PUBLIC HEARING HELD BY THE AD HOC ADVISORY GROUP
ON ORGANIZATIONAL SENTENCING GUIDELINES

BREAKOUT SESSION II

ADMINISTRATION AND IMPLEMENTATION

NOVEMBER 14, 2002

1:33 p.m. to 4:03 p.m.

Held at:

Thurgood Marshall Building

One Columbus Circle, NE

Judicial Conference Center

Washington, D.C.  20002
MODERATOR

GREG WALLANCE

IN ATTENDANCE:

GALE C. ANDREWS
CAROLE BASRI
NANCY M. HIGGINS
E. SCOTT GILBERT
DEBRA YANG
ERIC PRESSLER
BARBARA KIPP
DONALD LANGEVOORT
PAUL FIORELLI
RICHARD GRUNER
RICHARD BEDNAR
LISA KUCA
GEORGE CARDONA

MR. WALLANCE:  Good afternoon and welcome to Panel 2, Administration and Implementation.

We have, I think, an exceptionally large and exceptionally qualified panel to address a number of important issues.

For purposes of format, we're going to give each of the panelists an opportunity, for a couple of minutes, to express their thoughts on not just the specific issues which we'll be dealing with, which I will summarize in a moment, but really anything else you would like to talk about in terms of today's proceeding.

After we complete that, we're going to move on to each of the six questions that we really have to take up and this is very much a working session. The Ad Hoc committee formulated the questions that are generally phrased in terms of the yes and no answer, things aren't that simple, but what we hope to achieve today is to
answer those questions -- there may be several
answers -- and identify the pros and cons of each
of the answers. And I think that would be of
great value to the Ad Hoc Committee.

Just to summarize those questions just
by topic, Internal Communications of Standards
and Procedures, should there be changes?
Encouraging an internal reporting system where
employees are free of retribution, do the
guidelines need changes? Should there be greater
emphasis on auditing and monitoring? Should
there be credit for emphasis on consistent
discipline; that is, should the guidelines have
as a component of an effective compliance program
the evaluation of an employee's performance; that
is, how well the employee fulfills the compliance
objectives set by the company.

Should there be an increase in
culpability score if the organization does not
have a compliance program?

Carole, you're down in the front. And
how can the guidelines encourage self-reporting
given the reality that self-reporting can often
lead to waiver of privilege and therefore third
party claims and litigation. Some of it was
touched on this morning.

Those are the topics. I'm going to
briefly introduce the panelists starting from the
first tier, the lower tier, if you will.

Gale Andrews, vice president for
Ethics and Business Conduct for the Boeing
Company.

Scott Avelino, KPMG here in
Washington.

Carole Basri, executive director of
the American Corporate Counsel Association of
Greater New York.

Nancy Higgins, vice president, Ethics
and Business Conduct for Lockheed Martin.

And going to the top, Professor Donald
Langevoort from Georgetown University School of
Law.
Barbara, Bobby, Kipp from PricewaterhouseCoopers.

Eric Pressler, the director of Legal Compliance and Business Ethics for PG&E Corp.

Debra Yang, United States Attorney, Central District of California.

Scott Gilbert, Counsel for Litigation and Legal Policy, General Electric.

And to my very left, my colleagues on the Ad Hoc committee: Lisa Kuca, Richard Bednar, myself, Richard Gruner and Paul Fiorelli.

So with that we'll start with the lower right, Nancy Higgins, and work our way left and then go to the second tier.

Nancy, the floor is yours -- oh, I've been asked to remind you to -- it won't count so much in this part, but when we get into the interactive part to try to avoid cutting each other off so we have -- I know that's a natural part of interactive session, but to try to remember we're trying to get down a clear
transcription so it can be described for the
public record.

Nancy, the floor is yours.

MS. HIGGINS: Thank you. I really
appreciate the opportunity to participate in this
today and share my perspective, which comes from
being involved in the development and
implementation of corporate ethics and compliance
programs, both are for original signatory for the
defense in this technique [inaudible] ethics so
they were familiar with ethics programs and
compliance programs before the guidelines were
pulled. But all the same benefits from the
guidelines and -- [inaudible] to take a look at
the programs and improve them.

In fact, I think the greatest benefit
to the guidelines comes from that language in
§8A1.2 Comment (k)(7)(I). It requires that
management have taken steps to prevent specific
types of offenses for which there is a
substantial risk because of the nature of that
company's business.

As a result of that provision, companies all across the country did undertake a comprehensive assessment of the risk areas for their companies and a systematic review of the policies and procedures, the training and the monitoring mechanisms in place to ensure compliance in each of those special risk areas.

For many companies what started out as a law department driven effort to ensure compliance with the sentencing guidelines was radically changed into a management-driven process aimed not only at reducing the risk of federal criminal offenses but reducing the risk of other numerous areas as well.

I have a very clear recollection of one executive telling me after a briefing that he's going to sleep better at night now that he knew that someone had assessed all these instruments and that he had programs in place to address them.
He then instructed me to expand the effort to address similar risk areas as well. So companies really have benefitted from the guidelines.

With this background, I'd like to offer two specific recommendations and save my thoughts for a round discussion of specific questions.

Again, I ditto the disclaimer that others have made, my views are my own and don't represent any official position of Lockheed Martin Corporation.

First, I'd like to express my agreement with one of the comments made this morning by Alan Yuspeh. He recommended that the Commission mandate that business organizations of a certain size should have an officer level position or an ethics and compliance officer that is comparable in stature to other major functional organizations such as the general counsel, the CFO or the head of HR.
I used to believe that as long as senior management was generally committed to the company's ethics and business conduct overall then the title and further inspection of the ethics officer wasn't all that important. But since joining Lockheed Martin my opinion has changed. My effectiveness as an ethics officer and the success of the Lockheed Martin ethics and business program is in large part due to the fact that my position was created as part of senior management.

I am an invested officer of the corporation according to the CEO and the COO as well as to the auditing ethics committee and board of directors. That position gives me the opportunity for frequent interaction and influence with company senior management in a manner that is simply not possible for those at a lower level in the organization.

Adoption, a balance recommendation [inaudible] to use his words, for an upgrade dramatically the
level of attention to compliance and sound business conduct in the large corporations in this country.

Second, I'd like to express my agreement with the -- frequent testimony of the Ethics Officers Association. Particularly I agree with its recommendation to add a note to comment "K", that would state a requirement for organizations to have communicative conduct expectations and organizational values.

Put simply, compliance programs are more effective when they are accompanied by a clear statement of corporate commitment to a culture of ethical business conduct.

I support the language proposed in the UAW. Most particularly I would ask that any ethical cultural language that the Commission should adopt be a statement of general principles rather than have specific code content requirements.

In other words, the language should be
point of focus rather than perspective. I say this not only for philosophical reasons because I think that about all of the parts in the sentencing situation, but for very practical reasons from the perspective of those of us who may well be required to implement changes in our programs based on the Commission’s actions.

Most companies are right now in the process of examining and revising the existing codes of conduct that are obsolete in the SEC proposed rules. If the revised guidelines contain requirements for specific code provisions, companies that have just revised their codes may well have to do so again next year in order to ensure that their codes include the language that our lawyers will tell us are necessary to assure compliance for the requirements of the sentencing guidelines.

For Lockheed Martin, which just
revised its code last year, found a three
[inaudible] in as many years and generally found
it uncomfortable for all three years. It is
unlikely that any changes that are there, of
course, will need to be publicly exposed. The
SEC rules would really add value to existing
codes of conduct or enhance the effectiveness of
compliance programs.

So for that reason I would ask that if
the Commission does decide it has specific code
violation requirements to ensure that it uses
language that is comparable to the code of
conduct requirements in the SEC rules.

MR. WALLANCE: Thank you, very much.
MS. BASRI: Is it possible to have
someone get back to me?

MR. WALLANCE: Sure. Absolutely.
Scott Avelino.

MR. AVELINO: I would like to thank
the Commission for inviting me here today.

Having worked with some of the organizations
across diverse sectors, I'm implementing and
evaluating a compliance program for a sentencing
guidelines framework. It's particularly
gratifying for [inaudible] based on my
experience in that a committee organization
will carry forth.

In the interest of speaking favorably
on issues of public policy I will be expressing
my personal views this afternoon which do not
require any particular position of KPMG or its
international member firms.

In preparing my today, I spent some
time reading advanced written comments submitted
to the Commission as part of the public comment
period. It was, if I may say, a largely
gratifying experience. I regard those of us who
worked every day in the trenches to advance the
notion of what we call  [inaudible],
so maybe I shouldn't have been surprised
when I found myself rooting for and applauding
so many comments which I won't hardly play
Overall, I think we're all saying the same things. First, the sentencing guidelines are good. They provide common, practical and fluid framework which many organizations can fashion their own approaches for responsible self governance.

Second, the guidelines should not be overly descriptive in the process although there are a few processes that could use some fine-tuning.

Finally, at the end of the day, the guidelines should focus on effective results and should set more explicit obligations for organizations to be the same.

Indeed, the time has come for organizations to go beyond designing and implementing programs like forward management in force should have a basis for knowing and should be able to persuasively demonstrate that their programs are effective.
I was discouraged to see a variety of comments that seemed to downplay the need to revisit the guidelines. The comments that went along the lines of, "If it ain't broke, don't fix it." I would argue that trust in the American institutions today is broken and governments do provide an important remedy to fix this. To do so, they must be strengthened, adapted and improved based on the experience in both the public and private sectors since their adoption over ten years ago.

Some cited a lack of empirical evidence that supports [inaudible]. So I'll take this opportunity to share some of argument.

In the year 2000, KPMG released the results of its national benchmarking study on organizational integrity. It was based on a survey we conducted with their assistance of well-regarded research and opinion firms on a statistically grounded cross sample less than
2400 working adults across 17 different industries, 14 job categories 5 levels of responsibility and via thresholds of organizational size.

By sharing the arguments with you I think you'll gain an understanding of where I come from, the exhibit test that came from the Commission is an important one.

So here's where we were in the year 2000, almost ten years after the guidelines have come into effect. Seventy-six percent of employees nationally had observed violations of the law of their company's standards in the past 12 months. Roughly 50 percent of those employees said that what they observed did cause a significant loss of public trust in its discovery.

The types of offenses they witnessed included falsifying financial data, deceptive sales practices, conflicts of interest, anti-competitive trade practices, insider
trading, environmental issues, unsafe working conditions, employment discrimination, sexual harassment and misleading the public or media.

The leading root causes of misconduct cited were cynicism and distrust about senior management's commitment to manage standards of business conduct, pressure in numbers, pressure to cut corners to meet goals and lack of adequate training.

Fifty-seven percent of employees nationally lacked confidence that top management knew what type of behavior really went on inside the company.

Fifty-five percent lacked the confidence that top management would be approachable if employees had questions, concerns or needed to deliver bad news.

Only 40 percent of employees expressed a strong level of comfort in using the organization's hotlines to report violations and the response series couldn't tell us why.
If they reported misconduct, 40 percent lacked confidence that any appropriate action would be taken, approximately 40 percent lacked confidence in the confidentiality of the interview and around 50 percent lacked confidence they would be protected against retaliation, and just over 60 percent lacked confidence that discipline would be applied evenly or fairly.

We've offered up the findings of this study to add to the important public discourse that takes place on these issues.

I will say that we've also offered up this survey and its benchmarking data as a tool that organizations can use to help evaluate the effectiveness of their own ethics and compliance issues.

I will say that relatively few companies have stepped up to the plate. Why? Behind the scenes, I can say that the common reaction is, why would we? Or, why would we really want to know?
I don't think anyone objects to closed conduct training hotlines and the like. But to collect the information back on how well it's working, I think the middle-of-the-road view today is "get it."

And with that I will conclude my remarks by saying thank you again for inviting me, I look forward to being on your guideline.

MR. WALLANCE: Thank you, Scott. You may want to come back to some of the findings in that survey as we go through the guidelines.

Gale Andrews.

MR. ANDREWS: Yes. Again, I'd like to thank you for the opportunity to be here today to speak to you on this really important topic. The guidelines have been a major component of what has formed a lot of ethics programs and compliance programs around. And I think it's very important we're here and I applaud your efforts.

I'm not going to read my prepared
statement because I think you've all been able to
read that. But I do have some comments that I'd
like to make and some of those are based on what,
in fact, I've witnessed this morning, had the
opportunity to see the earlier sessions.

In general, I would echo what I heard
this morning. The guidelines are basically
sound. The guidelines provide what is needed at
the level that is needed, and I would add my
voice to those who say we don't want to get more
prescriptive. As my writing indicates, it needs
to be adaptable and it needs to be flexible to
accompany the variety of companies and markets
and customers who are I think today, does that so
I encourage that.

