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# UNITED STATES SENTENCING COMMISSION

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**TRANSCRIPT**

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**PUBLIC HEARING**

**DECEMBER 13, 1990**



# TRANSCRIPT OF PROCEEDINGS

UNITED STATES SENTENCING COMMISSION

PUBLIC HEARING

ON

SENTENCING GUIDELINES FOR ORGANIZATIONAL DEFENDANTS

Pages 1 thru 255

Washington, D.C.  
December 13, 1990

MILLER REPORTING COMPANY, INC.

507 C Street, N.E.  
Washington, D.C. 20002  
546-8666



UNITED STATES SENTENCING COMMISSION

Public Hearing

on

Sentencing Guidelines for Organizational Defendants

Washington, D.C.

December 13, 1990

BEFORE:

Chairman William W. Wilkins  
Commissioner Helen Corrothers  
Commissioner George G. MacKinnon  
Commissioner Paul L. Maloney  
Commissioner Ilene H. Nagel  
Commissioner A. David Mazzone  
Commissioner Julie E. Carnes  
Commissioner Michael S. Gelacak



1                                   \* P R O C E E D I N G S \*

2                   CHAIRMAN WILKINS: Let me call this public hearing  
3 to order.

4                   This is another of several public hearings the  
5 United States Sentencing Commission has held on the subject  
6 of Organizational Sanctions.

7                   We have earlier distributed for public comment a  
8 draft issued by the Sentencing Commission as well as a draft  
9 issued by the Department of Justice to generate for comment  
10 and we have received a great deal of comment in written form  
11 already.

12                  We extended the deadline for public comment until  
13 after the first of the year to allow for more thought and  
14 study and more comment. Comment is very helpful to the  
15 Commission and indeed has influenced its decisions in  
16 individual guidelines and certainly already in the area of  
17 organizational sanctions.

18                  We are delighted to have a number of very distin-  
19 guished witnesses today and at the conclusion of the list of  
20 witnesses' testimony, we will, of course, as we always do,  
21 open the floor for comments from anyone who has not previous-  
22 ly requested to testify, but who has information or other



1 comments they wish to bring to our attention.

2 I would suggest to the witnesses that you allow  
3 some time for questions from the Commission. And, of course,  
4 we would solicit your assistance in following up with  
5 additional ideas that you may have generated from our  
6 questions or perhaps from testimony given by other witnesses  
7 so that we may have the benefit of your additional thoughts.

8 Each witness has been allotted approximately 20  
9 minutes and it is helpful to us, since we have received your  
10 written testimony and we have read your written testimony and  
11 we are familiar with it, that you may wish to use your time  
12 by summarizing the testimony to us and allowing a portion of  
13 that 20 minute period for the questions from various Commis-  
14 sioners.

15 Our first witness today is a very distinguished  
16 attorney and public servant, Griffin Bell, former Attorney  
17 General, former Federal Judge, and now a partner at King and  
18 Spaulding. Mr. Bell is here today representing Martin Mariet-  
19 ta.

20 Mr. Bell, we are honored to have you with us and  
21 we'd be glad to hear from you at this time.

22 STATEMENT OF MR. BELL



1 MR. BELL: Thank you, Your Honor, members of the  
2 Commission.

3 I filed a statement, but I'm going to let that  
4 remain filed and just say a few words about the general  
5 subject.

6 Generally speaking, my position is that--and I say  
7 my position and I speak from someone whose had a lot of  
8 experience in the corporate side of prosecutions for viola-  
9 tion of the criminal laws, vicarious liability situations and  
10 others.

11 I've had particular experience in some of the  
12 aerospace companies and even the smaller companies. So I  
13 think I have a fairly broad knowledge of the problem and also  
14 a number of problems that may arise under these guidelines.

15 My first point is the Treasury should have broad  
16 discretion in sanctioning corporations because imputed  
17 liability does not reflect actual corporate intent and  
18 because corporate decisions about internal investigations may  
19 have to address issues unrelated to the corporation's desire  
20 to coordinate and detect corporate crimes. I'll explain that  
21 in more detail.

22 A lot of times a corporation--it may be some low



1 level employee that may do something think he's helping the  
2 corporation and actually the corporation would be glad not to  
3 have that kind of help. There are actual cases like this  
4 that have nothing to do with top management.

5           Yet, under the law, the corporation could be cast  
6 into a vicarious liability situation. If so, then these  
7 guidelines come into effect and there's enough discretion  
8 left for the judge to determine whether the corporation had a  
9 compliance plan, whether they had an ethics code, whether  
10 they had a hot line for people to call in and report wrong  
11 doing, those sorts of things.

12           Twenty five years ago, nothing like that existed in  
13 corporate America. Today that's only in a big company and  
14 that doesn't help with a system in place like that because  
15 they had been in a more cooperative mode with the Defense  
16 Department in just trying to keep down wrong doing and also  
17 to detect wrong doing.

18           I'm not certain the guidelines give enough weight  
19 to that sort of thing and it probably can't be done mechani-  
20 cally. Probably only a district judge could really under-  
21 stand the nuances of this sort of thing.

22           So I would account for more discretion in the

1 district judges. I support strongly these corporate com-  
2 pliance programs. They have deterred crime. They have  
3 caused crime to be discovered and crime to be reported.

4 Encouraging corporations to have effective com-  
5 pliance programs should be the highest priority of this  
6 Commission. The Justice Department simply doesn't have  
7 enough people and never will to just go out and start an  
8 investigation where there is some suspicion.

9 It's the corporation itself that is going to find  
10 out about the crime. Some time you don't for sure there is a  
11 crime and it requires a good deal of investigation sometimes  
12 to know. You get into all sorts of problems about whether  
13 you're turning your own people in. It's very complicated.

14 Those are the sort of things that the district  
15 judges would consider. And also, it's in the public interest  
16 to have these compliance programs. If there is anything in  
17 the guidelines that would discourage compliance programs,  
18 well, then those things need to be changed. It is very  
19 important to have them. We encourage compliance programs.

20 On these points where you give credit, you ought to  
21 give a good deal of credit for having a compliance program  
22 separate and apart from reporting disclosure. Those things



1 ought not to run together as they do. They ought to be  
2 separated and those two things ought to get more weight than  
3 anything else, good compliance programs with a finding of  
4 good faith in the operation of the program and disclosure,  
5 those two things.

6 Now, there should be no penalty fined when a  
7 corporation has an effective compliance program and no high  
8 level management is involved. This is where you have a low  
9 level person whose done something and it was detected by the  
10 compliance program.

11 Most of the crime is picked up by the corporations  
12 themselves. They have internal auditors. Twenty years ago  
13 there was no such thing as internal auditors in corporate  
14 America. Now you have audit committees on the board. You  
15 have internal auditors that report directly to the audit  
16 committees.

17 And under the American Law Institute principles of  
18 corporate government, it is part of a corporate set up now  
19 and most of the big companies, middle size and a lot of small  
20 ones are doing that. So you need to have that in mind as you  
21 decide what to do about imposing the sanctions.

22 The Government in corporate America needs to form a

1 partnership in preventing crime and also in discovering crime  
2 in the workplace. We don't need to have an adversarial  
3 relationship between corporate America and the Justice  
4 Department. We ought to have something that encourages not  
5 only compliance, but detection and reporting.

6 I think that maybe the mechanical approach that the  
7 Commission seems to be taking without having enough discre-  
8 tion in the District court would really discourage people  
9 from reporting. It would discourage having a detection  
10 program.

11 We're far beyond that now mainly caused by the  
12 Defense Department. They've been pioneers in making com-  
13 panies set up programs and do reporting and we don't need to  
14 go back where we use to be, but there's a danger of that.

15 Also, it strikes me that there is not enough  
16 thought given to a company that can't pay the fine. Most  
17 people who get in trouble are most of them small companies  
18 because they're almost--that stands to reason, they're more  
19 smaller companies. But if they can't pay the fine, what  
20 happens? Well, you've got a provision where the fine can be  
21 reduced.

22 The Justice Department's submission contains a very



1 strange thing. If a company couldn't pay all of the fine and  
2 the fine had to be reduced, the Justice Department would  
3 automatically put that company on probation. In other words,  
4 they've got a double standard.

5 The place that's supposed to be in charge of equal  
6 protection of the law has got an unequal protection in the  
7 provisions in their filing.

8 Anybody who can pay the fine may not be put on  
9 probation, but if you can't pay it you're going to be  
10 automatically on probation. That shouldn't be. In either  
11 event it ought to be discretionary. Everybody ought to be  
12 treated the same.

13 But there will be a lot of companies that can't  
14 remotely pay these fines and I'm representing a company now  
15 that can't pay a antitrust fine and I have advised them to go  
16 into Chapter 11 and I've offered the lawyers for the Govern-  
17 ment the company if they want it. They could have it because  
18 there is no way to pay what we are said to owe.

19 So there's going to be a lot of cases like that.  
20 There will be others where the fine needs reducing. This is  
21 a situation that needs to be dealt with and that is what I  
22 call public interest case. I know of a company that had to

1 pay about \$200 million to the Defense Department and probably  
2 owes that or more. The Defense Department didn't want to put  
3 them out of business. They wanted to fine them. What  
4 arrangement would be made where you want to save a company?  
5 Suppose we had one company making airplanes and one making  
6 submarines and so forth? We wouldn't want to put that  
7 company out of business. We wouldn't want to get ourselves  
8 in an international economy where we didn't have any problems  
9 in our country, but people that are not under these kinds of  
10 laws would--we don't want to get in that shape.

11 So it has to be some sort of discretion in the  
12 guidelines back in the district court for those kinds of  
13 cases.

14 I think with those general comments I want to now  
15 mention the eight points that I attached to my statement that  
16 I hope might be worthy of consideration by the Commission.

17 The first one would be that we have--and I know of  
18 a case like this--where a corporation detected a crime  
19 through the internal auditors, reported it to the Defense  
20 Department and they said, "Well, you're not going to get any  
21 credit for that. We already knew about it. Somebody wrote us  
22 a letter." You ought to get credit in a situation like that

1 because you had no way of knowing it until it was caught, but  
2 it was promptly reported.

3 The guidelines should have a formula permitting the  
4 court to impose no fine at all if there was a bona fide  
5 compliance program in effect and no high level management  
6 knowledge, even if there was no voluntary disclosure. That's  
7 a little different from what I first said.

8 The current provision on prior convictions as a  
9 basis for upward departure should be modified to allow  
10 departure only if the same business group or division  
11 committed the prior offense.

12 Now in the case of a big company that's been in  
13 business for a long time, they may have had a conviction in  
14 one department of the company 30 years ago and one 20 years  
15 ago and another one 4 and so forth. There are companies like  
16 that. Those prior convictions ought not to be charged  
17 against them unless its in the same operating part of the  
18 company. If one of them is making generators and another one  
19 is making engines, we'll say, and it's not in the same place,  
20 they ought not to be charged with the prior conviction.

21 Also, there should be no upward departure if one of  
22 the prior convictions was the result of a voluntary dis-



1 closure. There should be some credit received for the  
2 voluntary disclosure.

3           The criminal laws in this country in my judgment  
4 operates best where we encourage individuals and the corpora-  
5 tions to voluntarily disclose crime. It sort of goes against  
6 the grain to disclosure, but we can't have a lawful society  
7 unless we have a population that believes in voluntary  
8 disclosure.

9           The next one is there should be no multipliers in  
10 calculating the fine range. That's because the guidelines  
11 mandate restitution and, therefore, there is a built in  
12 multiplier. We don't want to engage in over kill where--now  
13 there is some crimes where you can six, not treble damages,  
14 but six times. An example would be the violation of an-  
15 titrust laws and then at the same time you violated the False  
16 Claims Act dealing with the Government. So you could six  
17 times.

18           We going to get where we almost wipe out every  
19 company unless it's a real big company. We don't want to do  
20 that. So I would say no multipliers and I believe you ought  
21 to get credit on a multiplier for the restitution. That  
22 would be a double right there, or might even be more than

1 double according to how much you got hit for.

2           The next one is the Commission should adopt the  
3 proposed alternative fine determination section which would  
4 permit the court to determine--this is very important--which  
5 of the gross gain, loss or amount from the fine tables is the  
6 most appropriate basis for a fine in a given case, regardless  
7 of which is the highest. Just let the court decide. This  
8 gives the court a little bit of discretion. In fact, it  
9 gives the court a good deal of discretion.

10           We think the current proposals for upward depar-  
11 tures are overbroad and ill defined. For example, the  
12 commentaries do not indicate what constitutes a threat to the  
13 environment, to a market, or to the national security. Those  
14 things are so vague and indefinite that they need to be  
15 spelled out. I have no objection to those things, but they  
16 need to be spelled out.

17           Then another point is that because a judicial order  
18 can stay in effect indefinitely and there's are injunction on  
19 the book that have been on the book for 50 or 60 years--they  
20 had one against AT&T that I think was imposed in the 20's--  
21 but normally they stay on the books for a long time. A  
22 corporation should not be penalized for a menial employee's

1 violation of an order entered years before even if the  
2 corporation had a pervasive program to ensure compliance.

3 In other words, there ought to be--not an exemption  
4 because it's just some low level person. It ought not to be  
5 charged with a violation of the order.

6 The downward departure for a parallel payment of  
7 punitive civil or administrative fines allows for departure  
8 only if the fine has been paid at the time of sentencing and  
9 only if paid to a governmental entity..

10 I would suggest that this guideline should permit  
11 motions after sentencing to reduce the criminal fine based on  
12 a parallel payment as well as allow departures for punitive  
13 damages paid to civil plaintiffs.

14 I'm very concerned about the piling on of damages  
15 that's going on in the country and it's not only going on in  
16 the civil side, it's going on in the criminal side. We don't  
17 want to get where we impose the death penalty in every case.  
18 We still have to have some sort of a graduated approach to  
19 punishment.

20 I told somebody this morning that's how Solim [ph.]  
21 became famous when he took over all and everything you did in  
22 Ancient Greece and it warranted the death penalty. He



1 rewrote the code and made it more graduated. We don't want  
2 to go back the other way. So that would be sort of a general  
3 comment.

4           The Commission should make expressly clear that its  
5 proposal is not an indication of support for a prosecutor's  
6 decision to charge a corporation when it has done everything  
7 it can to prevent, detect, remedy, and punish criminal  
8 conduct.

9           Now this is very important because the prosecutors  
10 may assume from the guidelines that in every case there ought  
11 to be an indictment for vicarious liability. This encourages  
12 that sort of approach and there's going to be always a lot of  
13 cases where you ought not have vicarious liability.

14           We think that some word of caution should be  
15 included on that score. Those are just general comments and  
16 other than that I'll stand on the statement I filed. But I  
17 would be glad to answer any questions that the Commission  
18 might ask.

19           CHAIRMAN WILKINS: Thank you very much.

20           The overall goal of the Commission's proposal is  
21 crime control and I take it from your testimony that that  
22 should be the goal of public policy from this Commission or

1 any other public entity is crime control.

2 Do you think--and you've represented big corpora-  
3 tions and smaller corporations. If there is a specific  
4 identified mitigating factor built into the guidelines that  
5 mitigates down if the corporation has a meaningful compliance  
6 detection program in place, even though it didn't work in  
7 this one case because there was a crime committed, do you  
8 think corporations in general will respond to that and  
9 develop and if they have them now would it increase the use  
10 of compliance detection programs in their organizations? And  
11 then will that lead in your judgment to deterring future  
12 criminal activity within the organizational structure?

13 MR. BELL: It would and that's a good approach, but  
14 to leave it where you can only mitigated down to 15 percent  
15 and then pay restitution on top of that--and always in one of  
16 these investigations you have to pay the cost of the inves-  
17 tigation--you really are not encouraging as much as you  
18 should be. You ought to be able to mitigate down to zero and  
19 it's almost impossible to get the score of nine. That needs  
20 to be changed where you can get the score of nine.

21 What you want to do is rely on the good faith of  
22 people. We ought to remember the times when we thought

1 everybody was honest and we still think that because if we  
2 didn't the whole credit system would break down. We have,  
3 generally speaking, honest people in this country. They need  
4 to be encouraged. I think we can go a step further than  
5 encouraging. The general approach is good.

6 CHAIRMAN WILKINS: Let me ask any Commissioner to  
7 my right, any questions?

8 COMMISSIONER MacKINNON: General, you spoke about  
9 the limits on management and divisions not to be--that is old  
10 management shouldn't be brought back in and that one division  
11 of a corporation shouldn't be responsible for what some other  
12 division held.

13 I don't think that people generally realize how  
14 some of these large corporations work in divisions. For  
15 instance, the Pilsbury Company owns Burger King and they  
16 operate Burger King as a division. And what you're saying is  
17 that if Burger King engages in some offense that it shouldn't  
18 be chargeable against Pilsbury. I took that to be your  
19 particular remark and I just thought I'd mention it.

20 CHAIRMAN WILKINS: Commissioner Corrothers?

21 MR. BELL: And you could have not only a separate  
22 corporation. You could have divisions within a big corpora-



1 tion.

2 COMMISSIONER MacKINNON: Well, they are a division.

3 MR. BELL: Oh, they are?

4 COMMISSIONER MacKINNON: Yes.

5 MR. BELL: I thought they were a subsidiary.

6 COMMISSIONER CORROTHERS: I appreciated your  
7 remarks about the necessity to encourage corporations to  
8 develop compliance plans to implement them. I think as a  
9 general manner we would both want--we would want to both  
10 ensure just punishment and adequately encourage corporations  
11 to develop and implement the plans as well as to voluntarily  
12 report infractions.

13 I am wondering concerning the wide latitude or  
14 broad discretion that you would advocate for the courts. I  
15 think it was point number 5, for example, that the court  
16 should even determine the manner or method of determining the  
17 fine.

18 Do you think that we would have a problem of wide,  
19 too wide, or unwarranted disparity? Do you think that we  
20 would have across the country cases--basically the same types  
21 of cases, same types of circumstances and such a wide  
22 difference of the results of those cases that it could be a

1 problem? I'm just wondering what you think about that.

2 MR. BELL: I don't think it would be. For 200  
3 years we've been relying on the district courts and the great  
4 disparity of sentencing we hear about a lot of times has to  
5 do with the State courts. We've got to remember we have 51  
6 court systems, 50 in the States and 1 in the Federal. In the  
7 Federal judges there's some difference, but I've never known  
8 it to be a problem.

9 The Sentencing Commission came about because of the  
10 Parole Board. We were have a trouble with the Parole Board  
11 and they were resentencing people. And all this came about.  
12 They changed the severity or the gradation of the offense.  
13 One prisoner would be getting out early and one would be  
14 getting out late.

15 We're trying to do something about that problem and  
16 we don't want to over do it. It's never been the problem  
17 with the district judges that I've known and I was a Federal  
18 judge for a long time. I've been practicing law for 42 years  
19 and I just don't know of district judges being a problem.

20 I'd very much stand for letting them have full  
21 discretion. This would be a measure--they don't have--they  
22 can take the lesser of the three, but they can't go below

1 that. So you've got them hemmed in pretty well.

2 COMMISSIONER CORROTHERS: Thank you.

3 CHAIRMAN WILKINS: Any questions from Commissioners  
4 to my left?

5 COMMISSIONER MAZZONE: Mr. Bell, calling on your  
6 experience as the Attorney General and also your later  
7 private representation of clients, your recommendation number  
8 8 is interesting and your statement earlier follows up on  
9 that.

10 If I remember the statement, I think you said  
11 something like, that there should be a partnership between  
12 corporate America and the Department of Justice. I hope I  
13 heard that right.

14 MR. BELL: That's right, I said that.

15 COMMISSIONER MAZZONE: And that the relationship  
16 should not be entirely adversarial. Now having in mind that  
17 before judges ever get to exercise any discretion or have in  
18 mind that guidelines never reach the bench until there's been  
19 a conviction, is it your view, or can you expand on your view  
20 that somehow there is some working relationship that you  
21 think needs to be developed before guidelines ever go into  
22 effect as to the development of a prosecutive policy or the

1 exercise of prosecutive decision?

2           Number 8 seems to me, Mr. Bell, if you don't mind,  
3 and this is the question, it seems to me to say that there  
4 are going to be some cases where the Commission--there are  
5 going to be some cases where the judge is going to look at  
6 the case and say, "I don't think this case belongs here".

7           MR. BELL: That could easily happen.

8           COMMISSIONER MAZZONE: Well, how has it happened--I  
9 mean, how then do you establish this working relationship,  
10 this almost non-adversarial relationship with the Justice  
11 Department about which you spoke? It sounds interesting.

12           MR. BELL: That eight is intended to be more of a  
13 precautionary statement calling on the Sentencing Commission  
14 to point that out.

15           But when I was Attorney General we had Professor  
16 Dan Meder at the University of Virginia come up for 2 years  
17 and run something called the Office for Improvement in  
18 Administrating Justice. One of the things he and a group of  
19 people did was come up with something called principles of  
20 prosecution. This would be a principle of prosecution right  
21 there.

22           COMMISSIONER MacKINNON: I've got the principles on



1 my desk, General.

2 MR. BELL: Have they been suspended?

3 COMMISSIONER MacKINNON: No, sir, they're still in  
4 effect. They've been modified somewhat by the prosecutorial  
5 policies with respect to the sentence that the Attorney  
6 Generals put out since, but the 1981s are still in effect.

7 MR. BELL: This would be a principle of prosecution  
8 right here and it merely indicates that the law of vicarious  
9 liability will remain the same despite whatever the Sentenc-  
10 ing Commission does.

11 We've got a memorandum that we give clients at the  
12 law firm on vicarious liability to the developments of it.  
13 It's not an old doctrine at all. There's more and more use  
14 of vicarious liability, but one could get the impression from  
15 these guidelines that in every case there ought to be an  
16 indictment where there's a crime committed by anybody, no  
17 matter how obscure, in a corporation.

18 But that's not the law, but Congress might make it  
19 the law and some prosecutors might say, "Well, Congress has  
20 said all of this and made sentencing guidelines and we think  
21 that is the law", but that's called prosecutorial discretion  
22 and these guidelines are not intended, I'm sure, to have

1 anything at all to do with the prosecutorial discretion, but  
2 I'm just saying eight is in there to make that clear.

3 COMMISSIONER MAZZONE: Thank you.

4 COMMISSIONER GELACAK: Mr. Bell, I think I agree  
5 with a couple of your points, but I have a little bit of a  
6 question about vicarious liability in essence.

7 I understand your concern about increasing prosecu-  
8 tions against corporate America by putting harsher penalties  
9 in place, but I also try to balance that with the understand-  
10 ing that we don't have the resources to chase all the crime  
11 that is committed in this country either individually or  
12 corporately.

13 So what we try to do is encourage individual  
14 compliance as much as possible. That's one of the reasons  
15 why the IRS system works and why a lot of systems function in  
16 this country.

17 What we're doing, in essence--at least I hope what  
18 we're doing by searching harsher penalties is encouraging  
19 better compliance.

20 How do we do that without sending that message to  
21 corporate America, not necessarily that we're out here to  
22 prosecute you, but we want you to understand that if you're

1 going to engage in this kind of activity and we do find you,  
2 we are able to prosecute you and you're going to pay a  
3 harsher penalty for. You're not going to engage in it in the  
4 first instance because of the possibility that we will find  
5 you. We will be able to prosecute you.

6 How do we get to that point without increasing  
7 penalties?

8 MR. BELL: Well, you get to that point by prosecut-  
9 ing the actor, the person who committed the wrong because  
10 that person had to have the intent to do wrong. The corpora-  
11 tion would not have the intention to do wrong. You're  
12 treating the same and that's not right in my judgment.

13 You're treating somebody who is a actor--treat the  
14 actor--the corporation the same as the person who committed  
15 the crime. Vicarious liability is just that. You're being  
16 held because you were a bystander, in a sense, to the crime.

17 So then you don't have to have the intent. So I  
18 think you're treating them the same and I think you ought not  
19 to treat them the same. I think you deter the crime by  
20 prosecuting the actor.

21 In cases where the corporation has not been  
22 attentive, they've not tried to deter crime, they've not had

1 a program that would detect crime or deter crime, they've not  
2 had ethics teaching to their employees, those sort of things,  
3 that would weigh heavily with me if I was a prosecutor about  
4 prosecuting them. I probably would prosecute a company like  
5 that that hadn't tried. But if they tried, I think that  
6 maybe even if they get prosecuted then they ought to be able  
7 to show good conduct as you get down to zero on the scale on  
8 the sentencing.

9 My only quarrel is reduce it down where you can get  
10 credit for the good work you've done. Our country is based  
11 on good work.

12 COMMISSIONER GELACAK: Absolutely and I think I  
13 agree everything you say. What I'm concerned about, however,  
14 is not the person who gets prosecuted, but the person who  
15 doesn't engage in the activity because he's afraid of being  
16 prosecuted. I guess in my mind where we're trying to get is  
17 to encourage those types of individuals not to commit crimes  
18 in the first instance.

19 MR. BELL: I want to tell you that today if you're  
20 doing business with the Government and you have some employees  
21 commit a wrong, you're in deep trouble. You're not only  
22 going to be prosecuted by the Department of Justice, you're

1 going to be barred from doing business with the Government.

2 Now there are some companies that don't do any  
3 business except with the Government. If they're barred  
4 they're gone. We don't want to have such a drastic system  
5 that we injure people who are innocent, the other employees,  
6 for example, that lose jobs, companies that go broke.

7 We've got to leave some play, some discretion in  
8 there for somebody and that somebody would be the district  
9 judge. If the Sentencing Commissions guidelines would say  
10 that, it would go a long way towards keeping the system in  
11 balance.

12 CHAIRMAN WILKINS: Mr. Bell, we appreciate the  
13 excellent written submission that you have earlier made and  
14 your testimony today.

15 Thank you very much.

16 Our next witness is Robert S. Mueller, III. Mr.  
17 Mueller is Assistant Attorney General of Criminal Division,  
18 Department of Justice. He will be accompanied by Mr. Joe B.  
19 Brown, who is United States Attorney from Nashville, Ten-  
20 nessee. Mr. Brown is Chairman of the Attorney General's  
21 Advisory Commission of Sentencing Guidelines. We're delighted  
22 to have both of you with us today.



1 STATEMENT OF MR. MUELLER

2 MR. MUELLER: Thank you, Mr. Chairman. It's a  
3 pleasure to be here today and I want to thank you for  
4 allowing both myself and Joe Brown to testify before you. I  
5 also want to thank you for allowing Jim Rill, who is the  
6 Assistant Attorney General of the Antitrust Division, to  
7 testify this afternoon, as well as Dick Steward, Assistant  
8 Attorney General of Environment and Natural Resources  
9 Division. I think they will probably give you a much sharper  
10 perspective of how the proposed guidelines affect their  
11 particular divisions and their areas of interest.

12 What I would like to do today very briefly is  
13 summarize at the outset the Justice Department's position and  
14 then, quite obviously, answer the questions that many of you  
15 appear to have.

16 Let me state at the outset that it is the Ad-  
17 ministration's position, it is the Attorney General's  
18 position that it is imperative that the Sentencing Commission  
19 approve strong guidelines in the area of organizational  
20 sentencing.

21 Strong guidelines are essential in order to serve  
22 the purposes of sentencing articulated in the Sentencing

1 Reform Act of 1984. Those purposes are just punishment,  
2 deterrence, protection of the public from further crimes of  
3 the defendant, and rehabilitation.

4 Now the Commission has published for comment both  
5 its own set of guidelines as well as the set that has been  
6 submitted by the Department of Justice. I am here today to  
7 ask the Commission to strongly consider adopting that set of  
8 guidelines which the Department has suggested.

9 We believe that the Department's set of guidelines  
10 more effectively serves the interest of justice and more  
11 particularly closely reflects the goals of the Sentencing  
12 Reform Act.

13 Let me at the outset summarize the more important  
14 features of the Department's proposal and secondly, briefly  
15 outline what we see are problems with the Commission's  
16 version.

17 As you are aware, the Department's proposes using  
18 an offense level approach to setting fines for organizations  
19 and really the battle lines, I think, have been most obvious-  
20 ly drawn in the issue of how fines are to be levied and the  
21 size of the fines.

22 We believe that our approach is both straightfor-

1 ward and is also similar to the existing sentencing guidelines  
2 for individuals.

3         Additionally, our guidelines work or build upon  
4 what the Commission has been producing in the past several  
5 years in classifying offenses by seriousness and specifying  
6 what offense characteristics should affect the level of  
7 punishment.

8         Most importantly, the offense level approach  
9 assures that the seriousness of the offense, as measured by  
10 the offense level, is reflected in the penalty imposed on an  
11 organization.

12         Let me also point out another aspect of our  
13 proposal which we think the Commission should take into  
14 account. That is the aggravating factors that increase the  
15 offense level for conduct that indicates increased serious-  
16 ness of an offense or a greater need of deterrence.

17         As the Chairman and the Commissioners are aware, in  
18 our proposal we have set out a number of aggravating factors  
19 which we think the court should look to in determining an  
20 appropriate fine. The high level organizational involvement  
21 is one. Prior criminal history or prior similar conduct is  
22 another. Violation of a judicial order, a third. And

1 bribery or other like conduct, a fourth.

2 I also want to point out that our proposal has  
3 mitigating factors including within it. Many of those  
4 factors which Judge Bell has pointed out are included in the  
5 Government's proposal.

6 They include a mitigation factor for the reporting  
7 of an offense to the governmental authorities upon prompt  
8 discovery of that offense; Secondly, a reasonable lack of  
9 knowledge of the offense by high level management; Thirdly, a  
10 mitigation factor where an offense is represented by an  
11 isolated incident of criminal activity rather than a pattern  
12 of conduct; and, fourthly, mitigation is appropriate quite  
13 obviously when there has been substantial cooperation of the  
14 organization in the investigation or substantial steps by it  
15 to prevent a recurrence of the similar offenses.

16 Let me spend a moment, if I might now, to address  
17 our major concerns with the proposed sentencing guidelines  
18 that the Commission has issued.

19 First, as we point out in our papers, we have some  
20 concern about the use of the gain/loss approach for calculat-  
21 ing sentences.

22 Secondly, we have substantial concern about the--

1 what I will describe as a one-sided adjustment system which  
2 in our view will dramatically reduce fines in many instances.

3           Turning to the first item that I mentioned, the  
4 Commission's gain/loss approach, our most serious concern  
5 with it is that it fails to capture the seriousness of many  
6 organizational offenses which would be prosecuted in this day  
7 and age.

8           While the gravity of some offenses may be measured  
9 solely by financial loss or gain, many corporate offenses  
10 simply cannot be so categorized. Let me mention several  
11 examples which come to mind.

12           Crimes in which the harm clearly cannot be measured  
13 in meaningful financial terms include environmental crimes,  
14 crimes involving national security, or crimes involving  
15 serious risk of death or bodily injury.

16           Secondly, there are crimes in which monetary gain  
17 or loss represents only a portion of the underlying harm, for  
18 example, money laundering, which directly facilitates  
19 narcotics trafficking and organized crime, or also the  
20 exportation of sensitive technology, which may facilitate  
21 terrorism or other similar acts against society.

22           Thirdly, there are crimes involving regulatory



1 reporting requirements where the actual financial gain or  
2 loss may be indeed minimal. An example of this are the  
3 currency reporting requirements which are intended to inhibit  
4 money laundering, but in and of themselves do not demonstrate  
5 a substantial gain or loss to an institution or to victims.

6 Let me turn for a second, if I could, to additional  
7 problems that we see with the Commission's proposal and that  
8 is the absence of aggravating factors.

9 While the Commission's draft includes numerous  
10 mitigating factors that require a reduction in the fine  
11 levels, it includes no provisions requiring an increase in  
12 the fine for any aggravating factor.

13 The asymmetry of this proposal is inconsistent with  
14 the individual guidelines currently in effect which establish  
15 a variety of guidelines or guideline aggravating factors and  
16 which take into account many of those indicia of crime that  
17 cannot be qualified or quantified by the gain or loss  
18 approach.

19 We also have some concerns about the effect of the  
20 mitigating factors in the Sentencing Commission's proposal.  
21 The one sided adjustment system presents problems first  
22 because of its dramatic effect in reducing fines in many

1 cases.

2           Although the fine ranges appear relatively high,  
3 they may be reduced by the mitigating factors to nominal  
4 amounts or even to zero.

5           The mitigating factors that are included in that  
6 approach are not only numerous and duplicative, but addition-  
7 ally should prove quite easy for most organizational of-  
8 fenders to meet.

