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

PLENARY SESSION II

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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
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PAUL FIORELLI
RICHARD GRUNER
ERIC H. HOLDER, JR.
MICHAEL HOROWITZ
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PANEL:

JAMES COMEY
JOSH HOCHBERG
BILL LYTTON
DEBORAH YANG
ALAN YUSPEH
MR. JONES: Folks, get resettled in.

I do want to make two comments. One is that the discussion this morning will continue in the various breakout groups in the afternoon and so I know that there were members of the advisory group that may have had questions. A lot of that will be able to be addressed this afternoon at the breakout sessions.

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

On our panel this afternoon -- for this second plenary session, we have starting
right next to me James Comey, the United States Attorney from the Southern District of New York. Next to him is Josh Hochberg, the Chief of the Fraud Section at the Criminal Division at the Department of Justice here in Washington D.C. In the middle is Bill Lytton, Executive Senior Vice President and General Counsel of Tyco International in New York. Next to Mr. Lytton is Deborah Yang, former judge, Los Angeles Superior Court, now the United States Attorney for the Central District of California in Los Angeles. At the end, Alan Yuspeh, the Senior Vice President for Ethics, Compliance and Corporate Responsibility at HCA in Nashville.

Now as a former DOJ type and talking with Josh, who is going to lead off the panel, we're going to have the Department of Justice representatives sort of go in series as a group starting with Josh who will kind of bring in the U.S. Attorney community as appropriate. And, Josh, the floor is yours.
MR. HOCHBERG: Thank you, Todd. On behalf of the Department of Justice, I thank you very much for this invitation to appear here.

We've assembled a group consisting of the United States Attorney from the Southern District of New York, James Comey, and Deborah Yang, the United States Attorney for the Central District of California. I am the Chief of the Fraud Section a mile away in the Criminal Division. I think between us we represent a significant fraction of the criminal investigations and prosecutions of organizations throughout the country, both in terms of number, type, and certainly many of the large investigations.

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

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

As recent events has demonstrated, more work needs to be done, including greater efforts in enforcement and in incorporating best compliance practices within a greater number of organizations, both large scale public,
for-profit organizations, and non-for-profit and governmental units. Overall we believe that the sentencing guidelines as currently constituted are fundamentally sound, and our experience does not suggest the wholesale need for change. However, we believe some limited important changes in the organizational sentencing regime are called for. Generally we believe the guidelines strike the proper balance between specificity in seeking good organizational behavior and that the guidelines do not over-dictate what needs to be done to ensure good organizational behavior.

As you know, the guidelines are used to sentence very small organizations with dozens or fewer individuals, as well as global multi-billion dollar corporations with tens of thousands of employees and municipal entities of varying sizes. No single set of rules issued by a centralized regulatory body can correctly specify exactly what good management practices
and actions should be for all shapes and sizes of organizations. The guidelines properly set forth principles, general principles, and lay out a model framework of the good corporate citizen, leaving it to the courts to determine the level of compliance and culpability within the framework and to determine what a just sentence will be.

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

As to the maximum organizational fine, the reality of the current statutory sentencing provision is that the deterrent value of a possible maximum fine is diminished in relation
to the size of the company. The maximum $500,000 alternative fine for an organization set forth in Title 18 may have significant deterrent value for a small company but is clearly a pinprick for a multi-national corporation with a net worth exceeding $500 million. While section 3571 authorizes a larger fine of twice the actual loss if it exceeds $500,000, this section is noticeably ineffective in the face of noneconomic crimes or crimes where loss is not readily susceptible to calculation. For example, obstruction of justice, destruction of records, false statements, and certain regulatory crimes.

The sentence of Arthur Anderson, LLP, to the maximum fine of $500,000 recently vividly illustrates the need for a higher limit for corporate funds. We hope the Advisory Group and ultimately the Commission itself will consider joining the Department of Justice in seeking higher statutory penalties in this area.

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

In addition to the changes we are recommending, we have submitted written responses to the six questions and an overall response. In our submission we set forth our view that the
Commission should establish overall policy without dictating the specifics of corporate governance. In some cases we believe that the guidelines could be improved by incorporating examples of management practices, including compliance programs that have proven to be effective in various industries. We specifically recommend that an effective compliance program should have mechanisms whereby a compliance officer can report directly to the board of directors and high-level management when necessary. We do not think it necessary, however, for the Commission to dictate the exact mechanism for such access.

In our written position, we also set forth positions that encourage and reward good corporate citizens and increase penalties for those who do not report criminal activity or choose to cooperate with investigations. For example, we specifically recommend an enhanced punishment for those who do not self-report.
I thank you for this opportunity to testify, and I invite Deborah Yang now to address issues relating to the effectiveness of compliance programs and ways to encourage disclosure of wrongdoing.

MS. YANG: Good morning. Thank you to the advisory committee for allowing me to come up and address you today. There's two things that I want to focus on, the first being that we believe the organizational guidelines can be improved, one, through an increase in the guidance provided on what is necessary for an organization to actually implement an effective organizational -- an effective compliance program, and, second, an increase in the incentives for self-reporting of any criminal conduct that might be discovered within an organization. Underlying both of these suggestions is a simple fact made clear by all of our experiences in investigating and prosecuting these organizational crimes. That the organizations themselves, if they have the will
to do so, are actually the ones who are in the best position to deter and detect criminal conduct by their employees at a time with the potential harm from that conduct can still be minimized.

