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

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

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

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

We are delighted to have a number of very distinguished witnesses today and at the conclusion of the list of witnesses' testimony, we will, of course, as we always do, open the floor for comments from anyone who has not previously requested to testify, but who has information or other
comments they wish to bring to our attention.

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

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

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

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

STATEMENT OF MR. BELL
MR. BELL: Thank you, Your Honor, members of the Commission.

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

Generally speaking, my position is that—and I say my position and I speak from someone whose had a lot of experience in the corporate side of prosecutions for violation of the criminal laws, vicarious liability situations and others.

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

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

A lot of times a corporation—it may be some low
level employee that may do something think he's helping the corporation and actually the corporation would be glad not to have that kind of help. There are actual cases like this that have nothing to do with top management.

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

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

I’m not certain the guidelines give enough weight to that sort of thing and it probably can’t be done mechanically. Probably only a district judge could really understand the nuances of this sort of thing.

So I would account for more discretion in the
district judges. I support strongly these corporate compliance programs. They have deterred crime. They have caused crime to be discovered and crime to be reported.

Encouraging corporations to have effective compliance programs should be the highest priority of this Commission. The Justice Department simply doesn’t have enough people and never will to just go out and start an investigation where there is some suspicion.

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

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

On these points where you give credit, you ought to give a good deal of credit for having a compliance program separate and apart from reporting disclosure. Those things
ought not to run together as they do. They ought to be
separated and those two things ought to get more weight than
anything else, good compliance programs with a finding of
good faith in the operation of the program and disclosure,
those two things.

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

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

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

The Government in corporate America needs to form a
partnered in preventing crime and also in discovering crime in the workplace. We don't need to have an adversarial relationship between corporate America and the Justice Department. We ought to have something that encourages not only compliance, but detection and reporting.

I think that maybe the mechanical approach that the Commission seems to be taking without having enough discretion in the District court would really discourage people from reporting. It would discourage having a detection program.

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

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

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

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

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

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

So there's going to be a lot of cases like that.

There will be others where the fine needs reducing. This is
a situation that needs to be dealt with and that is what I
call public interest case. I know of a company that had to
pay about $200 million to the Defense Department and probably owes that or more. The Defense Department didn’t want to put them out of business. They wanted to fine them. What arrangement would be made where you want to save a company? Suppose we had one company making airplanes and one making submarines and so forth? We wouldn’t want to put that company out of business. We wouldn’t want to get ourselves in an international economy where we didn’t have any problems in our country, but people that are not under these kinds of laws would—we don’t want to get in that shape.

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

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

The first one would be that we have—and I know of a case like this—where a corporation detected a crime through the internal auditors, reported it to the Defense Department and they said, "Well, you’re not going to get any credit for that. We already knew about it. Somebody wrote us a letter." You ought to get credit in a situation like that.
because you had no way of knowing it until it was caught, but
it was promptly reported.

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

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

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

Also, there should be no upward departure if one of
the prior convictions was the result of a voluntary dis-
1 closure. There should be some credit received for the
2 voluntary disclosure.

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

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

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

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

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

Then another point is that because a judicial order can stay in effect indefinitely and there's are injunction on the book that have been on the book for 50 or 60 years--they had one against AT&T that I think was imposed in the 20's--but normally they stay on the books for a long time. A corporation should not be penalized for a menial employee's
violation of an order entered years before even if the corporation had a pervasive program to ensure compliance.

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

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

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

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

I told somebody this morning that's how Solim [ph.] became famous when he took over all and everything you did in Ancient Greece and it warranted the death penalty. He
rewrote the code and made it more graduated. We don't want to go back the other way. So that would be sort of a general comment.

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

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

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

CHAIRMAN WILKINS: Thank you very much.

The overall goal of the Commission's proposal is crime control and I take it from your testimony that that should be the goal of public policy from this Commission or
any other public entity is crime control.

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

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

What you want to do is rely on the good faith of people. We ought to remember the times when we thought
everybody was honest and we still think that because if we
didn't the whole credit system would break down. We have,
generally speaking, honest people in this country. They need
to be encouraged. I think we can go a step further than
encouraging. The general approach is good.

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

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

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

CHAIRMAN WILKINS: Commissioner Corrothers?

MR. BELL: And you could have not only a separate
corporation. You could have divisions within a big corpora-
COMMISSIONER MacKINNON: Well, they are a division.

MR. BELL: Oh, they are?

COMMISSIONER MacKINNON: Yes.

MR. BELL: I thought they were a subsidiary.

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

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

Do you think that we would have a problem of wide, too wide, or unwarranted disparity? Do you think that we would have across the country cases—basically the same types of cases, same types of circumstances and such a wide difference of the results of those cases that it could be a
problem? I’m just wondering what you think about that.

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

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

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

I’d very much stand for letting them have full discretion. This would be a measure—they don’t have—they can take the lesser of the three, but they can’t go below
that. So you've got them hemmed in pretty well.

COMMISSIONER CORROTHERS: Thank you.

CHAIRMAN WILKINS: Any questions from Commissioners
to my left?

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

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

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

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

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

MR. BELL: That could easily happen.

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

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

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

COMMISSIONER MacKINNON: I've got the principles on
my desk, General.

MR. BELL: Have they been suspended?

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

MR. BELL: This would be a principle of prosecution right here and it merely indicates that the law of vicarious liability will remain the same despite whatever the Sentencing Commission does.

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

But that's not the law, but Congress might make it the law and some prosecutors might say, "Well, Congress has said all of this and made sentencing guidelines and we think that is the law", but that's called prosecutorial discretion and these guidelines are not intended, I'm sure, to have
anything at all to do with the prosecutorial discretion, but
I'm just saying eight is in there to make that clear.

COMMISSIONER MAZZONE: Thank you.

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

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

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

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

How do we do that without sending that message to
corporate America, not necessarily that we're out here to
prosecute you, but we want you to understand that if you're
going to engage in this kind of activity and we do find you, we are able to prosecute you and you’re going to pay a harsher penalty for. You’re not going to engage in it in the first instance because of the possibility that we will find you. We will be able to prosecute you.

How do we get to that point without increasing penalties?

MR. BELL: Well, you get to that point by prosecuting the actor, the person who committed the wrong because that person had to have the intent to do wrong. The corporation would not have the intention to do wrong. You’re treating the same and that’s not right in my judgment.

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

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

In cases where the corporation has not been attentive, they’ve not tried to deter crime, they’ve not had
a program that would detect crime or deter crime, they've not
had ethics teaching to their employees, those sort of things,
that would weigh heavily with me if I was a prosecutor about
prosecuting them. I probably would prosecute a company like
that that hadn't tried. But if they tried, I think that
maybe even if they get prosecuted then they ought to be able
to show good conduct as you get down to zero on the scale on
the sentencing.

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

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

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

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

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

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

Thank you very much.

Our next witness is Robert S. Mueller, III. Mr. Mueller is Assistant Attorney General of Criminal Division, Department of Justice. He will be accompanied by Mr. Joe B. Brown, who is United States Attorney from Nashville, Tennessee. Mr. Brown is Chairman of the Attorney General’s Advisory Commission of Sentencing Guidelines. We’re delighted to have both of you with us today.
STATEMENT OF MR. MUELLER

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

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

Let me state at the outset that it is the Administration's position, it is the Attorney General's position that it is imperative that the Sentencing Commission approve strong guidelines in the area of organizational sentencing.

Strong guidelines are essential in order to serve the purposes of sentencing articulated in the Sentencing
Reform Act of 1984. Those purposes are just punishment, deterrence, protection of the public from further crimes of the defendant, and rehabilitation.

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

We believe that the Department’s set of guidelines more effectively serves the interest of justice and more particularly closely reflects the goals of the Sentencing Reform Act.

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

As you are aware, the Department’s proposes using an offense level approach to setting fines for organizations and really the battle lines, I think, have been most obviously drawn in the issue of how fines are to be levied and the size of the fines.

We believe that our approach is both straightfor-
ward and is also similar to the existing sentencing guidelines for individuals.

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

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

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

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

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

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

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

First, as we point out in our papers, we have some concern about the use of the gain/loss approach for calculating sentences.

Secondly, we have substantial concern about the--
what I will describe as a one-sided adjustment system which
in our view will dramatically reduce fines in many instances.

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

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

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

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

Thirdly, there are crimes involving regulatory
reporting requirements where the actual financial gain or loss may be indeed minimal. An example of this are the currency reporting requirements which are intended to inhibit money laundering, but in and of themselves do not demonstrate a substantial gain or loss to an institution or to victims.

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

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

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

We also have some concerns about the effect of the mitigating factors in the Sentencing Commission’s proposal. The one sided adjustment system presents problems first because of its dramatic effect in reducing fines in many
Although the fine ranges appear relatively high, they may be reduced by the mitigating factors to nominal amounts or even to zero. The mitigating factors that are included in that approach are not only numerous and duplicative, but additionally should prove quite easy for most organizational offenders to meet.

Another point with regard to the mitigating system that is suggested by the Commission and that is that the proposed system allows a corporate offender to obtain substantial mitigation based solely on post-offense conduct. Ordinarily the sentencing judge looks askance at eleventh hour efforts to create an appearance of rehabilitation. The proposed system, however, both encourages and unduly rewards such behavior.

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

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

In brief overview, those are our concerns with regard to the Commission's proposal and briefly why we believe that the Commission should consider seriously adopting the proposal that has been submitted by the Department.

Thank you, Mr. Chairman.

CHAIRMAN WILKINS: Thank you, Mr. Mueller.

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

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

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

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

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

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

I will say though that our principle concern is not directed at the percentage of increase or decrease between
the levels. I will have to get you an answer as to why there
are those increases in those percentages.

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

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

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

MR. MUELLER: I understand that.

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

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

MR. MUELLER: I understand and we will provide you
an answer as to the rationale.
CHAIRMAN WILKINS: If the Commission's proposal was
tougher than the Justice Department's proposals, would it
change your mind?

MR. MUELLER: I'm sorry.

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

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

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

We take into account, given what Justice Bell has
said, we take into account the mitigators which he and
corporate America are requesting the Commission to put out,
but the Justice Department is looking for a fair system, not
necessarily, quote, a tougher system.
CHAIRMAN WILKINS: I think all of us share that same view. I'm delighted to hear that.

Any questions by Commissioners to my right?

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

MR. MUELLER: Well, my understanding--

COMMISSIONER MacKINNON: Does it vary disproportionately?

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

COMMISSIONER MacKINNON: Was that what they were talking about?

MR. MUELLER: We--

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

Is that what your schedule does?

MR. MUELLER: No, it's my understanding that our
schedule was principally based on the fraud tables which have been published previously by the Commission and that those fraud tables apparently vary in such inconsistent proportions.

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

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

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

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

Any questions to my left, Commissioner Nagel?

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

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

The other--

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

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

I think you make an interesting point when you say,
While some offenders deserve reduced punishment because of a variety of factors, including a low level of organizational involvement in the offense, the degree of mitigation must be carefully measured so as not to thwart Federal criminal law.

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

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

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

COMMISSIONER NAGEL: Thank you.

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

What this Commission is addressing is sentencing
after conviction. The theories that relate to obtaining that conviction in my mind and whether the rightness or wrongness of that is perhaps not--this is not perhaps the best place to debate that.

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

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

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

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

Have it in mind, of course, your apparently reluctant admission that the Commission is not restricted to
illegal gain or loss, but also can move to the offense level
as a third alternative, but passing that for the moment.

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

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

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

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

Now you’ve got eight. Going to your fine table
that eight or ten--did I add two--whatever it was, comes to a
fine, as I see it, and let me just be sure, of $25,000 to $64,000. High level management aided or abetted, add two levels. I think that comes to 10, $25,000 to $64,000 is the fine range. The highest fine that the judge could impose without departing would be $64,000. That corporation has gained a million two. That's the question part. How do you explain the result from using your table, Mr. Brown, as well? How do you explain the result and why does that make any sense whatsoever?

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

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

COMMISSIONER MAZZONE: Why have you figured it in at the back door when the Commission's proposal does it at
the beginning? Right out front, add in the gain, add in the loss. You add it at the end. Why do it there?

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

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

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

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

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

Some of the amounts that our proposal is they are
going to be less than what would be under the Commission.
Some are going to be hire. I think the exact amount are not
the critical elements so long as we have a system that
produces a reasonably fair system. And I think the amounts,
as Judge Wilkins has pointed out, in the amounts of the
difference as you go up the scale become greater, but I think
that becomes necessary particularly in corporate fines
because the amount of spread we’ve got in fines is much
greater. So as you go up the scale of severity I think that
it does give the court a wider latitude of discretion. The
higher you go up the more discretion the court has got
between the minimum fine and the maximum fine, which I think
is appropriate.

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

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

The Commission’s proposal is for the judge to be
confronted with the facts that there was a gain here of a
million two. There’s no loss than can be calculable. The
offense level here—we do not have an offense level based on
gain. The greater of the three is the million two. That’s
the offense level. What’s so hard about that? What makes
yours so much easier?

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

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

COMMISSIONER MAZZONE: You may be right. I await
your response to Commissioner Nagel’s request because I don’t
think you have a heck of a lot more information than we have
and we’re doing the best with what we’ve got and there’s been
a lot of work done on it. These kinds of cases point out to
me at least that the judges can do this work and should do
this work and this gives judges more discretion to reach a
fair result. But maybe you can come up with some actual
cases that will be different.

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

If you have a set of guidelines which give substan-
tial discretion to the judges, then you have no guidelines.
It’s our submission that the Department of Justice’s proposal,
like the individual guidelines, provides sufficient discretion but also assures the uniformity of the deterrence that Congress wished as a result of passing the Sentencing Reform Act.

CHAIRMAN WILKINS: Commissioner Carnes?

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

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

That being your opinion, I’m curious why the Department’s proposal gives substantial reductions when the organization has taken substantial steps to prevent a recurrence of similar offenses such as implementing appropriate monitoring procedures.

In fact, at offense level 22 your entire fine would go down 50 percent nearly by this one factor and I would
submit to you that is one factor that could be accomplished simply by the corporation having fired one employee and simply promising to the court that it had implemented a compliance program and would not do criminal conduct again.

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

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

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

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

COMMISSIONER CARNES: You've also expressed a dislike for a fine system based in any way on loss or gain. Yet, it appears, having run the numbers through all of our
systems, that in most cases the fines are going to be higher under a loss/gain system as proposed by the Commission than under either the Commission or the Department's offense table.

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

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

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

MR. BROWN: I think it also would be important to
take a look at the aggravators and mitigators. I'm not sure in running it through the computer how that would figure out, but I think one of our concerns is that under the Commission's proposal that so many of those are going to be--the mitigators are going to so much easier to get under our proposal. I'm not sure--I'd have to see how you--when you ran the computer how you figured in the aggravators and mitigators. I'm not sure I would necessarily agree with your computer results because I'm concerned about those aggravators or lack of aggravators.

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

MR. MUELLER: No.

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

MR. MUELLER: We think either system would--has sufficient penalties to provide the deterrence that is one of
the critical goals of the Sentencing Reform Act, and while I think at certain levels there may be a discrepancy, I think we may be higher at certain levels and lower at certain levels, whether we are higher or lower at a particular level is no so important as whether or not the system as applied adequately reflects the seriousness of the conduct, which may or may not be based solely on monetary gain or loss.

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

I'm curious though that one of your aggravating factors is risk to national security and you triggered a two level increase for that. It strikes me if the particular offense conduct, for example, selling military secrets to Iraq or designing tanks that would be so defective that in the course of armed conflict men would be killed and the tanks would fail, that your system would provide for only a two level increase for something so egregious, whereas the Commission's draft that would allow a judge to depart upward would allow that judge to take into account varying sorts of
risk to national security and in that particular hypothetical
give a fine that I think you would agree would much more
closely approximate the harm caused by that conduct than a
mere two level increase. I would be interested in your
reaction to that.

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

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

May I make one last point, Mr. Chairman, with
regard to the point made by Commissioner Carnes, and that is
on the fine tables. As Joe Brown has pointed out, your fine
tables may well result in higher fines because the ag-
gravators are included within the fine tables and I think the
point is well taken that you can’t just compare the fine
tables, but you have to compare the mitigators, aggravators
in any particular situation. So that if you impose our
aggravators in a particular situation it may result in an
increased fine compared to your proposal in as much as your
proposal already includes in it what is perceived to be as
aggravators.

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

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

Commissioner Gelacak?