9           Another point with regard to the mitigating system  
10 that is suggested by the Commission and that is that the  
11 proposed system allows a corporate offender to obtain  
12 substantial mitigation based solely on post-offense conduct.

13           Ordinarily the sentencing judge looks askance at  
14 eleventh hour efforts to create an appearance of rehabilita-  
15 tion. The proposed system, however, both encourages and  
16 unduly rewards such behavior.

17           Finally, our last concern that I'll mention here  
18 today is that it would be extremely difficult for the  
19 Government to rebut evidence of this post-crime mitigation  
20 once it is introduced by the corporate counsel at the  
21 sentencing hearing.

22           While before indictment the Government has access

1 to information relating to the corporation, after indictment  
2 and at the sentencing stage the Government no longer has  
3 access to use of the grand jury or other discovery devices  
4 which would enable the prosecutor to look behind the  
5 mitigating factors which are presented by corporate counsel  
6 at the sentencing hearing.

7 In brief overview, those are our concerns with  
8 regard to the Commission's proposal and briefly why we  
9 believe that the Commission should consider seriously  
10 adopting the proposal that has been submitted by the Depart-  
11 ment.

12 Thank you, Mr. Chairman.

13 CHAIRMAN WILKINS: Thank you, Mr. Mueller.

14 For any guideline system to work successfully and  
15 certainly be accepted by judges and other members of the  
16 judicial family it must rest on some rational basis and it  
17 must do, among other things, provide proportionality among  
18 the fences.

19 Our individual guidelines do that. For example,  
20 when you move--when they move from one level to the next,  
21 there is an increase of approximately 12 and a half percent  
22 and the Commission's proposed organizational sanctions also

1 move in a proportional manner from one level to the next.

2           What I've analyzed as the Department's submission,  
3 and perhaps you can help me understand the pattern that  
4 emerges there, for example, if you go from level 13 to level  
5 14, that is the offense is one level more serious than the  
6 other, there is a 20 percent increase between 13 and 14.

7           If you go one level from level 16 to level 17,  
8 there is a 75 percent increase in the minimum fine to be  
9 imposed. If you go from level 17 into level 18, just that  
10 one level increase, there's a difference of 33 percent  
11 increase. And then if you go from level 21 to level 22,  
12 there's a hundred percent increase.

13           I just don't understand the basis for these varying  
14 increases from one level to the next.

15           MR. MUELLER: I should point out at the outset, Mr.  
16 Chairman, that our fine schedule was based on a comparison of  
17 other fines and the graduation is--and I can't speak to--you  
18 quite obviously have the figures in front of you as to the  
19 percentage increases and without looking at each percentage  
20 increase I can't address the rationale behind it.

21           I will say though that our principle concern is not  
22 directed at the percentage of increase or decrease between

1 the levels. I will have to get you an answer as to why there  
2 are those increases in those percentages.

3 But the quantification of the fine based on a  
4 monetary percentage increase as opposed to looking at the  
5 particular levels and making certain that the conduct is  
6 reflected in each of the levels.

7 But I will get you an answer to your question with  
8 regard to the rationale behind the increase that seems  
9 disparate between the various levels.

10 CHAIRMAN WILKINS: If we were to adopt the Justice  
11 Department's proposal, I would be asked that question.

12 MR. MUELLER: I understand that.

13 CHAIRMAN WILKINS: And when they say you go 75  
14 percent at one level here and you go 33 percent here and then  
15 you go 100 percent here, I would have to have some reason  
16 other than to say--I couldn't turn to you and say, write Mr.  
17 Mueller and he'll answer it for you.

18 But there must be some basis for it, but there  
19 needs to be some pattern to emerge. Otherwise, people say,  
20 "What is this? I don't understand it."

21 MR. MUELLER: I understand and we will provide you  
22 an answer as to the rationale.



1           CHAIRMAN WILKINS: If the Commission's proposal was  
2 tougher than the Justice Department's proposals, would it  
3 change your mind?

4           MR. MUELLER: I'm sorry.

5           CHAIRMAN WILKINS: If the Commission's proposal  
6 turned out to be tougher, that is whatever we come out with  
7 is tougher, more severe sanctions, would you take it rather  
8 than the Justice Department?

9           MR. MUELLER: The Justice Department I don't think  
10 is looking at whether the sentencing guidelines are tougher  
11 per se. I think what the Justice Department is struggling to  
12 come up with and has presented after much internal review and  
13 thought is a suggested sentencing guidelines which is fair  
14 and satisfies the objectives of the Sentencing Reform Act.

15           I would emphasize that there are a number of  
16 objectives of the Sentencing Reform Act, including deter-  
17 rence, which requires high fines.

18           We take into account, given what Justice Bell has  
19 said, we take into account the mitigators which he and  
20 corporate America are requesting the Commission to put out,  
21 but the Justice Department is looking for a fair system, not  
22 necessarily, quote, a tougher system.

1 CHAIRMAN WILKINS: I think all of us share that  
2 same view. I'm delighted to hear that.

3 Any questions by Commissioners to my right?

4 COMMISSIONER MacKINNON: Counsel, the part you're  
5 just talking about, the degree in which the fine schedule  
6 varies as you go up, is that, as I take what was involved?

7 MR. MUELLER: Well, my understanding--

8 COMMISSIONER MacKINNON: Does it vary dispropor-  
9 tionately?

10 MR. MUELLER: I will have to get back to the  
11 Commission--

12 COMMISSIONER MacKINNON: Was that what they were  
13 talking about?

14 MR. MUELLER: We--

15 COMMISSIONER MacKINNON: Well, let me just say  
16 this, you may be having the same problem that we had with our  
17 offense levels. When we go from offense level 1 to offense  
18 level 18, we go by progressions of 6 items a piece, but when  
19 we get to 19, we start with 7, then we go to 8, then 9, 10,  
20 11, 12, 13, 14, and 15. We vary it completely.

21 Is that what your schedule does?

22 MR. MUELLER: No, it's my understanding that our

1 schedule was principally based on the fraud tables which have  
2 been published previously by the Commission and that those  
3 fraud tables apparently vary in such inconsistent propor-  
4 tions.

5 At the higher fraud levels there are greater  
6 percentage differences reflected, but I will have to go back  
7 and, quite frankly, obtain a more thorough understanding of  
8 the rationale behind the percentage differences at the  
9 various levels.

10 I do know that it was based principally on the  
11 fraud tables, but I would have to go back myself and compare  
12 that to the fraud tables.

13 COMMISSIONER MacKINNON: We finally get it at 41 to  
14 an 81 month difference where we started out as a 6 month  
15 difference in the levels.

16 CHAIRMAN WILKINS: The percentage remains constant  
17 as well though. The percentage remains constant.

18 Any questions to my left, Commissioner Nagel?

19 COMMISSIONER NAGEL: I actually have two requests.  
20 One is that you testified that the emphasis on loss or gain  
21 may, in your judgment, at least in the Commission's draft  
22 under reflect the seriousness of the harm and you present in

1 your submitted testimony some hypothetical examples.

2           It would be helpful to us if you could submit to us  
3 after today's hearing some actual cases perhaps from files of  
4 1987 to 1990 where the emphasis on loss or gain would under  
5 reflect the harm and if you could include in your submission  
6 the fine that would result from the Commission draft and  
7 compare that to the fine that would result from the  
8 Department's draft. I think that would be very helpful to us  
9 because the hypotheticals don't give us a sense for the sort  
10 of the depth of the real cases. So if you could prepare  
11 something like that.

12           The other--

13           MR. MUELLER: We have done that. We will provide  
14 that.

15           COMMISSIONER NAGEL: Okay. The other request I  
16 have pertains to this submitted statement which you prepared  
17 and on page 13 you indicate, "In addition, the proposed  
18 mitigation system in our view over accommodates concerns of  
19 vicarious liability". As I'm sure you know and will be clear  
20 from the variety of witnesses who testify today, this is an  
21 area of raging debate.

22           I think you make an interesting point when you say,

1 "While some offenders deserve reduced punishment because of a  
2 variety of factors, including a low level of organizational  
3 involvement in the offense, the degree of mitigation must be  
4 carefully measured so as not to thwart Federal criminal law."

5

6 It would be helpful again I think to us if you  
7 could expand on this, that is, in particular if you could  
8 point to actual cases where the Commission's draft would in  
9 your judgment thwart the purpose of imputed liability.

10 We have a list of cases which have come up in the  
11 last few years where it has been a strict liability statute,  
12 but it would be helpful if we could see something there and  
13 if you could expand on it.

14 MR. MUELLER: I'll be glad to provide that also.

15 COMMISSIONER NAGEL: Thank you.

16 MR. MUELLER: I'd like to make one point with  
17 regard to vicarious liability. Much is stated in this forum  
18 on vicarious liability and there may be a raging debate. I  
19 would suggest that it's inappropriate debate here. It is a  
20 hallmark now the Federal criminal law has been for a number  
21 of years.

22 What this Commission is addressing is sentencing



1 after conviction. The theories that relate to obtaining that  
2 conviction in my mind and whether the rightness or wrongness  
3 of that is perhaps not--this is not perhaps the best place to  
4 debate that.

5 I do understand the point with regard to the  
6 complicity of higher ups in the corporation and that should  
7 be addressed and it should be--the complicity or lack of it  
8 should be addressed as a mitigator. I believe that.

9 I might also add that one of the problems of  
10 vicarious liability is that there should be benefit to the  
11 corporation as part of the Government's showing in that  
12 regard.

13 CHAIRMAN WILKINS: Any other questions to my left?  
14 Judge Mazzone?

15 COMMISSIONER MAZZONE: Mr. Mueller, you just said  
16 in response to Judge MacKinnon's question that your proposal  
17 was based on the offense levels in our, that is the  
18 guidelines, fraud tables. And at the same time you have  
19 criticized the Commission's proposal as based on illegal gain  
20 or loss.

21 Have it in mind, of course, your apparently  
22 reluctant admission that the Commission is not restricted to

1 illegal gain or loss, but also can move to the offense level  
2 as a third alternative, but passing that for the moment.

3 Take this case, the facts of a natural case, a  
4 hospital supply company sells drugs to hospitals and diverts  
5 its product to smaller and more profitable distributors.  
6 That venture gains calculable gain of a \$1,200,000. It's a  
7 gain. It's an illegal gain.

8 MR. MUELLER: A hospital supply company diverts--  
9 can you follow--I lost you there for a second.

10 COMMISSIONER MAZZONE: Diverts drugs that are  
11 supposed to go to a hospital at a certain price for quan-  
12 tities or discounts or whatever regulatory control there  
13 might be, diverts those same drugs to smaller distributors,  
14 high profit distributors and gains a million two, right in  
15 the books, can't dispute it. It's there.

16 Well, that case under your proposal going to our  
17 offense levels, which I think you said is the basis for your  
18 fines, the base offense level for fraud is 6. Let's assume  
19 the highest level management was involved, under your  
20 proposal that's an increase of two levels.

21 Now you've got eight. Going to your fine table  
22 that eight or ten--did I add two--whatever it was, comes to a

1 fine, as I see it, and let me just be sure, of \$25,000 to  
2 \$64,000. High level management aided or abetted, add two  
3 levels. I think that comes to 10, \$25,000 to \$64,000 is the  
4 fine range. The highest fine that the judge could impose  
5 without departing would be \$64,000. That corporation has  
6 gained a million two. That's the question part. How do you  
7 explain the result from using your table, Mr. Brown, as well?  
8 How do you explain the result and why does that make any  
9 sense whatsoever?

10 MR. BROWN: I don't think we come to that result.  
11 One is under Chapter 2 you have a base level of 6. You also  
12 add in--in the fraud tables you add in an amount of--allow  
13 additional levels based on the law. So you'd have to take  
14 into account in figuring the Chapter 2 base level for the  
15 million two so that you wouldn't have a base level of six or  
16 eight.

17 In figuring out the offense level, you take into  
18 account money there. So you're way up there, plus the  
19 Department in its submission puts in a base as the gain of  
20 the fines. So we've already figured it in.

21 COMMISSIONER MAZZONE: Why have you figured it in  
22 at the back door when the Commission's proposal does it at

1 the beginning? Right out front, add in the gain, add in the  
2 loss. You add it at the end. Why do it there?

3 MR. BROWN: I think a lot of us as prosecutors are  
4 comfortable with what the Commission has done. We've worked  
5 with Chapter 2. We're familiar with it. We think that a  
6 fairer way to get an offense level is to figure it in using  
7 some of the Chapter 2 figures. That's a good way to put it  
8 in. We've put in some floors as to the amount of gain so  
9 that in fact we wouldn't come out with a result where you'd  
10 have a fine of less than the gain.

11 So the Department I think has put it in as a floor.  
12 Our view I think generally is that the Commission's sort of  
13 three level of doing it, twice the gain and three times the  
14 loss or the fine table, is unduly complex. We think that our  
15 system is an easier system to apply in the field and that we  
16 do better than with the specific aggravators.

17 One of the concerns particularly, Judge Mazzone,  
18 that I've got on the way that it's set up now is that the  
19 aggravators are all put in as policy statements. The  
20 Department cannot appeal the failure of a judge to depart  
21 upward where it simply is a departure.

22 So if the judge says, "Okay, I don't think upper

1 management is involved", we've got no way to appeal that. In  
2 your case in the hospital, the judge says, "Well, I'm not  
3 sure upper management is there. It's a departure", the  
4 Commission has left those as departures. We think those  
5 ought to be built in as aggravators and then if we disagree  
6 we've got a chance to appeal.

7           The way it is now the Department has no way to  
8 really fight anything except a downward slide. I think our  
9 system from my view and the U.S. Attorneys view, we think  
10 it's a simpler and easier system to apply and it works fairly  
11 well.

12           Some of the amounts that our proposal is they are  
13 going to be less than what would be under the Commission.  
14 Some are going to be hire. I think the exact amount are not  
15 the critical elements so long as we have a system that  
16 produces a reasonably fair system. And I think the amounts,  
17 as Judge Wilkins has pointed out, in the amounts of the  
18 difference as you go up the scale become greater, but I think  
19 that becomes necessary particularly in corporate fines  
20 because the amount of spread we've got in fines is much  
21 greater. So as you go up the scale of severity I think that  
22 it does give the court a wider latitude of discretion. The

1 higher you go up the more discretion the court has got  
2 between the minimum fine and the maximum fine, which I think  
3 is appropriate.

4 MR. MUELLER: One other answer to that is that in  
5 our proposal 8(c)2.1(d) provides for any gain that is not  
6 recouped by restitution is added on. So I think that would  
7 in your example satisfy the concern about fairness that  
8 appears to arise from the application of the two disparate  
9 fine tables.

10 COMMISSIONER MAZZONE: I understand what you've  
11 done. I, just as I say, see the difference between the two  
12 proposals. I don't see what makes yours easier. The judge  
13 is confronted with that situation that I've just given you.  
14 He turns to your fraud table. He turns to your proposal and  
15 says, "Well, the fine here is \$25,000 to \$64,000, but they  
16 made money at it and they disgorged some or whatever and  
17 there's another--there's a million dollars two gained. I'm  
18 going to add that to the maximum and the fine is going to be  
19 \$1,264,000", that's your proposal.

20 The Commission's proposal is for the judge to be  
21 confronted with the facts that there was a gain here of a  
22 million two. There's no loss than can be calculable. The



1 offense level here--we do not have an offense level based on  
2 gain. The greater of the three is the million two. That's  
3 the offense level. What's so hard about that? What makes  
4 yours so much easier?

5 MR. MUELLER: I think in that particular example it  
6 may not be particularly hard, but in an environmental case,  
7 it may be an antitrust case--I mean, does the judge want to  
8 sit there and decide what the punitive profit or loss is or  
9 decide to go to the alternate table? I mean where you've got  
10 on the books a particular figure that either the prosecutor  
11 or the court can pluck out, it may be just as simple under  
12 both systems.

13 But when you are focusing principally on a deter-  
14 mination of what is the gain, what is the loss, or do you go  
15 to the alternate table, I think the courts are going to be  
16 spending an awful lot of time in hearings on what is the  
17 gain, what is the loss where, number one, you don't have to  
18 and it may not be appropriate because the gain or loss does  
19 not necessarily identify the seriousness of the conduct in  
20 the cases that we have mentioned.

21 COMMISSIONER MAZZONE: You may be right. I await  
22 your response to Commissioner Nagel's request because I don't

1 think you have a heck of a lot more information than we have  
2 and we're doing the best with what we've got and there's been  
3 a lot of work done on it. These kinds of cases point out to  
4 me at least that the judges can do this work and should do  
5 this work and this gives judges more discretion to reach a  
6 fair result. But maybe you can come up with some actual  
7 cases that will be different.

8 MR. MUELLER: Well, let me address for a moment the  
9 point that was made by Justice Bell in terms of discretion.  
10 I think that the Government's proposal gives sufficient  
11 discretion to the judge within limits. You either are going  
12 to have sentencing guidelines or you are not. We have had  
13 this debate and we probably personally have had this debate  
14 in the past with regard to individual guidelines. Either you  
15 have a door in which you can drive through in which case you  
16 do not have guidelines, or you have structured guidelines  
17 that give you the uniformity that the Sentencing Reform Act  
18 thought was necessary and you give judges limited discretion  
19 in certain circumstances to depart from.

20 If you have a set of guidelines which give substan-  
21 tial discretion to the judges, then you have no guidelines.  
22 It's our submission that the Department of Justice's proposal,

1 like the individual guidelines, provides sufficient discretion  
2 but also assures the uniformity of the deterrence that  
3 Congress wished as a result of passing the Sentencing Reform  
4 Act.

5 CHAIRMAN WILKINS: Commissioner Carnes?

6 COMMISSIONER CARNES: Yes. I have three questions  
7 for Mr. Mueller.

8 Mr. Mueller, in your written submission you  
9 indicated that the Department has opposed too great a  
10 reduction in the fine based on events that have occurred long  
11 after the crime has been committed and you've reiterated that  
12 today by saying such eleventh hour contrition is something  
13 that is viewed suspiciously by the Department and judges.  
14 Such things are cosmetic, you say, and they're not easily  
15 disproved by the prosecutor.

16 That being your opinion, I'm curious why the  
17 Department's proposal gives substantial reductions when the  
18 organization has taken substantial steps to prevent a  
19 recurrence of similar offenses such as implementing ap-  
20 propriate monitoring procedures.

21 In fact, at offense level 22 your entire fine would  
22 go down 50 percent nearly by this one factor and I would

1 submit to you that is one factor that could be accomplished  
2 simply by the corporation having fired one employee and  
3 simply promising to the court that it had implemented a  
4 compliance program and would not do criminal conduct again.

5 That being so, could you tell me what policy  
6 considerations justifies a reduction of the magnitude?

7 MR. MUELLER: I will have to look and--quite  
8 obviously in our proposal it was thought important to give  
9 some reduction to conduct that indicated remorseful contrition  
10 and the desire to assure that this conduct did not take place  
11 in the future.

12 In putting together our proposal we believed that  
13 there should be a reduction. Now whether that is substantial  
14 or so substantial, as you say, I would have to go and give  
15 some more thought to it.

16 We did feel that the mitigators that we put in were  
17 far less substantial than was put in the Commission's draft.  
18 But I will have to get back to you after I've looked at the  
19 particular facts that you've given to me.

20 COMMISSIONER CARNES: You've also expressed a  
21 dislike for a fine system based in any way on loss or gain.  
22 Yet, it appears, having run the numbers through all of our

1 systems, that in most cases the fines are going to be higher  
2 under a loss/gain system as proposed by the Commission than  
3 under either the Commission or the Department's offense  
4 table.

5 That being the case, is your opposition to the use  
6 of a loss system based on a perception that somehow such a  
7 system unfairly results in fines that are too high?

8 MR. MUELLER: No. As I have expressed before and  
9 you are telling me something I did not know previously about  
10 what has been run through your computer and I'd be interested  
11 in seeing it, but no, our opposition is based on our belief  
12 that an offense level approach is the appropriate approach to  
13 adapt.

14 It's a basic philosophical difference in whether or  
15 not you adopt a loss/gain approach or an offense level  
16 approach and our opposition, as I have stated before, is that  
17 if you do not adopt an offense level approach you are not  
18 taking into account the seriousness of certain offenses in  
19 the same manner in which you took into account the serious-  
20 ness of offenses when you were determining what were the  
21 appropriate levels in sentencing individuals.

22 MR. BROWN: I think it also would be important to

1 take a look at the aggravators and mitigators. I'm not sure  
2 in running it through the computer how that would figure out,  
3 but I think one of our concerns is that under the Commis-  
4 sion's proposal that so many of those are going to be--the  
5 mitigators are going to be so much easier to get under our  
6 proposal. I'm not sure--I'd have to see how you--when you  
7 ran the computer how you figured in the aggravators and  
8 mitigators. I'm not sure I would necessarily agree with your  
9 computer results because I'm concerned about those ag-  
10 gravators or lack of aggravators.

11 COMMISSIONER CARNES: Well, if turns out that our  
12 computer results are that a loss system is most of the time  
13 going to result in fines that are higher and that therefore  
14 certainly take into account these offense characteristics  
15 you're so concerned about, do you withdraw your opposition to  
16 that kind of system? Does it modify your position in any  
17 way?

18 MR. MUELLER: No.

19 COMMISSIONER CARNES: Whatever results, you still  
20 are opposed to a loss/gain system?

21 MR. MUELLER: We think either system would--has  
22 sufficient penalties to provide the deterrence that is one of



1 the critical goals of the Sentencing Reform Act, and while I  
2 think at certain levels there may be a discrepancy, I think  
3 we may be higher at certain levels and lower at certain  
4 levels, whether we are higher or lower at a particular level  
5 is no so important as whether or not the system as applied  
6 adequately reflects the seriousness of the conduct, which may  
7 or may not be based solely on monetary gain or loss.

8 COMMISSIONER CARNES: And lastly, let's talk a bit  
9 about the aggravating factors. The Department has opposed  
10 the omission of such factors in the Commission draft. You  
11 indicate that omitting these factors fails to capture  
12 completely the seriousness of the offense.

13 I'm curious though that one of your aggravating  
14 factors is risk to national security and you triggered a two  
15 level increase for that. It strikes me if the particular  
16 offense conduct, for example, selling military secrets to  
17 Iraq or designing tanks that would be so defective that in  
18 the course of armed conflict men would be killed and the  
19 tanks would fail, that your system would provide for only a  
20 two level increase for something so egregious, whereas the  
21 Commission's draft that would allow a judge to depart upward  
22 would allow that judge to take into account varying sorts of

1 risk to national security and in that particular hypothetical  
2 give a fine that I think you would agree would much more  
3 closely approximate the harm caused by that conduct than a  
4 mere two level increase. I would be interested in your  
5 reaction to that.

6 MR. MUELLER: That's a good point. I would have to  
7 look at that as to whether or not our system should be  
8 adjusted in that particular case when quite obviously the--it  
9 may well be and it's been pointed out that our proposal would  
10 allow a judge to depart in that circumstance. However, I'd  
11 have to go back and look at it closely so I could assure that  
12 that were the case because I am well aware in our system it  
13 tracks the individual system whereas if it is considered as a  
14 mitigator then the judge may not use that as a basis for  
15 departure.

16 But your point is well taken and I have to look at  
17 our proposal to see whether it adequately reflects the  
18 seriousness of the offense in the hypothetical that you've  
19 given.

20 May I make one last point, Mr. Chairman, with  
21 regard to the point made by Commissioner Carnes, and that is  
22 on the fine tables. As Joe Brown has pointed out, your fine

1 tables may well result in higher fines because the ag-  
2 gravators are included within the fine tables and I think the  
3 point is well taken that you can't just compare the fine  
4 tables, but you have to compare the mitigators, aggravators  
5 in any particular situation. So that if you impose our  
6 aggravators in a particular situation it may result in an  
7 increased fine compared to your proposal in as much as your  
8 proposal already includes in it what is perceived to be as  
9 aggravators.

10 So I think it is difficult to compare fine tables  
11 against each other.

12 CHAIRMAN WILKINS: We'll take a real case and run  
13 it through yours and run it through ours, just like you're  
14 going to do for us, I guess. Apply all of our mitigators and  
15 apply all of your aggravators so that we can compare apples  
16 and apples and the proof will be in the pudding and we will  
17 take a look at these real case examples. That's what we're  
18 doing now and we need your assistance because I think that  
19 vividly displays many times how this system either one will  
20 work in reality.

21 Commissioner Gelacak?

22 COMMISSIONER GELACAK: Just one quick one. We all

1 agree we're talking about sentencing and I assume that means  
2 that the Department charged with the responsibility of  
3 enforcing the law against corporate America will do that  
4 anyway regardless of what we effectuate as changes in  
5 sentencing policy.

6 Since that's the case, let's assume we adopt your  
7 proposal. What's going to change at the Department?

8 MR. MUELLER: Well, absolutely the Department will  
9 prosecute it as it has in the past and from the present to  
10 the Attorney General down. White collar crime, corporate  
11 crime is a substantial priority.

12 If you adopt our proposal, there will be no  
13 difference in terms or the charging decision. Now perhaps  
14 you're alluding to what Justice Bell was intimating might be  
15 a fall out from what some might perceive as being a tough  
16 sentencing structure in terms of prosecutors' more willing-  
17 ness to prosecute. I don't think that's going to be a fall  
18 out.

19 COMMISSIONER GELACAK: I think what I am trying to  
20 get at is, how does it make your job easier or tougher?  
21 You're going to do the same things anyway, or this will cause  
22 you to allocate resources differently?

1           MR. MUELLER: In terms of making the charging  
2 decision all the way up to the term and time of indictment  
3 and conviction there would be absolutely no difference. The  
4 same elements that go into making certain determination of  
5 whether or not to prosecute would be unchanged and the  
6 principals of Federal prosecution that were developed under  
7 Justice Bell and adopted--excuse me Attorney General Sivilet-  
8 ti are still in effect. They take into account in the  
9 prosecution decision many of the considerations which Judge  
10 Bell illuded to and it would not change basically the way we  
11 do our job as prosecutors.

12           In terms of sentencing, in my mind it would make  
13 the job easier in terms of specifying with certainty what the  
14 appropriate sentence will be in particular cases and will  
15 also assist not only us, but I think in the appearance of  
16 justice in terms of giving us uniformity across a particular  
17 bench and across the country with regard--from court to  
18 court.

19           One of the points that Judge Bell raised was the  
20 point that there perhaps is no difference in sentencing by  
21 judges of corporate offenders. I would say all you have to  
22 do is look at a judge's--the way a judge addresses a civil

1 docket in terms of settlements and you will vast differences  
2 between the way judges handle settlements of civil cases  
3 because it reflects their belief in the good or badness of  
4 corporate America.

5 I think that also is done when you are talking  
6 about sentencing corporations. I certainly have been before  
7 judges who have said, "Mr. Mueller, this case shouldn't be in  
8 this court", and that reflects a judge's belief that this  
9 case is de minimis or shouldn't be in this particular court.  
10 Now go in another courtroom and another judge will say,  
11 "Well, Mr. Mueller, why are you asking for a fine of a  
12 million dollars when this corporation is responsible for 5  
13 million dollars worth of damage?" That judge believes that  
14 the Government is too light. Any prosecutor in this room,  
15 most of them have had similar situations on a particular  
16 bench between various courts.

17 One of the objects, the benefits of this system  
18 from the prosecutor's point of view is it leads to uniformity  
19 and I would think from corporate America it also leads to  
20 certainty. You know if you commit the crime this is going to  
21 be the sentence you get.

22 CHAIRMAN WILKINS: I think Judge MacKinnon had a



1 question.

2 COMMISSIONER MacKINNON: There isn't anything in  
3 here that increases the punishment for any offense in there?

4 MR. MUELLER: There are aggravators, but--

5 COMMISSIONER MacKINNON: There is nothing in here  
6 that increases the maximum statutory punishment for any  
7 offense.

8 MR. MUELLER: No, there is not.

9 COMMISSIONER MacKINNON: In other words, it might  
10 lower it generally in many respects.

11 MR. MUELLER: In some cases it would.

12 COMMISSIONER MacKINNON: So the people that say  
13 that we're enable to deal with corporate crime today--now I  
14 read these fines that are being meated out, 30 million to GE,  
15 4 million to one on the coast, E.F. Hutton and Drexel  
16 Burnham, those are not small figures.

17 So there really isn't anything presently existing  
18 that prohibits a judge from imposing a maximum fine on any  
19 criminal activity at the present time, is there?

20 MR. MUELLER: There is not.

21 COMMISSIONER MacKINNON: And to the extent that we  
22 come in here, we probably come in below the maximums that are

1 presently allowable.

2 MR. MUELLER: In most cases I would say, yes.

3 CHAIRMAN WILKINS: We have to come in not greater  
4 than because it would be an act of futility to write  
5 guidelines exceeding statutory maximum penalties.

6 COMMISSIONER MALONEY: Mr. Chairman, if I may.

7 Judge Mazzone's hypothetical case sounded to me  
8 like he had a particular fact pattern mind. I'm just  
9 wondering about the calculus of the proposed fine. I got  
10 that one as a level 21 in our system which resulted in \$3.2  
11 million to \$9 million fine. I'm not certain--at least that  
12 was my calculus. So that I make that observation on a \$1.2  
13 million case.

14 CHAIRMAN WILKINS: Well, we'll go back and use that  
15 as one of the cases that you can run through the system and  
16 we'll do the same and see what the results are.

17 MR. MUELLER: Judge Mazzone knows I have problems  
18 with numbers.

19 CHAIRMAN WILKINS: Thank you very much, Mr. Mueller  
20 and thank you, Mr. Brown. We appreciate your assistance.

21 Our next witness is Stephen S. Cowen. Mr. Cowen is  
22 a former Federal prosecutor from Atlanta, Georgia. He's an

1 attorney with Steptoe and Johnson here in the District. He's  
2 been practicing with that firm for some time and he's also  
3 served as member of a defense attorney's practitioner's group  
4 that has advised the Sentencing Commission on various matters  
5 over the life of this Commission.

6 Mr. Cowen, we're delighted to have you with us.

7 STATEMENT OF MR. COWEN

8 MR. COWEN: Thank you very much, Judge Wilkins.

9 I am pleased to be here to offer comment on both  
10 the Commission's draft and the Department's draft. At the  
11 first portion of my statement, which I will not--

12 COMMISSIONER MacKINNON: Who do you represent?

13 MR. COWEN: No one, sir.

14 COMMISSIONER MacKINNON: You're here as a lawyer?

15 MR. COWEN: Yes, sir.

16 COMMISSIONER MacKINNON: Well, good.

17 MR. COWEN: And I'm pleased to have the opportunity  
18 to be here.

19 At the first part of my statement I add my voice to  
20 the chorus that I'm sure the Commission has heard from before  
21 and will hear from today and even on into the comment period  
22 that mandatory guidelines for sentencing corporations are

1 unnecessary and that it would be preferable and would provide  
2 the greatest flexibility and fairness to simply issue policy  
3 statements which would guide judges, but not mandate fines.

4 I also recognize however that it is quite likely  
5 that the Commission will decide to go with a mandatory fine  
6 system and I would prefer to spend my limited time addressing  
7 that.

8 Assuming that the Commission does issue mandatory  
9 guidelines, the basic approach in the Commission draft  
10 provides a more rational system for imposing fines than does  
11 that proposed by the Department of Justice.

12 What makes this a little awkward for me, since I am  
13 a defense attorney, is that I must confess that I like the  
14 Commission's methodology far better, but not necessarily your  
15 numbers.

16 The Department of Justice proposal differs from the  
17 Commission's by providing not only for aggravators and  
18 mitigating factors, but by refusing to give as much weight to  
19 mitigating factors.

20 Also, as has just been indicated in the prior  
21 testimony from the Assistant Attorney General, Mr. Mueller,  
22 Department of Justice draft relies exclusively on offense

1 levels.

2           This approach is not simpler to use, but it is  
3 simplistic. The irony is that the Department draft, as the  
4 past colloquy just demonstrated, at the lower and middle  
5 offense levels, often, not always, but often would result in  
6 fines far below the Commission's draft, while at the upper  
7 levels it would result in higher fines.

8           The Department of Justice draft is most disturbing  
9 to me because the fine ranges at the upper level are so high  
10 and so wide that they offer no pretense of rationality.

11           For example, at a level 25 the fine range under the  
12 Department draft is \$48 million to \$136 million. At the next  
13 level up it jumps to \$80 million to \$170 million. At the  
14 next level, \$100 million to \$204 million.