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

What we virtually always find in these investigations is that there are those within the organization who know or suspected far earlier that wrongdoing was occurring. In some
situations the suspicions go unreported because the employees themselves fear some sort of retribution and fear for their jobs and remain silent. In other circumstances, suspicions are reported, but the organization itself lacks any mechanism to ensure that the reports are acted on, either internally or by passing reports to outside authorities such as government regulators or law enforcement. In both instances, failures within the organization, whether in its policies, its practice, or its culture, allow wrongdoing to continue long after it should have been protected and stopped. The organizational guidelines recognize this fact and seek to address it by providing incentives for organizations to create effective compliance programs or to self-report criminal conduct.

Overall, we believe that the guideline's general approach to these issues are fundamentally sound. We do not propose any wholesale changes. In particular, we think it
important that the guidelines not to try
prescribe with specificity the details of
appropriate compliance programs. The Sentencing
Commission is not in a position to accurately
determine what types of programs will best serve
to limit criminal activity across the range of
types of organizations, companies, and
corporations covered by the guidelines. Rather,
we believe that each compliance program ideally
will be creatively tailored to the unique
characteristics of each organization's individual
structure and business in the context of a broad
guideline framework. It is more likely that
organizations will be encouraged to do more
rather than less and to construct a successful
compliance program with guidelines that more
generally describe elements that could be
included as part of an effective program.

Having said that, we would urge the
guidelines to provide more guidance on certain
points that we believe are crucial to make any
compliance program effective. What do I mean by that? First, we believe the guidelines must more strongly encourage organizations to make compliance an integral part of the organizational culture. We have all experienced corporations in which the compliance program consists of nothing more than a thick manual that sits around the back of somebody's desk. It's circulated but never really gets opened and the employees are never told what it's for, what it should be used for, and what it really means, so there's no support to that compliance manual. The guidelines must make clear that this is not an effective compliance program. The guidelines should specifically state at a minimum that an effective compliance program requires that the organization have disseminated the publications that explain in a practical manner what is required and follow it up with training programs and other forms of communication to ensure that the need to comply with those requirements is
In addition, the guidelines should make clear that organizations must ensure that employees who follow through on their training and report wrongdoing will not be punished. This can be accomplished in a number of ways, for example, by, one, providing internal whistleblower protections or, two, creating an ombudsman or, three, any other avenue for confidential reporting. Again, different organizations may choose different means. We don't think that the guidelines should dictate the specifics.

Second, we believe that the guidelines must make clear that an effective compliance program requires a mechanism that will ensure stockholders, investors, the board of directors, the audit committee, and others that it will continue to work even when one or more of the organization's high-level personnel are involved in the wrongdoing. Public confidence
particularly affected by the fear that high ranking corporate executives can act with impunity to use a corporation's assets at their will for their own benefit without any regard to the well-being of the investors or the employees.

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

It may be necessary as well to provide alternative reporting lines so the compliance officer can report even if the primary person to whom he or she normally would report to is
suspected of improper conduct. You've got to
give them another vehicle to get that information
across. Again, we don't think the guidelines can
specify exactly how the reporting channels should
be set up for all organizations, but we do
believe that the guidelines should specify that a
corporate compliance program needs to provide
reliable pathways for the reporting of corporate
wrongdoing which bypass the alleged wrongdoers.

Compliance programs, of course,
generate internal detection of organizational
wrongdoing. The next step is external
self-reporting to law enforcement and to
regulators. The guidelines already encourage
this. In addition, management and boards of
directors of organizations have an inherent
fiduciary duty to the stockholders and investors
to undertake such prophylactic activities.
Through the enactment of a new criminal offense
for retaliating against whistleblowers Section
18USC, Section 1514A, Congress included that in
the Sarbanes-Oxley Act of 2002 and additional protection for those who report suspected misconduct and potentially legalities. Notwithstanding those provisions, however, we believe that current incentives in the guidelines to self-report could be improved. Specifically we recommend an additional two-level enhancement when a company does not self-report in a timely fashion following discovery of criminal behavior. Self-reporting allows law enforcement and regulators to begin an investigation before evidence is stale. It minimizes the losses, conserves funds for restitution, and starts the corporation on the road to rehabilitation. It should be more strongly encouraged.

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

MR. COMEY: I'm her little brother.
Thank you very much for allowing me to address you and for your promise that nobody who used to work with me will be allowed to ask questions.

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

As in the case of individuals, the organizational guidelines work very hard to encourage cooperation and to reward it. And, as you well know and as Deborah said, this is for great reasons. First that cooperation reflects
that the corporation is looking to clean house
and to change its culture which may be a culture
of wrongdoing to a culture of corporate good
citizenship. It also enables the government to
gather the facts before they are stale, assist
the government in fully investigating the
wrongdoing, and figuring out who the wrongdoers
are and also assist us in minimizing victims
losses. And, as Deborah said, in husbanding
resources so that we can give folks money back
through restitution.

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

What constitutes full and thorough
cooperation will necessarily vary in every case, and for that reason we think that it would be unwise for the guidelines to try to define cooperation. At a minimum, though, it has to be recognized that if a corporation has learned precisely what happened, who is responsible, then they have to turn this over to the government if they wish to make a claim that they have cooperated and deserve a reduced culpability score.

