

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

PLENARY SESSION II

November 14, 2002

10:49 a.m.

Held at:

Thurgood Marshall Building

One Columbus Circle, N.E.

Judicial Conference Center

Washington, D.C. 20002

IN ATTENDANCE

ADVISORY GROUP MEMBERS:

RICHARD BEDNAR

B. TODD JONES, CHAIR

MARY BETH BUCHANAN

LISA A. KUCA

PAUL FIORELLI

JANE ADAMS NANGLE

RICHARD GRUNER

JULIE O'SULLIVAN

ERIC H. HOLDER, JR.

EDWARD S. PETRY

MICHAEL HOROWITZ

GARY R. SPRATLING

CHARLES HOWARD

WINTHROP M. SWENSON

RON JAMES

GREGORY J. WALLANCE

LISA A. KUCA

PANEL:

JAMES COMEY

JOSH HOCHBERG

BILL LYTTON

DEBORAH YANG

ALAN YUSPEH

1 MR. JONES: Folks, get resettled in.
2 I do want to make two comments. One is that the
3 discussion this morning will continue in the
4 various breakout groups in the afternoon and so I
5 know that there were members of the advisory
6 group that may have had questions. A lot of that
7 will be able to be addressed this afternoon at
8 the breakout sessions.

9 And because of our clock issue and the
10 dynamic schedules of the next plenary session, we
11 are going to sort of address things in a group
12 and then go to one of the speakers who has a
13 flight out at noon and then ask questions to the
14 end. So, again, my apologies to the members of
15 the Advisory Group, and I think it's important
16 that we hear from these individuals and what they
17 have to say. And focus pointed questioning we'll
18 save to the end.

19 On our panel this afternoon -- for
20 this second plenary session, we have starting

1 right next to me James Comey, the United States
2 Attorney from the Southern District of New York.
3 Next to him is Josh Hochberg, the Chief of the
4 Fraud Section at the Criminal Division at the
5 Department of Justice here in Washington D.C. In
6 the middle is Bill Lytton, Executive Senior Vice
7 President and General Counsel of Tyco
8 International in New York. Next to Mr. Lytton is
9 Deborah Yang, former judge, Los Angeles Superior
10 Court, now the United States Attorney for the
11 Central District of California in Los Angeles.
12 At the end, Alan Yuspeh, the Senior Vice
13 President for Ethics, Compliance and Corporate
14 Responsibility at HCA in Nashville.

15 Now as a former DOJ type and talking
16 with Josh, who is going to lead off the panel,
17 we're going to have the Department of Justice
18 representatives sort of go in series as a group
19 starting with Josh who will kind of bring in the
20 U.S. Attorney community as appropriate. And,
21 Josh, the floor is yours.

1 MR. HOCHBERG: Thank you, Todd. On
2 behalf of the Department of Justice, I thank you
3 very much for this invitation to appear here.
4 We've assembled a group consisting of the United
5 States Attorney from the Southern District of New
6 York, James Comey, and Deborah Yang, the United
7 States Attorney for the Central District of
8 California. I am the Chief of the Fraud Section
9 a mile away in the Criminal Division. I think
10 between us we represent a significant fraction of
11 the criminal investigations and prosecutions of
12 organizations throughout the country, both in
13 terms of number, type, and certainly many of the
14 large investigations.

15 We want to commend the Sentencing
16 Commission for having the foresight to convene
17 this Advisory Group to take seriously the
18 Commission's objective of regularly reviewing the
19 sentencing organizational guidelines. As we are
20 aware from recent news, there could be no better
21 time to consider the issues that are before this

1 group today.

2 Over the past year we have witnessed
3 how corporate fraud can cause widespread damage
4 to the economy. Most corporations foster
5 effective compliance with the law, but in those
6 rare cases where there are bad actors who allow
7 corruption to exist and indeed to thrive, the
8 organization itself must be held accountable.
9 This kind of corporate fraud that we are
10 currently seeing, even though committed by a
11 relatively few actors, has shaken the economic
12 foundation of the country. It's robbed
13 employees, senior citizens, pensioners, and
14 families across the nation of their financial
15 security by luring them into unsound investments.
16 It has also undermined public confidence.

17 As recent events has demonstrated,
18 more work needs to be done, including greater
19 efforts in enforcement and in incorporating best
20 compliance practices within a greater number of
21 organizations, both large scale public,

1 for-profit organizations, and non-for-profit and
2 governmental units. Overall we believe that the
3 sentencing guidelines as currently constituted
4 are fundamentally sound, and our experience does
5 not suggest the wholesale need for change.
6 However, we believe some limited important
7 changes in the organizational sentencing regime
8 are called for. Generally we believe the
9 guidelines strike the proper balance between
10 specificity in seeking good organizational
11 behavior and that the guidelines do not
12 over-dictate what needs to be done to ensure good
13 organizational behavior.

14 As you know, the guidelines are used
15 to sentence very small organizations with dozens
16 or fewer individuals, as well as global
17 multi-billion dollar corporations with tens of
18 thousands of employees and municipal entities of
19 varying sizes. No single set of rules issued by
20 a centralized regulatory body can correctly
21 specify exactly what good management practices

1 and actions should be for all shapes and sizes of
2 organizations. The guidelines properly set forth
3 principles, general principles, and lay out a
4 model framework of the good corporate citizen,
5 leaving it to the courts to determine the level
6 of compliance and culpability within the
7 framework and to determine what a just sentence
8 will be.

9 Despite our general admiration for the
10 guidelines as they exist, we do believe they can
11 be improved, and we focus here on three specific
12 recommendations. First the maximum fine which
13 may be assessed against a corporation; second,
14 the length of probation that is available in the
15 sentencing regime and, third, greater incentives
16 for self-reporting that can be provided to
17 corporate companies.

18 As to the maximum organizational fine,
19 the reality of the current statutory sentencing
20 provision is that the deterrent value of a
21 possible maximum fine is diminished in relation

1 to the size of the company. The maximum \$500,000
2 alternative fine for an organization set forth in
3 Title 18 may have significant deterrent value for
4 a small company but is clearly a pinprick for a
5 multi-national corporation with a net worth
6 exceeding \$500 million. While section 3571
7 authorizes a larger fine of twice the actual loss
8 if it exceeds \$500,000, this section is
9 noticeably ineffective in the face of noneconomic
10 crimes or crimes where loss is not readily
11 susceptible to calculation. For example,
12 obstruction of justice, destruction of records,
13 false statements, and certain regulatory crimes.
14 The sentence of Arthur Anderson, LLP, to the
15 maximum fine of \$500,000 recently vividly
16 illustrates the need for a higher limit for
17 corporate funds. We hope the Advisory Group and
18 ultimately the Commission itself will consider
19 joining the Department of Justice in seeking
20 higher statutory penalties in this area.

21 As to the length of the probation, our

1 experience and that of many others has shown that
2 changing a corporate culture is a very
3 significant undertaking that can often require
4 many years of visual management and oversight.
5 In several cases we have found that the maximum
6 available probation period has been inadequate
7 to bring about the need for change in corporate
8 culture, and we believe that there is a need for
9 an increase in the maximum period of probation
10 for organizational offenders. James Comey will
11 elaborate on this recommendation later. In terms
12 of great incentives for self-reporting and full
13 cooperation, we believe stronger incentives are
14 needed within the guidelines to achieve the
15 overall crime called -- crime control objectives
16 of the organizational guidelines. Deborah Yang
17 will address this topic more completely.

18 In addition to the changes we are
19 recommending, we have submitted written responses
20 to the six questions and an overall response. In
21 our submission we set forth our view that the

1 Commission should establish overall policy
2 without dictating the specifics of corporate
3 governance. In some cases we believe that the
4 guidelines could be improved by incorporating
5 examples of management practices, including
6 compliance programs that have proven to be
7 effective in various industries. We specifically
8 recommend that an effective compliance program
9 should have mechanisms whereby a compliance
10 officer can report directly to the board of
11 directors and high-level management when
12 necessary. We do not think it necessary,
13 however, for the Commission to dictate the exact
14 mechanism for such access.

15 In our written position, we also set
16 forth positions that encourage and reward good
17 corporate citizens and increase penalties for
18 those who do not report criminal activity or
19 choose to cooperate with investigations. For
20 example, we specifically recommend an enhanced
21 punishment for those who do not self-report.

1 I thank you for this opportunity to
2 testify, and I invite Deborah Yang now to address
3 issues relating to the effectiveness of
4 compliance programs and ways to encourage
5 disclosure of wrongdoing.

