

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

1 MODERATOR

2 GREG WALLANCE

3 IN ATTENDANCE:

4 GALE C. ANDREWS

5 CAROLE BASRI

6 NANCY M. HIGGINS

7 E. SCOTT GILBERT

8 DEBRA YANG

9 ERIC PRESSLER

10 BARBARA KIPP

11 DONALD LANGEVOORT

12 PAUL FIORELLI

13 RICHARD GRUNER

14 RICHARD BEDNAR

15 LISA KUCA

16 GEORGE CARDONA

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1 B-R-E-A-K-O-U-T S-E-S-S-I-O-N

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

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

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

15 After we complete that, we're going to
16 move on to each of the six questions that we
17 really have to take up and this is very much a
18 working session. The Ad Hoc committee formulated
19 the questions that are generally phrased in terms
20 of the yes and no answer, things aren't that
21 simple, but what we hope to achieve today is to

1 answer those questions -- there may be several
2 answers -- and identify the pros and cons of each
3 of the answers. And I think that would be of
4 great value to the Ad Hoc Committee.

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

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

21 Carole, you're down in the front. And

1 how can the guidelines encourage self-reporting
2 given the reality that self-reporting can often
3 lead to waiver of privilege and therefore third
4 party claims and litigation. Some of it was
5 touched on this morning.

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

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

12 Scott Avelino, KPMG here in
13 Washington.

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

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

19 And going to the top, Professor Donald
20 Langevoort from Georgetown University School of
21 Law.

1 Barbara, Bobby, Kipp from

2 PricewaterhouseCoopers.

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

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

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

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

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

15 Nancy, the floor is yours -- oh, I've
16 been asked to remind you to -- it won't count so
17 much in this part, but when we get into the
18 interactive part to try to avoid cutting each
19 other off so we have -- I know that's a natural
20 part of interactive session, but to try to
21 remember we're trying to get down a clear

1 transcription so it can be described for the
2 public record.

3 Nancy, the floor is yours.

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

16 In fact, I think the greatest benefit
17 to the guidelines comes from that language in
18 §8A1.2 Comment (k) (7) (I). It requires that
19 management have taken steps to prevent specific
20 types of offenses for which there is a
21 substantial risk because of the nature of that

1 company's business.

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

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

16 I have a very clear recollection of
17 one executive telling me after a briefing that
18 he's going to sleep better at night now that he
19 knew that someone had assessed all these
20 instruments and that he had programs in place to
21 address them.

1 He then instructed me to expand the
2 effort to address similar risk areas as well. So
3 companies really have benefitted from the
4 guidelines.

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

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

13 First, I'd like to express my
14 agreement with one of the comments made this
15 morning by Alan Yuspeh. He recommended that the
16 Commission mandate that business organizations of
17 a certain size should have an officer level
18 position or an ethics and compliance officer that
19 is comparable in stature to other major
20 functional organizations such as the general
21 counsel, the CFO or the head of HR.

1 I used to believe that as long as
2 senior management was generally committed to the
3 company's ethics and business conduct overall
4 then the title and further inspection of the
5 ethics officer wasn't all that important.

6 But since joining Lockheed Martin my
7 opinion has changed. My effectiveness as an
8 ethics officer and the success of the Lockheed
9 Martin ethics and business program is in large
10 part due to the fact that my position was created
11 as part of senior management.

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

20 Adoption, a balance recommendation [inaudible]
21 to use his words, for an upgrade dramatically the

1 level of attention to compliance and sound
2 business conduct in the large corporations in
3 this country.

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

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

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

21 In other words, the language should be

1 point of focus rather than perspective.

2 I say this not only for philosophical
3 reasons because I think that about all of the
4 parts in the sentencing situation, but for very
5 practical reasons from the perspective of those
6 of us who may well be required to implement
7 changes in our programs based on the Commission's
8 actions.

9 Most companies are right now in the
10 process of examining and revising the existing
11 codes of conduct that are obsolete in the SEC
12 proposed rules.

13 If the revised guidelines contain
14 requirements for specific code provisions,
15 companies that have just revised their codes may
16 well have to do so again next year in order to
17 ensure that their codes include the language that
18 our lawyers will tell us are necessary to assure
19 compliance for the requirements of the sentencing
20 guidelines.

21 For Lockheed Martin, which just

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

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

14 MR. WALLANCE: Thank you, very much.

15 MS. BASRI: Is it possible to have
16 someone get back to me?

17 MR. WALLANCE: Sure. Absolutely.

18 Scott Avelino.

19 MR. AVELINO: I would like to thank
20 the Commission for inviting me here today.
21 Having worked with some of the organizations

1 across diverse sectors, I'm implementing and
2 evaluating a compliance program for a sentencing
3 guidelines framework. It's particularly
4 gratifying for [inaudible] based on my
5 experience in that a committee organization
6 will carry forth.

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

12 In preparing my today, I spent some
13 time reading advanced written comments submitted
14 to the Commission as part of the public comment
15 period. It was, if I may say, a largely
16 gratifying experience. I regard those of us who
17 worked every day in the trenches to advance the
18 notion of what we call [inaudible],
19 so maybe I shouldn't have been surprised
20 when I found myself rooting for and applauding
21 so many comments which I won't hardly play

1 verdict.

2 Overall, I think we're all saying the
3 same things. First, the sentencing guidelines
4 are good. They provide common, practical and
5 fluid framework which many organizations can
6 fashion their own approaches for responsible self
7 governance.

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

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

16 Indeed, the time has come for
17 organizations to go beyond designing and
18 implementing programs like forward management in
19 force should have a basis for knowing and should
20 be able to persuasively demonstrate that their
21 programs are effective.

1 I was discouraged to see a variety of
2 comments that seemed to downplay the need to
3 revisit the guidelines. The comments that went
4 along the lines of, "If it ain't broke, don't fix
5 it." I would argue that trust in the American
6 institutions today is broken and governments do
7 provide an important remedy to fix this.

8 To do so, they must be strengthened,
9 adapted and improved based on the experience in
10 both the public and private sectors since their
11 adoption over ten years ago.

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

16 In the year 2000, KPMG released the
17 results of its national benchmarking study on
18 organizational integrity. It was based on a
19 survey we conducted with their assistance of
20 well-regarded research and opinion firms on a
21 statistically grounded cross sample less than

1 2400 working adults across 17 different
2 industries, 14 job categories 5 levels of
3 responsibility and via thresholds of
4 organizational size.

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

9 So here's where we were in the year
10 2000, almost ten years after the guidelines have
11 come into effect. Seventy-six percent of
12 employees nationally had observed violations of
13 the law of their company's standards in the past
14 12 months. Roughly 50 percent of those employees
15 said that what they observed did cause a
16 significant loss of public trust in its
17 discovery.

18 The types of offenses they witnessed
19 included falsifying financial data, deceptive
20 sales practices, conflicts of interest,
21 anti-competitive trade practices, insider

1 trading, environmental issues, unsafe working
2 conditions, employment discrimination, sexual
3 harassment and misleading the public or media.

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

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

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

18 Only 40 percent of employees expressed
19 a strong level of comfort in using the
20 organization's hotlines to report violations and
21 the response series couldn't tell us why.

1 If they reported misconduct, 40
2 percent lacked confidence that any appropriate
3 action would be taken, approximately 40 percent
4 lacked confidence in the confidentiality of the
5 interview and around 50 percent lacked confidence
6 they would be protected against retaliation, and
7 just over 60 percent lacked confidence that
8 discipline would be applied evenly or fairly.

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

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

17 I will say that relatively few
18 companies have stepped up to the plate. Why?
19 Behind the scenes, I can say that the common
20 reaction is, why would we? Or, why would we
21 really want to know?

1 I don't think anyone objects to closed
2 conduct training hotlines and the like. But to
3 collect the information back on how well it's
4 working, I think the middle-of-the-road view
5 today is "get it."

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

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

12 Gale Andrews.

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

21 I'm not going to read my prepared

1 statement because I think you've all been able to
2 read that. But I do have some comments that I'd
3 like to make and some of those are based on what,
4 in fact, I've witnessed this morning, had the
5 opportunity to see the earlier sessions.

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

16 I would also note that in my education
17 this morning as I watched the proceedings,
18 there's another set of stakeholders that I had
19 actually considered when I was preparing my
20 writing which was the legal profession that was
21 here this morning speaking to us, and I began to

1 see immediately this kind of interesting
2 dichotomy and approach toward what was needed,
3 what was [inaudible] and what the decided outcome was.