Now how a corporation discloses, the facts will vary and that's where the rubber hits the road. The government does not require any particular method so long as all pertinent facts are disclosed, including the identification of all culpable individuals, all relevant documents, and all witnesses with relevant individuals -- with relevant information. Let me give you some examples. For example, if the corporation -- cooperation may be full and complete if a corporation discloses the full facts of criminal
activity in a detailed briefing and voluntary provides relevant documents and the results of witness interviews or a corporation may provide a general briefing, identify the relevant witnesses, and bring them in for interviews to provide the government with an opportunity to find the detailed facts from their mouths. Depending upon the nature and type of disclosure, some work-product protection may have to be waived because frequently, although not always, the corporation has gathered the pertinent facts through an investigation by counsel that included witness interviews which are recorded work-product protection under the law. Occasionally, a corporation nevertheless will be able to provide the government with a thorough briefing of all the relevant facts without waiving work-product protection. But it's fair to say that most often a corporation that has chosen to cooperate will necessarily have to waive work-product protection
to some extent in order to supply the government
with thorough information.

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

In either context, if the facts can be
fully disclosed without a waiver, the Department
of Justice in its policy does not require a
waiver as a full measure of cooperation, and the
Holder memo made this very clear. However, if
the full facts are only available through access
to protected items such as information contained
in detailed notes taken during the witness
interviews I mentioned, the corporation will have
to decide whether to waive work-product
protection in order to claim to have thoroughly
cooperated.

I should also note, though, that
waivers can in many instances be limited or
partial or limited by subject matter, and let me
offer you a couple of examples that we've
encountered to highlight the point I'm trying to
make here. Let's say a corporation comes into my
office and says that we have uncovered an
accounting fraud and we have understated expenses
by one billion dollars. We know exactly what
happen, how it happened, and who was responsible
but we know this from interviews from our lawyers
conducted and they're covered by our work-product
protection and we don't want to waive that, so
we're not prepared to tell you anything more.
There you have it. I think everybody in this room would agree that that disclosure does not constitute the full and thorough cooperation that the guidelines envision and should require in order for the corporation to be rewarded.

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

On the other hand, though, it may turn
out that several of the witnesses decline to be interviewed by the government even if they're flown in by the corporation, and they invoke their fifth amendment rights. As a result, if we cannot fully reconstruct the crime or gather sufficient information against those responsible, we're going to turn to the corporation and ask for the notes of their interviews.

Now some may say, well, why don't you guys just immunize the witnesses and not ask for the waiver of any kind of work-product protection. The answer is simple. We don't want immunize those who may have done the deed, who may be culpable and perhaps are even the most culpable, and we're going to look to the corporation to fill in the missing information. And then the corporation will have to decide whether to waive work-product protection. If it does not waive it and the investigation is stymied or we have to immunize high-level officials, I can tell you right now the
government is unlikely to view that as sufficient cooperation to merit either leniency in our charging decision or credit through the guidelines at sentencing.

And these examples, I hope, also highlight a very important distinction between work-product protection and the traditional attorney-client privilege. In all the stuff I read to get ready for this, most of it -- whaling on the former Deputy Attorney General, they tend to conflate the two and not recognize the tremendous significance in our investigative work between the two. There's a significant difference because we recognize, as everyone knows, that the attorney-client privilege is a different animal and is a traditionally protected zone to facilitate communication between client and lawyer. And indeed the department's policy specifically notes that the waiver of the core privilege, the attorney-client privilege -- and I'm careful not to use the word privilege when I
talk about work-product. It's a doctrine or a protection. That waiver of privilege will rarely be necessary when a cooperation is -- excuse me. When a corporation is cooperating with the government. And even when we deal with work-product material, I should be clear, the government is almost never seeking counsel's mental impressions of those witness interviews. We want the facts, and as I'm sure any experienced member of the defense bar can tell you, they know how to keep mental impressions and strategy out of their notes of witness interviews. We recognize that the notes of the interview reflect, to some extent, the questions asked by an attorney, and, therefore, they give away the direction or the strategy of the lawyer maybe to some extent. But the disclosure of the notes of interview is a minimal intrusion on the protection and may be necessary if the corporation wants credit, either through leniency or through reduced culpability score.
The guidelines also reward cooperation in a different way by permitting us to file a downward departure motion based on substantial assistance. This is equivalent to the more traditional 5K 1.1 motion that we file for individuals. We believe it would be unwise for the guidelines to try to prescribe under what circumstances the government should make such a motion in the organizational context, what comprises substantial assistance for a lot of the reasons I just laid it out. Each case will be different.

When an individual cooperates, he's required to tell the government everything he knows about the criminal activity, and the rules should be no different for a corporation seeking similar leniency. Whether that disclosure will involve materials covered by work-product or, in the rare case, attorney-client privilege will vary, and the same principles are in play as in the context of the culpability score.
So in conclusion, the relevant cooperation guidelines properly focus on whether a corporation has cooperated, and that should remain their only focus. We strongly urge that the guidelines should not be amended to provide that in order to cooperate a waiver of privilege is not required precisely because in some situations the only way for a corporation to cooperate will be to waive either the work-product protections or in the rarer cases the attorney-client privilege.

Now let me say just a brief word about probation. As Josh mentioned, we would like to see the period of probation, which is now a statutory maximum of five years, modified so that the sentencing court has the option to extend probation for as long as necessary for the corporation to make a cultural change and to implement an effective compliance program. And there are two examples from my district that highlight the limits posed by the current five
In 1995 my office prosecuted Con Edison, who were a lovable local utility company, after they were convicted of environmental and false statements crimes for their conduct in deliberately concealing the release of 200 pounds of asbestos in a steam manhole explosion in mid-town Manhattan. Con Edison, in our view, had a dismal corporate culture of failing to comply with the environmental laws and was placed on three years probation and a monitor was put in place to help them get their act together. While the monitorship was very successful, three years was far too brief for the new compliance program to be designed and implemented and to be effective given the entrenched corporate culture. Con Edison agreed to a court order that extended the compliance program and the monitorship for an additional period of two years and to allow us to retain an expert consultant to review their work during the
second year of that additional period. During those two years, the company delayed too long in reporting a PCB release in another serious spill, and, at our request, they agreed to extend their obligations for two additional years. And after seven years, Con Edison is now on its own and the government wishes it well.