6 MS. YANG: Good morning. Thank you to
7 the advisory committee for allowing me to come up
8 and address you today. There's two things that I
9 want to focus on, the first being that we believe
10 the organizational guidelines can be improved,
11 one, through an increase in the guidance provided
12 on what is necessary for an organization to
13 actually implement an effective organizational --
14 an effective compliance program, and, second, an
15 increase in the incentives for self-reporting of
16 any criminal conduct that might be discovered
17 within an organization. Underlying both of these
18 suggestions is a simple fact made clear by all of
19 our experiences in investigating and prosecuting
20 these organizational crimes. That the
21 organizations themselves, if they have the will

1 to do so, are actually the ones who are in the
2 best position to deter and detect criminal
3 conduct by their employees at a time with the
4 potential harm from that conduct can still be
5 minimized.

6 Sham transactions, fraudulent
7 accounting methods, and other types of corporate
8 fraud that we've seen in the news these days
9 often come to the attention of the regulators and
10 to our offices only after significant harm has
11 already been done. For example, when the
12 earnings are restated downward by millions or
13 when a bankruptcy is declared. At this point
14 when we investigate and prosecute, it's terrific.
15 But for the victims, there's really very little
16 comfort indeed. The losses are real, and the
17 money is gone.

18 What we virtually always find in these
19 investigations is that there are those within the
20 organization who know or suspected far earlier
21 that wrongdoing was occurring. In some

1 situations the suspicions go unreported because
2 the employees themselves fear some sort of
3 retribution and fear for their jobs and remain
4 silent. In other circumstances, suspicions are
5 reported, but the organization itself lacks any
6 mechanism to ensure that the reports are acted
7 on, either internally or by passing reports to
8 outside authorities such as government regulators
9 or law enforcement. In both instances, failures
10 within the organization, whether in its policies,
11 its practice, or its culture, allow wrongdoing to
12 continue long after it should have been protected
13 and stopped. The organizational guidelines
14 recognize this fact and seek to address it by
15 providing incentives for organizations to create
16 effective compliance programs or to self-report
17 criminal conduct.

18 Overall, we believe that the
19 guideline's general approach to these issues are
20 fundamentally sound. We do not propose any
21 wholesale changes. In particular, we think it

1 important that the guidelines not to try
2 prescribe with specificity the details of
3 appropriate compliance programs. The Sentencing
4 Commission is not in a position to accurately
5 determine what types of programs will best serve
6 to limit criminal activity across the range of
7 types of organizations, companies, and
8 corporations covered by the guidelines. Rather,
9 we believe that each compliance program ideally
10 will be creatively tailored to the unique
11 characteristics of each organization's individual
12 structure and business in the context of a broad
13 guideline framework. It is more likely that
14 organizations will be encouraged to do more
15 rather than less and to construct a successful
16 compliance program with guidelines that more
17 generally describe elements that could be
18 included as part of an effective program.

19 Having said that, we would urge the
20 guidelines to provide more guidance on certain
21 points that we believe are crucial to make any

1 compliance program effective. What do I mean by
2 that? First, we believe the guidelines must more
3 strongly encourage organizations to make
4 compliance an integral part of the organizational
5 culture. We have all experienced corporations in
6 which the compliance program consists of nothing
7 more than a thick manual that sits around the
8 back of somebody's desk. It's circulated but
9 never really gets opened and the employees are
10 never told what it's for, what it should be used
11 for, and what it really means, so there's no
12 support to that compliance manual. The
13 guidelines must make clear that this is not an
14 effective compliance program. The guidelines
15 should specifically state at a minimum that an
16 effective compliance program requires that the
17 organization have disseminated the publications
18 that explain in a practical manner what is
19 required and follow it up with training programs
20 and other forms of communication to ensure that
21 the need to comply with those requirements is

1 understood.

2 In addition, the guidelines should
3 make clear that organizations must ensure that
4 employees who follow through on their training
5 and report wrongdoing will not be punished. This
6 can be accomplished in a number of ways, for
7 example, by, one, providing internal
8 whistleblower protections or, two, creating an
9 ombudsman or, three, any other avenue for
10 confidential reporting. Again, different
11 organizations may choose different means. We
12 don't think that the guidelines should dictate
13 the specifics.

14 Second, we believe that the guidelines
15 must make clear that an effective compliance
16 program requires a mechanism that will ensure
17 stockholders, investors, the board of directors,
18 the audit committee, and others that it will
19 continue to work even when one or more of the
20 organization's high-level personnel are involved
21 in the wrongdoing. Public confidence

1 particularly affected by the fear that high
2 ranking corporate executives can act with
3 impunity to use a corporation's assets at their
4 will for their own benefit without any regard to
5 the well-being of the investors or the employees.

6 To mitigate this fear, there must be
7 sufficient, independent oversight over a
8 compliance program to ensure that it will detect
9 even wrongdoing by high-level officers which
10 might otherwise might be successfully concealed.
11 For this purpose we believe it critical that
12 compliance officers have a direct reporting line
13 to the CEO, the board of directors, the outside
14 auditors, or some independent committee of the
15 board. It's this access that is key, we believe,
16 to uncovering and preventing criminal activity by
17 high ranking managers.

18 It may be necessary as well to provide
19 alternative reporting lines so the compliance
20 officer can report even if the primary person to
21 whom he or she normally would report to is

1 suspected of improper conduct. You've got to
2 give them another vehicle to get that information
3 across. Again, we don't think the guidelines can
4 specify exactly how the reporting channels should
5 be set up for all organizations, but we do
6 believe that the guidelines should specify that a
7 corporate compliance program needs to provide
8 reliable pathways for the reporting of corporate
9 wrongdoing which bypass the alleged wrongdoers.

10 Compliance programs, of course,
11 generate internal detection of organizational
12 wrongdoing. The next step is external
13 self-reporting to law enforcement and to
14 regulators. The guidelines already encourage
15 this. In addition, management and boards of
16 directors of organizations have an inherent
17 fiduciary duty to the stockholders and investors
18 to undertake such prophylactic activities.
19 Through the enactment of a new criminal offense
20 for retaliating against whistleblowers Section
21 18USC, Section 1514A, Congress included that in

1 the Sarbanes-Oxley Act of 2002 and additional
2 protection for those who report suspected
3 misconduct and potentially legalities.

4 Notwithstanding those provisions,
5 however, we believe that current incentives in
6 the guidelines to self-report could be improved.
7 Specifically we recommend an additional two-level
8 enhancement when a company does not self-report
9 in a timely fashion following discovery of
10 criminal behavior. Self-reporting allows law
11 enforcement and regulators to begin an
12 investigation before evidence is stale. It
13 minimizes the losses, conserves funds for
14 restitution, and starts the corporation on the
15 road to rehabilitation. It should be more
16 strongly encouraged.

17 Thank you very much for the
18 opportunity to address you this morning, and I'd
19 like to turn the microphone over to my brethren
20 James Comey from New York.

21 MR. COMEY: I'm her little brother.

1 Thank you very much for allowing me to address
2 you and for your promise that nobody who used to
3 work with me will be allowed to ask questions.

4 I'd like to spend just a few minutes
5 and talk about three topics. The -- I want to
6 say a brief word about probation and our wish
7 that probation -- we'd be able to extend the
8 maximum term of probation for organizations, and
9 I want to say a few words about criminal history.
10 But what I'd really like to talk about is a
11 subject that has generated tremendous sound and
12 fury, if you will, that I don't think signifies
13 nothing but that I think has generated a lot of
14 confusion and that is privilege and our approach
15 to work-product protection and privilege in the
16 context of cooperation.

17 As in the case of individuals, the
18 organizational guidelines work very hard to
19 encourage cooperation and to reward it. And, as
20 you well know and as Deborah said, this is for
21 great reasons. First that cooperation reflects

1 that the corporation is looking to clean house
2 and to change its culture which may be a culture
3 of wrongdoing to a culture of corporate good
4 citizenship. It also enables the government to
5 gather the facts before they are stale, assist
6 the government in fully investigating the
7 wrongdoing, and figuring out who the wrongdoers
8 are and also assist us in minimizing victims
9 losses. And, as Deborah said, in husbanding
10 resources so that we can give folks money back
11 through restitution.

12 As you know, the guidelines permit a
13 corporation to reduce its punishment by lowering
14 its culpability score for thorough cooperation.
15 And we understand that to mean, as the courts
16 have, cooperation that discloses all pertinent
17 information, specifically information that is
18 sufficient for the government to identify the
19 individuals responsible for the criminal conduct
20 and to understand its full scope.

21 What constitutes full and thorough

1 cooperation will necessarily vary in every case,
2 and for that reason we think that it would be
3 unwise for the guidelines to try to define
4 cooperation. At a minimum, though, it has to be
5 recognized that if a corporation has learned
6 precisely what happened, who is responsible, then
7 they have to turn this over to the government if
8 they wish to make a claim that they have
9 cooperated and deserve a reduced culpability
10 score.