I would also note that in my education
this morning as I watched the proceedings,
there's another set of stakeholders that I had
actually considered when I was preparing my
writing which was the legal profession that was
here this morning speaking to us, and I began to
see immediately this kind of interesting
dichotomy and approach toward what was needed,
what was [inaudible] and what the decided outcome was.
Speaking as an ethics professional,
somebody who has had the daily job to
administer an ethics program in a major
corporation, I had a certain set of desires from
the guidelines to help me in my task, to help me
work the cultural issues which were exposed this
morning, I think, to some degree. Yet as I saw
the legal community speak, they were clearly
looking more for rules of engagement and what to
do after the fact, how do you manage the
breakdown once it's occurred?
I think you all have a very difficult
task in front of you to administer to two groups
and find some compromise. But I do have some
ideas along those lines.
I think what you need to do, and what
I would encourage you to do, is think in terms of
the best possible outcome.
If, in fact, the guidelines do what we would like them to do or what I think the ethics community would like them to do, would, in fact, generate an environment where people would not be getting in trouble because their programs were, in fact, effective. Were they that capable of changing behavior.

And so I would encourage you to look at materials we present and make your changes in terms of what effect will this have on behavior and we use these guidelines to change what is, not to adjudicate what was.

I think that's an important step and I encourage you to keep that focus as you go forward.

I'll save the rest of my comments on the specific questions as we go through that section. Thank you, very much for the opportunity.

MR. WALLANCE: Thank you, Gale.

Scott Gilbert.
MR. GILBERT: Thank you for having me here today to join in on the discussion of this important task.

I come to the discussion from experience as a federal prosecutor and ten years of working we have had to be able, in terms of trying to prevent violations of law and investigate them when we suspected something there was wrong. Disclaimer I have just, really, three broad points to make at the onset and then go forward to discussion on specific points.

One, I would underscore and join with others in making a point that I think that the current set of guidelines or what defines an effective program are very good. They establish -- they strike the right balance between generality and specificity. Too much more detail as some of the proposals would envision, I think that we have enough.

Secondly, I think we do have to remember that we're at a moment when there are
many different regulators and bodies that are considering the forms, both the corporate governments and the substantive elements of the compliance program.

In our company, the company is regulated not only by these general, new federal requirements, it's new requirements that are coming out, and also by the substantive regulators in each of the industries in which we do business; insurance regulators, banking authorities, defense regulators, healthcare regulators. And these are the regulators, really, who are in the best position to understand what are the particular risks, challenges in those particular industries, and naturally those are the regulators that are most focused on very specific, prescriptive requirements.

I think that for the Commission to get into the business of trying to propose its own detailed requirements, an additional form of
1 regulation would be counterproductive.
2 And there's one, sort of, additional
3 voice which I hope that we've heard from today
4 which a global company has to deal with which is
5 that -- well, in our company, for example, a huge
6 portion of our population of employees work
7 outside the United States and are subject to the
8 regulations of the municipalities, provinces and
9 the federal governments outside of the United
10 States found any cultures where the notion of
11 what is pro-ethical may not be the same.
12 By that I don't mean cultures in which
13 there may be patterns of bribery or that kind of
14 behavior. I mean that in some places, for
15 example, Europe, reporting of potential criminal
16 behavior may be regarded as unethical in and of
17 itself.
18 And so I think that not only the too
19 much detail poses a threat not only of
20 conflicting with regulatory requirements, but if
21 the prescriptions are along the ethical nature, I
think that brings us into a much more complicated
game, which ought not to be played out in the
context of guidelines regulating the sentence to
be imposed upon corporations by assuming.[inaudible]
I don’t think it’s the right context without being
completely thorough.
The third point I will make is that I
do think that this would be a good opportunity to
address the problem of privilege waiver in the
context of self-disclosure. I -- my ten years or
so of experience is in a private sector, what I
have seen as the most effective partnership by
far, is when government and private sector in
industry work cooperatively toward that end.
And I think that one step that should
be addressed is you want to promote
self-disclosure but I think the way to do that is
not in the punitive sense, that is to look for
increased punishment of corporations that have
not self-disclosed in some fixed timberline but to
create incentives and to ease the burdens that
are upon companies that are voicing themselves.
I encourage the Commission to consider, as some have proposed, an explicit acknowledgment that self-disclosure will not result in a waiver of the attorney/client privilege and work product protection is associated with internal investigations.

MR. WALLANCE: Thank you, Scott. That certainly is an issue we'll be coming back to later.

Debra Yang.

MS. YANG: Thank you for allowing me to address you, I'll be very brief. Generally, I just want to set some guidelines and also find [inaudible] I just wish the government that -- if you think -- I'm sorry. It just needs a little bit of tweaking and perhaps more descriptive language and maybe some guidance on what the guidelines and compliance will build up to be.

One of the things is that -- is the perspective that I have is that I have the one
from the trenches in the court with the
guidelines in front of us with the judge trying
to determine whether or not somebody is, you
know, entitled to immunity or not or how to
calculate the sentence.

Oftentimes when there's a dearth of
information many times the judicial officer who
may not have the wealth of experience that
everybody in this room has -- that guidance is
very helpful as far as ascertaining what it is
the corporation should have done.

In particular, the government believes
that the language should be clarified to make
clear that training and other methods of
communication are necessary components to be
effective all around.

I think that by doing that what you
would do is rather than have some kind of loose
compliance go around, show that you need to have
the training aspects and then some other way of
reinforcing that.
That, and just to put it in that broad base terminology, and it would also allow itself to adjust in a very small corporation. Small as a phone company, where they do the same thing, however it translates down as workable and financially sound for them to do it at that level.

One of the other things is that we wanted to suggest the organization -- that language be added as follows: The organization must have taken steps to communicate effectively its standards and procedures to all employees and other agents. What steps are necessary to accomplish this must be determined on a case-by-case basis. At a minimum, however, the organization should have disseminated publications that explain in a practical manner what is required and follow them with training programs and other forms of communication to ensure that the need to comply with those requirements is understood.
What we talked about this morning in some essence was trying to regain culture -- exchange culture. By doing that, you have to have the mechanisms within the corporation so that the individual who comes on board that is new or whatever, knows exactly what is expected of them, what the protocol is.

Very similar you have a whole strategy that involves training employment age and discrimination on a manager's level. Though they knew what it was like beforehand, break it down into practical terms of how you relate to other employees needless to say, so that it is, sort of, mapped out for them so that it is not something that is guess work -- clear understanding of what it is that they should do.

One of the other means that I suggested this morning, it also put in a mechanism to confidentially report to the board of directors or the board audit committee, where appropriate, without fear of retaliation. That
is important so they have the luxury and comfort
of being able to do that.

One of the things is that we recommend
against a blanket rule for organizations of all
sizes requiring an increase in culpability score
for a failure to implement an effective program
to prevent and to detect violations of law.

In my jurisdiction in particular we
don't have all huge companies. We have a lot
of small and medium sized companies, we have a
lot of high-tech companies and there is a very
different culture there and one would attempt to
enforce, although working very hard with the
corporations, a compliance program onto
them and say what happens where

[inaudible].

I think that one follow-up point that
was raised this morning, we do also support the
notion of the limited waiver with respect to some
federal agents who are involved in the process,
whether it be some DOD as it was stated this
morning, some of the other agencies, perhaps some
bankruptcy trustee. I'm not sure exactly how we
would course through that but it certainly seems
to me something that would be very valid in
pursuing.

By no stretch of the imagination does
the government and its criminal prosecutions want
to be involved in assisting in a plaintiff's
bar, a civil case which is something that you
all feel is knocking on the other side of the
door.

I'll save the rest of my comments for
later.

MR. WALLANCE: I think we'll be coming
back to some of your comments.

Eric Pressler.

MR. PRESSLER: I want to start by
thanking you for inviting me to join in on the
discussion.

The organizational guidelines have had
an immense cross-industry impact on the
prevention of criminal activity and in the
development in the compliance and ethics programs
in corporations.

    In general, I would say they have done
a good job at promoting this, although I think
there are certain items that need to be kept in
mind as we move forward in changing the
guidelines.

    I have four points I wanted to
mention. The first of these is that one of the
greatest strengths of the guidelines is that they
provide a framework for compliance management and
identify key elements of an effective compliance
management program without dictating exactly or
prescriptively how the program must be
implemented.

    In this way, organizations can tailor
their compliance efforts based on the risks they
face, their corporate culture and the resources
available for compliance management issues.
I think this is particularly important as we look at the questions that we'll be facing later on, the issue of whether communication in training should be done more prescriptively in the guidelines, whether there should be specific encouragement for a self-evaluative privilege, and whether we should have periodic compliance auditing required. Things like that. I think we need to look at this from the perspective of being non-prescriptive and not changing the character of the guidelines.

The second point I wanted to make has to do with corporate conduct standards. I believe corporate conduct standards matter. They have a significant impact on organizations by creating a culture that is supportive of full compliance and they are key in developing an effective compliance management program. My view is that organizations should foster a compliant, culture and that the organizational guidelines should promote organizations to
do that.

The third point, I'm not sure if I would call this the need for clear incentives or the need for a self-evaluative privilege.

But basically, the implementation of compliance program that follows the requirements of the organizational guidelines for monitoring, auditing and self-reporting could result in an organization identifying and disclosing information that could be used against it in a lawsuit.

This is a significant dis-incentive to organizations that are considering implementing this type of program.

In the absence of an effective privilege, waiver or guarantee of reduced penalties, organizations may be reluctant to fully implement a guidelines type of program.

The fourth item, as the Advisory Group considers recommendations for changes in guidelines, I would hope that the Advisory Group
looks at some of the other guidance being given
to organizations, (e.g. guidance from Sarbanes,
guidance from the New York Stock Exchange and
others) so that there's a consistent and clear
message to organizations.

I know right now we're looking at
Sarbanes and we're looking at the stock exchange.
One requires such and such for a
code of conduct, this one requires a code of
ethics. I think as we move forward with the
sentencing guidelines, perhaps, we should address
some of the issues that are in the stock exchange
material and Sarbanes and make a significant
effort to make this consistent so organizations
can give consistent advice.

Those are my four points. Thank you.

MR. WALLANCE: Bobby Kipp.

MS. KIPP: Thank you, as everyone else
has said, it's nice to be here. My name is Bobby
Kipp. I am a partner at PricewaterhouseCoopers
and I am PricewaterhouseCoopers' ethics officer.
internally. I'm in an internal role for PricewaterhouseCoopers that I've been in since the beginning of our program which was the end of 1996, so we've been at this for a while. This isn't something that has come up as a result of the current environment.

My background is as a CPA and I only mention that from the standpoint of understanding an environment where there are lots of rules. I'll talk to that in a second.

I also serve on the board of the Ethics Officer Association as well as the board of the Ethics Resource Center. I think that all of these organizations, in addition to the sentencing guidelines, have done a lot to advance the ethical culture in business, particularly in the United States.

I'm going to take the approach that Gale took, which is to not go into the very specifics of the questions you'd like me to comment on. I did submit written comments and
I hope when we get to the discussion we'll get to those. But just make a couple of general comments.

As some people have reflected on here this morning, I think we have to keep in mind and hopefully you keep in mind, that your goal is hopefully broader than the notion of preventing and protecting criminal conduct, but looking at building ethical cultures and sustaining ethical cultures. I think we've heard a lot of people make comments that reflect on that being a goal that, perhaps, can be achieved in addition to the goal of legal compliance.

And I think, as others have said, that the guidelines have done a lot of good in terms of creating incentives and a structured framework for these kinds of compliance programs.

This, I think, matters when we look at the Ethics Officer Association, for example. When we look at some of their membership data,
something like 40 percent of the members have said that their primary incentive for creating their programs was the guidelines. So I think the work we're doing really matters. So that's a good thing.

I think the flip side of that says that, to many companies, the notion of being sentenced under the guidelines, that's, sort of, at the end of the game rather than the ultimate goal. And so I think the guidelines are there but for many of us aren't necessarily driving our day-to-day goal. Our goal is to keep a standard of business conduct that will protect the corporate reputation. We get to a point in sentencing which has all of those problems in spades.

I should mention that we are a private company, so we're not subject to Sarbanes for example, yet we have more of the characteristics of public companies than I think many other private companies do because of our size.

A couple of overall positions.
think given the notion of the whole culture being important, I think we would echo others that do not go in the direction of prescription. I think that the reaction could be, well, that's a self-serving position for an ethics officer to have, that is, I don't want to have a whole bunch of rules. And I think people will reflect on the reasons for that, and I absolutely ascribe to most of those, or all of those, in terms of the need to tailor activities of individual organizations to the risks and size of those organizations and also to allow the creativity in new solutions with regard to prescriptions about forms of training. Ten years ago we might never have thought about things like CD-ROMs or web training and things like that. I think you have to allow for creativity and have to go forward to allow for many possibilities.
I also see there is an interesting reflection in the accounting industry which has evolved over the past 30 or 40 years to set very detailed rules, and is now moving in the direction of accounting principles rather than detailed accounting rules because there's recognition that you can't define the rule or a specific answer to every possible situation. What you really need to do is to cause people to think in terms of principles and make decisions in terms of principles.

So I think the same thing can apply as it relates to accounting systems.