4 Speaking as an ethics professional,
5 somebody who has had the daily job to
6 administer an ethics program in a major
7 corporation, I had a certain set of desires from
8 the guidelines to help me in my task, to help me
9 work the cultural issues which were exposed this
10 morning, I think, to some degree. Yet as I saw
11 the legal community speak, they were clearly
12 looking more for rules of engagement and what to
13 do after the fact, how do you manage the
14 breakdown once it's occurred?

15 I think you all have a very difficult
16 task in front of you to administer to two groups
17 and find some compromise. But I do have some
18 ideas along those lines.

19 I think what you need to do, and what
20 I would encourage you to do, is think in terms of
21 the best possible outcome.

1 If, in fact, the guidelines do what we
2 would like them to do or what I think the ethics
3 community would like them to do, would, in fact,
4 generate an environment where people would not be
5 getting in trouble because their programs were,
6 in fact, effective. Were they that capable of
7 changing behavior.

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

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

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

20 MR. WALLANCE: Thank you, Gale.

21 Scott Gilbert.

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

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

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

20 Secondly, I think we do have to
21 remember that we're at a moment when there are

1 many different regulators and bodies that are
2 considering the forms, both the corporate
3 governments and the substantive elements of the
4 compliance program.

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

19 I think that for the Commission to get
20 into the business of trying to propose its own
21 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

1 think that brings us into a much more complicated
2 game, which ought not to be played out in the
3 context of guidelines regulating the sentence to
4 be imposed upon corporations by assuming.[inaudible]
5 I don't think it's the right context without being
6 completely thorough.

7 The third point I will make is that I
8 do think that this would be a good opportunity to
9 address the problem of privilege waiver in the
10 context of self-disclosure. I -- my ten years or
11 so of experience is in a private sector, what I
12 have seen as the most effective partnership by
13 far, is when government and private sector in
14 industry work cooperatively toward that end.

15 And I think that one step that should
16 be addressed is you want to promote
17 self-disclosure but I think the way to do that is
18 not in the punitive sense, that is to look for
19 increased punishment of corporations that have
20 not self-disclosed in some fixed timberline but to
21 create incentives and to ease the burdens that

1 are upon companies that are voicing themselves.

2 I encourage the Commission to
3 consider, as some have proposed, an explicit
4 acknowledgment that self-disclosure will not
5 result in a waiver of the attorney/client
6 privilege and work product protection is
7 associated with internal investigations.

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

11 Debra Yang.

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

20 One of the things is that -- is the
21 perspective that I have is that I have the one

1 from the trenches in the court with the
2 guidelines in front of us with the judge trying
3 to determine whether or not somebody is, you
4 know, entitled to immunity or not or how to
5 calculate the sentence.

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

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

17 I think that by doing that what you
18 would do is rather than have some kind of loose
19 compliance go around, show that you need to have
20 the training aspects and then some other way of
21 reinforcing that.

1 That, and just to put it in that broad
2 base terminology, and it would also allow itself
3 to adjust in a very small corporation. Small as
4 a phone company, where they do the same thing,
5 however it translates down as workable and
6 financially sound for them to do it at that
7 level.

8 One of the other things is that we
9 wanted to suggest the organization -- that
10 language be added as follows: The organization
11 must have taken steps to communicate effectively
12 its standards and procedures to all employees and
13 other agents. What steps are necessary to
14 accomplish this must be determined on a
15 case-by-case basis. At a minimum, however, the
16 organization should have disseminated
17 publications that explain in a practical manner
18 what is required and follow them with training
19 programs and other forms of communication to
20 ensure that the need to comply with those
21 requirements is understood.

1 What we talked about this morning in
2 some essence was trying to regain culture --
3 exchange culture. By doing that, you have to
4 have the mechanisms within the corporation so
5 that the individual who comes on board that is
6 new or whatever, knows exactly what is expected
7 of them, what the protocol is.

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

17 One of the other means that I
18 suggested this morning, it also put in a
19 mechanism to confidentially report to the board
20 of directors or the board audit committee, where
21 appropriate, without fear of retaliation. That

1 is important so they have the luxury and comfort
2 of being able to do that.

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

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

17 I think that one follow-up point that
18 was raised this morning, we do also support the
19 notion of the limited waiver with respect to some
20 federal agents who are involved in the process,
21 whether it be some DOD as it was stated this

1 morning, some of the other agencies, perhaps some
2 bankruptcy trustee. I'm not sure exactly how we
3 would course through that but it certainly seems
4 to me something that would be very valid in
5 pursuing.

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

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

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

16 Eric Pressler.

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

20 The organizational guidelines have had
21 an immense cross-industry impact on the

1 prevention of criminal activity and in the
2 development in the compliance and ethics programs
3 in corporations.

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

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

17 In this way, organizations can tailor
18 their compliance efforts based on the risks they
19 face, their corporate culture and the resources
20 available for compliance management issues.

21

1 I think this is particularly important
2 as we look at the questions that we'll be
3 facing later on, the issue of whether
4 communication in training should be done more
5 prescriptively in the guidelines, whether there
6 should be specific encouragement for a self-evaluative
7 privilege, and whether we should have
8 periodic compliance auditing required. Things
9 like that. I think we need to look at this from
10 the perspective of being non-prescriptive and
11 not changing the character of the guidelines.

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

1 do that.

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

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

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

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

19 The fourth item, as the Advisory Group
20 considers recommendations for changes in
21 guidelines, I would hope that the Advisory Group

1 looks at some of the other guidance being given
2 to organizations, (e.g. guidance from Sarbanes,
3 guidance from the New York Stock Exchange and
4 others) so that there's a consistent and clear
5 message to organizations.

6 I know right now we're looking at
7 Sarbanes and we're looking at the stock exchange.

8 One requires such and such for a
9 code of conduct, this one requires a code of
10 ethics. I think as we move forward with the
11 sentencing guidelines, perhaps, we should address
12 some of the issues that are in the stock exchange
13 material and Sarbanes and make a significant
14 effort to make this consistent so organizations
15 can give consistent advice.

16 Those are my four points. Thank you.

17 MR. WALLANCE: Bobby Kipp.

18 MS. KIPP: Thank you, as everyone else
19 has said, it's nice to be here. My name is Bobby
20 Kipp. I am a partner at PricewaterhouseCoopers
21 and I am PricewaterhouseCoopers' ethics officer

1 internally. I'm in an internal role for
2 PricewaterhouseCoopers that I've been in since
3 the beginning of our program which was the end of
4 1996, so we've been at this for a while. This
5 isn't something that has come up as a result of
6 the current environment.

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

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

18 I'm going to take the
19 approach that Gale took, which is to not go into
20 the very specifics of the questions you'd like me
21 to comment on. I did submit written comments and

1 I hope when we get to the discussion we'll get to
2 those. But just make a couple of general
3 comments.

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

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

19 This, I think, matters when we look at
20 the Ethics Officer Association, for example. When
21 we look at some of their membership data,

1 something like 40 percent of the members have
2 said that their primary incentive for creating
3 their programs was the guidelines. So I think
4 the work we're doing really matters. So that's a
5 good thing.

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

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

21 A couple of overall positions. I

1 think given the notion of the whole culture being
2 important, I think we would echo others that do
3 not go in the direction of prescription.

4 I think that the reaction could be, well, that's
5 a self-serving position for an ethics officer to
6 have, that is, I don't want to have a whole
7 bunch of rules.

8 And I think people will reflect on the
9 reasons for that, and I absolutely ascribe to
10 most of those, or all of those, in terms of the
11 need to tailor activities of individual
12 organizations to the risks and
13 size of those organizations
14 and also to allow the creativity in new solutions
15 with regard to prescriptions about forms of
16 training. Ten years ago we might never have
17 thought about things like CD-ROMs or web training
18 and things like that.

19 I think you have to allow for
20 creativity and have to go forward to allow for many
21 possibilities.

1 I also see there is an interesting
2 reflection in the accounting industry which has
3 evolved over the past 30 or 40 years to set
4 very detailed rules, and is now moving in the
5 direction of accounting principles rather than detailed
6 accounting rules because there's recognition that you
7 can't define the rule or a specific answer to
8 every possible situation. What you really need
9 to do is to cause people to think in terms of
10 principles and make decisions in terms of
11 principles.

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

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

21 I think the notion of including in the

1 response system section that those response
2 systems should allow for confidential and for
3 honest reporting, but again, not prescribing that
4 those be in the form of an ombuds.