COMMISSIONER GELACAK: Just one quick one. We all
agree we’re talking about sentencing and I assume that means that the Department charged with the responsibility of enforcing the law against corporate America will do that anyway regardless of what we effectuate as changes in sentencing policy.

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

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

If you adopt our proposal, there will be no difference in terms or the charging decision. Now perhaps you’re illuding to what Justice Bell was intimating might be a fall out from what some might perceive as being a tough sentencing structure in terms of prosecutors’ more willingness to prosecute. I don’t think that’s going to be a fall out.

COMMISSIONER GELACAK: I think what I am trying to get at is, how does it make your job easier or tougher? You’re going to do the same things anyway, or this will cause you to allocate resources differently?
MR. MUELLER: In terms of making the charging
decision all the way up to the term and time of indictment
and conviction there would be absolutely no difference. The
same elements that go into making certain determination of
whether or not to prosecute would be unchanged and the
principals of Federal prosecution that were developed under
Justice Bell and adopted--excuse me Attorney General Sivileti-
ti are still in effect. They take into account in the
prosecution decision many of the considerations which Judge
Bell illuded to and it would not change basically the way we
do our job as prosecutors.

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

One of the points that Judge Bell raised was the
point that there perhaps is no difference in sentencing by
judges of corporate offenders. I would say all you have to
do is look at a judge's--the way a judge addresses a civil
docket in terms of settlements and you will vast differences between the way judges handle settlements of civil cases because it reflects their belief in the good or badness of corporate America.

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

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

CHAIRMAN WILKINS: I think Judge MacKinnon had a
question.

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

MR. MUELLER: There are aggravators, but--

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

MR. MUELLER: No, there is not.

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

MR. MUELLER: In some cases it would.

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

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

MR. MUELLER: There is not.

COMMISSIONER MacKINNON: And to the extent that we come in here, we probably come in below the maximums that are
presently allowable.

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

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

COMMISSIONER MALONEY: Mr. Chairman, if I may.

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

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

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

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

Our next witness is Stephen S. Cowen. Mr. Cowen is
a former Federal prosecutor from Atlanta, Georgia. He's an
attorney with Steptoe and Johnson here in the District. He's
been practicing with that firm for some time and he's also
served as member of a defense attorney's practitioner's group
that has advised the Sentencing Commission on various matters
over the life of this Commission.

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

STATEMENT OF MR. COWEN

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

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

COMMISSIONER MacKINNON: Who do you represent?

MR. COWEN: No one, sir.

COMMISSIONER MacKINNON: You're here as a lawyer?

MR. COWEN: Yes, sir.

COMMISSIONER MacKINNON: Well, good.

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

At the first part of my statement I add my voice to
the chorus that I'm sure the Commission has heard from before
and will hear from today and even on into the comment period
that mandatory guidelines for sentencing corporations are
unnecessary and that it would be preferable and would provide
the greatest flexibility and fairness to simply issue policy
statements which would guide judges, but not mandate fines.

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

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

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

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

Also, as has just been indicated in the prior
testimony from the Assistant Attorney General, Mr. Mueller,
Department of Justice draft relies exclusively on offense
This approach is not simpler to use, but it is simplistic. The irony is that the Department draft, as the past colloquy just demonstrated, at the lower and middle offense levels, often, not always, but often would result in fines far below the Commission’s draft, while at the upper levels it would result in higher fines.

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

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

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

Because the Commission draft is primarily based on multiples of gain or loss, it has the merit of providing for
a steadier and more predictable progression of fines.

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

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

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

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

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

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

Now what concerns me is that the fines for this responsible and cooperative corporation would be in addition of course to full restitution. In the first example the 5
and a half million dollar loss with full cooperation by the company, a good effective compliance program, though not a perfect compliance program, obviously, no high level involvement, they are still going to be paying a $2 million fine even under the Commission's draft and a lesser fine under the Department's draft.

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

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

I would submit to the Commission that ought to be the upper limit for the maximum. And at the very most the upper limit for the minimum should be one time the loss or gain because you always will have restitution being ordered
by the court under any of the sentencing systems adopted.

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

I would submit that even the Government's experience in dealing with problems within the bureaucracy demonstrates that that is not always such an easy task.

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

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

The corporation that makes the effort to prevent that violation of corporate policy and to prevent criminal misconduct ought to be given very substantial credit for the effort and the guidelines ought to recognize that perfection
is impossible to achieve in any organization and certainly in mid-size and large corporations. That is just not an attainable goal.

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

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

The scandal involving the Food and Drug Administration is a good example. There you have FDA reviewers accepting bribes and gratuities and even though the FDA is subject to internal investigation by an Inspector General from the Health and Human Services Department, that criminal behavior was not discovered until a pharmaceutical manufac-
turer complained about unfair treatment at the FDA.

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

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

If the Government itself and the Department of Justice itself cannot always detect criminal misconduct by its employees and prevent it, no guideline sentencing system should expect that from a corporation either and it is my suggestion that the guidelines provide for greater credit for an effective compliance program for cooperation, for lack of high level involvement, and that the corporation that really engages in ideal corporate conduct not be subjected in the
case of a 5 and a half million dollar loss to a 2 million dollar fine.

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

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

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

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

Finally, I would say that the concern about
disparity in corporate sentencing seems to me to be exaggerated and misplaced. At least right now there is no proof that there is a disparity problem in corporate sentencing. We’ve only had the increased fines since 1984 and I don’t think there is enough data out there to demonstrate that currently there is a disparity problem.

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

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

CHAIRMAN WILKINS: Thank you very much.

Between now and the time we submit something to Congress we have the ability and perhaps the luxury of doing
a lot of rewriting if we so elect.

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

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

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

CHAIRMAN WILKINS: Any questions from Commissioners to my right?

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

MR. COWEN: Yes.

COMMISSIONER MALONEY: How is a zero fine consis-
tent with the jurisprudence in terms of vicarious liability and the congressional intent as manifested by statute? How do you square those two notions with the idea that a judge can impose after having the executive branch of Government charge a corporation have them be convicted either by a plea of guilty or after trial and then having the judge impose a zero fine? How does that square?

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

I could also imagine circumstances where you have the voluntary disclosure and the Department of Justice might decide for policy reasons that it’s not going to forgive the misconduct and will require the corporation to be subject to a conviction, but a judge might decide that all the societal interest at stake would require encouraging corporations in
that circumstance to make a voluntary disclosure and the
corporation should not be subjected to a fine.

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

MR. COWEN: Yes, sir.

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

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

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

But it’s very hard to compare corporation A to
corporation B and say they are identical in the way we can
compare bank robber A to bank robber B and say they are
similar and ought to be treated similar.

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

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

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

MR. COWEN: I think it will be rare that there will
be cases involving corporations that are very factually
similar and I think the problem--the greater problem is in
tyling the hands of judges and requiring them to impose unduly
high fines on corporations.
It seems to me that the best way for the Commission to deal with maybe just an imaginary disparity problem is to adopt this far more flexible tripartheid approach and then as the Commission is charged with doing, examine over a period of time whether that is that working and whether there are disparate sentences.

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

MR. COWEN: You mean the offense level?

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

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

COMMISSIONER MALONEY: Thank you.

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

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

COMMISSIONER MacKINNON: Let me ask you this. To what extent have you had a lot of corporate experience with
actual day to day, year in, year out operation of corporations?

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

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

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

A system that any corporation sets up for compliance should be adequately funded, should have enough teeth through a disciplinary system so it can be enforced. It should have a widespread publication within the corporation and it should obviously not just be something that people pay lip service to.

By the same token though, you do not want to put compliance managers and inside lawyers in the position of
every time they hear about a problem if they don’t solve it perfectly the corporation is going to get fined excessively high if it turns into a criminal problem because you will then discourage compliance managers and inside counsel from delving into the day to day affairs of the corporation in a way that is needed in order to have an effective compliance program.

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

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

COMMISSIONER MacKINNON: You spoke of disparity. There isn’t anything in the Act which we’re operating under or in the legislative history that speaks about disparity with respect to corporations. It directs the Commission to enact or propose corporate guidelines and that’s what we’re
operating under. We're not operating under any need for
demonstrating prior disparity as much as it might exist.

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

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

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

Have you come abreast of any case where a corpora-
tion was—I'm talking about a substantial corporation, a
large corporation, was punished for the act of a low level
employee?
MR. COWEN: I guess the question is how low is low?

I think you can have in the environmental area a situation where a low level employee creates a harm to the environment and the company would be prosecuted for that. I haven’t personally be involved in that.

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

COMMISSIONER MacKINNON: Well, they’re delegating corporate authority to middle management all over America, all over the world and they are acting with discretion for the corporation and they have to be punished and the corporation that stands to benefit from what they did is in that position.

So when you talk about middle management you’re talking about management today in the corporate field.

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

COMMISSIONER MacKINNON: All over America the corporations are moving their operating discretion down to middle management. They have to.
I appreciate your testimony. Thank you.

MR. COWEN: Thank you.

CHAIRMAN WILKINS: Any other questions from Commissioners?

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

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

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

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

By the way, let me say this, we're running behind schedule so we're not going to take a break. Any Commissioners who need to we'll just get up and take a break and certainly this applies to the audience. The only person I
will stop for is the court reporter. If you tell me we need
to stop, then we will stop.

Now, Mr. Rogers, go ahead.

STATEMENT OF MR. ROGERS

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

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

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

NAM has some very large corporate members, but most
of its 13,000 members would be legitimately classified as
small or very small businesses.

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

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

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

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

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

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

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

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

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

Nevertheless, some of our concerns remain. The
first is the necessity or desirability for binding guidelines
as opposed to advisory policy statements. In repeating this
argument I do not wish to alienate you. I read the papers and I have heard some of you talk and I know that at least some of you are firmly committed to act before next May and to act in the form of binding guidelines.

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

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

Moreover, we see no need to guidelines at this time. In the case of individuals, there was an enormous sentencing disparity problem disclosed by a rather ample data base. In the organizational area there is to our knowledge no real problem with or concern about disparity. One reason for the absence of the problem may be the absence of the data, but relative to individuals there really isn't much
organizational sentencing data available and that which is
available deals very largely with small or very small
corporations and almost none relates to very large publicly
traded companies.

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

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

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

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

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

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

If every effort to comply with the law, to disclose
the violations discovered, to cooperate with the Government
and plead guilty results in that sort of a fine, I submit the
incentive to do all of those things is minimized.
Now where a company for some reason cannot disclose the violation in advance, the situation becomes more complex and less appealing.

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

In that instance because the company concluded there was no crime, again in entire good faith, we lose four points for failing to disclose the offense to the Government. As I read the draft, three points for an effective program and two additional points for due diligence would also be in serious jeopardy.

I would expect the Government to argue, and it certainly could that had we—if we conducted an investigation and found nothing the compliance people knew or at least should have known of the offense, or that the unsuccessful
investigation itself is evidence the compliance program is ineffective.

If the Government is going to second guess compliance programs of personnel frequently, I think I can accurately predict that both will become less effective, not more effective over time.

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

The end result, as I read the draft, is that the only way to maximize the mitigation points is to voluntary disclose any fact that might conceivably support the criminal indictment, cooperate fully with the Government investigation, and then plead guilty to whatever charges the Government elects to bring and however many counts.

I submit that that is not a realistic or even a possible expectation in many situations and let me explain to you why.
The timing and outcome of internal audits in investigation often involves a real element of fortuity. I'm told by my friends with prior Government experience that Government investigations do as well.

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

In addition, the timing of the investigation versus a Government proceeding may be quite fortuitous as well. If a number of low level employees commits a reporting violation, it is quite unlikely that that would be called to the attention of senior management until a Government investigation commences or the actions is otherwise publicized and results in a simultaneous investigation by both the Government and the company.

In sum, voluntary disclosure is laudable and it
certainly warrants mitigation, but the current system appears to me be to be much too heavily weighted on that single factor with the result that it will be practically or in fact unavailable.

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

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

In closing, we believe guidelines should be viewed by the Commission as a last resort, not a first resort and that they should be promulgated in response to specific abuses of judicial discretion in the organizational sentencing process.

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

Finally, we urge the Commission to retain the
judicial discretion to impose the maximum fine in appropriate
cases and the minimum fine in others.

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

CHAIRMAN WILKINS: Thank you very much.

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

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

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

I do know that Jim Rill was quite anxious to get
the maximum antitrust fine for organizations raised to $10
million and you know that was done in November and I have a
feeling the Justice Department is much more comfortable
presenting some sort of a flat fine which is here is the
offense, here is the fine, and here is the table, rather than
conducting something they fear would be a mini trial on the amount of the gain or the amount of the loss.

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

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

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

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

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

COMMISSIONER MacKINNON: Well, look at the statute.

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

COMMISSIONER MacKINNON: Well, I don't have it now. I looked it up once and I think you remember that sitting next to me I gave it to the meeting that was in progress at
MR. ROGERS: I tried to find that citation and I did find the basic language in Section 994a, I believe it is, that talks about guidelines and it talks about persons and persons, of course, includes both individuals, natural persons and artificial persons like corporations. But the Act, as you know, goes on at great length and I discovered that a lot of the language that related to specific guidelines clearly talked to individuals because people were going to jail. So you knew that wasn't corporate and they were talking about crimes of violence and drug related offenses and I'm not talking about businesses that engage in that sort of thing.

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

COMMISSIONER MacKINNON: That's the policy statement.

MR. ROGERS: --that to me clearly indicated the congressional preference for policy statements for organizations rather than guidelines.
COMMISSIONER MacKINNON: Which we don’t look at if the statute is clear.

MR. ROGERS: But I don’t believe it is.

COMMISSIONER MacKINNON: Well, I think you’ll find that it is.

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

While there are violations of antitrust, there are different types of violations and you have a very hard chore in trying generalize from corporate crime. I’ve been following it for many years and that’s just my own observation.

MR. ROGERS: I agree with you.

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

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

MR. ROGERS: You bet.

COMMISSIONER MacKINNON: And what would you give as
the elements of an effective corporate compliance program?

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

Where you have a very large company like Ford--

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

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

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

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

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

There are whole areas of a company that you may ignore because you know that those people don't have the authority to violate anything and there are some of those. There are others that are very sensitive environmentally. So that's where your environmental effort is focused.
There are others that involve such things as insider trading and we have a very active program to prevent that. Antitrust is always a big factor at most companies. Most large companies have an antitrust compliance program. It involves a very substantial amount of time, a lot of internal investigations--

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

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

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

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

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

MR. ROGERS: Well, normally at most corporations I'm familiar with the chief compliance officer is very often
the senior lawyer who would be the vice president and general
counsel. That’s certainly the way it works in Ford. Now he,
of course, reports to the chairman of the board.

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

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

COMMISSIONER MacKINNON: And that was a by-law.

That was a by-law. Now I wonder how close you would come to
getting that high?

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

COMMISSIONER MacKINNON: Thank you.

CHAIRMAN WILKINS: Any questions from my left?

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

MR. ROGERS: I would hope that we would continue as
we have in the past to report violations even if we knew
going in that we were going to get clobbered. I think that’s
the right thing to do and I think that is what we would do. Compliance programs, I think we have fairly good compliance programs, although we're always trying to improve them and I think that compliance programs--don't get me wrong. When I said they weren't perfect, I didn't say they weren't any good. I think they do catch and forestall a great many civil offenses and not often criminal, but probably quite a few of them. The very presence of policies and the fact that they are enforced and communicated and that management is genuinely dedicated to them, I do think has a a very positive effect, but I would close the way I came in. Most of the members of NAM, over 13,000, are not anywhere near the Fortune 500. They don't have an office of the general counsel. They're lucky if they have a staff lawyer who is kind of a jack of all trades.

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

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

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

CHAIRMAN WILKINS: Any other questions?
We were delighted to extend the time for written submissions. So we look forward to those submissions when you have prepared them.

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

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

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

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

STATEMENT OF MR. STEWART

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

I think my colleague Bob Mueller has already indicated the Department's basic concerns with the approach proposed by the Commission, the problems in relying on a loss/gain approach to setting the fine schedule, the asymmetry in having mitigators and not aggravators and the ease
with which the mitigation structure could reduce fines even down to zero.

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

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

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

I want to focus particularly on the loss side. What is really required under the Commission’s proposal is an investigation in each case of the social loss caused by an
environmental offense.

