that is that it requires the United States Attorney's office to make these precise calculations. Otherwise, the United States Attorney's office cannot do its job of serving the courts. And I would not think that the United States Attorney's office can be expected to come in at the end of a case without all the material that a court needs to apply the guidelines.
Therefore, you leave, I think, in the calculations the disincentive I had been concerned about, that is, that the Government still must go through perhaps an extensive preparation of the damages portion of a case which normally they would not have to do in preparing a criminal case for prosecution. And I would urge you to give consideration again to that point.

Now you have, I believe, dealt with another calculation problem quite well. In the earlier discussions we were concerned about the difficulty in calculating the cost of prosecution, that is, the Justice Department does not know with any precision what its costs are. There are no time records kept. It is very hard to calculate what the cost of the investigating agency are, how do you allocate overhead and the like, calculations which are not normally thrown up in the normal course of prosecutorial business. And, therefore, it would create great difficulty.

Now you have made that a rough figure for a judge to take into account and I believe you have in a way dealt with that problem. You ask, I believe, whether these costs should be made more precise and added in and for the very reason that we have talked about, I would urge you to stay...
where you are now and not to jump back into the precise
calculations because you have a tremendous burden which you
are creating for the prosecution, which is a disincentive, to
use this remedy and at the same time at additional costs to
the public, to the tax payer, as well as the fact that it is
unsatisfactory. You cannot do it very well.

As a predicate for all these discussions, I do
think that organizational prosecution in many cases is an
appropriate method of approaching. Sometimes it is very
valuable to corporate executives who are thereby kept out of
the path of something that they might not normally be
considered to be wholly responsible for, and at the same
time, it permits the use of the criminal process.

So I would hope that the practical solutions in the
direction of greater flexibility remain and that the problem
that I had suggested can be dealt with.

Now in your eleventh question you asked whether
cooperation should be considered as a departure downward as
it appears in the present draft, or should be changed into a
guideline factor.

I would think that you should keep it as a depar-
ture downward for a very important reason. The corporation
which has problems of this sort almost invariably tends to cooperate either through new management, new directors who come in, or through the fact that senior management may not be involved. That is a great incentive. And the decision not to cooperate, as the guidelines now read, would be a very unwise decision because it throws the corporation in to these ranges of fines which are quite extraordinary in some regards.

But if you just make it a guideline factor, you have a mixed bag where the corporation is still subject to very heavy fines and the incentive is not as great and there is more of an incentive to fight the prosecution rather than to clean up the act.

I would say--I also note that you have taken a count of a number of other factors, particularly bribes to Federal officials, which is corrupting and cannot be measured economically. And I applaud that. I think that that is a return to the more traditional measures of criminal culpability, which does indeed belong in this code.

Having said all that, I will return to a position which I had earlier expressed and which is widely shared by my colleagues at the Bar in New York and that is that these
penalties are very heavy. I mean Option 2 penalties are--they knock your eye out. They are very heavy penalties.

Now I confess--I think that Commissioner Nagel's question is a very good one. How do you justify tough approaches to individuals and flexible guidelines for corporations? Maybe we are too late for that question that I would be concerned about.

Many of the Bar in New York and I think practically all of the judges are very uncomfortable with the constraints of the guidelines. I do not think that this comes as a great piece of information to the Commission. I think you have heard this. And though it is true, as former a United States Attorney just said, that he likes to see white collar criminals slam dunked, we have a lot of problems in our jails, I mean starting with the Crime Commission in the 60's. We have these terrible problems in our correctional systems and individuals are--can have personality discenegration with very long sentences. And so there is a very big problem with the way it applies to individuals in that I think you may have excessive deterrence and you may have the opposite of rehabilitation and that is personality discenegration.

I appreciate that this is not what I was asked to
speak about today, nor is it on your agenda for today, but I think that the correct answer to Commissioner Nagel's otherwise unanswerable question is that the individual guidelines are in some respects and in many respects too tough and that is what I think is probably the answer.

I would favor a reduction of the scale of fines, particularly in Option 2. And I would favor greater flexibility. But it may be that it is late in the day to make that type of answer to what I think is a very good question, but it is my honest answer to that question.

So I would be very happy to take any questions.

CHAIRMAN WILKINS: Thank you very much.

Judge MacKinnon?

COMMISSIONER MacKINNON: I was wondering about your last statement as to whether you thought the individual guidelines were too tough in respect to those guidelines that relate to the mandatory minimum sentences, or whether you were concerned about sentences that the Commission had the free hand to implement?

MR. ELSEN: As a matter of fact, some of the judges have said in the mandatory minimum sentences I think that they are helped in this area.
COMMISSIONER MacKINNON: So you do not think they are too tough in that respect?

MR. ELSEN: Well, I must tell you, Judge MacKinnon, I do not get into those types of crimes and, therefore, I do not have much personal experience, but I have heard that from some of the Federal judges.

The problem I have is in the area that former U.S. Attorney diGenova just said, the white collar area. I do think that corporate executives, of course, should not be permitted to engage in environmental pollution or insider trading, but there is a problem of excessive deterrence. We do want to permit people to do their job.

We have had some areas of the law, like foreign corrupt payments, in which corporate officials are caught between the criminal law and the problems of doing business in other parts of the world and the use of very stiff criminal sentences which can really destroy individuals creates an excessive deterrence and inability to deal with foreign competition and the like. And I think that there are a lot of--

COMMISSIONER MacKINNON: Even if do not pay bribes, we don't recognize that paying a foreign bribe is okay.
MR. ELSEN: Well, I--

COMMISSIONER MacKINNON: That is what is really involved.

MR. ELSEN: You know, Judge, I was involved in a lot of those cases and I think that paying foreign bribes is a terrible thing and it is very, very hard on Americans. It is something that somehow does not crease the conscience of French, Germans, Japanese, or others of our civilized allies.

COMMISSIONER MacKINNON: South Americans.

MR. ELSEN: I'm talking about people who do not take bribes in their home countries. I am not talking--South Americans are the people who take home bribes in their home territory. I am talking about people who share the value systems of our country.

Our senior management had great problems with enterprises that have been created in these areas and very, very harsh criminal penalties drive people away. Now that may be a good thing. It may be a good thing that we want to create greater timidity in business. But I am not sure that it is.

You know, as these cases come up for sentencing and it looks all cut and dried and you have a presentence report,
and you have an investigation and it all looks what a
terrible scoundrel this was, but that is not the way it
approaches. It comes to an executive on the executive’s
desk. The executive is dealing with a booming, buzzing
confusion and has to make a lot of policy choices.

And if you are going to be talking about 5 years in
a Federal penitentiary for making the wrong policy choice,
you are going to excessively deter. I think that that is one
of the problems with the way the individual guidelines are
working out in the white collar area right now.

COMMISSIONER MacKINNON: I don’t know what you mean
by policy choices?

MR. ELSEN: I’m talking about an executive who may
choose to play it safe, not to take a risk, that what they
think--I mean, for example, in the--

COMMISSIONER MacKINNON: But you have to violate
the law.

MR. ELSEN: Well, Judge, suppose you are told in a
foreign country that X is the sales agent whom you have to
deal with. You suspect that X is involved with some people
in the foreign government. You suspect that X’s success may
not be due simply to his skills as a sales representative,
but maybe due to the fact that monies are passing back and forth. You decide not to touch X. You decide not to. Now that may be a wrong decision. X may be the right person to deal with in that country, but the fact that it might turn out that you are dealing with a person like X who could land you into criminal trouble causes you to forego the decision to take a risk. Now I choose that—

COMMISSIONER MacKINNON: Wait a minute. Your definition—you are talking about dealing. What is your definition—what do you mean "dealing?"

MR. ELSEN: I'm talking about to retain X as your representative.

COMMISSIONER MacKINNON: At an elaborate sum.

MR. ELSEN: No, not necessarily.

COMMISSIONER MacKINNON: Well, like the husband of the Queen, for instance.

MR. ELSEN: Well, it is absolutely true. There are a lot of governments where you—now I am choosing a statute that is not enforced today I recognize and I am sure you recognize it too, Judge MacKinnon.

COMMISSIONER MacKINNON: No, I don't.

MR. ELSEN: And I am drawing examples because I
have had extensive experience with this statute and I have seen--with the investigations that preceded these statutes and I have seen what works.

Now it is absolutely true if you want to deal--as I can think of an example of an experience, if you want to deal with--do business in Pakistan years ago and your sales agent is a member of the Buto clan, you may very well conclude that that is too risky because it could eventually turn out that there is a corrupt allegiance there. On the other hand, it may be the only way to do business in that country and you do not know of any surface illegality.

The French will go in. The Japanese will go in. The Germans will go in. And if we are going to put people in jail for long periods of time, our people are not going to go in and will stay out of that country.

Now that may be okay, but I think that there are a lot of policy decisions that cross the desks of corporate executives which are--which should not be deterred quite that heavily. I am not saying that there should not be fines. I am not saying that there should not be punishment. I am just saying very heavy punishment is killing. I mean it destroys an individual. A manager simply will stay farther away than
perhaps our national interest dictates, that is what I am saying.

COMMISSIONER MacKINNON: I think I understand you.

MR. ELSEN: Yes. I do not know if we agree or not, but that is an honest appraisal of the situation. I personally as an individual am delighted I never have to deal with those decisions. I have the same moral code you do, but it is a luxury. I am not sure that we should impose that on all of our citizens.

CHAIRMAN WILKINS: Questions?

COMMISSIONER NAGEL: Yes. Mr. Elsen, you raised an interesting point which is the relationship between the severity of the sentence and the voluntary versus binding issue, that is, whether guidelines are mandatory or voluntary.

Let me just see if I can get clear your position on this because I think we did not articulate it before. Assume of the moment that ultimately the guidelines promulgated--as you know the guidelines are iterative and we start at position A, but there is no reason we will not go to B, or C, or D--assume that ultimately the guidelines promulgated both for individuals and for organizational defendants are set at
levels with which you agree in terms of the severity, that
is, your normative judgement and the Commission's normative
judgment end up in the same place so that you would not
testify that these are too high or too low or whatever, then
what is your position on whether one can justify mandatory
guidelines for individuals, which is in fact the mandate we
received from Congress? It was clear they rejected this
notion of voluntary and a temporary step to try out non-
binding guidelines for organizational defendants assuming
they are all set at the right level. That is the question I
should have asked Mr. diGenova, but since you have--

MR. ELSEN: But I mean that is thrown up by his
question. You have to construe your mandate and I happen to
believe that that is a matter of public policy, the more
flexible guidelines in which the judge can take account of
individual factors. The old system, the much berated old
system is a better system.

COMMISSIONER NAGEL: But Congress answered this.

MR. ELSEN: But Congress answered that. You do not
have that option and I recognize that. So I suppose you have
to interpret your legislative mandate and if you find that
moving in and out between the mandatory and then giving the
judges a time to exercise discretion so you can gather further data and experience, if you believe that that is consistent with your mandate, I think it is constructive. I think Mr. diGenova makes a good suggestion to you.

COMMISSIONER NAGEL: Thank you.

CHAIRMAN WILKINS: Seldom does a week go by when a district judge does not tell me that these guidelines are too tough. Seldom does a week go by that a district judge does not call me up and say, "What in the world are y'all doing up there, Wilkins? These guidelines aren't tough enough." So, you know, you get both ways. Maybe that means that we are pleasing neither and that is maybe a good sign.

MR. ELSEN: Judge Wilkins, I suspect that--you know, we are not necessarily in the criminal sentencing area a unified culture. Different parts of the country have different views. I come from a section of the country which is out of favor right now. There are some views which people will call liberal and I realize that's a terrible word to use. But I mean there is that attitude and some parts of the country have much tougher--just a couple of things from my experience.

I remember when I was a brand new Assistant U.S.
Attorney. I was prosecuting a stolen car case and I was up
against a very experienced legal aid lawyer. He really knew
the system inside and out. And he was defending a young man
who had stolen a car in Alabama and had driven it to the
Southern District of New York, where he was caught. And
under the law at that time, if he pleaded guilty he could be
sentenced in either district. He could be sentenced in the
district where he was apprehended.

And I remember this legal aid lawyer saying to this
young man, "You are the smartest young man I have ever met
because if you had been caught in Alabama you would have
gotten 10 years and in New York you are going to get proba-
tion", and that is what happened.

And it use to be--I remember--you know, Judge
Skelly Wright in terms of many of his views is considered a
social liberal in some ways. But Skelly Wright use to come
to New York for 3 weeks every summer when the Yankees were in
town and he use to sit there and he came from Louisiana. It
was a grim day for the defendants in the Southern District of
New York. I was a prosecutor. They all got--they were, to
use Mr. diGenova's words, they were slam dunked in ways that
they were not accustom to in New York. Why? This a great
1 judge, a man of complete integrity. He came from a different
culture. And that is one of our big problems. I sympathize
with you.

But I think if you put color coding for your calls
on your walls, you may find that they come from different
parts of the country.

CHAIRMAN WILKINS: Well, we may, but reasonable
differences I think is something Congress perhaps has already
answered for us and it depends on the crime as well as the
region. I know in New York if you get caught for a pistol
because of the high density of population, you are in a lot
of trouble. Where I come from, if you get caught without one
you are in a lot of trouble.

[Laughter.]

MR. ELSEN: What?

CHAIRMAN WILKINS: Where I come from, if you get
caught without a pistol you are in a lot of trouble, you see.
So it just depends on where you are from and who the judge
is.

We are trying to rationalize all of that and that
is what this thing is all about. We appreciate your ap-
preciation of our job, but we also appreciate the assistance
that you have rendered us and it has been substantial.

MR. ELSEN: Well, that is a hard job you have in
reconciling regional differences. That is a perfect example,
the gun laws. There is no question, New York is much tougher
than Nebraska or your part of the country.

CHAIRMAN WILKINS: Thank you very much.

MR. ELSEN: Thank you very much.

CHAIRMAN WILKINS: Our next witness is Frank H.
Menaker, Jr., Vice President, General Counsel, Martin
Marietta Corporation. Mr. Menaker is accompanied by Victoria
Toensing.

Ms. Toensing, will you offer testimony as well?

MS. TOENSING: No.

CHAIRMAN WILKINS: Okay. Fine.

MR. MENAKER: I asked her to join me principally
because she has worked a lot on this paper that I have given
to you and then I thought if you had any questions that she
could answer, it would be much quicker to get them answered
right away.

CHAIRMAN WILKINS: Well, we are delighted to have
both of you with us. Ms. Toensing has worked very closely
with the Commission on a number of projects over the past few
years.

MR. MENAKER: I understand. Thank you.

STATEMENT OF MR. FRANK H. MENAKER, JR., VICE PRESIDENT, GENERAL COUNSEL, MARTIN MARIETTA CORPORATION

MR. MENAKER: Let me first introduce myself. As the General Counsel of Martin Marietta Corporation, I also have had the opportunity to serve on a number of different projects throughout the community in which we deal. I am the Chairman of the Working Group of the Defense Industry Initiative, for example, which is something I hope to explain to you in a minute.

I have chaired the Voluntary Disclosure Committee of the American Bar Association's Public Contracts Loss Section and I am also a member of the Public Contracts Loss Section, a council member.

Also, I am a Director of the ACCA and I see that Mr. McFadden and Nancy Nort [ph.] and they are going to, I think, speak to you this afternoon. So I have a fair amount of experience in corporate matters and I am certainly not a criminal lawyer and I do not appear before you today with that level of expertise at all.

One of the things I did want to talk about, if I
could, was to try and describe to you what we think is important in terms of Martin Marietta and perhaps other corporations' concerns with regard to these guidelines.

And I guess the biggest concern that I have is in trying to help you find a balance between imposing sentences on corporations for their wrongdoing and at the same time trying to incentivise corporations to develop meaningful compliance programs because I think that corporations themselves are probably best equipped to deal with wrongdoing if in fact they have the proper incentives to do it.

One of the things that—and I use the term meaning-
ful compliance programs because it is a term that was used by Deputy Attorney General Arnold Burns in a letter he wrote in 1987 to then the Deputy Secretary of Defense Will Taft when he said that the decision that the Department of Justice would make with regard to indicting corporations would be based upon those that do business in the procurement area—Government procurement area. It would be based upon whether or not in part corporations had meaningful compliance programs. But nobody really understood what that meant at the time. That was February 5, 1987, when he wrote that letter.
Since that time, we have worked a lot with people like Morris Silverstein, who is also here today, and I believe addressed you earlier, in trying to understand that term and in trying to develop programs that would meet both the needs of the corporation and preventing wrongdoing and also would develop for the corporation a character of responsibility that would enable them to continue to do business with whatever customers they have.

There is no question in my mind that law enforcement has expanded dramatically against corporations in a variety of areas. It is not just corporations like Martin Marietta that do primarily defense contracting or contracting with NASA and other Government agencies, but corporations in the energy business like Exxon. Today I am told there was an article in the paper that they are negotiating a plea right now with regard to the Prince William Sound oil spill from the Exxon Valdez.

Energy corporations are facing increased law enforcement. Pharmaceutical corporations are facing it. Everybody really that does business in the country, I think, has to understand that law enforcement is increasing and criminal law enforcement is really what I am talking about.
The environmental laws are being enforced criminally from a Federal standpoint much more aggressively than they were 5 years ago. Health and safety laws have been enforced to some extent by the States against corporations from a criminal standpoint, but now I think the Federal Government will also enter that arena. And certainly from our standpoint, the Government procurement statutes have been enforced criminally much more aggressive in the past 5 years than they ever were before.

So it is important that corporations develop an ability to react to this type of law enforcement, to develop what we call these meaningful compliance programs, and to create the cultural changes that they have to create within their organizations to meet what I think is a very significant challenge.

From the standpoint of meaningful compliance programs, a corporation like Martin Marietta will have a very aggressive internal audit function. It will have environmental audit functions. It will have technical audit functions. It will have health and safety capability in terms of audit functions so that when we go out with various different teams of people throughout our organization we are looking for
compliance in a variety of areas.

Internal audit, I think, the financial internal audit is the lynch pin of all of these compliance programs. In addition to that, we will have whistleblower protection, or in effect we will have programs that provide that employees will not be treated unfairly if they make allegations against the corporation. We have ombudsmen that are set up within the corporation to hear allegations and talk about cultural change. That is a significant cultural change for a corporation. To provide an ombudsman or an ethics officer that anyone can go to and make an allegation is very unique in corporate America, but I think we are going to see more of it.

The traditional approach to bring an allegation through a corporation is to go to your supervisor. Obviously an employee who sees wrongdoing is not going to do that. They are not going to make the allegation at all, or they will just sit on it and let a matter fester. But an employee who can go to an ombudsman or an ethics officer clearly has that opportunity to bring a matter to the attention of higher level people in a corporation, put it out for investigation and analysis and probably disclosure.
An internal audit function has to be capable of auditing for contract compliance. It has to audit marketing people. It has to audit the marketing functions. It has to audit consultants. It has to do compliance auditing that is really different than the kinds of auditing that they have done in the past, which is basically procedural audits or financial audits to determine that the books and records of the corporation are in compliance with the policies and procedures of the corporation.

