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United States Sentencing Commission
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Submitted via email:
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Attn: Public Affairs

RE: COMMENTS OF THE ASSOCIATION OF CORPORATE COUNSEL ON THE REPORT OF THE AD HOC ADVISORY GROUP ON THE ORGANIZATIONAL SENTENCING GUIDELINES (PROPOSED AMENDMENTS TO CHAPTER EIGHT, UNITED STATES SENTENCING GUIDELINES)

Ladies and Gentlemen:

On behalf of the 16,000 individual in-house counsel members of the Association of Corporate Counsel (ACC) (formerly known as the American Corporate Counsel Association), we thank you for the opportunity to submit comments for your consideration as you review and consider the incorporation of the proposed amendments of the Advisory Group on the Organizational Sentencing Guidelines to the US Sentencing Guidelines, Chapter 8.[1]

Founded in 1982 as the "in-house bar association," ACC provides its members with networks, resources, education, and advocacy, all of it by corporate counsel, and for corporate counsel. ACC members, who work in over 7,000 separate private sector organizations, are particularly well positioned to comment on the practical impact of the guidelines' compliance requirements and on contemplated changes to the guidelines proposed under these amendments. Our members design preventive compliance programs, train corporate employees on how to comply with the laws, assist senior executives and the board in the creation of initiatives to promote an ethical corporate culture, advise line management on emerging legal responsibilities, and maintain, evaluate, and continuously improve their clients' legal compliance efforts. ACC members are often the top corporate compliance officials within their companies, and when not so formally vested, they are nonetheless considered key players in supporting the chief compliance officer and other managers with whatever legal guidance and practical resources are necessary to ensure preventive compliance and ethical behavior.

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[1] The complete US Sentencing Guidelines for Organizations, first adopted in 1991, can be found on the webpages of the US Sentencing Commission at http://www.ussc.gov/orgguide.htm; the report of the Ad Hoc Advisory Group to update and amend the organizational guidelines is provided at http://www.ussc.gov/corp/advgrprpt/advgrprpt.htm,

ACC members believe that whatever the original presumptions were of the Organizational Sentencing Guidelines (as adopted in 1991), the resulting impact has been far greater than most might have anticipated. Beyond the obvious intent to standardize the sentencing process for corporate defendants, the guidelines have done a great deal to define and thus change the way that companies focus on preventive compliance.

Certainly much of the focus of the Advisory Group is on fine-tuning the current standards and definitions to reflect the experience of the last 12-13 years. Indeed, corporations will continue to use the Guidelines as a prescription for appropriate and reasonable efforts that would help them prove that the actions of errant employees are not condoned by, representative of, or anticipated behaviors; if the guidelines are not operating in a manner that connects this desired outcome with the guidelines prescribed requirements, then the guidelines should be reconsidered.

ACC and its members are deeply cognizant that the field of corporate compliance is one that is subject to increasing scrutiny (by shareholders, regulators, financial services and insurance providers, the public and media, plaintiff's counsel, and the courts), as well as increasing regulation (by Congress and the regulatory agencies of the federal government, as well as the states and local governments within whose domains corporations reside and bear responsibilities as members of the community). While the regulatory environment of 1991 was sophisticated and extensive, in the Post-Enron,/Sarbanes-Oxley world of today, companies are more than mindful of not only their compliance obligations, but the increasing number of stakeholders who will scrutinize and judge their efforts, sometimes at counter-purposes with each other and the goal of promoting corporate compliance efforts.

In this letter, we wish to both recognize the Advisory Group's achievements in proposing amendments to help make the Guidelines better, but to also bring to your attention some concerns and larger policy questions that we believe are still not addressed adequately by the existing Guidelines or the Advisory Group's proposal to amend them, especially as we see these proposed amendments in the light of other regulatory guidance that our members are seeking to implement under the prescriptions of Sarbanes Oxley and related regulations.