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

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

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

We have a number of cases in progress, several involving bays and harbors in different parts of the country that have been contaminated by PCBs and DDT where there has been injury to the eco system, depletion of marine life, reduced shellfish and fish that are fit for catch and consumption.
We have in the Exxon Valdez spill underway an effort to build a case for natural resource damages. This is an incredibly complex and difficult enterprise involving work at the very frontiers of science to determine just what the effect on the environment is is a physical matter. Will the environment restore itself over time? Is there long term damage? How serious was the short term damage?

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

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

Trying to quantify the soft variables that are involved in environmental risks would protract the sentencing
process, be very difficult and burdensome for the parties and for the judge, and really give effectively a judge such wide ranging discretion in quantifying those soft variables as to undercut the effort—the goal of providing a degree of predictability and consistency.

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

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

So even on the gain side, how much did you gain by not doing what was needed to perhaps comply with the environmental laws? It’s also very difficult.

We do think that there are exceptional cases where under the Alternative Fines Act it is appropriate to base
sanctions on loss or gain where you're dealing with a case that is really far outside the normal standard range in terms of the effects that it has had.

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

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

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

There are other more detailed comments I have in my
statement, including some observations on probation, but I think those could be safely left for your later perusal and the remarks I’ve made I think highlight the most important parts of the Department’s concerns based on environmental violations.

Thank you.

CHAIRMAN WILKINS: Thank you very much.

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

MR. STEWART: In a perfect world?

CHAIRMAN WILKINS: Yes, sir.

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

CHAIRMAN WILKINS: It’s just as easy to determine one as the other.

MR. STEWART: I think it’s sounder to go on the offense level, which is based on the threatened risk of harm to society that conduct causes rather than the harm or gain that occurred in a particular case. I think that’s par-
particularly true of regulatory offenses such as environmental
offenses that are based on a prophylactic approach that we
are trying to prevent risky conduct that may or may not
eventuate harm in a particular case.

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

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

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

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

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

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

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

So I don't understand why the Department is
insistent to this approach particularly where gain--and I
understand environmental offenses may be difficult to
determine loss. So you don’t use loss. You use a fine table because it’s not readily determinable. But if it is, why not go that way because that’s the greatest indicant of the degree of seriousness of crime in as far as money concerned is how much gain you got illegally.

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

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

Questions to my right? Judge MacKinnon?

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

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

COMMISSIONER MacKINNON: At some time, some offenses.

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

COMMISSIONER MacKINNON: If your guidelines were
amended to include loss or gain factors you wouldn't any
objection to them, would you?

MR. STEWART: If they were amended to include?

Well, I think they do include—the Justice Department’s
proposal says if the net gain, net of restitution still
remains very substantial then you can make an upward adjust-
ment, but you start with the offense level and then in
appropriate cases I think you can build it in.

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

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

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

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

COMMISSIONER MacKINNON: What do you charge them
with.

MR. STEWART: Most cases we do not charge. Well,
the Exxon case is one case where we have charged several
felony counts.
COMMISSIONER MacKINNON: What are they?

MR. STEWART: What?

COMMISSIONER MacKINNON: What are they?

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

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

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

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

COMMISSIONER MacKINNON: Thank you.

CHAIRMAN WILKINS: Questions to my left? Commissioner Nagel?

COMMISSIONER NAGEL: Mr. Stewart, the antitrust division has submitted testimony which we will hear this afternoon expressing a preference for antitrust offenses
which would be treated under a separate set of guidelines specific to antitrust offenses rather than under what they refer to as a generic set of guidelines, which I take that to mean the Commission’s draft or in fact the Department’s draft.

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

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

MR. STEWART: Well, I would just say on the mitigation for compliance programs, I’m not sure one needs a specific exemption for environmental situations. One could
have a generic exception. So you don’t get a mitigation
benefit if the program was required by law. I think you
could take care of that generically.

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

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

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

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

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

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

MR. STEWART: Typically exemplary fact situations.

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

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

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

CHAIRMAN WILKINS: Judge Mazzone?

COMMISSIONER MAZZONE: And to follow up on that,
when you do give us that fact pattern, as you put it, please
tell me how you view the sentencing hearing that would take place and by that I mean, Professor Stewart, this is the--you are the second representative of Justice that has come here and has told us in a manner of speaking that the gain/loss approach of the Commission would make for complicated time consuming hearings for district judges.

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

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

Why does Justice think that the gain/loss or offense level approach that the Commission has drafted is so totally inconsistent when all you've done is say offense level and then if it's not enough you can add gain or loss.
I just don't know what the quarrel is all about if it's a quarrel.

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

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

While we reserve the right to ask for the doubling sanction, that's only in a very small fraction of cases. Now I'd be happy in my follow up submission to at least il-

lustrate how we think it can be done under the offense level and perhaps at least give you our view that it can be done.
COMMISSIONER MAZZONE: Again, across the hall from you in the Fraud Division is an Assistant U.S. Attorney or Attorney General who is saying, "This is easy. All I’ve got to do is figure out the loss or gain and that’s easy for a district judge." In your division on the other side when you come back with your compilation of cases that you will prepare for Commissioner Nagel add to it what you can anticipate would be the Government’s introduction of evidence or a summary of evidence and issues which the district judge will now be called upon to decide in order to reach what you would say would be a proper offense level.

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

CHAIRMAN WILKINS: Questions from other Commissioners?

COMMISSIONER GELACAK: I have two, Mr. Stewart, and I know we’re running late. Actual 1988 case, and I’d be happy to submit this for the record for you to have a chance to consider it, but I’d like your comment in any event. We have a company that illegally disposed of hazardous wastes
and knowingly injured some of its employees. In fact, three employees were injured.

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

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

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

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

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

Do you think--or what is your opinion as to what
kind of a chilling effect that will have on companies involved in environmental activity and individuals within those corporations? Are we going to lose some of the good people because the risk becomes too difficult to manage. Are we going to lose some of the good managers because they don’t want to take responsibility for the potential liability of their corporation?

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

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

This was an issue that was discussed a considerable extent in the Clean Air Act amendments in the enforcement provisions and the industry sought statutory exemption from liability for people who had done audits and were taken some
response measures. That didn’t pass, but the floor manager’s statement contained a rather strong statement that the Justice Department should take into account good faith audits and compliance attempts in its decisions.

I expect that we are going to be issuing some form of guideline about that. I have encountered this with some of our Federal departments, the Energy Department in particularly that is operating nuclear weapons plants that because of accumulated problems in the past are not in compliance and I’m sensitive to that problem and I think we’re going to respond to the legitimate concerns of corporate managers who are trying in a reasonable and good faith way to cope with compliance problems through some sort of public guidance and there will be comment on that.

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

COMMISSIONER GELACAK: Are you meeting any resistance in the Department to that suggestion?

MR. STEWART: All I would say is, traditional prosecutors say, you know, trust us and we don’t want to limit or discretion, but my own view is when we are dealing certainly with regulatory offenses that there is a benefit by
giving people an incentive to do audits and to report violations and come into compliance. If that takes some limitation on traditional prosecutorial discretion, I think it's appropriate.

COMMISSIONER GELACAK: Thank you.

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

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

STATEMENT OF MR. LANGSDORF

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

As you know, the guidelines apply with equal force except for possible adjustment between minimum and maximum fines, to the very smallest organizations consisting of as
few as one or two persons as well as to the largest corporations in the country.

An overwhelming majority of criminal cases brought each year are against small organizations. Most of the members of the Chamber are very small organizations. Accordingly, the Chamber is particularly concerned with the effect which the guidelines would have on small organizations.

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

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

However, in our view the guidelines still present so many serious problems that we again urge the Commission not to issue them in binding form. Rather, as we did last
year, we urge the Commission to issue the guidelines in a
non-binding form so that it will be able to learn from the
courts' actual experience how they will work in practice.

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

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

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

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

Under the loss standard, the amount of the fine may
be totally dependent on chance. Two corporations may commit identical offenses. One may be subject to a crushing fine under the loss standard. The other may be subject to a much smaller fine under the fine table.

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

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

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

This option is still insufficient to solve all of the problems since the court's flexibility would be limited by the requirement that in many cases absent mitigating factors it may not reduce the fine below the maximum amount
I would next like to address the three fine tables which have been proposed. In directing the staff to prepare a fine table, the Commission declared that the fines should generally equal or be greater than the highest fines imposed in the past. It seems puzzling and unfair that the sentences for even the smallest organizations acting under the least aggravating set of circumstances should be equal to or greater than the fines imposed in the past on perhaps the largest organizations acting under the most aggravating circumstances.

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

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

Thus, if the statutory maximum equals 3x, the amount in the table should be x. Assuming the validity of the complicated methodology employed by the staff, only Alternate B meets that goal. Under Alternate A where the
amount equals 50 percent of the statutory maximum, we run
into the same problem we discussed before in considering the
loss standard. The minimum rather than the maximum fine
would be equal to the statutory maximum

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

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

This is laudable on its face, but unfortunately,
these mitigating factors are to a large extent unattainable.
It turns out that is it not enough that high level management
not be involved or that an effective compliance program meet
the stringent criteria of the Commission.
The defendant also has to have made a timely report to the Government of the offense if responsible management, including apparently any inside counsel, knew or should have known of the offense.

In our view a defendant should be given mitigation points for lack of management involvement and for an effective compliance program whether or not it has self reported the offense to the Government.

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

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

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

The high fine level and mitigation approach is
particularly unfair to smaller organizations because they are not in a position to take advantage of the mitigation factors. The example he gives of an innocent partner who has to share in the fines resulting from his guilty brother’s crime graphically illustrates the problem which smaller organizations may face.

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

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

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

We certainly do encourage reporting of criminal
conduct. We don't have any specific guarantee that there
will not be retribution, but certainly we have never imposed
any and never would consider to impose any and we would plan
to make that clear within our organization.

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

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

So I think it's really, really a worthwhile
proposal.
CHAIRMAN WILKINS: Thank you very much.

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

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

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

And my concern was that there could--

CHAIRMAN WILKINS: That's the starting point.

MR. LANGSDORF: My concern was that instead of taking—that these could be unusual cases and I don't have any idea what the facts were in those cases at all, but that you could have the most aggravated case of the largest corporation, take that as the starting point and impose an entirely different case on a smaller corporation. That was my concern.
CHAIRMAN WILKINS: It is a concern. There has got to be some rationale unattending your decisions.

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

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

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

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

MR. LANGSDORF: I think putting so much emphasis on self-reporting is—I think if a crime—if it is very clear that a crime is a committed and there is no doubt about it, I think most responsible corporations would self report and I think that the problem is that there are many times when it's
impossible to determine whether a crime has actually been committed and as a result of putting that requirement this would then deny any credit at all for the compliance program and I think that would be a mistake.

CHAIRMAN WILKINS: Thank you.
Any questions to my right?

COMMISSIONER MacKINNON: You are presently associated with ITT?

MR. LANGSDORF: Yes, I am.

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

How many corporations or divisions do they presently operate?

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

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

MR. LANGSDORF: ITT Sheraton Corporation, that's
the hotel business, Hartford Fire Insurance Company, a major
insurance company, ITT Financial Corporation, ITT Ranier,
which is in the wood pulp business. We have a major defense-

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

MR. LANGSDORF: Well, there is--

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

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

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

COMMISSIONER MacKINNON: And who enforces that?

You? Is there some vice president? Are you a vice presi-
dent?

MR. LANGSDORF: I'm not a vice president, but I
report to the chief compliance officer of the corporation who
is a vice president and if there is a violation it is
enforced by him and by his superior, the general counsel of
the corporation or by the board.

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

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

COMMISSIONER MacKINNON: By a resolution?

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

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

MR. LANGSDORF: Yes.

COMMISSIONER MacKINNON: And that’s directed
primarily at antitrust?

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

COMMISSIONER MacKINNON: For all compliance, but
your biggest problem you think is antitrust?

MR. LANGSDORF: I don't think so. No, not necessarily.

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

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

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

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

COMMISSIONER MacKINNON: Do you look for violations? Do you think you're going to have violations? Or just the--

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

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

MR. LANGSDORF: Violations, yes.

COMMISSIONER MacKINNON: And what happened to them?

MR. LANGSDORF: Well, generally the employees are
dismissed. That certainly has been true in a recent crime in
the defense area, yes. There have been major dismissals.

COMMISSIONER MacKINNON: Were there some prosecu-
tions?

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

COMMISSIONER MacKINNON: But you do have a central
enforcer?

MR. LANGSDORF: Yes.

COMMISSIONER MacKINNON: Thank you.

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

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

How many points do you think over time will be the
heartland mitigation score?
MR. LANGSDORF: Well, I don’t know. I think that it depends on whether certain modifications are made. I’m very concerned with the present draft because it seems to restrict application of mitigation points to those circumstances where the company self reports the--I really don’t know. I cannot answer your question.

I think that, as I indicated before, if an effective compliance program is made an independent factor, I think that every responsible corporation would adopt one and that will--I think most companies will qualify for that credit.

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

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

COMMISSIONER MALONEY: To the extent that you think compliance program would be initiated, that would get you three; correct?
MR. LANGSDORF: Yes.

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

MR. LANGSDORF: Yes, I think so.

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

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

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

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

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

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

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

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

COMMISSIONER MALONEY: Thank you, Mr. Chairman.

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

MR. LANGSDORF: Absolutely.

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

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

CHAIRMAN WILKINS: Questions to my left anyone?

Well, thank you again.

MR. LANGSDORF: Thank you very much.

CHAIRMAN WILKINS: We appreciate your testimony, your written submission and we look forward to continuing to work with you in this area.
Our next witness is Samuel J. Buffone. Mr. Buffone is a partner with Asner, Jenkins, Myer, and Buffone. He is the chairman of a practitioner's group of attorneys advising the Sentencing Commission and he's here today representing the American Bar Association.

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

STATEMENT OF MR. BUFFONE

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

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

I would like, however, to comment on several areas that have not been addressed by other witnesses. The first is to, again, as I did the last time I appeared, commend the Commission for the process by which it has considered the
difficult question of organizational sanctions. We at the American Bar Association are deeply appreciative of the openness of the Commission’s process, your willingness to share your work product, solicit viewpoints from diverse groups who have an interest in this process, and to share your thinking on an ongoing basis.

We would like to urge the Commission to learn both what the benefits and the detriments of that process have been to your deliberative process. I think there is much that can be learned from it, both positive and negative in your consideration of individual guidelines. And we would hope that some of the more positive things that you’ve learned from this process that you have had the leisure that was not granted to you by the statutory schedule and individual guidelines to engage in a more extensive deliberative process, and we would hope that you could learn from that some things that could be carried over to your consideration of the coming rounds of amendments to the individual guidelines.

Turning to the organizational sanctions themselves, as I’ve testified in the past, the ABA’s position is dictated by our criminal justice standard. Those criminal justice
standards recommend broadly formulated guidelines that would grant to sentencing court judges a wide degree of discretion to draw upon a range of sanctions, not only the sanction of presumptively high fines but a mix of other sanctions to determine what is the most effective way to accomplish the multiple purposes of organizational sentencing.

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

We urge the Commission to carefully consider the problems associated with smaller organizational defendants.
I think there is a risk here that because of the understandable interest of the larger organization and the effects that these Guidelines might have upon them, to consider too extensively how these Guidelines are going to be applied to the large case -- to the big offender -- and to not consider or devote the same degree of consideration to the more typical case that's going to come before the federal court involving smaller corporate offenders.

There is much that we favor and it is included in our written comments about the Commission's draft proposal. We think that the provision for departure indicate a willingness on the Commission's part to consider the kind of suggestions we've made in the past. The departure language contained in the draft proposal is exactly the sort of thing that we had in mind for policy statements of broadly formulated guidelines. That's directing district court judges of broad types of factors that they should consider in sentencing for upward or downward departure we think could easily be converted into policy statements if that list were extended giving direction from the Commission of the kinds of factors that you believe a judge should consider and, where appropriate, the kind of weight that should be given to them.
I'd like to move on to two areas that we think should be given particular attention. The first is what I call the corporate death penalty -- the provisions of Guideline 8c-1.1 that would require a fine set at a level sufficient to divest the corporation of all of its assets. We think that there are significant problems raised by that guideline. The first is the potential Eighth Amendment problem for excessive fines. In the area of forfeiture, specifically RICO forfeiture, several courts of appeal have looked at the potential disproportionality between a fine and the underlying criminal conduct and have found that sufficient disproportionality would violate the Eighth Amendment. That's the Ninth Circuit in the Buscher case and the Second Circuit in the Porchelli case.

COMMISSIONER MACKINNON: What's the citation?