One other element to self-governance which I think is important is the element of voluntary disclosure. It is something which I think was addressed in the guidelines and it is part of the recommendations that we have made that it be given further consideration.

But with regard to voluntary disclosure, a corporation like Martin Marietta will have a policy that says that it will disclose all wrongdoing that it discovers in, for example, with regard to the Morris Silverstein program of the DOD, we make disclosures to the Department of Defense of any matters which we find might violate the Federal procurement laws.

That is a unique situation because once we make
that disclosure we subject ourselves both to Government
investigation through the DOD, as well as potential prosecu-
tion by the Justice Department.

We get certain advantages by making that dis-
closure. One is that I think we get extra consideration from
the Department of Justice as to whether or not they should
indict a corporation who has tried to find a problem and
disclose it. Secondly, the DOD guarantees that they will not
debar a corporation that has made a voluntary disclosure.
And to date they have kept that commitment with regard to all
of the disclosures that they have received.

The quid pro quo is a very important element to
motivating corporations to participate in these kinds of
programs. Our voluntary disclosure procedure is so detailed-
-and we send this to all of our employees--that if in fact a
decision is made at a lower level of management not to make a
disclosure, there is an automatic appeal to a higher level of
management. And even if the chief executive officer of the
corporation should decide that it is a matter that he does
not want to disclose, then the General Counsel has the
authority to take that matter to the Board of Directors.

So a disclosure in a company with a policy or
procedure like that is more than likely. In fact, I have a copy of our policy and operating instructions, which I would be glad to leave with you if you would like to see it.

I think that it is important that we understand that meaningful compliance programs and whether or not they really get implemented will depend upon whether or not the chief executive officer and the senior management of the corporation and the board of directors really support those programs.

We often use the example when it comes to wrongdoing whether or not a manager winks when someone says what should I do about a given problem. Should I put a cost in pool A or should I put it in pool B? And if clearly the answer is to put it in pool A and the manager says, "Well, do what's right", and winks at the individual, he is probably sending a message that he really wants it in pool B.

And so when you have a program, you not only have to say the right things, you have to go out and train your people in what to do. Joe diGenova talked about that this morning. Training programs are extremely important and I think you have to enforce your policies and procedures as strictly as you possibly can. That gets back to the over-
sight and governance processes of a corporation.

The reason why I bring all of this to your attention is because I feel that you need to find ways to not only handle the wrongdoing of a corporation through the sentencing guidelines which you are proposing, but also that you find mechanisms to further incentivise corporations to develop these kinds of programs because I believe that there is a lot of room for movement in this area, a lot of industries are interested in it, it is not just the defense industry. And certainly if the Commission were to react more positively in this area, I think we would see a movement in that direction.

I had only a few other comments that I would make. We made some recommendations. We made, I think, 14 recommendations in the paper that was submitted. One of those recommendations asked you to consider increasing the credit given to a corporation for its efforts to prevent recurrence of an offense under Option 1 as well as under Option 2. We would ask you to consider that further.

Also, we would like you to reconsider the definition of high level management. I think that if you are going to have a broad, wide area of trying to describe who is high level management, you really do not get any benefit at all.
from the way you are approaching the subject. That has got
to be a narrowly defined area. We would suggest a model
penal code would be the appropriate definition.

Make high level management those individuals who in
fact have an influence over the policy of the corporation and
do not broaden that area too far because if you do, it will
become meaningless.

I had no other direct comments, but I would be glad
to answer your questions.

CHAIRMAN WILKINS: Thank you.

Judge MacKinnon, any questions?

COMMISSIONER MacKINNON: You know I was really set
back when you said that you are only recently developing
meaningful compliance programs for complying with the law. I
just cannot understand that.

MR. MENAKER: I didn’t mean it to sound the way you
understood it. What I meant was--

COMMISSIONER MacKINNON: Well, you indicated that
enforcement was increasing and they are really working on
this now.

On high level management you want it restricted?

MR. MENAKER: Yes, sir.
COMMISSIONER MacKINNON: With a corporation of 135,000 employees, you want just restricted to a few assistant vice presidents and presidents? Most of those crimes are committed by managers and supervisors.

MR. MENAKER: Well, in terms of increasing the fines against a corporation where you believe that high level management is involved, if you are going to get any bang for that you should in fact limit it to senior level officials of the corporation who in fact make policy for the corporation.

COMMISSIONER MacKINNON: But don't you think that the people in the supervisory level and the management level in a corporation with 135,000 employees make a lot of policy?

MR. MENAKER: Actually, they don't make as much policy as you probably think. What do very often--

COMMISSIONER MacKINNON: Maybe they make more than you think.

MR. MENAKER: Well, I don't know, but what they do is they interpret policy. There is no question about that and a corporation has an obligation to communicate effectively to all levels of management what its policies and procedures really are.

And if in fact there is a misinterpretation, then
there may be a failure on the part of high level management. But if someone deliberately goes around policies and procedures, which is more likely to happen with the larger organization that you are talking about, then in fact I am not sure the increased fine should be appropriate.

COMMISSIONER MacKINNON: Deal with a concrete problem. Do you have an assistant for Martin Marietta? Do you have a vice president or an assistant vice president actually conducting negotiations with the Defense Department?

MR. MENAKER: You mean to negotiate a contract?

COMMISSIONER MacKINNON: Yes.

MR. MENAKER: Very often you do have a senior level person negotiating a contract.

COMMISSIONER MacKINNON: Well, I am saying, do others do it?

MR. MENAKER: Oh, yes, sir.

COMMISSIONER MacKINNON: Well, why shouldn't they be considered as high level managers?

MR. MENAKER: In terms of if they defrauded the Department of Defense, if they failed to provide them with information they should provide or misstated something?

COMMISSIONER MacKINNON: If they arranged for a
bribe.

MR. MENAKER: If they arranged for a bribe, depending upon the level and depending upon the circumstances, you would have to, I think, treat the corporation accordingly. But I don't think you can say flat out that the chairman of the board, or the directors of the corporation or the senior officers of the corporation condone that activity just because it occurred.

COMMISSIONER MacKINNON: No, but he was a man himself in high level management. If he's able to that--

MR. MENAKER: No question. The higher level the person involved in it clearly indicates the policy of the corporation with regard to it. I agree with that.

COMMISSIONER MacKINNON: Thank you.

CHAIRMAN WILKINS: Commissioner Corrothers?

COMMISSIONER CORROTHERS: Thank you for the degree of specificity that you provided in terms of the types of preventive incentives that we should promote or advocate.

Will you be forwarding us a copy of your testimony?

I don't think that I have received a copy? Did you provide that already?

MR. MENAKER: Well, I'll be glad to reduce that to
a more specific statement, yes, ma'am. I will do that.

CHAIRMAN WILKINS: That will be helpful, as well as your compliance document.

COMMISSIONER CORROTHERS: Yes, that will be useful too, the example, you have.

CHAIRMAN WILKINS: Questions?

In your compliance program, when you report criminal violations to the DOD for example, what do you about the individual?

MR. MENAKER: Well, it depends. Very often we follow the guidance of the DOD and the Justice Department at that point. On occasion, they have asked us to keep the individual in place, although removed from actual responsibility and on occasion we have disciplined them immediately and terminated their employment.

We have had a number of employment terminations over the past 5 years. And very recently, based upon four disclosures that we made, I think, in 1987 and 1988, we had four individuals indicted and convicted for their offenses.

CHAIRMAN WILKINS: So your compliance and disclosure indicates not only infraction, but those individuals responsible for the conduct.
MR. MENAKER: It does.

CHAIRMAN WILKINS: And then you leave it up to the prosecuting authorities and what to do about that.

MR. MENAKER: We identify that. We enter into a specific agreement with the Department of Justice, which has been worked out in advance by Justice and the DOD, and that agreement describes exactly what we are committing to and what we must tell them.

The individuals are quite often disciplined and the corporation, of course, has to make restitution and has to negotiate even a civil settlement with the Justice Department with regard to that.

CHAIRMAN WILKINS: Very good. Well, thanks a lot.

MR. MENAKER: Yes, sir.

CHAIRMAN WILKINS: Our next witness is Professor Christopher Stone, University of Southern California Law Center. Professor Stone has appeared before this Commission before.

We are delighted to see you back again today, Professor Stone.
STATEMENT OF PROFESSOR CHRISTOPHER STONE, UNIVERSITY OF SOUTHER CALIFORNIA LAW CENTER

PROFESSOR STONE: Thank you. Because I have had prior opportunities, I am not here armed with any theme. I would like to just pick up a few points, some of which are in response to exchanges I heard earlier.

The first, Mr. Saltzburg has raised what I think is an extremely important issue that was going to be the first one that I would have chosen to address, but I was not sure how it fell within the purview of this Commission, and that is the relationship between the fine to the corporation or the organization and that to its agents.

I think as long as that is unsettled there is bound to be ramifications in the attitude towards these guidelines. Many people who feel that the organizational fines are not high enough would feel otherwise if they were satisfied that the prosecutors were selecting for indictment and pursuing indictment of the individuals.

I think the pattern that evolves, as I understand it, is a co-indictment, that U.S. Attorneys favor some co-indictment of agents in the organization and then during the course of negotiations there tends to--there has tended to be
some null prossing of the individuals in exchange for a

1 guilty plea by the organization.

2 Of course, this is what makes a number of us feel
3 that the fines against organizations under those circumstan-
4 ces is not high enough. Now if there were opportunity for
5 firming up guidelines and discussing them, one might feel a
6 little otherwise.
7
8 In regard to a few other points that Mr. diGenova
9 raised in his testimony and some of these things have
10 occurred, I have heard that we ought to spend a little more
11 time and make the guidelines mere policy statements and not
12 mandatory.

13 As I read the provisions for the probation, the
14 language indeed for the most controversial of the provisions
15 is already cast in discretionary tone. If probation is
16 ordered, this in respect to the compliance, it is recommended
17 that the following steps take place. If probation is imposed
18 under 8(d)(1)(1)(b) where the firm is unable to pay the fine
19 at the time of the sentencing, is it recommended that the
20 court may impose other conditions.

21 It seems to me at least in regard to the probation-
22 ary provisions, it already is some mixture of mandate and
policy. I have heard several times discussion about the massive fine level; that's the term Joe used, the massive fine level.

Let me comment that I think in our society today corporations are capable of doing massively damaging things, massive spills we're getting, massive stock frauds, a 3 hundred million dollar settlement in the Bolsky [ph.], I think the figure was in that range, is not massive relative to massive salaries and compensation to people in that field.

What would be the appropriate level? You asked Ms. Church I thought the right question. You said, well, let's take a 500 million dollar fraud. What should the fine be? And I sympathize with her having a hard time to answer. It's a hard question. Sentencing is hard.

Well, under the present guidelines, as I read them, the fine level would top out at 1.5 million, two times the higher of pecuniary gain or pecuniary loss plus the non--the equal amount up to the point that hasn't been restituted.

So let's say 1.5 million on 500 million, I guess you said--

CHAIRMAN WILKINS: I said 500 thousand.

PROFESSOR STONE: Okay. Whatever it is, it's
triple the amount. If you do triple it, say 1.5, is that
massive. What that means is that if the chances of your
being caught are one and three or less, it's a good bargain,
that is, if I face making $500,000 and possibly getting
caught and possibly being pressed to conviction, and possibly
writing a check, and indeed when I write that check it would
be some time in the future, given the possibilities of appeal
and the time for indictment and discovery and we applied a
discount rate of 10 percent or 8 percent, whatever the firm
is using and penciling out its other adventures, my sense is
it is a very non-massive fine, that is, the chances are 50/50
of getting caught. I would be surprised that the chances of
being detected in a fraud are that large.

When someone robs a bank, you know a bank has been
robbed. You know there has been a crime. You may not know
who did it, but you know there has been a crime. These
massive stock frauds people just don't know. So the chances
of being caught are very slight.

So if you are looking at the deterrent effect, I
would say, no, these guidelines don't have massive penalties.
They are rather slender. Are the penalties massive? Look
what the guidelines do for environmental spills. If you have
a series of environmental spills, that is to say if you have unlawful discharges under the Federal Water Pollution Control Act, they are treated by the guidelines if it is a pattern of behavior as increasing six levels, which means that the total fine might be something like, as I calculate it, $40,000.

The Congressional fine is 5 to 50 thousand dollars a day for these violations. That is, Congress' fine level could be for a 5 day spill, your 50,000 times 5. It tops out under these guidelines at something like $40,000, the way I calculate in my testimony a level six increase. Are those massive? They don't seem as large as what Congress intended. So I don't really think that they are massive at all.

One area that I have singled out for attention that is particularly important has to do with regulatory offenses. Now they are important because the way the guidelines are shaped the critical terms are net pecuniary gain and net pecuniary loss and those work for your classic offenses like anti-trust violations where there is going to be a clear gain to the price fixture, let's say, and clear losses out there to those who have experienced losses through high consumer prices.

The many offenses such as failure to report under
the Nuclear Regulatory Act, the regulations, I regard as very serious. They pose hazards to the whole society. There is really no pecuniary gain of any measure by the company that falsifies records, by the licensing of a nuclear plant that does not report that corrosion is appearing in some pipe. There is no gain to it. It hasn't caused a loss to the public yet. It has caused an enormous loss to the society. The information value is a value to the society. If in one nuclear plant something is going wrong, not only to know that is of value to the regulators so that they can come in on that plant, but it may give evidence of what is happening in every comparable plant in the United States.

Now the fine under the structure that you have now makes that a mere regulatory non-reporting. Four thousand dollars doubled is eight thousand dollars. Congress has measured such violations--has put a price tag of $100,000 on them, much higher, and it seems to me rightly so. That is, the real problem, it seems to me, in the basic structure is that the regulatory offenses which don't cause a net pecuniary gain particularly don't cause a pecuniary loss, but impair the integrity of the systems on which the public rely for nuclear safety, for toxic safety, to get at problems
before they cause a public peril, before you've got a spill, before you've got your waste dump out there. That paper trail I regard as very significant and I think that these fines, massive, massive fines, no, these aren't massive fines. It is very light, light relative to deterrence it seems to me, quite light relative to what Congress has provided for in the relevant statutes.

I just had a few others points. I can touch on them very briefly. One, I think there has to be a provision that whenever an individual agent of a corporation is fined that the fine not be subject to indemnification under State law.

See the way the State corporations codes are framed typically, and certainly that of Delaware and now California and a number of States following suit, if an agent of an organization suffers some third party loss, including fines in the wake of episodes for which the officer did not have reason to know that he was violating the law or that was operated in the best interest of the corporation et cetera, the fined executive could just turn around to the corporation and get the corporation to indemnify the amount of the fine.

That is, after the work that has gone in to the
prosecutor taking the case, going before the jury, getting a conviction, getting a fine, vindicating supposedly the interest of the Government, quietly that executive can go back to the organization and request and indeed, depending upon the articles of the corporation, perhaps demand that he or she be indemnified, thereby deflecting the amount of the fine. That is intolerable. It is intolerable that corporations acting under the powers of State law should be able to subvert the operation of the Federal criminal law and that could be easily amended simply by providing that in instances where an agent of a corporation has been fined that as part of the sentence that has got to be picked up. Otherwise, there is no reporting mechanisms. These are very low visibility decisions to be picked up in the Federal reporting under the securities laws only perhaps in the instances of the top level executives.

Why don't I just take questions beyond that.

CHAIRMAN WILKINS: Thank you for your informative testimony.

Go ahead, Commissioner.

COMMISSIONER CORROTHERS: Professor Stone, in the area of I guess we could call it criminal or violation
history, I think it's on the last page of your written testimony, you indicate that by the time a violator is referred to the U.S. Attorney for criminal prosecution that there is often already a history of failed attempts to, I guess we'll call it, deter, through administrative remedies, and that as a consequence you favor prior civil enforcement sanctions by public authority to be treated on an equal footing with prior criminal convictions.

Another respondent has suggested to us almost the same thing, that we recognize and sanction both types of history, but that administrative and civil adjudication involve among other things a different standard of proof than conviction. So that for this reason and the other reasons we should separate the two as aggravating factors and sanction less harshly for the civil and administrative adjudications.

Do you see any merit to this suggestion?

PROFESSOR STONE: Well, thank you. It seems to me that what we are talking about--what I was focusing on was the conditions for the imposition of probation and it is true that in the civil--classic civil administrative penalty that comes up under some of regulatory agencies that the standard--the burden of proof is less onerous to the prosecution. But
1. I don't think that means that a court in deciding whether to issue probation ought not to be able to have that record before it as one of the considerations.

   You see, it's typical. It's not just occasional, but it is typical that before a case is referred to the U.S. Attorney for prosecution on the criminal side by one of the regulatory agencies that there is already a history of several attempts by the EPA or by NOA, or by one of the regulatory agencies to bring the company to heel with the civil fines.

   So that if we are thinking about a one bite rule, by the time we get that one bite into Federal court there may well be in the record of this company's behavior two or three episodes of essentially the same conduct.

   Now I think it is quite fair to point out, as has been pointed out, that the standard before the agencies is a lower standard. But I think in deciding whether or not to have a probation, that it is wise to take into account.

   I should underscore the fact, I also believe that most companies in America are honest. I think that most people in America are honest. The criminal law is being drafted for those company and those people in companies that
are abhorrent and by adopting these provisions and by recognizing that probation is one of several possible alternatives for judges to have to deal with these complicated and rare cases we are in any way, those of us who advocate it, trying to besmirch the reputation of corporate America. Indeed, on the contrary, my sense from dealing with corporations, and I have practiced on Wall Street and represented no one by all law violators, that the big--many companies, including, I think, the largest companies are very law abiding and actually standards of this sort would not affect their behavior as much as standards of companies that are more marginal and do a lot of the dirty work. And fine companies like some of those you have heard from--representatives speak from today already are talking about compliance programs.

All this does is make available to the court a remedy if there is not in place a compliance program. It gives a nudge to the firm to institute programs that I think many good chemical companies already have. There is nothing that goes beyond what really good chemical companies already have in these recommendations.

CHAIRMAN WILKINS: Thank you.
Questions?

COMMISSIONER NAGEL: Yes. Following up on that comment you just made in response to Commissioner Corrothers' question, you have testified before this Commission previously, as well as submitted documents, essentially arguing for the viability of probation as an appropriate sanction under certain contexts for organizational probation. In fact, I believe at the last hearing you testified about the program at Occidental, et cetera.

In view of the criticism that we have been hearing in response to our now proposed two versions of guidelines, as well as some of the recent criticism that has appeared in the press, is there something you would say in response as someone who earlier argued for the viability of this proposal? Having now heard some of the criticism, if you were responding, what would your response be? Are you persuaded by their arguments? Sort of where are you on this?

PROFESSOR STONE: I haven't been persuaded that anything in here is unwise. I think that the standard for—under the policy recommendations that a court would— it is recommended that a court impose all of these limitations on a firm that hasn't anted up. When I first read it I must say I
blanched because I thought, what judge is going to want to constitute himself to the SCC.

I really think that those provisions which would invite a court to monitor dividends and mergers do all those things that it takes an enormous staff to do are terribly unwise.