There is a flaw in the presumption that compliance and deterrence are tightly connected concepts in addressing corporate criminal behavior.

Recent highly publicized and significant failures at several public companies (some with highly regarded compliance programs in place that simply were focused on the wrong kinds of misconduct), coupled with a ten-fold increase in the number of prosecutions in the 1990's (as compared to the 1980's), shows us that the Sentencing Guidelines' prescriptions by themselves have not been effective in eliminating wrongdoing at companies by employees who are intent to break the law. Rather than immediately presuming that the Guidelines need to be strengthened, it might be wise re-examine the relationship between compliance and deterrence outside a purely punitive context.

Perhaps the Sentencing Commission and the Sentencing Guidelines as applied by courts are well-positioned to help control outcomes flowing from those who agree with the precept that

compliance is desirable, but some suggest that the Guidelines are poorly-situated to address deterrence of those who are intent on acting outside of the preventive law systems established within the company. Heaping greater punitive standards and increased accountability on the corporation as a whole for the undeterred criminal intent of the few may not do anything to stop or deter that which we all agree is most damaging to the company's legal health. It is difficult to legislate morality in any fashion, so we should not respond to an increase in high visibility corporate crimes and prosecutions by immediately presuming that more legislation with greater sanctions will solve our problems.

What will? We have no answer, except to note that the Advisory Group, while well-intended, continues to try to fashion a remedy from a cloth that has proven insufficient to cover the task. None of us has spent sufficient time looking at the necessary connection between compliance and deterrence, nor at the entities that may be better positioned than the Sentencing Commission to take on such new initiatives. Before adopting stricter requirements in the Guidelines, we encourage the Commission to think about this and consider alternative approaches.

Resist the temptation to expand the Guidelines to attach criminal liability and sanctions to all violations of law, including non-criminal violations of regulations.

Relatedly, we are concerned that the changes proposed in Application Notes 1 and 4(A) to Section 8B2.1 are well-intended, but are moving in the wrong direction. Rather than helping companies understand where to focus their efforts, the Advisory Group has suggested that compliance programs which were once focused on preventing criminal violations must now also be created to detect and prevent violations of *any* law, criminal or non-criminal, including regulatory violations; violations of *any* laws or regulations will be dealt with as criminal violations, with criminal sanctions.

While companies should try to prevent all wrongdoing and most make every effort to do so, the Sentencing Guidelines were written to address criminal behaviors by meting out consistent criminal penalties and remedies. It is wrong to impose criminal liability and penalties on companies whose employees have committed less than criminal acts. To do so is not only a blurring of the Commission's charter, but a dangerous move toward eliminating any meaningful gradation of punishment that that is consistent and appropriate to the underlying allegations. The Guidelines should not become a blunt instrument that attempts to bludgeon companies for every kind of misdeed – however minor or even unrelated to the larger allegations that we are most concerned about – that a corporate employee could conceive or commit.

There are over 300,000 federal regulations that subject companies to criminal liability. That does not include state statutes and non-criminal regulations and violations which companies must try to contemplate when designing compliance initiatives. If the Commission is concerned about the increase in corporate wrongdoing and prosecutions in recent years, it should be doing more to work with prosecutors and companies to define those areas of weakness in the corporate armor and focus laser-like attention to those issues. The Commission should not expand the responsibility of corporate compliance officials to anticipate every conceivable violation possible (and then risk assess it, train for compliance with it, and measure results and adjust the system to

respond to anything less than 100% success). Exponential expansion of the number of laws and regulations that could subject a company to entity-threatening penalties and criminal liabilities will only succeed in "dummying down" the most important compliance activities that companies should be focusing on implementing in an effort to cover every base, no matter how minor or unlikely it might be to cause problems of a material nature.

