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STATEMENT OF ALAN R. YUSPEH
BEFORE THE AD HOC ADVISORY GROUP TO THE
UNITED STATES SENTENCING COMMISSION

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Washington, D.C.

Thank you very much for the opportunity to appear before your panel today. I am flattered to have been asked to participate in this effort.

Though I know several of the members of this panel, it may be useful to those I have not met to summarize very briefly my work in the area of ethics and compliance programs. This work began in 1987, when I was asked to serve as the Coordinator, or Executive Director, of the Defense Industry Initiative on Business Ethics and Conduct, known as the DII. The DII consisted of some 50 defense contractors, each of which became a signatory to certain principles pertaining to ethical and compliant business conduct. I worked with this group through 1997. In the course of that work, I also was asked to assist various organizations outside the defense industry with designing an ethics and compliance program. In October 1997, I was asked to serve as the Senior Vice President for Ethics, Compliance and Corporate Responsibility at the largest hospital company in the country, a company then known as Columbia/HCA Healthcare

Corporation and now known as HCA, or Hospital Corporation of America. HCA owns some 180 hospitals. We have tried at HCA over the last five years to develop and implement a comprehensive and energetic ethics and compliance program.

I should also include a disclaimer not unlike that we often hear government officials make when they speak in public. The views that I am going to express today are my personal views on this matter. While HCA is of course aware of my participation in this session, these views do not represent any official position of HCA.

I would like to provide to your panel certain background information for the record of this proceeding. I have prior to today sent to your staff rather extensive materials about the HCA Ethics and Compliance Program. I have made available our Code of Conduct, an article for an academic journal explaining at some length our efforts, and two speeches that I have previously given which were published in *Vital Speeches of the Day*. I hope that this will be helpful background material. I should also note that HCA has placed virtually all relevant information about our Ethics and Compliance Program on our website. We believe that publicly held companies should be transparent about their efforts in this area. In our own case, because we are in an activity where there are many small stand-alone hospitals with far fewer resources than ours, we have also regarded it as a matter of our corporate social responsibility to make these materials available for other hospitals to adapt and use as they wish.

I would note first that the Commission should come to grips with something that I am reasonably certain is reality. 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 are sentenced. It is my belief that a large organization that believes itself to be well managed does not expect to be convicted of committing a crime. Thus, the appeal to a CEO that he or she should implement 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 should elaborate for a moment. I suspect that some companies 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 hotline, because these were mentioned in the Commission's guidelines. There is 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 a sufficient impetus for large American businesses to implement ethics and compliance programs that are as comprehensive, as robust, and as aspirational as they could be. Truly outstanding programs only occur, I believe, when top management of an 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 am using this term as President Theodore Roosevelt used it, to mean a visible and credible platform from which to persuasively advocate an agenda. If 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 a 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 confidence 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 very few changes to the definition of “effective program to prevent and detect violations of law” that will support a Commission effort to promote responsible business conduct. The first and most important change I would recommend is in Paragraph (2). I would recommend that a second sentence be added as follows: “For business organizations with _____ or more employees, an officer position must have been established as part of the senior management of 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 chief financial officer, or head of human resources, to oversee the organization’s 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 this country. No single structural element of an effective program to prevent and detect violations of law in a large corporation is so

important as the proper placement in the organizational structure of the person charged with leading this effort. If a corporate officer has this as his or her primary duty, that person will have the ear of the CEO, access to the Board of Directors, 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 corporations.

As to the issue of the size of business organizations to which this expectation should apply, I would suggest that you define that in terms of employees. In order to avoid criticism that you are imposing additional overhead on organizations that cannot afford it, I would recommend that you consider a threshold that by any reasonable standard defines large corporations. The listing in *Fortune Magazine* of the largest 500 business organizations in this country indicates that the median number of employees for such organizations is about 25,000. I think no leader of an organization of that size could assert with any credibility that his or her organization lacked the financial resources to afford to have a corporate officer in charge of compliance, business conduct, and corporate responsibility. You might conclude that the employee threshold should be lower.

My second proposal is that you incorporate within your definition of an “effective

program to prevent and detect violations of law” a requirement for publicly held business organizations at the employee threshold for which a full-time compliance officer is needed the obligation to have a compliance committee of the board of directors. We have had such a committee for almost five years at HCA, and it has been enormously important in ensuring the success of our efforts in this area. Particularly after the Sarbanes-Oxley Act has been passed, audit committees will be extraordinarily busy focusing on the accuracy of financial statements. A separate group of the board should monitor overall compliance and business conduct.

I would make only one other suggestion. While I recognize that the statutory duty of the Commission inclines it to speak to “criminal conduct” as the focus in its guidelines, perhaps a broader formulation could be used. At a minimum, I would suggest that the term of “violations of law” be considered as an alternative to criminal conduct in your compliance program definition. As we all know, there are many important laws that are not criminal, and certainly an effective compliance program seeks compliance with all of these. In addition, there may be conduct that is clearly improper but perhaps not illegal. I think even that could be covered by reference to improper conduct. Thus, I think the Commission should consider changing the definition of a compliance program to mean a “program that has been reasonably designed, implemented, and enforced so that it generally will be effective in preventing and detecting violations of law and other improper conduct.” If this were done, then conforming changes would have to be made elsewhere in the definition to use the broader term in lieu of “criminal conduct.” I do not think this is an overreach for the Commission. The Commission can define an effective compliance program in whatever way it wishes, and encouraging programs to

seek to address any violation of law or any improper conduct is to me more desirable than suggesting that such programs may properly focus only on the body of criminal law.

I would like to close with one final thought. In my view, it is regrettable that the business press and Congress seemed to focus solely on the issue of correct financial reporting in the last year. I think that the highly visible failures of corporate responsibility in the last year offered 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 this is expected. I would encourage the Commission to use its “bully pulpit” and some limited changes to its guidelines like those suggested as a means of doing this.