I take it that what is contemplated there is simply a firm that is a very small firm on the rocks. No one is thinking about a major company that the fear is that you may have some companies subject to a fine and it can't pay the fine for a while. It is trying to get backing up to pay the fine and somebody then drafted what looks to me like a part of a condensed indenture agreement from a major lending institution.

That part troubles me, I'd have to say, but I take it--and I'm not sure it's required. I know of no case in which a company or a firm that was subject to a fine has tried to merge out of the fine. Of course, it couldn't legally merge out of a fine, go bankrupt. If it disimbalanced itself of assets and then declares bankruptcy, of course that would be a fraud of creditors of whom the United States ranks quite high and it is treated rather generously
by the courts, I don't think that that's really required, but
I wasn't part of the discussion. I take it that it was
contemplated that that provision restricting dividend
payments, et cetera, et cetera was something that I never had
seen and I am enthusiastic for it. I don't know that it's
needed. It's probably going to make a lot of people think
that these provisions are more onerous, more cumbersome than
they really are. I don't think that they go beyond what the
SCC has been doing in ancillary relief for years in Federal
courts.

In settling cases under the securities laws Federal
courts have handed down—there have been judgments that have
imposed certain internal changes within companies, mandated
they hire a compliance officer, made it clear that the board
of directors has to review for a period of a year or 2 years
the securities prospectuses that are going out. They have to
anyway, but making clear about press releases, things of that
style, and they seem to work. They restore investor con-
fidence. People adjust to them. I think it's a lot of—I
don't want to say hysteria—I think it's really—I sympathize
with the people who are concerned in reading these things.

But, no, the answer to your question, would I
withdraw any of these probation provisions, I would install
that little clause that I recommend in the submitted tes-
timony that Commissioner Corrothers stressed.

COMMISSIONER NAGEL: Thank you.

CHAIRMAN WILKINS: Commissioner Corrothers?

COMMISSIONER CORROTHERS: Very quickly, concerning
the relationship of the fine to the size of the organization,
you suggest that we have not yet sufficiently allowed for the
differences in the punitive aspect caused by differences in
wealth of the various organizations.

You pose the possibility of solving this problem by
some index of likely insensitivity to fines that we might
call organizational denseness.

PROFESSOR STONE: Yes.

COMMISSIONER CORROTHERS: Though there is some
question as to what characteristics would correspond with
denseness sought.

You indicate that an appropriate reaction to
denseness might be achieved by or through the use of proba-
tionary regulations.

Are you able to expand on this idea, i.e., how this
could be achieved?
PROFESSOR STONE: Yes, the one I was addressing there for the others was the fact that there is a lot of concern. There always has been a lot of concern about levying fines of the same level irrespective of some measure of wealth of the corporation.

I have some—I share the uneasiness about a single level of fine across organizations of considerably different wealth characteristics, but the sort of wealth characteristics that we talk about ordinarily in connection with sorting out corporations into types, large and small, what do they mean in corporate—when we talk about corporations that have to do with the gross sales or profits or number of employees, things of that style, and I think it is very hard to set guidelines that will say charge a company that is big in some sense undefined and difficult to define sense of big, higher punch than a small company.

I am not sure that it is wise either because it may be distorting of appropriate market mechanisms. It seems to me that the solution is if a judge is worried about the fact that here is this huge company and this is the third or fourth time it is has been convicted of a pollution, similar pollution episode across the country, instead of just
thinking, well, I need a higher level of fine, which tends to
discriminate in very difficult ways between large and small
companies, that that would be an added reason for the
imposition of some compliance order on the firm.

So the fears that one has about the fine being
inadequately differentiated for firm type can be cashed out,
if you will, not by changing the fine level or playing around
with what is a dense company, an insensitive defined company,
and a non-insensitive defined company can be cashed out by
changing the attitude towards probation.

COMMISSIONER CORNOTHERS: Thank you very much.

CHAIRMAN WILKINS: We have only a minute left. Let
me ask you, one of our proposals deals with the corporation
primarily organized and existing and used for criminal
purposes, and we would suggest, or these proposals do, that
in effect, the fine strip the corporation of all of their
assets.

PROFESSOR STONE: Yes.

CHAIRMAN WILKINS: You raised concern about the
creditors of this organization and how we would deal with the
quote, innocent creditor. And I would suggest that the same
area deals with the innocent shareholder in any situation,
perhaps.

PROFESSOR STONE: Yes, but this wasn't just the shareholder. I am concerned about that whole provision. It seems to me that if a company is convicted it will be convicted of a particular crime and then this question, was it organized for a criminal purpose, it is a terribly hard thing to deal--to put in some judge's lap because the judge has heard testimony about a crime, something defined as a crime and now it seems to me that all of the problems of RICO start to come up and there are massive problems in RICO and you start to have to have now another hearing without a lot of guideline. What does it mean that a company was, you know, organized for a criminal purpose? Suppose it is a company that just simply could not from day one meet the affluent standards of that air basin that it operates in? Was it organized for a criminal purpose? I don't know.

What worried me was in the wake of the uncertainty of substantively what's meant and procedurally how do you decide what is a criminal organization. What compounds it is that the penalty seemed to be obliterate it. The fine should be high enough to deprive it of its assets.

What I was pointing out there was that the company,
albeit in some way organized for a criminal purpose, might have innocent bona fide lending institutions, that is, banks might have extended credit to this organization not knowing, and after all, it took the prosecutor some difficulty finding out, that you had here a, quote, criminal organization.

If you really set the fines so heavy as to obliterate it of its assets, depending on what one means by assets, but I take it if you take out the assets you also are going to wipe out not only the shareholders' equity, but the liabilities--the credit accounted for liabilities in the classic sense that offset those assets.

So you may have an innocent bank--and there still are, I would like to believe, some innocent banks in America--you have an innocent bank that is wiped out. It seems to me that if you are going to retain that provision, which I am not enthused about, then in lieu of the word "asset" it ought to say net assets, which would be--define net assets as net of the bona fide loans. Now that also causes problems because many small organizations, some of the stockholders also leverage by extending loans to the organization. They put in some of their money in stock and they try to enjoy a creditor position. So that would take some careful--if you
want to retain that section, it would be wise to talk to someone about just some accounting—standard accounting terminology. There are some comparable situations. All I am pointing at—and it could be taken care of—is there is a problem of confiscation of funds that are funds of innocent people, essentially, of innocent lenders.

CHAIRMAN WILKINS: That is a problem, I understand it, but is the same problem there with innocent shareholders in any situation?

PROFESSOR STONE: Well, not quite. Yes and no because shareholders have the claim to the residual. So if the company is making a lot of money off illegal behavior, they are the beneficiaries. If a company has got a bond—has got let's say an 8 percent note, they are going to be paid 8 percent on the note.

CHAIRMAN WILKINS: There may be a joint venture worked in there too with some lending institution.

PROFESSOR STONE: Yes, that is right, and then they would have—I think in the case of a joint venture the culpability of the joint venture would have to be examined.

But in regard to the difference between shareholders and bond holders, I appreciate on the first
level what you are saying. It is an appropriate question to put to me.

I am saying that the position of the stockholders and the bond holders isn't exactly parallel because the bond holders are entitled to their play as presumably some percentage of their loan unless they can exchange and swap for some--the ventures are convertible or something like that.

The stockholders are often though quote, innocent, in that they don't have any managerial hand in the wrongdoing. They, nonetheless, may be tainted in that over a period of years during which the offenses have been accruing they have been the beneficiaries of the bloated stock value in a way in which isn't quite as direct as the way of bond holders.

I think that needs a look at. I think that provision really needs a look at and I think that someone should hold it up against RICO and see what sort of interference there is.

The image that I get in my mind is like two songs, possibly both a little off key, being played in the same room and there is some dissidence there between RICO and what you
have in that little section.

CHAIRMAN WILKINS: It would only apply to a very small minimum of corporations, although they are a few that--

PROFESSOR STONE: That's right. I so understood it.

CHAIRMAN WILKINS: Well, thank you very much.

Again, we appreciate your assistance to this Commission. We look forward to a working relationship with you in the future as well.

We will take a break now and stand in recess until 1:30. We will start back sharply at 1:30.

[Whereupon, at luncheon recess was taken.]
AFTERNOON SESSION

CHAIRMAN WILKINS: We will begin the afternoon session of this public hearing on Organizational Sanctions and Related Matters.

Our first witness this afternoon is Professor Amitai Etzioni, who is a distinguished Professor of Law at George Washington University.

Professor Etzioni will be accompanied by Sally Simpson. Ms. Simpson is a criminologist at the University of Maryland.

Professor and Ms. Simpson, we are delighted to have you both.

PROFESSOR AMITAI ETZIONI, GEORGE WASHINGTON UNIVERSITY;
ACCOMPANIED BY MS. SALLY SIMPSON, CRIMINOLOGIST, UNIVERSITY OF MARYLAND

PROFESSOR ETZIONI: Thank you, Mr. Chairman, Members of the Commission.

I will just briefly summarized my statement. I served for 20 years at Columbia University. I would like to elaborate first of all on your work.

The American society tends about once every 10 years to sort of turn its mind on one major issue. In the...
60's you kind of pay attention to civil rights, in the 70's to the environment and at current to the kind of issues that we focused on in the turn of the century during the progressive era seem now to be on the agenda, the question of ethics of public institutions.

I most sincerely see the work of the Commission as lending a major hand to a need to show up American institutions. Now the world I live in and studies is slightly different from what you heard of some of the witnesses today, but indeed there are many corporations of integrity. There is also another small number which are engaging in various kinds of criminality including in recent years after the changes in sentencing.

So, for instance, we have regular report of something called sink tests where laboratories take specimens from patients and collect $150 for the test and then throw them down the sink to save them the cost of doing the test and report to the patients that the tests were negative. There were fatalities as a result.

We have banks. We estimate the amount of money laundered from drug dealers in American banks is 200 billion a year. Very few of those have been sentenced yet.
I, myself, served as a staff director of a State commission appointed by the State of New York investigating nursing homes and there you see the problem which I will turn to in detail in a moment where they assume they are not going to be caught and they engage in every human and economic abuse in the book including putting patients whose insurance run out on the porch so they catch pneumonia and shorten their life. And when they are caught they would either go out of business in New York and reopen in New Jersey, or if they would be fined, there was a great debate if there should be 6 percent interest levied on top of the restitution and that was in the period in which interest rates in the bank were very higher than 6 percent and the fact that it had no deterrence consequence, you can see, that many of the nursing homes, specific ones which are called by Judge Coplan [ph.] in his investigation in 1965 were brought up before our commission in 1975 and are still in business in 1985 doing some of the same kind of violations that they were caught before.

So there are significant segments of American enterprise which do need a showing up and I think the work of the Commission has basically implemented, as suggested, would
go a good part of the way necessary to achieve that affect.

     What is necessary according to the most conserva-
     tive economists, economists who have never been charged by
     being in any way politically or otherwise on the liberal side
     of the continuum is to not to make it attractive to corpora-
     tions to engage in violations and the only way that can
     happen is if the fines will exceed at least by some margin
     the benefit they expect to gain from violating the law.

     Therefore, the fines have to be calculated by a
     multiplier which reflects the conviction rate. Now I would
     be the first to admit that since we are talking here about
     measuring the frequency of illegal activity that we have a
     problem here. You cannot get, obviously, a precise reliable
     definition of how infrequent an illegal activity is by
     nature. Nevertheless, when you study this matter you do get
     a good estimate, just a very good estimate for the flow of
     cocaine in this country.

     And I would say that the best judgment can come at
     when you see for instance how common insider trading is and
     such that if you convict one out of a hundred, not only by
     indictment, conviction, and collect the fines because there
     are various obviously manuevers taking place after convic-
tions such as the few we heard about today, that this is probably an airing on the higher side.

So let me use the one out of hundred as my conservative estimate. That would suggest that if a corporation caused the damage of the kind which you asked about earlier of 500,000 and if it is not seem to them something they should charge the cost of doing business the multiplier to be used would have to be a hundred and a margin to provide some kind of deterrence. It is very far away from where we are and as a result it is very difficult for a corporation of integrity to stay in business because they have to compete with corporations who are not of integrity who, for instance, will report to the FDA as we had last year that their drugs are safe and effective when they are not. Now imagine this competition between a pharmaceutical firm who maintains the law and one which violates it or the defense where they underbid their products, how can a corporation of integrity stay in business?

I would hope, and I am sad to say it is not happening it seems, that the business community would be the first to come forward and demand severe penalties on those who compete unfairly by violating the law.
I would be further encouraged if they would do what to some extent the Bar does to some extent, the medical societies, where they disbar members who grossly violate the codes.

So if the National Manufacturer Association and other such groups, the Chamber and Commerce we hear from later, would come forward and say, "Fine, we will take care of our members who engage in improper, illegal, and unethical conduct", well, then maybe you could rest assured. That is not what we are hearing. We are hearing from them to say, study more.

Well, I make my livelihood out of studying things. We can always study more, but there is time for action and it is overdue.

Let me say about the notion that there are innocent shareholders, the shareholders are the ultimate seat of sovereignty and they delegate their power to the management. The management in the end, by condition, by ethical theory, by legal theory, is responsible to the shareholders.

So if management misbehaves and as a result there are losses to the shareholders, the shareholders would become more alert and be more synthesized to the need to see to it
that they will invest only in corporations of integrity. Maybe they will pay more to rating services who really rate not only bonds by A, B, C, and triple A, but will rate them by their moral and legal integrity and that way the market forces will come to work on the side of integrity.

So I see no problem at all if a corporation is engaged in illegal behavior and if they are publicly fined and that in somehow affecting the shareholders. They will learn from the experience and in turn see to it that a cleaner management will replace those of less integrity.

Maybe I will stop here and answer whatever ques-
tions.

CHAIRMAN WILKINS: Thank you very much.

Do you have any comments, Ms. Simpson, you would like to make?

MS. SIMPSON: No.

CHAIRMAN WILKINS: Any questions to my right?

COMMISSIONER MacKINNON: Professor, what is the foundation for your testimony about the large corporate crimes, I mean so many more than are ever discovered?

PROFESSOR ETZIONI: You figure if we have a part of those which were discovered by the Department of Justice when
they did a study in 1979, we came almost to exactly the same figure. They are based strictly on convictions. They do not include indictments or any other kind of earlier allegations.

COMMISSIONER MacKINNON: What were their findings?

PROFESSOR ETZIONI: There findings were that 62 percent of the sample they studied they found--of the large corporations they studied were involved in one or more illegal activity.

COMMISSIONER MacKINNON: Of consequence or--

PROFESSOR ETZIONI: Well, yes, indeed. The issues involved are fraudulent products, major tax violations, environmental violations, price fixing.

COMMISSIONER MacKINNON: Can you give me a concrete example?

PROFESSOR ETZIONI: Well, earlier in the day reference was made to an unnamed corporation in Connecticut.

COMMISSIONER MacKINNON: In what?

PROFESSOR ETZIONI: In Connecticut, which was building nuclear submarines. That would be a case in point. I see no--

COMMISSIONER MacKINNON: That was public.

PROFESSOR ETZIONI: Sir?
COMMISSIONER MacKINNON: That was public.

PROFESSOR ETZIONI: We are not referring--many of the things--

COMMISSIONER MacKINNON: I am talking about one of these that haven't surfaced.

PROFESSOR ETZIONI: No--

COMMISSIONER MacKINNON: You were talking about a lot of undiscovered crimes.

PROFESSOR ETZIONI: No. All of the cases we studied and they studied in one way or another are on the record only often they lack--

COMMISSIONER MacKINNON: What record, criminal record or prosecutions?

PROFESSOR ETZIONI: Yes, sir, or--

COMMISSIONER MacKINNON: You mean you come up with the 62 percent corporations actually prosecuted?

PROFESSOR ETZIONI: In many cases the corporations agreed not to repeat the crime in the future and that was all that happened. They admitted to their--I am not a lawyer by training. Actually, I am professor of sociology. I may not say it technically accurate.

But what happened is the corporations did not deny
that what happened was not in line with the law, but they agreed not to repeat this activity in the future in exchange for not being punished.

COMMISSIONER MacKINNON: Well, I don't know what--I think you are getting off the beat there. We have the figures on Federal corporate crime in America and they don't run over 400 a year. Now you say--and, of course, there are thousands of corporations and you say that 60 percent are engaged in law violations.

I just wonder--and you just said that they were all charged. Well, they aren't in Federal courts.

PROFESSOR ETZIONI: Let me talk to what I am most familiar with. Is the corporate 500--the Fortune 500 industrial corporation. So 60 percent of 500 would amount to 300--

COMMISSIONER MacKINNON: Two fifty.

PROFESSOR ETZIONI: To 300, if I am not mistaken.

COMMISSIONER MacKINNON: Of what?

PROFESSOR ETZIONI: Three hundred of the Fortune 500 and I am happy to provide you the list of the cases. They are charged of one or more--convicted not charged--convicted or made a deal in one or more criminal activity.
COMMISSIONER MacKINNON: What kind of cases? Not Federal cases because we only get 400 a year and we find that they are all mostly small corporations.

PROFESSOR ETZIONI: Well, I don't know. Is Beechut a small corporation?

COMMISSIONER MacKINNON: Small corporations mostly that commit the Federal violations.

COMMISSIONER NAGEL: May I perhaps ask a question that might help clarify?

What kind of time sample, that is, when we look at the number of corporations convicted by year. Were you looking at all corporations in the corporate 500 and looking to see over the period of let's say some larger number of years there was a criminal investigation or conviction, if not a conviction, there was some other settlement of criminal investigation. Is that--what was the timeframe--

PROFESSOR ETZIONI: That is exactly correct. We are talking about a 10 year period from 1975--

COMMISSIONER CORROTHERS: To '84.

PROFESSOR ETZIONI: That's exactly correct.

COMMISSIONER NAGEL: So for a period of 9 years when you investigated the 500 corporations in the Fortune 500
you found roughly 60 percent had some criminal either
conviction or settlement of a criminal investigation where
they did not dispute the criminal activity?

PROFESSOR ETZIONI: That's correct.

COMMISSIONER NAGEL: Am I saying that correctly?

PROFESSOR ETZIONI: Exactly right, only it's 10
years. It's from January of '75 to December '84.

COMMISSIONER NAGEL: And we're talking about 400
per year. So it's two different data bases.

PROFESSOR ETZIONI: Right.

COMMISSIONER NAGEL: Could I ask one follow-up
question? And that could include a State conviction?

PROFESSOR ETZIONI: I'm sure that's true.

COMMISSIONER MacKINNON: But you don't find many
State convictions.

PROFESSOR ETZIONI: I did not code them according
to State and Federal.

COMMISSIONER MacKINNON: Thank you.

COMMISSIONER CORROTHERS: Professor, just a
comment, as you know, I have been quoting from your testimony
all day. I would just say that your work or achievements are
remarkable. Because of the paucity of data in this area you
are extremely beneficial to our efforts and I would just like
to thank you for you assistance to us.

PROFESSOR ETZIONI: Thank you very much.

CHAIRMAN WILKINS: Any questions to my left?

[No response.]

CHAIRMAN WILKINS: Just one quick question, your
views on the innocent shareholder issue, how should we deal
with that, if at all?