There just isn't enough time or money or focus to contemplate training and detailed compliance systems designed to address every violation of law that the company could imagine; to admit that is not a cop-out by companies who don't want to live up to their responsibilities of good corporate citizenship … it is just a fact of business. The Commission and the Department of Justice need to join companies in the risk-assessment exercises the Commission is considering prescribing for companies in the Advisory Group's proposed reforms; by doing so, it might succeed in more meaningfully identifying those compliance failures that plague us most so that we can all work to eradicate them. We ask the Commission to resist the temptation to believe that they will do more to stymie crime by identifying every violation of law as a crime and creating a criminal liability to attach to it; indeed, we ask you to contemplate how much more effective we can be in addressing those crimes which hurt us most by focusing more attention (including carrots and sticks) on them through the Guidelines.

Mere identification of the litigation dilemma, without ideas or plans to overcome it, is not enough.

We commend the Advisory Group's recognition of the so-called "litigation dilemma": this has long concerned corporate legal leaders as a burdensome counterweight to the establishment of meaningful compliance initiatives and self-reporting initiatives. The "litigation dilemma" refers to the recognition that no significant enterprise in the history of mankind has been 100% free of mistakes or failures: when companies establish meaningful compliance initiatives, they create documents, education and training programs, systems of reporting, and even stakeholder expectations, all of which are "evidence" that will be used against the company by the government and, of greater concern, the plaintiff's bar, should (or should we say "when") a compliance failure occurs.

Thus, while the Advisory Group's decision to address this issue in their report is a tremendous step forward and long overdue, recognition of the issue without proposing any solutions to address the problem does nothing to solve an increasingly impossible situation for corporate America. If businesses are to remain competitive, they must be able to meet the legal obligations of Sarbanes Oxley and other compliance expectations without putting themselves at risk of attack by the plaintiff's bars' privateers.

Given that the Guidelines have already created an environment in which attorney-client privileged communications and information are already more likely to be surrendered to the government as a part of a company's cooperation with an investigation (see below for additional comments on this subject), ACC suggests that the Commission consider proposal of a self-evaluative privilege to be recognized by Congress which would allow privileged investigations to be shared with the government and the government only. If the point of the Guidelines and the compliance systems they are intended to stimulate is to prevent wrongdoing and mitigate its damage to others through self-reporting and remedial actions, companies that take this responsibility seriously and seek to follow the Guidelines' directives in good faith should not be put at risk of bankruptcy or crippling litigation by third parties who seek to profit from the company's attempts to do the right thing.

Value the attorney-client privilege, since it does more to encourage compliance than to frustrate the efforts of prosecutors seeking information about company misdeeds.

Having raised the subject of the privilege, we wish to take time to commend the Advisory Group for seeking to bolster the Guidelines' respect for the importance of the attorney-client privilege. The Guidelines currently punish companies who do not offer to waive the privilege (labeling this a sign of uncooperative behavior) and offer credit to companies that do waive he privilege. The Advisory Group acknowledges that the issue of attorney-client privilege is of concern and offers a middle road, proposing that the following comment be added to the guidelines:

> **If the defendant has satisfied the requirements for cooperation . . ., wavier of the attorney-client privilege and of work product protections is not a**

> **prerequisite to a reduction in culpability score . . .. However, in some circumstances, waiver of the attorney-client privilege and of work product protections may be required in order to satisfy the requirements of cooperation. (Advisory Committee Report, pages 105-106)**

While this progress is laudable, it still treats the attorney-client privilege as a bargaining chip, rather than as a fundamental right of clients (and especially criminal defendants) which supports the administration of justice and a legal system that encourages clients to consult with counsel. The attorney-client privilege exists because it is recognized as the most crucial element of the lawyer-client relationship. Lawyers need clients to talk openly with them; clients need reassurance from their lawyers that their decision to seek guidance from a lawyer will not be used against them. If clients don't believe that lawyers can be trusted in even the most delicate of situations, they are not likely to either seek out a lawyer, or to provide that lawyer with all the information necessary to assess the necessary response. Indeed, it bears repeating that clients don't have to consult with lawyers at all if they don't choose to do so. They certainly are under no obligation to have to hire lawyers to join every company strategic team to make sure the teams receive ongoing advice and counsel. And they don't have to form the respectful relationships with lawyers that strengthen their tendencies to listen to legal counsel and pursue recommended legal strategies. When the Sentencing Guidelines undermine the value of lawyer-client confidentiality by demanding waiver of it by any defendant that wishes to be seen as cooperative, the result is that clients will be less likely to value the lawyer-client relationship and seek it out. This is contrary to good compliance goals.