11 Now how a corporation discloses, the
12 facts will vary and that's where the rubber hits
13 the road. The government does not require any
14 particular method so long as all pertinent facts
15 are disclosed, including the identification of
16 all culpable individuals, all relevant documents,
17 and all witnesses with relevant individuals --
18 with relevant information. Let me give you some
19 examples. For example, if the corporation --
20 cooperation may be full and complete if a
21 corporation discloses the full facts of criminal

1 activity in a detailed briefing and voluntary
2 provides relevant documents and the results of
3 witness interviews or a corporation may provide a
4 general briefing, identify the relevant
5 witnesses, and bring them in for interviews to
6 provide the government with an opportunity to
7 find the detailed facts from their mouths.

8 Depending upon the nature and type of disclosure,
9 some work-product protection may have to be
10 waived because frequently, although not always,
11 the corporation has gathered the pertinent facts
12 through an investigation by counsel that included
13 witness interviews which are recorded
14 work-product protection under the law.

15 Occasionally, a corporation
16 nevertheless will be able to provide the
17 government with a thorough briefing of all the
18 relevant facts without waiving work-product
19 protection. But it's fair to say that most often
20 a corporation that has chosen to cooperate will
21 necessarily have to waive work-product protection

1 to some extent in order to supply the government
2 with thorough information.

3 Several important points need to be
4 made here because this privilege issue has since
5 the time of the so-called Holder memo generated a
6 lot of ink most by our brothers and sisters who
7 are in the defense bar and whom we love very
8 much. First, the government does not require the
9 corporation to waive work-product protection. It
10 is the corporation's decision and that entity's
11 alone to seek leniency by disclosing all relevant
12 facts to the government. This is the decision
13 that the corporation makes in the context of
14 either trying to persuade us not to file charges
15 or to minimize punishment under the guidelines if
16 charged.

17 In either context, if the facts can be
18 fully disclosed without a waiver, the Department
19 of Justice in its policy does not require a
20 waiver as a full measure of cooperation, and the
21 Holder memo made this very clear. However, if

1 the full facts are only available through access
2 to protected items such as information contained
3 in detailed notes taken during the witness
4 interviews I mentioned, the corporation will have
5 to decide whether to waive work-product
6 protection in order to claim to have thoroughly
7 cooperated.

8 I should also note, though, that
9 waivers can in many instances be limited or
10 partial or limited by subject matter, and let me
11 offer you a couple of examples that we've
12 encountered to highlight the point I'm trying to
13 make here. Let's say a corporation comes into my
14 office and says that we have uncovered an
15 accounting fraud and we have understated expenses
16 by one billion dollars. We know exactly what
17 happen, how it happened, and who was responsible
18 but we know this from interviews from our lawyers
19 conducted and they're covered by our work-product
20 protection and we don't want to waive that, so
21 we're not prepared to tell you anything more.

1 There you have it. I think everybody in this
2 room would agree that that disclosure does not
3 constitute the full and thorough cooperation that
4 the guidelines envision and should require in
5 order for the corporation to be rewarded.

6 Now another example, a different
7 example, a company comes into my office and says
8 we have uncovered a crime. There was a huge
9 understatement of expenses. It happened in the
10 widget department. We have conducted an
11 internal. We don't want to turn over the notes
12 to you or the report, but we will bring in all
13 the witnesses you'll need in order to figure out
14 what happened and to find who was responsible and
15 we will make sure that the witnesses make full
16 disclosure to you and provide you with all the
17 facts. So long as the corporation follows
18 through on that promise, in my view, that
19 cooperation will be full and worthy of full
20 credit.

21 On the other hand, though, it may turn

1 out that several of the witnesses decline to be
2 interviewed by the government even if they're
3 flown in by the corporation, and they invoke
4 their fifth amendment rights. As a result, if we
5 cannot fully reconstruct the crime or gather
6 sufficient information against those responsible,
7 we're going to turn to the corporation and ask
8 for the notes of their interviews.

9 Now some may say, well, why don't you
10 guys just immunize the witnesses and not ask for
11 the waiver of any kind of work-product
12 protection. The answer is simple. We don't want
13 immunize those who may have done the deed, who
14 may be culpable and perhaps are even the most
15 culpable, and we're going to look to the
16 corporation to fill in the missing information.
17 And then the corporation will have to decide
18 whether to waive work-product protection. If it
19 does not waive it and the investigation is
20 stymied or we have to immunize high-level
21 officials, I can tell you right now the

1 government is unlikely to view that as sufficient
2 cooperation to merit either leniency in our
3 charging decision or credit through the
4 guidelines at sentencing.

5 And these examples, I hope, also
6 highlight a very important distinction between
7 work-product protection and the traditional
8 attorney-client privilege. In all the stuff I
9 read to get ready for this, most of it -- whaling
10 on the former Deputy Attorney General, they tend
11 to conflate the two and not recognize the
12 tremendous significance in our investigative work
13 between the two. There's a significant
14 difference because we recognize, as everyone
15 knows, that the attorney-client privilege is a
16 different animal and is a traditionally protected
17 zone to facilitate communication between client
18 and lawyer. And indeed the department's policy
19 specifically notes that the waiver of the core
20 privilege, the attorney-client privilege -- and
21 I'm careful not to use the word privilege when I

1 talk about work-product. It's a doctrine or a
2 protection. That waiver of privilege will rarely
3 be necessary when a cooperation is -- excuse me.
4 When a corporation is cooperating with the
5 government. And even when we deal with
6 work-product material, I should be clear, the
7 government is almost never seeking counsel's
8 mental impressions of those witness interviews.
9 We want the facts, and as I'm sure any
10 experienced member of the defense bar can tell
11 you, they know how to keep mental impressions and
12 strategy out of their notes of witness
13 interviews. We recognize that the notes of the
14 interview reflect, to some extent, the questions
15 asked by an attorney, and, therefore, they give
16 away the direction or the strategy of the lawyer
17 maybe to some extent. But the disclosure of the
18 notes of interview is a minimal intrusion on the
19 protection and may be necessary if the
20 corporation wants credit, either through leniency
21 or through reduced culpability score.

1 The guidelines also reward cooperation
2 in a different way by permitting us to file a
3 downward departure motion based on substantial
4 assistance. This is equivalent to the more
5 traditional 5K 1.1 motion that we file for
6 individuals. We believe it would be unwise for
7 the guidelines to try to prescribe under what
8 circumstances the government should make such a
9 motion in the organizational context, what
10 comprises substantial assistance for a lot of the
11 reasons I just laid it out. Each case will be
12 different.

13 When an individual cooperates, he's
14 required to tell the government everything he
15 knows about the criminal activity, and the rules
16 should be no different for a corporation seeking
17 similar leniency. Whether that disclosure will
18 involve materials covered by work-product or, in
19 the rare case, attorney-client privilege will
20 vary, and the same principles are in play as in
21 the context of the culpability score.

1 So in conclusion, the relevant
2 cooperation guidelines properly focus on whether
3 a corporation has cooperated, and that should
4 remain their only focus. We strongly urge that
5 the guidelines should not be amended to provide
6 that in order to cooperate a waiver of privilege
7 is not required precisely because in some
8 situations the only way for a corporation to
9 cooperate will be to waive either the
10 work-product protections or in the rarer cases
11 the attorney-client privilege.

12 Now let me say just a brief word about
13 probation. As Josh mentioned, we would like to
14 see the period of probation, which is now a
15 statutory maximum of five years, modified so that
16 the sentencing court has the option to extend
17 probation for as long as necessary for the
18 corporation to make a cultural change and to
19 implement an effective compliance program. And
20 there are two examples from my district that
21 highlight the limits posed by the current five

1 year period of probation.

2 In 1995 my office prosecuted Con
3 Edison, who were a lovable local utility company,
4 after they were convicted of environmental and
5 false statements crimes for their conduct in
6 deliberately concealing the release of 200 pounds
7 of asbestos in a steam manhole explosion in
8 mid-town Manhattan. Con Edison, in our view, had
9 a dismal corporate culture of failing to comply
10 with the environmental laws and was placed on
11 three years probation and a monitor was put in
12 place to help them get their act together.

13 While the monitorship was very
14 successful, three years was far too brief for the
15 new compliance program to be designed and
16 implemented and to be effective given the
17 entrenched corporate culture. Con Edison agreed
18 to a court order that extended the compliance
19 program and the monitorship for an additional
20 period of two years and to allow us to retain an
21 expert consultant to review their work during the

1 second year of that additional period. During
2 those two years, the company delayed too long in
3 reporting a PCB release in another serious spill,
4 and, at our request, they agreed to extend their
5 obligations for two additional years. And after
6 seven years, Con Edison is now on its own and the
7 government wishes it well.