15           Because for profit operations who will be primarily  
16 the organizational defendants going before courts are largely  
17 motivated by economic gain, a sentencing system which takes  
18 into account gain or potential gain of the organization is  
19 more rational than one which relies solely on an offense  
20 level table.

21           Because the Commission draft is primarily based on  
22 multiples of gain or loss, it has the merit of providing for

1 a steadier and more predictable progression of fines.

2           While this reliance on economic impact provides a  
3 more rational basis for sentencing corporations, the Commis-  
4 sion's assignment of weights for the mitigators in the amount  
5 of the multipliers should be changed in order to achieve the  
6 goals of the Commission's carrot and stick approach.

7           As currently drafted, the Commission draft would,  
8 in my view, impose overly harsh fines on those organizations  
9 that would satisfy what everyone probably would agree would  
10 be ideal corporate conduct standards except for the fact that  
11 they had an employee, not a high level employee, but an  
12 employee who engaged in criminal misconduct.

13           A few examples will demonstrate the difficulties  
14 with the Commission's draft as well as the Department's  
15 draft. I didn't use a computer. I just used a calculator to  
16 come up with these figures. If you assume that you have a  
17 defense contractor who through the deliberate misstatements  
18 of mid-level personnel and despite an otherwise effective  
19 compliance program caused a loss to the Government of  
20 \$5,500,000 and that the problem was discovered by Government  
21 auditors. There was no high level knowledge. The company  
22 full cooperated with the Government investigation and pled



1 guilty and made full restitution.

2 Under the Department proposal for this \$5,500,000  
3 loss the fine range would be \$1,100,000 to \$2,850,000. While  
4 under the Commission's draft the range would be higher,  
5 \$1,925,000 to \$3,025,000. If you take the same defense  
6 contractor and up the loss figures to \$41,000,000 the pattern  
7 is the same. The Department's fine range would rise three  
8 levels to \$6,500,000 at the minimum and \$18,000,000 for the  
9 maximum. While the Commission range would be \$14,350,000 for  
10 the minimum and \$22,550,000 for the maximum.

11 If you add an aggravator that the Department has,  
12 namely that the same corporation had a division that 14 years  
13 ago in another division committed a similar offense, the  
14 Department's fine range would go up in the first example to  
15 \$2,100,000 a minimum to \$4,750,000 as the max and then  
16 \$13,000,000 to \$36,000,000 for the second example I gave.

17 Even in the second example the Commission's numbers  
18 at the low range are still higher than the Department's  
19 numbers.

20 Now what concerns me is that the fines for this  
21 responsible and cooperative corporation would be in addition  
22 of course to full restitution. In the first example the 5

1 and a half million dollar loss with full cooperation by the  
2 company, a good effective compliance program, though not a  
3 perfect compliance program, obviously, no high level involve-  
4 ment, they are still going to be paying a \$2 million fine  
5 even under the Commission's draft and a lesser fine under the  
6 Department's draft.

7           The same problem when you go up to the higher loss  
8 figures, \$41 million loss. This corporation would still be  
9 fined in the \$15 million or so range even though they fully  
10 cooperated and did everything one reasonably could expect  
11 them to do.

12           The problem with the Commission draft is that the  
13 multipliers are too high and the credit for mitigation is too  
14 low. I would suggest to the Commission that Congress really  
15 did set the guidance on what the maximum end should be when  
16 in the Fine Improvement Act of 1987 and in the original  
17 increased fine legislation in 1984 they put the maximum  
18 alternative fine at twice loss or twice gain.

19           I would submit to the Commission that ought to be  
20 the upper limit for the maximum. And at the very most the  
21 upper limit for the minimum should be one time the loss or  
22 gain because you always will have restitution being ordered

1 by the court under any of the sentencing systems adopted.

2           It seems to me that the reason why all of this good  
3 corporate conduct is under valued in both the Commission  
4 draft and the Department draft is because there is some  
5 skepticism about compliance programs and lack of high level  
6 involvement and some sense that corporations ought to be able  
7 to ferret out misconduct by even low and mid-level employees.

8           I would submit that even the Government's ex-  
9 perience in dealing with problems within the bureaucracy  
10 demonstrates that that is not always such an easy task.

11           Back during the Cuban missile crisis when President  
12 ordered no further Air Force flights over the Soviet Union  
13 during the height of the crisis, a U2 pilot strayed into  
14 Soviet air space and created an incident.

15           The President remarked at the time, "Well, there is  
16 always some so and so who doesn't get the word." In  
17 bureaucracies and in corporations there is always some so and  
18 so who does not get the word.

19           The corporation that makes the effort to prevent  
20 that violation of corporate policy and to prevent criminal  
21 misconduct ought to be given very substantial credit for the  
22 effort and the guidelines ought to recognize that perfection

1 is impossible to achieve in any organization and certainly in  
2 mid-size and large corporations. That is just not an  
3 attainable goal.

4 I would also submit that it is very difficult for  
5 corporations to qualify for voluntary disclosure credit under  
6 most circumstances. If a corporation learns of a criminal  
7 problem by one of its employees, the sentencing system ought  
8 to give extra credit and extra weight for voluntary dis-  
9 closure, but it should not depend on voluntary disclosure in  
10 order to bring the fine level down to a reasonable level.

11 The reason for that is voluntary disclosure is  
12 going to be rare for most organizations, corporations, and in  
13 fact, for Government bureaucracies as well. We have had  
14 several recent examples where the Government itself only  
15 learns about criminal misconduct within the bureaucracy when  
16 an outsider brings it to their attention.

17 The scandal involving the Food and Drug Administra-  
18 tion is a good example. There you have FDA reviewers  
19 accepting bribes and gratuities and even though the FDA is  
20 subject to internal investigation by an Inspector General  
21 from the Health and Human Services Department, that criminal  
22 behavior was not discovered until a pharmaceutical manufac-

1 turer complained about unfair treatment at the FDA.

2 Another example, and I only raise this one, not to  
3 criticize the Department of Justice, but just to show how  
4 difficult it is even for a very professional and dedicated  
5 organization to always ferret out misconduct of its own  
6 employees, including employees who are subject to background  
7 checks and all sorts of review.

8 We had an incident when I was in Atlanta where  
9 there was a joint criminal investigation between the Atlanta  
10 U.S. Attorney's office and the Houston U.S. Attorney's office  
11 and a Federal prosecutor in Houston contacted the target of  
12 the investigation and offered to sell the file for \$200,000.  
13 That crime was not detected until the target's lawyer  
14 contacted the Government.

15 If the Government itself and the Department of  
16 Justice itself cannot always detect criminal misconduct by  
17 its employees and prevent it, no guideline sentencing system  
18 should expect that from a corporation either and it is my  
19 suggestion that the guidelines provide for greater credit for  
20 an effective compliance program for cooperation, for lack of  
21 high level involvement, and that the corporation that really  
22 engages in ideal corporate conduct not be subjected in the

1 case of a 5 and a half million dollar loss to a 2 million  
2 dollar fine.

3 Therefore, the mitigating weights should be  
4 increased to allow fines to go down all the way to zero in  
5 the even of corporate conduct which satisfies all of the  
6 carrot and stick requirements other than voluntary dis-  
7 closure.

8 And, of course, in a case where a corporation was  
9 in a position to make a voluntary disclosure, then that  
10 should be factored into account if it failed to make the  
11 voluntary disclosure.

12 One way to ensure that fairness and flexibility  
13 remains in the sentencing system is for the Commission to  
14 adopt its third alternative that was proposed where it would  
15 allow courts to choose a fine based on loss, gain, or a fine  
16 table depending on the amount most appropriate to achieve the  
17 purposes of sentencing set out in the sentencing statute.

18 If the Commission adopted that approach, I think  
19 you would then have given sufficient flexibility, but still  
20 guidance to the sentencing courts so that a fair fine could  
21 be imposed.

22 Finally, I would say that the concern about



1 disparity in corporate sentencing seems to me to be exag-  
2 gerated and misplaced. At least right now there is no proof  
3 that there is a disparity problem in corporate sentencing.  
4 We've only had the increased fines since 1984 and I don't  
5 think there is enough data out there to demonstrate that  
6 currently there is a disparity problem.

7           And, of course, given the fact that corporations  
8 differ from each other dramatically both as to skill of their  
9 management, their own resources, their size, number of  
10 employees, et cetera, it is much less likely that you are  
11 going to have a sense of unfairness from one corporation in  
12 Texas being sentenced one way and another corporation of a  
13 different size and a different character being sentenced in  
14 New York a different way.

15           The problem in disparate sentencing for individuals,  
16 of course, is acute and runs right into our concerns about  
17 our democratic ideals that people ought to be treated the  
18 same. But corporations are so different that disparity is  
19 not a concern that should drive these fines.

20           CHAIRMAN WILKINS: Thank you very much.

21           Between now and the time we submit something to  
22 Congress we have the ability and perhaps the luxury of doing

1 a lot of rewriting if we so elect.

2 But assuming we had to pick one or the other of  
3 these two approaches, as a defense attorney, if you have such  
4 an opinion, which would you advise us to adopt?

5 MR. COWEN: If I were representing the corporations  
6 in example 1 or 2 I would urge you to adopt the Department's  
7 draft because those would require lower numbers.

8 I think there are going to be some instances where  
9 the Commission's numbers would be lower than the Department's  
10 numbers, but often times in the fraud circumstance it looks  
11 to me like the Department's numbers are lower and if I'm  
12 taking a result oriented approach, which as a defense lawyer  
13 I am compelled to and am not worried about the artistry or  
14 scientific nature of guidelines, I would rather have the  
15 Department draft.

16 CHAIRMAN WILKINS: Any questions from Commissioners  
17 to my right?

18 COMMISSIONER MALONEY: Where would you--would you  
19 bottom off the proposed mitigation table in the Commission's  
20 staff draft? Would you bottom off the minimum at zero?

21 MR. COWEN: Yes.

22 COMMISSIONER MALONEY: How is a zero fine consis-

1 tent with the jurisprudence in terms of vicarious liability  
2 and the congressional intent as manifested by statute? How  
3 do you square those two notions with the idea that a judge  
4 can impose after having the executive branch of Government  
5 charge a corporation have them be convicted either by a plea  
6 of guilty or after trial and then having the judge impose a  
7 zero fine? How does that square?

8 MR. COWEN: Well, we start with let's say this  
9 example one where there's a 5 and a half million dollar loss.  
10 The company, of course, has had to disgorge the gain of 5 and  
11 a half million dollars. Congress has not required a minimum  
12 fine for corporations and there may well be the circumstance  
13 including in that instance where the corporation's conducted  
14 so assisted the Government in making its case that without  
15 the company's assistance there would be no case against the  
16 individual and there would be no case against the company.

17 I could also imagine circumstances where you have  
18 the voluntary disclosure and the Department of Justice might  
19 decide for policy reasons that it's not going to forgive the  
20 misconduct and will require the corporation to be subject to  
21 a conviction, but a judge might decide that all the societal  
22 interest at stake would require encouraging corporations in

1 that circumstance to make a voluntary disclosure and the  
2 company should not be subjected to a fine.

3 COMMISSIONER MALONEY: You're asking the Commission  
4 to adopt the third alternative in its draft which basically  
5 allows the judge to choose gain, loss, or table.

6 MR. COWEN: Yes, sir.

7 COMMISSIONER MALONEY: How does that address the  
8 issue which--the notion of the Sentencing Reform Act that  
9 disparity is something that ought to be addressed? Is that  
10 not a prescription for disparate results in differing  
11 districts depending on which the judge chooses?

12 MR. COWEN: I don't think it's any more of a  
13 formula than a fine table that has enormously wide ranges  
14 such as the Department's draft which at the upper level has a  
15 swing of \$100 million and at the lower levels will go from \$6  
16 million to \$18 million at the same level.

17 As I said before, disparity is not nearly as  
18 apparent. I don't think it's been demonstrated. I haven't  
19 seen a study and maybe the Commission has one or Department  
20 has one looking into the issue of whether there is disparate  
21 corporate sentencing.

22 But it's very hard to compare corporation A to

1 corporation B and say they are identical in the way we can  
2 compare bank robber A to bank robber B and say they are  
3 similar and ought to be treated similar.

4 COMMISSIONER MALONEY: But under that system two  
5 cases are going to be treated--two cases that are factually  
6 similar are going to be treated the same in the draft;  
7 correct? And then you're going to allow the judge to choose  
8 between gain, loss, or the table in his discretion.

9 I don't understand how that does not open up the  
10 idea that if you get convicted in District Number 1 you might  
11 get the lowest fine as allowed by those options or the  
12 highest fines allowed by those options.

13 At least when you must choose there is a range upon  
14 which the judge can choose and this way it is so divergent  
15 that I guess I don't understand why you don't think that  
16 those disparate results aren't going to occur in cases that  
17 are factually very much alike.

18 MR. COWEN: I think it will be rare that there will  
19 be cases involving corporations that are very factually  
20 similar and I think the problem--the greater problem is in  
21 tying the hands of judges and requiring them to impose unduly  
22 high fines on corporations.

1           It seems to me that the best way for the Commission  
2 to deal with maybe just an imaginary disparity problem is to  
3 adopt this far more flexible tripartite approach and then as  
4 the Commission is charged with doing, examine over a period  
5 of time whether that is that working and whether there are  
6 disparate sentences.

7           COMMISSIONER MALONEY: One last question. What's  
8 the offense of conviction in your examples on page 5?

9           MR. COWEN: You mean the offense level?

10          COMMISSIONER MALONEY: No, the offense of conviction.  
11 What did you assume the offense of conviction was?

12          MR. COWEN: It would be either a False Statements  
13 Act or False Claims Act violation and obviously I went to the  
14 fraud tables.

15          COMMISSIONER MALONEY: Thank you.

16          COMMISSIONER MacKINNON: Counsel, what would you  
17 describe as the essential elements in a satisfactory compliance  
18 program?

19          MR. COWEN: I think the Commission has listed a  
20 pretty--

21          COMMISSIONER MacKINNON: Let me ask you this. To  
22 what extent have you had a lot of corporate experience with



1 actual day to day, year in, year out operation of corpora-  
2 tions?

3 MR. COWEN: Only as outside counsel advising  
4 companies. I am not experienced being on the inside of a law  
5 department in a corporation.

6 COMMISSIONER MacKINNON: Go ahead. What would you  
7 describe as the elements of what you would think would be a  
8 compliance program that would be adequate?

9 MR. COWEN: I think the Commission's listing has  
10 described the elements of a good compliance program. The  
11 only concern I would have about compliance programs is to be  
12 sure that we don't import into the system some negligent  
13 standard that requires inside lawyers or compliance managers  
14 to be faultless.

15 A system that any corporation sets up for com-  
16 pliance should be adequately funded, should have enough teeth  
17 through a disciplinary system so it can be enforced. It  
18 should have a widespread publication within the corporation  
19 and it should obviously not just be something that people pay  
20 lip service to.

21 By the same token though, you do not want to put  
22 compliance managers and inside lawyers in the position of

1 every time they hear about a problem if they don't solve it  
2 perfectly the corporation is going to get fined excessively  
3 high if it turns into a criminal problem because you will  
4 then discourage compliance managers and inside counsel from  
5 delving into the day to day affairs of the corporation in a  
6 way that is needed in order to have an effective compliance  
7 program.

8           One other thing I would say, Judge MacKinnon, is  
9 obviously this depends on the size of the corporation. The  
10 large Fortune 100 companies are in a far different position  
11 to set up the ideal compliance program and really enforce it  
12 and get good results.

13           If you are dealing with a company that has \$5  
14 million in revenues or \$50 million in revenues and may not  
15 even have one inside lawyer, what you would expect from them  
16 certainly would be a different type of program more suited to  
17 their resources and their situation.

18           COMMISSIONER MacKINNON: You spoke of disparity.  
19 There isn't anything in the Act which we're operating under  
20 or in the legislative history that speaks about disparity  
21 with respect to corporations. It directs the Commission to  
22 enact or propose corporate guidelines and that's what we're

1 operating under. We're not operating under any need for  
2 demonstrating prior disparity as much as it might exist.

3 Do you see any disparity in the tremendous offenses  
4 that are being committed today and being penalized with large  
5 fines?

6 MR. COWEN: I haven't done a study, but it seems to  
7 me that when you compare some of these widely noted cases  
8 where either huge fines have been imposed in the defense  
9 industry or huge fines imposed in the securities industry  
10 that the case in the securities industry is not going to be  
11 comparable to a similar securities problem in another  
12 district and so I don't see disparity. I see large fines out  
13 there, but I don't see a disparity problem because the--

14 COMMISSIONER MacKINNON: We're not looking for  
15 disparity really, although that will be an element, but we  
16 don't have to have that and that wasn't the reason that  
17 Congress gave as a reason for directing us to impose cor-  
18 porate guidelines.

19 Have you come abreast of any case where a corpora-  
20 tion was--I'm talking about a substantial corporation, a  
21 large corporation, was punished for the act of a low level  
22 employee?

1 MR. COWEN: I guess the question is how low is low?  
2 I think you can have in the environmental area a situation  
3 where a low level employee creates a harm to the environment  
4 and the company would be prosecuted for that. I haven't  
5 personally be involved in that.

6 Mid-level, non-supervisory employees, certainly and  
7 there was a case recently in Philadelphia where General  
8 Electric was convicted due to the criminal conduct of mid-  
9 level employees in sub of a sub of a sub.

10 COMMISSIONER MacKINNON: Well, they're delegating  
11 corporate authority to middle management all over America,  
12 all over the world and they are acting with discretion for  
13 the corporation and they have to be punished and the corpora-  
14 tion that stands to benefit from what they did is in that  
15 position.

16 So when you talk about middle management you're  
17 talking about management today in the corporate field.

18 MR. COWEN: They certainly have had responsibility  
19 delegated to them. I agree with that.

20 COMMISSIONER MacKINNON: All over America the  
21 corporations are moving their operating discretion down to  
22 middle management. They have to.

1 I appreciate your testimony. Thank you.

2 MR. COWEN: Thank you.

3 CHAIRMAN WILKINS: Any other questions from  
4 Commissioners?

5 Thank you very much, Mr. Cowen. We appreciate your  
6 testimony and your work with the Commission over the last 2  
7 years.

8 Our next witness is Richard R. Rogers, Associate  
9 Counsel, Ford Motor Company representing the National  
10 Association of Manufacturers. Accompanying Mr. Rogers is  
11 James P. Carty. Mr. Carty is Vice President of Government  
12 Regulation, Competition and Small Manufacturing Section of  
13 the National Association of Manufacturers.

14 While these gentlemen are taking the witness stand,  
15 let me recognize Judge Chuck Richey, United States District  
16 Judge for the District of Washington, D.C. Judge Richey,  
17 we're delighted to have you with us.

18 Mr. Rogers, we will be glad to hear from you.

19 By the way, let me say this, we're running behind  
20 schedule so we're not going to take a break. Any Commis-  
21 sioners who need to we'll just get up and take a break and  
22 certainly this applies to the audience. The only person I



1 will stop for is the court reporter. If you tell me we need  
2 to stop, then we will stop.

3 Now, Mr. Rogers, go ahead.

4 STATEMENT OF MR. ROGERS

5 MR. ROGERS: Mr. Chairman, Members of the Commis-  
6 sion, as you mentioned, I work for Ford, but I am testifying  
7 on behalf of the National Association of Manufacturers today  
8 and on their behalf I'd like to thank you very much for the  
9 privilege of testifying.

10 We will be submitting detailed comments to the  
11 Commission in writing by January 10th of next year and for  
12 that reason and because of time constraints this morning, I  
13 am not going to try to get into a great many specifics about  
14 the Commission's proposals.

15 However, I would like to make some comments about  
16 the general impact of the Commission's actions on the  
17 business community, the necessity for guidelines at this  
18 time, and finally, I'd like to go into some length about the  
19 mitigations formula as it might work or fair to work in  
20 actual practice.

21 NAM has some very large corporate members, but most  
22 of its 13,000 members would be legitimately classified as



1 small or very small businesses.

2 Small businesses do not and cannot afford a large  
3 staff of legal counsel to monitor their day to day activities  
4 or to set up and audit elaborate compliance programs.

5 In my opinion, this may be one of the reasons why  
6 smaller companies are more likely to inadvertently violate  
7 various criminal laws.

8 The Commission's organization sentencing data I  
9 think mirrors that suspicion that I have because the vast  
10 majority of people actually convicted and sentenced in the  
11 past have been relatively small organizations.

12 Thus, whatever the Commission does will impact on  
13 all organizations regardless of our size, but I think it's  
14 important to recognize at the outset that most companies who  
15 are actually prosecuted, convicted and sentenced will be  
16 small ones.

17 There is another difference between the Fortune 500  
18 and most of the NAM's members. Big companies can in general  
19 at least make big mistakes, whether those mistakes be  
20 business mistakes or legal ones. Smaller companies often do  
21 not have that sort of latitude for error.

22 Thus, if the guidelines that the Commission

1 ultimately promulgates result in a crippling or annihilating  
2 fine for most small businesses absent a constant mitigation  
3 down to avoid that result, there is in my view something  
4 wrong with the guidelines.

5           There is great merit to the Commission's carrot and  
6 stick approach, but the carrot has to be a real carrot and  
7 the stick should not turn out in actual practice to be a very  
8 large baseball bat.

9           Now this is not to say, and it would be thankless  
10 of us not to do so, that we don't think this draft is much  
11 better than the one that was submitted earlier in the year.  
12 There is an expressed recognition in the current draft that  
13 certain mitigating factors should result in a very substan-  
14 tial reduction in the fine imposed.

15           There has been, we think, an obvious effort to take  
16 into account and to address some of the concerns that were  
17 previously voiced by NAM and other members of the business  
18 community. We'd like to thank you very much for your  
19 attention and sensitivity in that respect.

20           Nevertheless, some of our concerns remain. The  
21 first is the necessity or desirability for binding guidelines  
22 as opposed to advisory policy statements. In repeating this

1 argument I do not wish to alienate you. I read the papers  
2 and I have heard some of you talk and I know that at least  
3 some of you are firmly committed to act before next May and  
4 to act in the form of binding guidelines.

5 NAM recognizes you have the authority to issue  
6 guidelines if you elect to do so subject to whatever limita-  
7 tions are imposed by law. However, we would urge you not to  
8 do that absent a real legal or factual need to do so.

9 As we read the law, you have no legal compulsion to  
10 submit binding guidelines to the Congress by May of 1991 or  
11 any other date. Indeed, the legislative history cited at  
12 page 4 of our written statement appears to indicate a clear  
13 congressional preference for policy statements with respect  
14 to the organizational sentencing rather than mandatory  
15 guidelines.

16 Moreover, we see no need to guidelines at this  
17 time. In the case of individuals, there was an enormous  
18 sentencing disparity problem disclosed by a rather ample data  
19 base. In the organizational area there is to our knowledge  
20 no real problem with or concern about disparity. One reason  
21 for the absence of the problem may be the absence of the  
22 data, but relative to individuals there really isn't much

1 organizational sentencing data available and that which is  
2 available deals very largely with small or very small  
3 corporations and almost none relates to very large publicly  
4 traded companies.

5           The Criminal Fines Enforcement Act of 1984 provided  
6 sentencing judges the discretion to impose a broad array of  
7 new remedies, including much larger fines, an alternative  
8 fine of two times the gain or loss, whichever is greater,  
9 forfeiture, notice to victims, restitution, and so on.

10           For example, the alternative fine provision of  
11 double the gain or loss, whichever is greater, was enacted  
12 pursuant to the following statement of legislative history  
13 and I'm reading from that history. "Imposing a fine based on  
14 gain or loss is discretionary and the Committee is confident  
15 that Federal judges will not abuse this discretion". That is  
16 at 84 U.S. Congressional Administrative News at page 5450.

17           As I read the current draft proposal, most of these  
18 discretionaries are not mandated for virtually every offense.  
19 If there is evidence that sentencing judges are abusing the  
20 discretion which Congress expressly gave them, then guidelines  
21 might indeed be warranted. If they aren't, then we would  
22 suggest that policy statements be issued until such time as

1 there is evidence that sentencing judges are abusing their  
2 discretion in sentencing organizations.

3           Turning from the necessity for guidelines to their  
4 substance, there is real merit to the Commission's approach  
5 on mitigation. Such factors as disclosure, effective  
6 compliance programs, due diligence, and cooperation with the  
7 Government are obviously laudable and constitute the carrot  
8 part of the carrot and stick equation.

9           However, if very large fines are unavoidable  
10 despite every corporate effort to obey the law and cooperate  
11 with the Government in the event of an offense, then the  
12 carrot becomes a illusory and only the stick remains.

13           A company which achieves a maximum score of nine  
14 mitigation points will be subject to a fine of 15 to 25  
15 percent of the greater of one of the fine tables or the gain  
16 or loss plus full restitution. That could be a very substan-  
17 tial or even annihilating fine for most small businesses with  
18 a previously spotless record.

19           If every effort to comply with the law, to disclose  
20 the violations discovered, to cooperate with the Government  
21 and plead guilty results in that sort of a fine, I submit the  
22 incentive to do all of those things is minimized.

1           Now where a company for some reason cannot disclose  
2 the violation in advance, the situation becomes more complex  
3 and less appealing.

4           Suppose the internal compliance personnel inves-  
5 tigate some suspicious act and after a thorough investigation  
6 conclude that no crime has been committed. Later the  
7 Government investigates the same conduct perhaps in the  
8 course of investigating entirely unrelated conduct and  
9 discovers what it believes in entire good faith to be a  
10 violation of criminal law, probably based on new facts or  
11 somewhat different facts than disclosed by the private  
12 investigation.

13           In that instance because the company concluded  
14 there was no crime, again in entire good faith, we lose four  
15 points for failing to disclose the offense to the Government.

16           As I read the draft, three points for an effective  
17 program and two additional points for due diligence would  
18 also be in serious jeopardy.

19           I would expect the Government to argue, and it  
20 certainly could that had we--if we conducted an investigation  
21 and found nothing the compliance people knew or at least  
22 should have known of the offense, or that the unsuccessful



1 investigation itself is evidence the compliance program is  
2 ineffective.

3 If the Government is going to second guess com-  
4 pliance programs of personnel frequently, I think I can  
5 accurately predict that both will become less effective, not  
6 more effective over time.

7 Now suppose further the company honestly believes  
8 on advice of expert outside counsel that it simply hasn't  
9 violated the law and elects to contest a case at trial, I  
10 think that result would probably result in the loss of three  
11 additional points, one for fully cooperating with the  
12 Government and the remaining points for failing to accept  
13 responsibility for the offense.

14 The end result, as I read the draft, is that the  
15 only way to maximize the mitigation points is to voluntarily  
16 disclose any fact that might conceivably support the criminal  
17 indictment, cooperate fully with the Government investiga-  
18 tion, and then plead guilty to whatever charges the Government  
19 elects to bring and however many counts.

20 I submit that that is not a realistic or even a  
21 possible expectation in many situations and let me explain to  
22 you why.

1           The timing and outcome of internal audits in  
2 investigation often involves a real element of fortuity. I'm  
3 told by my friends with prior Government experience that  
4 Government investigations do as well.

5           Internal audits are certainly not perfect. When I  
6 and my colleagues or our outside counsel counterparts begin  
7 investigating an activity even the most innocent tend to  
8 become nervous and the guilty may provide no information,  
9 little information, or false information. The result is that  
10 a great many internal audits are inconclusive. They neither  
11 show a criminal violation or proof beyond a shadow of a doubt  
12 that there was not one. I think Government investigations  
13 may often turn out the same way.

14           In addition, the timing of the investigation versus  
15 a Government proceeding may be quite fortuitous as well. If  
16 a number of low level employees commits a reporting viola-  
17 tion, it is quite unlikely that that would be called to the  
18 attention of senior management until a Government inves-  
19 tigation commences or the actions is otherwise publicized and  
20 results in a simultaneous investigation by both the Govern-  
21 ment and the company.

22           In sum, voluntary disclosure is laudable and it

1 certainly warrants mitigation, but the current system appears  
2 to me be to be much too heavily weighted on that single  
3 factor with the result that it will be practically or in fact  
4 unavailable.

5 Pleading guilty is also obviously a laudable factor  
6 warranting mitigation, but there should be no penalty where a  
7 company honestly believes that the law or the facts in a  
8 particular case do not warrant criminal prosecution.

9 Where fines are mandated at very high or near  
10 maximum levels, absent disclosure, cooperation, or a guilty  
11 plea, the Government ends up holding practically all of the  
12 cards.

13 In closing, we believe guidelines should be viewed  
14 by the Commission as a last resort, not a first resort and  
15 that they should be promulgated in response to specific  
16 abuses of judicial discretion in the organizational sentenc-  
17 ing process.

18 We believe that of course with the congressional  
19 intent to give judges that discretion. We believe mitigation  
20 factors should be realistic and not so heavily weighted to  
21 disclosure or pleas of guilty.

22 Finally, we urge the Commission to retain the

1 judicial discretion to impose the maximum fine in appropriate  
2 cases and the minimum fine in others.

3 Thanks very much for your attention. We have not  
4 had the opportunity to formulate answers to all of the  
5 questions as to which you've invited comment, but we'd be  
6 happy to try to answer any questions you may have.

7 CHAIRMAN WILKINS: Thank you very much.

8 You know, we have guidelines for organizations  
9 convicted of antitrust violations in place today and they've  
10 been there for several years.

11 Do you hear of or know of problems in the field  
12 that have developed in those guidelines?

13 MR. ROGERS: I haven't seen much publicity either  
14 in the Wall Street Journal or in the advanced sheets that I  
15 read about specific sentences in terms of the guideline  
16 calculation that was used to arrive at it.

17 I do know that Jim Rill was quite anxious to get  
18 the maximum antitrust fine for organizations raised to \$10  
19 million and you know that was done in November and I have a  
20 feeling the Justice Department is much more comfortable  
21 presenting some sort of a flat fine which is here is the  
22 offense, here is the fine, and here is the table, rather than

1 conducting something they fear would be a mini trial on the  
2 amount of the gain or the amount of the loss.

3 But I'm not aware that the guidelines either have  
4 or have not worked properly. I just don't know.

5 CHAIRMAN WILKINS: All right. Thank you very much.  
6 Any questions from my right?

7 COMMISSIONER MacKINNON: Counsel, you have stated  
8 the same thing that's stated by other people at times that  
9 the act or the legislation--actually you're talking about  
10 legislative history favors policy statements.

11 However, the Act, as I recall it, and I can dig it  
12 out again if I have to, calls for corporate guidelines. The  
13 word "guidelines", as I recall it, is used. Are you familiar  
14 with that?

15 MR. ROGERS: Judge, could I have the cite to that?  
16 I missed it. I know you--

17 COMMISSIONER MacKINNON: Well, look at the statute.

18 MR. ROGERS: Do you have citation for that? I'd  
19 like t--

20 COMMISSIONER MacKINNON: Well, I don't have it now.  
21 I looked it up once and I think you remember that sitting  
22 next to me I gave it to the meeting that was in progress at

1 that time.

2 MR. ROGERS: I tried to find that citation and I  
3 did find the basic language in Section 994a, I believe it is,  
4 that talks about guidelines and it talks about persons and  
5 persons, of course, includes both individuals, natural  
6 persons and artificial persons like corporations. But the  
7 Act, as you know, goes on at great length and I discovered  
8 that a lot of the language that related to specific guidelines  
9 clearly talked to individuals because people were going to  
10 jail. So you knew that wasn't corporate and they were  
11 talking about crimes of violence and drug related offenses  
12 and I'm not talking about businesses that engage in that sort  
13 of thing.

14 When I went to the legislative history, which is  
15 voluminous, it runs hundreds of pages, the only reference I  
16 found to organizational sentencing was the one cited in our  
17 written testimony at page 4 and that to me--

18 COMMISSIONER MacKINNON: That's the policy state-  
19 ment.

20 MR. ROGERS: --that to me clearly indicated the  
21 congressional preference for policy statements for organiza-  
22 tions rather than guidelines.



1 COMMISSIONER MacKINNON: Which we don't look at if  
2 the statute is clear.

3 MR. ROGERS: But I don't believe it is.

4 COMMISSIONER MacKINNON: Well, I think you'll find  
5 that it is.

6 One other view on disparity, I think if you'll go  
7 back and review the history of corporate sentences for many  
8 years you will have a difficulty proving disparity because  
9 corporate crimes do not seem to fit into the same pigeon  
10 holes.

11 While there are violations of antitrust, there are  
12 different types of violations and you have a very hard chore  
13 in trying generalize from corporate crime. I've been  
14 following it for many years and that's just my own observa-  
15 tion.