Also in my district, another example was an entity that pled guilty in the recent past to environmental crimes and was placed on three years probation extendable to the maximum five years. This entity, like Con Edison, was also required to develop and implement a comprehensive and effective environmental compliance program under the oversight of the court appointed monitor. It has taken the entity almost 14 months to obtain a report from a consultant who develops compliance programs for companies, and they still have not adopted or implemented a comprehensive program. There was a tremendous backlog of deficiencies in this entity's business
compliance, and we just don't see it proceeding quickly and we see us bumping up against the three years. So it's hard to say how long it will take this organization or many others to fully implement a comprehensive and effective compliance program.

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

Now the last thing I want to mention very briefly is something that was raised for me by my securities unit chief, and that is prior history. We believe that the guidelines should increase the culpability score by two levels for a corporation which has within the last ten years engaged in similar conduct, whether by one criminal offense or two civil or regulatory
adjudications. As you know, the current guidelines provide for a two-level enhancement only if the conduct was committed within five years and a one-level enhancement if the conduct was committed within ten years. What we're suggesting is that the five year dividing line should be eliminated because (inaudible) corporations committing the same misconduct within ten years have clearly demonstrated a complete inability to be deterred to change bad corporate culture or to enforce an effective compliance program, and we think that ten years is a bit of a blink of an eye in the life of a corporation and its culture. It's very different from an individual situation. You might also wish to consider requiring a one-level adjustment for a corporation that has had one civil or regulatory adjudication of misconduct within the last ten years.

Thank you, again, for inviting us to testify here today and thank you for your hard
work, which makes a big difference. Thank you.

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

MR. LYTTON: Owe, I bet they will.

THE WITNESS: I'm Bill Lytton. I am the Executive Vice President and General Counsel of Tyco International, Limited. You may have heard of that company. I have been in that job now for seven weeks and three days, but who's counting. Prior to being in that job, however, I had a number of other experiences that may be relevant to this. I was a federal prosecutor in Chicago and in Philadelphia for about eight-and-a-half years ending up as first assistant U.S. Attorney in Philadelphia. I was
counsel to President Reagan and President Bush relating to the Iran contra investigation. I was a lawyer in private practice in Philadelphia with a law firm that had pioneered class actions against corporations. I have been in-house counsel at four different companies, General Electric Aerospace, Martin Marietta, Lockheed Martin, International Paper, and now at Tyco. That's probably five, I guess. I miscounted. That's why I'm not an accountant. I won't even go there. And then, finally, up until about two months ago, I was the chairman of the American Corporate Counsel Association, which represents about 6,000 corporations in the United States and abroad and there in house staff.

So I bring a variety of background, and I speak for none of these organizations that I just mentioned. But I thought I would reflect on what it's like inside and what the experience has been working with and after the guidelines were adopted.
First of all, I think the guidelines had been a wonderful addition to the general texture of corporate life because I think for those who needed an excuse to do the right thing, it has provided that. For those who needed an incentive, it has provided that. And I think most companies have now adopted that. I recall some years ago I was speaking at the University of Pennsylvania when I was a GE, and this was way before all the other corporations had sort of seen this. And I said to the assemblage of general counsel, I said the Aerospace industry's past is your future. They all thought I was nuts, but I wasn't. I think that the focus on the conduct of corporations and the people that run them is, indeed, the focus that we all now see today.

When I was at Martin Marietta, there was a chairman of that organization by the name of Norm Augustine. Some of you may know him. He is a wise man, and we used to fuss about a lot,
getting the paperwork right on government contracts. Not an insignificant thing and not an insignificant challenge, but every once in a while Norm would say to let's focus on the mission. What's the mission? Is the mission to get the paperwork right or is it for the airplane to fly? And we have to do both, but let's not forget the main mission.

And so I ask and raise the issue of what is the mission of the sentencing guidelines and the Sentencing Commission? Is it to foster an environment where, in fact, we all go out of business? We can focus on street crime or other things. Or is the mission to try and get headlines and be able to produce press releases about the number of fines and the number of convictions? The latter is a lot more fun in a lot of ways, and it's easier to calculate. But a focus on the former of providing and fostering that atmosphere where people who want to do the right thing are encouraged to do it, and people
who don't want to do the right thing are found
out and prevented from doing it is, I think, what
the better focus should be.

When I was a young prosecutor in
Chicago, I learned something about human nature.
I was invited to go speak to the Chicago Police
Department, and back in the mid-70s that was
almost a RICO organization in some respects. But
I went there, and I was to speak to them about
the benefits of obeying the fourth amendment and
the rules with regard to search and seizure. And
I gave them a very impassioned talk about that.
At the end of it, I said so why is it important
that we obey the fourth amendment thinking that
they would all say so the evidence isn't
suppressed, so the organization of government is
not harmed. Then they to a person said, so we
don't get sued. That's what motivated them. I
think there's a lesson there for all of us
because personal responsibility is far more
effective in trying to get people to change than
a concern about what will happen to the
corporation, unless you're talking about the
death penalty of the corporation. And that's
where I have to disagree with my friend Josh here
who said that he thought the civil penalty should
be increased and that $500,000 fine on Arthur
Anderson was not enough. In another context,
that fine might have been considered abusing the
corpse. The corporation was dead. The market
had killed it. That's where the real deterrent
was. So I don't think that a million dollar fine
or five billion dollar fine on Arthur Anderson
would have had any more affect. The corporation
had died.