8 Also in my district, another example
9 was an entity that pled guilty in the recent past
10 to environmental crimes and was placed on three
11 years probation extendable to the maximum five
12 years. This entity, like Con Edison, was also
13 required to develop and implement a comprehensive
14 and effective environmental compliance program
15 under the oversight of the court appointed
16 monitor. It has taken the entity almost 14
17 months to obtain a report from a consultant who
18 develops compliance programs for companies, and
19 they still have not adopted or implemented a
20 comprehensive program. There was a tremendous
21 backlog of deficiencies in this entity's business

1 compliance, and we just don't see it proceeding
2 quickly and we see us bumping up against the
3 three years. So it's hard to say how long it
4 will take this organization or many others to
5 fully implement a comprehensive and effective
6 compliance program.

7 We are concerned that, as in the case
8 of Con Ed, five years will simply not be enough,
9 and we believe the court should have the
10 flexibility to impose periods longer than five
11 years and extend them upon a showing that the
12 original period was too brief to change the
13 corporation's way of doing business.

14 Now the last thing I want to mention
15 very briefly is something that was raised for me
16 by my securities unit chief, and that is prior
17 history. We believe that the guidelines should
18 increase the culpability score by two levels for
19 a corporation which has within the last ten years
20 engaged in similar conduct, whether by one
21 criminal offense or two civil or regulatory

1 adjudications. As you know, the current
2 guidelines provide for a two-level enhancement
3 only if the conduct was committed within five
4 years and a one-level enhancement if the conduct
5 was committed within ten years. What we're
6 suggesting is that the five year dividing line
7 should be eliminated because (inaudible)
8 corporations committing the same misconduct
9 within ten years have clearly demonstrated a
10 complete inability to be deterred to change bad
11 corporate culture or to enforce an effective
12 compliance program, and we think that ten years
13 is a bit of a blink of an eye in the life of a
14 corporation and its culture. It's very different
15 from an individual situation. You might also
16 wish to consider requiring a one-level adjustment
17 for a corporation that has had one civil or
18 regulatory adjudication of misconduct within the
19 last ten years.

20 Thank you, again, for inviting us to
21 testify here today and thank you for your hard

1 work, which makes a big difference. Thank you.

2 MR. JONES: Now, again, back to the
3 clock, that mundane thing that's sort of keeping
4 us going here. I know Mr. Lytton has to catch a
5 flight, and I would ask him to go ahead and
6 present your prepared remarks, and then we'll
7 have some time for questions, assuming, of
8 course, that our DOJ representatives are willing
9 to answer questions.

10 MR. LYTTON: Owe, I bet they will.

11 THE WITNESS: I'm Bill Lytton. I am
12 the Executive Vice President and General Counsel
13 of Tyco International, Limited. You may have
14 heard of that company. I have been in that job
15 now for seven weeks and three days, but who's
16 counting. Prior to being in that job, however, I
17 had a number of other experiences that may be
18 relevant to this. I was a federal prosecutor in
19 Chicago and in Philadelphia for about
20 eight-and-a-half years ending up as first
21 assistant U.S. Attorney in Philadelphia. I was

1 counsel to President Reagan and President Bush 41
2 relating to the Iran contra investigation. I was
3 a lawyer in private practice in Philadelphia with
4 a law firm that had pioneered class actions
5 against corporations. I have been in-house
6 counsel at four different companies, General
7 Electric Aerospace, Martin Marietta, Lockheed
8 Martin, International Paper, and now at Tyco.
9 That's probably five, I guess. I miscounted.
10 That's why I'm not an accountant. I won't even
11 go there. And then, finally, up until about two
12 months ago, I was the chairman of the American
13 Corporate Counsel Association, which represents
14 about 6,000 corporations in the United States and
15 abroad and there in house staff.

16 So I bring a variety of background,
17 and I speak for none of these organizations that
18 I just mentioned. But I thought I would reflect
19 on what it's like inside and what the experience
20 has been working with and after the guidelines
21 were adopted.

1 First of all, I think the guidelines
2 had been a wonderful addition to the general
3 texture of corporate life because I think for
4 those who needed an excuse to do the right thing,
5 it has provided that. For those who needed an
6 incentive, it has provided that. And I think
7 most companies have now adopted that. I recall
8 some years ago I was speaking at the University
9 of Pennsylvania when I was a GE, and this was way
10 before all the other corporations had sort of
11 seen this. And I said to the assemblage of
12 general counsel, I said the Aerospace industry's
13 past is your future. They all thought I was
14 nuts, but I wasn't. I think that the focus on
15 the conduct of corporations and the people that
16 run them is, indeed, the focus that we all now
17 see today.

18 When I was at Martin Marietta, there
19 was a chairman of that organization by the name
20 of Norm Augustine. Some of you may know him. He
21 is a wise man, and we used to fuss about a lot,

1 getting the paperwork right on government
2 contracts. Not an insignificant thing and not an
3 insignificant challenge, but every once in a
4 while Norm would say to let's focus on the
5 mission. What's the mission? Is the mission to
6 get the paperwork right or is it for the airplane
7 to fly? And we have to do both, but let's not
8 forget the main mission.

9 And so I ask and raise the issue of
10 what is the mission of the sentencing guidelines
11 and the Sentencing Commission? Is it to foster
12 an environment where, in fact, we all go out of
13 business? We can focus on street crime or other
14 things. Or is the mission to try and get
15 headlines and be able to produce press releases
16 about the number of fines and the number of
17 convictions? The latter is a lot more fun in a
18 lot of ways, and it's easier to calculate. But a
19 focus on the former of providing and fostering
20 that atmosphere where people who want to do the
21 right thing are encouraged to do it, and people

1 who don't want to do the right thing are found
2 out and prevented from doing it is, I think, what
3 the better focus should be.

4 When I was a young prosecutor in
5 Chicago, I learned something about human nature.
6 I was invited to go speak to the Chicago Police
7 Department, and back in the mid-70s that was
8 almost a RICO organization in some respects. But
9 I went there, and I was to speak to them about
10 the benefits of obeying the fourth amendment and
11 the rules with regard to search and seizure. And
12 I gave them a very impassioned talk about that.
13 At the end of it, I said so why is it important
14 that we obey the fourth amendment thinking that
15 they would all say so the evidence isn't
16 suppressed, so the organization of government is
17 not harmed. Then they to a person said, so we
18 don't get sued. That's what motivated them. I
19 think there's a lesson there for all of us
20 because personal responsibility is far more
21 effective in trying to get people to change than

1 a concern about what will happen to the
2 corporation, unless you're talking about the
3 death penalty of the corporation. And that's
4 where I have to disagree with my friend Josh here
5 who said that he thought the civil penalty should
6 be increased and that \$500,000 fine on Arthur
7 Anderson was not enough. In another context,
8 that fine might have been considered abusing the
9 corpse. The corporation was dead. The market
10 had killed it. That's where the real deterrent
11 was. So I don't think that a million dollar fine
12 or five billion dollar fine on Arthur Anderson
13 would have had any more affect. The corporation
14 had died.

15 Now let's talk about some of the
16 practical impediments based upon my experience,
17 not just in the companies I worked with but in
18 talking with a variety of colleagues who are in
19 that area in the past and probably in the
20 present. One of the things that we find
21 ourselves constantly up against is a very active

1 plaintiff's bar. I am perfectly happy to give
2 over and waive the attorney-client privilege to
3 the Department of Justice or anybody else and
4 work-product privilege in a voluntary disclosure
5 except if that is later going to be used to line
6 the pockets of a rabid plaintiff's bar that is
7 out there to line -- they're bounty hunters.
8 They're modern day bounty hunters, and that's the
9 reality.

10 I think in reading the materials
11 coming down here, I saw that Joe Murphy had a
12 proposal that would allow a (inaudible) for
13 privileged material turned over in a voluntary
14 disclosure that would not be deemed waived in any
15 other process. I think that's a wonderful,
16 wonderful idea. I don't think that you guys
17 would have any problem talking us into doing that
18 if we thought we had that protection because I
19 don't worry about talking to the government
20 because I'm dealing with sensible people whose
21 goals are not to line their own pockets. They

1 are interested in, I think, the same goals that I
2 have and that my corporations and my colleagues
3 have. So if you give me that protection, I won't
4 have a problem giving that to you. Now I've
5 signed documents that say this is a limited
6 waiver, and I hope that's right. But I don't
7 know whether it is. If this is on the record,
8 I'm sure it is. But I am concerned about that.
9 So I do worry about that.