PROFESSOR ETZIONI: Well, I don't think this should
be concern to the Commission. I think when the corporation
is publicly convicted and are publicly fined the question
that is publicly held should not matter precisely because you
want to send a signal to the shareholders to shift their
investments to corporations of integrity.

CHAIRMAN WILKINS: Well, thank you very much,
Professor. And Ms. Simpson, we appreciate your attendance as
well. Thank you.

Our next witness is Mr. Frank McFadden, Senior Vice
President and General Counsel, Blount, Incorporated of
Montgomery, Alabama. Mr. McFadden is representing the
American Corporate Council Association.

Nice to have you with us, sir.
STATEMENT OF MR. FRANK McFADDEN, SENIOR VICE PRESIDENT, GENERAL COUNSEL, BLOUNT, INC., MONTGOMERY, ALABAMA, AMERICAN CORPORATE COUNCIL ASSOCIATION

MR. McFADDEN: Mr. Chairman, Judge MacKinnon, Commissioners, I am delighted to be here. And as the Chairman has correctly pointed out, I appear on behalf of the American Corporate Council Association, which is an organization of corporate counsel, an organization I have served as a director for 6 years and was its Chairman in 1989.

Solely so the Commission will understand where I come from and for that reason only, I report to the Commission that it was my high privilege to serve as a United States District Judge for 12 years in the Northern District of Alabama.

I, therefore, come to this problem with some appreciation for the problems, although it was never my privilege or duty to impose sentences with the help of guidelines formulated by this distinguished Commission.

CHAIRMAN WILKINS: I'm not sure you missed a whole lot, Judge.

[Laughter.]

MR. McFADDEN: Some of my colleagues would think I
was blessed; others would perhaps think I was cursed. We do
come here with different cultures, as has been said earlier,
and when the Chairman referred to his section of the country
and the guns, I was reminded of certain areas in our section
establishments which check you for knives when you enter and
if you don't have one, they give you one.

[Laughter.]

MR. McFADDEN: I will keep my remarks very simple
and they will track in large measure what has been said in
the written submission on behalf of the American Corporate
Council.

The first point is that we think the guidelines are
not needed. There is not enough data, in our judgment, to
form a meaningful set of guidelines. Nor does the data
establish a demonstrated need for the guidelines.

I do not believe that American business is as
corrupt as Professor Mayer and others have suggested. I have
seen American business from the point of view of a practicing
lawyer in two States, New York and Alabama, from a point of
view of a trial judge in which I had many corporations before
me in many contexts. I am not an expert on sentencing
corporations, however. And I have been in the business world
for a good many years in a company with international
operations and thousands of employees and I do not believe we
have the critical criminal problem which has been suggested
here.

Nor do I believe that the prosecutors and law
enforcement agencies at all levels of Government, both local,
State, and Federal, are as incompetent as it has been
suggested. Particularly, Professor Mayer suggests that there
are thousands of undiscovered and unprosecuted crimes. I
just believe that our regulatory agencies and our law
enforcement agencies at all levels of Government have been
more efficient than it has been suggested.

I would have less problem with these guidelines if
the standard of criminal conduct was the same for corpora-
tions as it is for individuals. If we are talking about
conduct with criminal intent on behalf of the senior manage-
ment of a corporation, I would be the last to defend any
leniency in that aspect of the enforcement of the criminal
laws and the imposition of the fines that the Congress has
seen fit to impose.

However, as we all know, under the doctrine of
imputed liability, senior management of a corporation and the
corporation must face the liability of conduct of very low
level employees, some cases have suggested menial employees,
notwithstanding a very detailed compliance program, such as
has been outlined to you, and an aggressive execution of that
compliance program.

At times the corporation may be held criminally
liable when the individual who was committing the act did not
know it was illegal. He was stupid, but it was illegal. And
I suggest that when we are dealing with that kind of cir-
cumstances the application of mechanical guidelines with
little or no discretion on the part of the judge is perhaps
misplaced.

I have a lot of faith in the judges that the
Congress and the President have sent to the Federal bench
over the years. And I believe by and large they are capable
of fitting in this context the crime to the punishment,
particularly where there is no body of empirical data to
establish the disparities and the other deficiencies which
the Congress and the Commission have found in the sentencing
process.

Another theory I have with respect to this, that if
you take the discretion away from the judge you give it to
the prosecutor and I am told, although I have made no
independent study of it, that with respect to the individual
guidelines some of the sitting judges are complaining that
that's what's happening, that the discretion is being removed
from the courtroom to the prosecution's drafting table.

I suggest to you that the judge is the one, the
Article 3 judge appointed by the President and approved by
the Senate, is the one who should exercise that discretion
and not the prosecutor.

Now I am acutely aware that the probation
guidelines are policy statements and that if passed would not
be binding on the courts. But with the congressional mandate
that this Sentencing Commission possesses it would be very,
very difficult for the courts to ignore them and I also
suggest to you that policy guidelines and recommendations are
one step away from final and binding guidelines. That would
be the normal progression.

I suggest to you, as other speakers have, that
judges by inclination, training, experience, and time are not
capable of running corporations; not capable of running them
even if they did have the education, experience, and inclina-
tion because of the other duties.
The Fifth Circuit Court of Appeals of the United
States took judicial notice once that Federal judges were not
particularly competent in accounting matters. I being the
judge of whom they were speaking, I became acutely aware of
that judicial notice.

I would suspect that the courts would take judicial
notice that trial judges are not particularly expert at
running corporations. More importantly, however, I think
that the courts, if they undertake to run the corporations,
will run afoul of other courts and other governmental
agencies.

If the court has to put its stamp of approval on
the issuances of new securities, the acquiring of debt, it
would be in conflict with both State and Federal agencies
with respect to those matters.

If the court has to give its approval before a
bankruptcy proceeding may proceed, I suggest that we will
have conflicting courts both with jurisdiction over that
matter if the sentencing court chooses to exercise it.

Mr. Chairman, those are all of the remarks that I
propose to make at this time, and I, of course, invite
questions from the Commission.
CHAIRMAN WILKINS: Thank you, Judge McFadden.
Judge MacKinnon?

COMMISSIONER MacKINNON: You spoke about your experience and I think your current experience. Has that been international?

MR. McFADDEN: Yes, sir.

COMMISSIONER MacKINNON: Is your client in the waste management field internationally?

MR. McFADDEN: We are in the business of designing and building plants, among other things, to burn waste in the United States. We were in that business in the United States and in Europe. We have sold the company in Europe which was involved in it.

But we do not deal with the waste until it is delivered to the plant where it is then burned and converted into energy.

COMMISSIONER MacKINNON: Really my question was whether Blount was in the waste management field or operation in Australia.

MR. McFADDEN: No, sir.

COMMISSIONER MacKINNON: I know you are in Minneapolis, but I--
MR. McFADDEN: Yes, sir. We do have a plant in Minneapolis and one in New Jersey.

COMMISSIONER MacKINNON: I just wondered how extensive that was. That was a new venture for a Postmaster General.

MR. McFADDEN: Yes, sir. It was a new venture for the Postmaster General and it is not—we have two plants in operation and some that may or may not go forward and, as we have announced publicly, that unit of our business is for sale.

COMMISSIONER MacKINNON: I can understand why. I get the Minneapolis paper everyday.

MR. McFADDEN: Well, you understand some of the political problems and the staying power that is necessary. We think it is a good business, but—

COMMISSIONER MacKINNON: That's all I have. Thanks a lot, Judge.

MR. McFADDEN: Yes, sir.

COMMISSIONER CORROTHERS: Judge McFadden, you have indicated in your testimony that an aggressive compliance program should merit more than a 20 percent reduction in the fine.
MR. McFADDEN: Yes, ma’am.

COMMISSIONER CORROTHERS: Could you share with me what you feel would be an adequate reduction? Do you have in mind a certain percentage?

MR. McFADDEN: I do not have in mind a certain percentage and I would not. I philosophically have problems with percentages because there is so many factors involved in it. And I know from experience that you can have a very aggressive, hard compliance program and in organization with 10 or 15 or 20 thousand people someone violates the law. And I think there are so many factors in that that the trial judge would have to put all of those together and I hesitate to put a percentage on it.

COMMISSIONER CORROTHERS: I guess even as I’m listening you I guess even with the compliance programs they could vary in terms of how effective they are or how well thought out they are, or how many factor—how strong they are.

So I guess that would be one of the things too the judge would have to look at.

MR. McFADDEN: Yes, ma’am. There are two factors to it. I can write a very detailed compliance program and...
distribute it to all of the managers, but unless the managers aggressively monitor it and execute it, it’s not worth the paper it’s written on.

COMMISSIONER CORROThERS: And have training or some type of quality control, or some type of internal auditing system to verify that the employees are indeed following those procedures.

MR. McFADDEN: And while we are on the subject of mitigating matters, it seems to me that one of these is a catch 22 as a reduction of 20 percent if the corporation discovers it and reports it to the authorities.

And if the corporation discovers it and reports it to the authorities, it has made the case for the prosecutor and it would be an unusual prosecutor that wouldn’t take advantage of that.

So you encourage them to comply, but then—and you reduce the fine, but when he goes into court still on a guilty plea, as I would understand it, he would be subject to a minimum penalty of 200 percent of the gain or loss with the mitigating and aggravating factors applied, and that’s troublesome to me.

Excuse me. You asked a question and didn’t ask for
another speech. I'm sorry about that.

COMMISSIONER CORROthers: Oh, that's fine. I found useful all of your comments. Thank you very much.

MR. McPADDEN: Thank you, ma'am.

CHAIRMAN WILKINS: Questions, Commissioner Nagel?

COMMISSIONER NAGEL: No.

COMMISSIONER MacKINNON: Judge, on the discount for cooperation and things like that, in England I think they suggest 30 to 40 percent. Would you think that would be about adequate?

MR. McPADDEN: Well, I think that would certainly be a good place to start and we are talking about cooperation with the prosecuting people, but it is difficult for me to assign percentages to it because these matters are so complex—often are so complex.

Cooperation after the involvement of high level management, knowing better and with intent to violate the law is one thing. Cooperation when some low level employee has been stupid is quite another.

COMMISSIONER MacKINNON: Thank you.

CHAIRMAN WILKINS: Thank you very much, Judge. We appreciate you sharing your views with us.
MR. McFADDEN: Thank you.

CHAIRMAN WILKINS: Our next witness is Roger W. Langsdorf, Senior Counsel and Director of Antitrust Compliance of ITT.

You are representing the United States Chamber of Commerce today, is that correct, Mr. Langsdorf?

MR. LANGSDORF: That is correct.

CHAIRMAN WILKINS: We are glad to have you with us.

MR. LANGSDORF: I am very glad to be here.

STATEMENT OF MR. ROGER W. LANGSDORF, SENIOR COUNSEL, DIRECTOR OF ANTITRUST COMPLIANCE, ITT CORPORATION, U.S. CHAMBER OF COMMERCE

MR. LANGSDORF: I am appearing on behalf of the nearly 180,000 organizations which are members of the Chamber of Commerce. More than 92 percent of the Chamber's members are small business firms with fewer than 100 employees.

Fifty nine percent have fewer than 10 employees.

In formulating the sentencing guidelines for individuals, the Commission was guided by the principle that all defendants should be treated in an equal manner since all men and women are created equal at least in the eyes of the law.
The problem in extending this proposition to organizations is that unlike people, organizations are not created equal. They range in size and degree of complexity from a one man corporation to a multi-national giant.

As the Commission has noted, between 85 and 90 percent of organizations sentenced in the last 5 years were small and closely held.

Fines which may well be within the means of a multi-billion dollar corporation may virtually destroy a smaller organization. However, except where there is a total inability to pay, the court is forbidden under the guidelines to lower the fines below the guideline minimum.

The guidelines are based on the assumption that organizations should be treated much more harshly than individuals regardless of the size of the organization. The fine scales under both options are greatly in excess of the fine schedules for individuals, particularly in the case of the smaller organization and is unfair and irrational to impose a substantially greater minimum fine on a defendant simply because it is an organization. As a result, innocent stockholders may be punished much more severely than individuals perpetrating the crime.
Because of the vast differences between organizations, the minimum fine should be set at a level low enough to give the court flexibility to ensure that the punishment fits the organization as well as the crime.

In Section 3572 of Title 18 of the United States Code, the court in determining whether to impose a fine and the amount of fine is required to consider among other factors the defendant's income, the burden that the fine will impose, whether restitution is ordered, and the amount and the size of the organization.

The guidelines list these factors, but state that they may be considered by the court only in determining the amount of the fine within the guideline range. This is a clear violation of the statute which specifies that the factors must be considered by the court in determining whether to impose any fine at all or a fortiori, whether to go below the minimum levels.

We have serious problems with both of the options which the Commission has imposed. In both cases the fines would be greatly in excess of the fines which have been imposed on organizations in past cases.

On Monday night, I received a telephone call from
John Lott, who was formerly the chief economist at the Commission and is now a professor at UCLA Business School. He said that he conservatively estimated that the fines under Option--

COMMISSIONER MacKINNON: Of what Commission?

MR. LANGSDORF: Pardon me. The United States Sentencing Commission.

--that the fines under Option 1 would constitute a 15 to 20 fold increase in the fines on organizations and that Option 2 would constitute a 40 fold increase in such fines.

What possible justification can there be for these truly massive increases? What research has the Commission conducted to determine whether these increases are necessary? What studies has the Commission made to determine what cost this increase would impose on business? How many businesses would be driven to the brink of bankruptcy? What determination has the Commission made of the effect which these increases would have on decreasing crime?

The only studies we have seen by the Commission's staff are two papers setting forth a compilation of the means and medians of fines which were imposed in 1984 to 1988. As far as we can tell, there is no correlation between the
results of these studies and the fines which have been
imposed in the guidelines.

We are disturbed that no matter which option is
selected the minimum fines which will be imposed would often
been greater than the maximum fines permitted by statute.
The effect would be to deny the courts the discretion which
Congress intended them to have to lower fines below the
statutory maximum.

Under Option 2, the fines at the upper end of the
scale would wipe out many small businesses, which constitute
a vast majority of the defendants. However, we feel that
Option 2 may be even worse. Thus, if there is a substantial
loss say in an environmental spill of say 100 million
dollars, the fine would be a minimum of 200 million dollars
and if restitution is not practicable at the time of sentenc-
ing, the fine would be 300 million dollars. This is certain-
ly massive by any standard and this could be for a low level
offense. So that it would be entirely disproportionate to
the degree of culpability.

In some cases such a fine may be justified, but in
many cases it would not and under the guidelines the courts
would be stripped of the discretion to lower the fines.
With respect to restitution, Judge Wilkins is quoted as saying in a Wall Street Journal, January 19th, that the thrust of the guidelines is to provide a system which will promote and motivate and provide real strong incentives for companies to police themselves, for corporations that don't cooperate, that don't clean up the environment when on order to, that don't make restitution, some penalties, heavy penalties may be imposed.

When in fact under the guidelines heavy penalties or fines are imposed whether or not restitution is made. Indeed, as I read the guidelines, particularly Option 1, the greater the amount paid thereby establishing the amount of the loss, the greater the fines would be. Thus, rather than provide an incentive to make restitution, it does the opposite.

In conclusion, we would like to endorse the recommendation made by some of the previous speakers to issue the guidelines if at all in a non-binding form at this time. You might even consider issuing them with both options so that the courts could select between the options or within Option 1, of if they deem it appropriate, to go below the options.
The courts will then have an opportunity to see how
they work in actual practice for perhaps a period of 3 years,
given the higher level of fines which the Congress has
authorized courts to impose.

At the end of this period the Commission then can
determine on the basis of this actual experience whether a
separate set of mandatory guidelines for organizations should
be issued at all and, if so, what the form of these
guidelines should be.

CHAIRMAN WILKINS: Thank you very much.

Questions?

COMMISSIONER MacKINNON: Counsel, you said that
these fines bore no relation to your prior fines. Of course,
you recognize that the Congress has increased very substan-
tially--

MR. LANGSDORF: I understand that.

COMMISSIONER MacKINNON: --the amount of fines.

And, of course, the--

MR. LANGSDORF: The maximum fines which may be
imposed.

COMMISSIONER MacKINNON: Well, and, of course, the
necessarily the fines before that couldn't be anywhere near
what they can be now or should be now according to what
Congress has opened up.

MR. LANGSDORF: That's true.

COMMISSIONER MacKINNON: You recognize also that
these fines can't exceed what Congress has authorized.

MR. LANGSDORF: I understand that, but they--as I
pointed out, what the effect of these guidelines is in many
cases to push the fines up to the statutory maximum so that
there is no real minimum/maximum, it's right at that level.

COMMISSIONER MacKINNON: I'm very appreciative of
having your figures on the amount of members and the amount
of your members that involves small corporations.

Thank you.

COMMISSIONER NAGEL: I wanted to just follow up on
something I very quickly read in your testimony, which we
just got and so that is--

MR. LANGSDORF: I apologize for that.

COMMISSIONER NAGEL: No, that's fine. I tried to
glance through it quickly. And that is that it appears to me
that you might be arguing that the Commission should take
into account the size of the corporation in order to dif-
ferentiate the appropriate fine and that's a position that we
have previously heard a great deal of testimony about, but on
the other side, that is, most everyone else who has testified
before us has argued not to take size into account. I think
there was an exception this morning in Professor Stone's
testimony.

Can you elaborate for a minute on that because it's
an area we've debated at great length?

MR. LANGSDORF: I realize it's a very difficult
proposition and in my capacity as lawyer for ITT Corporation,
I hesitate to urge that higher fines be imposed on larger
corporations.

The point that we are trying to make is that there
has to be a wide range so that the courts can take the size
of the corporation, particularly at the lower end, into
consideration. I think that's—I suppose the balance has to
be struck, but when the minimums are so high and they are
beyond—I think that in many cases people think of a major
corporation in setting them.

When the minimums are so high they are above the
level of the smaller corporation. And, therefore, I think
that the range has to be low enough so that it is within the
reach of smaller corporations.
COMMISSIONER NAGEL: Let me put the question more specifically as it has emerged in prior debates. Suppose you have two organizations, both convicted of polluting. You estimate that the harm is equal in both instances, suppose it's equal to $100,000, just say it's small. One is a very small mom and pop operation and one is a major corporation.

Do you set a fine in accordance with the harm, that is the $100,000, however you do that, or do you set it with the harm modified by some consideration of one is a small mom and pop and one is a major corporation, or do you look primarily to the size? What would your view on that be?

MR. LANGSDORF: I guess my view is that in every one of these situations it depends on a number of factors. I think--

COMMISSIONER NAGEL: Assume all other factors are equal.

MR. LANGSDORF: For a small corporation a fine, I suppose, even of that size could be prohibitive for--frankly for a company the size of ITT that would be a slap on the risk. And I think it does--and I think the courts just have to have this flexibility. It may depend on a number of factors, what kind of a compliance program the court--
COMMISSIONER NAGEL: But you would take size into account, assuming everything else is equal, because this has been, as I say, an area of great debate and--

MR. LANGSDORF: Yes, I would, but I think that to formulate guidelines that rejudify that would be almost impossible. That's why I urge flexibility.

COMMISSIONER NAGEL: Thank you.