Now let's talk about some of the
practical impediments based upon my experience,
not just in the companies I worked with but in
talking with a variety of colleagues who are in
that area in the past and probably in the
present. One of the things that we find
ourselves constantly up against is a very active
plaintiff's bar. I am perfectly happy to give
over and waive the attorney-client privilege to
the Department of Justice or anybody else and
work-product privilege in a voluntary disclosure
except if that is later going to be used to line
the pockets of a rabid plaintiff's bar that is
out there to line -- they're bounty hunters.
They're modern day bounty hunters, and that's the
reality.

I think in reading the materials
coming down here, I saw that Joe Murphy had a
proposal that would allow a (inaudible) for
privileged material turned over in a voluntary
disclosure that would not be deemed waived in any
other process. I think that's a wonderful,
wonderful idea. I don't think that you guys
would have any problem talking us into doing that
if we thought we had that protection because I
don't worry about talking to the government
because I'm dealing with sensible people whose
goals are not to line their own pockets. They
are interested in, I think, the same goals that I have and that my corporations and my colleagues have. So if you give me that protection, I won't have a problem giving that to you. Now I've signed documents that say this is a limited waiver, and I hope that's right. But I don't know whether it is. If this is on the record, I'm sure it is. But I am concerned about that. So I do worry about that.

The second thing is when I give it over -- when I'm dealing with these wonderful people from the Department of Justice, my former colleagues, I have this wonderful trust and good will. But I'll tell you an example. I had to go once to the Defense Logistics Agency when I was in the defense industry and I was talking to them about a debarment, and I said we did certain things. They said why did you do that, and I said, well, the government asked us to do that. They said what government was that, and I said the Department of Justice. And they said that's
not us. And the DOD and DLA and EPA and all may
take a different view than these good people
here. So we need to have sort of a consistency
in the Federal Government as we look at whether
or not waiver is going to be a defective waiver
or whether we can limit that waiver.

I would also -- I guess I want to talk
about just a couple of other things that some of
my colleagues said here. Deborah talked about
increasing incentives for self-reporting. I
think the correlating is decreasing the
incentives for not reporting. I think Eric's
memo was a wonderful memo. I've never criticized
it publicly. I think it's a wonderful memo, and
I think that it can be used as the basis for
non-prosecution of companies that notwithstanding
a tremendous effort and effective compliance
system like the DOJ and like every other agency
in town in our country has people who just don't
get it and who violate the law. We need to have
the carrot there. And I think we have it
effectively, but we don't have it in a policy way. If you -- if -- that's a wonderful incentive. If you say notwithstanding a terrific effort that you guys did, somebody did something wrong, we're going to give you the benefit of the doubt. That would help.

Number two, I think that another point that Deborah made was the timeliness of self-reporting. I agree with that, but how do we find that? Often times a matter will come into an ombudsman or a lawyer and it will be an allegation and you don't know what you've got. It sounds terribly serious. You want to investigate it. You've got to look at it, and you make a voluntary disclosure. That's fine. I had this happen with the DODIG years ago. And then when you get into it, you find out it wasn't a problem. There was no violation of the law. Something came in. We looked into it. Nothing happened. I have now made a voluntary disclosure, and I have chummed the water for the
sharks in the plaintiff's bar to come after me, and I will now be in litigation forever about, well, there must have been something wrong there, you made a disclosure. So give me some protection and give me some leeway on timeliness so that we can do it when we reach a certain threshold. I don't know what that is, but work with us on that. Give us some leeway, and allow us to go in and do that.

I think that -- again, in the bottom line it comes down to personal responsibility. I'm now involved in a corporation where we are trying to rebuild a corporation that consists of 260,000 employees in a hundred countries around the world that has been devastated by the actions -- alleged actions, I should say, of two or three or four people at the top, and you know that story. I won't go into it. We're trying to build that culture. I have no problem in convincing these people that this is the right thing to do. They want to do it. They want to
regain that self-respect. I need your help, and
the Sentencing Commission guidelines can help as
we expand that to make sure as we go forward
there's enough of an incentive there to help us
and that the disincentives are removed. If you
do that, we'll be back here in a couple years
praising your services, and we'll be all out of
business. Thank you very much.

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

MR. YUSPEH: Thank you very much and
thank you for inviting me to participate today.
I would just like to say a few words
preliminarily, which is that I regarded the
material that I had said to Paula Desio when she
voted to be a bit of a work in progress, so I've
taken the liberty to change some of the nuances
of the points that are made there. I'll share
the changes with you, but the basic points are
much the same. I probably should caveat my
remarks the same my friend Bill Lytton did by
saying that these are my personal views, and they
reflect my experiences as the coordinator of the
Defense Industry ethics initiative for a period
of 11 years and the last five years as the
corporate ethics and compliance officer for an
organization which is the largest health care
provider in the country.

And, finally, I feel like I almost
ought to almost apologize for this, but the
reality is that my experience, like that of many
people on the panel, is essentially a large
company kind of experience. I know that there's
an interest amongst your group in small
companies. I will say that what we've done at
HCA is that we have put all of our compliance
materials on the Internet since the start of our
efforts in this area five years ago, so we have
literally put thousands of pages of policies and
procedures and codes of conduct in virtually --
audit tools and virtually everything else
pertaining to our ethics and compliance efforts
on the Internet in reflection of the fact that we
recognize that a lot of those in our activity,
that is hospitals, are very small. They're often
10 or 15 or 20 bed hospitals in the country that
are freestanding and, again, have the resources
we do. So our position has been that it's an
indicia of the corporate social responsibility to
those things available and said to people that
they may use them as they wish, adapt them for
whatever purpose they may find.