5 I'll get to the rest of it later but I
6 just wanted to get that overall framework.

7 MR. WALLANCE: Thank you, Bobby.

8 Professor Langevoort.

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

20 My other apology is that I have to
21 leave at 3:00. So when I stand up here and walk

1 out the door, it's not of either disinterest nor
2 protest. I have a prior commitment.

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

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

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

16 I won't go into the details. We can
17 certainly save some of that for subsequent
18 discussion. But it leads me to a general view of
19 compliance assessment that is very much
20 consonant of what I'm hearing from many of the
21 other panelists today, which is that less detail is

1 better than more detail. Benchmarks are better
2 than overall netting out of costs and benefits
3 and one ought to leave much room for
4 management experimentation and customization
5 within different compliance challenges in
6 different contexts.

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

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

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

1 there.

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

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

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

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

21 MR. WALLANCE: Thank you.

1 Carole, you'll get the last word.

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

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

15 And what I gain from this is an
16 understanding that a lot of lawyers don't know
17 very much about corporate compliance. And I
18 think there really needs to be an education
19 process going on at an earlier time so that there
20 is more analytical work done in law schools. For
21 example appreciate Richard Gruner's work in that

1 area. Professor Gruner has put out the kind of
2 work to worry us and the kind of work you do in
3 here is very important. There needs to be a
4 message getting out because -- [Inaudible]. One
5 thing that I personally think is important is the
6 SEC's proposed rules that came out on November
7 6th in release number 158.

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

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

20 I think that this is the time to look
21 at that issue. I agree with many people who

1 stood by that fact that the guidelines are
2 basically good, that they have been very
3 functional, they have allowed for creativity,
4 they've allowed for value-based systems, but I do
5 think they need to enter into the equation of
6 corporate government.

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

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

1 third mentality --

2

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

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

16 MR. WALLANCE: Thank you, Carole. All
17 right. We're going to start with the questions
18 and work through them one by one. We'll probably
19 have, on average, 15 to 20 minutes per question,
20 although some may require more time and some
21 less.

1 It's kind of an awkward seating
2 arrangement because I really would like to see a
3 debate and I realize that half of you are sitting
4 with your backs to the other half which is not a
5 constant to debate, and the other half are
6 looking at the backs of the heads of the others.
7 So we'll do the best we can with this format and
8 at the same time we have to be mindful of the
9 fact that we're transcribing this and therefore
10 interruptions are inevitable but we have to try
11 to keep this as clean as we can.

12 So we'll start with the first
13 question.

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

16 MR. WALLANCE: Sure. Absolutely.

17 MR. BEDNAR: I listened very carefully
18 to each of you and I thank you for your remarks,
19 as I do that on behalf of all of us. What is
20 interesting is that not one of you spoke to the
21 application of the Guidelines in the courtroom.

1 All of you spoke to the guidelines as providing
2 the inspiration or the stimulation or the
3 innovation for adopting a good ethics and
4 compliance program within an organization for
5 other reasons; as an adjunct of developing a
6 strong ethical culture within the organization,
7 as a mechanism for risk avoidance, risk penalties
8 and sanctions in the first place, for
9 reputational reasons, for image reasons, if you
10 will. And I just wanted to ask whether that's
11 right. Did I hear you correctly that companies
12 with which you're familiar don't really set out
13 to draft a good ethics and compliance program
14 because they want to use it in the courtroom but
15 rather for these higher, broader reasons? I see
16 a lot of heads nodding up and down. It's sort of
17 incidental that they may put you in good standing
18 in the courtroom.

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

1 concerned about this.

2 MR. BEDNAR: Right.

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

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

17 MR. BEDNAR: Right.

18 MR. PRESSLER: I disagree a little bit
19 there. The sentencing guidelines did have a big
20 impact on the Ethics Officers Association and on
21 corporations developing ethics and compliance

1 programs, but was it the incentive or was it the
2 fact that a program guidance was provided?

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

17 So I'm not sure that it's the
18 incentives in a lot of cases that promote this.

19 Earlier today, I don't know which
20 speaker it was, commented that certain
21 organizations don't have compliance and ethics

1 programs. Incentives are there for
2 programs but basically the issue is that the
3 incentives aren't necessarily what's driving
4 programs. There is also a communications issue.

5 And there is -- someone mentioned a
6 publicity issue. Do organizations know what they
7 should be doing and if they knew what they should
8 be doing would they do it? It's not necessarily
9 you need a greater incentives, it may be that you need
10 to get the word out.

11 MR. WALLANCE: Okay. Bobby?

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

20 MR. BEDNAR: Along that same line I
21 have observed many companies who have been under

1 a compliance agreement of one kind or another who
2 continue all of those programs even after the
3 compliance requirement has expired.

4 MS. KIPP: Right.

5 MR. WALLANCE: So we'll start with the
6 first question: Should Section 8A1.2, comment
7 3(k)(4) regarding the internal communication of
8 standards and procedures for compliance be more
9 specific with respect to training methodologies?

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

16 And I believe I heard Debra Yang
17 argue, I think along with her colleagues, and
18 read in the paper that was submitted, that it
19 should be in the conjunctive. And I was struck
20 by the fact that to some degree isn't that
21 prescriptive? Doesn't that then require every

1 company who wants to conform with these
2 guidelines, to implement training programs, not
3 simply, let's say, hand out literature or coffee
4 mugs with, "Compliance is our business," or
5 whatever other means of creative communication
6 that they employ.

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

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

19 So is it an example of what would
20 satisfy that requirement or should that be the
21 requirement?

1 MS. YANG: I guess in reaction -- in
2 follow-up to what I said this morning, part of
3 this is a lot of experience in working with some
4 of these companies, may be the training manuals.
5 They really aren't used in any meaningful way.
6 They were developed and then they were shelved.
7 We lack the method of training involved and that
8 there's no translation necessarily from it being
9 developed to it being actually used to help
10 change the ethical culture within the
11 corporation, which, again, all of us are talking
12 about how this will instill something some of
13 that.

14 So when you say training, yes, I know
15 it can be very expensive. But by leaving it more
16 defined as training as opposed to a specific kind
17 of training. When you are a very small company
18 training could begin by just somebody saying that
19 process during orientation. That's just part of
20 the orientation process. Spend some time going
21 into that compliance memo, so to speak, so that

1 there is something more that assures us that
2 something is being done with it, so that it is
3 being provided to the individuals, so they know
4 what is required of them as they start to change
5 their culture.

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

10 In other words, you mentioned many
11 settings where there are training documents or
12 there are documents being distributed, and either
13 nobody really reads them or they read them
14 quickly and it's gone a half an hour later.
15 Isn't the issue really whether any of this sticks
16 and if so, shouldn't a key feature of the
17 training or dissemination process be evaluation
18 of sufficiency? And maybe that's the direction
19 we ought to be going in a guidelines
20 definition.

21 MR. WALLANCE: Scott?

1 MR. GILBERT: I'm just struck by the
2 slippery slope that we're on in terms of trying
3 to describe this kind of detail. The existing
4 sense is that the organization must have taken
5 steps to communicate effectively its standards
6 and procedures -- [inaudible] so for a company
7 that means what, that means distributors, sales
8 representatives, lawyers, accountants. And when
9 we're talking about employees, we're talking
10 about hourly employees, we're talking about
11 salaried employees. We're talking about huge,
12 different variations in populations here.

13 I think that for this group, for the
14 Commission to try to get into the weeds and to
15 start prescribing what is an effective training
16 program for a company, takes you into areas that
17 I don't think the Commission is equipped to deal
18 with.

19 MR. GRUNER: Well, suppose we use
20 general language along the lines of the company
21 has an obligation to evaluate the effectiveness

1 of their own programs in articulating their own
2 law compliance demands for their own employees
3 and not really get down to an
4 employee-by-employee or even a law-by-law
5 standard. I think we could be general and still
6 get across that same topic.

7 MR. GILBERT: Can we get an
8 understanding, though, is it possible to get an
9 understanding of how to measure the effectiveness
10 of training, is it percentage of employees taking
11 the training or is it tracking it adequately, is
12 there -- do you require testing in order to
13 measure the rates of retention over time?

14 I just think that as someone who has
15 designed an on-line training system that's now
16 conducted in nine languages for 300,000 people, I
17 can tell you these are incredibly complicated
18 issues once you get down into them. And I think
19 there is a huge incentive already. It is
20 completely obvious that if the company merely
21 hands out a policy guide of some sort and does

1 nothing further, that company will be policed by
2 the marketplace because it will run into problems
3 and it will pay all sorts of other costs in the
4 form of noncompliance.