CHAIRMAN WILKINS: Let me ask you very quickly, assuming that the corporation is indicted and convicted, high level management was involved in the decision making process of the misconduct, they did not cooperate, didn't voluntarily make restitution, the illegal gain was a half a million dollars, what should the fine be?

MR. LANGSDORF: I think that the--I would like to make a point that I think one of the other speakers made that a distinction can be drawn between gain and loss. I'm particularly troubled by the loss situation, as I said, in an environmental case where something which can be even a low level crime can cause a massive amount of loss. I think the unfairness is much greater.

I think that where the top level management is involved and there is a large gain, and particularly if the
corporation is in a position to afford it, I think the fine should be severe and I don't know exactly what multiple, but-

CHAIRMAN WILKINS: What is it, 2, or 3, or 4--

MR. LANGSDORF: I would be not shocked by two times of the amount. If there is an actual gain and the corporation can afford it, yes, that would not shock me.

CHAIRMAN WILKINS: Two wouldn't. Would four shock you? I'm just asking you. See we've got to make these hard calls. I'm asking--

MR. LANGSDORF: I mean it's really difficult for you to play God on some of these things and that's one of my problems. These figures just come out of nowhere with effects on every corporation and every type of situation, every type of crime. That's why I'm really troubled by the whole proposition.

CHAIRMAN WILKINS: Commission Corrothers has a question.

COMMISSIONER CORROThERS: Since we just received your testimony, I hope I'm not misrepresenting your views. I am trying to quickly look at it. But I believe that you feel that unless the--this is in the area of probation--that
unless the company is without resources for policing itself that the notion of probation is offensive.

I'm wondering what the alternative is when, as we indicated among the circumstances in our published draft, that there is a criminal conviction within a previous say 5 years of conduct similar to that's involved in the instance offense or high level management involvement, as sustained or pervasive pattern of criminal behavior, et cetera, there is clear assurance that what--I guess I'm wondering what alternatives do you have to assure that there is some type of assurance that the problem will be remedied?

MR. LANGSDORF: In such a case appropriation is clearly, clearly appropriate.

COMMISSIONER CORROTHERS: So then you don't find in every instance the notion of probation to be offensive?

MR. LANGSDORF: No, certainly not. I think this--As I understand, the guidelines will greatly expand the circumstances under which probation would have to be ordered and that we would find offensive.

COMMISSIONER CORROTHERS: It seemed that--your view appeared quite restricted in your statement that except for when the company has no resources you found it offensive. So
that was a pretty strong statement.

MR. LANGSDORF: Yes, I think certainly subject to
the amendment that you have suggested.

COMMISSIONER CORROTHERS: Okay. Thank you.

COMMISSIONER MacKINNON: Counsel, if a judge
finished with a case and he didn’t do a lot else, but he had
someone that has paid the normal one, and he had some
reluctance to be assured that the corporation was going to
operate properly thereafter, wouldn’t you think that that
would be a good case to put the corporation say on a year or
two probation to see, nothing else?

MR. LANGSDORF: I think within the discretion of
the judge, yes, Your Honor, yes.

CHAIRMAN WILKINS: Thank you very much, sir.

Our next witness is Samuel J. Buffone. Mr. Buffone
is a practicing attorney here in Washington. He’s here
representing the American Bar Association. He is also the
Chairman of an practitioners advisory working group that
works very closely with the Commission.

Mr. Buffone, we are delighted to have you with us.

STATEMENT OF MR. SAMUEL J. BUFFONE, AMERICAN BAR ASSOCIATION

MR. BUFFONE: Thank you, Chairman Wilkins and
Members of the Commission. I am pleased to be here. As the Chairman noted, I appear today to speak on behalf of the American Bar Association.

I would like to recognize at the outset that in the preparation of our testimony the committee that I Chair on the Sentencing Commission was aided and worked quite closely with other arms of the American Bar Association, specifically, the White Collar Crime Committee, a subcommittee Chaired by Victoria Toensing, that contributed substantially to our positions as reflected in our written testimony.

I would also like to echo a comment that I made during the last set of hearings on organization sanctions, but I think is even more evident, and that is that the Commission deserves to be praised for the process by which you have considered the complex issues posed by organizational sanctions.

We at the American Bar Association believe that the openness and depth of the consideration that you have given to this issue should not only be a model for further deliberative processes of the Commission, but for other agencies as well. And we commend you for the effort you have put into this and the openness by which you have received
comments not only from our organization, but from the public at large.

CHAIRMAN WILKINS: Thank you.

MR. BUFFONE: In our prior testimony on these issues given in October of 1988, we suggested that the Commission adopt a flexible approach to organizational sanctions and suggested at that time that you use broadly formulated guidelines with expansive commentary so as to permit a period of experimentation and application.

Our views at that point were that that period of experimentation would permit the generation of a data base that would permit the Commission to go forward towards the promulgation of more concrete guidelines.

I have read and heard some of the testimony that has been given this morning and I understand that there have been some comments that have been supportive of that type of approach.

I would like to try to bring some specificity to just what our position is because I think it diverges somewhat from what some of the other witnesses testified to.

First, we support organizational guidelines. We believe that there should be guidelines consistent with the
statute and the Commission's purpose to aid judges in the sentencing of organizations.

We believe that now is an appropriate time to promulgate such guidelines. However, we recognize, as we have in the past, that the small amount of data available to the Commission does not provide an adequate basis to have a firm and concrete set of guidelines that will cover all application situations.

We think that absence of data is further compounded by the fact that as the Commission itself has recognized this is a new day for organizational sentencing. Enhanced fines, availability of alternative sentencing options such as corporate probation, that while available in the past, have not been utilized on a regular basis by sentencing courts, creates even some suspicion for the data that does exist.

In addition, we have seen an increase in enforcement activities by the Department of Justice in the areas of economic and white collar crime that of necessity involve organizations. And we believe that as that stepped up campaign of enforcement continues into the future that you are going to see more instances of organizational sentencing rather than less.
That all comes together, we believe, to create a situation where the Commission should look for procedures and guidelines that permit applications that will permit sentencing judges to experiment, to have some breath to the options that are available to them and then as a Commission to closely monitor that data and move towards concrete guidelines that would cover more of the application situations like the individual guidelines.

In the interim period, what we recommend is that you have broadly formulated guidelines; that those guidelines be accompanied by expansive commentary. By expansive commentary I mean commentary that will in detail address many of the issues that have been considered through your long deliberative process, reflect some of the debate that you have heard on those issues, and give some guidance.

We believe that one of the most complicating issues in the area of organizational sentencing is the range of issues created by vicarious liability. And I know you have heard from others speak about the issues of vicarious liability as they apply to corporate criminality.

We think that the breath and range of the vicarious liability doctrine creates the potential for unforeseen
applications and the Commission should recognize that and in its commentary direct district courts to view the applications of vicarious liability and suggest that the departures may be appropriate where there are unforeseen applications of vicarious liability.

That brings us to our next point, which is departure authority generally. The Commission has taken a position on departures in the proposed guidelines that while addressing several specific issues does not vary much from the generalized standard of departures as contained in the individual guidelines.

We suggest that consistent with the statute that, as you know, limits departures to matters that were not adequately considered of a kind or to a degree by the Commission that you draft commentary to make it clear that there are many factors that you have not adequately considered; that you expect that those factors will indeed be presented to sentencing court judges and that consistent with the Commission's heart land concept of departures as expressed in the initial individual guidelines, that you make clear that the heart land for organizational sentencing may indeed be a very narrow heart land, but given the limited
experience in the past, that the typical normative case that
the guidelines are based on is a very narrow range of cases
and that the availability of departure on either side of that
heart land indeed may be far more expansive than in the area
of individual guidelines.

As a second basic recommendation, we recommend that
the organizational guidelines provide for flexibility in the
application of monetary penalties and increased coordination
with civil and administrative remedies.

It is the ABA's position, as reflected in its
Standards on Criminal Justice, that monetary penalties,
including fines and restitution, should be the principle
weapon in the arsenal of a sentencing judge when looking at
the issues of corporate criminality.

We do not believe, however, that they are always
necessary or that monetary sanctions should in all instances
be the predominant sanction.

We read the guidelines as making mandatory sanc-
tions perhaps more mandatory than the statute contemplated.

In our written testimony, we have addressed the issues of the
statutory mandate for imposing fines and restitution and have
suggested that the guidelines be moderated to make it clear
that fines are not necessary in all cases.

Regarding coordination with civil and administrative remedies, we suggest that any final guidelines clarify the degree of coordination with civil and administrative remedies, both those that have gone to judgment, those that are filed and proceeding, and those that are contemplated.

We would foresee a system in which sentencing judges would have authority to judge the likelihood that administrative or civil remedies will in fact be instituted and provide an adequate remedy for restitution, and satisfy part of the need that would be served by a punitive fine.

That position is in large part driven by our fear that the complexity of factual determinations required for findings of gain and loss in order to determine the appropriate level of fines or the appropriate level of restitution may unduly complicate the sentencing process.

We believe that the undue complication is not always an excuse for not imposing fines or restitution, as the statute may reflect at least as to restitution, and that often civil remedies and administrative remedies provide an efficient and satisfactory basis for determining the levels of restitution and provide some disgourgement of ill gotten
gains from corporate wrongdoers.

Our third general recommendation is that the guidelines should limit the circumstances under which intervention as corporate probation is appropriate. And I use the word "intervention" as advisably.

While our criminal justice standards take almost a semantic approach to this that corporate probation is a misnomer, I don’t mean to make much of the semantics, but rather, I would like to focus on the application.

Where corporate probation is truly interventionist in the sense that the nature of the probation requires intervention into the ongoing affairs of the corporation at the management level, controlling such things as the payment of dividends, the establishment of business plans, and the formulation of the corporation’s business practices in the future, we believe that those kinds of interventionist probation should be limited for a narrow range of cases where they are indeed necessary.

The guidelines mandate that probation and a series of probationary conditions will be imposed in all cases where there has not been payment of a monetary fine or sanction at the time of sentencing.
We have tried to set out in our testimony a wide range of circumstances in which we believe it will not be possible or appropriate for monetary sanctions to be paid at the time of sentencing.

Either the exact amount of restitution or fines cannot be appropriately determined at the point of sentencing, the restitutionary victims cannot be appropriately isolated, the corporation may determine that it wishes to lodge an appeal and challenge the finding, there will be situations in which there will be much more complicated remedial orders that may require additional fact finding and some level of implementation before an adequate restitutionary or monetary penalty can be arrived at.

In those situations, we believe it is not appropriate to impose probation as a matter of course with probationary conditions which may be interventionist in nature.

In addition, there will be a wide range of circumstances, we believe, in which the ability and willingness of a corporation to pay a fine or restitution will indeed not be at issue.

In those circumstances, unless a court makes a
specific finding that there is either a likelihood of an
inability to pay, or a likelihood of an unwillingness on
behalf of the corporate defendant to make payment, in those
situations probation would clearly be necessary in order to
ensure that the monetary sanctions are carried out.

If those two findings are not made, then we do not
believe that corporate probation would be appropriate in
those circumstances.

Again, to summarize, we believe that the remedy of
probation should be applied in a narrow range of cases,
first, to those cases where other sanctions cannot be
adequately carried out without probation, the example of
corporation that does not have the financial ability or the
willingness to pay a fine. It should be reserved for the
narrow range of cases where supervision of the corporation’s
activities will promote law abiding conduct and serve other
criminal law purposes.

There has been many references to environmental
crimes. We envision circumstances in which environmental
compliance might well be furthered by a probationary sen-
tence.

We envision circumstances in which the level of
criminality in a corporation and the absence of any effect of
compliance or self-policing policies or programs within the
corporation would be furthered by some degree of intervention
that would ensure that such policies and programs were put
into place.

Our fear is that reading the guidelines, as they
are now suggested, if we have that wide range of corporations
that are the smaller corporations that have been referred to,
then in all likelihood will not have formalized compliance
programs. If a judge is to make a finding, as suggested by
the guidelines, would such programs in the future in all
likelihood decrease the potential for further criminality?

I believe the exact language as contained at
Section 8d 1.1(c)(3), the court finds that probation will
significantly increase the likelihood of future compliance
with the law. Our fear is that where there has been past
criminality, no corporate compliance program, that a judge
would be hard pressed to not make that finding that a
compliance program would significantly further future
compliance with the law and that corporate probation will
become the normative, perhaps mandated sanction rather than
the limited sanction envisioned by our criminal justice
Our third general recommendation--excuse me--those three general recommendations are what we believe should govern the formulation of guidelines for corporations. If the Commission is looking for refinements of its existing proposal, we have made a number of specific recommendations for refinements in that proposal.

I would like to address a few of those. One is proposed guideline 8(c)1.1, suggests what we have labeled as a disabling fine provision and it provides that where a corporation is operated for a primarily criminal purpose the fine levels should be set at a sufficient level to take all of the assets of the corporation.

We fear that there are potential dangers in the application of that guideline. It would effectively require the equivalent of a RICO or CCE enterprise forfeiture without any of the many protections mandated by Congress before such forfeiture can be imposed, including a finding of guilt beyond a reasonable doubt as to the forfeiture issues.

It additionally carries with it the potential for vague application. Courts will be asked to determine what is a corporation operated primarily for a criminal purpose.
without any clear definition of what "primarily operated for a criminal purpose" means.

We can envision a situation in which a corporation will be indicted for very limited conduct, convicted of that offense, come to sentencing and find that a whole series of uncharged criminal episodes will be brought to the attention of the sentencing court in order for the court to determine whether or not the corporation has operated primarily for a criminal purpose.

Additionally, the words, "primarily for a criminal purpose", we believe are subject to the same sort of vagueness attack which is recently troubled at least four members of the Supreme Court in H.J., Inc., as applied to the pattern definition in the RICO statute.

Among the other specific suggestions that we have made is that the Commission permit discretion to a sentencing court to waive the comparative culpability of multiple defendants.

We believe the existing case law permits a district court judge to do that for individuals and he should be permitted to do that under the restitutionary guidelines as to corporate and individual defendants or multiple corporate
defendants.

We suggest that Commission permit specifically consideration of acceptance of responsibility. Now we read the guidelines to encompass some consideration of that issue by the Commission and we read your mitigating factors as potentially applicable to the issue of acceptance of responsibility.

We think there should be clarification of the ability of a sentencing court judge to consider true acceptance of responsibility by a corporation, perhaps even pre-conviction and pre-investigation as a factor that would provide for an equivalent two level adjustment as that currently provided for individuals.

We believe that there should be an increase in the fine ranges so as to permit more flexible application of the guidelines so that sentencing judges would have broader discretion to make finding within the range; fewer guideline ranges of more breath.

And I have already addressed the issues regarding monetary penalties, but we have suggested that the proposed guidelines be amended to clarify that monetary penalties should not be necessary in all cases and that where--
me--monetary penalties should not require probationary
conditions in all cases and specifically, the guidelines
should recognize that where an appeal is taken, probationary
conditions should ordinarily be stayed if they are for the sole
purposes of enforcing payment of the fine or restitution.

Thank you for your consideration of our comments.

CHAIRMAN WILKINS: Thank you for your testimony.

Judge MacKinnon?

COMMISSIONER MacKINNON: Why do you say that
corporate probation is a misnomer?

MR. BUFFONE: Judge, I tried to say that was a
semantic distinction and that's the position taken in the
Criminal Justice Standards. The drafters of those standards
took that position because they believed that what they
thought was appropriate for what we're now calling corporate
probation was so divergent from the what we know as in-
dividual probation that it should be called something else.

I think whatever we call it we all understand what
it is and I don't think it makes much difference what we call
it as long as we draw that distinction that corporate
probation is going to serve a different purpose, have
different types of conditions attached to it than it would
for individual probation.

COMMISSIONER MacKINNON: You recognize that it would be an appropriate remedy in some instances?

MR. BUFFONE: Correct, Your Honor. We support corporate probation and believe that it should be one of the sentencing options available to a sentencing judge.

COMMISSIONER MacKINNON: How about apportionment?

You said that you wanted them to weigh the liability among several corporations that are guilty.

MR. BUFFONE: We want the authority to do that, Your Honor. We cited law from two circuits that permit in the application of restitution to individuals a consideration of relative culpability.

We believe that that should be extended to corporations that where you have a situation with individual and corporate defendants or multiple corporate defendants that a court be permitted to apportion restitution based upon culpability.

COMMISSIONER MacKINNON: But not required to do so?

MR. BUFFONE: Not required.

COMMISSIONER MacKINNON: Thank you.

CHAIRMAN WILKINS: Commissioner Saltzburg?
COMMISSIONER SALTZBURG: Sam, I have question. Has the ABA taken a formal position or the criminal justice section? Is this a formal position of theirs or the subcommittee position? What is the status of the testimony?

MR. BUFFONE: You understand our hierarchy somewhat, but it does get complex. This is a position of the Criminal Justice Section. It has not been adopted by the House of Delegates or the Criminal Justice Council.

Our subcommittee has generalized authority to take positions before the Sentencing Commission. Those positions are subject to change when voted upon by the House of Delegates.

In addition, the ABA as a whole certainly has the authority to take positions contrary to those taken by our subcommittee and has not voted on the positions taken in our testimony.

To the extent that they reflect the Criminal Justice Standards and are consistent with them, the standards do reflect overall ABA policy.

COMMISSIONER SALTZBURG: I have just have two other questions about portions of your testimony that are in writing. I don’t think you addressed them here, but maybe
First, there is an argument made in the written portion regarding the use of the word "may" when it comes to restitution and when it comes to fines. And I understand the argument to be that Congress put in the statute that fines "may" be imposed, restitution "may" be imposed and that the proposed guidelines in effect require corporations in many—in fact, all instances where they are convicted to pay fines and to pay restitution if indeed there are victims as to whom restitution can be paid and that somehow the argument is that's a violation of a statute.

Isn't that exactly what the Commission has done with respect to individuals and imprisonments and the same word "may" used and isn't the whole idea of guidelines to have something to guide courts and they can depart when they find something the Commission hasn't considered?

MR. BUFFONE: I said the basic position did not mean to imply that the guidelines would be legal. We believe, however, that the statutory language that we referred to indicated that Congress contemplated that there might be situations in which fines or restitutions would not be necessary and we think that the guidelines should clarify
that fines and restitutions are not mandatory in all situations.

But I think the broader issue is that the Commission has made a determination in its draft guidelines that it will be a primarily fine driven sanction system. While with emphasis on primary, we don’t dispute that basic decision, we think the Commission may have gone too far in being—n having the entire sanction model be driven by the fine determination and we think that the commentary should suggest that there may well be instances of corporate criminality where other types of remedies, including corporate probation compliance programs, remedial orders, notice to victims, may be more important the monetary sanctions.

COMMISSIONER SALTZBURG: Let me ask one other question. I don’t understand at all, I confess, the portion of the testimony in writing that has to deal with appeals.

The argument as I understand it is somehow the imposition of probation when a corporation is unable to immediately pay a fine interferes or impairs the right to appeal. And the subpoint is that if a corporation is simply fined and can pay it, it can seek a stay of the fine by posting a bond and then can appeal.
Maybe you could explain this to me. It seems to me a corporation has the right to appeal upon the imposition of any sentence and it is true, I guess, it's true that if probation has taken effect, probation conditions may be imposed while an appeal is pending, but it is also true, isn't it, the same is true with respect to a bond, there's a cost of posting it the whole time the appeal is pending. So I don't understand the argument.