There are just a few points that I
wanted to share with you today, and I had tried
to in my modified written comments say these with
some care and so I hope you'll indulge me if I do
sort of go through the portions of text that I
think are most relevant. My thoughts are these,
that large corporations in this country are, for
the most part, unlikely to take comprehensive
energetic management action to have excellent
ethics and compliance programs if the only
perceived incentive is to reduce their criminal
liability if they were sentenced. It is my
belief that a large organization that believes it
is to be well-managed does not expect to be
convicted of committing a crime. Thus, the
appeal to a chief executive officer that he or
she should implement, and I've chosen my words
carefully here, a diligent, comprehensive ethics
and compliance program primarily to be sentenced
more leniently if convicted of a crime is not
likely to resonate.

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

There's a huge difference, however, between a mechanical approach to matters such as this and a top management driven genuine effort to create an ethical culture and to make sound business conduct a matter of daily practice.

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

I believe that the Commission can be effective in moving large corporations even further in this area, but I believe that it will have to do so by trying to use its position and stature as a bully pulpit. I'm using this term as President Theodore Roosevelt used it to mean a
visible and credible platform from which to persuasively advocate an agenda. Yet the Sentencing Commission through its visibility is, in effect, saying to large American corporations that these are the management practices you need to adopt. There is greater likelihood that organizations will do that than if no governmental authority is making such recommendations. Particularly at a time when it appears that we are in the midst of a crisis of corporate responsibility and when investor competency seems to be lagging in light of this, the Commission could easily claim a proper leadership role to advise well-managed organizations as to how to approach these issues.

I think there are a few changes to the definition of an effective program to prevent the violations of law that will support a Commission effort to promote responsible business conduct, and the first and most important change that I would recommend is in paragraph two. I recommend
the second sentence be added to read as follows, "for business organizations with blank or more employees," that is a certain number or more employees, "an officer position must have been established as part of the senior management in the organization with the primary responsibility of overseeing compliance with such standards and procedures, promoting sound business conduct, and ensuring overall organizational responsibility."
The Commission should recommend that business organizations of a certain size have a position that is comparable in stature to other major functional leadership positions such as the general counsel or the chief financial officer or the head of human resources to oversee the organizations approach to compliance business conduct and corporate responsibility. This single recommendation more than any other the Commission could articulate has the potential to upgrade the level of attention to compliance and sound business conduct among large corporations.
In my view, no single structural element of an effective program to prevent or detect violations of law in a large organization is so important as the proper placement and the organizational structure of the person charged with leading this effort. Yet if a corporate officer has as his or her primary duty to do this, that person will have the ear of the CEO. He or she will have access to the board of directors. The person will have influence with other leaders in the organization, and the availability of sufficient resources to do the job.

To the extent that our effort at HCA in the last five years to create a program like that described in the sentencing guidelines has been successful, a primary reason for this is that my position was created as a part of senior management. If the Sentencing Commission by using its bully pulpit can influence large
business organizations in this country to elevate
the stature of these issues by creating officer
level ethics and compliance officers, it will
have had an enormous impact on ensuring ethical
and compliant conduct by our largest
organizations.

I would say as to this recommendation
that I know this poses probably interesting
precedential issues and that the sentencing
guidelines obviously don't make any demarcation
between larger and smaller organizations and were
this idea to have appeal to you it would be
difficult to know where to set the threshold. I
know that there will be many who complain that
demands or burdens of this financially are too
substantial. I would simply say that you can
certainly set a threshold at a level where no
credible person could complain that they could
not afford it. For example, in the little
research I did in the Fortune 500, it appears
that the mean level of employees -- or mean or
medium. I'm not sure which, but sort of the mid-level of employees of that group is 25,000. So I think certainly if you set this at 25,000 or higher as a requirement, I think that no person could credibly object to it and perhaps it should be somewhat lower.

I have two other suggestions relating to the guidelines. One is that we have had great success at HCA with a board ethics and compliance committee, which would have also had (inaudible) since the inception of the separation dating back to '97. We found even before the Sarbanes-Oxley Act that our audit committee was awfully busy, and we've had an ethics and compliance committee that has been shared by one of the retired CEOs of a major accounting firm and has met five times during the year, each time for two hours, having a very busy agenda. And it's inconceivable to me that the audit committee or any other group could have exercised proper oversight, so I think one thing you might wish to consider as well is that
if this idea of at some level requiring that a part of an effective program is having an officer that will act as a compliance officer, a compliment to that I think would be having a board committee on ethics and compliance, which would also -- I assure you if you assign that to a group of directors, it will get the requisite attention.

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

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

I say, in summary, that really my comments today are essentially, one, a plea that you consider whether you can counsel the Sentencing Commission to be more engaged in the market of ideas. I know that there have been some comments made earlier today. People said that some of this is a marketing problem. I don't know if you call it that. But I do think that if the Commission believes that the only way it communicates is by changing the guidelines and then relies upon people to find them and read them, that is not nearly as effective as if the
members of the Commission are willing to be very visible in the realm of public opinion and trying to influence the opinion of leaders of the companies. And then the second point I would make is that -- is that as to this product that they would be selling, I think the sentencing guideline definition of an effective program is fundamentally a good definition, but the improvements I think you could make in that at least as to large organizations pertain in this in this placement of the ethics and compliance officer, pertain perhaps to a board committee, and pertain also to this issue of the scope.