16 MR. ROGERS: I agree with you.

17 COMMISSIONER MacKINNON: What would you give as the  
18 elements for an effective compliance program?

19 Well, first of all, let me ask you, have you had  
20 any experience in compliance programs?

21 MR. ROGERS: You bet.

22 COMMISSIONER MacKINNON: And what would you give as

1 the elements of an effective corporate compliance program?

2 MR. ROGERS: Well, it varies from area to area.

3 Where you have a very large company like Ford--

4 COMMISSIONER MacKINNON: Well, it depends on the  
5 nature of the crime that the corporation might be subjected  
6 to.

7 MR. ROGERS: Exactly. That's certainly one factor.

8 COMMISSIONER MacKINNON: And certainly a resource  
9 corporation that is mining or doing something like that is  
10 not the same as a securities or a financial corporation.

11 MR. ROGERS: That's absolutely right. We have to  
12 tailor compliance programs and indeed antitrust presentations  
13 within Ford Motor Company to quite different businesses with  
14 quite different potential problems.

15 Where you are faced with a very large situation  
16 like that, that's what an effective compliance program has to  
17 do.

18 There are whole areas of a company that you may  
19 ignore because you know that those people don't have the  
20 authority to violate anything and there are some of those.  
21 There are others that are very sensitive environmentally. So  
22 that's where your environmental effort is focused.

1           There are others that involve such things as  
2 insider trading and we have a very active program to prevent  
3 that. Antitrust is always a big factor at most companies.  
4 Most large companies have an antitrust compliance program.  
5 It involves a very substantial amount of time, a lot of  
6 internal investigations--

7           COMMISSIONER MacKINNON: What I'm interested in are  
8 the elements of the program that ought to be in place.

9           MR. ROGERS: I think you've hit most of them in the  
10 explanation that was attached to your recent draft. That is  
11 that they have to be realistic under the circumstances. They  
12 have to be bona fide in the sense that they're enforced and  
13 communicated to the employees who need to know.

14          COMMISSIONER MacKINNON: About enforcement, where  
15 would you put the top enforcement?

16          MR. ROGERS: I'm not sure I understand your  
17 question. Do you mean Commission enforcement?

18          COMMISSIONER MacKINNON: I want to know who you  
19 would have administer and be responsible for the entire  
20 program in a corporation?

21          MR. ROGERS: Well, normally at most corporations  
22 I'm familiar with the chief compliance officer is very often

1 the senior lawyer who would be the vice president and general  
2 counsel. That's certainly the way it works in Ford. Now he,  
3 of course, reports to the chairman of the board.

4 COMMISSIONER MacKINNON: In General Electric it was  
5 the president of the corporation that was responsible for  
6 fixing prices.

7 MR. ROGERS: Oh, I remember, this is the old  
8 electrical--

9 COMMISSIONER MacKINNON: And that was a by-law.  
10 That was a by-law. Now I wonder how close you would come to  
11 getting that high?

12 MR. ROGERS: I think as a direct result of the GE  
13 case and a lot of subsequent cases you won't find that  
14 happening much today.

15 COMMISSIONER MacKINNON: Thank you.

16 CHAIRMAN WILKINS: Any questions from my left?

17 COMMISSIONER GELACAK: Yes. Assume we adopt the  
18 Commission's proposal, what's going to change at Ford Motor  
19 Company?

20 MR. ROGERS: I would hope that we would continue as  
21 we have in the past to report violations even if we knew  
22 going in that we were going to get clobbered. I think that's

1 the right thing to do and I think that is what we would do.

2 Compliance programs, I think we have fairly good  
3 compliance programs, although we're always trying to improve  
4 them and I think that compliance programs--don't get me  
5 wrong. When I said they weren't perfect, I didn't say they  
6 weren't any good. I think they do catch and forestall a  
7 great many civil offenses and not often criminal, but  
8 probably quite a few of them. The very presence of policies  
9 and the fact that they are enforced and communicated and that  
10 management is genuinely dedicated to them, I do think has a a  
11 very positive effect, but I would close the way I came in.  
12 Most of the members of NAM, over 13,000, are not anywhere  
13 near the Fortune 500. They don't have an office of the  
14 general counsel. They're lucky if they have a staff lawyer  
15 who is kind of a jack of all trades.

16 They just simply do not and cannot afford to devote  
17 the amount of time and effort to compliance that the Ford  
18 Motor Company does.

19 COMMISSIONER GELACAK: So they're going to conduct  
20 business pretty much the same way they conduct it now?

21 MR. ROGERS: I think they are, yes, sir.

22 CHAIRMAN WILKINS: Any other questions?

1 We were delighted to extend the time for written  
2 submissions. So we look forward to those submissions when  
3 you have prepared them.

4 MR. ROGERS: Thank you very much, Mr. Chairman.

5 CHAIRMAN WILKINS: Thank you very much, Mr. Rogers  
6 and Mr. Carty.

7 Our next witness is Richard B. Stewart. Mr.  
8 Stewart is an assistant Attorney General, Environment and  
9 Natural Resources Division of the Department of Justice.

10 Mr. Stewart, delighted to see you again, delighted  
11 to have you with us.

12 STATEMENT OF MR. STEWART

13 MR. STEWART: Thank you, Mr. Chairman. It is a  
14 pleasure to be here today. I have a written statement that  
15 has been submitted. In view of the time schedule you are  
16 under, I'm going to be brief and summarize what I think are  
17 the most pertinent points.

18 I think my colleague Bob Mueller has already  
19 indicated the Department's basic concerns with the approach  
20 proposed by the Commission, the problems in relying on a  
21 loss/gain approach to setting the fine schedule, the asym-  
22 metry in having mitigators and not aggravators and the ease



1 with which the mitigation structure could reduce fines even  
2 down to zero.

3 I'm going to comment really on those general themes  
4 from the particular viewpoint of the work in our division  
5 which deals with environmental violations which, as I think  
6 you know, an area of increasing interest. There is increased  
7 levels of enforcement effort and it's certainly an important  
8 element of organization offenses.

9 We certainly support the idea of organizational  
10 guidelines to provide some predictability in organizational  
11 sentencing to send a clear message to the organizational  
12 corporate community that violations will receive appropriate  
13 sanctions.

14 My particular concern with the loss/gain approach  
15 in environmental cases is the difficulty in applying it. I  
16 fear that attempting to apply it would undercut many of the  
17 purposes of the guidelines which are to attempt to simplify,  
18 shorten the sentencing process and introduce a greater degree  
19 of consistency in those sentences.

20 I want to focus particularly on the loss side.  
21 What is really required under the Commission's proposal is an  
22 investigation in each case of the social loss caused by an

1 environmental offense.

2 Well, how does one quantify the loss caused by an  
3 oil spill or a release of toxics into the environment or a  
4 violation of an air pollution Control statute?

5 In certain cases there are pecuniary costs that are  
6 involved in responding, cleaning up the spill, removing the  
7 toxic discharge to the extent it can be, but many of the  
8 costs are going to be intangible. There are going to be  
9 destruction of natural eco systems. There are going to be  
10 threats to health. And how does one put a price tag on that?

11 This is a very practical problem for our division  
12 because under the Super Fund Act and the Oil Spill Act  
13 Congress has provided an action for natural resource damages  
14 initiated at the behest of Federal trustee agencies such as  
15 the Interior Department and the National Oceanic and At-  
16 mospheric Administration.

17 We have a number of cases in progress, several  
18 involving bays and harbors in different parts of the country  
19 that have been contaminated by PCBs and DDT where there has  
20 been injury to the eco system, depletion of marine life,  
21 reduced shellfish and fish that are fit for catch and  
22 consumption.

1           We have in the Exxon Valdez spill underway an  
2 effort to build a case for natural resource damages. This is  
3 an incredibly complex and difficult enterprise involving work  
4 at the very frontiers of science to determine just what the  
5 effect on the environment is is a physical matter. Will the  
6 environment restore itself over time? Is there long term  
7 damage? How serious was the short term damage?

8           And then if one does that, then one has to go  
9 beyond and put a price tag on the adverse effect on the  
10 environment. This involves the frontiers of economic  
11 science. So called contingent valuation studies when one  
12 determines through structured opinion polls, interviews,  
13 surveys, the economic value that the public in general places  
14 on a resource.

15           Now, we are trying to resolve those questions in a  
16 few limited cases, major cases that have been brought by our  
17 client agencies, but at least logically the Commission's  
18 approach would require us to do this as a routine matter in  
19 every criminal case that involved some threat to human health  
20 or the environment.

21           Trying to quantify the soft variables that are  
22 involved in environmental risks would protract the sentencing

1 process, be very difficult and burdensome for the parties and  
2 for the judge, and really give effectively a judge such wide  
3 ranging discretion in quantifying those soft variables as to  
4 undercut the effort--the goal of providing a degree of  
5 predictability and consistency.

6           So we think particular in the environmental  
7 setting this problem with quantifying loss really is a very  
8 strong justification for an offense level approach that tries  
9 to build into the offense categories themselves, these  
10 questions of risk that are difficult to quantify in a  
11 particular case.

12           I've talked about the loss side. The gain side can  
13 also be complicated. How much did a corporation save, for  
14 example, by failing to install a new production process, a  
15 new type of technology where some of the benefits of that new  
16 technology would be increased economic profits and some might  
17 be better environmental compliance.

18           So even on the gain side, how much did you gain by  
19 not doing what was needed to perhaps comply with the environ-  
20 mental laws? It's also very difficult.

21           We do think that there are exceptional cases where  
22 under the Alternative Fines Act it is appropriate to base

1 sanctions on loss or gain where you're dealing with a case  
2 that is really far outside the normal standard range in terms  
3 of the effects that it has had.

4 But for the standard heartland sort of a case, we  
5 think the offense level approach is far preferable and that  
6 the loss/gain approach would really undermine and threaten to  
7 defeat the purposes of having guidelines.

8 I might say briefly on the asymmetry of mitigators  
9 and aggravators and the generosity of the mitigators, a  
10 particular point that arises in environmental offenses, one  
11 of the mitigators would be that the corporation have an  
12 ongoing compliance program that had admittedly failed to  
13 prevent the violation in question.

14 I'd just point out that in an environmental context  
15 such compliance programs are often required by law already.  
16 For example, a monitoring and reporting system for discharges  
17 is a common feature of the environmental laws so that a firm  
18 might have a monitoring and reporting system in place. There  
19 would be a substantive violation and yet, as I understand the  
20 proposed Commission guidelines, a company would get a credit  
21 for what is already required as a matter of law.

22 There are other more detailed comments I have in my

1 statement, including some observations on probation, but I  
2 think those could be safely left for your later perusal and  
3 the remarks I've made I think highlight the most important  
4 parts of the Department's concerns based on environmental  
5 violations.

6 Thank you.

7 CHAIRMAN WILKINS: Thank you very much.

8 Assume a perfect world is just as easy to determine  
9 loss or gain as it is to look to a fine table. Would you  
10 then favor a system that says pick the one that is the  
11 greater of the three and use that as the fine calculator?

12 MR. STEWART: In a perfect world?

13 CHAIRMAN WILKINS: Yes, sir.

14 MR. STEWART: Well, I guess we don't live in a  
15 perfect world. It does seem to me that the--I don't know how  
16 perfect your perfect world is, but--

17 CHAIRMAN WILKINS: It's just as easy to determine  
18 one as the other.

19 MR. STEWART: I think it's sounder to go on the  
20 offense level, which is based on the threatened risk of harm  
21 to society that conduct causes rather than the harm or gain  
22 that occurred in a particular case. I think that's par-

1 ticularly true of regulatory offenses such as environmental  
2 offenses that are based on a prophylactic approach that we  
3 are trying to prevent risky conduct that may or may not  
4 eventuate harm in a particular case.

5 But we want to stop that risky conduct from being  
6 undertaken in advance. So at least in the case of regulatory  
7 offenses I think the offense level is the more appropriate  
8 approach.

9 CHAIRMAN WILKINS: Even if it produces a lower fine  
10 than if you had used gain?

11 MR. STEWART: Yes. Well, then one has a situation,  
12 I think, such as covered by the Alternative Fines Act if you  
13 have just hypothetically a large oil tanker in a pristine  
14 area and there is a massive release of oil or of toxic  
15 chemicals, you might in that particular situation have  
16 massive losses. In that case I think the use of the loss  
17 doubling provisions could be appropriate because you're  
18 dealing with not the standard case, but a case where excep-  
19 tional care may be required, justifiably required because of  
20 the very serious harm that would be threatened to the  
21 violation. In those situations the deterrent incentive of a  
22 high sanction is appropriate. But those I think are the



1 exceptional cases and not the standard.

2 CHAIRMAN WILKINS: What if we wrote use loss or  
3 gain or the fine table to be determined by the Department of  
4 Justice in each given case?

5 MR. STEWART: Well, I think that would really  
6 defeat the purposes of the guidelines. You want to provide  
7 some predictability and consistency and it's not the job of  
8 the Department--

9 CHAIRMAN WILKINS: I'm at a loss to determine why  
10 the Department of Justice does not want to use gain if it's  
11 readily determinable and it will produce a higher sanction  
12 for someone who has cheated, defrauded, or done something  
13 than some arbitrary fine table that would produce a lesser  
14 sanction.

15 If you use three of them and you pick the highest,  
16 then that to me seems to be what we ought to be about. If  
17 it's readily determinable--and of course we know in the real  
18 world, not the perfect world, the prosecutor is going to tell  
19 the court whether it is readily determinable or not.

20 So I don't understand why the Department is  
21 insistent to this approach particularly where gain--and I  
22 understand environmental offenses may be difficult to

1 determine loss. So you don't use loss. You use a fine table  
2 because it's not readily determinable. But if it is, why not  
3 go that way because that's the greatest indicant of the  
4 degree of seriousness of crime in as far as money concerned  
5 is how much gain you got illegally.

6 MR. STEWART: In the offenses where that is like  
7 fraud where that is an important variable, that is of course  
8 built into the offense levels themselves.

9 CHAIRMAN WILKINS: Perhaps we will continue this  
10 debate some more.

11 Questions to my right? Judge MacKinnon?

12 COMMISSIONER MacKINNON: You would agree that if  
13 you had a potentiality of putting in a loss or gain figuring  
14 in on your fine it would have some commendable use at some  
15 time?

16 MR. STEWART: Would gain be relevant in some cases?

17 COMMISSIONER MacKINNON: At some time, some  
18 offenses.

19 MR. STEWART: I think it could be, although, as the  
20 Chairman indicated, perhaps it doesn't arise that often in  
21 environmental cases.

22 COMMISSIONER MacKINNON: If your guidelines were

1 amended to include loss or gain factors you wouldn't any  
2 objection to them, would you?

3 MR. STEWART: If they were amended to include?  
4 Well, I think they do include--the Justice Department's  
5 proposal says if the net gain, net of restitution still  
6 remains very substantial then you can make an upward adjust-  
7 ment, but you start with the offense level and then in  
8 appropriate cases I think you can build it in.

9 COMMISSIONER MacKINNON: What crime is committed in  
10 an oil spill? I'm talking about crime. I'm not talking  
11 about civil damage.

12 MR. STEWART: It could be a range of offenses. I  
13 mean one could have, although it wouldn't be rare, a situa-  
14 tion of deliberate discharge of oil.

15 COMMISSIONER MacKINNON: Well, you've had a lot of  
16 oil spills all over. Do you charge them criminally?

17 MR. STEWART: Yes, we have in appropriate cases.

18 COMMISSIONER MacKINNON: What do you charge them  
19 with.

20 MR. STEWART: Most cases we do not charge. Well,  
21 the Exxon case is one case where we have charged several  
22 felony counts.

1 COMMISSIONER MacKINNON: What are they?

2 MR. STEWART: What?

3 COMMISSIONER MacKINNON: What are they?

4 MR. STEWART: The Dangerous Cargos Act and the  
5 Ports and Waterways Act make it a felony essentially to  
6 knowingly or willfully violate regulations designed to have a  
7 ship properly staffed by competent personnel at all times.

8 We charged a violation of the Clean Water Act,  
9 negligent discharge of pollutants and violations of the  
10 Migratory Bird Treaty Act and the Refuge Act, which are  
11 essentially strict liability offenses.

12 COMMISSIONER MacKINNON: And no criminal intent  
13 necessary to be proven.

14 MR. STEWART: No, those are misdemeanors and there  
15 is no knowing or willful element in those statutes as the  
16 Congress has written.

17 COMMISSIONER MacKINNON: Thank you.

18 CHAIRMAN WILKINS: Questions to my left? Commis-  
19 sioner Nagel?

20 COMMISSIONER NAGEL: Mr. Stewart, the antitrust  
21 division has submitted testimony which we will hear this  
22 afternoon expressing a preference for antitrust offenses

1 which would be treated under a separate set of guidelines  
2 specific to antitrust offenses rather than under what they  
3 refer to as a generic set of guidelines, which I take that to  
4 mean the Commission's draft or in fact the Department's  
5 draft.

6           Recognizing that you may not have discussed this in  
7 your submitted testimony, could you nonetheless as an expert  
8 on the subject comment on whether there is anything unique to  
9 environmental offenses that would similarly argue for  
10 guidelines specifically drafted for environmental offenses.  
11 I take it you were making one such comment when you referred  
12 us to the fact that in the case of the mitigation for a  
13 compliance plan that that would be mitigation for every  
14 environmental defendant because it's in many statutes  
15 required by law.

16           Are there other things that you might think of that  
17 would argue for separate guidelines specific to environmental  
18 offenses because of the loss/gain issue, because of the  
19 compliance issue or anything else?

20           MR. STEWART: Well, I would just say on the  
21 mitigation for compliance programs, I'm not sure one needs a  
22 specific exemption for environmental situations. One could

1 have a generic exception. So you don't get a mitigation  
2 benefit if the program was required by law. I think you  
3 could take care of that generically.

4 I think under an offense level approach that it is  
5 appropriate if possible to build in the variables that are  
6 relevant in most environmental offenses.

7 So I think our view is that we don't need special  
8 treatment. Now if the Commission were really intent on  
9 following through with an approach that was primarily based  
10 on loss/gain, although we do not favor that, then I would  
11 think--I would urge consideration of some special treatment  
12 of environmental violations.

13 COMMISSIONER NAGEL: Could I then make two re-  
14 quests? One is if you would submit to us something in  
15 writing that would address the issue that if the Commission  
16 does proceed with the approach proposed loss or gain or a  
17 table choosing the highest, that you then would comment on  
18 why there should be separate environmental guidelines if you  
19 so believe and what specific factors you would include in  
20 such a draft that were not included and taken account of in  
21 our proposed draft.

22 Second, I would ask if you could submit to us



1 something akin to what I asked Bob Mueller which is a sample  
2 of actual cases from the Environmental Crimes Division from  
3 perhaps 1985 to 1990 where you think the Commission's  
4 emphasis on loss or gain will under reflect the seriousness  
5 of the harm so we can see those cases. And maybe while  
6 you're at it, include some comment on the issue of vicarious  
7 and imputed liability.

8 MR. STEWART: Well, that's a large assignment, but  
9 I'll take it on willingly.

10 CHAIRMAN WILKINS: When you do, if you would use a  
11 format of something like a fact pattern to lay out the facts  
12 of the case and then you can use--

13 MR. STEWART: Typically exemplary fact situations.

14 CHAIRMAN WILKINS: That's right so that an indepen-  
15 dent evaluation can be made as well.

16 COMMISSIONER NAGEL: When your colleague Steve  
17 Briar was here he always gave an assignment to the witness.  
18 So we're just following up on his pack.

19 MR. STEWART: I'll speak to him personally.

20 CHAIRMAN WILKINS: Judge Mazzone?

21 COMMISSIONER MAZZONE: And to follow up on that,  
22 when you do give us that fact pattern, as you put it, please



1 tell me how you view the sentencing hearing that would take  
2 place and by that I mean, Professor Stewart, this is the--you  
3 are the second representative of Justice that has come here  
4 and has told us in a manner of speaking that the gain/loss  
5 approach of the Commission would make for complicated time  
6 consuming hearings for district judges.

7 I'm not sure if that's a comment on your concern  
8 for the resources or the ability of district judges to do  
9 that, but what makes you think it would be less complicated  
10 and easier to arrive at an offense level in an environmental  
11 crime that has so many different societal losses or personal  
12 losses? What's going to make it easier for me to decide how  
13 to reach some fair offense level to define that kind of  
14 conduct?

15 That's going to be a hearing. It's going to  
16 require witnesses. It's going to require perhaps expert  
17 testimony, long term effects of toxic spills. I can think of  
18 cases in which it would be a trial.

19 Why does Justice think that the gain/loss or  
20 offense level approach that the Commission has drafted is so  
21 totally inconsistent when all you've done is say offense  
22 level and then if it's not enough you can add gain or loss.

1 I just don't know what the quarrel is all about if it's a  
2 quarrel.

3 MR. STEWART: Well, I would say that at least I'm  
4 hopeful that one could build in factors and maybe not totally  
5 mechanical, at least structured factors to assess the risk  
6 posed by different kinds of environmental offenses and to  
7 some extent the sentencing guidelines for individuals do  
8 that. If there is a release of toxic substances, then that  
9 moves you up in the offense level.

10 So I think at least in our experience in the  
11 individual limited obviously to date that the--in the  
12 sentencing of individuals that the offense levels do ap-  
13 propriately look at variables that affect the risk to health  
14 and the environment that are involved in different violations  
15 and that that to some extent can be done wholesale through  
16 the guidelines rather than retail before the court in every  
17 case.

18 While we reserve the right to ask for the doubling  
19 sanction, that's only in a very small fraction of cases. Now  
20 I'd be happy in my follow up submission to at least il-  
21 lustrate how we think it can be done under the offense level  
22 and perhaps at least give you our view that it can be done.

1           COMMISSIONER MAZZONE: Again, across the hall from  
2 you in the Fraud Division is an Assistant U.S. Attorney or  
3 Attorney General who is saying, "This is easy. All I've got  
4 to do is figure out the loss or gain and that's easy for a  
5 district judge." In your division on the other side when you  
6 come back with your compilation of cases that you will  
7 prepare for Commissioner Nagel add to it what you can  
8 anticipate would be the Government's introduction of evidence  
9 or a summary of evidence and issues which the district judge  
10 will now be called upon to decide in order to reach what you  
11 would say would be a proper offense level.

12           MR. STEWART: I think I can give you some examples  
13 actually from the limited experience with the sentencing of  
14 individuals to show you how it's actually been done and how  
15 it might be done for organizations. I'd be happy to do that.

16           CHAIRMAN WILKINS: Questions from other Commis-  
17 sioners?

18           COMMISSIONER GELACAK: I have two, Mr. Stewart, and  
19 I know we're running late. Actual 1988 case, and I'd be  
20 happy to submit this for the record for you to have a chance  
21 to consider it, but I'd like your comment in any event. We  
22 have a company that illegally disposed of hazardous wastes

1 and knowingly injured some of its employees. In fact, three  
2 employees were injured.

3 The offense level would have been 27, the highest  
4 of anybody convicted in 1988 and the maximum statutory fine  
5 in the case was \$9,500,000. If you look at the Commission's  
6 proposals, A, B, and C, the highest fine we can come up with,  
7 we would come up with a \$12,200,000 fine.

8 The Department, when it considers high level  
9 involvement in a post-compliance plan at level 27 would  
10 establish a minimum guideline fine of \$120,000,000.

11 If once you've had a chance to look at that you  
12 agree with those figures, how on earth do we maintain any  
13 credibility if we establish a guideline sentencing proposal  
14 that exceeds present statutory maximums by \$100 million?

15 MR. STEWART: I will certainly look into that  
16 question.

17 COMMISSIONER GELACAK: The second question, many of  
18 the environmental offenses are strict liability offenses and  
19 most people in the corporate area would say that both of the  
20 proposals that we are looking at for organizational sanctions  
21 propose much harsher penalties.

22 Do you think--or what is your opinion as to what

1 kind of a chilling effect that will have on companies  
2 involved in environmental activity and individuals within  
3 those corporations? Are we going to lose some of the good  
4 people because the risk becomes too difficult to manage.

5 Are we going to lose some of the good managers  
6 because they don't want to take responsibility for the  
7 potential liability of their corporation?

8 MR. STEWART: Well, I guess I would perhaps differ  
9 with your premise that most offenses are strict offenses. At  
10 least in the reauthorizations of the major environmental laws  
11 in Congress in the 1980s they have--most of the major  
12 relevant offenses require knowing or willful conduct.

13 While we do have strict liability offenses, we do  
14 not charge those routinely. So I think the real concern that  
15 I have heard from many managers in particular is they have a  
16 compliance program, they have an auditing program and it  
17 shows a violation and if they continue to operate for one  
18 more day, are they guilty of a knowing offense?

19 This was an issue that was discussed a considerable  
20 extent in the Clean Air Act amendments in the enforcement  
21 provisions and the industry sought statutory exemption from  
22 liability for people who had done audits and were taken some

1 response measures. That didn't pass, but the floor manager's  
2 statement contained a rather strong statement that the  
3 Justice Department should take into account good faith audits  
4 and compliance attempts in its decisions.

5 I expect that we are going to be issuing some form  
6 of guideline about that. I have encountered this with some  
7 of our Federal departments, the Energy Department in par-  
8 ticularly that is operating nuclear weapons plants that  
9 because of accumulated problems in the past are not in  
10 compliance and I'm sensitive to that problem and I think  
11 we're going to respond to the legitimate concerns of cor-  
12 porate managers who are trying in a reasonable and good faith  
13 way to cope with compliance problems through some sort of  
14 public guidance and there will be comment on that.

15 So I think that is going to be the way we'll try to  
16 address this concern.

17 COMMISSIONER GELACAK: Are you meeting any resis-  
18 tance in the Department to that suggestion?

19 MR. STEWART: All I would say is, traditional  
20 prosecutors say, you know, trust us and we don't want to  
21 limit or discretion, but my own view is when we are dealing  
22 certainly with regulatory offenses that there is a benefit by

1 giving people an incentive to do audits and to report  
2 violations and come into compliance. If that takes some  
3 limitation on traditional prosecutorial discretion, I think  
4 it's appropriate.

5 COMMISSIONER GELACAK: Thank you.

6 CHAIRMAN WILKINS: Thank you very much, Professor  
7 Stewart. We look forward to working with you in the future  
8 on this and other issues. Thank you.

9 Our next witness is Roger W. Langsdorf. Mr.  
10 Langsdorf is senior counsel and director of antitrust  
11 compliance, ITT Corporation. He is here today representing  
12 the United States Chamber of Commerce. We're delighted to  
13 have you with us.

14 STATEMENT OF MR. LANGSDORF

15 MR. LANGSDORF: Thank you very much, Mr. Chairman,  
16 members of the Commission. It is a great honor for me to  
17 appear here again this year to represent the 180,000 members  
18 of the United States Chamber of Commerce who would be  
19 directly affected by the proposed guidelines.

20 As you know, the guidelines apply with equal force  
21 except for possible adjustment between minimum and maximum  
22 fines, to the very smallest organizations consisting of as



1 few as one or two persons as well as to the largest corpora-  
2 tions in the country.

3           An overwhelming majority of criminal cases brought  
4 each year are against small organizations. Most of the  
5 members of the Chamber are very small organizations.  
6 Accordingly, the Chamber is particularly concerned with the  
7 effect which the guidelines would have on small organiza-  
8 tions.

9           The multi-million dollars fines which may be  
10 significant but not unbearable for a corporate giant may be  
11 overwhelming for a smaller organizations. The guidelines as  
12 we read them do not permit the courts to lower fines below  
13 the guideline minimums unless the organization is completely  
14 unable to pay.

15           In certain respects the guidelines this year are an  
16 improvement over last year's version, particularly the  
17 provisions which would limit the application of the loss  
18 method of determining fines and the treatment of antitrust  
19 defendants like all other defendants.

20           However, in our view the guidelines still present  
21 so many serious problems that we again urge the Commission  
22 not to issue them in binding form. Rather, as we did last

1 year, we urge the Commission to issue the guidelines in a  
2 non-binding form so that it will be able to learn from the  
3 courts' actual experience how they will work in practice.

4 I would like to focus on three areas; first, the  
5 loss method in determining fines; secondly, the proposed fine  
6 tables; and, lastly, the mitigation factors.

7 Under the guidelines if the loss caused by viola-  
8 tion is greater than the amount in the table, the fine must  
9 be two to three times the amount of such loss, assuming no  
10 mitigating factors.

11 Including restitution, the defendant must pay a  
12 total of three to four times the amount of the loss. In the  
13 case of a major oil spill, for example, the loss may be  
14 astronomical. When multiplied by three or four the total  
15 amount required to be paid would be out of sight even for the  
16 largest corporation, not to mention small organizations.

17 Use of the multiple of loss standard runs counter  
18 to the purposes of the Commission to reduce disparity and  
19 increase certainty in the sentencing process and to ensure  
20 correlation between the severity of the crime and the amount  
21 of the penalty.

22 Under the loss standard, the amount of the fine may

1 be totally dependent on chance. Two corporations may commit  
2 identical offenses. One may be subject to a crushing fine  
3 under the loss standard. The other may be subject to a much  
4 smaller fine under the fine table.

5 Assuming that the loss method is used, we question  
6 making the minimum fine double the gain or loss. This is the  
7 maximum fine permitted by the alternate fine provision,  
8 Section 3571d of Title 18.

9 Obviously the purpose of Congress was to allow  
10 imposition of maximum fines only in the most egregious cases.  
11 Under the proposal, maximum statutory fines could be required  
12 in the least egregious cases and the courts would have no  
13 leeway to reduce fines within the guideline range due to such  
14 factors as the size and resources of the organization.

15 We welcome the alternatives on page 9. The one  
16 most directly meeting the questions we have raised is C,  
17 since it would authorize the court in its discretion not to  
18 apply the loss method if it is found to be inappropriate.

19 This option is still insufficient to solve all of  
20 the problems since the court's flexibility would be limited  
21 by the requirement that in many cases absent mitigating  
22 factors it may not reduce the fine below the maximum amount

1 permitted by statute.

2 I would next like to address the three fine tables  
3 which have been proposed. In directing the staff to prepare  
4 a fine table, the Commission declared that the fines should  
5 generally equal or be greater than the highest fines imposed  
6 in the past. It seems puzzling and unfair that the sentences  
7 for even the smallest organizations acting under the least  
8 aggravating set of circumstances should be equal to or  
9 greater than the fines imposed in the past on perhaps the  
10 largest organizations acting under the most aggravating  
11 circumstances.

12 Be that as it may, even under Alternate B, which is  
13 the lower scale, the proposed fines appear in most cases to  
14 exceed the stiffest sentences in the past.

15 The Commission further directed that the fine  
16 tables should be prepared in such a way as to ensure that in  
17 the more egregious cases the fines will be within the  
18 guideline range equal to the statutory maximum.

19 Thus, if the statutory maximum equals  $3x$ , the  
20 amount in the table should be  $x$ . Assuming the validity of  
21 the complicated methodology employed by the staff, only  
22 Alternate B meets that goal. Under Alternate A where the

1 amount equals 50 percent of the statutory maximum, we run  
2 into the same problem we discussed before in considering the  
3 loss standard. The minimum rather than the maximum fine  
4 would be equal to the statutory maximum

5           Thus, while we were disturbed by the premises  
6 underlying the formulation of these tables and by the  
7 extremely limited data based on which these tables were  
8 based, and we thoroughly confused by the method which the  
9 staff has used, we believe that the only one of the three  
10 tables which even purportedly meets the objectives of the  
11 Commission is Alternative B.

12           One of the premises underlying setting the fine  
13 tables as a high level was that aggravating factors that  
14 frequently occur such as involvement of high level management  
15 in the offense and the lack of inadequate compliance program  
16 would be presumed--the companies would be prevented to rebut  
17 this presumption by establishing mitigating factors.

18           This is laudable on its face, but unfortunately,  
19 these mitigating factors are to a large extent unattainable.  
20 It turns out that is it not enough that high level management  
21 not be involved or that an effective compliance program meet  
22 the stringent criteria of the Commission.

1           The defendant also has to have made a timely report  
2 to the Government of the offense if responsible management,  
3 including apparently any inside counsel, knew or should have  
4 known of the offense.

5           In our view a defendant should be given mitigation  
6 points for lack of management involvement and for an effec-  
7 tive compliance program whether or not it has self reported  
8 the offense to the Government.