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

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

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

21 MR. WALLANCE: There are two issues

1 here. And actually, effectiveness, we're going
2 to take up when we get to the question of whether
3 there should be self-auditing --

4 MR. LANGEVOORT: Right.

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

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

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

19 Gale?

20 MR. ANDREWS: As I read the question
21 before and made my response, I was struck that

1 they seemed to be debating the words of training
2 and communication. And as I concurred in my
3 writing, the purpose of training is to
4 communicate, to educate through communication or
5 some form of communication. So to say training
6 and communication seems a bit on the redundant
7 side --

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

17 MR. ANDREWS: Let me finish my point
18 here. The issue in my mind is not whether it's
19 dissemination of documents or classroom training
20 or -- there are many avenues that are seen and
21 accepted as acceptable means in training adults.

1 And so I think we should be focused on, again,
2 results.

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

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

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

21 MR. FIORELLI: I think in the theme of

1 not being prescriptive and moving towards a point
2 of focus, I am wondering, do we then do a
3 disservice by reading this and not stopping at
4 the end of agents as saying that the organization
5 must have taken steps to communicate effectively
6 its standards and procedures to all employees and
7 other agents. Make that a period and then don't
8 include any other descriptions or prescriptions.
9 There must be training and/or other methods of
10 communication.

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

17 MS. KUCA: I think we're getting a
18 little over-analytical. They all, in one way,
19 shape or form, are trained on the job and if we
20 include training as part of the dissemination of
21 information, I don't think it's onerous on any

1 size company, even a small one. I mean, even the
2 guy who flips a hamburger at McDonald's goes
3 through training to know that he can't do it
4 without gloves.

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

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

18 MR. WALLANCE: Let me follow up on
19 that. Would anyone here regard as effective a
20 compliance program that has no training and
21 simply relied on a fairly detailed employee code

1 and ethical code and so on that hands out to
2 employees and even has them submit back, you
3 know, I read this and every year it does this.
4 Would anyone here think that that was inadequate?

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

15 Scott?

16 MR. AVELINO: I'll agree that
17 training, put in those phrases is good. I would
18 caution that I think there is over -- too much
19 credit is given -- experimenting in training. In
20 my experience, when someone has done something
21 wrong, it's not because they didn't know what

1 they were doing was wrong. They knew what they
2 were doing is wrong and they did it anyway
3 because of pressures, because of so many other
4 things, and that's where I think all of this
5 debate and discussion of training just falls
6 short.

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

13 MS. KUCA: But doesn't that go to what
14 Mr. Bednar said earlier which is, that helps the
15 company keep people like Debra at bay while the
16 person who willfully violated the law --
17 basically, I mean, the reality is that the
18 company is going to have to offer up somebody,
19 and if the company is doing the training, then
20 the company has a little bit of protection to
21 offer up the person who willfully behaved badly

1 on his own. Doesn't that give the corporation --
2 I mean, it may not help you sleep at night, but
3 doesn't that sort of help you show the government
4 and others that you're doing your best to educate
5 your people not to misbehave?

6 MR. AVELINO: It's good on what you
7 are trying to deal with consequences of
8 misconduct as limited, like when responding to
9 preventing misconduct on --

10 MR. WALLANCE: Eric and then --

11 MR. PRESSLER: My perspective is that
12 training is a very important component. One
13 example of why I feel training works, aside from
14 the fact that we have tests that show that people
15 learn things that they didn't know before they
16 took the training, is that sometimes when we do
17 training we go out and measure effectiveness. Our
18 training program has two components. Training
19 targeted at specific compliance issues and
20 and training targeted at the overall organization
21 regarding compliance and ethics. We do vignettes

1 and for example, we found out that if we put out
2 vignettes on certain topics, we suddenly in the
3 next month or two you get a lot of calls in over
4 our help line system about those topics that we
5 weren't getting before training.

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

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

1 program doesn't influence everybody.

2 But hopefully, also, there is some
3 positive side to it.

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

6 MR. WALLANCE: Carole?

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

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

1 those changes. So I think training is critical.

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

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

9 MS. BASRI: Right.

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

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

1 organization itself.

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

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

12 MR. FIORELLI: The last time I
13 suggested stopping the sentence at the comma of
14 agents, so my question is: Should we rewrite
15 this to say the organizations must have taken
16 steps to communicate effectively its standards
17 and procedures to all employees, maybe, and other
18 agents, maybe not and other agents? Instead of
19 “e.g. by requiring participation in training
20 programs and by disseminating publications that
21 explain in a practical manner what is required.”

1 If we think training is important,
2 should it be there? Should we say that it is
3 there if we think we also have other methods of
4 disseminating publications, should that be there
5 also? So these would not be examples of what
6 would be required, they would be required.

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

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

19 MR. WALLANCE: We'll move on to the
20 second question. Just an observation, somebody
21 used the word "tweak" before and I think I heard

1 it this morning. I don't think these are tweaks.
2 I happen to think that subtle changes can amplify
3 enormously because of the way these guidelines --
4 the life that these guidelines have taken on.
5 And so deleting agents, for example, or
6 prescribing training and disseminating
7 publications, I think it would have rather
8 significant consequences, which is one reason why
9 we're engaged in this process because we're
10 trying to evaluate what those consequences might
11 be and get feedback from people who do this kind
12 of work on a day-to-day basis. And so far, I
13 think this has proven to be an extremely useful
14 process.

15 So we'll move on to the second
16 question, 1(f). Should Section 8A1.2, comment
17 3(k)(5), concerning implementing and publicizing
18 a reporting system that fosters reporting without
19 fear of retribution be made more specific and
20 encouraged?

21 And then there are four different

1 types of activities; whistle-blowing, a privilege
2 or policy for self-assessment, creation of an
3 ombudsman office for confidential reporting and
4 other means of encouraging reporting without fear
5 of retribution.

6 This question could be the topic of a
7 full-day seminar. I would like to throw out how
8 could -- assuming you wanted to keep all of these
9 objectives -- and they are all worthy objectives
10 I suppose -- how far could you go with the
11 guidelines? They -- the guidelines are in terms
12 of, for example, whistle-blowing protection
13 because there's a reference already to, you know,
14 reporting without fear of retribution, does that
15 or does that not in effect sum up what
16 whistle-blowing protection is all about?

17 The ombudsman office, some of these
18 issues get into the question of whether the
19 Commission not so much should change the
20 guidelines but be recommending the creation of
21 privileges by Congress.

1 So I'm going to throw this out to
2 discussion. Again, keeping in mind that roughly
3 15 minutes to 20 minutes is what we'll have to
4 devote to this very broad and complex issue.

5 Eric, you started to raise your hand.

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

16 And in the written material that I
17 submitted I mentioned that in our company about
18 20 to 30 percent of employees report allegations
19 anonymously. The Ethical Leadership Group, the
20 Priest group indicated, in a study that
21 included 56 corporations, that was conducted in

1 2001, found that 38 percent of allegations were
2 submitted this way.

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

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

12 In terms of the ombudsman office
13 issue.

14 MR. WALLANCE: Go ahead.

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

20 Getting back to my statement
21 about keeping things non-prescriptive, I think

1 there are a lot of ways for people to design
2 effective reporting systems. They may have
3 ethics offices, help lines,
4 hotlines, ombudsman offices, etc. There are a lot of
5 alternatives.

6 I think by requiring an ombudsman
7 office, particularly when you think about
8 small organizations, you're throwing
9 something out there that is not in keeping with
10 the guidelines being non-prescription.

11 MR. WALLANCE: Any other comments?

12 MR. GRUNER: Can I ask a question
13 about the anonymous reporting option, if we were
14 to frame it that way?

15 MR. WALLANCE: Sure.

16 MR. GRUNER: Are there any companies
17 that would have an objection, either your own
18 companies or ones you're aware of where anonymous
19 reporting is insufficient to trigger an internal
20 investigation and therefore they would resist
21 that as even an option? In other words, they

1 would insist that you would identify yourself if
2 you're a reporting party?

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

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

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

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

19 There are companies, interesting enough,
20 that believe they have very open communication and why
21 wouldn't somebody come forward and say it, because we're

1 not that kind of company.