MR. BUFFONE: Let me give an example of how I think that would affect. Let's assume that we have a Fortune 500 corporation that for the past hundred years has paid a quarterly dividend and its stock in large part may trade at a higher value because of the anticipation of investors that they are going to be paid that quarterly dividend. Let's further assume that that same corporation is convicted of a crime and that there is a significant fine attached in the millions of dollars.

At the time of sentencing, the corporation may believe that it has a very solid grounds for appeal, but under—as we read the guidelines, the fine would be imposed at the time of sentencing, probation would attach because the fine was not paid, and one of the conditions of probation
would be that any dividends could not be paid without the approval of the court.

Now that might send shock waves out to the investors who hold the stock because of the security of the dividend payment. We think that corporation should be placed in a situation where there can be a stay of that condition of probation until a determination is made that the fine is in fact final following appeal and the corporation would then pay it.

COMMISSIONER MacKINNON: How does that interfere with appeal?

MR. BUFFONE: Well, not having the right to stay those conditions of probation would interfere with the appellate right, Your Honor, because the corporation would be forced to choose between having someone interfere with their dividend determination or go forward with this appeal.

I understand Commissioner Saltzburg to say that the solution there is to merely bond the fine. It's not clear from the guidelines that that's an option.

COMMISSIONER SALTZBURG: What I guess I'm saying so I understand the point, that you are right, as long as the probation conditions attach, and if the corporation appeals
it may be subject to all the conditions while the appeal is pending, right?

MR. BUFFONE: That is correct.

COMMISSIONER SALTZBURG: But he can always ask the judge, "Judge, don't interfere with our paying the dividend", right?

MR. BUFFONE: I think it's a very easy problem to deal with and that would be dealt with quite simply by a statement to that effect in the commentary.

CHAIRMAN WILKINS: Thank you very much. We appreciate your testimony.

Our next witness is Professor Richard Gruner. Professor Gruner is from Whittier College School of Law and he has been in communication with our Commission and indeed has testified on at least one other occasion that I recall.

Professor, delighted to see you again.

STATEMENT OF PROFESSOR RICHARD GRUNER, WHITTIER COLLEGE SCHOOL OF LAW

PROFESSOR GRUNER: It's good to be back and it's nice to be able to testify in support of what I find to be a substantial addition to this area of the law, an area which has been overly neglected and, as one of the earlier tes-
tifiers indicated, I think you’ve addressed one of the problems that society is currently focusing on, that being corporate misconduct and the scope of corporate impacts that that misconduct can impose.

I would like to speak today about a few specific topics that are addressed in more detail in my written submission; first of all, some of the choices that the Commission has left open in the draft, and also, some additions to the draft that I think would improve it.

Overall, I want to emphasize though that I think both in the area of corporate and organizational fines and in the probationary standards that the draft is an excellent set of standards and requires no dramatic fundamental change.

The few areas that I would like to indicate that there might be adjustments concerning, first of all, the major choice of Option 1 versus Option 2 in the fine setting standards.

I think it’s clear to persons that think about how corporations make decisions that a standard that inadequately deters corporations from pursuing illegal gains is an inadequate fine setting standard and I think as currently drafted, Option 2 would create inadequate deterrence to
crimes that are aimed at illegal gains.

For that reason, particularly with respect to pecuniary offenses, those meaning where gain is the object, that those I think are the substantial bulk of the offenses that are going to be involved here, that the fines that would be produced by Option 2 are just way too low.

The need is for a fine setting mechanism that more than extracts illegal gains, a fine setting mechanism that extracts multiple times illegal gains such that an organization or a person within an organization who knows that not every offense is going to be penalized will nonetheless see organizational fines because of their multiple of illegal gain amount will nonetheless be deterred by the scope of the potential fine.

That is why the mechanism in Option 1 where gain--as to pecuniary offenses--gain or loss is the primary scaling mechanism seems much more sensible.

I have one reservation about Option 1 which is in the other type of offense, which is in the what I label non-pecuniary offense where the losses and gains are either unmeasurable or small and in that context I am concerned that the Option 1 minimums are too small, particularly in cir-
cumstances where the crime prevention expenses may be large with respect to a type of non-pecuniary offense.

As I read the drafts, and I think it was confirmed in some of the discussion earlier this morning, the advantages to an organization of not implementing crime prevention techniques are not included in the concept of gain under the current draft.

So that if a couple saves a million dollars by not implementing certain crime prevention techniques, it still might come out ahead so long as the offenses that it are involved do not incur losses or gains, meaning that the offenses that might be committed would be punished only by the minimum fines.

There are two approaches to counteract this. One was suggested in discussion this morning, which is to try to incorporate the notion of prevention costs that were not incurred by the organization as a notion of gain and once that's included in gain, then if you pick up in Option 2, those hypothetical gains will raise the appropriate organizational fines.

That's a good approach in concept. I'm concerned though that the notion now of gain is a hypothetical gain.
In other words, the gain to the organization is what they should have done, but didn’t, a very difficult determination it seems to me, particularly since it will be hard to determine, given that we’re talking about actions that were not taken, what should have been done that would have been sufficient to prevent the offense and, therefore, the costs that should be included in that hypothetical gain or the prevention costs gain figure.

It seems to me that a preferable approach might simply be to rely on stiffer minimum penalties, recognizing that those stiffer minimums are to deal with the non-pecuniary offenses and that that forgoes what I see as a very difficult fact finding exercise concerning prevention costs.

I would suggest that as an appropriate measure of minimum fines that indeed the fines that would have been determined under Option 2 might be appropriate minimums under Option 1.

A few other detail issues concerning the fine setting mechanisms; I notice that there is a substantial increase in fines related to the involvement of high level management. And while I would not contest that the involvement of truly high level management is a source of concern
and should be a basis for fine increase, the definition of
who is a high level manager is a very problematic one.

The comments to the current draft indicate that
anyone with substantial management authority will be con-
sidered high level management, while that's helpful because I
think it suggests that some mid-level managers in large
organizations will be within the concept of high level
management.

Defining who has substantial management authority
is of itself an ambiguous or difficult task involving an
ambiguous standard.

It seems to me that a preferable approach would be
rather than relying on a finding that high level management
was involved that instead a sentence increase be premised on
the involvement of any superior with a primary actor in a
crime.

In other words, where an organizational offense is
committed by a primary actor the support in the offense by a
superior at any level or the concealment of that offense by a
superior at any level should be the basis for a fine in-
crease. That would include, of course, the high level
manager who is concealing or supporting, but it would also
include say a branch officer manager who concealed offenses by a subordinate.

As to the provision on fine setting—the provisions that relate to prior offenses and increases based on prior offenses, I have two different types of difficulties. In one dimension I think the provisions are too broad and that’s with respect to large organizations who would find themselves in a position almost always of having some track record of an offense somewhere in that organization within the prior 15 years. And I am troubled by the notion that perhaps in being sentenced for an environmental offense, for example, the concern would have a prior tax reporting offense 14 years previously, obviously in a different functional component of the company.

I don’t see that prior offense as having much basis or much reason to be included as a basis for a fine increase. So I would recommend that the provisions on considering prior offenses as a basis for fine increase relate only to offenses involving similar conduct or similar personnel within the prior 15 years. With that limitation it would apply appropriately to large concerns as well as small ones.

In another respect, however, I think that the prior
offense provisions are too weak. Specifically, it doesn’t seem, according to my reading, that any further increment for the third, fourth, and subsequent offenses; that once you find one prior offense there is an increment, but not so for multiples beyond that.

So I would suggest that in fact the increase be for each prior offense or that there be some arrangement for prior offenses beyond one prior during the period under scrutiny.

Turning to organizational probation, which has been my ongoing interest in the organizational sentencing area, I again applaud the current draft for supporting the notion of probation as an organizational reform tool. I believe this going to be a very commonly used sentence that will achieve significant public benefits.

It is a necessary sentence in that in many respects organizational fines, even at some of these levels may still be inadequate to achieve all of the goals of sentencing under current law.

Particularly when used as a supplement to organizational fines, probation can ensure that actual changes in corporate or organizational behavior to avoid future criminal
misconduct are made.

In addition, probation sentences can help ensure that organizational offenders carry out the corrective measures they have agreed to take by providing for external monitoring of subsequent organizational activities by probation officers or expert consultants.

I do believe that current draft could be strengthened by addition either in policy statements or commentary of more particulars as to the nature of the compliance plans that are envisioned under the draft and I would suggest that the following sorts of measures would be ones that could be specified as illustrative, although not exclusive examples of the types of measures that would be included in a compliance plan.

Specifically, requirements of changes in operating practices where the changes would lessen the chance of subsequent offenses;

Requirements of changes in information handling and monitoring practices that would tend to reveal subsequent offenses;

Requirements of increased monitoring of organizational operations by top managers to expand the awareness of
those top managers of potential illegal conduct at lower levels;

The specification of individual responsibilities for organization reform tasks that are required under the compliance plan; and,

Finally, requirement of studies either at the outset of probation or over the course of the probation term of the sufficiency of organizational practices to prevent and detect illegal actions by organization employees and agents with such studies either to be performed by the organization or by outside experts, as the court deems necessary.

I would go on to point out that in connection with probation used as a reform tool, I believe that the current draft could be strengthened by further provisions concerning the monitoring of probation compliance.

Specifically, the draft currently refers to the creation of reports by the organizational probationer on probation compliance, those reports to be reviewed by the sentencing court or probation officer.

While such reports may be a valuable part of a broader monitoring program, they will not necessarily be sufficient of themselves.
Sentencing courts should be able to authorize
probation officers to make inquiries of organizational
probationers perhaps on an unscheduled basis to determine
their performance under probation terms.

In addition, probation officers should have the
ability to make unscheduled reviews of corporate records and
facilities perhaps, however, subject to the requirement of
advance authorization by a sentencing court.

These are simply good audit techniques. Probation
compliance measurement should not be limited to use of less
effective techniques.

As a related matter, I think there should be
provision in the draft for the appointment of special
probation officers. It has been recognized in prior tes-
timony that courts are not effective in running corporations
or even perhaps monitoring how closely corporations or other
organizations have complied with probation terms.

The solution to that problem is to get the exper-
tise that is necessary. And the way to get that expertise is
through the appointment of special probation officers. Such
probation officers could either be management experts,
attorneys, executives in the same field as the organizational
probationer, persons with enough knowledge of the relevant areas to determine when specific probation terms have or have not been complied with.

And I think the draft would be more effective in providing for probation compliance monitoring if it included reference to these kinds of special probation officers.

As a related matter, the draft does not at current time cover the consequences of revocation of probation and I'm thinking particularly of probation as used as a reform measure.

It would be useful to include further provisions that specify that upon resentencing after a revocation of a probation compliance plan the further compliance plan would include more substantial constraints on conduct and more substantial monitoring provisions to reflect the failure of the earlier plan.

Those are the extent of my prepared comments. I would be happy to answer any questions.

CHAIRMAN WILKINS: Thank you very much.

Judge MacKinnon?

COMMISSIONER MacKINNON: I want to agree with you. You were talking about the appointment of monitors and so on...
to superintend probation. I had already written down on my
notes here before you said that was the way to do that was to
appoint a monitor to ride herd. And I want to tell you
that's the way to do it.

PROFESSOR GRUNER: I think that that's both a--

COMMISSIONER MacKINNON: That could be in the
corporation.

PROFESSOR GRUNER: That could be part of the
compliance plan to designate a compliance officer in the
corporation who is responsible for gathering the information
on compliance status and providing it to the court.

It could be an independent expert that is acting as
a sort of intermediary to interpret the corporation's data to
present a summary to the court.

I think there is a concern that the reports that
may be created will be either so burdensome for the court to
review or so technical for the courts to review that there is
going to need to be some help available and that is the way
to do it.

COMMISSIONER MacKINNON: Well, on the long range,
it's best to have it in house.

PROFESSOR GRUNER: It certainly is. The only
concern with that would be to ensure that the in house person
is himself acting with the independence that such a position
applies.

COMMISSIONER MacKINNON: That's all. Thank you.

COMMISSIONER CORROTHERS: Of course, we are doing
that in the field of corrections, the monitors both in house
and appointed who work with the courts.

My only comment was to say, Professor Gruner, that
I found your testimony quite useful for our purpose and I
thank you.

CHAIRMAN WILKINS: Commissioner Nagel?

COMMISSIONER NAGEL: Yes, sir.

I want to thank you again for your continued help
to the Commission. I have one quick question and that is
that you mention in your written statement the use of what
you call punitive community service. Could you just either
very briefly comment on that for us or perhaps you want to
send something in?

PROFESSOR GRUNER: That would be something to think
about either in amending the community service provisions or
the probation portions. But the idea is that there is prior
case law concerning the use of probation as a means to
implement community service that was clearly punitive to the defendant organization and usually in circumstances where fines would not have been an adequate punitive substitute.

I'm thinking particularly of the Daniel [ph.] 0. Pastries case, which was a case involving price fixing by several New York City bakeries in which had fines been imposed in a substantial amount the bakeries would have gone out of business and there were obviously a lot of employees who were not participants in the price fixing that would have been put out of work.

And there the sentencing court decided that it was more appropriate to require that the bakeries provide essentially loaves of bread, loaves of their product to charitable organizations in the community, but not really for a, what I would consider a normal restitution purpose, it was more to impose a burden of service on the firm to punish them because fines were not adequate.

Now it seems to me if that type of punishment were reserved for circumstances where the organization could not pay its full fine you would limit the risk of cases like the ones appointing professors to endowed chairs, et cetera. You simply would not have those cases because where the corpora-
tion or organization could pay a fine, you would never trigger the punitive probation arrangement.

On the other hand, once a finding of inadequate resources was available and even perhaps in circumstances where a plan of periodic fine payment would be problematical because it too would risk putting the firm out of business, that a substitute arrangement of community service designed to be punitive is a good alternative that should be available.

COMMISSIONER NAGEL: If there are other examples which you can cite to us, the would be very helpful to have.

PROFESSOR GRUNER: I’d be glad to.

COMMISSIONER NAGEL: Thank you.

CHAIRMAN WILKINS: Thank you very much.

PROFESSOR GRUNER: Thank you.

CHAIRMAN WILKINS: Our next witness is Fred Garrick, Associated Builders and Contractors.

Good afternoon, Mr. Garrick. We are glad to have you with us.

STATEMENT OF MR. FRED GARRICK, ASSOCIATED BUILDERS AND CONTRACTORS

MR. GARRICK: Thank you very much.
Judge Wilkins, Members of the Commission, good afternoon. My name is Fred Garrick. I am General Counsel for BENK, a construction general contractor operating throughout the United States.

BENK is a member of Associated Builders and Contractors and I am here today on behalf of ABC to express our concerns with regard to certain aspects of the guidelines this Commission has proposed regarding the sentencing of organizations in criminal cases.

ABC is a national construction trade association representing over 18,000 members who believe in the American shop philosophy which states that jobs should be awarded to the lowest responsible bidder regardless of labor affiliation.

BENK is a national corporation with operations in engineering, construction, and plant maintenance industries. We are headquartered in Birmingham, Alabama.

BENK has experienced phenomenal growth since our founding in 1972. Our contract volume last year was approximately 1.3 billion dollars, just as an indication of the size of our operations.

BENK fully subscribes to the merit shop philosophy.
Although BENK is not signatory to any collective bargaining agreements with any unions, we hire employees regardless of their labor affiliation whether they are union members or independent craft people.

We subcontract work to others based on the lowest responsible bid regardless of whether a subcontractor may be open shop or union affiliated.

CHAIRMAN WILKINS: Mr. Garrick, may I interrupt you a minute, sir?

MR. GARRICK: Yes, sir.

THE WITNESS: We have copies of your testimony. It would really be more beneficial to us if you would summarize the points that you want to make and let us ask you some questions.

I don't know whether you were reading the introductory part or not, but I will let you use your time any way you want to. I just suggest we can benefit more from the other approach.

MR. GARRICK: A revised summary is available for you, sir. But to summarize with regard to the two issues, first, with regard to the probation issue, certain aspects of the probation does give us concern in the control aspect that
a court may have over the corporation, those aspects being
principally the restrictions that may be put on a company and
with regard to the raising of operating capital that may be
necessary because the increase of--any increase in debt in
the corporation or requires approval by the probation officer
who may be in charge.

Construction companies generally live and die by
operating capital and that is a factor that would be of
concern. So, therefore, we would encourage the Commission
through footnotes to address the flexibility that they may
have in the operation of the probation provisions.

Additional concerns would be those relative to
compensation to individual officers or managers who may be
non-related to the incident that was in question.

The other aspect that I would like to address is
with regard to violence within the labor movement. The three
factors that I feel may be warranted as additional considera-
tion with regard to aggravating factors would be an or-
ganization's lack of taking disciplinary action towards
particular members who may be responsible for the actions
involved, in particular, those individuals who may par-
ticipate in or direct violence within--under the offending
actions that the lack of taking such discipline is considered an aggravating factor on behalf of the sentencing guidelines.

An additional consideration with regard to the aggravation factor would be that the activity—the criminal activity is one which acts to deprive citizens of a fundamental right. Going into the classification of the activity, the criminal activity involved, if it has the result of infringing upon fundamental rights of individuals, that also should be considered as an aggravating factor.

And the third item with regard to the aggravation factor—the aggravating factor in determining the fine levels would be the level of violence that may have occurred in such activity.

A lot of the discussions concern the white collar crime of embezzlement or fraud or what have you, but the fact that violence does come into play whether it be for bodily injury or property damage, then that also should be a factor of consideration.

I will pleased to answer any questions you may have.

CHAIRMAN WILKINS: Thank you very much.

Judge MacKinnon?
COMMISSIONER MacKINNON: What are the most frequent offenses that your members are charged with?

MR. GARRICK: That our members are charged with?

COMMISSIONER MacKINNON: Yes.

MR. GARRICK: The contractors whom I represent through the ABC I really can't say that there is a frequency of items that those members are charged with.

COMMISSIONER MacKINNON: Bid rigging?

MR. GARRICK: Pardon?

COMMISSIONER MacKINNON: Bid rigging?

MR. GARRICK: That is certainly an item that has--that contractors have been charged with.

COMMISSIONER MacKINNON: Antitrust at all?

MR. GARRICK: That would fall under the bid rigging provisions, correct.

COMMISSIONER MacKINNON: Well, that's under the--but I'm talking about normal antitrust.

MR. GARRICK: Probably not a whole lot in the antitrust area. Bid rigging would probably be the most--have the most notoriety about it. You may have some environmental--criminal environmental problems that may occasionally crop up. I can't speak on specific instances on that.
COMMISSIONER MacKINNON: And are you speaking about violence in labor matters?

MR. GARRICK: That is correct.

COMMISSIONER MacKINNON: Do you have many offenses in that area?

MR. GARRICK: Yes.

COMMISSIONER MacKINNON: You do?

MR. GARRICK: Yes.