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

COMMISSIONER MACKINNON: What's the name of it?

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

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


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

Our third problem is the language, primarily for criminal purpose or principally by criminal means has two dangers inherent in it. The first is that it’s going to require district court to engage in fact finding that may be very difficult. It’s going to require courts to look at a range of uncharged conduct potentially to see whether or not this corporation has been run primarily for criminal means or by criminal purposes.
Second, that language draws with it the potential for a determination that it is unconstitutionally vague. Again, looking to the RICO area which is most analogous, Justice Scalia, speaking on behalf of four other members of the Supreme Court in the HJ case, found that the pattern language of the RICO statutes potentially subjected it to a constitutional challenge for being unconstitutionally vague. Similar problems are inherent in this language.

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

The innocent brother may well not have known of any
of this illegal conduct until it came to the attention of law
enforcement authorities. If the corporation is charged and
tried and convicted of fraud related federal offenses, I
tried to lay out in my testimony how many of the mitigating
factors that would normally reduce the high fine level would
not be available to that kind of a corporation and would wind
up visiting an extremely harsh fine penalty on the innocent
owner and the corporation because of the involvement of one
of its shareholders.

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

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

MR. BUFFONE: Again, I tried to draw on a hypothet-
ical, Judge Wilkins, to show that the guilty brother in this
case may well have paid his loan sharker or his bookie and
not have those assets to be reached. Now my reading of the
Commission's proposal is that you would then look to the
remaining assets of the corporation to satisfy those fines
and restitutions.
COMMISSIONER MALONEY: How would the offset provision which is contained in both drafts apply to your hypothetical? I'm sorry, how would the offset provision on closely held corporations apply to the hypothetical that you have in your testimony?

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

COMMISSIONER MALONEY: How large was this corporation in your hypothetical?

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

COMMISSIONER MALONEY: How many people?

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

COMMISSIONER MALONEY: No further questions.

COMMISSIONER MACKINNON: You spoke of policy statement. I suppose you're talking like most of the others
are on non-binding policy statements.

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

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

So I could see guidelines -- guidelines that would move towards specificity in the future but would contemplate
flexible application and departures during their initial implication.

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

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

COMMISSIONER MACKINNON: I thought you said four?

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

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

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

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

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

MR. BUFFONE: One year ago.
COMMISSIONER WILKINS: Thank you.

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

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

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

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

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

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

COMMISSIONER MAZZONE: Thank you.

COMMISSIONER WILKINS: Thank you very much. Our next witness is Charles A. Harff, Vice President, Senior Counsel and Secretary of Rockwell International. Delighted to have you with this.
STATEMENT OF MR. HARFF

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

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

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

But I think the essential point that has to be
recognized is that no program no matter how vigorously
pursued and how diligently applied is going to ensure that
you’re going to have complete compliance. You’re not. When
you have a large corporation of 100,000 or more employees,
some employees -- and another witness this morning mentioned
it -- there’s always one, in fact there are more than one,
who for their own motive either choose to ignore or will not
do what the corporation mandates.

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

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

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

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

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

No matter how committed a large organization is, as I said, I think you’re going to find some employees doing
some things that are basically wrong, they’re criminal. And I would urge that the way to deal with that is to prosecute those individuals and every time that happens I think you send a message that reaffirms the corporate message which we try very, very hard and effectively to about 99.-something percent to transmit to the employees. But individual prosecution gets that message much more effectively than significant fines and penalties of a corporate level.

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

For example, the premium that’s going on on reporting violations I think has to be put in a more detailed form. I think some of the witnesses this morning have already touched on the fact that beauty is in the eye of the beholder. Frequently we will investigate very thoroughly a particular matter. We will conclude that no crime was committed. But that does not necessarily preclude a prosecu-
tor from believing that those same facts come out differently.

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

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

I think the issue of cooperation, again, cooperation
with the government's investigation which is another mitigat-
ing factor needs to be put in a context that does make it
consistent with the corporation's right to assert defenses
and legal privileges and to seek a trial. We have had direct
experience with prosecutors who will basically say unless you
agree at the outset that you will not withhold anything,
privilege or product, interview notes, whatever, you will not be deemed to be cooperating. I think that’s probably going further than the Commission should encourage in the factors set forth.

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

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

Let me just briefly touch on a couple of other points. I am troubled by the concept of accepting responsibility. I think perhaps it’s a matter of being separated by a common language. I think if accepting
responsibility means that the corporation will redress the wrong, if it means that the corporation will emphatically deal with a program that will avoid that in the future, if it means that you'll discharge or reprimand or otherwise deal with the particular people who caused the problem, we would agree with that 100 percent.

The problem is I think it has to be said in terms of recognizing responsibility rather than accepting because once you accept responsibility you open up the door to the plaintiff's bar which is rather vigorous on bringing derivative suits following almost any criminal action. And you can defend effectively and properly derivative actions that contest the actions of corporate management by simply dealing with the business judgment rule. You can't require one supervisor or one auditor to sit next to each employee.

There comes a point of diminishing return.

I think if the corporation has accepted responsibility, the plaintiff can -- civil derivative action I think will undercut the business judgment rule, and I think that's a serious problem.

Second, I think more attention needs to be paid to the issue of effectiveness of programs. I think some of the
language in the proposed guidelines would suggest that if an entity has been guilty of prior similar misconduct, then the mitigation factors would not apply. And I think that's unrealistic as one looks at larger sized corporations with multiple locations, with multiple divisions and again going back to what I said at the very beginning, we will never achieve perfection in getting our message out and we work awfully hard at it.

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

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

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

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

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

MR. HARFF: Well, that may be true.

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

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

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

MR. HARFF: Well, we're really in I think 40 states. Our principal office is in California, yes.
COMMISSIONER MACKINNON: Now tell us in brief form some of the ingredients of that $5.5 million affair.

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

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

COMMISSIONER MACKINNON: What did they do?

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

They shipped some electronic boxes to us which didn't work, and we said you have to take them back, we won't
accept them, they don't work. They said that's not -- we'll be glad to fix them, but you have no warranty. Well, we said now wait a minute, warranty -- that's a whole different issue. If it's defective when you deliver it, you have the obligatio to fix it. Well, they took them back and they fixed them and they billed us $250,000 for fixing them and we didn't pay it.

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

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

And the conversation went, "If you'll pay us on one side we'll take that contract at $42 million even though it's outrageously low -- I'll give you that contract for $42 million even though it's outrageously low if we never hear
from you again about that $250,000 claim.

The other fellow said, well, okay. In his mind, he thought he was getting the $250,000 in the price. In our man’s mind, he didn’t think he was paying it. Under the government contract provision, you’ve got to certify cost and pricing data, and we did not disclose that conversation.

The government took the position that in the second contract we had failed to disclose that we could have gotten a $250,000 lower price if we had paid the disputed amount in the other one. And maybe we could have.

COMMISSIONER MACKINNON: What was the indictment offense?

MR. HARFF: A false claim and a false statement.

We had certified --

COMMISSIONER MACKINNON: And how did they get the thing up to $5.5 million?

MR. HARFF: Well, before I answer that let me just tell you that the government -- once we got into this -- and by the way, it’s important to note, my staff investigated this for a long time -- our people did not tell us what they really had been doing; it took a long time and they really never did admit that they had really traded anything here.
COMMISSIONER MACKINNON: Who was the top man in that particular negotiation that was in charged with the maximum authority in the corporation?

MR. HARFF: Well, that would be the contract manager for that particular $1.2 billion.

COMMISSIONER MACKINNON: And what was his position?

MR. HARFF: It would be a -- he was really a manager of a contract, any particular division; he was not --

COMMISSIONER MACKINNON: And what obligations would he have and what would be the range of his managerial authority?

MR. HARFF: He would have delegated authority certainly to deal with subcontracts at the --

COMMISSIONER MACKINNON: And how much money?

MR. HARFF: Probably up to $50 million, $100 million -- something in that range.

COMMISSIONER MACKINNON: That's all I need. Thank you.

MR. HARFF: But let me answer your question on the fine because the individual whom we fired was tried and acquitted.
COMMISSIONER MACKINNON: You what?

MR. HARFF: The individual who had been handling this was indicted, was tried and acquitted.

COMMISSIONER MACKINNON: And acquitted?

MR. HARFF: And acquitted. The judge said, "Well, if the corporate defender before me were making $100,000, I think a $500,000 fine would be appropriate. But since this corporation makes over a billion dollars, I'm going to multiple that $500,000 to make the difference between $100,000 and a billion." And we got to $5 million.

COMMISSIONER MACKINNON: The $5.5 million was a fine?

MR. HARFF: Correct.

COMMISSIONER MACKINNON: In the Southern District of California or was it the Central District?

MR. HARFF: The Central District. I might add that it was a conditional plea because in that case we believed we had reported voluntarily and the government had not followed the procedures that it committed to on voluntary disclosure. And we now have an appeal pending in the Ninth Circuit to set that aside.

COMMISSIONER MACKINNON: Who was the judge?

COMMISSIONER MACKINNON: Thank you.

COMMISSIONER WILKINS: So you got $250,000 false claim and you got a $5.5 million fine. So you ought to be urging us to get these Guidelines out there as soon as we can.

COMMISSIONER MALONEY: Thank you, Judge. For what reasons did the company institute the compliance programs that they have on board? Could you outline --MR. HARFF:

Well, I think the model, of course, we've had for many, many years. We certainly strengthened them with the initiatives that the Defense Department some six or seven years ago, looking towards responsibility of government contractors.

So we have significantly extended them, and we've added a great deal of training time and good deal more oversight.

COMMISSIONER MALONEY: So it was clearly for reasons unrelated to the deliberations of --

MR. HARFF: Absolutely.

COMMISSIONER MALONEY: Okay. Would you said that it's a fair statement that other corporations are similarly motivated?

MR. HARFF: Well, certainly any corporation having
any significant business with the United States Department has been under considerable -- I was going to say pressure and that's the wrong word -- but considerable inducement to adopt stronger and stronger programs at self-policing.

In doing business with an area where there are just legions of applicable requirements.

COMMISSIONER MACKINNON: Was this man fired or did you --

MR. HARFF: Absolutely. Because he should have known better.

COMMISSIONER NAGEL: Let me ask you if you could provide us with any of the documents you have from that case as well as the cite.

MR. HARFF: I'd be happy to.

COMMISSIONER NAGEL: Great. Thank you.

COMMISSIONER WILKINS: Well, thank you very much, Mr. Harff. We appreciate your testimony and I find it very helpful to us today. Thank you. We'll recess at this time until two o'clock. We'll reconvene at two o'clock sharp.

[Recess.]
AFTERNOON SESSION

2:00 P.M.

COMMISSIONER WILKINS: Let's come to order, please. We'll get started with the afternoon session. Our first witness is James F. Rill. Mr. Rill is Assistant Attorney General, Antitrust Division, Department of Justice. Accompanying Mr. Rill is Mr. Neal Roberts. We're delighted to have both of you with us, and we'd be happy to hear from you at this time.
STATEMENT OF MR. RILL

MR. RILL: Thank you very much, Mr. Chairman. I deeply appreciate the opportunity to be here today and present the views of the Department on that particular aspect of the Draft Sentencing Guidelines for Organizations that vitally concerns the Antitrust Division. That is, of course, the possible elimination of the current guidelines for determining antitrust fines for organizations in favor of a guideline based on offense levels or, in the alternative, demonstrated loss or gain.

Simply put, this change would very likely substantially reduce antitrust sanctions against organizations to a small fraction of what they are today and thereby seriously undermine the efforts of the Department, Congress and the Commission effectively to deter this particular category of white collar crime.

The Department of Justice strongly recommends retention of the current antitrust fine guideline for organizations. The Department has worked closely with the Commission to develop a comprehensive sentencing guideline for antitrust offenses. The current guideline establishes sanctions for organizational defendants that dovetail with
the individual sanctions, particularly incarceration, to provide an effective deterrent.

Antitrust offenses were given such careful attention for good reason. Antitrust violations comprise between one-fourth and one-third of all federal offenses by organizations. They typically occur in a very complex market setting and very often they are extremely difficult to detect. The antitrust guideline provides a combination of individual and organizational sanctions that are relatively easy to compute, are proportional to the harm caused by the violation and operate together to punish and deter antitrust crime.

The fine component of the antitrust sanctions do not depend on offense level or on demonstrated, that is, established amount of injury. Instead, they are a function of the volume of commerce of the defendant that was tainted by the antitrust conspiracy. Volume of commerce serves as a useful proxy for the harm caused by an antitrust defense because, as this Commission has explicitly recognized, actual antitrust overcharges are costly and time consuming to calculate and present.

We are only now beginning to have substantial experience with the current antitrust guideline, and its
overall approach seems to us to be very sound. However, even
though only a very small number of organizations have been
sentenced under the Guidelines so far, the draft proposal
would change the entire approach of the Guidelines to
antitrust fines for organizations so as significantly to
increase the burden of imposing organizational sanctions
while substantially at the same time reducing the size of the
sanctions. Neither offense level or demonstrated gain or
loss is a satisfactory criterion for determining antitrust
fines.

Offense levels relating to incarceration for
antitrust crimes are effectively relatively low, currently
ranging from 8 to 13. The Commission set offense levels for
antitrust violations to result in short but certain prison
sentences for antitrust offenders and in addition provided
for substantial individual and organizational fines.
Substantial fines, particularly organizational fines,
constitute a very significant aspect of the punishment and
deterrence for antitrust defenses under the current Guidelin-
es.

This carefully calibrated system of sanctions in
part reflects the Sherman Act's relatively short -- that is,
three year maximum prison term and high -- now $10 million --
maximum corporate fine and is consistent with the historic
characteristics of Sherman Act sanctions.

Because of the relatively low current offense
levels for antitrust, organizational fines cannot appropriat-
ely be based on them. The resulting fines would be too low
to provide adequate deterrence and punishment for organiza-
tional offenders.

Let's take an example. The case of a price fixing
conspiracy affecting $10 million in a corporation's sales.
Assuming for the moment that the amount of the violation
overcharge cost would not be determined without unduly
complicating the sentencing process which is a point I'll
return to in a moment. The Guideline fine range based on the
offense levels in the current draft proposal would be in the
order of $75,000 to $112,000. Such a fine would be no
penalty at all; it would be calculated as a relatively minor
cost of doing business.

Under the existing guideline, in contrast, the fine
would be on the order of $2-5 million as a function of the
volume of commerce affected by the conspiracy -- a proxy for
the harm that has been caused.
Let me return to the alternative -- basing organizational fine on demonstrated loss or gain. That, Mr. Chairman, Members of the Commission, is essentially unworkable. The extent to which an antitrust violation causes gain or loss is quite difficult to calculate and will almost always be vigorously contested by defendants in litigation. These calculations would enormously complicate the sentencing process and would require substantial expenditures of resources by the Department and by the court.

The Antitrust Division would have to provide these resources by diverting part of what we have now from important criminal and civil enforcement activities. Conversely, the volume of commerce test remains a good proxy for loss or gain in antitrust cases, particularly with respect to the objective of seeking broad scale deterrence across the entire organizational community.

In summary, the Commission's proposal for establishing guideline fine ranges simply cannot be effectively applied to antitrust violations without seriously complicating the sentencing process for antitrust offenses and, at the same time, seriously lowering the organizational fine levels for those antitrust defenses.
There is no reason to do either. The current guideline provides an appropriate organizational sanction for antitrust offenses that we believe establishes an effective antitrust deterrent. This view, I should add, is strongly supported by Congress' decision to sharply increase the Sherman Act maximum corporate fine from $1 million to $10 million per count which happened on the last day of the most recently concluded Congressional session so as to permit the fines established by the current guidelines to be imposed without the need for proof of gain or loss.

The Department of Justice, in conclusion, strongly recommends that antitrust defenses be excluded from the coverage of the provisions in the draft chapter of the sentencing guidelines on organizational sentencing that establishes guideline fine ranges based on offense level or demonstrated gain or loss.

That concludes my brief oral statement, Mr. Chairman. You have a prepared text for your review, and I would certainly be pleased to attempt to answer any questions you or the members of the Commission may have.

COMMISSIONER WILKINS: I think your position is well stated. As I understand that, in the event we were to
adopt the Justice Department’s proposed organizational
sanctions guidelines, you would still urge us to exempt from
that operation or application antitrust violations?