I think, in general, the guidelines provide the right framework, as I said before. I think there's probably a couple of places where a little bit more tweaking or refinement would be helpful. The notion of mentioning both training and communication as two different types of activities but not prescribing forms they should take.

I think the notion of including in the
response system section that those response systems should allow for confidential and for honest reporting, but again, not prescribing that those be in the form of an ombuds. I'll get to the rest of it later but I just wanted to get that overall framework.

MR. WALLANCE: Thank you, Bobby.

Professor Langevoort.

MR. LANGEVOORT: My name is Donald Langevoort, Georgetown University. I have two apologies to make at the outset. One is that I am a securities regulation specialist with very little detailed knowledge of the organization sentencing guidelines. That's not been a primary area of focus for me but I have looked a lot at the problem of compliance in financial services in the securities industry. Most of my comments are simply going to be coming out of that analogous context.

My other apology is that I have to leave at 3:00. So when I stand up here and walk
out the door, it's not of either disinterest nor protest. I have a prior commitment.

My work in securities compliance and securities regulation has led me to an interest mainly in how one evaluates the costs and benefits associated with a compliance program.

Any system that is subjective or is based on an assessment of the reasonableness of a compliance program inevitably should take into account both benefits -- which are obvious and easily seen -- and by its costs.

Most of my work is on some of the hidden costs and unexpected costs associated with various systems in compliance in various industry settings.

I won't go into the details. We can certainly save some of that for subsequent discussion. But it leads me to a general view of compliance assessment that is very much consonant of what I'm hearing from many of the other panelists today, which is that less detail is
better than more detail. Benchmarks are better than overall netting out of costs and benefits and one ought to leave much room for management experimentation and customization within different compliance challenges in different contexts.

That in turn leads me to a great interest of mine: trust-based or ethics-based compliance systems. I am a great believer in much of what was said here, which is that absent strong emphasis on ethics the compliance system is unlikely to be effective.

At the same time, I am extremely skeptical on efforts to mandate much more than a benchmark baseline that would prompt companies to pay more attention to the ethics-based systems.

Ethics to some extent is inconsistent with heavy monitoring. Trust-based systems actually work better at promoting ethics in voluntary compliance than systems with heavily supervised auditing or monitoring. There is a tradeoff
there.

I think companies, based on their own special challenges, have to make those choices. Writing them advertently or inadvertently into the sentencing guidelines takes you down an unfortunate path.

I am a great believer that companies must have a values statement. It is a very important thing to do.

At the same time, I doubt the statement by itself makes much of a difference. You must look to the question of whether it is it an effective value statement. Does it really work in managing the perceptions and the ethical decisions made on the ground in corporation. One could get lost in the maze.

Again, that leads me to feel on balance that it is often smarter to stay with general expressions of benchmarks and objectives and not micro-manage the process.

MR. WALLANCE: Thank you.
Carole, you'll get the last word.

MS. BASRI: I am the executive director of the American Corporate Counsel Association, I am also an adjunct professor at University of Pennsylvania School of Law and I teach a course in corporate lawyering. I also do consulting work in this area in some major corporations.

From these personal experiences, particularly when teaching at the University of Pennsylvania Law School, I have a lot of students that already have law degrees. I have a lot of people that come into my class [inaudible].

And what I gain from this is an understanding that a lot of lawyers don't know very much about corporate compliance. And I think there really needs to be an education process going on at an earlier time so that there is more analytical work done in law schools. For example appreciate Richard Gruner's work in that
area. Professor Gruner has put out the kind of work to worry us and the kind of work you do in here is very important. There needs to be a message getting out because -- [Inaudible]. One thing that I personally think is important is the SEC's proposed rules that came out on November 6th in release number 158.

We then talked about creating a qualified legal compliance committee. I found that idea when we qualified legal compliance committee in creating that board level to be a very important change for the large compliance organizations that have to be ultra-more organizations.

And, therefore, my comment that I made to Commission, don't miss the fact the Chernoff decision was different. There should really be more talk about the responsibility of board of directors to oversee compliance.

I think that this is the time to look at that issue. I agree with many people who
stood by that fact that the guidelines are basically good, that they have been very functional, they have allowed for creativity, they've allowed for value-based systems, but I do think they need to enter into the equation of corporate government.

Of course, again, the train was going. They keep referring to corporate compliance principles but they do that Ad Hoc. Sometimes it's called conduct, sometimes it's ethics, post-ethics. It's now time to get alignment here. And I think that voice in the Commission that much stronger if you can align with what is going on and point out these little similar taste things going on.

That brings me to another point which is culture. I believe that the real thing that has to occur in companies to have the corporate compliance is cultural change. Some places are, by their nature, good corporate citizens. Many organizations don't. I believe are part of the
third mentality --

MS. BASRI: The FBI and law [inaudible] enforcement. They found five percent of the population was -- that's what they want. Five percent is truly found to be more realistic and the other 90 percent follows. How do you change that? Well, what you do is you create a process, as taking control and I think this is what we have to do. Look toward creating an environment with a path more forward encourage that cultural end in these companies. And, I think that what can be done now for these now [inaudible].

Thank you, very much. I appreciate this opportunity to speak to you.

MR. WALLANCE: Thank you, Carole. All right. We're going to start with the questions and work through them one by one. We'll probably have, on average, 15 to 20 minutes per question, although some may require more time and some less.
It's kind of an awkward seating arrangement because I really would like to see a debate and I realize that half of you are sitting with your backs to the other half which is not a constant to debate, and the other half are looking at the backs of the heads of the others. So we'll do the best we can with this format and at the same time we have to be mindful of the fact that we're transcribing this and therefore interruptions are inevitable but we have to try to keep this as clean as we can.

So we'll start with the first question.

MR. BEDNAR: Greg, before we do that can I throw out an observation?

MR. WALLANCE: Sure. Absolutely.

MR. BEDNAR: I listened very carefully to each of you and I thank you for your remarks, as I do that on behalf of all of us. What is interesting is that not one of you spoke to the application of the Guidelines in the courtroom.
All of you spoke to the guidelines as providing
the inspiration or the stimulation or the
innovation for adopting a good ethics and
compliance program within an organization for
other reasons; as an adjunct of developing a
strong ethical culture within the organization,
as a mechanism for risk avoidance, risk penalties
and sanctions in the first place, for
reputational reasons, for image reasons, if you
will. And I just wanted to ask whether that's
right. Did I hear you correctly that companies
with which you're familiar don't really set out
to draft a good ethics and compliance program
because they want to use it in the courtroom but
rather for these higher, broader reasons? I see
a lot of heads nodding up and down. It's sort of
incidental that they may put you in good standing
in the courtroom.

MR. ANDREWS: Dick, I would argue that
I think that that's the dichotomy I was speaking
to originally. That the two groups are most
concerned about this.

MR. BEDNAR: Right.

MR. ANDREWS: I think your observation is correct. I think if you speak to the legal community they would be more worried about are we in compliance or we do get the benefit, or at least we should, or -- if we should get in trouble. So I think it's really both sides of that argument that exist. I think it's a matter of, irrespective of who you're speaking to, it's going to color how you --

MR. AVELINO: It's coincidental that in the EOA association that their membership was about 12 organizations and in a broader sense of guidelines and today there are 800. I would say the guidelines -- [inaudible] situation.

MR. BEDNAR: Right.

MR. PRESSLER: I disagree a little bit there. The sentencing guidelines did have a big impact on the Ethics Officers Association and on corporations developing ethics and compliance
programs, but was it the incentive or was it the fact that a program guidance was provided?

If you have an organization that believes it is ethical, it's a good citizen, wants to be a good citizen, CEO wants to do the right thing, there is guidance on how to manage compliance provided by the sentencing guidelines. I guess there are the incentives but there is also the model aspect. We should have a Helpline, and we should have training, we should have some more auditing. And if you said, okay, we want to do that, it is not necessarily because there is an incentive but there's a benefit, since you want to do the right thing. It's a benchmark, and you see what other companies are doing. We are bound to make this better.

So I'm not sure that it's the incentives in a lot of cases that promote this. Earlier today, I don't know which speaker it was, commented that certain organizations don't have compliance and ethics
programs. Incentives are there for programs but basically the issue is that the incentives aren't necessarily what's driving programs. There is also a communications issue. And there is -- someone mentioned a publicity issue. Do organizations know what they should be doing and if they knew what they should be doing would they do it? It's not necessarily you need a greater incentives, it may be that you need to get the word out.

MR. WALLANCE: Okay. Bobby?

MS. KIPP: I disagree with you. If the sentencing guidelines went away tomorrow, we would not see many corporations discontinuing their efforts in compliance programs. So that says they are important for other reasons. I would agree with Eric there that the guidelines are helpful, but it's not there only because we think it's going to help us in the courtroom.

MR. BEDNAR: Along that same line I have observed many companies who have been under
a compliance agreement of one kind or another who
continue all of those programs even after the
compliance requirement has expired.

MS. KIPP: Right.

MR. WALLANCE: So we'll start with the
first question: Should Section 8A1.2, comment
3(k)(4) regarding the internal communication of
standards and procedures for compliance be more
specific with respect to training methodologies?

And one concrete formulation of the
question that's provided is where currently
participation in training programs, dissemination
of publications is stated in the disjunctive,
meaning either/or, the question is whether they
should be stated in the conjunctive.

And I believe I heard Debra Yang
argue, I think along with her colleagues, and
read in the paper that was submitted, that it
should be in the conjunctive. And I was struck
by the fact that to some degree isn't that
prescriptive? Doesn't that then require every
company who wants to conform with these
guidelines, to implement training programs, not
simply, let's say, hand out literature or coffee
mugs with, "Compliance is our business," or
whatever other means of creative communication
that they employ.

Training programs strike me as being
more expensive, more of a commitment. So I'm
suggesting -- I'm not suggesting that it's
appropriate or not, but I'm just trying to define
the issue. So I think that is what I'll throw
open to discussion.

MR. FIORELLI: And in addition to
that, it says, e.g., so these would be examples
of possible -- of ways of accomplishing that, or
are we saying that you should have training
programs, you should have other methods and other
methods of accomplishing that?

So is it an example of what would
satisfy that requirement or should that be the
requirement?
MS. YANG: I guess in reaction -- in follow-up to what I said this morning, part of this is a lot of experience in working with some of these companies, may be the training manuals. They really aren't used in any meaningful way. They were developed and then they were shelved. We lack the method of training involved and that there's no translation necessarily from it being developed to it being actually used to help change the ethical culture within the corporation, which, again, all of us are talking about how this will instill something some of that.

So when you say training, yes, I know it can be very expensive. But by leaving it more defined as training as opposed to a specific kind of training. When you are a very small company training could begin by just somebody saying that process during orientation. That's just part of the orientation process. Spend some time going into that compliance memo, so to speak, so that
there is something more that assures us that
something is being done with it, so that it is
being provided to the individuals, so they know
what is required of them as they start to change
their culture.

MR. GRUNER: Can I ask a follow-up to
that because it strikes me from what you said and
the way you framed it that the issue may not be
so much documents or training but sufficiency.

In other words, you mentioned many
settings where there are training documents or
there are documents being distributed, and either
nobody really reads them or they read them
quickly and it's gone a half an hour later.

Isn't the issue really whether any of this sticks
and if so, shouldn't a key feature of the
training or dissemination process be evaluation
of sufficiency? And maybe that's the direction
we ought to be going in a guidelines
definition.

MR. WALLANCE: Scott?
MR. GILBERT: I'm just struck by the
slippery slope that we're on in terms of trying
to describe this kind of detail. The existing
sense is that the organization must have taken
steps to communicate effectively its standards
and procedures -- [inaudible] so for a company
that means what, that means distributors, sales
representatives, lawyers, accountants. And when
we're talking about employees, we're talking
about hourly employees, we're talking about
salaried employees. We're talking about huge,
different variations in populations here.
I think that for this group, for the
Commission to try to get into the weeds and to
start prescribing what is an effective training
program for a company, takes you into areas that
I don't think the Commission is equipped to deal
with.

MR. GRUNER: Well, suppose we use
geneneral language along the lines of the company
has an obligation to evaluate the effectiveness
of their own programs in articulating their own
law compliance demands for their own employees
and not really get down to an
employee-by-employee or even a law-by-law
standard. I think we could be general and still
get across that same topic.

MR. GILBERT: Can we get an
understanding, though, is it possible to get an
understanding of how to measure the effectiveness
of training, is it percentage of employees taking
the training or is it tracking it adequately, is
there -- do you require testing in order to
measure the rates of retention over time?
I just think that as someone who has
designed an on-line training system that's now
conducted in nine languages for 300,000 people, I
can tell you these are incredibly complicated
issues once you get down into them. And I think
there is a huge incentive already. It is
completely obvious that if the company merely
hands out a policy guide of some sort and does
nothing further, that company will be policed by
the marketplace because it will run into problems
and it will pay all sorts of other costs in the
form of noncompliance.