9           The fact that an organization had once been found  
10 guilty of a criminal offense should not forever bar it from  
11 earning mitigation points which reduce the sentence for a  
12 similar offense.

13           The mere fact that a division of an organization  
14 once committed a crime and then years later another in-  
15 dividual in another division commits a similar crime does not  
16 mean that the compliance program is ineffective.

17           I would like to endorse a point which you will  
18 presumably hear soon from Mr. Buffone which he made in his  
19 written testimony on behalf of the American Bar Association,  
20 which frankly had not occurred to me until I read his written  
21 statement.

22           The high fine level and mitigation approach is

1 particularly unfair to smaller organizations because they are  
2 not in a position to take advantage of the mitigation  
3 factors. The example he gives of an innocent partner who has  
4 to share in the fines resulting from his guilty brother's  
5 crime graphically illustrates the problem which smaller  
6 organizations may face.

7           Since I anticipate they are coming, I am going  
8 to answer two questions that I think probably will be asked.  
9 First of all, in answer to the question which I anticipate  
10 that Judge MacKinnon would ask me, what are the elements of  
11 an effective compliance program?

12           This is something that I have had considerable  
13 experience with. For the last 6 years I have been Director  
14 of Antitrust Compliance at ITT Corporation. I think we have  
15 a most effective compliance program and I would endorse the  
16 six or seven elements set forth in the commentary. I think  
17 they are all valid.

18           The one point which we don't have, but which I  
19 think is well taken is publicizing a reporting system whereby  
20 agents and employees can report criminal conduct within the  
21 organization without fear of retribution.

22           We certainly do encourage reporting of criminal



1 conduct. We don't have any specific guarantee that there  
2 will not be retribution, but certainly we have never imposed  
3 any and never would consider to impose any and we would plan  
4 to make that clear within our organization.

5           As far as Commissioner Gelacak's question, how  
6 would the guidelines change things? I think that if specific  
7 credit is given for having an effective compliance program  
8 and there are no strings attached to it such as necessarily  
9 having to self report to the Government, I think that every  
10 major or minor corporation in the country will adopt every  
11 one of these points and I think as a compliance officer this  
12 will be extremely helpful to me to have something like this  
13 in saying, "Here is something that would win us mitigation  
14 points if we adopt this program."

15           It is not always easy for a compliance officer to  
16 sell a program and to make sure its carried out, but if we  
17 have something here that is really--is very much in the  
18 corporate interest and something that is spelled out for us,  
19 I have no doubt about it that every one of these provisions  
20 would be put in effect by every corporation.

21           So I think it's really, really a worthwhile  
22 proposal.

1 CHAIRMAN WILKINS: Thank you very much.s

2 Let me just comment about the methodology. The  
3 fines at each offense level in the fine table were set to  
4 accommodate the highest fines in the past for an offense that  
5 would fall under that offense level.

6 For example, a level 6 fine under the table  
7 accommodates offenses of the past that fell under level 6.  
8 They were not driven by offenses that fell under level 28  
9 which would be--I misunderstood what you said.

10 MR. LANGSDORF: No. I guess what I meant was that  
11 the--and I'm not sure I understand exactly, but that the  
12 Commission took the highest levels within that offense and  
13 then made that then the standard to be applied.

14 And my concern was that there could--

15 CHAIRMAN WILKINS: That's the starting point.

16 MR. LANGSDORF: My concern was that instead of  
17 taking--that these could be unusual cases and I don't have  
18 any idea what the facts were in those cases at all, but that  
19 you could have the most aggravated case of the largest  
20 corporation, take that as the starting point and impose an  
21 entirely different case on a smaller corporation. That was  
22 my concern.

1           CHAIRMAN WILKINS: It is a concern. There has got  
2 to be some rationale unattending your decisions.

3           Just one quick comment, you talked about the fact--  
4 and this is a concern to me because we have in there as an  
5 alternative if you've got a good compliance detection program  
6 or if you self report, those are mitigating factors.

7           You said because of that there may be a disincentive  
8 to self report because if you don't report, you'll say  
9 well, I've got a good compliance program. So that may be a  
10 disincentive to self report, that is having those as--

11          MR. LANGSDORF: You only get one extra point then  
12 if you self report.

13          CHAIRMAN WILKINS: We wrote it by saying, if you  
14 know about the crime and don't report it, then you do not  
15 have a good compliance program. By putting it that way then  
16 that would take away the disincentive not to report, wouldn't  
17 it?

18          MR. LANGSDORF: I think putting so much emphasis on  
19 self-reporting is--I think if a crime--if it is very clear  
20 that a crime is a committed and there is no doubt about it, I  
21 think most responsible corporations would self report and I  
22 think that the problem is that there are many times when it's

1 impossible to determine whether a crime has actually been  
2 committed and as a result of putting that requirement this  
3 would then deny any credit at all for the compliance program  
4 and I think that would be a mistake.

5 CHAIRMAN WILKINS: Thank you.

6 Any questions to my right?

7 COMMISSIONER MacKINNON: You are presently as-  
8 sociated with ITT?

9 MR. LANGSDORF: Yes, I am.

10 COMMISSIONER MacKINNON: Well, I remember when they  
11 were a small corporation back in the 40s and a lawyer from  
12 St. Paul was one of the principal officers. I subsequently  
13 came to the point where I was investing and improving the  
14 investment of millions of dollars in ITT in the 60s.

15 How many corporations or divisions do they present-  
16 ly operate?

17 MR. LANGSDORF: I can't give you answer. It  
18 certainly runs into the--I mean they're--I can't give you  
19 precise answer to that question.

20 COMMISSIONER MacKINNON: Just name off a few of the  
21 businesses.

22 MR. LANGSDORF: ITT Sheraton Corporation, that's

1 the hotel business, Hartford Fire Insurance Company, a major  
2 insurance company, ITT Financial Corporation, ITT Ranier,  
3 which is in the wood pulp business. We have a major defense-  
4 -

5 COMMISSIONER MacKINNON: Now, do you have a  
6 compliance program for each one of them, or one for ITT?

7 MR. LANGSDORF: Well, there is--

8 COMMISSIONER MacKINNON: They operate as separate  
9 divisions or subsidiaries, which?

10 MR. LANGSDORF: They operate as separate divisions  
11 of the corporation. There are subsidiaries and divisions.  
12 There are some basics units of the corporation.

13 But just focusing on antitrust, which is my area in  
14 particular, we have one compliance program that covers the  
15 entire corporation and every division, every subsidiary is  
16 expected to comply with that compliance program.

17 COMMISSIONER MacKINNON: And who enforces that?  
18 You? Is there some vice president? Are you a vice presi-  
19 dent?

20 MR. LANGSDORF: I'm not a vice president, but I  
21 report to the chief compliance officer of the corporation who  
22 is a vice president and if there is a violation it is

1 enforced by him and by his superior, the general counsel of  
2 the corporation or by the board.

3 COMMISSIONER MacKINNON: Now tell us so we can look  
4 for it in the future, how that man gets to have that par-  
5 ticular responsibility, but a by-law, by some oral direction,  
6 or what?

7 MR. LANGSDORF: Designated by the board of direc-  
8 tors.

9 COMMISSIONER MacKINNON: By a resolution?

10 MR. LANGSDORF: I don't know exactly how he got  
11 that position. I know I was appointed by the general counsel  
12 and that's how I got my position. I believe it's a directive  
13 from the board of directors. I can find out exactly--

14 COMMISSIONER MacKINNON: So you have one man over  
15 you who is responsible directly the board of directors for a  
16 compliance program?

17 MR. LANGSDORF: Yes.

18 COMMISSIONER MacKINNON: And that's directed  
19 primarily at antitrust?

20 MR. LANGSDORF: No, he is responsible for all  
21 compliance.

22 COMMISSIONER MacKINNON: For all compliance, but

1 your biggest problem you think is antitrust?

2 MR. LANGSDORF: I don't think so. No, not neces-  
3 sarily.

4 COMMISSIONER MacKINNON: What other offenses do you  
5 think you run into potentiality?

6 MR. LANGSDORF: Well, I think in the defense  
7 industry. I think that's a very, very important cause for  
8 concern.

9 COMMISSIONER MacKINNON: On billing and costs and  
10 things of that character?

11 MR. LANGSDORF: Well, there can be a variety of  
12 potential crimes.

13 COMMISSIONER MacKINNON: Do you look for viola-  
14 tions? Do you think you're going to have violations? Or  
15 just the--

16 MR. LANGSDORF: Well, we certainly don't think  
17 we're going to have them, but we try to do everything--

18 COMMISSIONER MacKINNON: Let me ask you, have you  
19 had any in the past?

20 MR. LANGSDORF: Violations, yes.

21 COMMISSIONER MacKINNON: And what happened to them?

22 MR. LANGSDORF: Well, generally the employees are



1 dismissed. That certainly has been true in a recent crime in  
2 the defense area, yes. There have been major dismissals.

3 COMMISSIONER MacKINNON: Were there some prosecu-  
4 tions?

5 MR. LANGSDORF: Yes, and we did report the crime.  
6 We cooperated with the Government. Yes, there were prosecu-  
7 tions.

8 COMMISSIONER MacKINNON: But you do have a central  
9 enforcer?

10 MR. LANGSDORF: Yes.

11 COMMISSIONER MacKINNON: Thank you.

12 COMMISSIONER MALONEY: Mr. Langsdorf, good to see  
13 you again.

14 Having observed the Commission's draft and the  
15 mitigation system that is set up in the Commission's draft,  
16 do you have a notion of what the heartland mitigation score  
17 would be? In other words, what score do you believe that  
18 over time corporations would come in with as far as the  
19 mitigation score if you apply the mitigation system as  
20 outlined in the Commission draft?

21 How many points do you think over time will be the  
22 heartland mitigation score?

1 MR. LANGSDORF: Well, I don't know. I think that  
2 it depends on whether certain modifications are made. I'm  
3 very concerned with the present draft because it seems to  
4 restrict application of mitigation points to those cir-  
5 cumstances where the company self reports the--I really don't  
6 know. I cannot answer your question.

7 I think that, as I indicated before, if an effec-  
8 tive compliance program is made an independent factor, I  
9 think that every responsible corporation would adopt one and  
10 that will--I think most companies will qualify for that  
11 credit.

12 COMMISSIONER MALONEY: How likely is it, do you  
13 think, that a corporation would come in with zero mitigation  
14 points?

15 MR. LANGSDORF: Well, that depends on this question  
16 of self reporting which is fraught with a lot of questions.  
17 A company will self report if there is a clear violation. I  
18 think that there may be many cases where they won't qualify  
19 for many of those points.

20 COMMISSIONER MALONEY: To the extent that you think  
21 compliance program would be initiated, that would get you  
22 three; correct?

1 MR. LANGSDORF: Yes.

1 COMMISSIONER MALONEY: Generally corporations  
2 cooperate. Do you think that's a fair statement?

3 MR. LANGSDORF: Yes, I think so.

4 COMMISSIONER MALONEY: So that would get you five  
5 right away. Is that accurate? I mean, do you think that's  
6 logical--a logical outcome?

7 MR. LANGSDORF: I don't know. I'm just not sure.

8 COMMISSIONER MALONEY: I noticed that you like the  
9 inclusion of antitrust in the Commission's draft. Could you  
10 explain why?

11 MR. LANGSDORF: Well, I think that it just doesn't  
12 make sense to single out one offense in a separate category.  
13 I just don't understand it really.

14 I think that if the Commission goes down that road  
15 then it has to really focus individually on every single  
16 crime and I don't see the point of it.

17 I mean if there is any validity in this approach it  
18 should be across the board and should apply to everything?

19 COMMISSIONER MALONEY: As opposed to the present to  
20 our guideline, do you have an idea what effect fine levels--  
21 what effect on fine levels adoption of the Commission draft

1 would have?

2 MR. LANGSDORF: I really haven't studied that  
3 exactly how that would affect it.

4 COMMISSIONER MALONEY: Thank you, Mr. Chairman.

5 CHAIRMAN WILKINS: Did I misunderstand you? Did  
6 you say if this were adopted most corporations in your  
7 judgment would develop a meaningful compliance protection  
8 program? Is that not a desirable societal interest result?

9 MR. LANGSDORF: Absolutely.

10 COMMISSIONER MacKINNON: Well, let me ask you this.  
11 Do you think most of them have compliance programs at the  
12 present time?

13 MR. LANGSDORF: I think most of them do, yes. I  
14 think this would strengthen that. That was my point. I  
15 think that they will--and I think they will be much more  
16 vigorous in putting them into effect and carrying them out?

17 CHAIRMAN WILKINS: Questions to my left anyone?

18 Well, thank you again.

19 MR. LANGSDORF: Thank you very much.

20 CHAIRMAN WILKINS: We appreciate your testimony,  
21 your written submission and we look forward to continuing to  
22 work with you in this area.

1           Our next witness is Samuel J. Buffone. Mr. Buffone  
2 is a partner with Asner, Jenkins, Myer, and Buffone. He is  
3 the chairman of a practitioner's group of attorneys advising  
4 the Sentencing Commission and he's here today representing  
5 the American Bar Association.

6           Mr. Buffone, we're delighted to see you once again.

7 STATEMENT OF MR. BUFFONE

8           MR. BUFFONE: Chairman Wilkins, Members of the  
9 Commission, I'm pleased to be here. As you are aware, I have  
10 appeared several times in the past to testify on behalf of the  
11 American Bar Association, and my testimony today will echo  
12 much of what I've testified to in the past.

13           I find myself in agreement with many of the  
14 witnesses who I've had the pleasure of hearing this morning  
15 who have urged the Commission to adopt a flexible attitude  
16 towards organizational sanctions, one that would emphasize  
17 policy statements or flexible guidelines rather than the  
18 system contained in the Commission's proposed draft.

19           I would like, however, to comment on several areas  
20 that have not been addressed by other witnesses. The first  
21 is to, again, as I did the last time I appeared, commend the  
22 Commission for the process by which it has considered the



1 difficult question of organizational sanctions. We at the  
2 American Bar Association are deeply appreciative of the  
3 openness of the Commission's process, your willingness to  
4 share your work product, solicit view points from diverse  
5 groups who have an interest in this process, and to share  
6 your thinking on an ongoing basis.

7           We would like to urge the Commission to learn both  
8 what the benefits and the detriments of that process have  
9 been to your deliberative process. I think there is much  
10 that can be learned from it, both positive and negative in  
11 your consideration of individual guidelines. And we would  
12 hope that some of the more positive things that you've  
13 learned from this process that you have had the leisure that  
14 was not granted to you by the statutory schedule and in-  
15 dividual guidelines to engage in a more extensive deliberative  
16 process, and we would hope that you could learn from that  
17 some things that could be carried over to your consideration  
18 of the coming rounds of amendments to the individual guideli-  
19 nes.

20           Turning to the organizational sanctions themselves,  
21 as I've testified in the past, the ABA's position is dictated  
22 by our criminal justice standard. Those criminal justice

1 standards recommend broadly formulated guidelines that would  
2 grant to sentencing court judges a wide degree of discretion  
3 to draw upon a range of sanctions, not only the sanction of  
4 presumptively high fines but a mix of other sanctions to  
5 determine what is the most effective way to accomplish the  
6 multiple purposes of organizational sentencing.

7           Our position is dictated in part by the view that  
8 the Commission should consider closely offender  
9 characteristics and look towards the status of the individual  
10 corporate offender. Judge MacKinnon, I share your view that  
11 the statute is the place to first look in addressing these  
12 difficult questions. And if you look at 18 U.S.C. { 3572(a)-  
13 (7), you will find one of the clearest Congressional direc-  
14 tives about organizational sanctions, that is, the section  
15 dealing with the imposition of a sentence of fine on related  
16 matters direct factors to be considered by sentencing courts  
17 that includes if the defendant is an organization, the first  
18 factor listed is the size of the organization followed by  
19 consideration of measures taken by the organization to  
20 discipline and to prevent recurrence of such offenses.

21           We urge the Commission to carefully consider the  
22 problems associated with smaller organizational defendants.



1 I think there is a risk here that because of the understan-  
2 dable interest of the larger organization and the effects that  
3 these Guidelines might have upon them, to consider too  
4 extensively how these Guidelines are going to be applied to  
5 the large case -- to the big offender -- and to not consider  
6 or devote the same degree of consideration to the more  
7 typical case that's going to come before the federal court  
8 involving smaller corporate offenders.

9           There is much that we favor and it is included in  
10 our written comments about the Commission's draft proposal.  
11 We think that the provision for departure indicate a willing-  
12 ness on the Commission's part to consider the kind of  
13 suggestions we've made in the past. The departure language  
14 contained in the draft proposal is exactly the sort of thing  
15 that we had in mind for policy statements of broadly formu-  
16 lated guidelines. That's directing district court judges of  
17 broad types of factors that they should consider in sentencing  
18 for upward or downward departure we think could easily be  
19 converted into policy statements if that list were extended  
20 giving direction from the Commission of the kinds of factors  
21 that you believe a judge should consider and, where ap-  
22 propriate, the kind of weight that should be given to them.

1 I'd like to move on to two areas that we think  
2 should be given particular attention. The first is what I  
3 call the corporate death penalty -- the provisions of  
4 Guideline 8c-1.1 that would require a fine set at a level  
5 sufficient to divest the corporation of all of its assets.  
6 We think that there are significant problems raised by that  
7 guideline. The first is the potential Eighth Amendment  
8 problem for excessive fines. In the area of forfeiture,  
9 specifically RICO forfeiture, several courts of appeal have  
10 looked at the potential disproportionality between a fine and  
11 the underlying criminal conduct and have found that sufficient  
12 disproportionality would violate the Eighth Amendment.  
13 That's the Ninth Circuit in the Buscher case and the Second  
14 Circuit in the Porchelli case.

15 COMMISSIONER MACKINNON: What's the citation?

16 MR. BUFFONE: I do not have citations, Your Honor.  
17 I'd be happy to send a letter to the Commission containing --  
18

19 COMMISSIONER MACKINNON: What's the name of it?

20 MR. BUFFONE: United States v. Buscher in the Ninth  
21 Circuit and United States v. Porchelli in the Second Circuit  
22 as well as the Second Circuit decision in United States v.

1 Reagan. The Reagan decision, Your Honor, is a Southern  
2 District of New York District Court decision.

3 COMMISSIONER MACKINNON: R-E-A or R-E-G.

4 MR. BUFFONE: R-E-A-G-A-N, Your Honor. I will send  
5 a letter to the Commission with specific citations.

6 The second problem with that particular provision  
7 is that it gets the Commission and the district courts into  
8 the thorny area of enterprise forfeiture. Again, in the CCE  
9 and RICO areas, courts have wrestled with the many difficult  
10 problems created by the enterprise forfeiture doctrine where  
11 there are very specific statutory limits placed upon enterpr-  
12 ise forfeiture by those statutes. Effectively, this guideline  
13 would permit district court to consider the concept of  
14 enterprise forfeiture without those limitations.

15 Our third problem is the language, primarily for  
16 criminal purpose or principally by criminal means has two  
17 dangers inherent in it. The first is that it's going to  
18 require district court to engage in fact finding that may be  
19 very difficult. It's going to require courts to look at a  
20 range of uncharged conduct potentially to see whether or not  
21 this corporation has been run primarily for criminal means or  
22 by criminal purposes.

1           Second, that language draws with it the potential  
2 for a determination that it is unconstitutionally vague.  
3 Again, looking to the RICO area which is most analogous,  
4 Justice Scalia, speaking on behalf of four other members of  
5 the Supreme Court in the HJ case, found that the pattern  
6 language of the RICO statutes potentially subjected it to a  
7 constitutional challenge for being unconstitutionally vague.  
8 Similar problems are inherent in this language.

9           Finally, I'd like to turn to the problem I began  
10 with, and that is the small offender. By small offender, I  
11 mean to refer to a corporation that by its business structure  
12 and net assets is not organized in the same way as some of  
13 the other larger corporations who have appeared and testified  
14 before the Commission today and in the past. I use the  
15 hypothetical of a construction home improvement company set  
16 up as a corporation by owned by two brothers who each own 50  
17 percent of the stock. One of the brothers incurred some  
18 illegal gambling debts. Because of that, he engages in  
19 extensive criminal activity through the corporation, over-  
20 charging clients, siphoning that money out into his own  
21 pocket to pay his gambling debts.

22           The innocent brother may well not have known of any

1 of this illegal conduct until it came to the attention of law  
2 enforcement authorities. If the corporation is charged and  
3 tried and convicted of fraud related federal offenses, I  
4 tried to lay out in my testimony how many of the mitigating  
5 factors that would normally reduce the high fine level would  
6 not be available to that kind of a corporation and would wind  
7 up visiting an extremely harsh fine penalty on the innocent  
8 owner and the corporation because of the involvement of one  
9 of its shareholders.

10 I'd be pleased to answer any questions that you  
11 might have at this time.

12 COMMISSIONER WILKINS: Assume two things -- there's  
13 a proposition that says that the guilty brother of your  
14 example would have to -- whatever fine that he pays it would  
15 then reduce the fine that the corporation would have to pay.

16 MR. BUFFONE: Again, I tried to draw on a hypothet-  
17 ical, Judge Wilkins, to show that the guilty brother in this  
18 case may well have paid his loan shark or his bookie and  
19 not have those assets to be reached. Now my reading of the  
20 Commission's proposal is that you would then look to the  
21 remaining assets of the corporation to satisfy those fines  
22 and restitutions.

1 COMMISSIONER MALONEY: How would the offset  
2 provision which is contained in both drafts apply to your  
3 hypothetical? I'm sorry, how would the offset provision on  
4 closely held corporations apply to the hypothetical that you  
5 have in your testimony?

6 MR. BUFFONE: It might well that it's going to  
7 offset only if there's a penalty against an individual  
8 defendant that he can satisfy. That's certainly true of  
9 restitution, and I believe that my reading of the Commission's  
10 draft that it would be true as to the underlying fine as  
11 well.

12 COMMISSIONER MALONEY: How large was this corpora-  
13 tion in your hypothetical?

14 MR. BUFFONE: In my hypothetical, I drafted it as  
15 having several million dollars of sales per year.

16 COMMISSIONER MALONEY: How many people?

17 MR. BUFFONE: That's not in the hypothetical. I  
18 think we could extend this kind of analogy to corporations of  
19 easily 50 or fewer employees.

20 COMMISSIONER MALONEY: No further questions.

21 COMMISSIONER MACKINNON: You spoke of policy  
22 statement. I suppose you're talking like most of the others

1 are on non-binding policy statements.

2 MR. BUFFONE: Judge MacKinnon, I've come around in  
3 my thinking. I testified not the previous time but two  
4 appearances ago before the Commission that I thought all you  
5 should draft was policy statements, to have a one to two year  
6 period of experimentation in district courts.

7 Well, enough time has gone by that whatever data I  
8 hoped would have been produced is out there. It's just there  
9 to be studied. I think the Commission could draft flexible  
10 guidelines that do one of two things: either not mandate  
11 fines at the high level that they're mandated now but have a  
12 broader fine range that could be applied by the district  
13 court; or do, as I think the Commission has taken a large  
14 step towards doing, and that's encouraging departure. If the  
15 Commission specifically finds that it has not adequately  
16 considered a number of factors such as the effect of vicarious  
17 liability, the size and structure of corporations, that would  
18 encourage district court to use their departure authority  
19 because they would be certain that the Commission had not  
20 adequately considered those factors.

21 So I could see guidelines -- guidelines that would  
22 move towards specificity in the future but would contemplate



1 flexible application and departures during their initial  
2 implication.

3 COMMISSIONER MACKINNON: Did I understand you to  
4 say that Justice Scalia had referred to RICO in some respects  
5 unconstitutional?

6 MR. BUFFONE: No, I hope I didn't say that, Your  
7 Honor. He was joined by three other members of the Supreme  
8 Court --

9 COMMISSIONER MACKINNON: I thought you said four?

10 MR. BUFFONE: I meant four total, Your Honor.

11 COMMISSIONER MACKINNON: Oh, yeah, and what was his  
12 particular position?

13 MR. BUFFONE: His position was that the pattern  
14 language of RICO was not susceptible to precise enough  
15 meaning, and he suggested that the Court might find before it  
16 in the future challenges to the constitutionality of RICO  
17 based upon vagueness of that language.

18 In fact, there have been several of those challenges  
19 filed in the Courts of Appeal to the district courts.

20 COMMISSIONER MACKINNON: But it's been around for a  
21 lone time, and they have interpreted it.

22 MR. BUFFONE: One year ago.

1 COMMISSIONER WILKINS: Thank you.

2 COMMISSIONER MAZZONE: Let me assume two things:  
3 one is that we'll have guidelines, and two, that you would  
4 not be result oriented on behalf of a particular client.  
5 You've heard two proposals discussed, and you've read the two  
6 proposals published. Which of those two proposals do you  
7 believe would provide a sentencing judge with more flexibili-  
8 ty, as you put it, to arrive at a fair fine?

9 MR. BUFFONE: I make a proposal to give the  
10 sentencing court the option to look at gain/loss or a fine  
11 table.

12 COMMISSIONER MAZZONE: You're aware that Justice's  
13 proposal says in my mind somewhat the same thing except that  
14 it turns it around -- offense level and then adjusted by gain  
15 or loss if it's there.

16 MR. BUFFONE: I find that the question is begged  
17 somewhat by the fine table. While I personally prefer the  
18 Department's proposal of aggravators and mitigators, it would  
19 be starting from a low fine table base. Once we have the  
20 fine table the Department's proposed, then I don't favor  
21 their overall draft.

22 COMMISSIONER MAZZONE: The time table issue, you

1 know, we haven't settled on that, and we can always play with  
2 that -- we can always settle on a time table. But the  
3 approach itself -- I'm interested in your opinion as to which  
4 would cause sentencing judges more or less time and effort and  
5 which would give the sentencing judges more flexibility. You  
6 think that would be the Commission's approach?

7 MR. BUFFONE: I do, and I want to go back to my  
8 comment about offender characteristics because I think the  
9 question of how a judge is going to make a difficult deter-  
10 mination is going to be driven by both the offense and the  
11 offender characteristics. It's going to be a much different  
12 question if we have ITT in a defense procurement case  
13 involving potentially huge losses or an environmental case or  
14 my home construction contractor.

15 COMMISSIONER MAZZONE: Thank you.

16 COMMISSIONER WILKINS: Thank you very much. Our  
17 next witness is Charles A. Harff, Vice President, Senior  
18 Counsel and Secretary of Rockwell International. Delighted  
19 to have you with this.

1 STATEMENT OF MR. HARFF

2 MR. HARFF: I appreciate the opportunity to make a  
3 few remarks before the Commission, and I hope you're not too  
4 hungry.

5 As you can tell from the statement that I have  
6 given to the Commission earlier, it's short and it will be  
7 supplemented by a much more extensive set of comments that  
8 are really specific to a number of the issues that are being  
9 addressed by the Commission. I thought I'd take this  
10 opportunity really to talk about a conceptual issue that I  
11 think overrides much of the concern corporations like my own  
12 have about sentencing guidelines.

13 Now just as background, I might note that Rockwell  
14 has over 100,000 employees and over 100,000 stockholders,  
15 does about 45 percent of its business with government  
16 entities and the balance with commercial and international  
17 customers. We take particular pride in the self governance  
18 program that we have, and we think they're well designed,  
19 we've spent a great deal of time on them and I will talk a  
20 little more, I think, in view of Judge MacKinnon's interest  
21 in that in a few minutes.

22 But I think the essential point that has to be

1 recognized is that no program no matter how vigorously  
2 pursued and how diligently applied is going to ensure that  
3 you're going to have complete compliance. You're not. When  
4 you have a large corporation of 100,000 or more employees,  
5 some employees -- and another witness this morning mentioned  
6 it -- there's always one, in fact there are more than one,  
7 who for their own motive either choose to ignore or will not  
8 do what the corporation mandates.

9           And I think that's really the guts of the problem  
10 on -- we would urge the Commission in looking at the Guideli-  
11 nes and considering the Guidelines distinguish between three  
12 different kinds of organizational defendants specifically.

13           You have the smaller corporation where I think  
14 there is a substantially greater opportunity to administer  
15 effectively the conduct of the people to get the message to  
16 the level -- all the levels of the corporation.

17           The second group of organizations where I think you  
18 clearly have a senior level of management involvement, where  
19 culpability I think is not an issue, and I don't think the  
20 issue of whether the Guidelines provide sanctions that are too  
21 harsh or inappropriate really is one that I want to address.

22           I would like to turn to the third one which is the

1 large corporations which are criminally accountable only  
2 through the operation of imputed or vicarious liability  
3 because I think that's where a significant concern has to  
4 arrive. In that case, the corporation -- the entity that's  
5 before the court -- assuming that it has in place an effective  
6 program to avoid, to monitor, to police, discharge -- to do  
7 all the things that one might reasonably do, is really  
8 oftentimes really an innocent victim of employees who in  
9 their own misguided interest of doing whatever they're doing,  
10 may have thought that they were doing something for the  
11 benefit of the corporation but clearly were not. I think  
12 this problem has become more appropriate as we begin to  
13 criminalize more and more conduct that I think historically  
14 was really settled in a civil way.

15           That's particularly true, I think, in some of the  
16 government contractor areas where dispute -- legitimate  
17 dispute were handled civilly. And I think over the last  
18 decade with a lot of the attention on so-called waste, fraud  
19 and abuse issues it's become a very fertile ground for  
20 corporate prosecution.

21           No matter how committed a large organization is, as  
22 I said, I think you're going to find some employees doing

1 some things that are basically wrong, they're criminal. And  
2 I would urge that the way to deal with that is to prosecute  
3 those individuals and every time that happens I think you  
4 send a message that reaffirms the corporate message which we  
5 try very, very hard and effectively to about 99.-something  
6 percent to transmit to the employees. But individual  
7 prosecution gets that message much more effectively than  
8 significant fines and penalties of a corporate level.

9           At the corporate level I'm not sure there's much  
10 more one can do that isn't already being done. And I think  
11 the Guidelines should recognize the distinction for imputed  
12 liability by voting no fine if a convicted corporation can  
13 demonstrate that it hasn't from all the appropriate mitigating  
14 factors. I would add on that that some appropriate factors  
15 need to be refined a bit.

16           For example, the premium that's going on on  
17 reporting violations I think has to be put in a more detailed  
18 form. I think some of the witnesses this morning have  
19 already touched on the fact that beauty is in the eye of the  
20 beholder. Frequently we will investigate very thoroughly a  
21 particular matter. We will conclude that no crime was  
22 committed. But that does not necessarily preclude a prosecu-



1 tor from believing that those same facts come out differently.

2           Secondly, in our corporation I think we have  
3 something like 1200 government auditors who are resident in  
4 our facility, believe it or not, and it's not at all impos-  
5 sible that one of those 1200 is going to come across something  
6 faster or sooner than we do, not very often but they do, and  
7 I think the issue there ought to be to what extent does the  
8 company responsibly address an issue when it arises, to what  
9 extent to the company's own internal audit program, surveil-  
10 lance program, controlling program make it reasonably likely  
11 that we will uncover these.

12           But there shouldn't be a premium necessarily based  
13 on the fact that an issue arises that the company did not  
14 purge itself before. You're not going to win that race to the  
15 courthouse every time, or win it a lot of the time.

16           I think the issue of cooperation, again, cooperation  
17 with the government's investigation which is another mitigat-  
18 ing factor needs to be put in a context that does make it  
19 consistent with the corporation's right to assert defenses  
20 and legal privileges and to seek a trial. We have had direct  
21 experience with prosecutors who will basically say unless you  
22 agree at the outset that you will not withhold anything,

1 privilege or product, interview notes, whatever, you will not  
2 be deemed to be cooperating. I think that's probably going  
3 further than the Commission should encourage in the factors  
4 set forth.

5           The court ought to retain -- ought to be given the  
6 selection to look at these mitigating factors and determine  
7 to what extent they apply and it shouldn't be entirely by the  
8 numbers. I think it should be -- there are so many subjective  
9 differences you're going to encounter, I believe it's  
10 important to leave that kind of latitude and flexibility.

11           And a zero fine ought very much to be a fine that a  
12 judge can impose. Now a zero fine doesn't mean that the  
13 corporation escapes the adverse consequences of the act.  
14 Clearly there will be restitution which we would always think  
15 is appropriate. And in the government fraud area, the False  
16 Claims Act also permits the government -- entitles the  
17 government to obtain treble damages for substantial forfei-  
18 tures.

