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March 26, 2010

Honorable William K. Sessions, III, Chair
United States Sentencing Commission
One Columbus Circle, N.E.
Suite 2-500, South Lobby
Washington, D.C. 20002

RE: Response to Request for Additional Comments on Proposed 2010 Amendments to Chapter 8 of the Corporate Sentencing Guidelines Manual

Dear Judge Sessions:

Thank you and the Commissioners for the invitation you extended during our oral testimony on March 17, requesting that we consider offering additional thoughts on revisions to Chapter 8's "remediation" application note. We greatly appreciate the opportunity.

We suggest the following changes to the Commission's draft of new application note 6 to 8B2.1:

6. Application of Subsection (b)(7).—The seventh minimal requirement for an effective compliance and ethics program provides guidance on the reasonable steps that an organization should take if it determines, after a reasonable opportunity to investigate, that detection of criminal conduct has occurred. First, the organization should respond appropriately to the criminal conduct. In the event the criminal conduct has an identifiable victim or victims the organization should take reasonable steps, as warranted under the circumstances, to remedy the harm resulting from the criminal conduct. ~~to provide restitution and otherwise remedy the harm resulting from the criminal conduct.~~ Other appropriate responses may include self-reporting, disciplinary measures to sanction the culpable employees, and cooperation with authorities, ~~and other forms of remediation.~~ Second, to prevent further similar criminal conduct, the organization should assess the compliance and ethics program and make modifications necessary to ensure the program is more effective going forward. ~~The organization may take the additional step of retaining an independent monitor to ensure adequate assessment and implementation of the modifications.~~

As to the issue of monitors, we appreciate the thoughtful feedback from the Commission during and after the testimony and would like to address the point a little further, with your permission.



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As you know, ACC's view expressed in our written and oral testimony was that there should be no reference to monitors in Chapter 8. We do not believe the reference is necessary and we are concerned that the inclusion of a "monitor option" will make consideration of monitors more commonplace for those looking to the Manual for a "checklist" of appropriate remedies or probation terms to consider.

The hearing gave us a broader perspective on the possible role of the monitor option in your proposed amendments, and so we offer the following:

- First, ACC believes that if there is to be a mention of monitors in the Guidelines, it may be more appropriate as an option articulated as an available condition of probation, but not in the new application note regarding remediation requirements. As noted in our written submission, the idea that the company might actually be able to pre-empt the consideration of a monitor by a regulator, the Department of Justice, or a judge at sentencing by means of "beating the government to the punch" by showing that they have retained their own experts to provide oversight or help address failures going forward is an excellent suggestion, but not one we recommend codifying: doing so might make that action appear to be closer to a requirement than an option.

It seems logical that a prosecutor or judge who is so concerned about the corruption of a company's culture that they wish to unilaterally insert strong corrective oversight as a condition of probation may be skeptical of whether the company's pre-selected experts will be as effective as experts or a monitor selected independent of the company's wishes. Thus, our recommendation, consistent with the Commission's proposed approach and echoed in our written submission, is that the company may be best served to discuss the retention of acceptable experts with the court or prosecutor, as an alternative to the general oversight of a monitor. ACC believes that experts with specific skill sets, who can be tasked with remedial responsibilities inside the company, are likely to offer more effective and practical remedies needed by a company than would a monitor whose presence can be much more expensive and disruptive, and who is less likely to be equipped with practical experience in actually fixing a company's specific problems. Our experience in studying this issue is limited and often anecdotal, but it suggests that many companies that have experienced a failure do look for corrective guidance from outside experts with targeted skill sets to fix their problems, and that monitors that have been appointed to take over companies historically do not have such skills. But we do not believe that this thinking needs to be inserted into the manual, and we would not want to suggest through the Guidelines that if the company did not wish to retain its own equivalent of a monitor, or did not feel that external experts were needed, it might be seen as an indicator that the company is not taking the company's failure seriously.

- Second, if the Commission's intent is to include guidance on monitors that is in sync with our belief that a monitor option should be used only in the most dire circumstances and thus



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should be carefully considered by a judge before such a drastic measure is taken, then the inclusion of this text in the probation sections of Chapter 8 could be supported. But ACC strongly urges the Commission to make it clear how rarely monitors are likely to be an appropriate or effective consideration to achieve the outcomes the government wishes to assure, and that it note the extreme care that should be exercised because monitors often bring with them extreme and sometimes unnecessary expense as well as significant disruption, which courts should weigh carefully if their intent is to help the company build a path to a more successful future.

ACC thanks the Commission once again for the opportunity to testify, submit comments, and offer these additional thoughts. Please feel free to contact me if you have questions or if I or ACC can be of service in your deliberations.

Sincerely,

SJH [electronically filed]

Susan Hackett, Senior Vice President and General Counsel

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