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

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

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

21 We also have this more with companies

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

5 MR. WALLANCE: Bobby?

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

19 The question I think is: Do you do
20 more good than not by allowing an avenue for
21 people to come forward? And it seems to me that

1 an organization that has a culture where people
2 openly communicate shouldn't be scared by the
3 notion of adding a safety valve in anonymous
4 reporting. So it's maybe they think they have
5 open reporting but they really don't. Just an
6 interesting reflection on your feedback you've
7 gotten from --

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

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

16 But I do want to come back to this
17 cultural issue because I have found that as we
18 have discussed these issues around the world,
19 these are very serious issues. That is, people
20 who lived through World War II who have a
21 visceral reaction to any form of anonymous

1 reporting which resonates to them to the
2 experience with authoritarianism in World War II
3 are very much opposed to that. So that any
4 requirement of providing an anonymous reporting
5 channel, I think, is a mistake for global
6 companies to oppose that kind of requirement
7 through this mechanism on global companies that
8 are operating -- [inaudible]. It's a very
9 serious issue that in Europe is very strong now.

10 The other point I wanted to make is
11 that we spent a long time in dictionaries looking
12 up -- [inaudible] and scanning the history of the
13 ombudsman office and reading the case laws
14 emerging on what is privileged and whether we
15 could guarantee confidentiality. And our
16 conclusion was that we can't guarantee
17 confidentiality and that we were not comfortable
18 with the notion that someone could report
19 something to one of our employees whose title is
20 ombudsman, that information could have serious
21 impact on the well-being of employees, the

1 corporation, and that person could not be free to
2 surface that information that is beyond what's
3 been -- would be shielded by some confidentiality
4 notion and could not surface that information
5 properly -- [inaudible].

6 The -- [inaudible] writing --
7 [inaudible] certain exceptions to the
8 confidentiality, once again, very complicated
9 kind of notion. So I counsel against stepping
10 up, making more specific the requirement has some
11 sort of confidential, neutral ombudsman.

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

15 MR. GILBERT: Right.

16 MS. KUCA: With regard to this whole
17 confidential reporting system in the global
18 company, are you saying that -- I mean, if they
19 require that there be an anonymous reporting
20 function, there could also be an open-door
21 policy. Are you saying that they are

1 inconsistent and they can't function together so
2 that the company can decide what to employ where?

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

6 MS. KUCA: Um-hmm.

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

18 I think that companies are
19 hard-pressed, really, to say to an employee we're
20 going to treat this confidentially because they
21 may have to disclose to the government, they may

1 have to give it up to management in a new review
2 they may have to report to an audit committee.

3 The practical realities of life, it's
4 very hard to shield the person's identity in that
5 context. So my conclusion is that I think you
6 ought not to prescribe that there must be an
7 ombudsman that is a confidential reporting
8 mechanism. I think that's a very unclear term
9 which in a practical implication is --
10 [inaudible].

11 MR. WALLANCE: I'd like to ask Debra
12 Yang to comment on what Scott said, but first I'd
13 like to read the response to the Department of
14 Justice to this question.

15 "The inclusion of the internal
16 whistle-blower protection is an important
17 measure of an organization's commitment to have
18 an effective program. Similarly, the creation of
19 an ombudsman office may also be
20 an important measure, although as we stated
21 above, we think the guidelines should not dictate

1 specifics, as would creation of
2 other means of encouraging
3 reporting without fear of
4 retribution," here is the key point: "Such other
5 means could include a mechanism to confidentially
6 report to the board of directors or the board
7 audit committee where appropriate without fear of
8 retaliation." Confidentiality is even in
9 italics.

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

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

21 MS. YANG: [inaudible] -- Scott's

1 comments, I don't think -- this is from my own
2 perspective, [inaudible] issues -- [inaudible]
3 corporation.

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

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

16 And so any of these -- [inaudible]
17 subsequent mechanism to go to, you've also --
18 [inaudible] protection. Let's say you're the
19 young accountant that just joined some place and
20 uncomfortable with what he is over-seeing,
21 obviously he needs some protection you're not

1 going to get fired but what do you internally,
2 who do you go to?

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

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

16 What we're very careful to do is,
17 fundamentally we want to be candid with the
18 people that work there, is to say we will use our
19 best efforts to control this information to
20 protect you because we have an absolute
21 protection against retribution.

1 We stop short of saying it's
2 confidential because if you think about it, it's
3 not because at the end of the day you may have to
4 disclose it to the government or the auditor or
5 management to take action.

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

15 MR. GILBERT: There you have a greater
16 chance of keeping it anonymous forever. Someone
17 can just drop a typed note over somebody's desk.
18 But all I'm saying is I actually think it works
19 pretty well in its current arrangement.

20 A reporting system that fosters
21 reporting without fear of retribution leaving an

1 open for the company given it's context to choose
2 which of these mechanisms works best. Because
3 frankly, if you're a domestic U.S. company and
4 you have no operations overseas and you don't
5 have this issue of informant concerns, you should
6 put in an anonymous reporting form. That should
7 be part of the program.

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

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

21 MR. GILBERT: The employee is going to

1 say, you told me it was confidential --

2 MS. YANG: Right.

3 MR. GILBERT: And then the next thing
4 either you have breached a trust or you have a
5 lawsuit.

6 MR. WALLANCE: Gale?

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

13 I think anything we're doing around
14 crimes of nature -- [inaudible] or the confidence
15 of the company should focus on that result side
16 as opposed to trying to prescribe ways to cause
17 either anonymity or confidentiality issues to
18 occur.

19 I'll give you an example: In a large
20 company like Boeing, we have an anonymous
21 opportunity and if we somewhat guarantee

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

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

17 (End of Side 1, Tape 4.)

18 MS. KUCA: I think Scott's statistics
19 from his survey indicate that the employees have
20 no faith in the system already so it seems like
21 this component is one that may not be working

1 because you can have a non-retribution policy but
2 the statistic is saying that there is no faith in
3 it.

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

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

21 Again, I think that whatever we're

1 doing with the language is, we don't want to
2 focus on this front end piece which may or may
3 not be useful depending on the culture you're
4 coming from.

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

8 MR. ANDREWS: Right.

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

18 And that was really my basic question.
19 By promising -- what we're doing by having
20 whistle-blower protection and promising we're not
21 going to retaliate against you. Is that enough

1 to get the information into the hands of
2 management or do we want to have anonymous
3 reporting or do we want to try to go toward
4 confidentiality where you could have more of a
5 conversation with the person less clandestine,
6 drop boxes, and an easier ability to follow up on
7 details?

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

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

21 MS. HIGGINS: Thank you. I think that

1 you should bear in mind that most of the
2 companies have programs, have ways to report
3 anonymously and as you have just said, to keep
4 things confidential to the greatest extent
5 possible.

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

20 So we all try our best to keep things
21 confidential. I think the biggest concern that

1 people in many of these offices have is that we
2 can't protect them from outside sources. If the
3 government comes in with a subpoena or a
4 third-party litigant comes in with a subpoena, we
5 are not at this time able to protect that person
6 from disclosure by our office. And that is
7 something that keeps people from coming forward.

8 MR. GRUNER: I'd like to follow up on
9 that. Your facts assume
10 that there is a report made where
11 the reporting party already sought relief or change from
12 their own management and didn't get it. Isn't
13 that a situation where there is a very high likelihood
14 of retaliation because you're not only
15 accusing somebody, you're also essentially taking on the
16 management's first negative response to the problem?

17 Is there ever a follow-up, then, about
18 somebody who was in that obviously
19 hostile management environment as to what happens
20 to them next?

21 MS. HIGGINS: Yes. And it isn't

1 always a hostile situation. You have to bear in
2 mind that a large number of -- [inaudible]
3 offices are not substantiated, not just because
4 we didn't have enough information to investigate,
5 but because the reporter had their facts wrong.

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

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

19 MR. GRUNER: Yeah.

20 MS. HIGGINS: So it's really an effort
21 to maintain -- to build a culture where people

1 are encouraged to go forward and make that --

2 MR. GRUNER: You're assuming the
3 manager is the person accused.

4 MS. HIGGINS: Right.

5 MR. GRUNER: I am not assuming that.
6 I am assuming somebody else is the accused but
7 the manager has said let's forget this. So, then
8 the report is made in the face now of essentially
9 taking on management's decision.

10 It just strikes me that that is the
11 sort of retaliation setting where an
12 anti-retaliation program would have to have some
13 follow-up to be a serious anti-retaliation
14 measure. I'm wondering if anybody pursues it at
15 that level.