19           Let me just briefly touch on a couple of other  
20 points. I am troubled by the concept of accepting  
21 responsibility. I think perhaps it's a matter of being  
22 separated by a common language. I think if accepting

1 responsibility means that the corporation will redress the  
2 wrong, if it means that the corporation will emphatically  
3 deal with a program that will avoid that in the future, if it  
4 means that you'll discharge or reprimand or otherwise deal  
5 with the particular people who caused the problem, we would  
6 agree with that 100 percent.

7           The problem is I think it has to be said in terms  
8 of recognizing responsibility rather than accepting because  
9 once you accept responsibility you open up the door to the  
10 plaintiff's bar which is rather vigorous on bringing deriva-  
11 tive suits following almost any criminal action. And you can  
12 defend effectively and properly derivative actions that  
13 contest the actions of corporate management by simply dealing  
14 with the business judgment rule. You can't require one  
15 supervisor or one auditor to sit next to each employee.  
16 There comes a point of diminishing return.

17           I think if the corporation has accepted respon-  
18 sibility, the plaintiff can -- civil derivative action I  
19 think will undercut the business judgment rule, and I think  
20 that's a serious problem.

21           Second, I think more attention needs to be paid to  
22 the issue of effectiveness of programs. I think some of the

1 language in the proposed guidelines would suggest that if an  
2 entity has been guilty of prior similar misconduct, then the  
3 mitigation factors would not apply. And I think that's  
4 unrealistic as one looks at larger sized corporations with  
5 multiple locations, with multiple divisions and again going  
6 back to what I said at the very beginning, we will never  
7 achieve perfection in getting our message out and we work  
8 awfully hard at it.

9 But I don't think that that ought to be -- you  
10 don't test the efficacy of the program of the efficacy of a  
11 corporation's commitment by addressing whether or not a  
12 similar event has previously transpired.

13 I think the third is the recidivism point in the  
14 Guidelines which really say if a similar crime has been  
15 committed in the last ten years, I believe it is, then that  
16 automatically puts the corporation or corporate defendant in  
17 a different category. At the very least, it seems to me,  
18 that ought to be prospective because there are a number of  
19 corporations, including I'm sorry to say my own, that have  
20 pleaded guilty in the past which under circumstances which  
21 I'd be happy to go further into which we would not have done,  
22 in my judgment, had there been a penalty beyond the hope that

1 we understood to be applicable. So it should be prospective  
2 at the very least.

3 I've left you with the impression that we're really  
4 trying to avoid any guidelines, I think that's not so. I  
5 think we've really emphasized the importance of compliance  
6 programs. I think where they're in effect and where they are  
7 designed well, implemented well, that ought to be probably the  
8 principal factor in mitigating fines and penalties and in  
9 many cases down to a zero level.

10 I'd be glad to answer any questions you have.

11 COMMISSIONER MACKINNON: You mentioned your plea.  
12 That hasn't been too recent or hasn't been too far away, has  
13 it?

14 MR. HARFF: Well, that may be true.

15 COMMISSIONER MACKINNON: And your penalty was  
16 roughly \$4 million, was it?

17 MR. HARFF: IN 1985, it was \$1 million. In 1989,  
18 it was \$5.5 million.

19 COMMISSIONER MACKINNON: You're out of the West  
20 Coast?

21 MR. HARFF: Well, we're really in I think 40  
22 states. Our principal office is in California, yes.

1 COMMISSIONER MACKINNON: Now tell us in brief form  
2 some of the ingredients of that \$5.5 million affair.

3 MR. HARFF: I'm glad you asked that because you  
4 asked earlier of one of the witnesses to indicate at what  
5 level a problem arises. In this particular case -- and I  
6 will try to make it brief -- the problem involved a sub-  
7 contract manager who was negotiating a \$40 million subcontract  
8 with a major corporation.

9 As part of -- realize that \$40 million is a great  
10 deal of money, but you have to put it in the context of a \$1.2  
11 billion program. We would view that subcontract manager at  
12 about as low a level of the non-hourly worker level as you  
13 get. Giving him that kind of responsibility with supervision  
14 does not in our judgment --

15 COMMISSIONER MACKINNON: What did they do?

16 MR. HARFF: Well, what they did -- and there's  
17 always a great deal of dispute here -- is they hired a  
18 contractor -- the same contractor under which there had been  
19 an agreement not to have a warranty clause. The price was  
20 less because there was no warranty clause.

21 They shipped some electronic boxes to us which  
22 didn't work, and we said you have to take them back, we won't

1 accept them, they don't work. They said that's not -- we'll  
2 be glad to fix them, but you have no warranty. Well, we said  
3 now wait a minute, warranty -- that's a whole different  
4 issue. If it's defective when you deliver it, you have the  
5 obligatio to fix it. Well, they took them back and they  
6 fixed them and they billed us \$250,000 for fixing them and we  
7 didn't pay it.

8           And this went on -- they argued about this for  
9 about a year and a half. And a new contract came along --  
10 the first one was a cost-plus contract. To the extent that  
11 we pay the \$250,000, the government would have reimbursed us  
12 for most of it.

13           A new contract came along, and the same two people  
14 were arguing about what kind of price they would have. And  
15 the conversation went something like this, and there's not  
16 much disagreement about it. Our fellow said, "Well, I'll  
17 give you that contract" -- they started off asking for \$60  
18 million; finally they brought it down to \$42 million.

19           And the conversation went, "If you'll pay us on one  
20 side we'll take that contract at \$42 million even though it's  
21 outrageously low -- I'll give you that contract for \$42  
22 million even though it's outrageously low if we never hear



1 from you again about that \$250,000 claim.

2 The other fellow said, well, okay. In his mind, he  
3 thought he was getting the \$250,000 in the price. In our  
4 man's mind, he didn't think he was paying it. Under the  
5 government contract provision, you've got to certify cost and  
6 pricing data, and we did not disclose that conversation.

7 The government took the position that in the second  
8 contract we had failed to disclose that we could have gotten  
9 a \$250,000 lower price if we had paid the disputed amount in  
10 the other one. And maybe we could have.

11 COMMISSIONER MACKINNON: What was the indictment  
12 offense?

13 MR. HARFF: A false claim and a false statement.  
14 We had certified --

15 COMMISSIONER MACKINNON: And how did they get the  
16 thing up to \$5.5 million?

17 MR. HARFF: Well, before I answer that let me just  
18 tell you that the government -- once we got into this -- and  
19 by the way, it's important to note, my staff investigated  
20 this for a long time -- our people did not tell us what they  
21 really had been doing; it took a long time and they really  
22 never did admit that they had really traded anything here.

1 COMMISSIONER MACKINNON: Who was the top man in  
2 that particular negotiation that was in charged with the  
3 maximum authority in the corporation?

4 MR. HARFF: Well, that would be the contract  
5 manager for that particular \$1.2 billion.

6 COMMISSIONER MACKINNON: And what was his position?

7 MR. HARFF: It would be a -- he was really a  
8 manager of a contract, any particular division; he was not --

9  
10 COMMISSIONER MACKINNON: And what obligations would  
11 he have and what would be the range of his managerial  
12 authority?

13 MR. HARFF: He would have delegated authority  
14 certainly to deal with subcontracts at the --

15 COMMISSIONER MACKINNON: And how much money?

16 MR. HARFF: Probably up to \$50 million, \$100  
17 million -- something in that range.

18 COMMISSIONER MACKINNON: That's all I need. Thank  
19 you.

20 MR. HARFF: But let me answer your question on the  
21 fine because the individual whom we fired was tried and  
22 acquitted.

1 COMMISSIONER MACKINNON: You what?

2 MR. HARFF: The individual who had been handling  
3 this was indicted, was tried and acquitted.

4 COMMISSIONER MACKINNON: And acquitted?

5 MR. HARFF: And acquitted. The judge said, "Well,  
6 if the corporate defender before me were making \$100,000, I  
7 think a \$500,000 fine would be appropriate. But since this  
8 corporation makes over a billion dollars, I'm going to  
9 multiple that \$500,000 to make the difference between  
10 \$100,000 and a billion." And we got to \$5 million.

11 COMMISSIONER MACKINNON: The \$5.5 million was a  
12 fine?

13 MR. HARFF: Correct.

14 COMMISSIONER MACKINNON: In the Southern District  
15 of California or was it the Central District?

16 MR. HARFF: The Central District. I might add that  
17 it was a conditional plea because in that case we believed we  
18 had reported voluntarily and the government had not followed  
19 the procedures that it committed to on voluntary disclosure.  
20 And we now have an appeal pending in the Ninth Circuit to set  
21 that aside.

22 COMMISSIONER MACKINNON: Who was the judge?

1 MR. HARFF: Consuelo Marshall.

2 COMMISSIONER MACKINNON: Thank you.

3 COMMISSIONER WILKINS: So you gbt \$250,000 false  
4 claim and you got a \$5.5 million fine. So you ought to be  
5 urging us to get these Guidelines out there as soon as we can.

6 COMMISSIONER MALONEY: Thank you, Judge. For what  
7 reasons did the company institute the compliance programs  
8 that they have on board? Could you outline --MR. HARFF:  
9 Well, I think the model, of course, we've had for many, many  
10 years. We certainly strengthened them with the initiatives  
11 that the Defense Department some six or seven years ago,  
12 looking towards responsibility of government contractors.

13 So we have significantly extended them, and we've  
14 added a great deal of training time and good deal more  
15 oversight.

16 COMMISSIONER MALONEY: So it was clearly for  
17 reasons unrelated to the deliberations of --

18 MR. HARFF: Absolutely.

19 COMMISSIONER MALONEY: Okay. Would you said that  
20 it's a fair statement that other corporations are similarly  
21 motivated?

22 MR. HARFF: Well, certainly any corporation having

1 any significant business with the United States Department has  
2 been under considerable -- I was going to say pressure and  
3 that's the wrong word -- but considerable inducement to adopt  
4 stronger and stronger programs at self-policing.

5 In doing business with an area where there are just  
6 legions of applicable requirements.

7 COMMISSIONER MACKINNON: Was this man fired or did  
8 you --

9 MR. HARFF: Absolutely. Because he should have  
10 known better.

11 COMMISSIONER NAGEL: Let me ask you if you could  
12 provide us with any of the documents you have from that case  
13 as well as the cite.

14 MR. HARFF: I'd be happy to.

15 COMMISSIONER NAGEL: Great. Thank you.

16 COMMISSIONER WILKINS: Well, thank you very much,  
17 Mr. Harff. We appreciate your testimony and I find it very  
18 helpful to us today. Thank you. We'll recess at this time  
19 until two o'clock. We'll reconvene at two o'clock sharp.

20 [Recess.]

1

AFTERNOON SESSION

2

2:00 P.M.

3

COMMISSIONER WILKINS: Let's come to order, please.

4

We'll get started with the afternoon session.

5

Our first witness is James F. Rill. Mr. Rill is

6

Assistant Attorney General, Antitrust Division, Department of

7

Justice. Accompanying Mr. Rill is Mr. Neal Roberts.

8

We're delighted to have both of you with us, and

9

we'd be happy to hear from you at this time.

1 STATEMENT OF MR. RILL

2 MR. RILL: Thank you very much, Mr. Chairman. I  
3 deeply appreciate the opportunity to be here today and  
4 present the views of the Department on that particular aspect  
5 of the Draft Sentencing Guidelines for Organizations that  
6 vitally concerns the Antitrust Division. That is, of course,  
7 the possible elimination of the current guidelines for  
8 determining antitrust fines for organizations in favor of a  
9 guideline based on offense levels or, in the alternative,  
10 demonstrated loss or gain.

11 Simply put, this change would very likely substan-  
12 tially reduce antitrust sanctions against organizations to a  
13 small fraction of what they are today and thereby seriously  
14 undermine the efforts of the Department, Congress and the  
15 Commission effectively to deter this particular category of  
16 white collar crime.

17 The Department of Justice strongly recommends  
18 retention of the current antitrust fine guideline for  
19 organizations. The Department has worked closely with the  
20 Commission to develop a comprehensive sentencing guideline  
21 for antitrust offenses. The current guideline establishes  
22 sanctions for organizational defendants that dovetail with



1 the individual sanctions, particularly incarceration, to  
2 provide an effective deterrent.

3           Antitrust offenses were given such careful attention  
4 for good reason. Antitrust violations comprise between one-  
5 fourth and one-third of all federal offenses by organizations.  
6 They typically occur in a very complex market setting and very  
7 often they are extremely difficult to detect. The antitrust  
8 guideline provides a combination of individual and organiza-  
9 tional sanctions that are relatively easy to compute, are  
10 proportional to the harm caused by the violation and operate  
11 together to punish and deter antitrust crime.

12           The fine component of the antitrust sanctions do  
13 not depend on offense level or on demonstrated, that is,  
14 established amount of injury. Instead, they are a function  
15 of the volume of commerce of the defendant that was tainted  
16 by the antitrust conspiracy. Volume of commerce serves as a  
17 useful proxy for the harm caused by an antitrust defense  
18 because, as this Commission has explicitly recognized, actual  
19 antitrust overcharges are costly and time consuming to  
20 calculate and present.

21           We are only now beginning to have substantial  
22 experience with the current antitrust guideline, and its

1 overall approach seems to us to be very sound. However, even  
2 though only a very small number of organizations have been  
3 sentenced under the Guidelines so far, the draft proposal  
4 would change the entire approach of the Guidelines to  
5 antitrust fines for organizations so as significantly to  
6 increase the burden of imposing organizational sanctions  
7 while substantially at the same time reducing the size of the  
8 sanctions. Neither offense level or demonstrated gain or  
9 loss is a satisfactory criterion for determining antitrust  
10 fines.

11           Offense levels relating to incarceration for  
12 antitrust crimes are effectively relatively low, currently  
13 ranging from 8 to 13. The Commission set offense levels for  
14 antitrust violations to result in short but certain prison  
15 sentences for antitrust offenders and in addition provided  
16 for substantial individual and organizational fines.  
17 Substantial fines, particularly organizational fines,  
18 constitute a very significant aspect of the punishment and  
19 deterrence for antitrust offenses under the current Guidelin-  
20 es.

21           This carefully calibrated system of sanctions in  
22 part reflects the Sherman Act's relatively short -- that is,

1 three year maximum prison term and high -- now \$10 million --  
2 maximum corporate fine and is consistent with the historic  
3 characteristics of Sherman Act sanctions.

4 Because of the relatively low current offense  
5 levels for antitrust, organizational fines cannot appropriat-  
6 ely be based on them. The resulting fines would be too low  
7 to provide adequate deterrence and punishment for organiza-  
8 tional offenders.

9 Let's take an example. The case of a price fixing  
10 conspiracy affecting \$10 million in a corporation's sales.  
11 Assuming for the moment that the amount of the violation  
12 overcharge cost would not be determined without unduly  
13 complicating the sentencing process which is a point I'll  
14 return to in a moment. The Guideline fine range based on the  
15 offense levels in the current draft proposal would be in the  
16 order of \$75,000 to \$112,000. Such a fine would be no  
17 penalty at all; it would be calculated as a relatively minor  
18 cost of doing business.

19 Under the existing guideline, in contrast, the fine  
20 would be on the order of \$2-5 million as a function of the  
21 volume of commerce affected by the conspiracy -- a proxy for  
22 the harm that has been caused.

1           Let me return to the alternative -- basing  
2 organizational fine on demonstrated loss or gain. That, Mr.  
3 Chairman, Members of the Commission, is essentially unwork-  
4 able. The extent to which an antitrust violation causes gain  
5 or loss is quite difficult to calculate and will almost  
6 always be vigorously contested by defendants in litigation.  
7 These calculations would enormously complicate the sentencing  
8 process and would require substantial expenditures of  
9 resources by the Department and by the court.

10           The Antitrust Division would have to provide these  
11 resources by diverting part of what we have now from important  
12 criminal and civil enforcement activities. Conversely, the  
13 volume of commerce test remains a good proxy for loss or gain  
14 in antitrust cases, particularly with respect to the objective  
15 of seeking broad scale deterrence across the entire organiza-  
16 tional community.

17           In summary, the Commission's proposal for establis-  
18 hing guideline fine ranges simply cannot be effectively  
19 applied to antitrust violations without seriously complicating  
20 the sentencing process for antitrust offenses and, at the same  
21 time, seriously lowering the organizational fine levels for  
22 those antitrust defenses.

1           There is no reason to do either. The current  
2 guideline provides an appropriate organizational sanction for  
3 antitrust offenses that we believe establishes an effective  
4 antitrust deterrent. This view, I should add, is strongly  
5 supported by Congress' decision to sharply increase the  
6 Sherman Act maximum corporate fine from \$1 million to \$10  
7 million per count which happened on the last day of the most  
8 recently concluded Congressional session so as to permit the  
9 fines established by the current guidelines to be imposed  
10 without the need for proof of gain or loss.

11           The Department of Justice, in conclusion, strongly  
12 recommends that antitrust defenses be excluded from the  
13 coverage of the provisions in the draft chapter of the  
14 sentencing guidelines on organizational sentencing that  
15 establishes guideline fine ranges based on offense level or  
16 demonstrated gain or loss.

17           That concludes my brief oral statement, Mr.  
18 Chairman. You have a prepared text for your review, and I  
19 would certainly be pleased to attempt to answer any questions  
20 you or the members of the Commission may have.

21           COMMISSIONER WILKINS: I think your position is  
22 well stated. As I understand that, in the event we were to

1 adopt the Justice Department's proposed organizational  
2 sanctions guidelines, you would still urge us to exempt from  
3 that operation or application antitrust violations?

4 MR. RILL: That is the position of the Department,  
5 Mr. Chairman. It is our view that the antitrust  
6 organizational fine levels have been established on a  
7 considered, rational, sound basis that are working effectively  
8 as a deterrent to provide an effective range and an effective  
9 level of deterrence and are relatively easy to apply given  
10 the potential complexity of the alternative.

11 COMMISSIONER WILKINS: Thank you. Questions to my  
12 right? Mr. MacKinnon?

13 COMMISSIONER MACKINNON: How many prosecutions of  
14 corporations did you file last year -- antitrust violations?

15 MR. RILL: I'll get you the exact number, Judge  
16 MacKinnon, and provide it for the Commission. We had -- I'll  
17 give you an estimate now -- approximately 75 total cases in  
18 the last fiscal year, approximately, I believe, 39 or 40 of  
19 those involved corporate offenders. But I would have to  
20 provide an exact number for the record.

21 COMMISSIONER MACKINNON: That's about 10 percent of  
22 corporate crime in America.

1 MR. RILL: I'll accept that, Judge MacKinnon.

2 COMMISSIONER MACKINNON: Well, we get 350 cases a  
3 year generally. Okay, thanks.

4 COMMISSIONER NAGEL: Mr. Rill, would it be safe to  
5 say that your position is that we leave the antitrust  
6 guidelines as they are and not include it in what you call  
7 the generic draft?

8 MR. RILL: With respect to the organizational and  
9 individual fine levels, yes, Commissioner Nagel.

10 COMMISSIONER NAGEL: When we drafted those -- this  
11 was actually before you presumed your position -- you may know  
12 that we did so in consultation with the Department, with the  
13 ABA and the Antitrust Bar. I don't know whether you have  
14 information on this, but to the extent that you do, has there  
15 been any suggestion from any of the other constituent groups  
16 that there be a change or is everyone seemingly still in  
17 agreement?

18 MR. RILL: I don't know of other constituent  
19 groups. I know that the issue is under consideration in the  
20 Antitrust Bar at the present time. Having been a former  
21 chairman of the Antitrust Section, I know something of the  
22 constituency of that Section, and I suspect the level of



1 antitrust fine analysis would be an issue that would be  
2 somewhat closely contested in this Section.

3 I can only say that my own experience in the  
4 Antitrust Bar for 30 years before I took my current position  
5 substantially confirms the difficulty that would be involved  
6 in attempting to establish sanctions based on gain or loss.  
7 In private litigation, for example, where gain or loss is  
8 very much an issue, it's been my own personal experience that  
9 about 20 percent of the time and expenses is involved in the  
10 establishment of liability and about 80 percent of the time  
11 is spent in attempting to establish parameters for damage in  
12 both litigated and settled cases. I cannot overestimate from  
13 my own experience the strength and force of our conclusion  
14 that we're compelled to establish gain or loss to achieve  
15 effective sanctions it will be an enormous drain on the  
16 resources of the Department and indeed on the resources of  
17 the courts, as I'm sure those who are experienced in handling  
18 both criminal and private antitrust litigation will confirm.

19 COMMISSIONER NAGEL: Thank you.

20 COMMISSIONER WILKINS: Any other questions?

21 COMMISSIONER MAZZONE: I'm always interested in  
22 your concern for the imposition on judicial resources and

1 never having had anything like this. What goes into the  
2 complicated sentencing hearing. Again, understanding that at  
3 the time the judge gets it, there's been a conviction, what  
4 goes into the sentencing hearing that makes it so complicated?

5 MR. RILL: Typically, the Department does not  
6 approach the sentencing hearing because of the complication.  
7 With the alternative approach of gain or loss that's permitted  
8 as a cap under the statute. Typically, because of the  
9 complications the Department will look to the statutory  
10 dollar amount cap which is now \$10 million and attempt to  
11 apply the guideline level of volume of commerce which is a  
12 relatively speaking easy figure to obtain in developing the  
13 sentencing.

14 In the event that gain or loss were to be the  
15 criterion, then I can relate again to my private practice  
16 experience in saying we would have to look at the circumstan-  
17 ces that existed in the marketplace, run some analyses of  
18 independent variable factors that might have produced gain or  
19 loss to the victim or to the perpetrator of the crime, have  
20 some level of confidence in the data that we're gathering,  
21 have some confidence in the model that attempted to isolate  
22 the conspiratorial overcharge and its effect on either the

1 perpetrator and the victim, and have that hotly contested  
2 presumably by experts on either side before the court could  
3 make any type of determination. That is frankly enormously  
4 time consuming, and as -- since I'm not an economist I could  
5 say with some conviction -- econometrics is not an exact  
6 science. We would be substantially less confident in the  
7 result than we are with the current guideline volume of  
8 commerce proxy that's used with a good degree of efficacy and  
9 confidence.

10 COMMISSIONER MAZZONE: Having just written an  
11 opinion which started with econometric models for 100 days and  
12 then discarding them at the end when I finally can, I know  
13 exactly what you mean. But I'm interested in this proposal.  
14 Mr. Rill, how do you see that this is done? Can you suggest  
15 to us even language that says exempt antitrust violations or  
16 just say Chapter 2R covers it fully and don't bother with it.  
17 How do we do that?

18 MR. RILL: I think that the precise language is  
19 readily available by the retention of, as you suggest,  
20 Chapter 2R insofar as it relates to the fines for organiza-  
21 tions and individuals arising from antitrust defenses and  
22 simply to exclude those provisions from the revised general-

1 ized chapter that has been proposed to you, subject, of  
2 course, to revising that chapter to take care of the other  
3 departmental recommendations.

4 But purely for antitrust, the drafting is there.  
5 The result has been a very closely calibrated individual  
6 incarceration table and a separate organizational fine level  
7 which reflects the history under the Sherman Act of attempting  
8 to be sure that there are actually jail times served by the  
9 offenders which had not always been the case but relatively  
10 short jail times which themselves do not automatically or  
11 even in any range of principle reflect the large fines that  
12 are necessary to attempt to deter offenses by organizations.

13 So we have small individual incarceration periods  
14 which should under the guidelines be served of a certainty and  
15 large organizational fines which was the principal, based in  
16 part on history and on logic, underline the current antitrust  
17 organizational guidelines.

18 COMMISSIONER MAZZONE: Thank you.

19 COMMISSIONER WILKINS: Thank you very much, Mr.  
20 Rill, Mr. Roberts.

21 MR. RILL: Thank you.

22 COMMISSIONER WILKINS: You might submit to us the

1 language that you would propose we use so we'll know exactly  
2 the words you would like to see if we were to adopt that, how  
3 we cross-reference antitrust or exclude or whatever may be  
4 the best way to do it.

5 MR. RILL: I'd be very pleased to do that.

6 COMMISSIONER WILKINS: Thank you very much. Our  
7 next witness is Andrew L. Frey. Mr. Frey is an attorney with  
8 Mayer, Brown & Platt in Washington, D.C. He's here represen-  
9 ting several corporate organizations. A few years ago when  
10 this Sentencing Commission was the target of a number of  
11 unfounded attacks based upon the constitutionality and  
12 challenged our very existence, we had the good fortune and  
13 good sense to hire Mr. Frey and he was successful in defending  
14 us. Once our lawyer and always our lawyer, although I must  
15 tell you we did not necessarily feel compelled to follow your  
16 sound advice. We'd be glad to hear from you.

17 STATEMENT OF MR. FREY

18 MR. FREY: Thank you. I appreciate the opportunity  
19 to appear today. I submitted written comments, and I don't  
20 propose to read them but I will cover the subjects that I  
21 covered in my written comments.

22 COMMISSIONER MALONEY: Did you submit --



1 MR. FREY: Yes, American Information Technologies  
2 Corporation, Chevron U.S.A. and Santa Fe Pacific.

3 COMMISSIONER MALONEY: I noticed that too, come to  
4 think of it. What is American Technologies?

5 MR. FREY: Ameritech is one of the local Bell  
6 Operating telephone companies in the Midwest. These com-  
7 panies, I should note, are not companies that are imminently  
8 facing federal criminal prosecution of any kind or that have  
9 an immediate or direct concern in this, and they have asked me  
10 to appear on their behalf as good corporate citizens who are  
11 concerned with the important activity that the Commission is  
12 undertaking.

13 I don't know, Mr. Chairman, whether you'd like me  
14 to go through all my comments or as I pass from topic to topic  
15 to stop for questions with respect to the particular topic.  
16 Whichever way is better for you.

17 COMMISSIONER WILKINS: I'd say the best form is to  
18 go ahead and make such comments as you think appropriate, and  
19 then we'll get back into it.

20 MR. FREY: All right. Let me say first of all that  
21 the comments that I make are not made simply with the  
22 objective of persuading the Commission to adopt the most

1 lenient possible stance toward corporate crime. On the  
2 contrary, we support appropriate punishment of corporate  
3 crime as much as anyone else does.

4 But we are concerned that appropriate punishment  
5 must involve a rational and fair framework and it's not just  
6 a matter of piling on to satisfy some public sense that may  
7 not have the benefit of the thought and sophistication that  
8 the Commission is able to bring to the problem.

9 I think the most important consideration and in  
10 this respect I think by and large the Commission's approach  
11 recognizes this is deterrence of crime when you're talking  
12 about organizational sanctions. Obviously, incapacitation if  
13 we're talking about publicly held corporations at least is  
14 not an objective and retribution as well, I think, is not a  
15 very significant objective because the impact of the large  
16 corporate fine falls primarily on the shareholders, the  
17 employees and the customers of the organization that is being  
18 fined, most of whom or all of whom ordinarily will have done  
19 nothing to deserve retribution.

20 Now that is not to say that corporations should not  
21 be punished for crime because the punishment does, if  
22 appropriate and proportioned, bring about a desired degree of



1 compliance with the law by corporations.

2           Now I'm sorry I couldn't be here this morning. I'm  
3 sure you've heard from others the plea to defer the adoption  
4 of fining guidelines. I also subscribe to that view because  
5 I believe the base of experience that the Commission has at  
6 this point to proceed with fining guidelines is inadequate  
7 and the risk of unjust, unforeseen results is unduly great.

8           At the same time, I think what the Commission is  
9 now doing is a very useful and important part of the process  
10 of coming to the goal of rational corporate sentencing.  
11 Individual judges sentencing in individual cases do not have  
12 the benefit of a system that comes to my mind in thinking  
13 about what I believe is needed in this area is interactive  
14 dialogue. That is, I think that the Commission still has  
15 much to learn from individual judges imposing sentences in  
16 individual cases, and I think conversely that judges have  
17 much to learn from the Commission setting forth the systematic  
18 set of views about the issues that are involved in corporate  
19 sentencing.

20           It seems to me that policy statements are the ideal  
21 mechanism for accomplishing this. Alternatively, one  
22 possibility the Commission may wish to consider would be to

1 agree upon guidelines at this point but to delay the promulg-  
2 ation of the guidelines for a period of three or four years  
3 during which the guidelines would function as policy state-  
4 ments but they would then spring into effect unless the  
5 Commission determined affirmatively to make changes or to  
6 withhold their development.

7           Now let me turn to the fine tables briefly. In my  
8 statement I have taken the position to which I still adhere  
9 since Monday -- I haven't changed my mind, but the upperbound  
10 and the average approach is not a logical approach. And I  
11 guess I start from what may be a slightly different premise  
12 from the staff study of this on the August 21st principles.  
13 It seems to me that the maximum fine prescribed by statute,  
14 let's say \$500,000 for the typical felony, has to be taken by  
15 the Commission to represent ordinarily the punishment that's  
16 appropriate for the most serious instance of the offense.

17           Less serious instances deserve lesser punishments.  
18 The problem I have with the upperbound or even the average  
19 approach is that it leaves very little room for discretion  
20 that in too large a class of cases the statutory maximum will  
21 be the guideline's minimum. That goes I think in spades for  
22 the Department of Justice Guidelines which I view as a

1 concealed effort to make loss, at least in the class of  
2 offenses that involve monetary crime, the sole factor in  
3 determining the punishment.

4 In any event, I think that the scaling should be  
5 such that the maximum statutory punishment is not the  
6 Guideline's minimum and indeed that there is room for upward  
7 departures, that is, that the Commission's scale, it seems to  
8 me, should be a scale -- and I understand that there are many  
9 levels of offenses from level 5 to level 37, let's say,  
10 leaving aside the misdemeanor and the nuclear offense -- and  
11 you have to deal with that.

12 I make the point in my statement that the selection  
13 of level 16 as the touchstone for the fine table reaching the  
14 maximum statutory fine is not necessarily consistent with the  
15 way the Commission has treated the maximum term of imprison-  
16 ment for fraud offenses which doesn't kick in until about  
17 level 19 to 22 depending on the criminal history of the  
18 offender.

19 I have one final point that I wanted to make about  
20 the fine table. Whatever the numbers are that are in it, I  
21 think that the approach that the Commission has now taken has  
22 an undue tendency to mislead the public into thinking that the

1 Commission is being more lenient than it actually is because  
2 people will look at the fine table -- they will assume that  
3 that is the fine that the Commission has prescribed for the  
4 offense at that level if it's unmitigated. Yet, the reality  
5 is that the fine prescribed is two to three times that much.  
6 Therefore, I think as a matter of sort of truth in regula-  
7 tions, it would be better to adopt a figure in the table  
8 which represents the range of penalties that the judge is to  
9 impose for an unmitigated version or the most serious version  
10 of the offense, leaving aside factors that cause an out of  
11 guidelines sentence.

12           Now let me turn to the question of mitigation  
13 factors, and I think this is one of the most complicated  
14 questions and obviously the draft that the Commission has put  
15 out now reflects a lot of thought and effort and a great deal  
16 of refinement on this subject compared to the previous draft.  
17 And I think there's a lot that's good in it, but we do have  
18 some problems with it.

19           One type of problem comes with the weighing of the  
20 various elements, and I think it's useful to think about the  
21 factors that define the gravity of an offense in three  
22 categories: the pre-offense conduct of the company which

1 would include things like compliance programs; the offense  
2 conduct itself; and the post-offense conduct which involves  
3 voluntary disclosure, cooperation with the investigation and  
4 those elements.

5 I have and time doesn't permit now a lot of  
6 questions about the way the particular factors have been  
7 defined and whether they're defined with sufficient clarity  
8 in the current guidelines. When we submit our more extended  
9 statements in January, we'll try to pinpoint what we view as  
10 the problems associated with the language. With respect to  
11 some of these factors, our view is that the most important  
12 factor in determining the gravity of an offense other than  
13 the offense level itself is the extent of management involve-  
14 ment in the commission of an offense. And that factor is  
15 given only two out of nine points of weight in the current  
16 proposal. We would give it the most weight.

17 Let me say also that I think the way the current  
18 mitigating factors are defined does not begin to do justice  
19 to the complexity of the real world. There are too many  
20 shades of gray between cooperation and no cooperation,  
21 between an offense that represents the policy of a company --  
22 let's say, the bribing of foreign officials that's been

1 approved by the board of directors -- to an offense that  
2 involves some culpable involvement by company management that  
3 does not reflect company policy or top company officials down  
4 to the offense that is committed by the low level person, and  
5 I might point out that that is the only circumstance in which  
6 you propose to give mitigation and that is a circumstance in  
7 which under the Restatement of Torts punitive damages could  
8 not even be imposed on a company. So obviously the Restate-  
9 ment of the American Law Institute didn't even think any  
10 punishment was appropriate for that class of case.