I just don't think doing a cost
benefit analysis here -- that you need to be more
prescriptive in this context in setting further
requirements in a very complicated area.

MR. LANGEVOORT: I'd like to echo that
very strongly. One of my specialties is insider
trader compliance. And, one of my empirical
projects is testing what people who have been
through insider trading compliance programs
really know about insider trading. And the
answer is: pitifully less than they should.

It does seem to me that once you
go down what you call the slippery slope of
making the effectiveness of the training the
issue being tested, it is going to be very difficult
to know where to stop.

MR. WALLANCE: There are two issues
here. And actually, effectiveness, we're going
to take up when we get to the question of whether
there should be self-auditing --

MR. LANGEVOORT: Right.

MR. WALLANCE: -- of compliance

programs. This simply asks whether, in effect,
training should be a component, should be treated
in the guidelines as an expected component of
what constitutes an effective compliance program
without prescribing what type of training. That
would be left to, you know, the GEs or the other
companies or -- so let me keep the focus there.

MR. LANGEVOORT: I just read Mr.
Gruner to be suggesting something else.

MR. WALLANCE: We're definitely going
to get to that in a broader context, but just
keeping the focus on whether training should be
part of a compliance program.

Gale?

MR. ANDREWS: As I read the question
before and made my response, I was struck that
they seemed to be debating the words of training
and communication. And as I concurred in my
writing, the purpose of training is to
communicate, to educate through communication or
some form of communication. So to say training
and communication seems a bit on the redundant
side --

MR. WALLANCE: But it says to -- no, I
think it's not. I think it's training or
disseminating publications. And the issue that I
think this question raises is whether is it
enough just to disseminate publications or should
companies who want to comply or conform have to
actively train, which does imply something more.
A more inter -- more sort of reaching out to your
employees in an active way.

MR. ANDREWS: Let me finish my point
here. The issue in my mind is not whether it's
dissemination of documents or classroom training
or -- there are many avenues that are seen and
accepted as acceptable means in training adults.
And so I think we should be focused on, again, results.

For a particular culture, classroom training may be the answer, for another culture, web-based training may be the answer, for another culture it may be just disseminating information to your company news system or whatever it is.

But I think what we should be looking for here is that, in effect, there's active learning, that there's an opportunity to -- acceptable means of education. As opposed to prescribing, you have to train -- assume formal training classroom and news media or whatever the answer is.

I would think you could word this around or work this around ensuring that you have some results-based communication going on there that provides the breadth of opportunity for a variety of companies and a variety of opportunities to perform.

MR. FIORELLI: I think in the theme of
not being prescriptive and moving towards a point of focus, I am wondering, do we then do a disservice by reading this and not stopping at the end of agents as saying that the organization must have taken steps to communicate effectively its standards and procedures to all employees and other agents. Make that a period and then don't include any other descriptions or prescriptions. There must be training and/or other methods of communication.

I'm just thinking that philosophically when you're writing this document, what are we looking for? Are we looking for more examples or are we saying we should be taking examples off the table because that tends to encourage or discourage behavior?

MS. KUCA: I think we're getting a little over-analytical. They all, in one way, shape or form, are trained on the job and if we include training as part of the dissemination of information, I don't think it's onerous on any
size company, even a small one. I mean, even the
guy who flips a hamburger at McDonald's goes
through training to know that he can't do it
without gloves.

And I also think that you get back to
what Debra has pointed out, which is how are you
showing me that you're educating these people in
what their job duties are?

So I agree with Scott completely, you
cannot get any more detailed than requiring
training because there is different types of
training for different people. But I don't think
any one of you would argue that training is
required. I mean, you need to be trained in how
to do your job whether it's where to put the
paper at the end of the day or when to punch a
clock in or -- I mean, it's just part of it.

MR. WALLANCE: Let me follow up on
that. Would anyone here regard as effective a
compliance program that has no training and
simply relied on a fairly detailed employee code
and ethical code and so on that hands out to
employees and even has them submit back, you
know, I read this and every year it does this.
Would anyone here think that that was inadequate?

And if that's the case -- and I'm
asking these questions somewhat rhetorically --
it shouldn't be taken as a conclusion or position
that any of us have, it's just to stimulate
debate. If that's the case, then why shouldn't
the guidelines state that an effective program
does have to have a training component and then
leave it to the companies to decide how much that
component should be, but to at least set that
benchmark up there?

Scott?

MR. AVELINO: I'll agree that
training, put in those phrases is good. I would
cautions that I think there is over -- too much
credit is given -- experimenting in training. In
my experience, when someone has done something
wrong, it's not because they didn't know what
they were doing was wrong. They knew what they were doing is wrong and they did it anyway because of pressures, because of so many other things, and that's where I think all of this debate and discussion of training just falls short.

There's another counter-argument that no one likes it to come under [inaudible] values [inaudible] on the right side of anti-trust law. And that is where training is helpful, but I caution the over-emphasis encumbered on the training level.

MS. KUCA: But doesn't that go to what Mr. Bednar said earlier which is, that helps the company keep people like Debra at bay while the person who willfully violated the law -- basically, I mean, the reality is that the company is going to have to offer up somebody, and if the company is doing the training, then the company has a little bit of protection to offer up the person who willfully behaved badly
on his own. Doesn't that give the corporation --
I mean, it may not help you sleep at night, but
doesn't that sort of help you show the government
and others that you're doing your best to educate
your people not to misbehave?
MR. AVELINO: It's good on what you
are trying to deal with consequences of
misconduct as limited, like when responding to
preventing misconduct on --
MR. WALLANCE: Eric and then --
MR. PRESSLER: My perspective is that
training is a very important component. One
example of why I feel training works, aside from
the fact that we have tests that show that people
learn things that they didn't know before they
took the training, is that sometimes when we do
training we go out and measure effectiveness. Our
training program has two components. Training
targeted at specific compliance issues and
and training targeted at the overall organization
regarding compliance and ethics. We do vignettes
and for example, we found out that if we put out vignettes on certain topics, we suddenly in the next month or two you get a lot of calls in over our help line system about those topics that we weren't getting before training.

So something is going on that is either encouraging people to report things that are wrong. Perhaps, they now know are certain actions are wrong because of the training or they know to ask questions in more detail about how detail about how things should be done. I think training is an essential component.

MR. GRUNER: I want to pick up from that and also distinguish the notion that training doesn’t always work. It clearly doesn't always work and when there's somebody sentenced, its clear there was a bad apple that got through the system somehow. But if we're assessing the general effectiveness of the compliance program, hopefully there are hundreds, maybe thousands of other employees that it did influence in a good way. So we shouldn't just focus on the fact that a training
program doesn't influence everybody.
But hopefully, also, there is some
positive side to it.

MR. AVELINO: I agree, I think
[inaudible].

MR. WALLANCE: Carole?

MS. BASRI: I found that when you
train, it has to be in small groups; it shouldn't
be Internet-based if you're trying to teach
concepts. I think Internet-based works very
nicely when you have a lot of information to give
on those specific kinds of issues. But when
you're trying to teach code of conduct, I find it
difficult to do your baseline training that way.

Now, I do find the training makes a
big difference and should be done in a group, as a
piece of paper or the Internet doesn't resonate
enough. So people who are not aware of values
have an opportunity to see that other people have
those values and maybe they need to rethink where
they are, which is why I think you see some of
those changes. So I think training is critical.

MR. WALLANCE: I think Carole is an advocate of face-to-face training. Bobby, you might have a different view.

MS. KIPP: I'm not going to argue with Carole on that because I don't think we're going to get to that in this group as to whether we're going to prescribe Internet or not Internet so --

MS. BASRI: Right.

MS. KIPP: -- it's an academic question. I think, Greg, you suggested a pretty practical approach here, would anybody in this room object to the notion of including both words. In my experience, they are different activities toward the goal of awareness and knowledge.

So I guess I would look at it and say from my perspective and my experience, training activities are different, training activities are very important. Who, what, when, where, how needs to be decided by the company or the
organization itself.

But if you ended it with the words, “e.g., by required participation in training programs and disseminating other forms of communication,” I would be happy. I'd also just like to register that I think this "and other agents" phrase should come out because it's so ill-defined that it's problematic.

MR. WALLANCE: We'll take one more comment on this issue and then we're going to move to the next question.

MR. FIORELLI: The last time I suggested stopping the sentence at the comma of agents, so my question is: Should we rewrite this to say the organizations must have taken steps to communicate effectively its standards and procedures to all employees, maybe, and other agents, maybe not and other agents? Instead of “e.g. by requiring participation in training programs and by disseminating publications that explain in a practical manner what is required.”
If we think training is important, should it be there? Should we say that it is there if we think we also have other methods of disseminating publications, should that be there also? So these would not be examples of what would be required, they would be required.

MR. WALLANCE: Carole, last word, but then I want to move on to the next question.

MS. BASRI: The changes, if you take out the "other agents" because I think we've gone over practices, for example, I would like the agents to at least get a copy -- [inaudible]. I think they have responsibilities and agents. And I think we get into a whole host of issues, but the thing is, you do want to get your subcontractors and agents somewhat on board. I don't think you should limit your liability. I think that's the lead group.

MR. WALLANCE: We'll move on to the second question. Just an observation, somebody used the word "tweak" before and I think I heard
it this morning. I don't think these are tweaks. I happen to think that subtle changes can amplify enormously because of the way these guidelines -- the life that these guidelines have taken on. And so deleting agents, for example, or prescribing training and disseminating publications, I think it would have rather significant consequences, which is one reason why we're engaged in this process because we're trying to evaluate what those consequences might be and get feedback from people who do this kind of work on a day-to-day basis. And so far, I think this has proven to be an extremely useful process. So we'll move on to the second question, 1(f). Should Section 8A1.2, comment 3(k)(5), concerning implementing and publicizing a reporting system that fosters reporting without fear of retribution be made more specific and encouraged? And then there are four different
types of activities; whistle-blowing, a privilege
or policy for self-assessment, creation of an
ombudsman office for confidential reporting and
other means of encouraging reporting without fear
of retribution.

This question could be the topic of a
full-day seminar. I would like to throw out how
could -- assuming you wanted to keep all of these
objectives -- and they are all worthy objectives
I suppose -- how far could you go with the
guidelines? They -- the guidelines are in terms
of, for example, whistle-blowing protection
because there's a reference already to, you know,
reporting without fear of retribution, does that
or does that not in effect sum up what
whistle-blowing protection is all about?
The ombudsman office, some of these
issues get into the question of whether the
Commission not so much should change the
guidelines but be recommending the creation of
privileges by Congress.
So I'm going to throw this out to discussion. Again, keeping in mind that roughly 15 minutes to 20 minutes is what we'll have to devote to this very broad and complex issue.

Mr. Pressler: I'll try to keep it real brief. I wanted to comment both on the whistle-blowing issue and the ombudsman office issue. In terms of the whistle-blowing issue, I think you hit the nail on the head, fear of retribution is really what is driving this. And from my experience, corporations deal with the fear of retribution in two ways; they try to keep information as confidential as they can and they allow anonymous reporting.

And in the written material that I submitted I mentioned that in our company about 20 to 30 percent of employees report allegations anonymously. The Ethical Leadership Group, the Priest group indicated, in a study that included 56 corporations, that was conducted in
2001, found that 38 percent of allegations were submitted this way.

So my first suggestion is that perhaps the sentencing guidelines should specifically note that organizations should allow for anonymous reporting.

Related to that, I think there should be some emphasis put on confidentiality, although confidentiality to the extent practical and possible because we can't keep things entirely confidential.

In terms of the ombudsman office issue.

MR. WALLANCE: Go ahead.

MR. PRESSLER: In terms of the requirement of encouraging a neutral ombudsman office, I know that the ombudsman's concept works well in certain organizations.

Getting back to my statement about keeping things non-prescriptive, I think
there are a lot of ways for people to design effective reporting systems. They may have ethics offices, help lines, hotlines, ombudsman offices, etc. There are a lot of alternatives. I think by requiring an ombudsman office, particularly when you think about small organizations, you're throwing something out there that is not in keeping with the guidelines being non-prescription.

MR. WALLANCE: Any other comments?
MR. GRUNER: Can I ask a question about the anonymous reporting option, if we were to frame it that way?

MR. WALLANCE: Sure.
MR. GRUNER: Are there any companies that would have an objection, either your own companies or ones you're aware of where anonymous reporting is insufficient to trigger an internal investigation and therefore they would resist that as even an option? In other words, they
would insist that you would identify yourself if you're a reporting party?

MR. PRESSLER: Again, most, the great majority of organizations do already allow anonymous reporting.

You're saying probably 90 percent plus, but there are some that don't. And this clarification I think would help that.

MR. GRUNER: I'm trying to flush out the 10 percent, or whatever their percentage is, and determine what their objection is. Is it a notion that they can't effectively investigate it without an identity of the reporting party?

MS. BASRI: I've actually encountered this and their fear is that you're going to get a lot of spurious reports that they are going to have to investigate and it's just going to create a lot of bad blood within the company.