16 MS. HIGGINS: Yes. Our process
17 involves a requirement for the ethics office to
18 get back in touch with the person after the
19 matter has been closed in a case where it appears
20 that there is a high risk of retaliation.

21 They tell people at the time to come

1 back to us if they feel that they are suffering a
2 retaliation.

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

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

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

21 We've handled about 2500 cases on our

1 help line in the past few years and I'd like to
2 say that about 95 percent of the value comes from
3 about five percent of the cases. And of that
4 five percent there are a number of those with merit,
5 where the secretary or someone like that came
6 forward, who I don't believe would have come
7 forward at all if they couldn't come forward
8 anonymously.

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

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

16 And I think the fact that 38 percent
17 of the cases -- quoting the Ethical Leadership
18 Group Benchmarking study, that 38 percent of the
19 cases in all of these corporations they surveyed,
20 56 corporations, were anonymous. There are people
21 out there with items to report, and a policy may say no

1 fear of retribution, but they are not going to come
2 forward unless they feel protected. And the only way
3 to do that in the absence of a promise of confidentiality
4 is to permit coming forward anonymously.

5 So I think it has to be in there.

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

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

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

1 I just want to make that point. I think it is a
2 good idea, but there has to be an appropriate
3 process involved.

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

8 1(g) asks whether there should be
9 greater emphases and importance given to auditing
10 and monitoring including either through
11 prescription or point of focus, self-auditing of
12 the compliance program for its effectiveness.

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

20 And since, Debra, you indicated you
21 have to make a plane, I'm going to start with

1 Number 3 and pick up with something you said
2 which came up this morning, which is to what
3 extent would the Department of Justice be willing
4 to advocate a safe harbor against or from waiver
5 of the work product, if not attorney/client
6 privilege, when a company discloses to the
7 government the results of an internal audit or
8 let's say an employee whistle-blower report?

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

18 MS. YANG: Actually, I wrote a note
19 here to remind myself to make a disclaimer --
20 [inaudible] officially. But from things that
21 came up with this morning and some other things

1 before, it definitely would seem to make sense.
2 We've had a number of situations and problems
3 with bankruptcy trustees, situations where we
4 have to shared information with the bankruptcy
5 trustee who ultimately generates a public report.
6 And that's not something that we necessarily want
7 to do or endorse because some of the information
8 we have is from protected sources, so to speak,
9 things that are not public in nature.

10 So we've had that -- [inaudible].
11 Corporations that had dealings with other
12 agencies, federal agencies. So I think that
13 there is an interest there trying to see whether
14 or not we can pursue some sort of safe harbor. I
15 think the department suffers from that, I think,
16 in some ways -- well, I think the difficulty is
17 putting all of the heads together with the
18 federal agencies and is trying -- [inaudible]
19 with all of the varying interest.

20 MR. WALLANCE: Let me throw this out
21 because it's probably the easiest cases where

1 there is a safe harbor from disclosure to
2 plaintiff's attorneys for use in private
3 litigation --

4 MS. YANG: Right.

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

9 MS. YANG: Right.

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

14 But you're looking also at the SEC
15 , you're looking at state attorney
16 generals, you're looking at Congress,
17 congressional committees, would it be -- just to
18 think out loud, would it make sense to have a
19 safe harbor but within that safe harbor there
20 could be disclosure within the executive branch
21 of government but not to Congress, not to state

1 attorney generals and obviously not to
2 third-party litigants?

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

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

20 With respect to state agencies that
21 may have parallel investigations, I don't know,

1 that one we have to think through. I think there
2 are a few more policy problems that are included
3 in that. Oftentimes, we work in conjunction
4 with -- [inaudible] -- cross-designated over on
5 certain cases. Oftentimes, we have --
6 [inaudible] over certain cases, so I'm not sure
7 how -- that's not an easy question to answer.

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

13 Who said it this morning -- MR.
14 Lytton, start to chum the waters. And I say,
15 yes, I can definitely see that, but I also say
16 that chum the waters enough and you may actually
17 get yourself in a situation where your
18 corporation may never be charged.

19 We had a case recently where a
20 corporation came forth, did self-reporting, turn
21 things over and ultimately because we felt that

1 they were so pious and also trying to sort of do
2 the right things by themselves, we didn't charge
3 them. So they actually managed to cross the
4 great divide. So there was a great incentive,
5 that of a benefit. The corporation could save
6 itself from being charged. So there is some
7 comfort in knowing that that is feasible and a
8 viable option and something that we look at all
9 the time. Because as we sort of got into this
10 morning, the ultimate goal here is not to
11 dismantle corporate America, the ultimate goal
12 here is to take out those wrongdoers and
13 perpetrators who are, I guess, causing the
14 American public to have a crisis in confidence in
15 corporate America.

16 And so it's not the goal of the
17 Department of Justice nor my office in particular
18 to look at corporations. If they come to us and
19 tell us, "Look, we did this, we did this, we did
20 this," -- and trying to comply with this program.
21 That doesn't look like somebody who is really

1 turning their back on what you are trying to put
2 everything together. And that's something that
3 is very persuasive to us.

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

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

15 MR. BEDNAR: Creates tension.

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

20 MS. YANG: Right.

21 MR. WALLANCE: The audit companies

1 make that decision without regard to whether they
2 are ultimately going to have to deal with
3 plaintiff's lawyers and so on because there is so
4 much in their interest.

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

16 But nonetheless, just getting the
17 plaintiff's lawyers outside or within the safe
18 harbor, if you will, I think would probably serve
19 a lot of Department of Justice interests and I
20 don't think interfere with any law enforcement or
21 societal interests. They still have the right to

1 go after the documents in ordinary discovery,
2 during their discovery and the Courts will
3 resolve the issues.

4 So I really welcome --

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

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

14 MS. YANG: Both federal and state.

15 MR. WALLANCE: You know, my view would
16 be that that would be an improvement of the
17 current situation because the waiver -- at least
18 you've excluded the plaintiff's attorneys and
19 they've excluded Congress. You don't have to
20 deal with all of these rulings that are all over
21 the place, vertical waiver and horizontal waiver

1 and inconsistent jurisdictions on this issue. It
2 does give some clarity.

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

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

17 Any thoughts?

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

20 MR. WALLANCE: I haven't gotten quite
21 that far in the legislative drafting process.

1 It's a concept right now. But I've seen other
2 safe harbors and it would be the disclosure to
3 the Department of Justice, and I guess you could
4 say pursuant to the sentencing guidelines or in
5 hopes of the qualifying for the sentencing
6 guidelines but not constitute a waiver as regards
7 to third parties.

8 That's not the elegant language but
9 that would be the concept.

10 I think it's fairly easy to define
11 what you're waiving or not waiving as against
12 whom. I think what is harder is to define what
13 circumstances the safe harbor is triggered. It's
14 the disclosure to law enforcement of what and,
15 you know, that would require some thought.

16 But I do think that the guidelines
17 themselves, when they talk about disclosure of
18 the information, that
19 kind of gives you a starting point.

20 MR. GILBERT: I think it's a great
21 idea. I think the public policy objectives

1 should be encouraged, companies to come forward.
2 I think that voluntary social programs in the
3 defense region work really well in encouraging
4 that kind of reporting and this would solve one
5 of the difficult problems which is the
6 third-party litigation under harassment. So I
7 encourage you in that endeavor.

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

19 And these waiver decisions are all over
20 the place. Nobody really knows what's going to
21 happen if they make that disclosure, how long it

1 will be. So I would think that this is something
2 that is really worth exploring.

3 Carole?

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

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

1 kind of protection.

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

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

14 I think this is a very fundamental
15 issue.

16 MS. KUCA: I just want to caution one
17 thing and maybe get some thoughts from others on
18 it, which is remembering the fact that this is
19 not an exercise in the United States' best
20 practice standard on corporate compliance
21 programs. This body of law kicks in at the

1 sentencing process. We could more unevenly
2 tip the playing field if we're going
3 to embody this prosecutorial discretion
4 element into the application of the guidelines.
5 We are going to see very much what we
6 see going on in individual indictments which is
7 leaving the whole departure issue in the
8 hands of the
9 Department of
10 Justice. If we're looking at this as
11 an application process to mitigate sentence,
12 the
13 probation officer is
14 not going to be empowered to make that call.

15 Having been on that side, you
16 know, they are going to march across the U.S.
17 attorney's office and say, "Did they self-report,
18 was it timely?" I am not saying it's not what
19 we're saying, I think it's a terrific idea, I'm
20 just saying that when we look to what we're going
21 to put in ink -

1 MR. WALLANCE: If this is only an
2 exploratory -- I want to stress that this is only
3 an exploratory discussion and nobody here has
4 gone beyond that stage yet.