10 The second thing is when I give it
11 over -- when I'm dealing with these wonderful
12 people from the Department of Justice, my former
13 colleagues, I have this wonderful trust and good
14 will. But I'll tell you an example. I had to go
15 once to the Defense Logistics Agency when I was
16 in the defense industry and I was talking to them
17 about a debarment, and I said we did certain
18 things. They said why did you do that, and I
19 said, well, the government asked us to do that.
20 They said what government was that, and I said
21 the Department of Justice. And they said that's

1 not us. And the DOD and DLA and EPA and all may
2 take a different view than these good people
3 here. So we need to have sort of a consistency
4 in the Federal Government as we look at whether
5 or not waiver is going to be a defective waiver
6 or whether we can limit that waiver.

7 I would also -- I guess I want to talk
8 about just a couple of other things that some of
9 my colleagues said here. Deborah talked about
10 increasing incentives for self-reporting. I
11 think the correlating is decreasing the
12 incentives for not reporting. I think Eric's
13 memo was a wonderful memo. I've never criticized
14 it publicly. I think it's a wonderful memo, and
15 I think that it can be used as the basis for
16 non-prosecution of companies that notwithstanding
17 a tremendous effort and effective compliance
18 system like the DOJ and like every other agency
19 in town in our country has people who just don't
20 get it and who violate the law. We need to have
21 the carrot there. And I think we have it

1 effectively, but we don't have it in a policy
2 way. If you -- if -- that's a wonderful
3 incentive. If you say notwithstanding a terrific
4 effort that you guys did, somebody did something
5 wrong, we're going to give you the benefit of the
6 doubt. That would help.

7 Number two, I think that another point
8 that Deborah made was the timeliness of
9 self-reporting. I agree with that, but how do we
10 find that? Often times a matter will come into
11 an ombudsman or a lawyer and it will be an
12 allegation and you don't know what you've got.
13 It sounds terribly serious. You want to
14 investigate it. You've got to look at it, and
15 you make a voluntary disclosure. That's fine. I
16 had this happen with the DODIG years ago. And
17 then when you get into it, you find out it wasn't
18 a problem. There was no violation of the law.
19 Something came in. We looked into it. Nothing
20 happened. I have now made a voluntary
21 disclosure, and I have chummed the water for the

1 sharks in the plaintiff's bar to come after me,
2 and I will now be in litigation forever about,
3 well, there must have been something wrong there,
4 you made a disclosure. So give me some
5 protection and give me some leeway on timeliness
6 so that we can do it when we reach a certain
7 threshold. I don't know what that is, but work
8 with us on that. Give us some leeway, and allow
9 us to go in and do that.

10 I think that -- again, in the bottom
11 line it comes down to personal responsibility.
12 I'm now involved in a corporation where we are
13 trying to rebuild a corporation that consists of
14 260,000 employees in a hundred countries around
15 the world that has been devastated by the
16 actions -- alleged actions, I should say, of two
17 or three or four people at the top, and you know
18 that story. I won't go into it. We're trying to
19 build that culture. I have no problem in
20 convincing these people that this is the right
21 thing to do. They want to do it. They want to

1 regain that self-respect. I need your help, and
2 the Sentencing Commission guidelines can help as
3 we expand that to make sure as we go forward
4 there's enough of an incentive there to help us
5 and that the disincentives are removed. If you
6 do that, we'll be back here in a couple years
7 praising your services, and we'll be all out of
8 business. Thank you very much.

9 MR. JONES: And our last speaker,
10 before we open it up to Q and A for those that
11 can stick around because I know your schedules
12 are tight, is Alan Yuspeh, Senior Vice President
13 at HCA, Nashville, Tennessee.

14 MR. YUSPEH: Thank you very much and
15 thank you for inviting me to participate today.
16 I would just like to say a few words
17 preliminarily, which is that I regarded the
18 material that I had said to Paula Desio when she
19 voted to be a bit of a work in progress, so I've
20 taken the liberty to change some of the nuances
21 of the points that are made there. I'll share

1 the changes with you, but the basic points are
2 much the same. I probably should caveat my
3 remarks the same my friend Bill Lytton did by
4 saying that these are my personal views, and they
5 reflect my experiences as the coordinator of the
6 Defense Industry ethics initiative for a period
7 of 11 years and the last five years as the
8 corporate ethics and compliance officer for an
9 organization which is the largest health care
10 provider in the country.

11 And, finally, I feel like I almost
12 ought to almost apologize for this, but the
13 reality is that my experience, like that of many
14 people on the panel, is essentially a large
15 company kind of experience. I know that there's
16 an interest amongst your group in small
17 companies. I will say that what we've done at
18 HCA is that we have put all of our compliance
19 materials on the Internet since the start of our
20 efforts in this area five years ago, so we have
21 literally put thousands of pages of policies and

1 procedures and codes of conduct in virtually --
2 audit tools and virtually everything else
3 pertaining to our ethics and compliance efforts
4 on the Internet in reflection of the fact that we
5 recognize that a lot of those in our activity,
6 that is hospitals, are very small. They're often
7 10 or 15 or 20 bed hospitals in the country that
8 are freestanding and, again, have the resources
9 we do. So our position has been that it's an
10 indicia of the corporate social responsibility to
11 those things available and said to people that
12 they may use them as they wish, adapt them for
13 whatever purpose they may find.

14 There are just a few points that I
15 wanted to share with you today, and I had tried
16 to in my modified written comments say these with
17 some care and so I hope you'll indulge me if I do
18 sort of go through the portions of text that I
19 think are most relevant. My thoughts are these,
20 that large corporations in this country are, for
21 the most part, unlikely to take comprehensive

1 energetic management action to have excellent
2 ethics and compliance programs if the only
3 perceived incentive is to reduce their criminal
4 liability if they were sentenced. It is my
5 belief that a large organization that believes it
6 is to be well-managed does not expect to be
7 convicted of committing a crime. Thus, the
8 appeal to a chief executive officer that he or
9 she should implement, and I've chosen my words
10 carefully here, a diligent, comprehensive ethics
11 and compliance program primarily to be sentenced
12 more leniently if convicted of a crime is not
13 likely to resonate.

14 These comments may sound startling to
15 some, so I think I should elaborate for a moment.
16 I suspect that some companies -- and Bill Lytton
17 can attest to the facts, but they have taken some
18 actions in light of the sentencing guidelines. I
19 have no doubt that there are corporations that
20 have created some materials or perhaps added some
21 practice such as a hot line because these were

1 mentioned in the Commission's guidelines.
2 There's a huge difference, however, between a
3 mechanical approach to matters such as this and a
4 top management driven genuine effort to create an
5 ethical culture and to make sound business
6 conduct a matter of daily practice.

7 I think that the fear of sentencing
8 alone will not create sufficient impetus for
9 large American businesses to implement ethics and
10 compliance programs that are as comprehensive
11 (inaudible) and as aspirational as they could and
12 should be. Truly outstanding programs only
13 occur, I believe, when top management of the
14 organization sees value in them and is personally
15 committed to doing such programs diligently.

16 I believe that the Commission can be
17 effective in moving large corporations even
18 further in this area, but I believe that it will
19 have to do so by trying to use its position and
20 stature as a bully pulpit. I'm using this term
21 as President Theodore Roosevelt used it to mean a

1 visible and credible platform from which to
2 persuasively advocate an agenda. Yet the
3 Sentencing Commission through its visibility is,
4 in effect, saying to large American corporations
5 that these are the management practices you need
6 to adopt. There is greater likelihood that
7 organizations will do that than if no
8 governmental authority is making such
9 recommendations. Particularly at a time when it
10 appears that we are in the midst of a crisis of
11 corporate responsibility and when investor
12 competency seems to be lagging in light of this,
13 the Commission could easily claim a proper
14 leadership role to advise well-managed
15 organizations as to how to approach these issues.

16 I think there are a few changes to the
17 definition of an effective program to prevent the
18 violations of law that will support a Commission
19 effort to promote responsible business conduct,
20 and the first and most important change that I
21 would recommend is in paragraph two. I recommend

1 the second sentence be added to read as follows,
2 "for business organizations with blank or more
3 employees," that is a certain number or more
4 employees, "an officer position must have been
5 established as part of the senior management in
6 the organization with the primary responsibility
7 of overseeing compliance with such standards and
8 procedures, promoting sound business conduct, and
9 ensuring overall organizational responsibility."
10 The Commission should recommend that business
11 organizations of a certain size have a position
12 that is comparable in stature to other major
13 functional leadership positions such as the
14 general counsel or the chief financial officer or
15 the head of human resources to oversee the
16 organizations approach to compliance business
17 conduct and corporate responsibility. This
18 single recommendation more than any other the
19 Commission could articulate has the potential to
20 upgrade the level of attention to compliance and
21 sound business conduct among large corporations

1 in this country.

2 In my view, no single structural
3 element of an effective program to prevent or
4 detect violations of law in a large organization
5 is so important as the proper placement and the
6 organizational structure of the person charged
7 with leading this effort. Yet if a corporate
8 officer has as his or her primary duty to do
9 this, that person will have the ear of the CEO.
10 He or she will have access to the board of
11 directors. The person will have influence with
12 other leaders in the organization, and the
13 availability of sufficient resources to do the
14 job.