The concluding thought I would leave you with, and I'm just -- I'd just like to read you the last few lines I wrote, is that in my view it's regrettable that the business press and Congress have seemed to focus solely on the issue of correct financial reporting in the last year. I think the highly visible failures of corporate responsibility in the last year offer a wonderful
opportunity for a national conversation on the need for all large corporations to have in place formal structured ethics and compliance programs. While Congress has not mandated these, the Sentencing Commission has a great opportunity to send the message to the business community. That is what is expected. I would encourage the Commission to use its bully pulpit and some limited changes to its guidelines like those suggested as a way for doing this. Thanks for listening.

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

MR. SWENSON: If this isn't too greedy, I'd like to ask a question to Bill before he has to go and one to Al and one to Bill very quickly. Bill, you're talking about trying
to change the environment, I think, in which the
sentencing guidelines operates as opposed to
amending the sentencing guidelines themselves.

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

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

MR. LYTTON: Yeah, I think for two
reasons, maybe three. I think the statute you
just cited gives that to you. I think, number
two, almost by default there's really no one else
who can -- who has this role right now in an
objective way. Number three, I think the first
amendment protects you in the ability to make
statements like that. So I'm with Alan on this.
I think you've got a bully pulpit. I think
you've been invited to use it, and I think it's
helpful to do it because as good as the
guidelines are where we have these practical
issues that limit our ability to use them to the
maximum and that really have in some ways a
disincentive, we need to recognize that and try
and fix it.

MR. SWENSON: And, Alan, one of the --
one of the push backs I think the Commission
might get in adopting your proposal of edited
compliance adversaries is that today many
companies say, well, our general counsel is our
chief compliance officer or our COO and that
person is a high-level person who does have
access to senior management and to the board.

Why do we need to have, in essence -- I guess you'd say sort a full-time person primarily focused separate independent chief compliance officer.

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

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

I was reading, and I want to -- I think this as sort of useful to introduce into the record. At the conference of the Ethics Officer Association, Mr. Bernard who was the chairman and chief executive officer made some superb remarks, which Dr. Petry might want to share with the other members of the advisory
group. But one thing of interest to me is in his remarks he had a bulleted list of 19 different things that in his view ethics and compliance -- his ethics and compliance officer, Ray Leon, ought to be doing, things like being advisor to your company's leaders, raise the tough issues that maybe difficult for your CEO or leadership team to hear, tell me when I'm off base or out of line, and tell all the members of the my leadership team a lot of very specific things.

So my answer is that this is clearly enough information -- enough work that if you're setting standards, if you're creating awareness, if you're running a hot line, if you're doing auditing and monitoring, if you're having various kinds of committees and internal structures and local ethics and compliance officers that you really need somebody who's going to do that. If the thought is, well, we'll just give it to the HR person and they can do it as an extra job, it's an (inaudible).
MR. LYTTON: Win, can I just add that at Tyco we have recently created -- by the way, the whole new senior management team just got there, so we're starting from nothing in many ways. We created a senior vice president for corporate compliance that reports to the CEO under the board, and under that person a corporate -- a corporate governance, I'm sorry. Under that person will be the ombudsman and a whole bunch of things would fall within that.

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

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

One of the things that in an article that Bill and a co-author wrote made the observation is that in press releases the department often bullied issues on some of these major corporate cases. They rarely talk about the company's compliance program (inaudible) this position this is the outcome. Don't talk about the compliance program, whether the company had
one, how effective it was, whether it was
evaluated and how. One of the things that
particularly struck me about the Anderson case
was it seemed to be a case that in many ways
cried out for an answer to that question. If
you're going to say by criminally charging a very
large organization where people lose their jobs
and entire (inaudible) and so forth, is it, you
know, a commitment to a strong ethics and
compliance program really the test on whether the
acts of the small number should speak for this
large organization?

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

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

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

MR. COMEY: Well, we've done it. The entity that I mentioned, which I don't want to name. It's currently under probation. That is
something that we are going to employ. We've
raised it kind of as a threat, if you will, at
this point to say you've got to get your act
together or we're going to seek the violation,
we're going to file a violation and notice with
the court. So it is a -- it is a tool that we
can use and we have used.

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

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

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

MR. JONES: Eric Holder.

MR. HOLDER: Yeah. There's been a lot
of discussion here and I guess over the last few
months about the Holder memo (inaudible). That
was an effort directed by career folks --

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

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

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

MR. HOLDER: One of the things that I
think Jim -- you talk about, though, the policy
that is embodied in the memo with regard to
waiver, and I think that policy in the memo was
hopefully set out. I think you have talked about
it in a way in which it was intended to be used.
My question is, is the theory different from the
reality? What I hear from practitioners -- I'm
not experienced myself. But from practitioners
is that in order to get in the door there is a
requirement that waiver occur as opposed to more
nuanced things that you were discussing, and I
think they were contained in the memo.

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

MR. COMEY: As to the waiver, we hear
the same thing, the U.S. attorneys do, and the attorneys on the advisory committee has been asked and go back and look at that memo and see if there's anything that needs to be changed. And one of the things we've heard in that process is, look, whatever you guys say, the troops in the field -- many are saying waive, waive, waive. Mary Beth Buchanan in an effort to try and get her arms around that did a survey, and the survey didn't bear that out as a matter of policy. Now Mary Beth acknowledged that it wouldn't necessarily show us if the low-level troops are doing that, and I think maybe -- I don't think the memo ought to be changed, but perhaps we need to educate better in the field. We need to train better. We need to teach people the difference between work-product and privilege and that there's a dance you can go through and that it's not in the interest of -- that reducing collateral damage to shareholders from the civil litigation that was mentioned to just say you've
got to waive right at the outset because you may be inflicting more harm on the company.