There are companies, interesting enough, that believe they have very open communication and why wouldn't somebody come forward and say it, because we're
not that kind of company.

And it really counts against them when to put them at odds with reporting these. It's like admitting they didn't have open communication. They have a problem, they're going there now because of Sarbanes-Oxley and Section 301 that there's a problem.

And so if the reason that they wouldn't want to get involved with it is because they are scared that they won't get the who, what, when and where and be investigating something that's not quite there.

To get that information, they are going to end up getting personal information in the process that it might not be honest. And then they feel they violated their relationship with that person because to investigate it they are going to probably need to determine who that person is. So they are having a real conflict there.

We also have this more with companies
that are based abroad and have subsidiaries here,
because there is a cultural difference also going
on. I've seen it happen in U.S. companies as
well, very broad terms.

MR. WALLANCE: Bobby?

MS. KIPP: I am surprised by what I just heard, Carole. My experience is as Eric said -- first of all; I echo Eric's comments, I won't repeat them. We are at the exact same position on questions. But I think the question was, do you know of anybody that would object or doesn't have an anonymous reporting capability? I don't know of any organization that objects to this. It seems to me that there are certainly situations in which things are anonymously reported and that -- because they anonymously reported, you can't investigate because you are not given enough information to investigate.

This is the nature of the beast.

The question I think is: Do you do more good than not by allowing an avenue for people to come forward? And it seems to me that
an organization that has a culture where people openly communicate shouldn't be scared by the notion of adding a safety valve in anonymous reporting. So it's maybe they think they have open reporting but they really don't. Just an interesting reflection on your feedback you've gotten from --

MR. WALLANCE: Let's give Scott an opportunity.

MR. GILBERT: I come from a company which has an anonymous reporting option and we get a lot of anonymous reports, and I think it's a very useful mechanism to have because I think some employees feel more comfortable surfacing information that way.

But I do want to come back to this cultural issue because I have found that as we have discussed these issues around the world, these are very serious issues. That is, people who lived through World War II who have a visceral reaction to any form of anonymous
reporting which resonates to them to the experience with authoritarianism in World War II are very much opposed to that. So that any requirement of providing an anonymous reporting channel, I think, is a mistake for global companies to oppose that kind of requirement through this mechanism on global companies that are operating -- [inaudible]. It's a very serious issue that in Europe is very strong now. The other point I wanted to make is that we spent a long time in dictionaries looking up -- [inaudible] and scanning the history of the ombudsman office and reading the case laws emerging on what is privileged and whether we could guarantee confidentiality. And our conclusion was that we can't guarantee confidentiality and that we were not comfortable with the notion that someone could report something to one of our employees whose title is ombudsman, that information could have serious impact on the well-being of employees, the
corporation, and that person could not be free to
surface that information that is beyond what's
been -- would be shielded by some confidentiality
notion and could not surface that information
properly -- [inaudible].

The -- [inaudible] writing --

[inaudible] certain exceptions to the
confidentiality, once again, very complicated
kind of notion. So I counsel against stepping
up, making more specific the requirement has some
sort of confidential, neutral ombudsman.

MS. KUCA: Scott, I have a question.
I just want to make sure I'm understanding what
you're saying.

MR. GILBERT: Right.

MS. KUCA: With regard to this whole
confidential reporting system in the global
company, are you saying that -- I mean, if they
require that there be an anonymous reporting
function, there could also be an open-door
policy. Are you saying that they are
inconsistent and they can't function together so
that the company can decide what to employ where?

MR. GILBERT: I'm making two points, that you can confuse them, anonymity with
confidentiality, they are two different things.

MS. KUCA: Um-hmm.

MR. GILBERT: Anonymity means the
person can report information without giving up
his or her name. Confidentiality issue is
whether if a person walks in to the ombudsman
office, there should be some guarantee that that
communication between that employee and that
ombudsman person is somehow shielded by some
notion of confidentiality and the ombudsman
person is restricted from providing information
about who the person is or details that might
reveal the person's identity.

I think that companies are
hard-pressed, really, to say to an employee we're
going to treat this confidentially because they
may have to disclose to the government, they may
have to give it up to management in a new review
they may have to report to an audit committee.
The practical realities of life, it's
very hard to shield the person's identity in that
context. So my conclusion is that I think you
ought not to prescribe that there must be an
ombudsman that is a confidential reporting
mechanism. I think that's a very unclear term
which in a practical implication is --
[inaudible].

MR. WALLANCE: I'd like to ask Debra
Yang to comment on what Scott said, but first I'd
like to read the response to the Department of
Justice to this question.
"The inclusion of the internal
whistle-blower protection is an important
measure of an organization's commitment to have
an effective program. Similarly, the creation of
an ombudsman office may also be
an important measure, although as we stated
above, we think the guidelines should not dictate
specifics, as would creation of other means of encouraging reporting without fear of retribution," here is the key point: "Such other means could include a mechanism to confidentially report to the board of directors or the board audit committee where appropriate without fear of retaliation." Confidentiality is even in italics.

Debra, Scott seems to be suggesting that as a practical matter, a company could never, would never want to assure that kind of confidentiality. It needs the flexibility, among other things, I suppose, to take it and disclose it to your office in order to get the benefit of a disclosure marked down in culpability score if not the cooperation criteria.

So can you comment on what you had in mind and how to reconcile what you put in here with what Scott is saying?

MS. YANG: [inaudible] -- Scott's
comments, I don't think -- this is from my own perspective, [inaudible] issues -- [inaudible] corporation.

I think the general idea is that -- [inaudible] example of any type of variation of the program that not one was required, don't have to have an ombudsman, you know. The thought process behind that was that we wanted to have some mechanism to get the information to somebody who was not a participant in the wrongful conduct.

There are some clear issues on the corporate side. But you still need to have some sort of ability for them to get that information out.

And so any of these -- [inaudible] subsequent mechanism to go to, you've also -- [inaudible] protection. Let's say you're the young accountant that just joined some place and uncomfortable with what he is over-seeing, obviously he needs some protection you're not
going to get fired but what do you internally,
who do you go to?

I guess that's why we want examples
given, we don't want to -- [inaudible] required
because in large part I can't begin to
contemplate all of the issues that you may come
across on an international basis.

MR. GILBERT: See, what I'm saying is
we have a very robust ombudsman organization.
[inaudible] allowed to go outside their
chain-of-command to a different context and
report -- [inaudible]. We require them to report
concerns, not violations, because the moment they
report it they may not know it's a violation of
law or corporate policy, but concerns.

What we're very careful to do is,
fundamentally we want to be candid with the
people that work there, is to say we will use our
best efforts to control this information to
protect you because we have an absolute
protection against retribution.
We stop short of saying it's confidential because if you think about it, it's not because at the end of the day you may have to disclose it to the government or the auditor or management to take action.

MS. KUCA: Hey, Scott, what about the -- forget the confidentiality issue and let's go back to the anonymity issue. Should -- is there some sort of unanticipated harm that we're overlooking to require the company to have the ability to report something anonymously? Do the same sort of restrictions apply, you're not going to be able to keep it anonymous for long, therefore -- I mean --

MR. GILBERT: There you have a greater chance of keeping it anonymous forever. Someone can just drop a typed note over somebody's desk. But all I'm saying is I actually think it works pretty well in its current arrangement. A reporting system that fosters reporting without fear of retribution leaving an
open for the company given it's context to choose which of these mechanisms works best. Because frankly, if you're a domestic U.S. company and you have no operations overseas and you don't have this issue of informant concerns, you should put in an anonymous reporting form. That should be part of the program.

All I am saying is I think that this is an example required, they must have an anonymous element, I think there will be some companies that are going to --

MS. YANG: Let me clarify something just with this confidentiality aspect, is when we say confidential, we don't just mean I get to tell Scott and that is just it. And that is not the issue. That it be treated in a confidential manner so that I can tell Scott, and Scott can make that determination as far as what to do. I realize that that not always gives the assurances to the reporting individual -- [inaudible].

MR. GILBERT: The employee is going to
say, you told me it was confidential --

MS. YANG: Right.

MR. GILBERT: And then the next thing

either you have breached a trust or you have a
lawsuit.

MR. WALLANCE: Gale?

MR. ANDREWS: Again, I think in this
discussion about being too descriptive, I would
also be worried about the focus slightly
differently, which is what the employees are
worried about, whether they are anonymous or
confidentiality is a lack of retribution.

I think anything we're doing around

I'll give you an example: In a large

company like Boeing, we have an anonymous

opportunity and if we somewhat guarantee
confidentiality, much as Scott has been talking
about, if an employee, say, witnesses a felony
and comes forward and says, "I witnessed this
felony and I want to be confidential," well, I'm
sorry, we're going to turn it over to the
appropriate authorities and there is going to be
an investigation and this person is a witness and
all of these other things and we don't have an
all witness protection program so, therefore, you
are where you are.

But what we really need to worry about
in that in the dichotomy nature the employee is
not harmed. And so from the standpoint of, in my
view of what the sentencing piece of this should
look like is, are we protecting these people,
should be the primary concern.

(End of Side 1, Tape 4.)

MS. KUCA: I think Scott's statistics
from his survey indicate that the employees have
no faith in the system already so it seems like
this component is one that may not be working
because you can have a non-retribution policy but
the statistic is saying that there is no faith in
it.

MR. ANDREWS: And I would agree that
we begin to focus people on being worried about
confidentiality and worried about anonymity. In
fact, it's almost impossible, again, for the
Boeing Company with 170,000 employees, you know,
making sure that the -- [inaudible] isn't going
to hold something is very difficult to do. I
mean, there is just the truth of the matter. And
with all good intentions, you can't always manage
that piece of information.

So we have to focus on making sure
that -- you know, try not to let things get out.
But if they should, making sure there is no
consequence to the individual who, in fact, came
forward and did what we asked him to do which is
to be honest, to come forward with issues, to
voice their concerns.

Again, I think that whatever we're
doing with the language is, we don't want to
focus on this front end piece which may or may
not be useful depending on the culture you're
coming from.

MR. FIORELLI: One thing I think we
should remember is that retaliation can be both
formal and informal.

MR. ANDREWS: Right.

MR. FIORELLI: You can have
retaliation where a person comes forward, makes a
complaint and you can make sure that she or he is
not fired or terminated. That's easy. But how
does he or she integrate back into the work
place? What are people -- the rumor mill. What
do people say about the methods? How is their
career tracked? Has it slopped a lot less than
it was?

And that was really my basic question.

By promising -- what we're doing by having
whistle-blower protection and promising we're not
going to retaliate against you. Is that enough
to get the information into the hands of management or do we want to have anonymous reporting or do we want to try to go toward confidentiality where you could have more of a conversation with the person less clandestine, drop boxes, and an easier ability to follow up on details?

At the same time, I hear your concerns that we don't have the mechanism now to promise confidentiality. And so it's a very -- I guess in an ideal world, perhaps we would be able to do that. And maybe that is what the reporting source wants. They just want to be able to get it off of their plate and onto somebody else's plate and say, "I just don't want this to come back to hurt me." And don't let this -- you know, "You deal with it and don't let this affect my career."

MR. WALLANCE: Nancy and Eric and Carole and then we will bring this to a close.

MS. HIGGINS: Thank you. I think that
you should bear in mind that most of the companies have programs, have ways to report anonymously and as you have just said, to keep things confidential to the greatest extent possible.

Now, reality is that by the time somebody contacts one of our programs, that person has taken a lot of time thinking about it, trying to get up their nerve to do that. They've already told eight or ten of their closest friends. So when a confidential or anonymous investigation gets underway -- it gets to the organization, most of the people there know who -- and oftentimes they've already brought the matter to the attention of the management, as is suggested in the first place. And the reason they came to the reporting office is because management didn't act as they hoped that they would.

So we all try our best to keep things confidential. I think the biggest concern that
people in many of these offices have is that we can't protect them from outside sources. If the government comes in with a subpoena or a third-party litigant comes in with a subpoena, we are not at this time able to protect that person from disclosure by our office. And that is something that keeps people from coming forward.

MR. GRUNER: I'd like to follow up on that. Your facts assume that there is a report made where the reporting party already sought relief or change from their own management and didn't get it. Isn't that a situation where there is a very high likelihood of retaliation because you're not only accusing somebody, you're also essentially taking on the management's first negative response to the problem? Is there ever a follow-up, then, about somebody who was in that obviously hostile management environment as to what happens to them next?

MS. HIGGINS: Yes. And it isn't
always a hostile situation. You have to bear in mind that a large number of -- [inaudible] offices are not substantiated, not just because we didn't have enough information to investigate, but because the reporter had their facts wrong.

MR. GRUNER: Whether or not it is not substantiated though, you've now taken on your manager by saying, you know, Joe Blow inadequately responded to this. Even if the reporting party somehow got their facts wrong, they're in a hostile manager/manager relationship.

MS. HIGGINS: What I was going to say is that those are the situations where you would have the most honest, the most concern because once somebody alleged -- [inaudible]. It is investigated and it's found out, and that person -- that problem isn't there anymore.