MR. RILL: That is the position of the Department,
Mr. Chairman. It is our view that the antitrust
organizational fine levels have been established on a
considered, rational, sound basis that are working effectively
as a deterrent to provide an effective range and an effective
level of deterrence and are relatively easy to apply given
the potential complexity of the alternative.

COMMISSIONER WILKINS: Thank you. Questions to my
right? Mr. MacKinnon?

COMMISSIONER MACKINNON: How many prosecutions of
corporations did you file last year -- antitrust violations?

MR. RILL: I’ll get you the exact number, Judge
MacKinnon, and provide it for the Commission. We had -- I’ll
give you an estimate now -- approximately 75 total cases in
the last fiscal year, approximately, I believe, 39 or 40 of
those involved corporate offenders. But I would have to
provide an exact number for the record.

COMMISSIONER MACKINNON: That’s about 10 percent of
corporate crime in America.
MR. RILL: I’ll accept that, Judge MacKinnon.

COMMISSIONER MACKINNON: Well, we get 350 cases a year generally. Okay, thanks.

COMMISSIONER NAGEL: Mr. Rill, would it be safe to say that your position is that we leave the antitrust guidelines as they are and not include it in what you call the generic draft?

MR. RILL: With respect to the organizational and individual fine levels, yes, Commissioner Nagel.

COMMISSIONER NAGEL: When we drafted those -- this was actually before you presumed your position -- you may know that we did so in consultation with the Department, with the ABA and the Antitrust Bar. I don’t know whether you have information on this, but to the extent that you do, has there been any suggestion from any of the other constituent groups that there be a change or is everyone seemingly still in agreement?

MR. RILL: I don’t know of other constituent groups. I know that the issue is under consideration in the Antitrust Bar at the present time. Having been a former chairman of the Antitrust Section, I know something of the constituency of that Section, and I suspect the level of
antitrust fine analysis would be an issue that would be somewhat closely contested in this Section.

I can only say that my own experience in the Antitrust Bar for 30 years before I took my current position substantially confirms the difficulty that would be involved in attempting to establish sanctions based on gain or loss. In private litigation, for example, where gain or loss is very much an issue, it's been my own personal experience that about 20 percent of the time and expenses is involved in the establishment of liability and about 80 percent of the time is spent in attempting to establish parameters for damage in both litigated and settled cases. I cannot overestimate from my own experience the strength and force of our conclusion that we're compelled to establish gain or loss to achieve effective sanctions it will be an enormous drain on the resources of the Department and indeed on the resources of the courts, as I'm sure those who are experienced in handling both criminal and private antitrust litigation will confirm.

COMMISSIONER NAGEL: Thank you.

COMMISSIONER WILKINS: Any other questions?

COMMISSIONER MAZZONE: I'm always interested in 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
perpetrator and the victim, and have that hotly contested
presumably by experts on either side before the court could
make any type of determination. That is frankly enormously
time consuming, and as -- since I'm not an economist I could
say with some conviction -- ecometrics is not an exact
science. We would be substantially less confident in the
result than we are with the current guideline volume of
commerce proxy that's used with a good degree of efficacy and
confidence.

COMMISSIONER MAZZONE: Having just written an
opinion which started with ecometric models for 100 days and
then discarding them at the end when I finally can, I know
exactly what you mean. But I'm interested in this proposal.
Mr. Rill, how do you see that this is done? Can you suggest
to us even language that says exempt antitrust violations or
just say Chapter 2R covers it fully and don't bother with it.
How do we do that?

MR. RILL: I think that the precise language is
readily available by the retention of, as you suggest,
Chapter 2R insofar as it relates to the fines for organiza-
tions and individuals arising from antitrust defenses and
simply to exclude those provisions from the revised general-
ized chapter that has been proposed to you, subject, of course, to revising that chapter to take care of the other departmental recommendations.

But purely for antitrust, the drafting is there. The result has been a very closely calibrated individual incarceration table and a separate organizational fine level which reflects the history under the Sherman Act of attempting to be sure that there are actually jail times served by the offenders which had not always been the case but relatively short jail times which themselves do not automatically or even in any range of principle reflect the large fines that are necessary to attempt to deter offenses by organizations.

So we have small individual incarceration periods which should under the guidelines be served of a certainty and large organizational fines which was the principal, based in part on history and on logic, underline the current antitrust organizational guidelines.

COMMISSIONER MAZZONE: Thank you.

COMMISSIONER WILKINS: Thank you very much, Mr. Rill, Mr. Roberts.

MR. RILL: Thank you.

COMMISSIONER WILKINS: You might submit to us the
language that you would propose we use so we'll know exactly
the words you would like to see if we were to adopt that, how
we cross-reference antitrust or exclude or whatever may be
the best way to do it.

MR. RILL: I'd be very pleased to do that.

COMMISSIONER WILKINS: Thank you very much. Our
next witness is Andrew L. Frey. Mr. Frey is an attorney with
Mayer, Brown & Platt in Washington, D.C. He's here represen-
ting several corporate organizations. A few years ago when
this Sentencing Commission was the target of a number of
unfounded attacks based upon the constitutionality and
challenged our very existence, we had the good fortune and
good sense to hire Mr. Frey and he was successful in defending
us. Once our lawyer and always our lawyer, although I must
tell you we did not necessarily feel compelled to follow your
sound advice. We'd be glad to hear from you.

STATEMENT OF MR. FREY

MR. FREY: Thank you. I appreciate the opportunity
to appear today. I submitted written comments, and I don't
propose to read them but I will cover the subjects that I
covered in my written comments.

COMMISSIONER MALONEY: Did you submit --

COMMISSIONER MALONEY: I noticed that too, come to think of it. What is American Technologies?

MR. FREY: Ameritech is one of the local Bell Operating telephone companies in the Midwest. These companies, I should note, are not companies that are imminently facing federal criminal prosecution of any kind or that have an immediate or direct concern in this, and they have asked me to appear on their behalf as good corporate citizens who are concerned with the important activity that the Commission is undertaking.

I don't know, Mr. Chairman, whether you'd like me to go through all my comments or as I pass from topic to topic to stop for questions with respect to the particular topic. Whichever way is better for you.

COMMISSIONER WILKINS: I'd say the best form is to go ahead and make such comments as you think appropriate, and then we'll get back into it.

MR. FREY: All right. Let me say first of all that the comments that I make are not made simply with the objective of persuading the Commission to adopt the most
lenient possible stance toward corporate crime. On the contrary, we support appropriate punishment of corporate crime as much as anyone else does.

But we are concerned that appropriate punishment must involve a rational and fair framework and it's not just a matter of piling on to satisfy some public sense that may not have the benefit of the thought and sophistication that the Commission is able to bring to the problem.

I think the most important consideration and in this respect I think by and large the Commission’s approach recognizes this is deterrence of crime when you’re talking about organizational sanctions. Obviously, incapacitation if we’re talking about publicly held corporations at least is not an objective and retribution as well, I think, is not a very significant objective because the impact of the large corporate fine falls primarily on the shareholders, the employees and the customers of the organization that is being fined, most of whom or all of whom ordinarily will have done nothing to deserve retribution.

Now that is not to say that corporations should not be punished for crime because the punishment does, if appropriate and proportioned, bring about a desired degree of
compliance with the law by corporations.

Now I'm sorry I couldn't be here this morning. I'm sure you've heard from others the plea to defer the adoption of fining guidelines. I also subscribe to that view because I believe the base of experience that the Commission has at this point to proceed with fining guidelines is inadequate and the risk of unjust, unforeseen results is unduly great.

At the same time, I think what the Commission is now doing is a very useful and important part of the process of coming to the goal of rational corporate sentencing. Individual judges sentencing in individual cases do not have the benefit of a system that comes to my mind in thinking about what I believe is needed in this area is interactive dialogue. That is, I think that the Commission still has much to learn from individual judges imposing sentences in individual cases, and I think conversely that judges have much to learn from the Commission setting forth the systematic set of views about the issues that are involved in corporate sentencing.

It seems to me that policy statements are the ideal mechanism for accomplishing this. Alternatively, one possibility the Commission may wish to consider would be to
agree upon guidelines at this point but to delay the promulgation of the guidelines for a period of three or four years during which the guidelines would function as policy statements but they would then spring into effect unless the Commission determined affirmatively to make changes or to withhold their development.

Now let me turn to the fine tables briefly. In my statement I have taken the position to which I still adhere since Monday -- I haven't changed my mind, but the upperbound and the average approach is not a logical approach. And I guess I start from what may be a slightly different premise from the staff study of this on the August 21st principles. It seems to me that the maximum fine prescribed by statute, let's say $500,000 for the typical felony, has to be taken by the Commission to represent ordinarily the punishment that's appropriate for the most serious instance of the offense.

Less serious instances deserve lesser punishments. The problem I have with the upperbound or even the average approach is that it leaves very little room for discretion that in too large a class of cases the statutory maximum will be the guideline's minimum. That goes I think in spades for the Department of Justice Guidelines which I view as a
concealed effort to make loss, at least in the class of offenses that involve monetary crime, the sole factor in determining the punishment.

In any event, I think that the scaling should be such that the maximum statutory punishment is not the Guideline's minimum and indeed that there is room for upward departures, that is, that the Commission's scale, it seems to me, should be a scale -- and I understand that there are many levels of offenses from level 5 to level 37, let's say, leaving aside the misdemeanor and the nuclear offense -- and you have to deal with that.

I make the point in my statement that the selection of level 16 as the touchstone for the fine table reaching the maximum statutory fine is not necessarily consistent with the way the Commission has treated the maximum term of imprisonment for fraud offenses which doesn't kick in until about level 19 to 22 depending on the criminal history of the offender.

I have one final point that I wanted to make about the fine table. Whatever the numbers are that are in it, I think that the approach that the Commission has now taken has an undue tendency to mislead the public into thinking that the
Commission is being more lenient than it actually is because people will look at the fine table -- they will assume that that is the fine that the Commission has prescribed for the offense at that level if it's unmitigated. Yet, the reality is that the fine prescribed is two to three times that much. Therefore, I think as a matter of sort of truth in regulations, it would be better to adopt a figure in the table which represents the range of penalties that the judge is to impose for an unmitigated version or the most serious version of the offense, leaving aside factors that cause an out of guidelines sentence.

Now let me turn to the question of mitigation factors, and I think this is one of the most complicated questions and obviously the draft that the Commission has put out now reflects a lot of thought and effort and a great deal of refinement on this subject compared to the previous draft. And I think there's a lot that's good in it, but we do have some problems with it.

One type of problem comes with the weighing of the various elements, and I think it's useful to think about the factors that define the gravity of an offense in three categories: the pre-offense conduct of the company which
would include things like compliance programs; the offense conduct itself; and the post-offense conduct which involves voluntary disclosure, cooperation with the investigation and those elements.

I have and time doesn’t permit now a lot of questions about the way the particular factors have been defined and whether they’re defined with sufficient clarity in the current guidelines. When we submit our more extended statements in January, we’ll try to pinpoint what we view as the problems associated with the language. With respect to some of these factors, our view is that the most important factor in determining the gravity of an offense other than the offense level itself is the extent of management involvement in the commission of an offense. And that factor is given only two out of nine points of weight in the current proposal. We would give it the most weight.

Let me say also that I think the way the current mitigating factors are defined does not begin to do justice to the complexity of the real world. There are too many shades of gray between cooperation and no cooperation, between an offense that represents the policy of a company — let’s say, the bribing of foreign officials that’s been
approved by the board of directors -- to an offense that involves some culpable involvement by company management that does not reflect company policy or top company officials down to the offense that is committed by the low level person, and I might point out that that is the only circumstance in which you propose to give mitigation and that is a circumstance in which under the Restatement of Torts punitive damages could not even be imposed on a company. So obviously the Restatement of the American Law Institute didn’t even think any punishment was appropriate for that class of case.

What I’m suggesting, and I’ll come to how I would scale that in a minute, is somewhat more flexibility in being able to have intermediate stopping points between the most culpable and the least culpable conduct with respect to each of these components. I’ve noted in my statement that in terms of the adequacy of definition of terms there are terms like full cooperation, becoming aware of an offense and various other terms that the meaning of which will be the subject of a great deal of controversy in the courts if the Commission is not able to define it more closely.

I think you’ve heard today and I will not spend too much time on it -- others will have spoken to it -- that
voluntary disclosure is a factor that in our view is given
too much weight in the present proposal. It's given too much
weight because of several things. One is that in many
instances the best intention and best managed company will
not learn of the occurrence of the offense before government
investigation has begun. Whether a company learns of it in
time to avail itself of this credit or mitigation factor is a
matter of luck, and punishment should not turn significantly
on luck.

Secondly, I think what underlies the treatment of
voluntary disclosure is a questionable assumption that what
corporate counsel, let's say, should do when he or she learns
of some possible irregularity is immediately run to the
United States Attorney and tell them about it before conduct-
ing their own internal investigation and determining what the
truth of the matters are. That is not, I believe, a respon-
sible or proper way for a lawyer to act with respect to a
client and that includes corporate counsel with respect to a
corporate client. I think you'll hear more about that later
this afternoon.

We've also noted that we don't believe that
compliance programs and voluntary disclosure should be linked
in the way the guidelines currently link them. They are two separate factors. They each deserve some credit if they exist. I'm not saying voluntary disclosure gets no credit, but we for reasons stated in my statement don't think they should be linked together.

Now, in the more fundamental problem, leaving aside the definition and the weighing of the different elements, the Justice Department I think has proposed that the fine table figure be a median or middle figure which could be aggravated up or mitigated down. The Commission has proposed starting from a top figure and mitigating down.

I'm actually proposing a different approach from either of those approaches, but I think I would have to agree more with -- if that was the choice from between those two, more with the Justice Department's approach than with the Commission's approach. The reason I do so is because these various factors properly put the burden on a different party to come forward and to persuade the court of their presence or absence.

And one of the things that the Commission needs to think about in formulating the factors is who has the burden of coming forward and the burden of persuasion with respect to
proving the existence or non-existence of a factor. On some it should be placed on the prosecution properly; on others, it should properly be placed on the defendant to earn mitigation.

Now, that's something -- that's a subject to think about. I don't have specific concrete suggestions to make now. I think the Justice Department's approach while I prefer it in theory because it only moves one or two levels up or down from the offense level, is quite inadequate to take into account the differences in corporate culpability between the commission of an offense with the presence or absence of various mitigating and aggravating circumstances.

In that respect, I think the Commission which would have greater flexibility and give what I think works out to larger credits or larger aggravation, depending on how you view it, that is a more appropriate, more proportioned response to corporate crime.

What I have proposed instead of thinking about aggravating and mitigating circumstances is to think about scaling the gravity of the offense, that is, to identify the pre-offense, the offense conduct and the post-offense elements and to assign points -- I suggested on a scale of
nine, you might assign three to pre-offense, four to offense
conduct and two to post-offense conduct. But whatever the
points may be, with some kind of directions to the court on
how to scale. If it's zero to four for offense conduct,
recognize that there are intermediate steps. It shouldn't be
zero or four. The judge should be able to have one or two or
three depending on the degree of high level management
involvement or other factors that the Commission may identify
as appropriate.

The same is true for these other factors. The
result would be a scaling and when you have your scaled
number after the judge had gone through this process, he
would then apply that to the fine table figure, let's say, if
that were being used in much the same way that the Commission
proposes to do it now.

Let me finally say a couple of words about loss as
a basis for the fine. Again, here I see in the Commission's
latest proposal a far more sophisticated appreciation of the
difficulties that are associated with using loss as a basis
for a fine than I think the earlier proposals manifested, and
I think that's good to see. I continue to believe, and I
think most people on the Commission have heard me express
this view before, not that loss is never appropriate to use as a basis for punishment because I think there are times that it is, but that the concept of the alternative fine statute was to give the court a discretion to make a judgment that it is very hard for the Commission to capture in words in a guideline.

For that reason, I prefer the third of the options set forth which is to leave to the discretion of the court whether to use loss or gain as a factor. Now I would not leave that to the unguided discretion of the court. That is, it seems to me, as I said in the beginning, that the Commission can say some things to the courts about how they ought to go about making the choice whether to use the alternative fine statute that would be very helpful. Maybe it should say them in the form of policy statements; maybe it should say them in the form of guidelines. So I think it is important for the Commission to continue to think about when loss is appropriate as a factor or when gain, which I more readily see as being an appropriate sentencing factor than loss, when gain is appropriate.