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

17 MS. YANG: I can tell you --

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

20 MS. YANG: But have been cases where
21 [inaudible], they are always there. They are

1 always waiting for whatever information -- they
2 were right on top of whatever we do in our case.
3 We do not, you know -- ignore them because that's
4 not part of what it is that we do, nor do they
5 drive what it is that we do, but you can feel
6 them right there just waiting for any tidbit on
7 any discovery.

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

14 MR. FIORELLI: But haven't there been
15 keystone cases where plaintiff's attorneys say
16 that the government didn't do as good a job as
17 they should have done, weren't as diligent as
18 they should be, and I will advance this case. If
19 you're not going to do it, I will. If you don't
20 give me any information that was available to the
21 government then you were disadvantaging MR.

1 I'm not saying that I disagree with
2 the argument, I'm just saying that I'm not sure
3 if we're giving the plaintiff's side a fair
4 hearing.

5 MR. WALLANCE: Well, thank you for --

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

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

13 MS. YANG: I did.

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

19 MS. YANG: I appreciate all of the
20 work that you do. It's nice to see this side of
21 it as opposed to just reading it and -

1 MR. WALLANCE: Have a good flight
2 back. Let's move on to the related issue in the
3 auditing which is whether more emphasis should be
4 given to auditing and monitoring including either
5 prescriptively or by point of focus,
6 self-auditing of compliance. There is a
7 certain logical feel to that. If you're going to
8 have a compliance program, just as you're going
9 to have any other business activity, shouldn't
10 you be auditing that effort to see whether it's
11 effective? But that's a generality. The
12 practicality of doing it may create issues and I
13 welcome thoughts on any or all of the foregoing.

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

1 the sufficiency of what programs they've chosen.

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

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

21 It's in that sense that I view auditing by

1 companies as something that reduces our need to be
2 prescriptive. I'd be much more willing -- I would think it
3 would be logical to be much more flexible about
4 compliance evaluation standards and allow these to be
5 developed by companies, but also more demanding about
6 self-assessment by companies under their own standards.

7 MR. WALLANCE: Bobby?

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

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

1 in those broad terms.

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

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

14 MS. KUCA: Thank you.

15 MR. WALLANCE: Gale?

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

18 MS. KUCA: Thank you.

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

21 MR. ANDREWS: No longer -- well, the

1 term "audit" sometimes can be seen as onerous
2 depending on the culture that you're in. I would
3 contend that any control be monitored, needs to
4 be evaluated or audited in some frequency or it
5 will lapse. So I would think that it is
6 unrealistic in anybody who runs control systems
7 survey doesn't think that it's unrealistic to
8 have good values, different goals periodically.

9 I would not shy away from the word
10 audit because if you open up this one area of
11 record be more prescriptive. It may be
12 beneficial if you open this open this up to
13 evaluation, you may to get a new assessment. And
14 I think -- so whatever you do there whether you
15 use the word audit or independent evaluation or
16 whatever, I think the key is independence. I
17 think you need to have -- you know, I think the
18 benefit of the transparency that it would bring
19 to effectiveness of your program would be what
20 you're looking for.

21 And so in my mind the audit has

1 independent translators -- there are other words
2 you could use.

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

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

14 MR. BEDNAR: Yeah.

15 MR. WALLANCE: Scott Avelino and then
16 Scott Gilbert.

17 MR. AVELINO: I think there is
18 Curie-Weiss law some definitional confusion
19 around the audit term and I wouldn't Gale's
20 comment in finding out that. There is an audit
21 that the company is doing, a self audit, can

1 evaluate whatever compliance they want.

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

5 In terms of Value, Parment, Levit
6 (phonetic), ME Value's program -- well, why agree
7 with everything, but must not be too sure but was
8 wondering about some minor-- for example,
9 illustrative guide -- something along that
10 line -- because in my experience, there is a vast
11 low, but there's significant confusion on what it
12 is to evaluate the program. I think the
13 definition moves forward into two categories.
14 One, I would refer to as a process audit and you
15 would go to a company and say, "How do you know
16 if your program is effective? Well, we
17 distribute the code to everybody. We have signed
18 certifications back from 87 percent of
19 employees," so on and so forth. Okay. That
20 speaks to a process being in place and that is
21 probative on whether or not compliance is being

1 achieved. It is not terminative as to whether or
2 not an organization policed or compliant with the
3 law. And that's where a substantive audit is
4 required where standards comply with that
5 inquiry.

6 So the distinction between what is a
7 process are making sure that the training is
8 taking place, the board is being briefed, the
9 code is one thing. I think companies relying on
10 that may be falling short actually chucking
11 correctional compliance. So the attention to
12 reposits is subject to embodiments.

13 MR. WALLANCE: Scott Gilbert.

14 MR. GILBERT: First of all, I'm struck
15 by -- there was a parallel discussion along these
16 lines taking place, it probably still is taking
17 place, treasury in respect to the elements for
18 compliance program. In patriot and compliance,
19 There are a lot of times we spend trying to keep
20 in focus on what constitutes an audit for that
21 purpose. So if we haven't already looked at

1 Balor and Lature (phonetic) to navigate, that
2 probably would be a rich source of information.

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

20 I don't have the answer to that
21 question, but again, it strikes me as the sort of

1 thing that one has to be careful about the
2 consequences of imposing some requirement. If
3 I've clearly confused everyone -- Greg has a
4 confused look on --

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

18 So what are the consequences to that?

19 MR. GILBERT: One other thing -- this
20 did come up in a treasury conference. I do think
21 it is very important that you choose the word

1 carefully because I did hear a representatives in
2 treasury, for example, confronting a problem with
3 a small company saying, "Look, we don't need a
4 year to go out and hire the DWC to conduct an
5 audit of your company, of your compliance
6 program," it just means that someone is not
7 responsible for the compliance program. Someone
8 else within your company has to take a careful
9 look, and that's the kind of check and balance
10 that we're talking about.

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

18 MR. WALLANCE: Nancy.

19 MS. HIGGINS: I'd like to say that I
20 agree with what Scott is saying that it's very
21 important to have a regular, periodic

1 self-assessment of your program. It's good to
2 have someone other than the compliance eyes do
3 that so that you just don't just get a word about
4 what a great job you're doing.

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

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

19 They are an internal audit
20 organization and dealing with the audits, my
21 program and they -- [inaudible]. And I think the

1 experience that we have in the DII (phonetic)
2 [inaudible] where at the outset we have a
3 requirement for our signatures to have an annual
4 questionnaire on the external auditors. And we
5 found over the course of the years that basically
6 we were doing all of the work and they were
7 getting \$100,000 a year to tell us, "good job."

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

17 MR. ANDREWS: In my experience,
18 absolutely. I've done this from both sides. I
19 was a general auditor for the corporation and now
20 I'm the ethics officer of the corporation so
21 now -- [inaudible] function. There's never a

1 question there's an issue -- deficiency or
2 something in our process that's failing, that's
3 causing things not to be recorded or recorded
4 properly, we step up immediately. And I think --
5 [inaudible] different associations we belong to,
6 I don't think I've ever heard anybody not
7 thinking that that was an important factor in
8 what goes on in having a healthy ethics program.

9 MS. KUCA: So it wouldn't be perceived
10 as burdensome?

11 MR. ANDREWS: I didn't say that. I
12 said important.

13 MS. HIGGINS: Again, it would depend
14 on the size of the organization, the type of
15 program in non-prescriptive banter then it
16 should -- [inaudible].

17 MR. ANDREWS: I guess it gets back to
18 the heart of the issue which is why would you
19 want to spend the money on an ethics program in
20 the first place that didn't work? And so you
21 need a mechanism to help you make that a valuable

1 expenditure. Part of that is some kind of a
2 review process. The logical support, well, I'm
3 spending my money but I don't want to spend more
4 money because I don't want to know if it works or
5 not.

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

8 MR. PRESSLER: I agree that a focus on
9 effectiveness is important. But when I think
10 about an audit, I think of an audit where you
11 have some specific standards and you
12 measure performance against those standards.

13 Since the sentencing guidelines
14 themselves are not very prescriptive, we seem to
15 agree that that's a given.

16 If you're auditing an element of a
17 program, let's say you are auditing the reporting
18 system. I may personally have some ideas about what
19 we have been calling a good reporting system.
20 We have a case data base to track things, such as
21 certain specifics related to allegations, or things

1 like that. But there are really no imposed standards.