MR. GRUNER: Yeah.

MS. HIGGINS: So it's really an effort to maintain -- to build a culture where people
are encouraged to go forward and make that --

MR. GRUNER: You're assuming the

manager is the person accused.

MS. HIGGINS: Right.

MR. GRUNER: I am not assuming that.

I am assuming somebody else is the accused but

the manager has said let's forget this. So, then

the report is made in the face now of essentially

taking on management's decision.

It just strikes me that that is the

sort of retaliation setting where an

anti-retaliation program would have to have some

follow-up to be a serious anti-retaliation

measure. I'm wondering if anybody pursues it at

that level.

MS. HIGGINS: Yes. Our process

involves a requirement for the ethics office to

get back in touch with the person after the

matter has been closed in a case where it appears

that there is a high risk of retaliation.

They tell people at the time to come
back to us if they feel that they are suffering a retaliation.

Of course, retaliation is not a very difficult issue. Everyone who reports something for the rest of their lives thinks that any adverse occurrence in their career directly is a result of that report. So it's difficult.

MR. WALLANCE: I promised Eric and Carole quick last words.

MR. PRESSLER: In terms of what I have observed, let's take a situation where the company has promised no retribution but also fails to promise confidentiality because they cannot do that and you are Susie Smith, the secretary to some high-level person. You know that the high-level person may be doing things that look a little fishy to you and you're not sure but you are suspicious. Is it enough for Susie Smith to come forward unless she can come forward anonymously?

We've handled about 2500 cases on our
help line in the past few years and I'd like to
say that about 95 percent of the value comes from
about five percent of the cases. And of that
five percent there are a number of those with merit,
where the secretary or someone like that came
forward, who I don't believe would have come
forward at all if they couldn't come forward
anonymously.

Very often they will come forward
anonymously and then two or three discussions in
they say, "Oh, I'll just tell you who I am but
keep it quiet." Something like that.

But I don't believe they would have
come forward at all had they not been able to
come forward anonymously.

And I think the fact that 38 percent
of the cases -- quoting the Ethical Leadership
Group Benchmarking study, that 38 percent of the
cases in all of these corporations they surveyed,
56 corporations, were anonymous. There are people
out there with items to report, and a policy may say no
fear of retribution, but they are not going to come forward unless they feel protected. And the only way to do that in the absence of a promise of confidentiality is to permit coming forward anonymously.

So I think it has to be in there.

MR. WALLANCE: Okay, Carole, and then we'll move on to auditing.

MS. Basri: Just one point. With anonymous reporting and particularly third-party anonymous reporting, we can go back to that person after they have been assigned a case number and ask additional questions.

The person doesn't always remain anonymous because sometimes when we report on merit they are so specific that that ends up -- [inaudible]. I just want to point that out. We think that makes a difference. I think anonymous reporting is a good thing and it can be done as a process so that you do get as much information as possible to safeguard any serious claims, but it has to be a process of supporting -- [inaudible].
I just want to make that point. I think it is a good idea, but there has to be an appropriate process involved.

MR. WALLANCE: Okay. I'd like to move on to auditing. And what I am going to do is treat 1(g) and 3 together because they are both auditing-related questions.

1(g) asks whether there should be greater emphases and importance given to auditing and monitoring including either through prescription or point of focus, self-auditing of the compliance program for its effectiveness.

And Number 3 asks whether -- how can Chapter Eight encourage auditing and monitoring and self-reporting regarding suspected misconduct and potential illegalities, keeping in mind the risk of third party litigation or use by government enforcement personnel realistically diminishes the likelihood of such auditing?

And since, Debra, you indicated you have to make a plane, I'm going to start with
Number 3 and pick up with something you said which came up this morning, which is to what extent would the Department of Justice be willing to advocate a safe harbor against or from waiver of the work product, if not attorney/client privilege, when a company discloses to the government the results of an internal audit or let's say an employee whistle-blower report?

And you indicated, and I think James Comey indicated, some interest -- and obviously none of this is literally official in the sense that you're committing anyone, but I want to explore this because I think there would be some interest -- I am guessing there would be some interest in the white-collar community in resolving the issues created by the waiver problem, perhaps this way.

MS. YANG: Actually, I wrote a note here to remind myself to make a disclaimer -- [inaudible] officially. But from things that came up with this morning and some other things
before, it definitely would seem to make sense. We've had a number of situations and problems with bankruptcy trustees, situations where we have to shared information with the bankruptcy trustee who ultimately generates a public report. And that's not something that we necessarily want to do or endorse because some of the information we have is from protected sources, so to speak, things that are not public in nature. So we've had that -- [inaudible]. Corporations that had dealings with other agencies, federal agencies. So I think that there is an interest there trying to see whether or not we can pursue some sort of safe harbor. I think the department suffers from that, I think, in some ways -- well, I think the difficulty is putting all of the heads together with the federal agencies and is trying -- [inaudible] with all of the varying interest. MR. WALLANCE: Let me throw this out because it's probably the easiest cases where
there is a safe harbor from disclosure to
plaintiff's attorneys for use in private
litigation --

MS. YANG: Right.

MR. WALLANCE: And then I have the
sense that, again, unofficially, you and your
colleagues didn't think that that could create
enormous issues.

MS. YANG: Right.

MR. WALLANCE: But what about, for
example -- and I think Josh raised the notion,
well, maybe we would want to give it to the civil
division of the Department of Justice.

But you're looking also at the SEC,
you're looking at state attorney
generals, you're looking at Congress,
congressional committees, would it be -- just to
think out loud, would it make sense to have a
safe harbor but within that safe harbor there
could be disclosure within the executive branch
of government but not to Congress, not to state
attorney generals and obviously not to
third-party litigants?

I realize these create enormous policy
issues but I would just like to have a discussion
without any official statement on your part on
that point.

MS. YANG: Just purely on a thought
basis, not on any sort of policy or a formal
basis, that might be a workable alternative.
Oftentimes when we ourselves during our
investigations come across situations where
congress is doing something else on that same
case amidst any witnesses and there is the
uncomfortable relationship anyway, diverse
interest in what it is that we want to -- of how
we want to work -- what goals have been brought
to us, what entities we want to achieve. So at
least with respect to the legislative --
[inaudible].

With respect to state agencies that
may have parallel investigations, I don't know,
that one we have to think through. I think there
are a few more policy problems that are included
in that. Oftentimes, we work in conjunction
with -- [inaudible] -- cross-designated over on
certain cases. Oftentimes, we have --
[inaudible] over certain cases, so I'm not sure
how -- that's not an easy question to answer.

One of the things that you did bring
out in sort of the full sense of self-report,
you're going to run into -- [inaudible], power of
the United States government onto yourself and
who really wants to do that in a willing fashion?

Who said it this morning -- MR.

Lytton, start to chum the waters. And I say,
yes, I can definitely see that, but I also say
that chum the waters enough and you may actually
get yourself in a situation where your
corporation may never be charged.

We had a case recently where a
corporation came forth, did self-reporting, turn
things over and ultimately because we felt that
they were so pious and also trying to sort of do
the right things by themselves, we didn't charge
them. So they actually managed to cross the
great divide. So there was a great incentive,
that of a benefit. The corporation could save
itself from being charged. So there is some
comfort in knowing that that is feasible and a
viable option and something that we look at all
the time. Because as we sort of got into this
morning, the ultimate goal here is not to
dismantle corporate America, the ultimate goal
here is to take out those wrongdoers and
perpetrators who are, I guess, causing the
American public to have a crisis in confidence in
corporate America.

And so it's not the goal of the
Department of Justice nor my office in particular
to look at corporations. If they come to us and
tell us, "Look, we did this, we did this, we did
this," -- and trying to comply with this program.
That doesn't look like somebody who is really
turning their back on what you are trying to put
everything together. And that's something that
is very persuasive to us.

That same conversation with Mr. --
[inaudible] in the hallway about -- reverse the
corporation and see what it is that they are
doing and what mechanisms they put in place, they
can't protect themselves against every possible
situation, but they try to put something in
place to minimize that and to allow those
individuals to come forward they need to
consider -- that's a big factor.

Back to the safe harbor, we should be
interested in --

Mr. BEDNAR: Creates tension.

Mr. WALLANCE: Richard was just saying
this is an area of great tension and so I'm
wondering -- and I hear you on the value of a
company self-disclosing.

Ms. YANG: Right.

Mr. WALLANCE: The audit companies
make that decision without regard to whether they
are ultimately going to have to deal with
plaintiff's lawyers and so on because there is so
much in their interest.

There are probably a lot of close
calls. It may have gone against disclosure
because they were concerned about the third
parties coming down and the chumming waters concern.
And really I think that this safe harbor -- and I
welcome some of your comments, particularly
before Debra leaves, on this issue, because I
think it strikes me as a possible solution to
this tension. It may not be a perfect solution,
particularly it depends on where the line is
drawn and who is inside and who is outside.

But nonetheless, just getting the
plaintiff's lawyers outside or within the safe
harbor, if you will, I think would probably serve
a lot of Department of Justice interests and I
don't think interfere with any law enforcement or
societal interests. They still have the right to
go after the documents in ordinary discovery,
during their discovery and the Courts will resolve the issues.

So I really welcome --

MS. YANG: What if the line were drawn as far as including -- you know, because as I said to you before, it's problematic when you try to expose some other state agencies. But what if you drew the line around everybody inside the circle in all of the regulatory agencies so that would exclude your legislative aspects.

MR. WALLANCE: Federal only or both state and --

MS. YANG: Both federal and state.

MR. WALLANCE: You know, my view would be that that would be an improvement of the current situation because the waiver -- at least you've excluded the plaintiff's attorneys and they've excluded Congress. You don't have to deal with all of these rulings that are all over the place, vertical waiver and horizontal waiver
and inconsistent jurisdictions on this issue. It
does give some clarity.

I think there would have to be a significant
dialogue before anything could get done, but I
think it's something that our group would have to
look at and that's why I'm encouraging this in
the context of this hearing.

Some other thoughts, particularly if
you think -- for those of you in the private
sector, you think that even just excluding that's
all that can be achieved, but even just
excluding the federal government there's no waivers
against private litigants. Whether that would be
seen as something positive. The company still
has the option whether to disclose or not, but at
least it's offered that additional protection.

Any thoughts?

MR. GILBERT: How would you articulate
the C problem?

MR. WALLANCE: I haven't gotten quite
that far in the legislative drafting process.
It's a concept right now. But I've seen other safe harbors and it would be the disclosure to the Department of Justice, and I guess you could say pursuant to the sentencing guidelines or in hopes of the qualifying for the sentencing guidelines but not constitute a waiver as regards to third parties. That's not the elegant language but that would be the concept. I think it's fairly easy to define what you're waiving or not waiving as against whom. I think what is harder is to define what circumstances the safe harbor is triggered. It's the disclosure to law enforcement of what and, you know, that would require some thought. But I do think that the guidelines themselves, when they talk about disclosure of the information, that kind of gives you a starting point. MR. GILBERT: I think it's a great idea. I think the public policy objectives
should be encouraged, companies to come forward.

I think that voluntary social programs in the defense region work really well in encouraging that kind of reporting and this would solve one of the difficult problems which is the third-party litigation under harassment. So I encourage you in that endeavor.

MR. WALLANCE: Bill's point was that he really wasn't that worried about disclosing it to government officials. He may have even meant, I won't quote him, but the SEC because he knows he's dealing with responsible people. But he really seemed to be expressing a lot of concern about just opening his door to these plaintiffs. You know the plaintiff's lawyers these days are extraordinarily well-funded, jury verdicts have been astronomical. So it's a very legitimate fear.

And these waiver decisions are all over the place. Nobody really knows what's going to happen if they make that disclosure, how long it
will be. So I would think that this is something
that is really worth exploring.

Carole?

MS. Basri: Just a short thing. The whole foundation of what we're trying to do is create an effective compliance programs. You're going to go intellect processes corporation You're going to have to do some base level of risk assessment. You really want a rigid approach, you don't want a cookie cutter taken off the shelf. To really want them to have a co-product that makes sense and a training program that really addresses the robists, they are going to have to do it.

Now, if they feel they are shielded and protected in some way, they are going to do a better job of really coming up with a good code of conduct that really addresses the issues that ingrain the training program. And I think what we really want to have is a program -- the government has to realize we got to have some
kind of protection.

It's very hard to go in and teach senior people and 8A bring in an outside free cell and then create these records and then say, "No, we can't create them," and then we don't have a basis for litigating a good code of conduct with compliance records.

I see that if we don't get to the bottom of this, we'll always be dealing with a house of cards. What their risks are and what their problems are and what needs to be addressed in code of conduct, what do we really need training in?

I think this is a very fundamental issue.

