Association of Corporate Counsel

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March 17, 2010

Re: **US Sentencing Guidelines Manual – Proposed Amendments to Chapter 8**

Testimony of Susan Hackett,

Senior Vice President and General Counsel

Honorable Members of the United States Sentencing Commission and Staff:

ACC appreciates this opportunity to share our perspectives with the Commission on both their proposed amendments and the additional issue offered for comment on topics related to Chapter 8 of the Corporate Guidelines Manual.

For those of you less familiar with my organization, ACC is the bar association for in-house lawyers. Our membership is limited to those who are employed to provide legal services within their client organization. We were founded in 1982 as the American Corporate Counsel Association or ACCA, and changed our name to Association of Corporate Counsel several years ago as the increasingly international interests of our members (from both within and without the US) became a stronger unifying force than our identification with any one country's jurisdiction. It is our members' unique status and concerns as in-house counsel that defines their interest in our organization and what we provide for them. We currently have over 26,000 individual members working in over 10,000 public, private and non-profit organizations in more than 70 countries.

The vast majority of our members are in the US, or working in multinational companies often subject to US jurisdictional issues, and thus are very interested in the Guidelines' Manual. Many have direct responsibility for (and the rest have indirect responsibility for) their company's compliance programs and their company's defense in the event of a compliance failure. Because of the extremely large number of companies and industries represented in our membership and the breadth and depth of our members' expertise across every substantive practice area and within every aspect of a company's management and compliance leadership structures, ACC is a representative "voice" of the in-house bar and thus uniquely positioned to offer relevant perspectives on the Commission's proposals.

An Introduction to ACC's Comments and the Perspectives We Bring to the Commission

The impact of the messages sent by the Commission on what ACC members do to implement effective compliance programs on a daily basis cannot be understated. ACC is thus most interested in addressing the Commission's important work in seeking to create guidelines that are useful to the development of effective corporate compliance programs. In our written statement, we detail our concerns with the proposals before you today that we would like the Commission to address in the interest of assuring the success of companies looking to the Guidelines for guidance on how to establish and implement their own effective compliance initiatives.

I will allow you to read our statement's concerns with the corresponding support for our positions that I've laid out in writing. But to offer you a verbal summary here, we are asking the Commission to:

1. Consider adding additional detail to the Commission's requirement that the organization "take[s] reasonable steps to respond appropriately if criminal conduct

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[is] detected, and "to prevent further similar criminal conduct, including making any necessary modifications to the organization's compliance and ethics program." In § 8B2.1(b)(7) we suggest the Commission consider adding the following language: "The need for, method, or appropriate extent of, any of these measures will vary according to the circumstances and the relevant compliance challenges the company seeks to address."

Additionally, proposed language in that same section includes the following statement: "The organization may take the additional step of retaining an independent monitor to ensure adequate assessment and implementation of the modifications." ACC believes this language, while perhaps intentioned as merely the articulation of an option, may – by virtue of being singled out for recitation by the Commission – become a presumptive practice that companies are expected to consider or implement. We suggest the monitor reference be removed, for the reasons we articulate fully in our written submission and that have also been so eloquently outlined by David DeBold during his testimony on behalf of the Practitioner's Advisory Group.

We also request that the references to monitors in the Probation proposals likewise be removed. We believe that repeated insertion of a "monitor option" into the Guidelines' Manual suggests that the Commission sees the practice as some kind of "best" or common practice that judges should consider routinely, rather than the nuclear option that most folks who've ever worked in a monitor situation perceive it to be.

2. **Reconsider the proposal's suggestion that "document retention" policies are a good indicator of a specific conduct that evidence compliance commitment in high level and substantial-authority personnel when judging whether a company has an effective compliance and ethics program.**

The Commission's proposals include two instances of "bracketed" language to clarify what is expected of high-level and substantial authority personnel. ACC is particularly concerned about new references to "document retention policies" in the bracketed language. Our comments focus on two concerns with these proposals: whether it is appropriate to judge the efficacy of a company's compliance efforts by whether its senior managers are responsible for the company's records management programs (is that really what an effective compliance program is primarily about?), and whether the Commission, if it truly thinks that records management is the bell weather of effective complianc programs, truly meant to focus its attention on document retention as the sole cited factor.

Essentially, ACC believes that Section 8B2.1 places too much emphasis on one specific element of a corporation's operations, and chooses for that emphasis a corporate function – records management – that is not even primarily related to corporate compliance initiatives. Further, casting the topic of records management with the wording "document retention" creates an implicit belief that the Commission is interested in strong document retention policies rather than good records management (which includes setting policies for that which is to be retained, as well as what is to be destroyed, archived, retrieved, and managed); one could infer from the Commission's proposed

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language that the Commission believes that the company that is engaged in effective compliance keeps everything forever.

Of course, the ability to produce all responsive and relevant documents related to a legal or compliance problem is certainly very important. But those needs sit on top of a larger corporate interest in managing data and records generally, and are thus ancillary to the company's overall document requirements and burdens. It is unlikely that most folks in the corporate world would consider records management and responsibility to be so closely linked in terms of overall supervision by legal, compliance or executive management. We would suggest that these concepts be de-coupled and reference to document retention policies be removed.

If the Commission decides there is a need to reference records management issues in the Guidelines, ACC requests that it not be so closely tied specifically to retention, and that your focus should be properly placed – not on defining appropriate record management tactics, but rather – on sound and enforceable document hold policies that could be more appropriately related to legal or compliance efforts.