Finally with regard to loss, if I could capture what I believe to be the proper place for loss, let me say
first of all that if you have an offense where the loss is
substantially greater than the gain to the offender, I view
that as a warning sign that the use of loss is questionable.
Now I don’t mean necessarily actual gain. I would include
potential gain anticipated by the offender at the time of the
commission of the offense.

That’s a warning sign. Conversely, where you have
an offense that is committed not directly for the purpose of
gain but out of some malicious purpose for the purpose of
inflicting loss -- and the loss inflicted is a foreseeable
and intended outcome of the offense and greater than the fine
table would call for, I think that would be the paradigm or
prime example of when loss is appropriate to use.

So I would not rule out loss altogether as the
Justice Department, I think although I didn’t hear their
testimony this morning but from what I understand of what
they said suggests can be done, there are circumstances where
it should be used. It’s there in the statute because
Congress intended that in the special cases where the normal
fine is inappropriate that that be available.

However, I think there should be no presumption in
favor of use of loss or gain, and I think the Commission
should spend a little time thinking about the specific class of probably small unusual class of cases in which loss is the best criterion.

So that completes my remarks. I'm delighted if there are any questions.

COMMISSIONER WILKINS: On the mitigating scale of one to nine, you suggest we should add to high level management not being involved. I think you said that. Where would you take away and give it that weight? Which other factors would you use in order to get --

MR. FREY: I recognize that I am squeezing a balloon or that this is some game and I would take away from the credit given for post-offense conduct. I think that is generally true in the individual guidelines that the main thing is the crime itself. Post-offense conduct counts; it should count. But I think the current proposal puts too much weight on post-offense conduct.

So I guess I would take from there and give to the offense conduct --

COMMISSIONER WILKINS: Take from cooperation and acceptance of responsibility, one of those areas.

MR. FREY: Right, particularly voluntary disclosure.
COMMISSIONER WILKINS: When you submit your additional thoughts to us, for example, becoming aware of is a phrase that gives you some pause. Tell us what words you would use for that.

MR. FREY: I don't have the benefit of having seven people on staff to think about that, but to the extent something better occurs to me, I will certainly propose it.

COMMISSIONER WILKINS: And your additional thoughts on how to define and restrict of loss.

MR. FREY: You can count on --

COMMISSIONER WILKINS: It's a struggle with that. It's a tough issue. Give us any thoughts along those lines as well. Questions to my right.

COMMISSIONER MALONEY: Mr. Frey, I've been on this issue now for almost a year, and I must say I've read your submittals I think twice now. And while I don't always agree with what you submit, I can say I think without fear of contradiction that your material is well thought out, well presented and is extremely helpful in trying to investigate these issues that the Commission is struggling with.

I am intrigued at least for purposes of discussion anyway about dividing the mitigation and pre-offense, offense
conduct and post-offense. And you delineate on page 11 of your statement a division of those factors. Would you group those together and allow, assuming that one or more of them were present, would you allow the judge on his own to -- would you assign specific values inside the category for particular items, or is it your alternative and perhaps this is too specific in terms of your total thought process of this, but would you group them together and say, "Judge, assign a factor," or would you say for compliance, assign one; for past criminal history, one, etc.?

MR. FREY: I can answer that with a broad brush. I would not try to tell the judge specifically, but this is of a piece with my general view that you ought to be issuing policy statements and not guidelines. So you'll have to perhaps discount it for that. I believe that this is one example of an area where the Commission doesn't know enough to be comfortable that it's anticipated the problems and that it will lay down a set of rules that in actual application will produce fair results. So I guess what I would say is here are the factors to consider, judge, in looking -- you know, if it's four points for offense conduct, here's what we mean, here are the things that are relevant.
Let's take post-offense conduct where you have cooperation and you have voluntary disclosure of the offense. And maybe -- I don't mean to be wedded to nine points or any particular number. That can be adjusted. But I think I would tell a judge that it should be weighted at zero if you find that there was voluntary disclosure of the offense before the investigation began, full cooperation with the investigation and so on. Then the gravity of the post-offense conduct would be zero on the scaling.

Conversely, if you find that there was no disclosure, that there was unreasonable interference with the government's investigation and here you have to be sensitive to the fact -- many of us are lawyers -- that the duty of a lawyer is to assert his client's rights. And you have to be careful in drawing the line between punishing the company for defending itself appropriately against criminal charges that it may not be persuaded are warranted and obstructing -- by that I don't mean criminally obstructing -- but let's say unreasonably interfering. A degree of intransigence, an unreasonable lack of cooperation that suggests an obstructionist attitude.

Now obviously along this spectrum is a variety of
points, and I think it's best to leave to the judge with the
kind of guidance I'm talking about to scale it.

COMMISSIONER MALONEY: Given the Commission's draft
and the mitigation system that's there, based on your
experience in representing corporate clients, do you have a
notion of what the heartland, if you will, mitigation scale
would be for a corporation who found itself in front of the
federal district judge for sentencing?

MR. FREY: I have to be honest to say that I have a
lot less experience even than what the Commission has been
able to -- I don't personally have experience that would
enable me to tell you that. The fact that I don't doesn't
mean that nobody would; I just don't.

COMMISSIONER MALONEY: Thank you, Mr. Chairman.

COMMISSIONER MACKINNON: Questions? How would you
describe "management"?

MR. FREY: Well, this is why, I guess -- one of the
problems that I had and I noted in my -- you'll see -- you
can see that I have a few notes in red ink on the page that
deals with this. I don't know what any person who held a
policy setting or legal compliance position means. I think
those terms would need to be defined. In my concept there is
management and there is management -- there's the board of
directors, there's the chief executive officer; there are the
senior vice presidents of a company -- the people who set the
company's policy to make the decisions. Their culpable
involvement in an offense is the most serious.

Then there's mid-level management, and under the
Restatement standard for punitive damages, the punitive
damages can be inflicted for even supervisory personnel
misconduct. And then there's the guy, the broker's rep who
engages in churning a customer's account who's at the bottom
of the ladder. And so I resist defining management in any
rigid way.

COMMISSIONER MACKINNON: You would let it go just
as management, the exercise of public discretionary corporate
authority?

MR. FREY: I think one way to look at it is when
you've identified who the wrongdoers are in the corporation,
ask yourself how much power and responsibility those people
exercise and you measure in a significant way the scope of
the harm that they are capable of causing through criminal
conduct. Obviously, the higher up in the corporation
somebody is, the more harm he or she is capable of causing
because the more power he or she exercises.

COMMISSIONER MACKINNON: Well, sometimes those people down below got a lot more exercise than some of these vice presidents sitting up there behind a desk and not doing a lot.

MR. FREY: When you talk about a corporation -- after all, you know, everybody says corporations can only commit crimes through individuals. That's obviously true -- they can only do anything through an individual. But as you rise up in the ladder of corporate responsibility, it becomes more appropriate to talk about the action as truly being the action of the corporation in my estimation.

The board of directors acts for the corporation exercising the fullest powers. The fellow down at the bottom who is phoning the time records on a government contract is doing something that shouldn't be done and perhaps the corporation should be held responsible. But it is not the same thing is --

COMMISSIONER MACKINNON: Well, he is exercising more grubby corporate power than the vice president sitting up there who doesn't know what he's doing from day to day.

MR. FREY: With all respect, Judge MacKinnon, I
can't agree with that because if the vice president in charge of government contracting tells people to falsify their hours, then many people will falsify their hours and the scope of the offense will be larger.

If an individual or somebody in some unit does it, the scope of the conduct will be smaller.

COMMISSIONER MACKINNON: But if the vice president doesn't check on that and some person down below wants to falsify something and make his particular operation look more profitable, he is the one that is responsible and is actually putting the corporation in a bind and that is the typical case -- that is a typical case that I've prosecuted.

MR. FREY: Well, nobody would question that the individual should be prosecuted in that situation. The question is whether (a) it's appropriate to prosecute the corporation and I believe that most prosecutors will refrain from prosecuting the company if they're persuaded that the culpable conduct is only at the lowest levels of the company.

COMMISSIONER MACKINNON: But don't you think that the corporation ought to be prosecuted if they let a person in middle management function in a corporate capacity and exercise corporate discretion without any supervision from
some vice president?

MR. FREY: That's a difficult question for me to answer in the abstract. I don't say they shouldn't. I do say that the crime is not failing to exercise adequate supervision. If that's the crime, then obviously the corporation should be prosecuted.

COMMISSIONER MACKINNON: But the fact that they acted with corporate authority delegated.

MR. FREY: I understand that as a matter of federal criminal law the corporation is subject to prosecution and punishment. We're talking here about the question of the exercise of either prosecutorial discretion or punishment discretion, and therefore when it comes to -- as far as you're concerned, the decision has been made to prosecute, the corporation has been convicted. You're now trying to determine how much punishment is appropriate.

I had a conversation with relation to the Exxon Valdez case in which somebody was saying, well, they didn't double hull their boats, so isn't that an appropriate factor to take into account and punishment them, to which my answer is it's not a crime not to have double hull boats, and there's something seriously wrong with punishing people
primarily on the basis of doing something that's totally legal.

COMMISSIONER MacKINNON: On page 8 of your prepared remark on cooperation you say that a similar problem arises under the mitigating factor for full cooperation which is not adequately defined.

How would you define full cooperation?

MR. FREY: I'll have to admit that it's easier for me to tell you that it's not adequately defined than it is for me to tell you how to define it.

COMMISSIONER MacKINNON: Well, don't you think that full cooperation pretty well expresses the thought.

MR. FREY: Well, what it leaves out is useful but less than full cooperation, for example. I don't think it--I think that Judge Mazzone, when he had a case before him would be able to tell you--it's a little bit like what Justice Stewart said about obscenity. He would be able to tell you whether there was what he felt was full cooperation, partial cooperation, or no cooperation.

COMMISSIONER MacKINNON: And you don't need any further definition.

MR. FREY: Well, perhaps--
COMMISSIONER MacKINNON: Well, I'm saying, that's a question.

MR. FREY: Perhaps you don't and I would say that if what you were saying was it's zero if it's full cooperation and it's up to two for interference with the investigation, then I don't think you need more definition. I think the judge can supply the content to that concept.

If you just have one thing, all or nothing, then I have a problem with not doing a little bit more about defining it.

COMMISSIONER MacKINNON: Thank you.

CHAIRMAN WILKINS: Questions to my left?

COMMISSIONER NAGEL: Mr. Frey, I think on a number of previous occasions you may have testified at the same time as Professor Coffee. He has testified and written on the subject and in much of his work he makes the argument that much of organizational crime is committed by middle management without the involvement of senior management and it's done not for personal gain, but rather for corporate gain and he worries about the fact that if that is the case and you adopt as system much like the one you're advocating, you'll promote sort of an increase in corporate irresponsibility or a
failure to have corporate accountability. That is, senior management will continue not to get involved, yet they will create pressure for persons lower down in the organizational scheme to commit crimes because it's financially efficient and then they'll get mitigation because they weren't involved. You know, that could be a straw man. It could be some sort of--

MR. FREY: I would have several comments about that. The first is that it seems to me that premise number one is wrong, which is what motivates the middle level manager.

I suspect the middle level manager is motivated by considerations of personal gain. He or she just perceives personal gain to be equated with making a lot of profits for the company, if that's what's driving the crime.

The best way to deter that is probably to prosecute the individuals who are responsible. Now, it is important and I think what you propose to do does take into account whether top management has done what should be done to train and to oversee the conduct of those beneath it, that includes middle level managers.

Part of a compliance program is to make sure that
the responsible officers in the corporation are told to obey the law, how to obey the law and that company communicates to its employees in an area where there is a risk of criminal activity that that kind of activity won't be tolerated and how to avoid it.

COMMISSIONER NAGEL: How would you feel then if you were to follow your lead in assigning more mitigation points to pre-offense behavior, especially when senior management were not involved however it's defined, but to tie that mitigating factor to the presence of a compliance detection plan that has been effectively implemented. Would that be consistent with your thesis?

MR. FREY: Well, a couple of things. One is, I--management involvement I am treating as part of offense behavior rather than pre-offense behavior. That is, I'm talking about management involvement in the offense. There's also management involvement in compliance programs, which would be pre-offense behavior.

I don't think that they should be tied together and let me give you one reason for that. Offenses--the offenses that a Government contractor commits may not involve false claims to the Government or another foreseeable.
offenses that a stockbroker commits may not be securities fraud. There may be other—so when you say should a company have an effective compliance program, what you really mean is with respect to the offenses that that company's business is likely to generate, should it have a compliance program. Yet, the company may commit offenses in areas where you can't really fault it for not having gone ahead and had a compliance program because it wasn't the likely offense and I wouldn't--

COMMISSIONER NAGEL: You would make that distinction; correct?

MR. FREY: Well, I wouldn't say that if they didn't have a compliance program to prevent assaults or some other unlikely offense that they wouldn't get credit for the fact that the assault was committed by some low level person. I would not think that would be appropriate.

I think you can deal with it by deciding how much weight you want to give to the efforts that the company makes, reasonable efforts to anticipate and prevent criminal activity by those who work for it and how much weight you want to give to the--how the crime itself happened and how fair is it to say that this stains the whole company. After
all, it's the pension funds that own the stock in the company that are going to end up paying.

That's not to say that they shouldn't in some cases, but it's just to say that you're buying deterrence. You need more deterrence when the higher level people are involved. You ought to need less deterrence when people who exercise less corporate power are the culpable actors.

COMMISSIONER NAGEL: Can I make just one last request? When you do submit your subsequent testimony, which I take it you're going to submit some additional materials. Could you just elaborate in those materials on the comment you make on page 2 of your remarks about deterrence being a primary goal for organizational sanctions and tie it into the statute and the legislative history. And you believe this--make an argument--I think I read what you're saying to make the argument that where there are a multitude of goals for individual defendants that there's a certain assumed priority of general deterrence for organizational. Just give us something to buttress that claim, if you think there is something.

MR. FREY: I think the statute that provides for the adoption of sentencing guidelines probably doesn't
address it because I’m quite satisfied that Congress never contemplated the adoption of guidelines for corporations. So it wouldn’t be surprising that they didn’t spend much time thinking about it.

COMMISSIONER NAGEL: If there is something there I would be happy to see it.

CHAIRMAN WILKINS: Any questions?

COMMISSIONER MAZZONE: Thank you for crediting me with the ability to recognize cooperation when I see it and now let me put on my commissioner’s hat and reveal my ignorance really about this.

You would propose re-weighing the mitigating factors in some other fashion and what is your view on a fact to which recognizes within it acceptance of responsibility when pursuing that reward by a company exposes that company a concern which was expressed to you this morning to a stockholder’s scrutiny or a lawsuit, a derivative lawsuit?

What is your view on including such a factor or including acceptance of responsibility in such a factor and if you have a view that it ought to be retained, as part 3 of your assignment that Judge Wilkins gave you and Commissioner Nagel gave you, let me give you one too. Can you draft a
definition of acceptance of responsibility in the corporate sense that might relieve some of those concerns expressed this morning that all they're doing is buying a lawsuit?

MR. FREY: You raise something that I have not thought about. I wasn't here this morning and I didn't hear the testimony. So I'm a little reluctant to jump into this.

COMMISSIONER MAZZONE: You admit responsibility. You accept responsibility. Your corporation is contrite, expresses remorse and then gets a stockholder derivative suit.

MR. FREY: I guess my instinct is to say that that wouldn't be much of a suit and it particularly wouldn't be much of a suit if the sentencing guidelines gave the corporation credit and a lower fine for doing these things.

So I guess my instinct, but I haven't thought it through, is not to put a lot of weight on that concern. As I've said, and I think as is the sense of the business community generally, the current proposal puts way too much weight on post-offense conduct, voluntary disclosure, cooperation, acceptance of responsibility.

I do think those are factors that are traditionally part of sentencing and I guess my instinct is to say they should be part of sentencing corporations as well as
sentencing individuals, but I will give some more thought to that question.

CHAIRMAN WILKINS: Commissioner Carnes?

COMMISSIONER CARNES: Mr. Frey, we've all been struggling for some time on how to handle loss. I think intuitively we all can hypothesize situations where loss could result in fines that would overstate the offense. On the other hand, as you've pointed out, there's situations where it might be very appropriate. I'd like to reiterate what the Chairman asked. If you--I know with your limited time--could help us a bit by identifying some of those cases you said in footnote we should identify in the guidelines where we think loss is presumptively a factor and those cases where loss is not appropriate I think that would be helpful to us.