15 To the extent that our effort at HCA
16 in the last five years to create a program like
17 that described in the sentencing guidelines has
18 been successful, a primary reason for this is
19 that my position was created as a part of senior
20 management. If the Sentencing Commission by
21 using its bully pulpit can influence large

1 business organizations in this country to elevate
2 the stature of these issues by creating officer
3 level ethics and compliance officers, it will
4 have had an enormous impact on ensuring ethical
5 and compliant conduct by our largest
6 organizations.

7 I would say as to this recommendation
8 that I know this poses probably interesting
9 precedential issues and that the sentencing
10 guidelines obviously don't make any demarcation
11 between larger and smaller organizations and were
12 this idea to have appeal to you it would be
13 difficult to know where to set the threshold. I
14 know that there will be many who complain that
15 demands or burdens of this financially are too
16 substantial. I would simply say that you can
17 certainly set a threshold at a level where no
18 credible person could complain that they could
19 not afford it. For example, in the little
20 research I did in the Fortune 500, it appears
21 that the mean level of employees -- or mean or

1 medium. I'm not sure which, but sort of the
2 mid-level of employees of that group is 25,000.
3 So I think certainly if you set this at 25,000 or
4 higher as a requirement, I think that no person
5 could credibly object to it and perhaps it should
6 be somewhat lower.

7 I have two other suggestions relating
8 to the guidelines. One is that we have had great
9 success at HCA with a board ethics and compliance
10 committee, which would have also had (inaudible)
11 since the inception of the separation dating back
12 to '97. We found even before the Sarbanes-Oxley
13 Act that our audit committee was awfully busy,
14 and we've had an ethics and compliance committee
15 that has been shared by one of the retired CEOs
16 of a major accounting firm and has met five times
17 during the year, each time for two hours, having
18 a very busy agenda. And it's inconceivable to me
19 that the audit committee or any other group could
20 have exercised proper oversight, so I think one
21 thing you might wish to consider as well is that

1 if this idea of at some level requiring that a
2 part of an effective program is having an officer
3 that will act as a compliance officer, a
4 compliment to that I think would be having a
5 board committee on ethics and compliance, which
6 would also -- I assure you if you assign that to
7 a group of directors, it will get the requisite
8 attention.

9 The last suggestion I make with regard
10 to the -- I'm not (inaudible). There's one that
11 relates to the comments Mr. Priest made, which is
12 that it does puzzle me that they speak only for
13 the most part to criminal conduct. I recognize
14 that they are guidelines for sentencing those who
15 commit crimes. But in terms of judging what is
16 an effective program to prevent and detect
17 violations of law, I would think that you or the
18 Commission could define that more broadly. At a
19 minimum, I would think it should cover all laws.
20 We at HCA don't make a distinction between the
21 criminal law and any other law. We believe that

1 it's important to observe all of them, and I
2 think good programs have to do that.

3 If one wanted to be very aggressive in
4 approaching this, there's an argument even that
5 improper conduct could somehow be wove into this,
6 but I do think, and I think Mr. Priest raised the
7 point earlier, that considering the language that
8 this not focus on just criminal conduct but more
9 broadly would be prudent.

10 I say, in summary, that really my
11 comments today are essentially, one, a plea that
12 you consider whether you can counsel the
13 Sentencing Commission to be more engaged in the
14 market of ideas. I know that there have been
15 some comments made earlier today. People said
16 that some of this is a marketing problem. I
17 don't know if you call it that. But I do think
18 that if the Commission believes that the only way
19 it communicates is by changing the guidelines and
20 then relies upon people to find them and read
21 them, that is not nearly as effective as if the

1 members of the Commission are willing to be very
2 visible in the realm of public opinion and trying
3 to influence the opinion of leaders of the
4 companies. And then the second point I would
5 make is that -- is that as to this product that
6 they would be selling, I think the sentencing
7 guideline definition of an effective program is
8 fundamentally a good definition, but the
9 improvements I think you could make in that at
10 least as to large organizations pertain in this
11 in this placement of the ethics and compliance
12 officer, pertain perhaps to a board committee,
13 and pertain also to this issue of the scope.

14 The concluding thought I would leave
15 you with, and I'm just -- I'd just like to read
16 you the last few lines I wrote, is that in my
17 view it's regrettable that the business press and
18 Congress have seemed to focus solely on the issue
19 of correct financial reporting in the last year.
20 I think the highly visible failures of corporate
21 responsibility in the last year offer a wonderful

1 opportunity for a national conversation on the
2 need for all large corporations to have in place
3 formal structured ethics and compliance programs.
4 While Congress has not mandated these, the
5 Sentencing Commission has a great opportunity to
6 send the message to the business community. That
7 is what is expected. I would encourage the
8 Commission to use its bully pulpit and some
9 limited changes to its guidelines like those
10 suggested as a way for doing this. Thanks for
11 listening.

12 MR. JONES: We appreciate the
13 comments. The focus and succedments of all the
14 speakers' statements, we do have about 15 minutes
15 for questions from the group. And if you could
16 get it over to Win Swenson for the first
17 question.

18 MR. SWENSON: If this isn't too
19 greedy, I'd like to ask a question to Bill before
20 he has to go and one to Al and one to Bill
21 very quickly. Bill, you're talking about trying

1 to change the environment, I think, in which the
2 sentencing guidelines operates as opposed to
3 amending the sentencing guidelines themselves.

4 MR. LYTTON: Yeah, I think the
5 guidelines are very effective, as I said. I
6 think they're very good. I think CAREMARK has
7 also helped sort of establish that as a minimum
8 that we need to do, so I'm not objecting to the
9 guidelines. I want --

10 MR. SWENSON: Your premise really is
11 that there are live kind of barriers to effective
12 compliance programs through a legal environment
13 and policy environment. I guess my question is,
14 do you think that the Commission has the
15 authority to sort of speak out and try and
16 address those issues in some fashion under
17 28USC995 civil sections, which talk about
18 providing outreach to other government agencies
19 making recommendations to Congress and the like?

20 MR. LYTTON: Yeah, I think for two
21 reasons, maybe three. I think the statute you

1 just cited gives that to you. I think, number
2 two, almost by default there's really no one else
3 who can -- who has this role right now in an
4 objective way. Number three, I think the first
5 amendment protects you in the ability to make
6 statements like that. So I'm with Alan on this.
7 I think you've got a bully pulpit. I think
8 you've been invited to use it, and I think it's
9 helpful to do it because as good as the
10 guidelines are where we have these practical
11 issues that limit our ability to use them to the
12 maximum and that really have in some ways a
13 disincentive, we need to recognize that and try
14 and fix it.

15 MR. SWENSON: And, Alan, one of the --
16 one of the push backs I think the Commission
17 might get in adopting your proposal of edited
18 compliance adversaries is that today many
19 companies say, well, our general counsel is our
20 chief compliance officer or our COO and that
21 person is a high-level person who does have

1 access to senior management and to the board.
2 Why do we need to have, in essence -- I guess
3 you'd say sort a full-time person primarily
4 focused separate independent chief compliance
5 officer.

6 MR. YUSPEH: My answer -- there are
7 two answers, I would think. One, I think, I
8 think it is inherently problematic for the
9 general counsel to try to play this role. I
10 think in our organization, I have an excellent
11 relationship with the general counsel, but his
12 job is different than my job. He really is
13 primarily the legal representative of the company
14 and, therefore, has certain duties under the code
15 of professional responsibility and the like. My
16 job is to promote ethical and compliant conduct
17 in terms of the broader sense of the word amongst
18 175,000 people around the country, in England,
19 and in Switzerland, you know, 24 hours a day, 365
20 days a year. It's a different job. You tend to
21 look at the world in different kinds of ways, and

1 I think it's an irreconcilable conflict.

2 As to the question of why can't you
3 just dual hat somebody else in the organizational
4 structure, the reality is, I think, that there's
5 a lot of work to do to do these jobs well in
6 large organizations. In our organization we have
7 22 people in the ethics and compliance
8 department, but we have hundreds of others in
9 internal audit. We probably have our 22 lawyers
10 for the hospitals that spend much more than half
11 their time doing compliance related work. We
12 have ethics and compliance officers in every
13 hospital. We have a work plan that has 35 tasks
14 annually, each of which is rather substantial.