COMMISSIONER MacKINNON: And are they handled through the National Labor Relations Board, or on a criminal basis?

MR. GARRICK: Both. The National Labor Relations Board, you can obtain injunctive remedies to try and cease conduct there, but on the criminal side those are generally pursued by the State agencies through the State criminal laws and occasionally by Federal agencies through any potential violations of Federal laws in that regard.

COMMISSIONER MacKINNON: Thanks a lot.

COMMISSIONER CORROTHERS: Mr. Garrick, you’re in the Birmingham, Alabama office, is that right?

MR. GARRICK: That’s correct.

COMMISSIONER CORROTHERS: I believe that’s near a
little town that's called Anniston.

MR. GARRICK: Yes.

COMMISSIONER CORROTHERS: I had basic training more
years ago than I'd like to remember in Anniston. I can never
forget it even though I try.

MR. GARRICK: I've been there about a year.

Previously, I spent about 12 years in Greenville, South
Carolina where I was general counsel for Daniel at that time.

COMMISSIONER CORROTHERS: I must say that I just
received this written testimony and was trying to look
quickly through it, concerning the application of guidelines
to the labor related violence, which I guess was your second
issue, was quite interesting as well as startling. I had no
idea the degree of problems in this area.

MR. GARRICK: I was in International Falls when a
riot occurred against our company and it was very startling.

COMMISSIONER MacKINNON: Are you talking about
Boise Cascade?

MR. GARRICK: That is correct.

COMMISSIONER CORROTHERS: I certainly agree with
your statement, I think it's on page 9, that the right to
pursue one's livelihood without fear or intimidation would
appear to me to be, as you say, as much a civil right as the
right to vote or use public accommodations.

This is quite startling. Obviously, we should be
concerned about these issues and should consider them in some
way. I will have to have some time to read your testimony
more thoroughly, but I would hope that we are able to do
something in this area.

MR. GARRICK: Thank you.

COMMISSIONER CORROTHERS: Thank you.

CHAIRMAN WILKINS: Commissioner Nagel?

COMMISSIONER NAGEL: Yes. I just wanted to clarify
something. I also just read your statement very quickly.
But is your concern that there is currently inadequate
punishment in terms of the sentences meted out to organiza-
tions convicted of an offense related to the violence? Or is
it the offense of conviction is something other than the
violence, but the violence is part and parcel of the sort of
organizational behavior and, therefore, there should be some
specific offense adjustment?

MR. GARRICK: I think it's twofold; first, that I
don't believe that there is adequate punishment in that area
for violence.
COMMISSIONER NAGEL: Are they even convicted? I mean it looks from what I have read that there aren't even prosecutions or convictions for these offenses.

MR. GARRICK: I'm sorry, I missed that.

COMMISSIONER NAGEL: Are these offenses being prosecuted?

MR. GARRICK: The prosecutions, the ones that are outlined in the statement, there are certain State prosecutions ongoing at this time. There are Federal investigations ongoing. I do not know the results of though because the FBI has not come out with that yet.

The other aspect is sending a message to State agencies that reinforces the Federal Government's position against violence of any form.

COMMISSIONER NAGEL: Thank you.

CHAIRMAN WILKINS: Commissioner Saltzburg?

COMMISSIONER SALTZBURG: No questions.

CHAIRMAN WILKINS: Judge MacKinnon do you have any further questions?

COMMISSIONER MacKINNON: Was Boise Cascade charged with any violation of a State law in connection with the strike in International Falls?
My recollection of reading that was that the union members attacked the corporation for use of non-union labor in a construction project.

MR. GARRICK: Right.

COMMISSIONER MacKINNON: Now as Boise Cascade charged with any offense?

MR. GARRICK: No, they were not.

COMMISSIONER MacKINNON: I'm aware of the attitude of the Governor on that matter.

MR. GARRICK: I did not know before I received notice of the statements today that Boise Cascade was even attending and I haven't spoken with them. I do not know the subject of their talk--

COMMISSIONER MacKINNON: When you mentioned International Falls, that's the one you were talking about, wasn't it?

MR. GARRICK: That is correct.

COMMISSIONER MacKINNON: Thank you.

CHAIRMAN WILKINS: Well, Mr. Garrick, you bring to the table a dimension involving organizational sanctions, that is violence by number of organizations that certainly this Commission needs to give serious consideration to as we
draft guidelines in this area and we thank you very much.

MR. GARRICK: Thank you very much.

CHAIRMAN WILKINS: Nell Minow is General Counsel and is representing the Institutional Shareholders Services.

Ms. Minow, we welcome you to this hearing.

STATEMENT OF MS. NELL MINOW, GENERAL COUNSEL, INSTITUTIONAL SHAREHOLDERS SERVICES

MS. MINOW: Thank you very much.

You have my testimony already. So what I would like to do is just talk very briefly and then perhaps we can discuss some of the points in it.

I hope you will indulge me and let me just make one personal note here. I want you to know that even though I am talking about maybe one speck on one leaf, I'm aware of the forest that you all are dealing with and I am really pleased with what you have done.

When I was in law school, I worked for both the State and the Federal prosecutor's office. I have been very, very interested in sentencing issues ever since then. And just one small note of irony, when you were first getting started, I helped prepare some materials for you. I was at that time in the Justice Department. So I am particularly
pleased to be here in a somewhat different capacity today.

    I am here today to talk about the interest that shareholders have in companies that obey the law. I've outlined already in my testimony and I am following in the footsteps of the President of my company, Bob Monks, the way that shareholders are twice charged with the cost of criminal behavior by the corporations. They pay both the prosecution and the defense as well as the decrease in value of their share ownership.

    And we as advisors to institutional investors with over a trillion dollars of assets, most in equity securities, are very, very much concerned about this.

    When you look at an individual who has violated the law, you look at somebody who faces real personal consequences and you just don't see that in the corporate context the same way.

    Of course, the primary sentencing on all of our minds today I am sure is Rayful Edmond who was given quite a severe sentence. And that is something that the prosecutor in that case announced was intended to be a message to the community that this kind of behavior was going to have these kinds of consequences.
I recall from the materials that I prepared for this Commission when I was at the Justice Department the case of a man convicted of an antitrust violation who was sentenced to public service, which turned out to be the organization of a golfing tournament and I think that that is much too often the case.

I think that people who testify before commissions like this often commit the sin of not saying what they want. So I am going to tell you what I want. When you talk about mitigating factors in sentencing corporations, I would like some mention of a corporate structure indicating that there is some accountability of shareholders in the case of a criminal violation.

I think that is a specific example of the kinds of evidence of taking responsibility for a crime and preventing its occurrence in the future that we look for in an individual or a corporation that has violated the law.

And, other than that, I would be happy to talk some more about some of the items in my written testimony, if that would be useful.

CHAIRMAN WILKINS: I am sure we will have some questions.
Judge MacKinnon, do you have any at this point?

COMMISSIONER MacKINNON: No, I don't. Thank you.

COMMISSIONER CORROTHERS: I think I have one, Ms. Minow. You suggest the provision mandating that no director who has served during the commission of certain identified crimes would be eligible for continued service on the board.

It's been presented to us by others that removal of directors is appropriate in cases wherein they are engaged in racketeering or essentially the directors are responsible for the criminal activity or acted in a criminal manner.

Do you think this particular criteria is appropriate or sufficient?

MS. MINOW: I would go a little further than that and I believe we submitted some materials earlier that were some sample provisions that we would like to see.

There are certain kinds of violations of the law, particularly with regard to pollution occupational safety that I would include there because I think those are the ones where the director should take responsibility for making sure that the company complies.

Now I am not talking about petty violations of their regulations or anything like that. I am talking about
criminal activity and for that reason I think the directors should be held liable.

COMMISSIONER CORROTHERS: There was a problem, as far as I was concerned, in terms of the specifics and you did respond that this particular criteria is not broad enough. I didn't see any specifics in your testimony. You say that we got this earlier?

MS. MINOW: Yes.

COMMISSIONER CORROTHERS: Was this--

MS. MINOW: In a supplemental--

COMMISSIONER CORROTHERS: Was it pertaining to this round of--

MS. MINOW: No, but I would be happy to resubmit it.

COMMISSIONER CORROTHERS: Was it the previous hearing on organizational sanctions?

MS. MINOW: It was a follow up to Mr. Monk's previous testimony, yes, and I would be happy to resubmit it.

COMMISSIONER CORROTHERS: 1988?

MS. MINOW: Yes.

COMMISSIONER CORROTHERS: Thank you.

COMMISSIONER NAGEL: I have one irrelevant question
and one relevant question. My irrelevant question is are you related to the distinguished legal family of Newton Martha?

    MS. MINOW: You bet. I am. As a matter of fact, I will tell you that Martha and I have a new Law Review article which just came out 2 weeks ago on the--the subject of the article is "Shareholder rights and women suffrage", which shows you how desperately we wanted to write something together.

    COMMISSIONER NAGEL: My more relevant question is, there has been a great deal of talk about the innocent shareholder and it's always raised in the context of if you fine corporation proportionate to the loss, that sort of punishment will basically be borne by the innocent shareholder rather than by corporate management.

    And in fact, Bob Monks, I thought, made a very interesting point when he first testified about his idea about holding the board of directors responsible.

    Now the Commission gave great consideration to that idea, ultimately did not follow it because there were too many problems and we had a great deal of concern about the innocent director and basically identifying which was the responsible director.
But, nonetheless, I guess I'd be interested to hear what is your view on this concern for the innocent shareholder and how then do we set an appropriate fine given the corporate structure, which is based on shareholders? What do we do with that?

MS. MINOW: Well, that is a real problem and the answer to that I'm afraid--there is an answer that goes beyond your area of jurisdiction. Right now because of State laws limiting director liability and indemnification there is really no way to get to the directors and get them to pay personally.

So I think that is a very difficult question and you're going to have a problem with the fine. Nevertheless, it is important to keep it as a matter of deterrence. Our shareholders--I know this isn't a complete answer to the question, but our institutional shareholders are holders of every company and even though they may take something of a bath with a big fine out of one of them, they will be profiting in the other ones which will see this fine and refrain from doing likewise, sort of the Rayful Edmond situation.

I don't know what three life sentences does to him
that the first one didn't do, but it send that kind of a
signal.

Also, of course, to the extent that the company
profited improperly from the criminal activity, they should
have to pay up and that's something that no matter how greedy
the shareholders are for returns I don't think that they want
those kinds of returns.

COMMISSIONER NAGEL: Thank you.

COMMISSIONER MacKINNON: Billy?

CHAIRMAN WILKINS: Go ahead, George.

COMMISSIONER MacKINNON: You were talking about
pollution and occupational safety and holding directors
liable. I hear a lot of talk around here about holding
directors liable but in my experience, and it's vast, I think
there are very few cases where directors are liable. The
people that are liable are the officers. Those are the
people that are running the corporation. The directors meet
once a month or so. They don't get down to the hands on
operation of the day to day which are causing these offenses
ordinarily.

MS. MINOW: Yes, that's true, but the directors, of
course, are responsible for selecting management and for
setting up a compensation structure for management.

COMMISSIONER MacKINNON: Yes, but it's just hard to find criminal liability in that.

MS. MINOW: Well, also, I think that the primary reason for holding directors liable is that if you do so it will encourage them to do what some companies have already done in response to criminal liability and that is to set up a compliance structure which encourages employees to report any kind of a problem rather than discouraging it.

And I think directors are responsible for establishing that kind of a structure.

COMMISSIONER MacKINNON: Well, that's minimal. When you get down to an actual offense I think you're going to find that you might not even reach the officer. You're going to get some low level manager or supervisor that's doing it.

MS. MINOW: Yeah, but how often in that case is the company itself convicted of the crime?

COMMISSIONER MacKINNON: Very seldom.

MS. MINOW: Yes, that's why I'm not afraid of being--

COMMISSIONER MacKINNON: The company will be
convicted, but not the director. I mean they are so remote from the day to day operation of those companies that it just isn’t practical to be always talking about directors and ignoring officers and managers and supervisors and people that really cause the offenses.

MS. MINOW: Well, I think you’re right and I was including, of course, the corporate officers who also serve as directors in my discussion.

But I do think you’re right in making a distinction between inside and outside directors. On the other hand, ultimately in the case of certain enumerated crimes, and we’ve submitted some material on that in the past, I think it may be appropriate to hold the directors liable, if they were negligent, if they were complicitus--

COMMISSIONER MacKINNON: Let me ask you this, I have followed this for a long time, can you cite me any cases where directors have been--where any substantial number of directors have been held responsible?

MS. MINOW: No, and I think that’s part of the problem. I think they should be in some cases. That’s what I’m saying here.

COMMISSIONER MacKINNON: Well, if they could have
been I think the United States Attorney would have charged
them.

MS. MINOW: Well, I'm not saying that they should
be put in jail for these kinds of crimes. I'm saying they
should be ineligible for further service on the corporation.
That was one of my possible examples.

COMMISSIONER MacKINNON: That's a theoretical
application, really in my judgment.

MS. MINOW: No, I think it's a mitigating factor in
determining the corporate sentence. If they have
demonstrated that they take criminal activity that seriously,
then I think that should be taken into account in determining
the sentence.

I mean, you know, you've got the example of Japan
where there is an airplane crash and the president of the
company personally visits each and every survivor and then
resigns. And you just don't see that kind of accountability
in American directors.

COMMISSIONER MacKINNON: Well, I don't—I'm not
cconcerned about the crash in Japan. I am concerned about the
payment of the bribe by Boeing to the Prime Minister of the
country.
MS. MINOW: Well, if--Okay. I am too. And don't you think that the directors play some role in that?

COMMISSIONER MacKINNON: I don't know whether they did or not.

MS. MINOW: I think the directors should send a very strong signal to management and say that we will not tolerate any violation of the law. And if they are not capable of sending that signal, then I think they should be removed.

The example that I come back to over and over again, of course, is Beechnut where they knowingly—the top management of that company knowingly permitted sugar water to be sold as apple juice for infants who, of course, don't know what apple juice is supposed to taste like and couldn't tell you even if they did, which was bad enough.

What really bothered me though was that the directors of the parent company, Nestle, not only did not fire these men, but they continued to pay their salary through the course of the appeals.

Now to me that does not send the appropriate signal to the Beechnut employees that they take compliance with the law seriously. To me if I were a Beechnut employee, I would...
say, "Well, sure. Why not?"

Now this was a particular frustration to me because Nestle is a Swiss company and as shareholders there was nothing we could do, but that's a problem for the laws of Switzerland and not the laws of the United States.

But that's the kind of unaccountability that I really, really object to and that's something where in my mind the directors who permitted this behavior to go and apparently encouraged it should be--

COMMISSIONER MacKINNON: But did they permit it to go on?

MS. MINOW: The top management of Beechnut--

COMMISSIONER MacKINNON: I'm talking about the directors.

MS. MINOW: The directors?

COMMISSIONER MacKINNON: I'm not talking about the officers.

MS. MINOW: No, but by continuing to pay their salaries through the course of the appeal even though they admitted that they had done this, I think that was inappropriate behavior and they should have been removed if it had been an American company.
CHAIRMAN WILKINS: Well, your testimony has been very informative this afternoon and we appreciate your assistance to us.

We also appreciate the assistance you rendered several years ago when you helped us get started.

MS. MINOW: Thank you very, very much. If I could be of any other help, just give me a call.

CHAIRMAN WILKINS: Well, you’ve been a great help.

Thank you very much.

Our last but certainly not least witness today is Mr. John P. Borgwardt.

Mr. Borgwardt, we are delighted to have you with us.

He is Associate General Counsel of Boise Cascade Corporation of Boise, Idaho.

Thank you very much for coming today and assisting us in this difficult matter.

STATEMENT OF MR. JOHN P. BORGWARDT, ASSOCIATE GENERAL COUNSEL, BOISE CASCADE CORPORATION, BOISE, IDAHO

MR. BORGWARDT: Thank you, Mr. Chairman.

I am John Borgwardt. I am a lawyer with Boise Cascade Corporation, Associate General Counsel.
COMMISSIONER MacKINNON: From where?

MR. BORGWARDT: Excuse me?

COMMISSIONER MacKINNON: From where?

MR. BORGWARDT: From Boise, Idaho, Judge.

John Ferry, our Chairman and Chief Executive Officer has filed written comments with the Commission given his views and he has asked that I appear before you this afternoon to comment further on our concerns about these guidelines that have been proposed.

If you don't know about Boise Cascade, and Judge MacKinnon apparently knows a little bit about us anyway, it's a forest products company with annual sales exceeding 4 billion dollars. It's one of the Fortune 500 manufacturing companies. It's the eighth largest producer of paper and paperboard in North America. It employs over 20,000 people.

We have eight paper and paperboard mills in the U.S. and two more in Canada. We have 40 other manufacturing facilities located around the country at which we manufacture lumber, plywood, particle board, and corrugated cartons. We also have a very extensive network of office supply distribution throughout the country.

We have a number of reservations about the proposed
guidelines, but they can be grouped really into three categories.

They fail adequately to distinguish between the truly culpable organizations and those organizations that have honestly tried and industrially tried to comply with the law, but nonetheless, find themselves charged and even convicted of violations.

The guidelines shift the responsibility and the discretion for selection of penalty from the judiciary, which is dedicated to an impartial administration of justice, to the prosecutorial branch, which is an advocate and should be an advocate, is not dedicated to impartiality and I don't think ever really should be.

Finally, they achieve the effect of punishing the innocent in the guise of being tough on crime.

Let me comment briefly on each of these. First, the degree of culpability; I don't think I would want to quarrel with Ms. Minow when she says that there have been occasions when organizations, and as Mr. Garrick said, not just business organizations, but labor unions, they have been culpable of acts that should be punished and should be punished severely. But not every organization that stands
convicted of a violation of Federal law bears the same kind of culpability that Ms. Minow was referring to.

There are a myriad of Government regulations. I cannot begin to count the ones that apply to our organization. I try very hard. I spend my entire professional life trying to guide my corporate clients into the compliance with Federal, State, and local regulations. We are actively pursuing that goal. I think we do a reasonably good job of it.

And yet, on any given day an organization of our size is probably able to be charged with and prosecuted for some violation.

We are engaged in activities that we have been doing for years. At the outset of those activities they were considered not only legal, but they were moral and ethical. Times change, ideas change, laws change, our behavior changes as well, sometimes it does not change as rapidly as the prosecutors or the interpreters would like it to.

Regulations are not always written as clearly and as understandably as they might be. And the prosecutors who first promulgate those regulations, then interpret them, and then enforce them are in the first instance interpreting
those as they thought they intended to write them, but not always as those of us who must comply with those regulations understand them.

At best, the compliance with these regulations is a difficult and a troublesome task that is not always achieved with perfection in the first instance. Not only are we subject to regulations that are inadvertently susceptible of violation, in an organization of any size there are quite often people who are off doing whatever they are doing despite the best efforts of management, directors, and their supervisors and they commit acts that are not only against company policy, but against specific instruction.