11           What I'm suggesting, and I'll come to how I would  
12 scale that in a minute, is somewhat more flexibility in being  
13 able to have intermediate stopping points between the most  
14 culpable and the least culpable conduct with respect to each  
15 of these components. I've noted in my statement that in  
16 terms of the adequacy of definition of terms there are terms  
17 like full cooperation, becoming aware of an offense and  
18 various other terms that the meaning of which will be the  
19 subject of a great deal of controversy in the courts if the  
20 Commission is not able to define it more closely.

21           I think you've heard today and I will not spend too  
22 much time on it -- others will have spoken to it -- that

1 voluntary disclosure is a factor that in our view is given  
2 too much weight in the present proposal. It's given too much  
3 weight because of several things. One is that in many  
4 instances the best intention and best managed company will  
5 not learn of the occurrence of the offense before government  
6 investigation has begun. Whether a company learns of it in  
7 time to avail itself of this credit or mitigation factor is a  
8 matter of luck, and punishment should not turn significantly  
9 on luck.

10           Secondly, I think what underlies the treatment of  
11 voluntary disclosure is a questionable assumption that what  
12 corporate counsel, let's say, should do when he or she learns  
13 of some possible irregularity is immediately run to the  
14 United States Attorney and tell them about it before conduct-  
15 ing their own internal investigation and determining what the  
16 truth of the matters are. That is not, I believe, a respon-  
17 sible or proper way for a lawyer to act with respect to a  
18 client and that includes corporate counsel with respect to a  
19 corporate client. I think you'll hear more about that later  
20 this afternoon.

21           We've also noted that we don't believe that  
22 compliance programs and voluntary disclosure should be linked



1 in the way the guidelines currently link them. They are two  
2 separate factors. They each deserve some credit if they  
3 exist. I'm not saying voluntary disclosure gets no credit,  
4 but we for reasons stated in my statement don't think they  
5 should be linked together.

6 Now, in the more fundamental problem, leaving aside  
7 the definition and the weighing of the different elements,  
8 the Justice Department I think has proposed that the fine  
9 table figure be a median or middle figure which could be  
10 aggravated up or mitigated down. The Commission has proposed  
11 starting from a top figure and mitigating down.

12 I'm actually proposing a different approach from  
13 either of those approaches, but I think I would have to agree  
14 more with -- if that was the choice from between those two,  
15 more with the Justice Department's approach than with the  
16 Commission's approach. The reason I do so is because these  
17 various factors properly put the burden on a different party  
18 to come forward and to persuade the court of their presence or  
19 absence.

20 And one of the things that the Commission needs to  
21 think about in formulating the factors is who has the burden  
22 of coming forward and the burden of persuasion with respect to

1 proving the existence or non-existence of a factor. On some  
2 it should be placed on the prosecution properly; on others,  
3 it should properly be placed on the defendant to earn  
4 mitigation.

5           Now, that's something -- that's a subject to think  
6 about. I don't have specific concrete suggestions to make  
7 now. I think the Justice Department's approach while I  
8 prefer it in theory because it only moves one or two levels  
9 up or down from the offense level, is quite inadequate to  
10 take into account the differences in corporate culpability  
11 between the commission of an offense with the presence or  
12 absence of various mitigating and aggravating circumstances.  
13 In that respect, I think the Commission which would have  
14 greater flexibility and give what I think works out to larger  
15 credits or larger aggravation, depending on how you view it,  
16 that is a more appropriate, more proportioned response to  
17 corporate crime.

18           What I have proposed instead of thinking about  
19 aggravating and mitigating circumstances is to think about  
20 scaling the gravity of the offense, that is, to identify the  
21 pre-offense, the offense conduct and the post-offense  
22 elements and to assign points -- I suggested on a scale of

1 nine, you might assign three to pre-offense, four to offense  
2 conduct and two to post-offense conduct. But whatever the  
3 points may be, with some kind of directions to the court on  
4 how to scale. If it's zero to four for offense conduct,  
5 recognize that there are intermediate steps. It shouldn't be  
6 zero or four. The judge should be able to have one or two or  
7 three depending on the degree of high level management  
8 involvement or other factors that the Commission may identify  
9 as appropriate.

10 The same is true for these other factors. The  
11 result would be a scaling and when you have your scaled  
12 number after the judge had gone through this process, he  
13 would then apply that to the fine table figure, let's say, if  
14 that were being used in much the same way that the Commission  
15 proposes to do it now.

16 Let me finally say a couple of words about loss as  
17 a basis for the fine. Again, here I see in the Commission's  
18 latest proposal a far more sophisticated appreciation of the  
19 difficulties that are associated with using loss as a basis  
20 for a fine than I think the earlier proposals manifested, and  
21 I think that's good to see. I continue to believe, and I  
22 think most people on the Commission have heard me express

1 this view before, not that loss is never appropriate to use  
2 as a basis for punishment because I think there are times  
3 that it is, but that the concept of the alternative fine  
4 statute was to give the court a discretion to make a judgment  
5 that it is very hard for the Commission to capture in words  
6 in a guideline.

7           For that reason, I prefer the third of the options  
8 set forth which is to leave to the discretion of the court  
9 whether to use loss or gain as a factor. Now I would not  
10 leave that to the unguided discretion of the court. That is,  
11 it seems to me, as I said in the beginning, that the Commis-  
12 sion can say some things to the courts about how they ought  
13 to go about making the choice whether to use the alternative  
14 fine statute that would be very helpful. Maybe it should say  
15 them in the form of policy statements; maybe it should say  
16 them in the form of guidelines. So I think it is important  
17 for the Commission to continue to think about when loss is  
18 appropriate as a factor or when gain, which I more readily  
19 see as being an appropriate sentencing factor than loss, when  
20 gain is appropriate.

21           Finally with regard to loss, if I could capture  
22 what I believe to be the proper place for loss, let me say

1 first of all that if you have an offense where the loss is  
2 substantially greater than the gain to the offender, I view  
3 that as a warning sign that the use of loss is questionable.  
4 Now I don't mean necessarily actual gain. I would include  
5 potential gain anticipated by the offender at the time of the  
6 commission of the offense.

7           That's a warning sign. Conversely, where you have  
8 an offense that is committed not directly for the purpose of  
9 gain but out of some malicious purpose for the purpose of  
10 inflicting loss -- and the loss inflicted is a foreseeable  
11 and intended outcome of the offense and greater than the fine  
12 table would call for, I think that would be the paradigm or  
13 prime example of when loss is appropriate to use.

14           So I would not rule out loss altogether as the  
15 Justice Department, I think although I didn't hear their  
16 testimony this morning but from what I understand of what  
17 they said suggests can be done, there are circumstances where  
18 it should be used. It's there in the statute because  
19 Congress intended that in the special cases where the normal  
20 fine is inappropriate that that be available.

21           However, I think there should be no presumption in  
22 favor of use of loss or gain, and I think the Commission

1 should spend a little time thinking about the specific class  
2 of probably small unusual class of cases in which loss is the  
3 best criterion.

4 So that completes my remarks. I'm delighted if  
5 there are any questions.

6 COMMISSIONER WILKINS: On the mitigating scale of  
7 one to nine, you suggest we should add to high level manage-  
8 ment not being involved. I think you said that. Where would  
9 you take away and give it that weight? Which other factors  
10 would you use in order to get --

11 MR. FREY: I recognize that I am squeezing a  
12 balloon or that this is some game and I would take away from  
13 the credit given for post-offense conduct. I think that is  
14 generally true in the individual guidelines that the main  
15 thing is the crime itself. Post-offense conduct counts; it  
16 should count. But I think the current proposal puts too much  
17 weight on post-offense conduct.

18 So I guess I would take from there and give to the  
19 offense conduct --

20 COMMISSIONER WILKINS: Take from cooperation and  
21 acceptance of responsibility, one of those areas.

22 MR. FREY: Right, particularly voluntary disclosure.

1 COMMISSIONER WILKINS: When you submit your  
2 additional thoughts to us, for example, becoming aware of is  
3 a phrase that gives you some pause. Tell us what words you  
4 would use for that.

5 MR. FREY: I don't have the benefit of having seven  
6 people on staff to think about that, but to the extent  
7 something better occurs to me, I will certainly propose it.

8 COMMISSIONER WILKINS: And your additional thoughts  
9 on how to define and restrict of loss.

10 MR. FREY: You can count on --

11 COMMISSIONER WILKINS: It's a struggle with that.  
12 It's a tough issue. Give us any thoughts along those lines  
13 as well. Questions to my right.

14 COMMISSIONER MALONEY: Mr. Frey, I've been on this  
15 issue now for almost a year, and I must say I've read your  
16 submittals I think twice now. And while I don't always agree  
17 with what you submit, I can say I think without fear of  
18 contradiction that your material is well thought out, well  
19 presented and is extremely helpful in trying to investigate  
20 these issues that the Commission is struggling with.

21 I am intrigued at least for purposes of discussion  
22 anyway about dividing the mitigation and pre-offense, offense



1 conduct and post-offense. And you delineate on page 11 of  
2 your statement a division of those factors. Would you group  
3 those together and allow, assuming that one or more of them  
4 were present, would you allow the judge on his own to --  
5 would you assign specific values inside the category for  
6 particular items, or is it your alternative and perhaps this  
7 is too specific in terms of your total thought process of  
8 this, but would you group them together and say, "Judge,  
9 assign a factor," or would you say for compliance, assign  
10 one; for past criminal history, one, etc.?

11 MR. FREY: I can answer that with a broad brush. I  
12 would not try to tell the judge specifically, but this is of  
13 a piece with my general view that you ought to be issuing  
14 policy statements and not guidelines. So you'll have to  
15 perhaps discount it for that. I believe that this is one  
16 example of an area where the Commission doesn't know enough  
17 to be comfortable that it's anticipated the problems and that  
18 it will lay down a set of rules that in actual application  
19 will produce fair results. So I guess what I would say is  
20 here are the factors to consider, judge, in looking -- you  
21 know, if it's four points for offense conduct, here's what we  
22 mean, here are the things that are relevant.

1           Let's take post-offense conduct where you have  
2 cooperation and you have voluntary disclosure of the offense.  
3 And maybe -- I don't mean to be wedded to nine points or any  
4 particular number. That can be adjusted. But I think I  
5 would tell a judge that it should be weighted at zero if you  
6 find that there was voluntary disclosure of the offense  
7 before the investigation began, full cooperation with the  
8 investigation and so on. Then the gravity of the post-  
9 offense conduct would be zero on the scaling.

10           Conversely, if you find that there was no dis-  
11 closure, that there was unreasonable interference with the  
12 government's investigation and here you have to be sensitive  
13 to the fact -- many of us are lawyers -- that the duty of a  
14 lawyer is to assert his client's rights. And you have to be  
15 careful in drawing the line between punishing the company for  
16 defending itself appropriately against criminal charges that  
17 it may not be persuaded are warranted and obstructing -- by  
18 that I don't mean criminally obstructing -- but let's say  
19 unreasonably interfering. A degree of intransigence, an  
20 unreasonable lack of cooperation that suggests an obstruc-  
21 tionist attitude.

22           Now obviously along this spectrum is a variety of

1 points, and I think it's best to leave to the judge with the  
2 kind of guidance I'm talking about to scale it.

3 COMMISSIONER MALONEY: Given the Commission's draft  
4 and the mitigation system that's there, based on your  
5 experience in representing corporate clients, do you have a  
6 notion of what the heartland, if you will, mitigation scale  
7 would be for a corporation who found itself in front of the  
8 federal district judge for sentencing?

9 MR. FREY: I have to be honest to say that I have a  
10 lot less experience even than what the Commission has been  
11 able to -- I don't personally have experience that would  
12 enable me to tell you that. The fact that I don't doesn't  
13 mean that nobody would; I just don't.

14 COMMISSIONER MALONEY: Thank you, Mr. Chairman.

15 COMMISSIONER MACKINNON: Questions? How would you  
16 describe "management"?

17 MR. FREY: Well, this is why, I guess -- one of the  
18 problems that I had and I noted in my -- you'll see -- you  
19 can see that I have a few notes in red ink on the page that  
20 deals with this. I don't know what any person who held a  
21 policy setting or legal compliance position means. I think  
22 those terms would need to be defined. In my concept there is

1 management and there is management -- there's the board of  
2 directors, there's the chief executive officer; there are the  
3 senior vice presidents of a company -- the people who set the  
4 company's policy to make the decisions. Their culpable  
5 involvement in an offense is the most serious.

6           Then there's mid-level management, and under the  
7 Restatement standard for punitive damages, the punitive  
8 damages can be inflicted for even supervisory personnel  
9 misconduct. And then there's the guy, the broker's rep who  
10 engages in churning a customer's account who's at the bottom  
11 of the ladder. And so I resist defining management in any  
12 rigid way.

13           COMMISSIONER MACKINNON: You would let it go just  
14 as management, the exercise of public discretionary corporate  
15 authority?

16           MR. FREY: I think one way to look at it is when  
17 you've identified who the wrongdoers are in the corporation,  
18 ask yourself how much power and responsibility those people  
19 exercise and you measure in a significant way the scope of  
20 the harm that they are capable of causing through criminal  
21 conduct. Obviously, the higher up in the corporation  
22 somebody is, the more harm he or she is capable of causing

1 because the more power he or she exercises.

2 COMMISSIONER MACKINNON: Well, sometimes those  
3 people down below got a lot more exercise than some of these  
4 vice presidents sitting up there behind a desk and not doing  
5 a lot.

6 MR. FREY: When you talk about a corporation --  
7 after all, you know, everybody says corporations can only  
8 commit crimes through individuals. That's obviously true --  
9 they can only do anything through an individual. But as you  
10 rise up in the ladder of corporate responsibility, it becomes  
11 more appropriate to talk about the action as truly being the  
12 action of the corporation in my estimation.

13 The board of directors acts for the corporation  
14 exercising the fullest powers. The fellow down at the bottom  
15 who is phoning the time records on a government contract is  
16 doing something that shouldn't be done and perhaps the  
17 corporation should be held responsible. But it is not the  
18 same thing is --

19 COMMISSIONER MACKINNON: Well, he is exercising  
20 more grubby corporate power than the vice president sitting  
21 up there who doesn't know what he's doing from day to day.

22 MR. FREY: With all respect, Judge MacKinnon, I

1 can't agree with that because if the vice president in charge  
2 of government contracting tells people to falsify their  
3 hours, then many people will falsify their hours and the  
4 scope of the offense will be larger.

5 If an individual or somebody in some unit does it,  
6 the scope of the conduct will be smaller.

7 COMMISSIONER MACKINNON: But if the vice president  
8 doesn't check on that and some person down below wants to  
9 falsify something and make his particular operation look more  
10 profitable, he is the one that is responsible and is actually  
11 putting the corporation in a bind and that is the typical  
12 case -- that is a typical case that I've prosecuted.

13 MR. FREY: Well, nobody would question that the  
14 individual should be prosecuted in that situation. The  
15 question is whether (a) it's appropriate to prosecute the  
16 corporation and I believe that most prosecutors will refrain  
17 from prosecuting the company if they're persuaded that the  
18 culpable conduct is only at the lowest levels of the company.

19 COMMISSIONER MACKINNON: But don't you think that  
20 the corporation ought to be prosecuted if they let a person in  
21 middle management function in a corporate capacity and  
22 exercise corporate discretion without any supervision from



1 some vice president?

2 MR. FREY: That's a difficult question for me to  
3 answer in the abstract. I don't say they shouldn't. I do  
4 say that the crime is not failing to exercise adequate  
5 supervision. If that's the crime, then obviously the  
6 corporation should be prosecuted.

7 COMMISSIONER MACKINNON: But the fact that they  
8 acted with corporate authority delegated.

9 MR. FREY: I understand that as a matter of federal  
10 criminal law the corporation is subject to prosecution and  
11 punishment. We're talking here about the question of the  
12 exercise of either prosecutorial discretion or punishment  
13 discretion, and therefore when it comes to -- as far as  
14 you're concerned, the decision has been made to prosecute,  
15 the corporation has been convicted. You're now trying to  
16 determine how much punishment is appropriate.

17 I had a conversation with relation to the Exxon  
18 Valdez case in which somebody was saying, well, they didn't  
19 double hull their boats, so isn't that an appropriate factor  
20 to take into account and punishment them, to which my answer  
21 is it's not a crime not to have double hull boats, and  
22 there's something seriously wrong with punishing people



1 primarily on the basis of doing something that's totally  
2 legal.

3 COMMISSIONER MacKINNON: On page 8 of your prepared  
4 remark on cooperation you say that a similar problem arises  
5 under the mitigating factor for full cooperation which is not  
6 adequately defined.

7 How would you define full cooperation?

8 MR. FREY: I'll have to admit that it's easier for  
9 me to tell you that it's not adequately defined than it is  
10 for me to tell you how to define it.

11 COMMISSIONER MacKINNON: Well, don't you think that  
12 full cooperation pretty well expresses the thought.

13 MR. FREY: Well, what it leaves out is useful but  
14 less than full cooperation, for example. I don't think it--I  
15 think that Judge Mazzone, when he had a case before him would  
16 be able to tell you--it's a little bit like what Justice  
17 Stewart said about obscenity. He would be able to tell you  
18 whether there was what he felt was full cooperation, partial  
19 cooperation, or no cooperation.

20 COMMISSIONER MacKINNON: And you don't need any  
21 further definition.

22 MR. FREY: Well, perhaps--

1 COMMISSIONER MacKINNON: Well, I'm saying, that's a  
2 question.

3 MR. FREY: Perhaps you don't and I would say that  
4 if what you were saying was it's zero if it's full cooperation  
5 and it's up to two for interference with the investigation,  
6 then I don't think you need more definition. I think the  
7 judge can supply the content to that concept.

8 If you just have one thing, all or nothing, then I  
9 have a problem with not doing a little bit more about  
10 defining it.

11 COMMISSIONER MacKINNON: Thank you.

12 CHAIRMAN WILKINS: Questions to my left?

13 COMMISSIONER NAGEL: Mr. Frey, I think on a number  
14 of previous occasions you may have testified at the same time  
15 as Professor Coffee. He has testified and written on the  
16 subject and in much of his work he makes the argument that  
17 much of organizational crime is committed by middle management  
18 without the involvement of senior management and it's done  
19 not for personal gain, but rather for corporate gain and he  
20 worries about the fact that if that is the case and you adopt  
21 as system much like the one you're advocating, you'll promote  
22 sort of an increase in corporate irresponsibility or a

1 failure to have corporate accountability. That is, senior  
2 management will continue not to get involved, yet they will  
3 create pressure for persons lower down in the organizational  
4 scheme to commit crimes because it's financially efficient  
5 and then they'll get mitigation because they weren't involved.

6           You know, that could be a straw man. It could be  
7 some sort of--

8           MR. FREY: I would have several comments about  
9 that. The first is that it seems to me that premise number  
10 one is wrong, which is what motivates the middle level  
11 manager.

12           I suspect the middle level manager is motivated by  
13 considerations of personal gain. He or she just perceives  
14 personal gain to be equated with making a lot of profits for  
15 the company, if that's what's driving the crime.

16           The best way to deter that is probably to prosecute  
17 the individuals who are responsible. Now, it is important  
18 and I think what you propose to do does take into account  
19 whether top management has done what should be done to train  
20 and to oversee the conduct of those beneath it, that includes  
21 middle level managers.

22           Part of a compliance program is to make sure that

1 the responsible officers in the corporation are told to obey  
2 the law, how to obey the law and that company communicates to  
3 its employees in an area where there is a risk of criminal  
4 activity that that kind of activity won't be tolerated and  
5 how to avoid it.

6 COMMISSIONER NAGEL: How would you feel then if you  
7 were to follow your lead in assigning more mitigation points  
8 to pre-offense behavior, especially when senior management  
9 were not involved however it's defined, but to tie that  
10 mitigating factor to the presence of a compliance detection  
11 plan that has been effectively implemented. Would that be  
12 consistent with your thesis?

13 MR. FREY: Well, a couple of things. One is, I--  
14 management involvement I am treating as part of offense  
15 behavior rather than pre-offense behavior. That is, I'm  
16 talking about management involvement in the offense. There's  
17 also management involvement in compliance programs, which  
18 would be pre-offense behavior.

19 I don't think that they should be tied together and  
20 let me give you one reason for that. Offenses--the offenses  
21 that a Government contractor commits may not involve false  
22 claims to the Government or another foreseeable. The

1 offenses that a stockbroker commits may not be securities  
2 fraud. There may be other--so when you say should a company  
3 have an effective compliance program, what you really mean is  
4 with respect to the offenses that that company's business is  
5 likely to generate, should it have a compliance program.  
6 Yet, the company may commit offenses in areas where you can't  
7 really fault it for not having gone ahead and had an  
8 compliance program because it wasn't the likely offense and I  
9 wouldn't--

10 COMMISSIONER NAGEL: You would make that  
11 distinction; correct?

12 MR. FREY: Well, I wouldn't say that if they didn't  
13 have a compliance program to prevent assaults or some other  
14 unlikely offense that they wouldn't get credit for the fact  
15 that the assault was committed by some low level person. I  
16 would not think that would be appropriate.

17 I think you can deal with it by deciding how much  
18 weight you want to give to the efforts that the company  
19 makes, reasonable efforts to anticipate and prevent criminal  
20 activity by those who work for it and how much weight you  
21 want to give to the--how the crime itself happened and how  
22 fair is it to say that this stains the whole company. After

1 all, it's the pension funds that own the stock in the company  
2 that are going to end up paying.

3 That's not to say that they shouldn't in some  
4 cases, but it's just to say that you're buying deterrence.  
5 You need more deterrence when the higher level people are  
6 involved. You ought to need less deterrence when people who  
7 exercise less corporate power are the culpable actors.

8 COMMISSIONER NAGEL: Can I make just one last  
9 request? When you do submit your subsequent testimony, which  
10 I take it you're going to submit some additional materials.  
11 Could you just elaborate in those materials on the comment  
12 you make on page 2 of your remarks about deterrence being a  
13 primary goal for organizational sanctions and tie it into the  
14 statute and the legislative history. And you believe this--  
15 make an argument--I think I read what you're saying to make  
16 the argument that where there are a multitude of goals for  
17 individual defendants that there's a certain assumed priority  
18 of general deterrence for organizational. Just give us  
19 something to buttress that claim, if you think there is  
20 something.

21 MR. FREY: I think the statute that provides for  
22 the adoption of sentencing guidelines probably doesn't



1 address it because I'm quite satisfied that Congress never  
2 contemplated the adoption of guidelines for corporations. So  
3 it wouldn't be surprising that they didn't spend much time  
4 thinking about it.

5 COMMISSIONER NAGEL: If there is something there I  
6 would be happy to see it.

7 CHAIRMAN WILKINS: Any questions?

8 COMMISSIONER MAZZONE: Thank you for crediting me  
9 wit the ability to recognize cooperation when I see it and  
10 now let me put on my commissioner's hat and reveal my  
11 ignorance really about this.

12 You would propose re-weighing the mitigating  
13 factors in some other fashion and what is your view on a fact  
14 to which recognizes within it acceptance of responsibility  
15 when pursuing that reward by a company exposes that company a  
16 concern which was expressed to you this morning to a  
17 stockholder's scrutiny or a lawsuit, a derivative lawsuit?

18 What is your view on including such a factor or  
19 including acceptance of responsibility in such a factor and  
20 if you have a view that it ought to be retained, as part 3 of  
21 your assignment that Judge Wilkins gave you and Commissioner  
22 Nagel gave you, let me give you one too. Can you draft a



1 definition of acceptance of responsibility in the corporate  
2 sense that might relieve some of those concerns expressed  
3 this morning that all they're doing is buying a lawsuit?

4 MR. FREY: You raise something that I have not  
5 thought about. I wasn't here this morning and I didn't hear  
6 the testimony. So I'm a little reluctant to jump into this.

7 COMMISSIONER MAZZONE: You admit responsibility.  
8 You accept responsibility. Your corporation is contrite,  
9 expresses remorse and then gets a stockholder derivative suit.

10 MR. FREY: I guess my instinct is to say that that  
11 wouldn't be much of a suit and it particularly wouldn't be  
12 much of a suit if the sentencing guidelines gave the  
13 corporation credit and a lower fine for doing these things.

14 So I guess my instinct, but I haven't thought it  
15 through, is not to put a lot of weight on that concern. As  
16 I've said, and I think as is the sense of the business  
17 community generally, the current proposal puts way too much  
18 weight on post-offense conduct, voluntary disclosure,  
19 cooperation, acceptance of responsibility.

20 I do think those are factors that are traditionally  
21 part of sentencing and I guess my instinct is to say they  
22 should be part of sentencing corporations as well as

1 sentencing individuals, but I will give some more thought to  
2 that question.

3 CHAIRMAN WILKINS: Commissioner Carnes?

4 COMMISSIONER CARNES: Mr. Frey, we've all be  
5 struggling for some time on how to handle loss. I think  
6 intuitively we all can hypothesize situations where loss  
7 could result in fines that would overstate the offense. On  
8 the other hand, as you've pointed out, there's situations  
9 where it might be very appropriate. I'd like to reiterate  
10 what the Chairman asked. If you--I know with your limited  
11 time--could help us a bit by identifying some of those cases  
12 you said in footnote we should identify in the guidelines  
13 where we think loss is presumptively a factor and those cases  
14 where loss is not appropriate I think that would be helpful  
15 to us.

16 Secondly, on voluntary disclosure you, like a lot  
17 of witnesses, feel that the Commission draft gives too much  
18 weight to that and I think we all understand the concerns of  
19 a lot of corporations that in many cases it will not be  
20 possible for corporations to voluntarily disclose.

21 But it seems to me if a corporation is able to do  
22 that and does that, isn't that what we want corporations to

1 do when they ferret out crime, to come to prosecutors and  
2 when they do do that, it's so rare, shouldn't they be  
3 rewarded pretty amply for that conduct?

4 MR. FREY: I think they should be rewarded. I'm  
5 not suggesting that the factor be eliminated. I think the  
6 reward that's offered here is disproportionate.

7 One of the problems that I have with it is, as I  
8 say, it's a matter of luck whether you can avail yourself of  
9 it. Often, the first time a corporation learns about an  
10 investigation is when it gets a grand jury subpoena. Now  
11 that corporation is automatically disqualified for this large  
12 chunk of mitigation credit.

13 I guess my reaction is, of course, what a  
14 corporation do is if you're the general counsel--and this is  
15 a question that is probably better addressed to people who  
16 have inside experience in corporations, which I haven't--but  
17 I assume if you're the general counsel of a corporation and  
18 you hear a rumor, you get a report, you get a complaint,  
19 something that suggests some wrong doing, your job is to  
20 conduct a thorough and careful investigation, satisfy  
21 yourself what the facts are. If you are satisfied at the  
22 conclusion of that investigation that a crime has been

1 committed, then I think most of the kinds of companies that I  
2 represent, I'd like to think, would come forward and make  
3 disclosure of it.

4 I think in 99 cases out of 100 by the time this has  
5 happened it will be too late for them to get credit under  
6 these guidelines and whether they can or not, as I say, I  
7 think will be a question of luck.

8 So I think you should give some credit. Those  
9 people who do it deserve some credit, but you should also  
10 recognize that the model corporate citizen acting in the way  
11 we want them to act, I believe, would usually turn out not to  
12 be available for this--not to be able to benefit from this  
13 credit.

14 And I don't think--I mean talk about shareholder  
15 derivative suits, a good way to get one is to take some  
16 unsubstantiated rumor of wrongdoing and go down to the local  
17 prosecutor without investigating it yourself, talk about how  
18 to get yourself into a lawsuit.

19 So I think you need to recognize the realities and  
20 you really ought to ask other people who have more experience  
21 with life inside a corporation than me, but I suspect that's  
22 what they'll tell you.

1 COMMISSIONER CARNES: Thank you.

2 CHAIRMAN WILKINS: Any other questions?

3 COMMISSIONER MacKINNON: Did I understand you to  
4 say that you didn't think that Congress indicated that  
5 corporations were to be sentenced by guidelines?

6 MR. FREY: My belief is that Congress contemplated  
7 policy statements, but did not contemplate guidelines. Now I  
8 have to say in part that my belief is influenced by my  
9 partner, who was formally Chief Counsel of the Senate  
10 Judiciary Committee and has personal recollections of what  
11 might have be intended, which I--

12 COMMISSIONER MacKINNON: Well, there is a statement  
13 like that in the legislative history but the statute says,  
14 3551(c), "An organization found guilty of an offense shall be  
15 sentenced in accordance with the provisions of Section 3553".  
16 Now you turn to 3553 and you get down to a(4) and it says  
17 that, "The court shall impose a sentence"--and so on--"of the  
18 kind of sentence and the sentencing range established for the  
19 applicable category of offense committed by the applicable  
20 category of defendant as set forth in the guidelines." Well,  
21 there's more to it. That's the substance of it.

22 I've seen this thrown around so many times. I put

1 that out last September and I told the people at the meeting  
2 we had at that time what it was and it was raised earlier  
3 today, but it's wrong. The guidelines--the statute says what  
4 I've said and there's a reference in the legislative history  
5 of one House which necessarily doesn't control unless there's  
6 some ambiguity here.

7 MR. FREY: Let me say that I have not--this is the  
8 first time that I've heard this point made, but in looking at  
9 the statute very quickly, it seems to me that the statute  
10 does not say what the Commission shall do, but what the court  
11 shall consider and, of course, there is no objection if  
12 guidelines exist. Needless to say, we hope the court shall  
13 consider them. If guidelines don't exist, the court can  
14 consider the policy statements that the Commission has  
15 promulgated. I'm in favor of the promulgation of policy  
16 statements.

17 The purpose of doing that is to have courts  
18 consider the collective wisdom of the Commission based on its  
19 study of this problem.

20 COMMISSIONER MacKINNON: Well, the policy statements  
21 are a subfactor of the basic offense sentences prescribed by  
22 the guidelines.



1 MR. FREY: I guess I need to think more about this.  
2 I don't take this at first blush as being a directive to the  
3 Commission to issue guidelines, but simply as you work your  
4 way through, contemplating the possibility that there would  
5 be guidelines.

6 I haven't taken the position that the Commission  
7 lacks power to promulgate guidelines, but it is my view that  
8 it's unwise to do so at this point.

9 COMMISSIONER MACKINNON: I would direct you to read  
10 those statutes.

11 MR. FREY: I would need to think more about it.

12 CHAIRMAN WILKINS: Thank you very much, Mr. Frey.

13 MR. FREY: Thank you.

14 CHAIRMAN WILKINS: We are delighted to have a very  
15 distinguished Professor of Law with us as our next witness.  
16 Professor Kathleen F. Brickey is a George Alexander Madill  
17 Professor of Law at Washington University Law School in St.  
18 Louis. Professor Brickey is a noted expert in the field of  
19 white collar crime and has written the leading treatise and  
20 case book on this subject.

21 Professor, we are honored that you are here. We  
22 know that you had rough plane ride to get here from St.



1 Louis, but we appreciate the extra effort that you had to  
2 make.

3 STATEMENT OF MS. BRICKEY

4 MS. BRICKEY: Thank you, Judge Wilkins. It's a  
5 pleasure to be here.

6 The Commission has requested comments on the  
7 proposal to offset fines that are paid by owners of closely  
8 held corporations when the court sentences the organization  
9 itself.

10 In my view the proposal raises two major issues.  
11 The first is a general policy question and that is whether  
12 there is a strong policy reason for reducing the amount of  
13 fine that is imposed on an organization by the amount of a  
14 fine that's paid by one of its owners.

15 The second is a question of scope. If offset is  
16 warranted, under what circumstances and with respect to what  
17 organizations should it be made available.

18 The policy question does not in my mind have a  
19 clearly correct answer. The strongest set for offset can be  
20 made in the context of an organization in which there is  
21 complete overlap between the fined owner, managers, and the  
22 organization.

1           Suppose for example that the sole owner of a close  
2 corporation is fined \$100,000 for price fixing. The  
3 corporation is later fined \$500,000 for the same misconduct.  
4 Although the corporation is an entity separate from the  
5 owner, fining the corporation has the same effect as if the  
6 fine had been assessed against the owner because either way  
7 the fine is paid out of the owner's assets or assets that the  
8 owner has invested in the corporation.