2 So I am wondering if you're talking
3 about a required audit, what you're
4 doing is setting up a system where basically
5 consultants are advising you on what they think
6 would be good or you yourself are telling your
7 auditors what you think is good and what they
8 ought to look at. I'm just having a hard time
9 visualizing this as an audit process of any sort.

10 This is more a required overview or
11 something like that, not an audit.

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

18 MS. HIGGINS: What you've actually hit
19 upon is one of the things that all of the people
20 that I talk to in the ethics compliance world
21 agree upon, and that is there is no general

1 agreement about what makes an effective program
2 or good ways to measure the effectiveness of the
3 program.

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

7 MR. ANDREWS: Substantive.

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

17 MR. GRUNER: Which is in turn
18 presumably your
19 company's best take on what it would take to be
20 an effective program. You're not sure if it is right
21 but it's your best approach to that?

1 MS. HIGGINS: That's correct.

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

16 MS. KUCA: Call me when you do.

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

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

1 MR. AVELINO: Sure.

2 MR. GILBERT: It's very important
3 because we're talking about -- the proposal is
4 some notion that there should be a regular
5 monitoring pumped up program for effectiveness.
6 And I would submit that the highest stage in a
7 company is beyond a program compliance to a stage
8 in which compliance with the law has been so
9 operationalized in the business processes that is
10 sort of built into the fabric of the company.

11 And so, therefore, what you want in
12 the auditing is not so much the elements of a,
13 quote, formal compliance program but substantive
14 process standards that are designed to promote
15 compliance within the key business processes.
16 That's a lot of jargon, let me give you an
17 example.

18 Perhaps the most important risk area
19 for a company might be the Foreign Corrupt
20 Practices Act or improper payments, and then it's
21 not so much important, then, to be auditing

1 formal elements of the program but to be looking
2 at percentage of sales representative agreements
3 that have fulfilled all of the due diligence
4 elements which were executed prior to the
5 performance by an individual.

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

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

19 MR. WALLANCE: The nice thing about
20 the guidelines is they are fairly general and
21 it's left to commentators and the in-house folks,

1 the specialists who work out the details.

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

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

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

18 Well, they've each done an audit or a
19 review, should they each get the same credit when
20 one company has 95 percent trained and the other has
21 70 percent?

1 So you run into an issue because of the lack of
2 of standards. All of this has become very relative,
3 so when you get into the sentencing phase, I'm
4 concerned that it would be seen as not equally applied.

5 MR. WALLANCE: That's a valid point.
6 Consistency of standards.

7 All right. I know it's painfully
8 obvious that we haven't given you any breaks
9 since 1:30, but just to cover the last two
10 questions and to get reactions to these. There's
11 only a few minutes left. 8A1.2 should have a
12 3(k)(6) be expanded to emphasize positive as well
13 as the enforcement aspects of consistent
14 discipline?

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

19 Should compliance programs
20 prescriptively or by a point of focus include an
21 element that employee performance evaluations

1 will affect their compensation? It's kind of a
2 little bit of a hodge-podge but in general it's a
3 fairly specific -- I think it would be a
4 significant addition to the guidelines to -- for
5 example, point of focus say, employees'
6 compensation should be evaluated on the basis of
7 the fulfillment of compliance objectives.

8 How do people feel about that? Scott.

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

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

20 MR. WALLANCE: Scott?

21 MR. AVELINO: I would echo that. In

1 some instances there seems to be cases where the
2 corporation of the compliance falls to
3 performances evaluations effective to reverts
4 negative effect. Easy example of health and
5 safety standards where a work force gets a bonus
6 for having pure group dissentionents (phonetic).
7 There is actually an incentive among the local
8 production force to under-report violations. In
9 fact, in a way this effort has -- it's
10 over-reached shirker to change the compensation
11 systems in corporate America.

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

21 MR. WALLANCE: Eric.

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

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

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

21 MR. WALLANCE: I think it goes along

1 with the concept that was raised this morning of
2 elevating -- well, it's probably elevating the
3 chief compliance officer to a level equal to the
4 general counsel or the CFO and then setting
5 compensation based on compliance achievement.
6 Also it tells the employees that our business
7 activities -- or, our compliance activities are
8 no less important than our business activities.

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

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

21 MR. WALLANCE: I think I know the

1 answer but --

2 MR. BEDNAR: We know who they are.

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

6 Last question and then -- I promised
7 4:00, we've just got a couple of minutes -- this
8 notion of, in effect, punishing companies that
9 have no compliance program, a decrease, you
10 certainly don't get the benefit of a compliance
11 program, but if you don't have a compliance
12 program, your culpability score will go in the
13 opposite direction; it will be worse than it
14 otherwise would have been without the benefit.
15 Any thoughts?

16 MR. GRUNER: I would just contest the
17 way you just described this possible guidelines change.
18 It's a change in the assumption of what the norm is,
19 what the midpoint of culpability is. We're assuming
20 that having a compliance program is the midpoint, not
21 having one puts you below the average.

1 MR. WALLANCE: If you have a five as a
2 starting point, you can trade off. If you have a
3 compliance program, then presumably you wouldn't
4 have five, you would have --

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

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

13 MR. GRUNER: Right.

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

21 So the question is, do we

1 collectively, it's a collective process, think
2 it's a good idea, bad idea or what?

3 Scott?

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

11 MR. WALLANCE: Punishment.

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

14 MR. GRUNER: That isn't quite what we
15 were contemplating changing. The question is what
16 if you did nothing? In other words, it's envisioned
17 there is a middle ground.
18 If you did nothing you would get the penalty. If
19 you did something but it didn't quite qualify,
20 you're neutral, you're at the five point. And if
21 the mitigating sentence.

1 So in fact this envisions that middle
2 ground of, "well, I tried but I didn't quite get
3 it all right" as being the norm. And you're only
4 punishing --

5 MR. WALLANCE: Absolutely.

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

8 MR. WALLANCE: Just as an example, the
9 2001 report of Sentencing Commission indicated
10 that there were 200 plus Chapter Eight sentences.
11 Ninety-four of those had some sort of culpability
12 score or sentencing analysis. Of those 94, only
13 two companies even attempted to implement
14 compliance programs. None of them got credit for
15 an effective program. So it suggests that 92
16 companies had not even attempted to implement
17 compliance programs.

18 These are undoubtedly mostly small
19 companies, probably the fronts for a gangster's
20 business activities and so on. So it may not be
21 that representative. But I think what this is

1 getting at is that kind of company --

2 MR. GRUNER: Yes.

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

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

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

11 MR. GILBERT: Assumes that people knew
12 about --

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

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

18 MR. WALLANCE: The publicity part.
19 Any other thoughts?

20 MR. ANDREWS: It just seems to me that
21 if we believe -- to take the opposite side, if we

1 believe that the sentencing guidelines provide
2 all of these great benefits then why shouldn't we
3 be doing things that promote people in that
4 direction if we believe in what gets done is a
5 pretty direct measurement.

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

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

20 MR. WALLANCE: Let me try something
21 out on you. The Department of Justice recommends

1 against such a blanket rule, changing the
2 culpability score. But an interesting, sort of,
3 alternative which is adding an application to the
4 commentary stating that the failure to have an
5 effective program to prevent and detect
6 violations of law could be weighed against the
7 larger organizations as evidence that an individual
8 of high-level personnel of the organization
9 condoned or was willfully ignorant of the criminal
10 conduct. So it's a basis for an inference that
11 puts you into that category that would preclude
12 you from any credit as well as enhance the
13 culpability score.

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

17 MR. CARDONA: Our thought pattern
18 there was essentially along the lines of smaller
19 corporations. Especially in our district, most
20 of the corporations we prosecute are fairly
21 small. Giving them an extra penalty would not

1 have to comply to a copy to receive that penalty
2 and one of the -- they don't do a -- a hero would
3 contact would contact that house based outside of
4 the company, basically make matters hectic in
5 their industry. Besides given the award but for
6 larger corporations where juristitude that have
7 this be a stit (phonetic). You could make that
8 part just for larger corporations.

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

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

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

20 MR. BEDNAR: It is.

21 MR. WALLANCE: Again, it's a good

1 illustration of -- it's maybe a little bit more
2 than a tweak, but it's not prescriptive. It's
3 really just the commentary in some respects and
4 it could have an impact.

5 MR. CARDONA: Yeah.

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

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

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