15 I was reading, and I want to -- I
16 think this as sort of useful to introduce into
17 the record. At the conference of the Ethics
18 Officer Association, Mr. Bernard who was the
19 chairman and chief executive officer made some
20 superb remarks, which Dr. Petry might want to
21 share with the other members of the advisory

1 group. But one thing of interest to me is in his
2 remarks he had a bulleted list of 19 different
3 things that in his view ethics and compliance --
4 his ethics and compliance officer, Ray Leon,
5 ought to be doing, things like being advisor to
6 your company's leaders, raise the tough issues
7 that maybe difficult for your CEO or leadership
8 team to hear, tell me when I'm off base or out of
9 line, and tell all the members of the my
10 leadership team a lot of very specific things.

11 So my answer is that this is clearly
12 enough information -- enough work that if you're
13 setting standards, if you're creating awareness,
14 if you're running a hot line, if you're doing
15 auditing and monitoring, if you're having various
16 kinds of committees and internal structures and
17 local ethics and compliance officers that you
18 really need somebody who's going to do that. If
19 the thought is, well, we'll just give it to the
20 HR person and they can do it as an extra job,
21 it's an (inaudible).

1 MR. LYTTON: Win, can I just add that
2 at Tyco we have recently created -- by the way,
3 the whole new senior management team just got
4 there, so we're starting from nothing in many
5 ways. We created a senior vice president for
6 corporate compliance that reports to the CEO
7 under the board, and under that person a
8 corporate -- a corporate governance, I'm sorry.
9 Under that person will be the ombudsman and a
10 whole bunch of things would fall within that.

11 Number two, with regard to making the
12 general counsel that when I was at another
13 company and we set up an ethics-based program, I
14 dearly wanted to have that under me because I
15 love it, but on the other hand I thought it would
16 send the wrong message. This isn't the lawyer's
17 job. This is a fundamental business function,
18 and I think separating it from law, as much as I
19 hated to lose that, was the right thing to do.
20 And I think having a separate organization,
21 whether it's like Alan's group or something else,

1 sends the right message to the organization.

2 MR. SWENSON: To the representatives
3 of the department, I think -- the way I'm reading
4 Bill's message in some way is that the government
5 needs to kind of stick with one voice, and I
6 think a lot of our witnesses have said and others
7 have said that the sentencing guidelines by
8 themselves may not be a sufficient incentive to
9 kind of achieve the policy act that we want,
10 which is to get companies to do compliance very
11 well. But the Holder memo, as we know, has an
12 additional incentive, which is you may not get
13 charged at all.

14 One of the things that in an article
15 that Bill and a co-author wrote made the
16 observation is that in press releases the
17 department often bullied issues on some of these
18 major corporate cases. They rarely talk about
19 the company's compliance program (inaudible) this
20 position this is the outcome. Don't talk about
21 the compliance program, whether the company had

1 one, how effective it was, whether it was
2 evaluated and how. One of the things that
3 particularly struck me about the Anderson case
4 was it seemed to be a case that in many ways
5 cried out for an answer to that question. If
6 you're going to say by criminally charging a very
7 large organization where people lose their jobs
8 and entire (inaudible) and so forth, is it, you
9 know, a commitment to a strong ethics and
10 compliance program really the test on whether the
11 acts of the small number should speak for this
12 large organization?

13 MR. HOCHBERG: I think we have
14 difficulty in describing what goes into a
15 charging decisions especially when the decision
16 is to prosecute. You know, that's beyond the
17 scope of our normal policies on press releases.
18 What we do often in global settlements is where
19 there is a corporate integrity agreement imposed
20 as part of the package and it -- that information
21 is included in the settlement press release and

1 whatever is put out by the administrative agency.

2 MR. COMEY: I should say, I'm not with
3 the Department of Justice. I'm the southerner of
4 New York. I agree. What we try to do in our
5 press releases where we don't prosecute a company
6 is describe and particularly highlight the
7 importance of that, that what made the difference
8 for us was the presence of a compliance program,
9 the change in management, all those sorts of
10 things. But I agree with Josh. If we charge
11 somebody, we can't lay out sort of why we charged
12 them.

13 MS. KUCA: My question is also for the
14 representatives from the government. You talked
15 specifically about extending the length of
16 probation. To what extent are you employing
17 violation of probation process on corporate
18 defendants that are under supervision now?

19 MR. COMEY: Well, we've done it. The
20 entity that I mentioned, which I don't want to
21 name. It's currently under probation. That is

1 something that we are going to employ. We've
2 raised it kind of as a threat, if you will, at
3 this point to say you've got to get your act
4 together or we're going to seek the violation,
5 we're going to file a violation and notice with
6 the court. So it is a -- it is a tool that we
7 can use and we have used.

8 MS. KUCA: A lot, a little, in
9 between?

10 MR. COMEY: There aren't that many
11 examples in my experience of corporations that
12 are on probation. I mean, we've had to two big
13 ones where we've had issues. I mentioned Con Ed
14 and this other one. We would use it a lot --
15 and, in fact, we wouldn't necessarily use it. I
16 think the monitor would use it more as a hammer
17 with the agency's monitoring and say, look, don't
18 make me go back to the government or to the court
19 to whom I'm going to report and say you're not
20 getting your act together. So I think it is -- I
21 think that is what's hanging over the

1 corporation's head is the ability to seek a
2 violation of probation.

3 MS. YANG: Let me just add in, we've
4 used it a few times in our office only when it's
5 been necessary and for smaller corporation. But
6 when I actually sat as a judge, it was something
7 that I used quite often because it gave me the
8 ability to allow the corporation to clean
9 themselves up and for me to monitor. It took a
10 tremendous amount of time and effort, but
11 everybody, you know, figured you were trying to
12 get to the same goal, especially perhaps in
13 environmental cases or things of that element,
14 where there's a lot of steps that need to be done
15 and laid out over time. It gave us the ability
16 to do that and ultimately at some point at the
17 end gave some sort of benefit to the corporation.

18 MR. JONES: Eric Holder.

19 MR. HOLDER: Yeah. There's been a lot
20 of discussion here and I guess over the last few
21 months about the Holder memo (inaudible). That

1 was an effort directed by career folks --

2 UNIDENTIFIED SPEAKER: Mr. Holder,
3 could you speak up a little bit?

4 MR. HOLDER: Directed by career folks
5 in the Justice Department. I just assumed it was
6 a good document. One of the people was actually
7 here I saw earlier Shira Shinland (phonetic)
8 somewhere. And it can just as easily be called
9 the Shira memo as the Eric memo or the Holder
10 memo.

11 MR. COMEY: We put it in the witness
12 protection program.

13 MR. HOLDER: One of the things that I
14 think Jim -- you talk about, though, the policy
15 that is embodied in the memo with regard to
16 waiver, and I think that policy in the memo was
17 hopefully set out. I think you have talked about
18 it in a way in which it was intended to be used.
19 My question is, is the theory different from the
20 reality? What I hear from practitioners -- I'm
21 not experienced myself. But from practitioners

1 is that in order to get in the door there is a
2 requirement that waiver occur as opposed to more
3 nuanced things that you were discussing, and I
4 think they were contained in the memo.

5 The second question I have is with
6 regard to smaller corporations. Maybe this is
7 for you, Josh. Do you all think that there is
8 more corruption, more wrongdoing in small
9 corporations, smaller companies, or is it -- I
10 mean, as a result of the guidelines and
11 everything and the inability of small
12 corporations to have compliance programs,
13 whatever. Or is it a function of the fact that
14 the enforcement policies of the department of the
15 FBI go after when someone is going to be
16 turned -- (inaudible). It's easier to detect
17 kinds of things that small corporations do as
18 opposed to things that (inaudible) to the Enrons
19 of the world are doing. Those are the two
20 questions.

21 MR. COMEY: As to the waiver, we hear

1 the same thing, the U.S. attorneys do, and the
2 attorneys on the advisory committee has been
3 asked and go back and look at that memo and see
4 if there's anything that needs to be changed.
5 And one of the things we've heard in that process
6 is, look, whatever you guys say, the troops in
7 the field -- many are saying waive, waive, waive.

8 Mary Beth Buchanan in an effort to try
9 and get her arms around that did a survey, and
10 the survey didn't bear that out as a matter of
11 policy. Now Mary Beth acknowledged that it
12 wouldn't necessarily show us if the low-level
13 troops are doing that, and I think maybe -- I
14 don't think the memo ought to be changed, but
15 perhaps we need to educate better in the field.
16 We need to train better. We need to teach people
17 the difference between work-product and privilege
18 and that there's a dance you can go through and
19 that it's not in the interest of -- that reducing
20 collateral damage to shareholders from the civil
21 litigation that was mentioned to just say you've

1 got to waive right at the outset because you may
2 be inflicting more harm on the company.

3 So as more U.S. attorneys get involved
4 in doing this kind of work, it may move the
5 department to push down to a lower level of
6 training on how to handle this sort of stuff.