MS. KUCA: I just want to caution one thing and maybe get some thoughts from others on it, which is remembering the fact that this is not an exercise in the United States' best practice standard on corporate compliance programs. This body of law kicks in at the
sentencing process. We could more unevenly

tip the playing field if we're going
to embody this prosecutorial discretion
element into the application of the guidelines.
We are going to see very much what we
see going on in individual indictments which is
leaving the whole departure issue in the
hands of the
Department of
Justice. If we're looking at this as
an application process to mitigate sentence,
the
probation officer is
not going to be empowered to make that call.
Having been on that side, you
know, they are going to march across the U.S.
attorney's office and say, "Did they self-report,
was it timely?" I am not saying it's not what
we're saying, I think it's a terrific idea, I'm
just saying that when we look to what we're going
to put in ink -
MR. WALLANCE: If this is only an exploratory -- I want to stress that this is only an exploratory discussion and nobody here has gone beyond that stage yet.

MR. FIORELLI: Just for the sake of being a devil's advocate, I'm not a plaintiff's attorney and I don't know if there are any of them here, and I guess my question would be to turn it on its head, what argument would they make as -- let's just say, I would like the information? If you're going to disclose that to the government, and perhaps the government is not being as diligent as we would like them to be. And we would advance that case on a private level if the government doesn't do an adequate job on the federal level.

MS. YANG: I can tell you --

MR. BEDNAR: And they'll do it on a pro bono basis.

MS. YANG: But have been cases where [inaudible], they are always there. They are
always waiting for whatever information -- they were right on top of whatever we do in our case. We do not, you know -- ignore them because that's not part of what it is that we do, nor do they drive what it is that we do, but you can feel them right there just waiting for any tidbit on any discovery.

So I don't know that they necessarily have a right to any of the stuff. I know not much of what we do has certain protections. It actually is public, grand jury investigation generally has all the succeeding protections -- the minute it gets filed, it's --

MR. FIORELLI: But haven't there been keystone cases where plaintiff's attorneys say that the government didn't do as good a job as they should have done, weren't as diligent as they should be, and I will advance this case. If you're not going to do it, I will. If you don't give me any information that was available to the government then you were disadvantaging MR.
I'm not saying that I disagree with the argument, I'm just saying that I'm not sure if we're giving the plaintiff's side a fair hearing.

MR. WALLANCE: Well, thank you for --

MS. YANG: I apologize but George Cardoz (phonetic) is the first assistant in our office and he is going to stay for the rest of the meeting. Thank you, very much.

MR. WALLANCE: Debra, the Ad Hoc committee is very grateful. I think you flew out here on a red eye?

MS. YANG: I did.

MR. WALLANCE: Yes. So we greatly appreciate your presence and the contribution that you and your colleagues made this morning. I thought it was enormously invaluable to this process. So thank you, very much.

MS. YANG: I appreciate all of the work that you do. It's nice to see this side of it as opposed to just reading it and --
MR. WALLANCE: Have a good flight back. Let's move on to the related issue in the auditing which is whether more emphasis should be given to auditing and monitoring including either prescriptively or by point of focus, self-auditing of compliance. There is a certain logical feel to that. If you're going to have a compliance program, just as you're going to have any other business activity, shouldn't you be auditing that effort to see whether it's effective? But that's a generality. The practicality of doing it may create issues and I welcome thoughts on any or all of the foregoing.

MR. GRUNER: To modify the question slightly, which is what I was trying to do earlier with training, and I'd like to address a more general concept. It seems to me that there is a real risk of being too prescriptive about how companies should do these various things. But the less we demand as particulars, the more we should, in fact, expect the companies themselves to develop as standards for assessing
the sufficiency of what programs they've chosen.

So the notion is that we wouldn't -- in the training setting we wouldn't say, "Do this kind of training over that kind of training," just do training that matters.

And in the general case as to the effectiveness of the overall program, I don't think that it's too much to expect that companies periodically assess how well they're doing and whether they need to move compliance efforts in a different direction. Companies ought to be interested in making that assessment such that when a sentencing activity actually does come up, it's not a matter of, well, okay we're really evaluating the effectiveness of this program in court for the first time, it's rather there is a record showing that the company has assessed its program and modified it where necessary. Consequently the company can say "we have reason to believe it was effective and if it wasn't, we changed it."

It's in that sense that I view auditing by
companies as something that reduces our need to be
prescriptive. I'd be much more willing -- I would think it
would be logical to be much more flexible about
compliance evaluation standards and allow these to be
developed by companies, but also more demanding about
self-assessment by companies under their own standards.

MR. WALLANCE: Bobby?

MS. KIPP: I have to leave as well,
but I absolutely agree with what you just said, Richard
and I think that as a practical matter most companies
do go through and assess and evaluate the effectiveness
of their procedures of their process. You can’t
prescribe how to do that, different things matter for
different activities.

But I do think that in the spirit of
strengthening what are already good standards,
there is no harm, in my opinion--I think it
actually strengthens the standards--to explicitly
say that organizations should evaluate
periodically the effectiveness of their
activities. And I think it has to be, sort of,
in those broad terms.

MS. KUCA: Before you leave, in one of the written submissions somebody pointed out an aversion to the term, "audit," saying it was a financial term of art. And while you and Scott are here, I was curious if you -- what your thoughts were on that, whether you thought review, assess, evaluate or better or worse than "audit."

MS. KIPP: I think the word "audit" is a term of art and I think it's better to say evaluate effectiveness for the reasons you just said.

MS. KUCA: Thank you.

MR. WALLANCE: Gale?

MS. KIPP: Thank you and I apologize for having to leave.

MS. KUCA: Thank you.

MR. WALLANCE: We will take Gale and then Scott.

MR. ANDREWS: No longer -- well, the
term "audit" sometimes can be seen as onerous depending on the culture that you're in. I would contend that any control be monitored, needs to be evaluated or audited in some frequency or it will lapse. So I would think that it is unrealistic in anybody who runs control systems survey doesn't think that it's unrealistic to have good values, different goals periodically. I would not shy away from the word audit because if you open up this one area of record be more prescriptive. It may be beneficial if you open this open this up to evaluation, you may to get a new assessment. And I think -- so whatever you do there whether you use the word audit or independent evaluation or whatever, I think the key is independence. I think you need to have -- you know, I think the benefit of the transparency that it would bring to effectiveness of your program would be what you're looking for. And so in my mind the audit has
independent translators -- there are other words you could use.

MR. BEDNAR: There is a corollary to that, I believe, Gale, and that is if we fall away from the word "auditing," which is in the guidelines now, many would take that as a relaxation of the requirement.

MR. ANDREWS: That's why it's always been my concern that people who were worried about the term audited. It has more than four letters in it, so I don't think we should worry about frankly neither should you. Generally, it sends a clear signal of independence I believe.

MR. BEDNAR: Yeah.

MR. WALLANCE: Scott Avelino and then Scott Gilbert.

MR. AVELINO: I think there is Curie-Weiss law some definitional confusion around the audit term and I wouldn't Gale's comment in finding out that. There is an audit that the company is doing, a self audit, can
evaluate whatever compliance they want.

Independent verification on any individual party
testing the reliability of that audit is on the
sly.

In terms of Value, Parment, Levit
(phonic), ME Value's program -- well, why agree
with everything, but must not be too sure but was
wondering about some minor-- for example,
illustrative guide -- something along that
line -- because in my experience, there is a vast
low, but there's significant confusion on what it
is to evaluate the program. I think the
definition moves forward into two categories.
One, I would refer to as a process audit and you
would go to a company and say, "How do you know
if your program is effective? Well, we
distribute the code to everybody. We have signed
certifications back from 87 percent of
employees," so on and so forth. Okay. That
speaks to a process being in place and that is
probative on whether or not compliance is being
achieved. It is not terminative as to whether or
not an organization policed or compliant with the
law. And that's where a substantive audit is
required where standards comply with that
inquiry.
So the distinction between what is a
process are making sure that the training is
taking place, the board is being briefed, the
code is one thing. I think companies relying on
that may be falling short actually chucking
correctional compliance. So the attention to
reposits is subject to embodiments.
MR. WALLANCE: Scott Gilbert.
MR. GILBERT: First of all, I'm struck
by -- there was a parallel discussion along these
lines taking place, it probably still is taking
place, treasury in respect to the elements for
compliance program. In patriot and compliance,
There are a lot of times we spend trying to keep
in focus on what constitutes an audit for that
purpose. So if we haven't already looked at
Balor and Lature (phonetic) to navigate, that
probably would be a rich source of information.

One thing that occurs to me is that I think that it is absolutely essential that
companies do assess the effectiveness of their programs periodically. But if one technique the
organizations do is to privilege reviews using self evaluative privilege or by having lawyers
and other people, compliance types or auditors working together on legal issues and the
operational issues together there is some objection that is attached to that. And I'm just
thinking forward, if an organization were actually put in place of having to demonstrate
that it is centralized, would it have to then waive the privilege that's associated with the
underlying audits or reviews, whatever you call them, in order to demonstrate that impact is
doing that.

I don't have the answer to that question, but again, it strikes me as the sort of
thing that one has to be careful about the consequences of imposing some requirement. If I've clearly confused everyone -- Greg has a confused look on --

MR. WALLANCE: Well, it's the consequences part as a new requirement because I think that's the issue. Even if it said, for example, auditing the compliance program periodically for effectiveness, I think that would have a significant impact. I think companies would feel -- lawyers would feel compelled to tell their companies, "If you want to be sure of getting the credit and you want to be sure of having a compliance program that is at the level of your peers, then we have to start auditing the compliance program on a regular basis."

So what are the consequences to that?

MR. GILBERT: One other thing -- this did come up in a treasury conference. I do think it is very important that you choose the word
carefully because I did hear a representative in treasury, for example, confronting a problem with a small company saying, "Look, we don't need a year to go out and hire the DWC to conduct an audit of your company, of your compliance program," it just means that someone is not responsible for the compliance program. Someone else within your company has to take a careful look, and that's the kind of check and balance that we're talking about.

I think that's a good kind of lesson to draw here, which is to say that what you really want is some other person who is not responsible for the day-to-day operation of these programs to have -- I hesitate to use the word "independent," but that's really what I'm talking about.

MR. WALLANCE: Nancy.

MS. HIGGINS: I'd like to say that I agree with what Scott is saying that it's very important to have a regular, periodic
self-assessment of your program. It's good to have someone other than the compliance eyes do that so that you just don't just get a word about what a great job you're doing.

But I do urge you to be careful in formulating requirements that would suggest a requirement for hiring outside agencies, outside auditors, outside counsel. One of the things that we have learned that those that have the programs for a long time is this huge cottage industry with experts who learn from us and then come back and try to sell it to us.

We are happy to work with them and we're happy to help them help others who don't know what they're doing, but we don't want to take valuable dollars and resources that can be used to improve our programs to pay somebody else to do for us what we already know how to do.

They are an internal audit organization and dealing with the audits, my program and they -- [inaudible]. And I think the
experience that we have in the DII (phonetic) [inaudible] where at the outset we have a requirement for our signatures to have an annual questionnaire on the external auditors. And we found over the course of the years that basically we were doing all of the work and they were getting $100,000 a year to tell us, "good job."

MS. KUCA: I just would like to ask you, Greg's question which is the consequence of doing this assessment of your program. I would think one of the consequences would be finding deficiencies and not addressing them. Can any of you share any insights on that? Is it your experience that companies are prepared to sort of do what needs to be done once these things are found -- educate me a little bit.

MR. ANDREWS: In my experience, absolutely. I've done this from both sides. I was a general auditor for the corporation and now I'm the ethics officer of the corporation so now -- [inaudible] function. There's never a
question there's an issue -- deficiency or
something in our process that's failing, that's
causing things not to be recorded or recorded
properly, we step up immediately. And I think --
[inaudible] different associations we belong to,
I don't think I've ever heard anybody not
thinking that that was an important factor in
what goes on in having a healthy ethics program.
MS. KUCA: So it wouldn't be perceived
as burdensome?
MR. ANDREWS: I didn't say that. I
said important.
MS. HIGGINS: Again, it would depend
on the size of the organization, the type of
program in non-prescriptive banter then it
should -- [inaudible].
MR. ANDREWS: I guess it gets back to
the heart of the issue which is why would you
want to spend the money on an ethics program in
the first place that didn't work? And so you
need a mechanism to help you make that a valuable
expenditure. Part of that is some kind of a
review process. The logical support, well, I'm
spending my money but I don't want to spend more
money because I don't want to know if it works or
not.

    MS. HIGGINS: Make sure it's value
    added.

    MR. PRESSLER: I agree that a focus on
effectiveness is important. But when I think
about an audit, I think of an audit where you
have some specific standards and you
measure performance against those standards.
Since the sentencing guidelines
themselves are not very prescriptive, we seem to
agree that that's a given.

    If you're auditing an element of a
program, let's say you are auditing the reporting
system. I may personally have some ideas about what
we have been calling a good reporting system.
We have a case data base to track things, such as
certain specifics related to allegations, or things
like that. But there are really no imposed standards.

So I am wondering if you're talking about a required audit, what you're doing is setting up a system where basically consultants are advising you on what they think would be good or you yourself are telling your auditors what you think is good and what they ought to look at. I'm just having a hard time visualizing this as an audit process of any sort. This is more a required overview or something like that, not an audit.