3. Consider our thoughts on the issue set out by the Commission for comment regarding methods for encouraging self-reporting.

The Commission asked interested parties to address whether the Commission should allow an organization to receive a three-level mitigation for an effective compliance program even when high-level personnel are involved in the offense. The draft offered for comment proposes three conditions for this receiving this credit.

First, let us say that ACC supports efforts by the Commission to make the three-level mitigation available in more cases.

As to the **condition for that the company must be able to evidence direct reporting authority to the board for "the individual(s) with operational responsibility for compliance in the organization,"** we think the concept has merit, but the wording is flawed. The term "direct reporting relationship" is not well-defined and is subject to broad misinterpretations if we're understanding the Commission's intent to be that they want to make sure that employees with concerns to share get access to the board if they're not getting action in the company. But within a company, a reporting authority has to do with the companies organizational chart and who supervises whom, as in, to whom do you report?

The term describing the targets of this proposal as those with "operational responsibility for compliance" also is ill-defined and could lead to problems. Who are the individuals who have operational responsibility for compliance? Does this mean persons with some / any level of compliance responsibility in their jobs or on their team? Is this person the Chief Compliance Officer? How does one define who the persons with operational responsibility are in a company that does not have a formal compliance function.

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ACC suggests that what is important is that the board has access to reports from concerned employees and that concerned employees can assure that their concerns will reach the board if they are valid. Thus, the Commission might better assert that an effective compliance program must be able to evidence some kind of effective communication procedure – the Guidelines should not dictate reporting details or whom the appropriate and responsible leader must be, but rather should seek to assure there are accessible lines of communication established that allow both the concerned employee and the board the confidence that the company's systems will ensure that the board hears concerns from employees with important stories to tell.

The last of the three requirements is also of concern to ACC: that the organization seeking credit promptly reported the violation to the appropriate authorities. This criterion is an appropriate consideration in theory, but as written, this language may impede the ability of a company that has done what it should to prove that it now should receive the credit for its efforts. It is rarely clear when a problem surfaces whether the company has a problem or not. It is far more likely that "something" is overheard by "someone," or doesn't look right in a report. Maybe in a few days or a few weeks someone with whom this peculiar irregularity has been shared (likely someplace like the proverbial water cooler) makes a decision to raise the issue to his superior. Then it takes time to get the issue from the superior to a responsible person with compliance or legal responsibilities who can consider how to investigate the concern and respond the person who raised the concern. If there is a legitimate concern to be raised, whoever is investigating the issue needs to put together something that is credible and sufficiently documented to allow the company's leaders to decide if this is an offense to be reported to the government, and that process takes time.

Taking adequate time to investigate a concern raised should not be punished. From the 20/20 hindsight perspective of a judge who knows now that a failure did occur, the actions of the person who didn't know if a problem existed some months back may not seem expeditious in review. Perhaps the Commission might better focus on not adding any additional descriptors to self-reporting (deferring to the other sections of the manual that already cover this issue), or if they do wish to expand on the concept further, perhaps alternative language such as "responsible" or "diligent" or "reasonable" reporting might create greater confidence that the company won't be precluded from receiving credit simply because it took the time to make a considered determination that there *was* a reportable violation before reporting it.

Conclusion:

ACC believes that "best thinking" in corporate legal compliance and the methods by which companies can assure compliant behaviors are changing in important ways: today, it is increasingly likely that compliance is a shared business and legal responsibility between in-house lawyers and many others in the company, at all levels of leadership – from the C-Suite to the line worker. In a growing number of more substantial public companies and in highly regulated industries, it is more common to see the growth of a separate compliance/ethics department that reports outside of the legal department's line

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of authority (and coordinates with legal to create innovative and more business-oriented teams focused on particular tasks or assuring particular behaviors). In other smaller companies or companies with smaller internal management groups, compliance programs may still be implemented the "old fashioned way."

What we see as a necessary result is an expansion of thinking in what constitutes the structure and format of effective compliance programs and best practices, creating a broader array of "leading" practices designed for particular purposes, rather than an assumption that there is any one "best practice" that can or should work in all settings. As companies respond to the complex and often treacherous path of assuring appropriate behaviors by all members of the corporate team and compliance with a wide variety of legal and ethical requirements, they no longer feel limited to employing "traditional" or uniform paths of activities that were previously implemented by the lawyers responsible for establishing and maintaining a traditional compliance function: compliance teams made up of lawyers and business people are more and more likely to think outside the box to craft unique compliance initiatives and internal controls that are customized to their particular corporate profile and culture, as well as the needs of their company, leadership, and industry.

Thus, modern compliance programs and leadership are as varied in their "format" and delivery methods as are the clients they serve. Therefore, the incentives and rewards the Commission wishes to offer to companies to "do the right thing" need to recognize that one-size or one-shape presumptions about how a compliance program should be structured will not fit all; in order for your efforts to have their intended prescriptive impact, the Commission should seek to formulate guidelines that articulate the *outcome* the Commission wishes to incent, rather than dictating the activities, methodology or means by which a company tries to reach that outcome. To do otherwise is to miss recognizing and rewarding the inventive and creative ways that companies currently and in the future are working to assure compliant cultures in different industries, with different managers, across many borders and with greater results.

ACC thanks the Commission for the opportunity to present our members' views and hopes that the Commissioners or staff will let us know if we can in any way assist them in their continuing work to improve Chapter 8 of the Guidelines Manual.

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