The Advisory Group's middle road solution fails in that it still subjugates the privilege to the needs of prosecutors, which is antithetical to the purposes of the privilege in the first place. The Advisory Group suggests that the privilege does not have to be waived in order to get credit for the company's compliance initiatives, but if the prosecutor shows a need for the privileged information, the prosecutor can have it. It is hard to conceive of a prosecutor who won't claim a need for privileged information in order to prove his case; it could be argued that what was confided between the lawyer and client is crucial information precisely because it is not open to public scrutiny. We request that the Sentencing Guidelines (and prosecutors and judges who use them) refrain from inference that any corporate criminal defendant who wishes to maintain the confidences of its attorney/client conversations and counsel must be guilty of wrongdoing and trying to cover up the smoking gun. To make and legislate such an inference goes against the grain of our criminal justice system, and renders the privilege meaningless in the corporate criminal context.

We would never suggest in the individual criminal defense context that the mere fact that the prosecutor would find his case easier to prove if he could discover what the client told his lawyer would override the client's right to counsel and confidentiality; why is it that in the corporate context we find it easier to suggest that clients shouldn't have the same privileges? The penalties are still stiff and the liabilities are entity-threatening. And the reasoning behind the privilege – encouraging the client to seek out competent and meaningful representation – remains the same in either context.

ACC believes that the diminution of the privilege is inappropriate and defeats the larger compliance goals of the Sentencing Guidelines. We should encourage clients to spend time consulting openly and honestly with lawyers; we should not punish them for having done so by allowing prosecutors to rummage through their conversations with counsel. There are plenty of ways for corporate defendants to cooperate with a government investigation without asking them to divulge lawyer-client conversations and privileged documents.

Added to the concerns raised above about the plaintiff's bar and the litigation dilemma, this issue has an exponentially negative impact in that under current rules, that which is divulged to the government that was privileged cannot be protected from discovery by subsequent third parties. Once revealed to the government (either voluntarily or under duress), the privilege cannot be applied against others who wish to make the same foray into confidential files.

If the Commission believes that in-house lawyers can have an important role in the creation, development, maintenance, and reporting of compliance initiatives, then we encourage the Commission to recognize that the attorney-client privilege is the foundation of the attorney-client relationship, as well as the foundation of the trust that clients have in the counsel that their lawyers provide them.

Other Issues Before the Commission

ACC does not wish to repeat arguments that have already been made so well to the Commission by others, but we wish to note our support for purposes of your consideration.

We commend to you the comments of United Technologies regarding their concerns with the use of the term "anonymous" (versus "confidential") when considering appropriate employee reporting mechanisms in Section 8B2.1(b)(5)(C).

We also commend to you the comments of the National Association of Criminal Defense Lawyers (NACDL) generally, and especially their praise for the improvements proposed by the Advisory Group to subsection (f) of Section 8C2.5 regarding the report's proposals for increased flexibility of judges to consider the participation (or lack thereof) of high level officials in the organization.

ACC also commends the thoughtful comments of the Ethics Resource Centers Fellows Program in general, and in specific, their suggestions regarding risk assessment under Section 8B.2(c).

We thank you for your consideration of our comments, and offer our assistance if we can be of any help to you in the process of amending and updating the Guidelines.

Sincerely,

Susan Hackett

Senior Vice President and General Counsel