I am not trying to suggest that an organization should be relieved of its responsibility. I am not trying to repeal the doctrine of respondent superior. On the other hand, I am suggesting to you that there may be great degrees of culpability or a lack thereof in an organization that goes all the way from clear participation by top management down to the point where management has done everything it possible can to avoid those violations and yet still the organization commits a violation, is responsible for it, and suffers the
The guidelines, as I understand them, do not make sufficient distinctions between those degrees of culpability and I am not entirely sure, in response to Ms. Nagel's comment how do you avoid punishing the truly innocent, I'm sure that I know how to avoid that in guidelines that will be applied in a mandatory manner.

The way it's done today is that the judge, viewing all of the facts, all of the circumstances, is able to choose and to fit the penalty to fit the degree of culpability.

Judge Harold Green of this district has commented better than I possibly can on the inherent shift of discretion from the judiciary to the prosecutor. That shift that he discussed was in discretion for selection of the punishment for an individual. That discretion is even more pronounced in dealing with an organization.

An organization by its very nature is engaged in activity that's repetitive in nature. If we do it today, we probably did it yesterday, and in all likelihood, we will do again tomorrow. We will do it until something in the organization changes and that can come about by a change in our understanding of the law, a change in our understanding
of the interpretation of the law, a realization that the law
has changed, or for whatever it may be, but a violation by an
organization is seldom a single violation.

If the violation is prosecuted as a violation of a
single act and a single punishment is selected, the punish-
ment is at one level. If it is chosen—if the prosecutor
chooses to take advantage of the wording of the statute or
the regulation and chooses to prosecute for each separate
violation that occurs on each occasion, the multiplicity or
the multiple that applies to the punishment can be substan-
tially increased and, again, that is at the discretion now,
or it will be under the guidelines, that will be at the
discretion of the prosecutor and not of the judge.

Again, we are concerned that the application of
that discretion can be done by a prosecutor who is not going
to draw the distinction between the degrees of a culpability
that we think the judiciary does and does very well.

In our experience, it is not at all unusual for an
organization to be held accountable for a violation of some
rule or regulation, not because the prosecutor seeks to
punish for that activity, but rather because that is the
activity that can be punished. The motivation is too often
the decision by the prosecutor that the organization has
engaged in some conduct that the prosecutor finds offensive
or that the prosecutor’s constituency finds offensive.

If punishment is sought, there are almost always
violations that can be discerned that the organization can be
charged with and the punishment can be imposed even though
that is not the motive for the activity.

The Federal judiciary has been our protection
against that kind of arbitrary application of the criminal
law. We would not like to see that protection diminished.

Finally, I would like to observe that if the
guidelines are rigidly adhered to in accordance with their
designed purpose, they do have the effect inevitably of
punishing the innocent more often than is acceptable in our
system.

No system can ever guarantee that the innocent will
not be punished, but I suggest to you that we should not
intentionally adopt a system that punishes the innocent with
the thought that by doing so we will encourage those in-
ocence to exercise tighter control over the truly culpable.

We are suggesting that, I think, when we suggest
that directors who are not aware or who are not participants
in a scheme to violate the law or managers who are not participants, or in the case of the imposition of fines, if we are to impose liability on the organization, and I'm talking about business corporations primarily because that's what I represent, the shareholders are going to be penalized for activity, or they can be, if these guidelines are rigidly enforced, the shareholders can be penalized for activity in which the organization is not culpable, management is not culpable, and yet there will be enormous fines levied upon those people simply because they have invested in that company.

It's interesting to compare, for example, the present savings and loan situation. I don't think there are very many people that would like to step forward in public who are not representing savings and loan management and say that what they did was all acceptable and those people should not be held accountable.

And yet, we recognize that if the depositors who had entrusted their savings to the savings and loans were forced to forfeit any substantial part of that it would be an unfair punishment of those people for acts that they had not committed.
There are, of course, differences between
shareholders in public corporations and depositors who have
put their money into insured savings accounts, but the
concept, I suggest to you, is basically the same. These are
people who have invested their own funds, their own savings
in companies that they believe to be honestly run and for the
most part that I believe are honestly run.

If they have not been, if there has been true
culpability on the part of the organization, I will not be
among those who will step forth and defend them. On the
other hand, I suggest to you that there are many, many
business organizations that are caught up in the violation of
statutes and regulations, despite their honest and vigorous
attempts to comply.

I am not suggesting they should be free from
punishment, but I am suggesting that there should be some--
there should be a great deal of consideration given to the
innocent investor and free him from the kind of punishment
that I think these guidelines will mandate.

I understand that you have had a long day. I
suspect that you have heard many of these thoughts expressed
before. There probably has been a great deal of repetition.
I am sorry to repeat those, if I have, except I think it is well that you understand that there are a lot of us who share some of these concerns and it bears hearing from a lot of us who do have them.

I thank you.

CHAIRMAN WILKINS: Thank you.

Judge MacKinnon?

COMMISSIONER MacKINNON: I assure you that you haven't repeated generally. There are a couple of items, but outside of that it's been brand new.

Has there been any change in your mind in the power of the prosecutor?

MR. BORGWARDT: I believe these guidelines will give to the prosecutor a great deal more power.

COMMISSIONER MacKINNON: Like what that he didn't have before?

MR. BORGWARDT: He can and always has been able to select the choice of a single charge of violating a statute with multiple counts or charging multiple violations, each one separate counts.

The sentencing judge has always had the power then to either impose a single sentence and have it run concur-
rently, or he can do a lot of things that judges can do and you are certainly aware of that.

By these guidelines I think what we're doing is saying to the prosecutor, you can make those choices. You can select the crime that you choose to charge or the number of crimes that you choose to charge and the penalty then will not be subject to the discretion of the sentencing judge. He will have no option but to impose--

COMMISSIONER MacKINNON: Well, he has though in an appropriate case. The difficulty is the words "appropriate case". If it isn't an appropriate case he doesn't. He can depart in an appropriate case.

MR. BORGWARDT: There is—what little I have read so far indicates that, (a) the judges are reluctant to depart from the guidelines--

COMMISSIONER MacKINNON: Well, they're going to have to get—they're going to have to learn to do it because our guidelines are only written for the average offense. They aren't written for aggravated offenses.

MR. BORGWARDT: I'm concerned that the judiciary sees them as being a lot more restrictive on their discretion than your remarks say and the few comments that I have seen
attributed to the reviewing courts have supported the
restrictions that the district judges now feel that they are
under.

This will, of course, take time to work out, but
the guidelines as written and as I think most people are
interpreting them give the sentencing judge precious little--

COMMISSIONER MacKINNON: The sentencing--you mean
the prosecutor?

MR. BORGWARDT: No, the sentencing judge.

COMMISSIONER MacKINNON: Give the sentencing judge
what?

MR. BORGWARDT: Very little discretion.

COMMISSIONER MacKINNON: He has a lot more sentenc-
ing authority than he ever had before. He could give two
sentences before and both of them--one of them was terminated
within one-third of the sentence by the parole board and the
other one could be terminated immediately by the parole
board.

Now the sentence that he chooses is the sentence
that's going to be enforced. So he's got more authority than
he ever had before. Before the Parole Commission set the
limit on every sentence, plus a 10 years limitation in the
statute in 4205.

You were talking about these, as I take it, the victims. If you're going to choose between whether the victim is going to pay the cost or the corporation is going to pay the cost, in other words, is the victim going to be the only person, or should the corporation be the victim? It seems to me that when those situations arise that you have to go to the entity that made the offense possible.

MR. BORGWARDT: Judge, I have not commented on the part of the sentencing guidelines that assume that the organization will be required to make full restitution for any gains that it has gained recovered. I don't quarrel with that concept at all.

I do not quarrel with the concept that the organization should be responsible for actual harm caused to the victim. That's a restatement of what I understand to be the tort law and if there is to be a reinforcement of that through the criminal process, again, I have no quarrel with that. It is the penalty on top of that that I am concerned with.

COMMISSIONER MacKINNON: I don't understand your S&L comparison. Generally there aren't any savings and loans
being prosecuted in these times, are there? They are
prosecuting the officers.

MR. BORGWARDT: They are prosecuting the officers.

COMMISSIONER MacKINNON: Yes.

MR. BORGWARDT: I suspect that the reason that
there is no prosecution of the organization is that there
probably under present rules and regulations and laws even
there is no advantage to the prosecution of the organization.

COMMISSIONER MacKINNON: I don’t think so. I don’t
think they've committed offenses. It seems to me that
everything I read about is an offense by an officer of a
corporation or it reflects a diminution in the real estate
investment in the general real estate market.

MR. BORGWARDT: Judge, I'm not sure that I'm
qualified to debate that issue with you as to the degree of
culpability of the organization.

If the management of those savings and loans are
guilty of violations, my guess is that the organization is
also guilty, again, as being responsible for the officers.

COMMISSIONER MacKINNON: I think it's personal
aggrandizement by the individuals--individual officers. The
most that I hear of, they embezzled and defrauded and picking
up money on the side for commissions on loans and things of that character. It doesn't involve the corporate activity itself. They are entrenching on the corporation.

MR. BORGWARDT: Again, I can't debate it. I get my information from the newspapers and I'm not always sure of the accuracy of that.

COMMISSIONER MacKINNON: Well, so do I.

Thank you.

COMMISSIONER CORROTHERS: I have one question. You verbally expressed concern about the punitive impact of the fine on the shareholders. The written comments reflect that tying funds to a multiple of profit or harm is sensible only when the economic interest of the organization are held by the same persons who have engaged in the illegal conduct and that to do otherwise punishes innocent shareholders.

It has been suggested to us by others that adequate deterrence requires that the fine be sufficiently high to prevent the organization from absorbing it as a part of the cost of doing business.

The idea has also been promoted that an appropriate fine will provide incentive to shareholders to take steps to obtain in the words of one respondent, "cleaner management"
end of quote.

Do you feel that this idea has any merit; the idea that fines could provide an incentive?

MR. BORGWARDT: In theory, the American business corporation is owned by its stockholders and is responsible to its stockholders and, therefore, the stockholders, through their vote at the annual meeting, have the power to change management and the board. In practice, that is rarely the case.

I have seen it once or twice in my career, but it is--

COMMISSIONER CORROthers: Why is that so?

MR. BORGWARDT: The nature of the organization being what it is, the stock is generally either very widely held making it difficult for the shareholders to act in a manner that truly influences the corporation, or it is held by a--even with institutional shareholders there are a fairly large number, there is beginning to be a movement on the part of some of the institutional shareholders to try to exercise some voice over the management of the corporations in which they invest. That is happening particularly in some of the areas of take over defenses, shareholder democracy, one share
one vote. So far, I don't know of any movement that is being
organized that really will transfer control of the corpora-
tion and its activities to the shareholders. It's probably
too expensive a proposition to be able to manage—to be
managed.

The simplest and easiest way for a shareholder to
register his or its displeasure with the management of a
company is simply to share those shares and reinvest in
another company. That's what usually happens.

COMMISSIONER CORROOTHERS: Of course, in the past,
the fines in many cases have been a lot lower than what they
probably be in the future.

MR. BORGWARDT: That is correct.

COMMISSIONER CORROOTHERS: And I guess we will see
in the future whether shareholders look a little harder for
ways of getting the type of control they need.

MR. BORGWARDT: The concern that I have again is
not for the corporation or the organization that is truly
culpable. I am suggesting, however, that the guidelines as
drafted do not adequately distinguish between those and the
result is going to be to punish many of the innocent
shareholders and do so under the principle that if we punish
the innocent enough they will take control and somehow stop
those who are guilty from committing those crimes. Govern-
ment can’t do it. Organizations can’t do it. I can’t do it.
You can punish me all you want to, I can’t stop a lot of
things that are going on and I would hate to see us adopt the
attitude that by punishing enough innocent people we can
force them to go and do something to stop those who are
guilty and I think that’s what we’re trying to do.

COMMISSIONER CORROTHERS: I don’t really think the
motive is to punish innocent people. I think what’s
happening is they are somehow caught up in the system and I
don’t know if we know a way to totally separate them from
either benefitting from the profits or from the results of
what could be profitable of illegal conduct, nor the punish-
ment associated with that illegal conduct.

MR. BORGWARDT: You have proposed disgourgement of
ill gotten gains. I don’t quarrel with that. You have
proposed compensation for actual harm caused and I don’t
quarrel with that.

But when you go on and say and let’s not worry
about the fact--

COMMISSIONER CORROTHERS: When we go on it’s then
to effect punishment because when you return what you have
taken you have not yet instituted punishment.

So your problem is, it's only when we get into
punishment.

MR. BORGWARDT: That's right and when we get into
punishment--

COMMISSIONER CORROthers: I am wondering what do
you do about illegal conduct?

MR. BORGWARDT: I don't know. I don't have an
answer, but what we are doing with these guidelines is to say
if we punish the innocent enough, maybe we can force the
innocent to take the proper steps. I don't think we're ready
for that in this country. I'm not ready for it.

COMMISSIONER CORROthers: Thank you.

CHAIRMAN WILKINS: Commissioner Saltzburg?

COMMISSIONER SALTZBURG: I just have a statement, a
short one. It is a long day. I've got to say I thought, as
Judge MacKinnon did, I didn't think you repeated anything
we've heard, but I do think that--I am the Department of
Justice's representative on the Commission and a couple of
things you said I thought were--made a more powerful case for
these guidelines than anything I've heard all day.
I mean a number of us had been real concerned about where to draw the line and what kinds of rewards to give corporations and we've had witnesses prior to you today who have said that--some who have said there is an extraordinary amount of corporate crime going on in America and we've questioned that. Some have said there is very little, that most corporations are law abiding, and we questioned that. And your chairman of the board chief executive officer has written a letter telling us there is really not a problem and the guidelines aren't needed. And you sat here and I wrote down, I was just staggered by this, I wrote down what you said. You said many, many business organizations are caught up in criminal activity and you said that our prosecutors--now I admit they are not all perfect, but you said our prosecutors sometimes prosecute criminal activities and they get convictions not for those crimes, but because of some other crime maybe they wanted to prosecute, but they didn't.

You know, one of the things in your statement I found missing was, we may bring charges sometimes. You know, we may have motives sometimes that aren't always the best, but we don't convict anybody unless we can prove beyond a reasonable doubt they are guilty or they confess that they
are guilty.

And one of the things about these guidelines that I think you ought to take back to the chairman of the board is that these guidelines are probably more protection than anything you have had before because contrary to the testimony that you gave where you talked about the fact that the prosecutor can add these charges on, the prosecutor can decide under the guidelines whether or not to add these penalties and cumulate them and punish you, the fact is, that's up to the Commission because the Commission to adopt the guidelines for individuals that group things and that prevent prosecutors from doing that and tie their hands. And if the Commission decides to do that for organizational sanctions, they can do the same thing and they could provide protections.

And the last thing that I wanted to say is that I think it really for me--you know, it doesn't advance the ball at all to talk about the innocent shareholders and the innocent managers and the few guilty people who work for the corporation. The whole point, you know, from the very beginning you're trying to figure out how you impose sanctions on corporations is to figure out how to get attention
of all the people in the corporate enterprise to make them
give a different answer from the one you gave.

As long as the answer continues to be, you know, I
don't know what to do about it, but all I know is that
directors can't do anything because they don't know what's
going on and I can't do anything, I'm just counsel. Nobody
can do anything, but you're not going to get anywhere unless
you just make us disgorge the ill gotten gains, I believe is
the term you used, you're going to get the same reaction
which is we better increase the sanctions because eventually
theory is, and I believe it, the theory is we're going to get
somebody's attention.

MR. BORGWARDT: I'm sorry that you—that either I
misspoke or you misinterpreted my words. I did not say that
many corporations are engaged in illegal activity. I think
many corporations are engaged in activity that can inadvert-
tently, despite their best efforts and despite their best
intentions, they can be charged with, prosecuted for, and
ultimately convicted of some violations of some rules.

COMMISSIONER MacKINNON: Did you say they got
caught up in--

MR. BORGWARDT: No, I have in mind, Judge--I have
in mind—I’ve recently been spending a good deal of my time with OSHA regulations and environmental regulations. I defy anybody to look at the activities of his or her organization and say we have absolutely no chance of being in violation of any of those regulations today.

I won’t even talk about what might happen tomorrow, but the possibility of inadvertent violation of just those two areas, despite the best efforts of everybody in the company, is very high indeed.

COMMISSIONER MacKINNON: I’ve had some OSHA cases and I agree with you.

CHAIRMAN WILKINS: One comment, let me make, you paraphrased Judge Green and I think one other witness commented about the perception of the shift of power from the prosecutor--from the court to the prosecutor. And I take exception with that. I think those who make that assertion do so from either a lack of understanding of the operation of the guidelines, or in attempt to distort how they really work and I do not accuse you of doing that at all, sir. I don’t mean that.

But let me just tell you just so the record is clear, we struggled with this mightily because a guideline
system can do just that and we don’t want that to happen.

Prosecutors have a lot of authority. Someone embezzles a corporation or an individual $10,000 every 30 days for 12 months, the U.S. Attorney in the past would indict one count, $120,000, maximum sentence 5 years, or 12 counts, $10,000 per count every 30 days, the maximum sentence 60 years. Now that’s a lot of discretion.

Under the guidelines it doesn’t matter how the indictment is phrased, if you steal $120,000 you are punished for $120,000.

So in many respects this discretion we keep hearing about of the prosecutor has been significantly reduced in many areas.

But in any event, let me say too that we are not wed to these guidelines that we put out. Many areas—there can be legitimate concern about them. Had we written something in a mamby pamby fashion or just some general statements, I doubt if you would have made the trip from Idaho to Washington to help us with this matter.

But because we have written several options and in concrete form, we got the attention of a lot of people and that’s what we needed because we need a lot of people’s help
because this is a very, very difficult area.

You have brought home to us the struggle that we are involved in and that is how do we distinguish between the corporation that is heavily involved in criminal activity from the top management to the bottom and the corporation that does everything it can to prevent crime, to be a model citizen, and yet, there is a rogue employee out there for one reason or another commits a crime in the name of the corporation.

Now those are the two extremes and that is what we are struggling with and we are appreciative of your assistance to us to help us find the right answer.

COMMISSIONER MacKINNON: Billy?

CHAIRMAN WILKINS: Yes, sir.

COMMISSIONER MacKINNON: You were talking about before under the old system there could be 30 counts and the judge doesn’t have to give them any sentence, or could give any sentence he wanted to. Well, of course, these guidelines and the action of Congress are an indictment of district court judges. That had to be corrected.

So to that extent, the rule now is that he has to give an appropriate sentence to get away from this wide
disparity and there isn't anything we can do about that. But that's the result and that's the cause and these people that you hear talking about the guidelines interfering with their judgment, sure they do. That's what Congress provided and we can't do anything about it.

The other thing I was going to ask you was, how does your corporation in size compare with Warehouser [ph.]?

MR. BORGWARDT: We're a bit smaller.

COMMISSIONER MacKINNON: I appreciate your problems in Minnesota too.

CHAIRMAN WILKINS: Thank you very much, sir.

In keeping with our policy, we invite anyone now who has not testified and who wishes to testify to come forward.

[No response.]

CHAIRMAN WILKINS: Having no takers, I declare this hearing adjourned. Thank you all very much.

[Whereupon, at 4:15 p.m., the hearing adjourned.]