Secondly, on voluntary disclosure you, like a lot of witnesses, feel that the Commission draft gives too much weight to that and I think we all understand the concerns of a lot of corporations that in many cases it will not be possible for corporations to voluntarily disclose.

But it seems to me if a corporation is able to do that and does that, isn't that what we want corporations to
do when they ferret out crime, to come to prosecutors and
when they do do that, it's so rare, shouldn't they be
rewarded pretty amply for that conduct?

MR. FREY: I think they should be rewarded. I'm
not suggesting that the factor be eliminated. I think the
reward that's offered here is disproportionate.

One of the problems that I have with it is, as I
say, it's a matter of luck whether you can avail yourself of
it. Often, the first time a corporation learns about an
investigation is when it gets a grand jury subpoena. Now
that corporation is automatically disqualified for this large
chunk of mitigation credit.

I guess my reaction is, of course, what a
corporation do is if you're the general counsel--and this is
a question that is probably better addressed to people who
have inside experience in corporations, which I haven't--but
I assume if you're the general counsel of a corporation and
you hear a rumor, you get a report, you get a complaint,
something that suggests some wrong doing, your job is to
conduct a thorough and careful investigation, satisfy
yourself what the facts are. If you are satisfied at the
conclusion of that investigation that a crime has been
committed, then I think most of the kinds of companies that I represent, I'd like to think, would come forward and make disclosure of it.

I think in 99 cases out of 100 by the time this has happened it will be too late for them to get credit under these guidelines and whether they can or not, as I say, I think will be a question of luck.

So I think you should give some credit. Those people who do it deserve some credit, but you should also recognize that the model corporate citizen acting in the way we want them to act, I believe, would usually turn out not to be available for this—not to be able to benefit from this credit.

And I don't think—I mean talk about shareholder derivative suits, a good way to get one is to take some unsubstantiated rumor of wrongdoing and go down to the local prosecutor without investigating it yourself, talk about how to get yourself into a lawsuit.

So I think you need to recognize the realities and you really ought to ask other people who have more experience with life inside a corporation than me, but I suspect that's what they'll tell you.
COMMISSIONER CARNES: Thank you.

CHAIRMAN WILKINS: Any other questions?

COMMISSIONER MacKINNON: Did I understand you to say that you didn’t think that Congress indicated that corporations were to be sentenced by guidelines?

MR. FREY: My belief is that Congress contemplated policy statements, but did not contemplate guidelines. Now I have to say in part that my belief is influenced by my partner, who was formally Chief Counsel of the Senate Judiciary Committee and has personal recollections of what might have been intended, which I--

COMMISSIONER MacKINNON: Well, there is a statement like that in the legislative history but the statute says, 3551(c), "An organization found guilty of an offense shall be sentenced in accordance with the provisions of Section 3553". Now you turn to 3553 and you get down to a(4) and it says that, "The court shall impose a sentence"--and so on--"of the kind of sentence and the sentencing range established for the applicable category of offense committed by the applicable category of defendant as set forth in the guidelines." Well, there’s more to it. That’s the substance of it.

I’ve seen this thrown around so many times. I put
that out last September and I told the people at the meeting
we had at that time what it was and it was raised earlier
today, but it's wrong. The guidelines--the statute says what
I've said and there's a reference in the legislative history
of one House which necessarily doesn't control unless there's
some ambiguity here.

MR. FREY: Let me say that I have not--this is the
first time that I've heard this point made, but in looking at
the statute very quickly, it seems to me that the statute
does not say what the Commission shall do, but what the court
shall consider and, of course, there is no objection if
guidelines exist. Needless to say, we hope the court shall
consider them. If guidelines don't exist, the court can
consider the policy statements that the Commission has
promulgated. I'm in favor of the promulgation of policy
statements.

The purpose of doing that is to have courts
consider the collective wisdom of the Commission based on its
study of this problem.

COMMISSIONER MacKINNON: Well, the policy statements
are a subfactor of the basic offense sentences prescribed by
the guidelines.
MR. FREY: I guess I need to think more about this. I don’t take this at first blush as being a directive to the Commission to issue guidelines, but simply as you work your way through, contemplating the possibility that there would be guidelines.

I haven’t taken the position that the Commission lacks power to promulgate guidelines, but it is my view that it’s unwise to do so at this point.

COMMISSIONER MacKINNON: I would direct you to read those statutes.

MR. FREY: I would need to think more about it.

CHAIRMAN WILKINS: Thank you very much, Mr. Frey.

MR. FREY: Thank you.

CHAIRMAN WILKINS: We are delighted to have a very distinguished Professor of Law with us as our next witness. Professor Kathleen F. Brickey is a George Alexander Madill Professor of Law at Washington University Law School in St. Louis. Professor Brickey is a noted expert in the field of white collar crime and has written the leading treatise and case book on this subject.

Professor, we are honored that you are here. We know that you had rough plane ride to get here from St.
Louis, but we appreciate the extra effort that you had to make.

STATEMENT OF MS. BRICKEY

MS. BRICKEY: Thank you, Judge Wilkins. It's a pleasure to be here.

The Commission has requested comments on the proposal to offset fines that are paid by owners of closely held corporations when the court sentences the organization itself.

In my view the proposal raises two major issues. The first is a general policy question and that is whether there is a strong policy reason for reducing the amount of fine that is imposed on an organization by the amount of a fine that's paid by one of its owners.

The second is a question of scope. If offset is warranted, under what circumstances and with respect to what organizations should it be made available.

The policy question does not in my mind have a clearly correct answer. The strongest set for offset can be made in the context of an organization in which there is complete overlap between the fined owner, managers, and the organization.
Suppose for example that the sole owner of a close corporation is fined $100,000 for price fixing. The corporation is later fined $500,000 for the same misconduct. Although the corporation is an entity separate from the owner, fining the corporation has the same effect as if the fine had been assessed against the owner because either way the fine is paid out of the owner's assets or assets that the owner has invested in the corporation.

To avoid the unfairness of fining him twice, the argument runs, the fine imposed on the organization should be offset by the amount of the fine that the owner previously paid. Thus, the offset would operate as a limitation on the owner's liability to an amount no greater than the liability of the organization.

The case can be made similarly when there are multiple owners all of whom have been previously fined. If both owners of a two owner corporation have been fined, for example, a second fine imposed on the corporation will likewise be satisfied out their assets.

When the relationship between the owner's fine and the closely held organization is more attenuated, however, so are the reasons for allowing offset.
Suppose for example that A, an owner/manager of a close corporation owned by five individuals engages in price fixing. A's misconduct and A is then fined. Should the amount of that fine be offset against the corporate fine when the corporation is later prosecuted?

It could be argued that to the extent that A has already paid a fine for the wrongdoing he will be punished a second time when the organization is fined. To minimize the unfairness then, the corporate fine should be reduced by the amount that A has already paid.

But this example lacks the identify of interests that was present in the previous two. What occurs in this context is not as the commentary suggests strictly an allocation of punishment. The offset does not reallocate the corporate fine among the five owners. Instead, it merely reduces the Government's claim against corporate assets that are owned by all five owners.

Thus, if A owns 50 percent of the corporation's shares and the $500,000 corporate fine is offset by A's $100,000 fine, the extent to which A's investment is affected by the corporate fine is simply reduced from $250,000 to $200,000.
Likewise, the four other owners benefit from the reduction of the fine even though they may have received a windfall from A's profitable misconduct.

In theory, the offset should work the other way. To avoid unfairness to A, but to achieve the full deterrent value of the corporate sanction, it would make more sense to assess the full fine against the corporation and to offset A's personal fine by the amount of the corporation's fine chargeable against his assets.

But finding a practicable way to do that is bound to be problematic if, as the proposal assumes, A has already paid the fine.

Another problematic aspect of the general policy issue is that the proposal only addresses half of the problem. If the driving concern is fairness to A, the fined owner, why is it unjust to fine A twice when A is fined before the corporate fine is imposed, but not unjust to fine A after the corporation has been fined, this time the full $500,000 not with the benefit of an offset?

Notably, when A is convicted, after the corporation is sentenced, it would be possible for the court to offset the portion of the corporate fine chargeable to A against the
fine that the court subsequently imposes on A.

If indeed strong policy reasons support the offset principle, the question why no similar offset is provided for officers and directors who have substantial ownership interests in publicly held corporations and who are personally fined in connection with the wrongful conduct needs to be addressed.

Assuming arguendo that offset may be warranted in some circumstances in which the overlap between the corporation and the fined owners is not complete, it is necessary to address a host of scope questions.

The threshold scope question is, what is a closely held organization? The proposed guideline targets organizations in which a small number of individuals own a controlling interest. The closest analog in corporate law also relies on the existence of a small number of shareholders.

But the corporate law focuses on the total number of shareholders, not the number of shareholders holding a controlling interest in a company. It's possible, for example, for one individual or one family to own 51 percent of the stock in a corporation and for the other 49 percent of
the shares to be publicly traded and owned by thousands of individual and institutional investors.

Although that would not be a closely held corporation for corporate law questions, for guideline purposes it would be. So, if this result was unintended, the language could be changed to read, "An organization is closely held when a small number of individuals own it", or to put it more in line with the corporate law, "when a few number of individuals own it".

The Commission and Justice Department proposals differ with respect to the size of corporations that may benefit from the offset.

The Commission proposal applies regardless of the size of the organization. The Justice Department proposal applies only to small organizations.

In corporate law, it is the number of shareholders and not the size of the company that determines whether or not the organization is closely held. One example I could give would be the Hallmark Card Corporation, which is enormous, but it is closely held. All of the stock is owned by the family.

The question of whose fines may be offset also
needs to be addressed. The Commission proposal applies to fines paid by, quote, the owners. It's unclear to me whether this is meant to mean all of the owners or whether it means any owner who is fined.

If the driving concern is fairness to fined individual owners, perhaps it makes sense to offset a fine imposed on any individual owner. But because the offset rule would result in a reduced corporate fine, the Justice Department requirement of substantial identity between the organization and the fined owners is appealing.

Before its offset provision would apply, fines must be imposed on a majority of owners. Thus, before the corporation receives the benefit of an owner's offset, the corporation must have borne the burden of the owner's fine.

What constitutes a majority of owners under the Justice Department's proposal remains to be resolved, however. Does it mean a numerical majority of owners or owners holding a majority of the shares?

If the purpose of the majority of owners rule is to require the corporation to bear the burden of the owner's fines before it receives the benefit of their offset, it would make more sense to require that owners holding a
majority ownership interest in the organization must have been fined.

A closely related question is what kinds of fines may be offset? The Commission proposal applies to, quote, any fines paid by the owners. Although the commentary discusses fines imposed after conviction of both the organization and the culpable individuals, neither the guideline nor the commentary limits the offset to criminal fines or, for that matter, fines imposed by the Federal Government. Nor does the guideline require that any individuals must have been convicted.

The Justice Department proposal is expressly limited to criminal fines imposed on convicted owners.

If the offset provision is not limited to criminal fines, it paves the way for permitting civil sanctions imposed on individuals to serve as a proxy for all or part of a criminal fine imposed on a convicted organization.

The net effect is that the offset partially nullifies the principle of institutional accountability for criminal conduct and I'd note in passing that I have similar reservations about the policy statement in Section 8(c)5.17 relating to the coordination of prior civil and administrative
fines that are punitive.

Another part of this question is how much of the corporation’s fine may be offset? The Commission’s proposal permits the offset of any fines paid by the owners without regard to their relationship to the organization’s fine.

The proposal seems to proceed on the assumption that the fine imposed on an individual owner will be smaller than that imposed on the organization. But the fines need not be imposed under the same statutes.

The fine imposed on individual owners need only, quote, arise out of the conduct constituting the organization’s offense conduct. It would be possible then for the owner to be fined under a civil statutory scheme that permitted imposition of a fine that would equal or exceed the organizational guideline fine level.

If that were to occur, the offset would completely nullify organizational accountability and provide a windfall to the other owners who benefited from the wrongdoing.

This concern is compounded by the fact that under the Commission’s proposal offset is mandatory. Under the Justice Department proposal the court would have discretion both with respect to whether to offset and how much to
offset. The court could allow the fine imposed on the organization to either be partially or totally offset.

The limit that the Justice Department's comment would place on the exercise of the discretion is that the offset could not completely wipe out the organization's fine unless there is, quote, absolute identity between the organization and the convicted individual owners. In other words, going back to the strongest case for the offset where the one owner corporation and the corporation have both been convicted, in that case the Justice Department proposal would permit a complete obliteration of the corporate fine.

Neither proposal expressly addresses the question whether offset should be allowed if the owner has been indemnified. The Commission proposal applies to fines paid by owners. If an owner satisfies the fine out of his own assets and then is indemnified, my question is, has the owner paid the fine for purposes of this guideline?

The Justice Department in contrast applies its proposal to fines imposed on owners, but cautions that the court should take into account the likelihood that the Government would be able to collect the fine. So in the indemnification context, the fine is imposed and the
Government collects the fines and yet the individual owner has been made whole by the corporation.

When an owner has been indemnified there is really no fairness concern with respect to him when a fine is imposed on the organization. The organization has made him whole.

It could be argued that the organization itself has a fairness argument in that it has paid the amount of the owner’s fine and thus should be entitled to an offset in that amount. But I would not find that reasoning persuasive for two reasons. First, the corporation has voluntarily assumed the liability. The fine was imposed on the individual owner, not on the organization. And second, like the SEC, I believe that indemnification of criminal fines is contrary to public policy and ought to be prohibited.

I might make just a couple of very brief comments about the policy statement to which I illuded a moment ago. I’m puzzled by the presence of the policy statement because no specific problem that needs to be addressed is identified in the draft.

Assuming that there is a problem that needs to be addressed, there is no indication in the draft as to why it
would be unique to an organizational sentencing context.

There is no similar departure authorized for punitive civil
or administrative sanctions that are imposed on individuals,
or at least I don’t believe there is, and the economic onus
on the individual may be just as great as on an organization
that has been administratively sanctioned.

I can give a couple of examples, one United States
versus Helper, where successive criminal and civil actions
under the False Claims Act could have exposed the defendant
to a $500,000 criminal fine and $130,000 punitive statutory
civil liability for a $585 Medicare fraud. The Supreme Court
in that case found that there was a double jeopardy violation,
but nonetheless, it illustrates that an individual the onus
of punitive, civil or administrative sanctions may be great.

More recently, we’ve seen that that can be true in
securities fraud context with Michael Milkins guilty plea
encompassing not only a very substantial criminal fines, but
global settlement of civil charges by the SEC.

A second point is that even though the policy
statement seeks to coordinate punitive, civil, administrative
and criminal sanctions, it tries to do so only with respect
to sanctions that are imposed before criminal sentencing.
Imposition of a punitive sanction is just as likely as not to occur after a criminal proceeding so that the range of criminal fines that could be imposed on an organization could be determined fortuitously by the timing of parallel civil proceedings.

A couple of examples, the Helper case, which I mentioned before, the criminal prosecution preceded the civil action for the punitive civil damages. E. F. Hutton pleaded guilty to 2,000 counts of mail fraud, was sentenced to pay the maximum criminal fine of $2 million. Several years thereafter in the aftermath of that conviction, Hutton was investigated by numerous State regulatory agencies and was assessed more than another half million dollars. So that the sequence is not necessarily going to be that the civil fine is imposed before the time of sentencing.

If consideration should be given to civil punitive and administrative punitive sanctions, I question whether the consideration ought to be given to State or local Government imposed sanctions. The factors that a court is directed to consider, at least two of the factors are in a posit in the context of State and local sanctions the dual sovereignty doctrine oviates the double jeopardy considerations and its
highly unlikely that there will be any evidence of congressional intent with respect to how Federal and State and local sanctions ought to be coordinated.

Finally, the policy statement is directed at civil and administrative punitive sanctions, but does not include criminal punitive sanctions so that if this policy statement is left in the guidelines, some thought might want to be given whether it makes sense to take into account administrative sanctions imposed by a State, but not criminal sanctions that can be imposed by virtue of a State criminal prosecution.

CHAIRMAN WILKINS: Thank you very much, Professor. Did you what a few number is? How do we define a few number?

MS. BRICKEY: A few number is obviously a general concept like a small number. In many jurisdictions the courts use few or relatively few. That can go from as few as one or two up to in a statutory context, for example, a Sub-S corporation can have as many as 35 owners. And it may well be that the Commission wants to consider quantifying just how many to prevent speculation as to whether this really is closely held.
CHAIRMAN WILKINS: Thank you.