9           To avoid the unfairness of fining him twice, the  
10 argument runs, the fine imposed on the organization should be  
11 offset by the amount of the fine that the owner previously  
12 paid. Thus, the offset would operate as a limitation on the  
13 owner's liability to an amount no greater than the liability  
14 of the organization.

15           The case can be made similarly when there are  
16 multiple owners all of whom have been previously fined. If  
17 both owners of a two owner corporation have been fined, for  
18 example, a second fine imposed on the corporation will  
19 likewise be satisfied out their assets.

20           When the relationship between the owner's fine and  
21 the closely held organization is more attenuated, however, so  
22 are the reasons for allowing offset.

1           Suppose for example that A, an owner/manager of a  
2 close corporation owned by five individuals engages in price  
3 fixing. A's misconduct and A is then fined. Should the  
4 amount of that fine be offset against the corporate fine when  
5 the corporation is later prosecuted?

6           It could be argued that to the extent that A has  
7 already paid a fine for the wrongdoing he will be punished a  
8 second time when the organization is fined. To minimize the  
9 unfairness then, the corporate fine should be reduced by the  
10 amount that A has already paid.

11           But this example lacks the identify of interests  
12 that was present in the previous two. What occurs in this  
13 context is not as the commentary suggests strictly an  
14 allocation of punishment. The offset does not reallocate the  
15 corporate fine among the five owners. Instead, it merely  
16 reduces the Government's claim against corporate assets that  
17 are owned by all five owners.

18           Thus, if A owns 50 percent of the corporation's  
19 shares and the \$500,000 corporate fine is offset by A's  
20 \$100,000 fine, the extent to which A's investment is affected  
21 by the corporate fine is simply reduced from \$250,000 to  
22 \$200,000.

1           Likewise, the four other owners benefit from the  
2 reduction of the fine even though they may have received a  
3 windfall from A's profitable misconduct.

4           In theory, the offset should work the other way.  
5 To avoid unfairness to A, but to achieve the full deterrent  
6 value of the corporate sanction, it would make more sense to  
7 assess the full fine against the corporation and to offset  
8 A's personal fine by the amount of the corporation's fine  
9 chargeable against his assets.

10           But finding a practicable way to do that is bound  
11 to be problematic if, as the proposal assumes, A has already  
12 paid the fine.

13           Another problematic aspect of the general policy  
14 issue is that the proposal only addresses half of the  
15 problem. If the driving concern is fairness to A, the fined  
16 owner, why is it unjust to fine A twice when A is fined  
17 before the corporate fine is imposed, but not unjust to fine  
18 A after the corporation has been fined, this time the full  
19 \$500,000 not with the benefit of an offset?

20           Notably, when A is convicted, after the corporation  
21 is sentenced, it would be possible for the court to offset  
22 the portion of the corporate fine chargeable to A against the

1 fine that the court subsequently imposes on A.

2           If indeed strong policy reasons support the offset  
3 principle, the question why no similar offset is provided for  
4 officers and directors who have substantial ownership  
5 interests in publicly held corporations and who are personally  
6 fined in connection with the wrongful conduct needs to be  
7 addressed.

8           Assuming arguendo that offset may be warranted in  
9 some circumstances in which the overlap between the  
10 corporation and the fined owners is not complete, it is  
11 necessary to address a host of scope questions.

12           The threshold scope question is, what is a closely  
13 held organization? The proposed guideline targets  
14 organizations in which a small number of individuals own a  
15 controlling interest. The closest analog in corporate law  
16 also relies on the existence of a small number of  
17 shareholders.

18           But the corporate law focuses on the total number  
19 of shareholders, not the number of shareholders holding a  
20 controlling interest in a company. It's possible, for  
21 example, for one individual or one family to own 51 percent  
22 of the stock in a corporation and for the other 49 percent of

1 the shares to be publicly traded and owned by thousands of  
2 individual and institutional investors.

3           Although that would not be a closely held  
4 corporation for corporate law questions, for guideline  
5 purposes it would be. So, if this result was unintended, the  
6 language could be changed to read, "An organization is  
7 closely held when a small number of individuals own it", or  
8 to put it more in line with the corporate law, "when a few  
9 number of individuals own it".

10           The Commission and Justice Department proposals  
11 differ with respect to the size of corporations that may  
12 benefit from the offset.

13           The Commission proposal applies regardless of the  
14 size of the organization. The Justice Department proposal  
15 applies only to small organizations.

16           In corporate law, it is the number of shareholders  
17 and not the size of the company that determines whether or  
18 not the organization is closely held. One example I could  
19 give would be the Hallmark Card Corporation, which is  
20 enormous, but it is closely held. All of the stock is owned  
21 by the family.

22           The question of whose fines may be offset also

1 needs to be addressed. The Commission proposal applies to  
2 fines paid by, quote, the owners. It's unclear to me whether  
3 this is meant to mean all of the owners or whether it means  
4 any owner who is fined.

5           If the driving concern is fairness to fined  
6 individual owners, perhaps it makes sense to offset a fine  
7 imposed on any individual owner. But because the offset rule  
8 would result in a reduced corporate fine, the Justice  
9 Department requirement of substantial identity between the  
10 organization and the fined owners is appealing.

11           Before its offset provision would apply, fines must  
12 be imposed on a majority of owners. Thus, before the  
13 corporation receives the benefit of an owner's offset, the  
14 corporation must have borne the burden of the owner's fine.

15           What constitutes a majority of owners under the  
16 Justice Department's proposal remains to be resolved,  
17 however. Does it mean a numerical majority of owners or  
18 owners holding a majority of the shares?

19           If the purpose of the majority of owners rule is to  
20 require the corporation to bear the burden of the owner's  
21 fines before it receives the benefit of their offset, it  
22 would make more sense to require that owners holding a



1 majority ownership interest in the organization must have  
2 been fined.

3           A closely related question is what kinds of fines  
4 may be offset? The Commission proposal applies to, quote,  
5 any fines paid by the owners. Although the commentary  
6 discusses fines imposed after conviction of both the  
7 organization and the culpable individuals, neither the  
8 guideline nor the commentary limits the offset to criminal  
9 fines or, for that matter, fines imposed by the Federal  
10 Government. Nor does the guideline require that any  
11 individuals must have been convicted.

12           The Justice Department proposal is expressly  
13 limited to criminal fines imposed on convicted owners.

14           If the offset provision is not limited to criminal  
15 fines, it paves the way for permitting civil sanctions  
16 imposed on individuals to serve as a proxy for all or part of  
17 a criminal fine imposed on a convicted organization.

18           The net effect is that the offset partially  
19 nullifies the principle of institutional accountability for  
20 criminal conduct and I'd note in passing that I have similar  
21 reservations about the policy statement in Section 8(c)5.17  
22 relating to the coordination of prior civil and administrative

1 fines that are punitive.

2 Another part of this question is how much of the  
3 corporation's fine may be offset? The Commission's proposal  
4 permits the offset of any fines paid by the owners without  
5 regard to their relationship to the organization's fine.

6 The proposal seems to proceed on the assumption  
7 that the fine imposed on an individual owner will be smaller  
8 than that imposed on the organization. But the fines need  
9 not be imposed under the same statutes.

10 The fine imposed on individual owners need only,  
11 quote, arise out of the conduct constituting the  
12 organization's offense conduct. It would be possible then  
13 for the owner to be fined under a civil statutory scheme that  
14 permitted imposition of a fine that would equal or exceed the  
15 organizational guideline fine level.

16 If that were to occur, the offset would completely  
17 nullify organizational accountability and provide a windfall  
18 to the other owners who benefited from the wrongdoing.

19 This concern is compounded by the fact that under  
20 the Commission's proposal offset is mandatory. Under the  
21 Justice Department proposal the court would have discretion  
22 both with respect to whether to offset and how much to

1 offset. The court could allow the fine imposed on the  
2 organization to either be partially or totally offset.

3         The limit that the Justice Department's comment  
4 would place on the exercise of the discretion is that the  
5 offset could not completely wipe out the organization's fine  
6 unless there is, quote, absolute identity between the  
7 organization and the convicted individual owners. In other  
8 words, going back to the strongest case for the offset where  
9 the one owner corporation and the corporation have both been  
10 convicted, in that case the Justice Department proposal would  
11 permit a complete obliteration of the corporate fine.

12         Neither proposal expressly addresses the question  
13 whether offset should be allowed if the owner has been  
14 indemnified. The Commission proposal applies to fines paid  
15 by owners. If an owner satisfies the fine out of his own  
16 assets and then is indemnified, my question is, has the owner  
17 paid the fine for purposes of this guideline?

18         The Justice Department in contrast applies its  
19 proposal to fines imposed on owners, but cautions that the  
20 court should take into account the likelihood that the  
21 Government would be able to collect the fine. So in the  
22 indemnification context, the fine is imposed and the

1 Government collects the fines and yet the individual owner  
2 has been made whole by the corporation.

3 When an owner has been indemnified there is really  
4 no fairness concern with respect to him when a fine is  
5 imposed on the organization. The organization has made him  
6 whole.

7 It could be argued that the organization itself has  
8 a fairness argument in that it has paid the amount of the  
9 owner's fine and thus should be entitled to an offset in that  
10 amount. But I would not find that reasoning persuasive for  
11 two reasons. First, the corporation has voluntarily assumed  
12 the liability. The fine was imposed on the individual owner,  
13 not on the organization. And second, like the SEC, I believe  
14 that indemnification of criminal fines is contrary to public  
15 policy and ought to be prohibited.

16 I might make just a couple of very brief comments  
17 about the policy statement to which I alluded a moment ago.  
18 I'm puzzled by the presence of the policy statement because  
19 no specific problem that needs to be addressed is identified  
20 in the draft.

21 Assuming that there is a problem that needs to be  
22 addressed, there is no indication in the draft as to why it

1 would be unique to an organizational sentencing context.  
2 There is no similar departure authorized for punitive civil  
3 or administrative sanctions that are imposed on individuals,  
4 or at least I don't believe there is, and the economic onus  
5 on the individual may be just as great as on an organization  
6 that has been administratively sanctioned.

7 I can give a couple of examples, one United States  
8 versus Helper, where successive criminal and civil actions  
9 under the False Claims Act could have exposed the defendant  
10 to a \$500,000 criminal fine and \$130,000 punitive statutory  
11 civil liability for a \$585 Medicare fraud. The Supreme Court  
12 in that case found that there was a double jeopardy violation,  
13 but nonetheless, it illustrates that an individual the onus  
14 of punitive, civil or administrative sanctions may be great.

15 More recently, we've seen that that can be true in  
16 securities fraud context with Michael Milkins guilty plea  
17 encompassing not only a very substantial criminal fines, but  
18 global settlement of civil charges by the SEC.

19 A second point is that even though the policy  
20 statement seeks to coordinate punitive, civil, administrative  
21 and criminal sanctions, it tries to do so only with respect  
22 to sanctions that are imposed before criminal sentencing.

1           Imposition of a punitive sanction is just as likely  
2 as not to occur after a criminal proceeding so that the range  
3 of criminal fines that could be imposed on an organization  
4 could be determined fortuitously by the timing of parallel  
5 civil proceedings.

6           A couple of examples, the Helper case, which I  
7 mentioned before, the criminal prosecution preceded the civil  
8 action for the punitive civil damages. E. F. Hutton pleaded  
9 guilty to 2,000 counts of mail fraud, was sentenced to pay  
10 the maximum criminal fine of \$2 million. Several years  
11 thereafter in the aftermath of that conviction, Hutton was  
12 investigated by numerous State regulatory agencies and was  
13 assessed more than another half million dollars. So that the  
14 sequence is not necessarily going to be that the civil fine  
15 is imposed before the time of sentencing.

16           If consideration should be given to civil punitive  
17 and administrative punitive sanctions, I question whether the  
18 consideration ought to be given to State or local Government  
19 imposed sanctions. The factors that a court is directed to  
20 consider, at least two of the factors are in a posit in the  
21 context of State and local sanctions the dual sovereignty  
22 doctrine oviates the double jeopardy considerations and its

1 highly unlikely that there will be any evidence of  
2 congressional intent with respect to how Federal and State  
3 and local sanctions ought to be coordinated.

4           Finally, the policy statement is directed at civil  
5 and administrative punitive sanctions, but does not include  
6 criminal punitive sanctions so that if this policy statement  
7 is left in the guidelines, some thought might want to be  
8 given whether it makes sense to take into account  
9 administrative sanctions imposed by a State, but not criminal  
10 sanctions that can be imposed by virtue of a State criminal  
11 prosecution.

12           CHAIRMAN WILKINS: Thank you very much, Professor.  
13           Did you what a few number is? How do we define a  
14 few number?

15           MS. BRICKEY: A few number is obviously a general  
16 concept like a small number. In many jurisdictions the  
17 courts use few or relatively few. That can go from as few as  
18 one or two up to in a statutory context, for example, a Sub-S  
19 corporation can have as many as 35 owners. And it may well  
20 be that the Commission wants to consider quantifying just how  
21 many to prevent speculation as to whether this really is  
22 closely held.



1 CHAIRMAN WILKINS: Thank you.

2 Questions to my right?

3 COMMISSIONER MacKINNON: You talk about fines being  
4 offset when there is a later prosecution and everybody seems  
5 to talk about some later prosecution. What about offsetting  
6 when they are contemporaneously sentenced? Do you mean there  
7 is going to be an offset then?

8 Here is a judge imposing a sentence on the president  
9 of the corporation and the corporation. That's what we're  
10 all talking about. They generally come up at one time and  
11 they were tried together. Are you going to have an offset in  
12 something like that?

13 MS. BRICKEY: Well, I'm not sure that it makes  
14 sense to do it.

15 COMMISSIONER MacKINNON: Well, I'm not either.

16 MS. BRICKEY: I think I made--at least my first  
17 example was the strongest case for doing it. I think the  
18 counter side of that is that it discounts the advantage that  
19 the owner has derived from doing business in the corporate  
20 form, including limited liability.

21 This is doing something that the courts won't do in  
22 the civil side and that is to pierce the corporate veil for

1 the benefit of someone who has opted to do business in that  
2 forum.

3 COMMISSIONER MacKINNON: Do you think an offset is  
4 practical? Don't you think a judge that sentences--obviously  
5 you're going to be sentenced by the same judge and if he  
6 thinks there's going to be an offset instead of imposing a  
7 \$400,000 fine he'll impose at \$500,000 and then you're going  
8 to offset it with the other thing and he winds up where he  
9 wanted to to begin with any way.

10 MS. BRICKEY: I think that's a very valid point.  
11 Assuming that the sentencing of the individual in the  
12 organization is contemporaneous, that kind of--

13 COMMISSIONER MacKINNON: Or by the same judge.

14 MS. BRICKEY: Or by the same judge.

15 COMMISSIONER MacKINNON: And they usually are,  
16 aren't they?

17 MS. BRICKEY: I'm not sure whether they are in the  
18 context of closely held corporations. In the context of  
19 publicly held corporations it is not uncommon for the  
20 officers and the corporation to be tried in separate trials  
21 by separate judges.

22 COMMISSIONER MacKINNON: Would you consider the

1 Cargo Corporation as a closely held corporation? It's the  
2 largest trader in the world in grains and its closely held,  
3 very closely held.

4 MS. BRICKEY: Who owns it?

5 COMMISSIONER MacKINNON: They own it, McMillans and  
6 so on.

7 MS. BRICKEY: How many of them are there?

8 COMMISSIONER MacKINNON: What's that?

9 MS. BRICKEY: How many of them are there?

10 COMMISSIONER MacKINNON: Well, they obviously bring  
11 in their officers, their top officers and the same for West  
12 Publishing, their top officers and when they leave they sell  
13 their stock and the man who takes the other top job goes on.  
14 There are a lot of situations like that in the country.

15 MS. BRICKEY: If for purposes of corporate law and  
16 I think that's what the Commission wanted to parallel if it  
17 retained this guideline, as long as there is a relatively  
18 small number of owners, if this is all--

19 COMMISSIONER MacKINNON: Well, you said up to 35.  
20 I don't think they've got 35 in either one of those  
21 corporations.

22 MS. BRICKEY: All right. Let's say they have a

1 family of eight. Even though they have an enormous  
2 corporation with an international operation, so long as the  
3 corporation is owned by that very small group of people it  
4 would be characterized as a close corporation.

5 COMMISSIONER MacKINNON: Do you think that there is  
6 any authority for the use of corporate funds to indemnify an  
7 officer on a fine? I've never heard of it.

8 MS. BRICKEY: Well, the Delaware corporation law is  
9 the first place to start. The Delaware corporation law--

10 COMMISSIONER MacKINNON: Well, you couldn't use to  
11 even pay for an insurance policy. I know they changed the  
12 law after I quit practicing corporate law.

13 MS. BRICKEY: I was surprised to discover that the  
14 Delaware corporation law permits the board of directors to  
15 indemnify a convicted corporate agent if the board makes a  
16 finding that the agent was acting not contrary to the  
17 interests of the corporation, was acting in good faith, and  
18 had no reason to believe that his conduct constituted a  
19 crime. So, yes, there is statutory authority for that. It  
20 may contrary to policy of the Federal sentencing guidelines.

21 COMMISSIONER MacKINNON: I don't know whether to  
22 say I'm glad to hear that or not glad to hear it, but I'll

1 tell you it arose within the last 20 years since I've been on  
2 the court.

3 Thank you.

4 CHAIRMAN WILKINS: Paul, did you have a question?

5 COMMISSIONER MALONEY: Yes, thank you, Mr. Chairman.

6 Professor Brickey, would you advocate if you had  
7 your druthers the deletion of any provision for offset?

8 MS. BRICKEY: I think I would. As I say, I'm not  
9 sure there's a clearly correct answer on this policy. My  
10 inclination would be not to have one particularly because  
11 what the owner of this corporation--one reason the owner will  
12 choose to do business in the corporate form as opposed to as  
13 a partnership or an unincorporated company is because you gain  
14 benefits like limited liability, tax benefits, and the like.

15 Here what you're saying is, if you happen to be the  
16 owner of a closely held corporation, we'll in effect pierce  
17 the corporate veil and take into account you individually as  
18 opposed to you as part of this organization and confer a  
19 special benefit on you that would not be conferred, for  
20 example, on the civil side.

21 COMMISSIONER MALONEY: I have the same question as  
22 it relates to 8c 5.17, which deals with the reverse Halper



1 issues. Would you prefer in terms of advocating position  
2 that the Commission delete that provision from the guidelines  
3 for the reasons that you went into?

4 MS. BRICKEY: Yes. I feel more firmly about that  
5 issue that I would prefer not to see that policy statement,  
6 but certainly if the policy statement were retained, I would  
7 hope to see some reason why it should apply only to  
8 organizations and not to individuals.

9 COMMISSIONER MALONEY: And if I understood you--one  
10 final question--If I understood you correctly in terms of  
11 defining majority of owners for purposes of the Department of  
12 Justice draft to the extent that you indicated that you felt  
13 that term was ambiguous and having heard you, you really say  
14 that could mean numerical majority of owners or numerical  
15 majority of share owners, shareholders; is that correct?  
16 Your preference is for the latter rather than the former?

17 MS. BRICKEY: Ownership of the majority of shares  
18 as opposed to a numerical--for example, it would be possible  
19 to have a close corporation in which one owner owned 90  
20 percent of the shares and 10 owners each own 1 percent. If  
21 you convicted those ten 1 percent owners, you really don't  
22 have much identity between the convicted owners and the

1 organization.

2 COMMISSIONER MALONEY: Thank you.

3 COMMISSIONER MacKINNON: Have you ever seen this  
4 suggestion made any place else?

5 MS. BRICKEY: No, I haven't. That's one reason I  
6 latched on to it. It intrigued me.

7 CHAIRMAN WILKINS: The suggestion that Judge  
8 MacKinnon made? Is that the one you're talking about, George?

9 COMMISSIONER MacKINNON: No, she's talking about  
10 the offset.

11 CHAIRMAN WILKINS: Any questions over here?

12 COMMISSIONER NAGEL: I found your comments very  
13 thoughtful. I wonder if during some subsequent period if you  
14 want to share with us your comments on other aspects of the  
15 draft. I recognize that you concentrated on offsets, but if  
16 you have any other comments, I would just urge you and invite  
17 you to submit them in the next period of time, or just call  
18 talk about them.

19 MS. BRICKEY: Thank you. I do have some thoughts  
20 on some other provisions, but I recognize that with the  
21 limited time here I could only address a couple of them.

22 CHAIRMAN WILKINS: You would advise us not to



1 include this offset provision, but if we do go on the basis  
2 of the majority of shares?

3 MS. BRICKEY: And I would strongly favor limiting  
4 the offset to criminal fines imposed on convicted owners  
5 rather than any other kind of sanction.

6 CHAIRMAN WILKINS: Other comments or questions from  
7 anyone?

8 Well, this has been very helpful and we look  
9 forward to any other comments you may make, but certainly,  
10 this expert advice on a difficult area has focused at least I  
11 know my attention to some areas I had not thought about and I  
12 appreciate very much your efforts in assisting us.

13 MS. BRICKEY: Thank you very much.

14 CHAIRMAN WILKINS: Thank you very much, Professor.

15 Our next scheduled witness and our final scheduled  
16 witness is Jonathan C. Waller. Mr. Waller is Assistant  
17 General Counsel with Sun Company representing the American  
18 Corporate Counsel Association.

19 Is Nancy Nord with you, Mr. Waller? Ms. Nord, you  
20 may or not, it's your pleasure, accompany Mr. Waller to the  
21 witness stand. We're delighted to have both of you here.  
22 Ms. Nord is the Executive Director of the American Corporate

1 Counsel Association.

2 Mr. Waller?

3 STATEMENT OF MR. WALLER

4 MR. WALLER: Thank you very much.

5 The American Corporate Counsel Association does  
6 appreciate the opportunity to address the members of the  
7 Commission on this very important issue to its members.

8 ACCA is a national bar association representing  
9 attorneys who practice in law departments throughout corporate  
10 America as well as associations and other private sector  
11 organizations. We have about 8,000 members in 3,000 different  
12 corporations.

13 ACCA recognizes the extensive work that the  
14 Commission has done in this area in drafting these proposals  
15 and we appreciate the opportunity at this point to address  
16 some concerns that we have with respect to some of the  
17 proposals.

18 This is of particular interest to myself in my role  
19 as Assistant General Counsel of Sun Company. One of the  
20 roles that I have in my job is to have oversight and  
21 responsibility for corporate compliance programs throughout  
22 Sun Company.

1 Corporate attorneys generally are responsible for  
2 designing and implementing these type of corporate compliance  
3 arrangements throughout the corporate organization.

4 COMMISSIONER MacKINNON: Did you say Sun Oil  
5 Company?

6 MR. WALLER: Sun Company was formally Sun Company,  
7 that is correct.

8 ACCA as an organization has worked extensively with  
9 its members to educate them with respect to effective  
10 corporate compliance arrangements and to help them educate  
11 non-managers in their responsibilities under the law.

12 Therefore, we are especially concerned about the  
13 way in which the mitigation factors are structured and  
14 scored. The mitigating factors we believe are skewed  
15 disproportionately toward voluntary disclosure of discovered  
16 criminal activity rather than toward prevention of wrongdoing.

17 Further, we are concerned that the application of  
18 the mitigating factors as they are presently structured may  
19 lead to unpredictable results.

20 Although we can understand the Commission's desire  
21 to encourage voluntary disclosure, we believe that assigning  
22 more points to that than others the Commission emphasis is

1 misplaced.

2           Indeed, such a requirement may in fact impede the  
3 efforts of corporate counsel to assure compliance throughout  
4 the organization.

5           For a corporate compliance program to have its  
6 maximum effect, there needs to be an atmosphere in which an  
7 employee knows that he or she can come forward and admit  
8 unintended wrongdoing or negligence without the threat of  
9 going to jail.

10           It is very difficult to achieve employee cooperation  
11 when the corporate policy dictates universally that immediate  
12 reporting of all wrongdoing irrespective of the statutory  
13 requirement in this regard to report such wrongdoing to law  
14 enforcement authorities.

15           In order for a compliance program to be effective  
16 it should ferret out law violations. It should require the  
17 managers of that particular program to take steps, including  
18 appropriate discipline, as well as employee education to  
19 assure that the activity will not be repeated as well as to  
20 rectify the harm that flows from the violation.

21           But ACCA is concerned that an across the board  
22 requirement of self reporting will impede the impact of good

1 faith attempts by corporations to discover and remedy  
2 violations.

3           We are also concerned about the fairness of how  
4 this factor will operate in the real world. A responsible  
5 corporate official would not notify the Government about  
6 unsubstantiated rumor or alleged wrongdoing. An internal  
7 investigation would be undertaken under the direction of  
8 corporate management to determine the truth of the  
9 allegations.

10           If the Government also became aware of the  
11 questionable activity during the investigation, mitigation  
12 would not even be available even though it would have been  
13 irresponsible for the corporation to come forward prematurely.

14           Another example would be that if the corporate  
15 attorneys were undertaking the investigation and reached a  
16 good faith determination that no wrongdoing had occurred,  
17 there is no need for voluntary disclosure. Mitigation would  
18 not be available should a prosecutor reach a different  
19 conclusion.

20           Finally on this point, we are concerned that the  
21 collateral negative impact of such a requirement may have on  
22 the corporation. If the company were to self report absent

1 some statutory duty to do so, the corporation has to consider  
2 matters other than just the criminal prosecution at hand.  
3 Civil suits surely may be brought. Shareholder suits are a  
4 real possibility if the corporation admits to wrong doing  
5 without a statutory obligation.

6           Consideration such as potential civil liability,  
7 settlement potential, and the drag on management time to say  
8 the least of what may turn about. If that individual that we  
9 have turned in is ultimately determined to be not guilty,  
10 that individual might turn around and sue the corporation as  
11 well.

12           In conclusion, we suggest that the Commission  
13 emphasize the prevention of wrongdoing by giving more weight  
14 to the existence of corporate compliance programs than to  
15 self reporting after the crime has occurred.

16           With respect to the issue of management involvement,  
17 we would also urge that more weight be given to the lack of  
18 management involvement in the criminal activity. If  
19 management is not involved in the activity and is making good  
20 faith efforts to assure compliance, then it is difficult to  
21 construct a rationale for assessing significant responsibility  
22 for the offense on the corporation.



1           In addition, because management is defined rather  
2 loosely in the proposal, the operation of the mitigation  
3 factors may be extremely arbitrary. The Commission makes no  
4 distinction between senior management taking an active part  
5 in the criminal activity and a lower level supervisor who  
6 undertakes activity that contravenes corporate policy.

7           Both cases are treated exactly alike and no  
8 mitigation is available even though the cases represent  
9 vastly different levels of corporate responsibility.

10           Finally, we have strong reservations about the  
11 impact of the guidelines on our members' abilities to perform  
12 their duties as corporate counsel. The mitigation factors  
13 include in house counsel within the category of management  
14 who must report should they become aware of a violation.

15           Under current principles of attorney professional  
16 standards, in house counsel may undertake in many cases to  
17 conduct internal investigations knowing that the  
18 attorney/client privilege will attach to their activities and  
19 the advice given to management as an outcome of the  
20 investigation.

21           Indeed, for purposes of determining a lawyer's  
22 obligations to its client no distinctions can be made between



1 in house and outside counsel. Rather, under the Commission's  
2 proposal should in house counsel become aware of possible  
3 violations while undertaking such an internal investigation  
4 that would otherwise be privileged, the mitigation would not  
5 be available if the counsel did not come forward and disclose.

6 This puts inside counsel in an untenable position  
7 with respect to our clients. Under the current wording of  
8 the proposal management would have no option but to retain  
9 outside counsel should an internal investigation be needed.  
10 Such a result would discriminate unfairly against inside  
11 counsel and would deprive corporate clients of the ability to  
12 work with the attorney of their choice.

13 We therefore strongly urge the references to inside  
14 counsel be dropped from the proposals.

15 A question was raised earlier this afternoon about  
16 the state of corporate compliance and the vast array  
17 throughout corporate America. As one that has worked over  
18 the last 15 years in designing and implementing corporate  
19 compliance programs and I have brought such an example with  
20 me, we are very strongly committed to the process of corporate  
21 compliance programs that cover not only the criminal sector,  
22 but the civil as well.

1           We are very committed to the development of these  
2 compliance programs. We believe that they are very effective  
3 to make sure that corporations are adequately protected,  
4 their stockholders are protected, and that we are able to  
5 assure compliance with the law.

6           We have been encouraged by Government officials  
7 over the years that the existence of corporate compliance  
8 programs are strong evidence that negate criminal intent.

9           I believe that the vast array of the members of  
10 ACCA have very sound corporate compliance programs  
11 particularly in those areas where it is the type of business  
12 that they're in, whether it's antitrust in the case of  
13 companies that sell, whether it's securities in the case of  
14 corporations that engage in the sell of securities and the  
15 like.

16           It is not possible for any corporation to assure  
17 that you have a compliance program as elaborate as this one  
18 may be for every single law that may have criminal activities  
19 associated with it. Many of them are ingrained and  
20 incorporated in the various procedures and activities that  
21 that particular corporation conducts whether it is a fire  
22 code with respect to the way in which an engineering design

1 is made, or whether it is compliance with a building code.  
2 All of these things are developed and part of the ongoing  
3 process and procedures of corporations and we have focused on  
4 certain areas to develop more elaborate and more formal  
5 compliance programs and done an effective job in educating  
6 our management with respect there too.

7 ACCA does intend to file more formal comments prior  
8 to the end of the comment period and I would be responsive to  
9 any questions that you may have.

10 CHAIRMAN WILKINS: I think the point that any  
11 compliance program should be geared to address the criminal  
12 conduct and that is what we should be reasonably foreseeable  
13 to the corporation taking into account the nature of its  
14 business?

15 MR. WALLER: Yes.

16 CHAIRMAN WILKINS: Is that something that you're  
17 driving at? That's a pretty good point.

18 Do you have any language that you've supplied along  
19 that line?

20 MR. WALLER: We would be happy to prepare such a  
21 language--such a provision.

22 CHAIRMAN WILKINS: Thank you.

1 Questions to my right?

2 COMMISSIONER MacKINNON: That's a question I raise  
3 about what kind of crimes are they protecting against. What  
4 kind of crimes do you think you're protecting against that  
5 you get protection from compliance programs?

6 MR. WALLER: In terms of the compliance programs  
7 that--

8 COMMISSIONER MacKINNON: No, your ordinary everyday  
9 operation.

10 MR. WALLER: I think that antitrust is one in which  
11 a corporation probably universally the larger corporations  
12 that are members of our association probably have a fairly  
13 elaborate antitrust program. I would venture to say that in  
14 the area of insider trading that many, many corporations have  
15 fairly comprehensive--

16 COMMISSIONER MacKINNON: Is insider trading a  
17 corporate offense?

18 MR. WALLER: It is when you get into Section 16  
19 areas and the like.

20 COMMISSIONER MacKINNON: It could be some reporting  
21 offense.

22 MR. WALLER: Yes.

1 COMMISSIONER MacKINNON: Who administers your  
2 program?

3 MR. WALLER: The program is designed by corporate  
4 attorneys. They are then distributed throughout the  
5 organization. In this particular case the chairman has  
6 signed a letter to all employees directing compliance with  
7 the policy. The responsibility for monitoring compliance,  
8 for assuring compliance, for going out and testing whether  
9 the compliance is made in this particular policy is the  
10 responsibility of the general counsel.

11 COMMISSIONER MacKINNON: The monitoring  
12 responsibility is the general counsel?

13 MR. WALLER: Yes.

14 COMMISSIONER MacKINNON: You transport oil by  
15 vessel?

16 MR. WALLER: Yes.

17 COMMISSIONER MacKINNON: You do?

18 MR. WALLER: Yes.

19 COMMISSIONER MacKINNON: Have you had any spills  
20 that were prosecuted criminally?

21 MR. WALLER: No.

22 COMMISSIONER MacKINNON: Thank you.

1 CHAIRMAN WILKINS: Thank you.

2 Any questions from my left, anyone?

3 Mr. Waller, thank you very much for your insightful  
4 testimony and we look forward to any other submissions that  
5 you wish to make to us.

6 MR. WALLER: Thank you very much.

7 CHAIRMAN WILKINS: Anyone else wish to testify,  
8 please come forward.

9 Well, I see your numbers have dwindled some since  
10 this morning, but this is a hearty crew left. I'm delighted  
11 to see former Congressman John Napier still with us.  
12 Congressman, glad to see you.

13 Well, thank all of you for your participation.

14 We will stand adjourned.

15 [Whereupon, at 4:00 p.m., the hearing was adjourned.]