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

MR. LYTTON: Could I just comment on that, Eric? Because as I was listening to Jim speak I was reminded of the biblical story of your hands are the hands of Esau but the voice is the voice of Jacob. And as I listened to what Jim was saying, I agreed with it. But in practice, both in my own experience and from what I've heard assisting U.S. attorneys out in the field, the ante to the game is waiver. And then I would also say the same thing in the agencies. So that's where I say, I think it's a wonderful policy. I can work with what Jim suggested very well if I have those protections, but I don't think it's happening out there. It might be useful if the Department of Justice
frankly had some sort of an ombudsman where people could call and not risk the ire of an AUSA when you go above them. I mean, there are all sorts of -- I was an AUSA for eight-and-a-half years, so I know how this works. I think that would help and also some sort of coordination among the agencies.

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

You want to address small corporations?

MR. HOCHBERG: Yeah, on the issue of small corporations, part of what the guidelines has difficulty reaching is the fact that in many relatively small corporations the corporation is
the vehicle with the criminality of the key controlling individual. So we end up with situations in the health care arena and the investment fraud arena where we look at relatively small companies where the reason to charge the company is to seize assets or to put them out of business. It's a different criteria than we're facing in the true legitimate corporations where there's some independent existence that is different than the corrupt ownership.

MR. JONES: Richard Gruner.

MR. GRUNER: Yeah, I had a question that follows up on some of what was said this morning. My question is asked in light of the round of corporate scandals that have surfaced in the last year-and-a-half most of which involved misconduct at the top or at near the top of the management chain. I wondered what sorts of features of compliance programs really are essential to capture that kind of misconduct in
an earlier stage if the notion of an independent
compliance officer was mentioned and that sort of
thing would be helpful? But I wonder if there
isn't also a need for regular board attention or
requirement of periodic board review of the
compliance programs efforts as well as some low
string and maybe minimum requirements of an
internal audit staff that provides an independent
source of information (inaudible) scrutiny that
would pick up these kinds of incidents rather
than somehow allowing -- relying on the
management chain to surface these?

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

MR. LYTTON: Yeah, I can address that
first. I think, number one -- the number one way
to get compliance at the top in a corporation is
to hire good people. And if you hire honest
people and aggressive people both on the board
and senior management, you've taken the first step. Number two, once you get those people in, you provide a regular process that facilitates their doing the type of oversight you would want.

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

I think all of that -- you have to have those systems in place. I don't recommend that the Sentencing Commission do that because I think that there are other ways that that's happening. Each corporation may approach it a
little differently. On the other hand, the
tougher you make it and the more liability you
put on the chairman of the audit committee, it's
going to get tougher to recruit these folks to
come and take the job. And I would just be --
right now we're still finding people. You know,
I went to Tyco, but, you know, what are you going
to do? I thought it was a toy company, as I
said. That's a lack of due diligence.

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

MS. YANG: Let me just add something
really quickly. The suggestions that you made were great in the larger corporation. Those are the things when we say the guidelines should sort of have that sort of open-ended ability for the corporation to sort of come up with different ways, but, you know, he's correct. It would be great if there were all really honest people up at the top. I can't know that. I don't know that. And what I would like to see is some sort of mechanism so that if there are those individuals who perhaps are not as honest as we would want them to be that there is some way for that reporting to come forward so that you have this clear mind of reporting. The compliance person can talk directly to the board, can speak to other different types of officers, and have those lines available so that if you do have somebody who is completely corrupt somewhere near the top, it's much more difficult for them to hide their activities. And that would be the sense of it.
MR. YUSPEH: I had participated in a panel discussion yesterday on this subject in Nashville, and one of the CEOs who was on the panel said that he had been in a meeting of CEOs to talk about it. And their synopsis of the problem of these high visibility cases was that it resulted from excessive self-interest and a total lack of core values. That was sort of the shorthand. And I would think that a lot of the discussion today has been this idea of needing to instill some kind of core values, and I think they can come from various places. Ideally you'd like it to come from the chief executive officer because he or she ought to really be the holder and the articulator of that.

But I think that your safety net becomes -- if you have a handful of other places that that person has sort of gone sour that they might come from. They might come from the board. So if you have a strong independent board and if you have a strong audit committee and perhaps a
strong ethics and compliance committee, that will help because perhaps that's a safety net. I think having an independent ethics and compliance officer helps because that person, though not nearly as well-positioned as the CEO to articulate these things, that is that person's sole job. I think it becomes a safety net, especially if that person goes to the board. And I think having a strong head of internal auditing feels that he or she has a direct entry to the board helps as well. So I think seeing what we've learned from some of these high visibility cases, have as many of those safety nets as you can build in if the CEO goes wrong. That would probably be a good idea.

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

MR. WALLANCE: I think James Comey's careful distinctions between work-product and attorney-client privilege waivers are extremely helpful. I don't think they're going to put an
end to the controversy. Therefore, I'd like to
give the Department of Justice representatives an
opportunity to respond to Bill Lytton's
invitation to become advocates for the safe
harbor from waiver when a company makes
disclosure of possible criminal wrongdoing to the
Department of Justice.

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

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

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

MR. JONES: On that note, I would like
to end our second summary panel. We have
received much good information. I would like to mention again that for those of you who can't participate, the afternoon breakout sessions will go into more depth and more less time driven discussion about some of these issues. I'd like to also take the opportunity at the end of the plenary sessions to thank the staff of the Sentencing Commission, in particular Paula Desio, Deputy General Counsel, for getting this event together, which was much work.

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

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