Questions to my right?

COMMISSIONER MacKINNON: You talk about fines being offset when there is a later prosecution and everybody seems to talk about some later prosecution. What about offsetting when they are contemporaneously sentenced? Do you mean there is going to be an offset then?

Here is a judge imposing a sentence on the president of the corporation and the corporation. That's what we're all talking about. They generally come up at one time and they were tried together. Are you going to have an offset in something like that?

MS. BRICKEY: Well, I'm not sure that it makes sense to do it.

COMMISSIONER MacKINNON: Well, I'm not either.

MS. BRICKEY: I think I made—at least my first example was the strongest case for doing it. I think the counter side of that is that it discounts the advantage that the owner has derived from doing business in the corporate form, including limited liability.

This is doing something that the courts won't do in the civil side and that is to pierce the corporate veil for
the benefit of someone who has opted to do business in that forum.

COMMISSIONER MacKINNON: Do you think an offset is practical? Don’t you think a judge that sentences—obviously you’re going to be sentenced by the same judge and if he thinks there’s going to be an offset instead of imposing a $400,000 fine he’ll impose at $500,000 and then you’re going to offset it with the other thing and he winds up where he wanted to to begin with any way.

MS. BRICKEY: I think that’s a very valid point. Assuming that the sentencing of the individual in the organization is contemporaneous, that kind of—

COMMISSIONER MacKINNON: Or by the same judge.

MS. BRICKEY: Or by the same judge.

COMMISSIONER MacKINNON: And they usually are, aren’t they?

MS. BRICKEY: I’m not sure whether they are in the context of closely held corporations. In the context of publicly held corporations it is not uncommon for the officers and the corporation to be tried in separate trials by separate judges.

COMMISSIONER MacKINNON: Would you consider the
Cargo Corporation as a closely held corporation? It's the largest trader in the world in grains and its closely held, very closely held.

MS. BRICKEY: Who owns it?

COMMISSIONER MacKINNON: They own it, McMillans and so on.

MS. BRICKEY: How many of them are there?

COMMISSIONER MacKINNON: What's that?

MS. BRICKEY: How many of them are there?

COMMISSIONER MacKINNON: Well, they obviously bring in their officers, their top officers and the same for West Publishing, their top officers and when they leave they sell their stock and the man who takes the other top job goes on. There are a lot of situations like that in the country.

MS. BRICKEY: If for purposes of corporate law and I think that's what the Commission wanted to parallel if it retained this guideline, as long as there is a relatively small number of owners, if this is all--

COMMISSIONER MacKINNON: Well, you said up to 35. I don't think they've got 35 in either one of those corporations.

MS. BRICKEY: All right. Let's say they have a
family of eight. Even though they have an enormous
corporation with an international operation, so long as the
corporation is owned by that very small group of people it
would be characterized as a close corporation.

COMMISSIONER MacKINNON: Do you think that there is
any authority for the use of corporate funds to indemnify an
officer on a fine? I’ve never heard of it.

MS. BRICKEY: Well, the Delaware corporation law is
the first place to start. The Delaware corporation law--

COMMISSIONER MacKINNON: Well, you couldn’t use to
even pay for an insurance policy. I know they changed the
law after I quit practicing corporate law.

MS. BRICKEY: I was surprised to discover that the
Delaware corporation law permits the board of directors to
indemnify a convicted corporate agent if the board makes a
finding that the agent was acting not contrary to the
interests of the corporation, was acting in good faith, and
had no reason to believe that his conduct constituted a
crime. So, yes, there is statutory authority for that. It
may contrary to policy of the Federal sentencing guidelines.

COMMISSIONER MacKINNON: I don’t know whether to
say I’m glad to hear that or not glad to hear it, but I’ll
tell you it arose within the last 20 years since I've been on
the court.

Thank you.

CHAIRMAN WILKINS: Paul, did you have a question?

COMMISSIONER MALONEY: Yes, thank you, Mr. Chairman.

Professor Brickey, would you advocate if you had
your druthers the deletion of any provision for offset?

MS. BRICKEY: I think I would. As I say, I'm not
sure there's a clearly correct answer on this policy. My
inclination would be not to have one particularly because
what the owner of this corporation--one reason the owner will
choose to do business in the corporate form as opposed to as
a partnership or an unincorporated company is because you gain
benefits like limited liability, tax benefits, and the like.

Here what you're saying is, if you happen to be the
owner of a closely held corporation, we'll in effect pierce
the corporate veil and take into account you individually as
opposed to you as part of this organization and confer a
special benefit on you that would not be conferred, for
example, on the civil side.

COMMISSIONER MALONEY: I have the same question as
it relates to 8c 5.17, which deals with the reverse Halper
issues. Would you prefer in terms of advocating position that the Commission delete that provision from the guidelines for the reasons that you went into?

MS. BRICKEY: Yes. I feel more firmly about that issue that I would prefer not to see that policy statement, but certainly if the policy statement were retained, I would hope to see some reason why it should apply only to organizations and not to individuals.

COMMISSIONER MALONEY: And if I understood you--one final question--If I understood you correctly in terms of defining majority of owners for purposes of the Department of Justice draft to the extent that you indicated that you felt that term was ambiguous and having heard you, you really say that could mean numerical majority of owners or numerical majority of share owners, shareholders; is that correct?

Your preference is for the latter rather than the former?

MS. BRICKEY: Ownership of the majority of shares as opposed to a numerical--for example, it would be possible to have a close corporation in which one owner owned 90 percent of the shares and 10 owners each own 1 percent. If you convicted those ten 1 percent owners, you really don’t have much identity between the convicted owners and the
COMMISSIONER MALONEY: Thank you.

COMMISSIONER MacKINNON: Have you ever seen this suggestion made any place else?

MS. BRICKEY: No, I haven't. That's one reason I latched on to it. It intrigued me.

CHAIRMAN WILKINS: The suggestion that Judge MacKinnon made? Is that the one you're talking about, George?

COMMISSIONER MacKINNON: No, she's talking about the offset.

CHAIRMAN WILKINS: Any questions over here?

COMMISSIONER NAGEL: I found your comments very thoughtful. I wonder if during some subsequent period if you want to share with us your comments on other aspects of the draft. I recognize that you concentrated on offsets, but if you have any other comments, I would just urge you and invite you to submit them in the next period of time, or just call talk about them.

MS. BRICKEY: Thank you. I do have some thoughts on some other provisions, but I recognize that with the limited time here I could only address a couple of them.

CHAIRMAN WILKINS: You would advise us not to
include this offset provision, but if we do go on the basis of the majority of shares?

MS. BRICKEY: And I would strongly favor limiting the offset to criminal fines imposed on convicted owners rather than any other kind of sanction.

CHAIRMAN WILKINS: Other comments or questions from anyone?

Well, this has been very helpful and we look forward to any other comments you may make, but certainly, this expert advice on a difficult area has focused at least I know my attention to some areas I had not thought about and I appreciate very much your efforts in assisting us.

MS. BRICKEY: Thank you very much.

CHAIRMAN WILKINS: Thank you very much, Professor.

Our next scheduled witness and our final scheduled witness is Jonathan C. Waller. Mr. Waller is Assistant General Counsel with Sun Company representing the American Corporate Counsel Association.

Is Nancy Nord with you, Mr. Waller? Ms. Nord, you may or not, it’s your pleasure, accompany Mr. Waller to the witness stand. We’re delighted to have both of you here.

Ms. Nord is the Executive Director of the American Corporate
Mr. Waller?

STATEMENT OF MR. WALLER

MR. WALLER: Thank you very much.

The American Corporate Counsel Association does appreciate the opportunity to address the members of the Commission on this very important issue to its members.

ACCA is a national bar association representing attorneys who practice in law departments throughout corporate America as well as associations and other private sector organizations. We have about 8,000 members in 3,000 different corporations.

ACCA recognizes the extensive work that the Commission has done in this area in drafting these proposals and we appreciate the opportunity at this point to address some concerns that we have with respect to some of the proposals.

This is of particular interest to myself in my role as Assistant General Counsel of Sun Company. One of the roles that I have in my job is to have oversight and responsibility for corporate compliance programs throughout Sun Company.
Corporate attorneys generally are responsible for designing and implementing these type of corporate compliance arrangements throughout the corporate organization.

COMMISSIONER MacKINNON: Did you say Sun Oil Company?

MR. WALLER: Sun Company was formally Sun Company, that is correct.

ACCA as an organization has worked extensively with its members to educate them with respect to effective corporate compliance arrangements and to help them educate non-managers in their responsibilities under the law.

Therefore, we are especially concerned about the way in which the mitigation factors are structured and scored. The mitigating factors we believe are skewed disproportionately toward voluntary disclosure of discovered criminal activity rather than toward prevention of wrongdoing.

Further, we are concerned that the application of the mitigating factors as they are presently structured may lead to unpredictable results.

Although we can understand the Commission’s desire to encourage voluntary disclosure, we believe that assigning more points to that than others the Commission emphasis is
Indeed, such a requirement may in fact impede the efforts of corporate counsel to assure compliance throughout the organization.

For a corporate compliance program to have its maximum effect, there needs to be an atmosphere in which an employee knows that he or she can come forward and admit unintended wrongdoing or negligence without the threat of going to jail.

It is very difficult to achieve employee cooperation when the corporate policy dictates universally that immediate reporting of all wrongdoing irrespective of the statutory requirement in this regard to report such wrongdoing to law enforcement authorities.

In order for a compliance program to be effective it should ferret out law violations. It should require the managers of that particular program to take steps, including appropriate discipline, as well as employee education to assure that the activity will not be repeated as well as to rectify the harm that flows from the violation.

But ACCA is concerned that an across the board requirement of self reporting will impede the impact of good
faith attempts by corporations to discover and remedy violations.

We are also concerned about the fairness of how this factor will operate in the real world. A responsible corporate official would not notify the Government about unsubstantiated rumor or alleged wrongdoing. An internal investigation would be undertaken under the direction of corporate management to determine the truth of the allegations.

If the Government also became aware of the questionable activity during the investigation, mitigation would not even be available even though it would have been irresponsible for the corporation to come forward prematurely.

Another example would be that if the corporate attorneys were undertaking the investigation and reached a good faith determination that no wrongdoing had occurred, there is no need for voluntary disclosure. Mitigation would not be available should a prosecutor reach a different conclusion.

Finally on this point, we are concerned that the collateral negative impact of such a requirement may have on the corporation. If the company were to self report absent
some statutory duty to do so, the corporation has to consider
matters other than just the criminal prosecution at hand.
Civil suits surely may be brought. Shareholder suits are a
real possibility if the corporation admits to wrong doing
without a statutory obligation.

Consideration such as potential civil liability,
settlement potential, and the drag on management time to say
the least of what may turn about. If that individual that we
have turned in is ultimately determined to be not guilty,
that individual might turn around and sue the corporation as
well.

In conclusion, we suggest that the Commission
emphasize the prevention of wrongdoing by giving more weight
to the existence of corporate compliance programs than to
sel reporting after the crime has occurred.

With respect to the issue of management involvement,
we would also urge that more weight be given to the lack of
management involvement in the criminal activity. If
management is not involved in the activity and is making good
faith efforts to assure compliance, then it is difficult to
construct a rationale for assessing significant responsibility
for the offense on the corporation.
In addition, because management is defined rather loosely in the proposal, the operation of the mitigation factors may be extremely arbitrary. The Commission makes no distinction between senior management taking an active part in the criminal activity and a lower level supervisor who undertakes activity that contravenes corporate policy.

Both cases are treated exactly alike and no mitigation is available even though the cases represent vastly different levels of corporate responsibility.

Finally, we have strong reservations about the impact of the guidelines on our members' abilities to perform their duties as corporate counsel. The mitigation factors include in house counsel within the category of management who must report should they become aware of a violation.

Under current principles of attorney professional standards, in house counsel may undertake in many cases to conduct internal investigations knowing that the attorney/client privilege will attach to their activities and the advice given to management as an outcome of the investigation.

Indeed, for purposes of determining a lawyer's obligations to its client no distinctions can be made between
in house and outside counsel. Rather, under the Commission’s proposal should in house counsel become aware of possible violations while undertaking such an internal investigation that would otherwise be privileged, the mitigation would not be available if the counsel did not come forward and disclose.

This puts inside counsel in an untenable position with respect to our clients. Under the current wording of the proposal management would have no option but to retain outside counsel should an internal investigation be needed. Such a result would discriminate unfairly against inside counsel and would deprive corporate clients of the ability to work with the attorney of their choice.

We therefore strongly urge the references to inside counsel be dropped from the proposals.

A question was raised earlier this afternoon about the state of corporate compliance and the vast array throughout corporate America. As one that has worked over the last 15 years in designing and implementing corporate compliance programs and I have brought such an example with me, we are very strongly committed to the process of corporate compliance programs that cover not only the criminal sector, but the civil as well.
We are very committed to the development of these compliance programs. We believe that they are very effective to make sure that corporations are adequately protected, their stockholders are protected, and that we are able to assure compliance with the law.

We have been encouraged by Government officials over the years that the existence of corporate compliance programs are strong evidence that negate criminal intent.

I believe that the vast array of the members of ACCA have very sound corporate compliance programs particularly in those areas where it is the type of business that they're in, whether it's antitrust in the case of companies that sell, whether it's securities in the case of corporations that engage in the sell of securities and the like.

It is not possible for any corporation to assure that you have a compliance program as elaborate as this one may be for every single law that may have criminal activities associated with it. Many of them are ingrained and incorporated in the various procedures and activities that that particular corporation conducts whether it is a fire code with respect to the way in which an engineering design
is made, or whether it is compliance with a building code. All of these things are developed and part of the ongoing process and procedures of corporations and we have focused on certain areas to develop more elaborate and more formal compliance programs and done an effective job in educating our management with respect there too.

ACCA does intend to file more formal comments prior to the end of the comment period and I would be responsive to any questions that you may have.

CHAIRMAN WILKINS: I think the point that any compliance program should be geared to address the criminal conduct and that is what we should be reasonably foreseeable to the corporation taking into account the nature of its business?

MR. WALLER: Yes.

CHAIRMAN WILKINS: Is that something that you're driving at? That's a pretty good point.

Do you have any language that you've supplied along that line?

MR. WALLER: We would be happy to prepare such a language--such a provision.

CHAIRMAN WILKINS: Thank you.
Questions to my right?

COMMISSIONER MacKINNON: That's a question I raise about what kind of crimes are they protecting against. What kind of crimes do you think you're protecting against that you get protection from compliance programs?

MR. WALLER: In terms of the compliance programs that--

COMMISSIONER MacKINNON: No, your ordinary everyday operation.

MR. WALLER: I think that antitrust in one in which a corporation probably universally the larger corporations that are members of our association probably have a fairly elaborate antitrust program. I would venture to say that in the area of insider trading that many, many corporations have fairly comprehensive--

COMMISSIONER MacKINNON: Is insider trading a corporate offense?

MR. WALLER: It is when you get into Section 16 areas and the like.

COMMISSIONER MacKINNON: It could be some reporting offense.

MR. WALLER: Yes.
COMMISSIONER MacKINNON: Who administers your program?

MR. WALLER: The program is designed by corporate attorneys. They are then distributed throughout the organization. In this particular case the chairman has signed a letter to all employees directing compliance with the policy. The responsibility for monitoring compliance, for assuring compliance, for going out and testing whether the compliance is made in this particular policy is the responsibility of the general counsel.

COMMISSIONER MacKINNON: The monitoring responsibility is the general counsel?

MR. WALLER: Yes.

COMMISSIONER MacKINNON: You transport oil by vessel?

MR. WALLER: Yes.

COMMISSIONER MacKINNON: You do?

MR. WALLER: Yes.

COMMISSIONER MacKINNON: Have you had any spills that were prosecuted criminally?

MR. WALLER: No.

COMMISSIONER MacKINNON: Thank you.
CHAIRMAN WILKINS: Thank you.

Any questions from my left, anyone?

Mr. Waller, thank you very much for your insightful testimony and we look forward to any other submissions that you wish to make to us.

MR. WALLER: Thank you very much.

CHAIRMAN WILKINS: Anyone else wish to testify, please come forward.

Well, I see your numbers have dwindled some since this morning, but this is a hearty crew left. I'm delighted to see former Congressman John Napier still with us.

Congressman, glad to see you.

Well, thank all of you for your participation.

We will stand adjourned.

[Whereupon, at 4:00 p.m., the hearing was adjourned.]