MR. GRUNER: Can I ask that as a follow-up to those who are being audited? How does the internal audit work with those of you whose programs are being audited now? Are there effectiveness measures that are the criteria of the audit?

MS. HIGGINS: What you've actually hit upon is one of the things that all of the people that I talk to in the ethics compliance world agree upon, and that is there is no general
agreement about what makes an effective program
or good ways to measure the effectiveness of the
program.

Scott spoke to that a little, talking
about the difference between process other than
other terms --

MR. ANDREWS: Substantive.

MS. HIGGINS: Substantive audit. But
generally, our program is audited to determine
that the ethics officers are following the
procedures that we set forth in our ethics
officers manual, that we are following all the
little processes, things that Scott mentioned,
everyone is getting trained, all of the companies
who developed compliance plan, to best qualify
risk areas.

MR. GRUNER: Which is in turn
presumably your
company's best take on what it would take to be
an effective program. You're not sure if it is right
but it's your best approach to that?
MS. HIGGINS: That's correct.

MR. ANDREWS: And it's more history as well. As these programs mature they've smoked over time to adapt to entering into what they are today. We've documented that, we've documented our changes and now we come back and make sure we are executing against our plan which softer sciences that the most you can do is monitor your actions against what you believe your mission statement is in determining there's a connection and it would be great, jump up and down if, in fact, there was some dollar thing I could put on, you know, how many dollars a day I saved in my program. Unfortunately, we haven't quite figured out how.

MS. KUCA: Call me when you do.

MR. WALLANCE: Scott and then Eric and then we move on to our last two questions.

MR. GILBERT: I think my fellow Scott's distinction between substantive and process is that you do it -- persistent.
MR. AVELINO: Sure.

MR. GILBERT: It's very important because we're talking about -- the proposal is some notion that there should be a regular monitoring pumped up program for effectiveness. And I would submit that the highest stage in a company is beyond a program compliance to a stage in which compliance with the law has been so operationalized in the business processes that is sort of built into the fabric of the company. And so, therefore, what you want in the auditing is not so much the elements of a, quote, formal compliance program but substantive process standards that are designed to promote compliance within the key business processes. That's a lot of jargon, let me give you an example.

Perhaps the most important risk area for a company might be the Foreign Corrupt Practices Act or improper payments, and then it's not so much important, then, to be auditing
formal elements of the program but to be looking
at percentage of sales representative agreements
that have fulfilled all of the due diligence
elements which were executed prior to the
performance by an individual.

These are operational standards that
are completely related to the specific legal
risk, but you wouldn't look at them as a form of
compliance. There are very important standards
that are designed to reduce violations of the
law, substantive audit in order to detect
variance from these standards.

So my point is, again, this is one of
these notions where if you try to delve more,
that is if you say you require an audit of the
program's effectiveness, that again raises five
questions about what it means to do that kind of
audit.

MR. WALLANCE: The nice thing about
the guidelines is they are fairly general and
it's left to commentators and the in-house folks,
the specialists who work out the details.

ERIC, last comment and the last two
questions and I'll have you out of here at 4:00.

MR. PRESSLER: It occurs to me that if
you have -- if you're at the sentencing stage,
let's say, and your organization is being
considered, let's say that Gale's organization is
being considered and Nancy's organization is
being considered, do they have an effective
program?

In Gale's organization, they've done an
audit and reviewed the program and they have a
standard for percentage of employees trained, there's a
full compliance commitment, and the standard is 70
percent or better, we think we've done a great
job. In Nancy's company the standard is 95 percent or
better.

Well, they've each done an audit or a
review, should they each get the same credit when
one company has 95 percent trained and the other has
70 percent?
So you run into an issue because of the lack of standards. All of this has become very relative, so when you get into the sentencing phase, I’m concerned that it would be seen as not equally applied.

MR. WALLANCE: That's a valid point.

Consistency of standards.

All right. I know it's painfully obvious that we haven't given you any breaks since 1:30, but just to cover the last two questions and to get reactions to these. There's only a few minutes left. 8A1.2 should have a 3(k)(6) be expanded to emphasize positive as well as the enforcement aspects of consistent discipline?

The example here, to illustrate that, should there be credit given to organizations that evaluate employees' performance based on the fulfillment of the compliance criteria?

Should compliance programs prescriptively or by a point of focus include an element that employee performance evaluations
will affect their compensation? It's kind of a little bit of a hodge-podge but in general it's a fairly specific -- I think it would be a significant addition to the guidelines to -- for example, point of focus say, employees' compensation should be evaluated on the basis of the fulfillment of compliance objectives. How do people feel about that? Scott.

MR. GILBERT: I think this is the best practice and it should be done. I don't think it should be incorporated into compliance guidelines. I think that, you know, I think the issues of compensation are complicated. There are lots of reasons why they need to be tailored and I think it should be done and I think that many companies do do it.

My concern is that there would be lots of implementation issues and interpretation issues of this standard.

MR. WALLANCE: Scott?

MR. AVELINO: I would echo that. In
some instances there seems to be cases where the corporation of the compliance falls to performances evaluations effective to reverts negative effect. Easy example of health and safety standards where a work force gets a bonus for having pure group dissentionents (phonetic). There is actually an incentive among the local production force to under-report violations. In fact, in a way this effort has -- it's over-reached shirker to change the compensation systems in corporate America.

I would offer up one interesting thing that I have seen -- is that it's happened to me in probably two situations that it's an organization as part of its co-certification basically bind the insurances by the company, that I will not suffer personally, if business is lost due to my office, out of my appearance. That's a pretty novel thing. Maybe to -- as a practice to the Guidelines [inaudible].

MR. WALLANCE: Eric.
MR. PRESSLER: The current standards talk about exclusively the disciplinary mechanisms, and to me that feels very prescriptive, getting back to this prescriptive/non-prescriptive measure. I think really the intent is that the organization must have taken reasonable steps to reinforce the importance of compliance.

If you keep that concept, whether it be discipline or performance reviews or whatever, you could state something along the lines that the organization must have taken reasonable steps to reinforce the importance of compliance through the use of mechanisms such as disciplinary action, performance evaluations, compensation systems and other forms of incentives. To make it less prescriptive, give some examples.

I really feel that the issue is making this important to people. It's not whether it's discipline or some other mechanism.

MR. WALLANCE: I think it goes along
with the concept that was raised this morning of elevating -- well, it's probably elevating the chief compliance officer to a level equal to the general counsel or the CFO and then setting compensation based on compliance achievement. Also it tells the employees that our business activities -- or, our compliance activities are no less important than our business activities.

So it's a conceptual approach, but I think it's something that has to be looked at carefully because it would, I think, involve a significant change from what we have now even if we're not prescriptive.

MR. BEDNAR: Greg, you don't suppose that if we looked into the reason why some of our CEOs are compensated so highly it's because the company does have that system and these CEOs would brace and allocate and practice at such a high level of ethical behavior that they are entitled to both levels of compensation?

MR. WALLANCE: I think I know the
answer but --

MR. BEDNAR: We know who they are.

MR. WALLANCE: But I think it would be a significant innovation to these guidelines. We raised it for that reason.

Last question and then -- I promised 4:00, we've just got a couple of minutes -- this notion of, in effect, punishing companies that have no compliance program, a decrease, you certainly don't get the benefit of a compliance program, but if you don't have a compliance program, your culpability score will go in the opposite direction; it will be worse than it otherwise would have been without the benefit.

Any thoughts?

MR. GRUNER: I would just contest the way you just described this possible guidelines change. It's a change in the assumption of what the norm is, what the midpoint of culpability is. We're assuming that having a compliance program is the midpoint, not having one puts you below the average.
MR. WALLANCE: If you have a five as a starting point, you can trade off. If you have a compliance program, then presumably you wouldn't have five, you would have --

MR. GRUNER: When we define what five means, that's what we're really doing here. We're defining it now as having a compliance program, whereas before we were defining it as if we were neutral about whether the average company has a compliance program.

MR. WALLANCE: Your starting culpability is always five, right?

MR. GRUNER: Right.

MR. WALLANCE: And if you have a compliance program, you take three off and you get down to two, set aside other factors. If you don't have a compliance program, I assume what this is getting at is your culpability score would go up to eight or whatever, setting aside other factors.

So the question is, do we
collectively, it's a collective process, think
it's a good idea, bad idea or what?
Scott?

MR. GILBERT: I think it's a bad idea.

My company -- I think it is a bad idea for small
businesses. I think what the issue is, do you
want to reduce the judge's discretion when she
sentences a small business to give that company a
break when the company didn't have a compliance
program?

MR. WALLANCE: Punishment.

MR. GILBERT: They didn't even know
that this rule existed.

MR. GRUNER: That isn't quite what we
were contemplating changing. The question is what
if you did nothing? In other words, it's envisioned
there is a middle ground.

If you did nothing you would get the penalty. If
you did something but it didn't quite qualify,
you're neutral, you're at the five point. And if
you did the full-scale qualifying effort, you get
the mitigating sentence.
So in fact this envisions that middle ground of, "well, I tried but I didn't quite get it all right" as being the norm. And you're only punishing --

MR. WALLANCE: Absolutely.

MR. GRUNER: If the company ignored its compliance program completely.

MR. WALLANCE: Just as an example, the 2001 report of Sentencing Commission indicated that there were 200 plus Chapter Eight sentences. Ninety-four of those had some sort of culpability score or sentencing analysis. Of those 94, only two companies even attempted to implement compliance programs. None of them got credit for an effective program. So it suggests that 92 companies had not even attempted to implement compliance programs.

These are undoubtedly mostly small companies, probably the fronts for a gangster's business activities and so on. So it may not be that representative. But I think what this is
getting at is that kind of company --

MR. GRUNER: Yes.

MR. GILBERT: I don't see how this would address the problem.

MR. GRUNER: Puts more of a stick behind at least getting started. I think is the idea.

MR. WALLANCE: Carrot. This is supposed to be a carrot and stick approach and that creates a -- sorry, it's a stick, it's a bigger stick.

MR. GILBERT: Assumes that people knew about --

MR. WALLANCE: What. You're presuming ignorance of the law is --

MR. GILBERT: Based on what I heard this morning, there was testimony this morning that I think that's a big issue --

MR. WALLANCE: The publicity part.

Any other thoughts?

MR. ANDREWS: It just seems to me that if we believe -- to take the opposite side, if we
believe that the sentencing guidelines provide all of these great benefits then why shouldn't we be doing things that promote people in that direction if we believe in what gets done is a pretty direct measurement.

So I would shy away from it based on these other concerns. I think it needs to be considered directly because both sides -- I think companies that do participate and comply need some recognition for -- you know, beyond just getting their sentence reduced, and I think on the other side, you bring on a whole another group, much like what happens in bigger organizations, the O.A.N.T.R.I.'s (phonetic) as issues get hotter, we get more membership and people get more aware.

So there needs to be a reason at times to make people more aware. So I would shy away from this.

MR. WALLANCE: Let me try something out on you. The Department of Justice recommends
against such a blanket rule, changing the
culpability score. But an interesting, sort of,
alternative which is adding an application to the
commentary stating that the failure to have an
effective program to prevent and detect
violations of law could be weighed against the
larger organizations as evidence that an individual
of high-level personnel of the organization
condoned or was willfully ignorant of the criminal
conduct. So it's a basis for an inference that
puts you into that category that would preclude
you from any credit as well as enhance the
culpability score.

And I thought that was an interesting
alternative. I don't know whether you have any
thoughts on that.

MR. CARDONA: Our thought pattern
there was essentially along the lines of smaller
corporations. Especially in our district, most
of the corporations we prosecute are fairly
small. Giving them an extra penalty would not
have to comply to a copy to receive that penalty
and one of the -- they don't do a -- a hero would
contact would contact that house based outside of
the company, basically make matters hectic in
their industry. Besides given the award but for
larger corporations where juristitude that have
this be a stit (phonetic). You could make that
part just for larger corporations.

MR. WALLANCE: Do you have any
definition of larger corporations?

MR. CARDONA: Well, we would suggest
using the ones, the guidelines -- different sizes
and I think you could pick one of those levels as
an appropriate for defining when a company when a
company qualifies as larger -- not exactly sure
where you might draw the line, but top level, two
levels down --

MR. WALLANCE: I thought that was a
very creative idea.

MR. BEDNAR: It is.

MR. WALLANCE: Again, it's a good
illustration of -- it's maybe a little bit more than a tweak, but it's not prescriptive. It's really just the commentary in some respects and it could have an impact.

MR. CARDONA: Yeah.

MR. WALLANCE: It's 4:00. You've all been here almost -- I think on behalf of myself and my colleagues and the Ad Hoc committee generally, we're very grateful for your participation. I found this extremely useful and I think it's going to be a very important factor in our recommendations and I'm going to thank you. We appreciate it. We look forward to a solution.

(Breakout Session adjourned 4:03 p.m.)