7 MR. LYTTON: Could I just comment on
8 that, Eric? Because as I was listening to Jim
9 speak I was reminded of the biblical story of
10 your hands are the hands of Esau but the voice is
11 the voice of Jacob. And as I listened to what
12 Jim was saying, I agreed with it. But in
13 practice, both in my own experience and from what
14 I've heard assisting U.S. attorneys out in the
15 field, the ante to the game is waiver. And then
16 I would also say the same thing in the agencies.

17 So that's where I say, I think it's a
18 wonderful policy. I can work with what Jim
19 suggested very well if I have those protections,
20 but I don't think it's happening out there. It
21 might be useful if the Department of Justice

1 frankly had some sort of an ombudsman where
2 people could call and not risk the ire of an AUSA
3 when you go above them. I mean, there are all
4 sorts of -- I was a AUSA for eight-and-a-half
5 years, so I know how this works. I think that
6 would help and also some sort of coordination
7 among the agencies.

8 MR. COMEY: And we do urge people to
9 push it up the chain. The U.S. attorneys are
10 very sensitive to this. We've talked about it a
11 lot. I don't think defense lawyers are shy doing
12 it anyway, but people -- if they have a problem
13 and they're seeking an unreasonable waiver, they
14 ought to kick it up and have people who look at
15 maybe a broader field think about it.

16 You want to address small
17 corporations?

18 MR. HOCHBERG: Yeah, on the issue of
19 small corporations, part of what the guidelines
20 has difficulty reaching is the fact that in many
21 relatively small corporations the corporation is

1 the vehicle with the criminality of the key
2 controlling individual. So we end up with
3 situations in the health care arena and the
4 investment fraud arena where we look at
5 relatively small companies where the reason to
6 charge the company is to seize assets or to put
7 them out of business. It's a different criteria
8 than we're facing in the true legitimate
9 corporations where there's some independent
10 existence that is different than the corrupt
11 ownership.

12 MR. JONES: Richard Gruner.

13 MR. GRUNER: Yeah, I had a question
14 that follows up on some of what was said this
15 morning. My question is asked in light of the
16 round of corporate scandals that have surfaced in
17 the last year-and-a-half most of which involved
18 misconduct at the top or at near the top of the
19 management chain. I wondered what sorts of
20 features of compliance programs really are
21 essential to capture that kind of misconduct in

1 an earlier stage if the notion of an independent
2 compliance officer was mentioned and that sort of
3 thing would be helpful? But I wonder if there
4 isn't also a need for regular board attention or
5 requirement of periodic board review of the
6 compliance programs efforts as well as some low
7 string and maybe minimum requirements of an
8 internal audit staff that provides an independent
9 source of information (inaudible) scrutiny that
10 would pick up these kinds of incidents rather
11 than somehow allowing -- relying on the
12 management chain to surface these?

13 Do you have thoughts on what might be
14 the essential features of the compliance program
15 focusing on the top doing the misconduct in a
16 large organization?

17 MR. LYTTON: Yeah, I can address that
18 first. I think, number one -- the number one way
19 to get compliance at the top in a corporation is
20 to hire good people. And if you hire honest
21 people and aggressive people both on the board

1 and senior management, you've taken the first
2 step. Number two, once you get those people in,
3 you provide a regular process that facilitates
4 their doing the type of oversight you would want.

5 Internal auditors should speak
6 regularly with the audit committee of the board
7 without management being there. And you need to
8 have an internal auditor who has courage if that
9 is necessary to do that. I think you have to
10 have very experienced people on the board who can
11 listen to a CFO, come in with a very complicated
12 financial scheme and understand that it doesn't
13 make any sense or know what the right questions
14 to ask would be. And that's why I think the
15 requirements of that financial background for the
16 chairman of the audit committee is very good.

17 I think all of that -- you have to
18 have those systems in place. I don't recommend
19 that the Sentencing Commission do that because I
20 think that there are other ways that that's
21 happening. Each corporation may approach it a

1 little differently. On the other hand, the
2 tougher you make it and the more liability you
3 put on the chairman of the audit committee, it's
4 going to get tougher to recruit these folks to
5 come and take the job. And I would just be --
6 right now we're still finding people. You know,
7 I went to Tyco, but, you know, what are you going
8 to do? I thought it was a toy company, as I
9 said. That's a lack of due diligence.

10 I do think there are processes that
11 you can establish that really allow it to
12 flourish. In the end, if you've got really
13 corrupt people, you can have the best processes
14 and work chart in the world. It won't work. And
15 that's where, I think, criminal prosecution comes
16 in, and the threat of going to jail and doing the
17 perp walk is one that scares the be jesus
18 (phonetic) out of people. So I think you need
19 the accommodation. The internal and the external
20 compliment each other.

21 MS. YANG: Let me just add something

1 really quickly. The suggestions that you made
2 were great in the larger corporation. Those are
3 the things when we say the guidelines should sort
4 of have that sort of open-ended ability for the
5 corporation to sort of come up with different
6 ways, but, you know, he's correct. It would be
7 great if there were all really honest people up
8 at the top. I can't know that. I don't know
9 that. And what I would like to see is some sort
10 of mechanism so that if there are those
11 individuals who perhaps are not as honest as we
12 would want them to be that there is some way for
13 that reporting to come forward so that you have
14 this clear mind of reporting. The compliance
15 person can talk directly to the board, can speak
16 to other different types of officers, and have
17 those lines available so that if you do have
18 somebody who is completely corrupt somewhere near
19 the top, it's much more difficult for them to
20 hide their activities. And that would be the
21 sense of it.

1 MR. YUSPEH: I had participated in a
2 panel discussion yesterday on this subject in
3 Nashville, and one of the CEOs who was on the
4 panel said that he had been in a meeting of CEOs
5 to talk about it. And their synopsis of the
6 problem of these high visibility cases was that
7 it resulted from excessive self-interest and a
8 total lack of core values. That was sort of the
9 shorthand. And I would think that a lot of the
10 discussion today has been this idea of needing to
11 instill some kind of core values, and I think
12 they can come from various places. Ideally you'd
13 like it to come from the chief executive officer
14 because he or she ought to really be the holder
15 and the articulator of that.

16 But I think that your safety net
17 becomes -- if you have a handful of other places
18 that that person has sort of gone sour that they
19 might come from. They might come from the board.
20 So if you have a strong independent board and if
21 you have a strong audit committee and perhaps a

1 strong ethics and compliance committee, that will
2 help because perhaps that's a safety net. I
3 think having an independent ethics and compliance
4 officer helps because that person, though not
5 nearly as well-positioned as the CEO to
6 articulate these things, that is that person's
7 sole job. I think it becomes a safety net,
8 especially if that person goes to the board. And
9 I think having a strong head of internal auditing
10 feels that he or she has a direct entry to the
11 board helps as well. So I think seeing what
12 we've learned from some of these high visibility
13 cases, have as many of those safety nets as you
14 can build in if the CEO goes wrong. That would
15 probably be a good idea.

16 MR. JONES: Last question of the
17 morning. Greg Wallance.

18 MR. WALLANCE: I think James Comey's
19 careful distinctions between work-product and
20 attorney-client privilege waivers are extremely
21 helpful. I don't think they're going to put an

1 end to the controversy. Therefore, I'd like to
2 give the Department of Justice representatives an
3 opportunity to respond to Bill Lytton's
4 invitation to become advocates for the safe
5 harbor from waiver when a company makes
6 disclosure of possible criminal wrongdoing to the
7 Department of Justice.

8 MR. COMEY: I think it's a terrific
9 point. In fact, I made a note of it to take it
10 home with me.

11 MR. LYTTON: Take it to the office,
12 Jim.

13 MR. HOCHBERG: There are some very
14 tough issues there. We're one department. We
15 have key problem litigation where our civil
16 division is involved. We have the criminal side
17 of their various policies that the SEC has. I
18 don't know the right answer, but, I mean, it
19 requires all (inaudible).

20 MR. JONES: On that note, I would like
21 to end our second summary panel. We have

1 received much good information. I would like to
2 mention again that for those of you who can't
3 participate, the afternoon breakout sessions will
4 go into more depth and more less time driven
5 discussion about some of these issues. I'd like
6 to also take the opportunity at the end of the
7 plenary sessions to thank the staff of the
8 Sentencing Commission, in particular Paula Desio,
9 Deputy General Counsel, for getting this event
10 together, which was much work.

11 And, again, thank you all for being
12 here, and we will reconvene at 1:30.

13 (Plenary Session II recessed 12:05 p.m.)

14

15

16

17

18

19

20

21

1
2
3
4
5
6
7
8
9
10
11
12
13
14
15
16
17
18
19
20
21

CERTIFICATE OF RECORDER/TRANSCRIBER

We hereby certify that the preceding
pages were recorded electronically and later
transcribed to the best of our ability.

Kathy Wilson
Recorder

Christy McGee
Transcriber

