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United States Sentencing Commission
One Columbus Circle, N.E.
Suite 2-500
Washington, D.C. 20002-8002

Attention: Michael Courlander

Re: Request for Additional Public Comments Regarding the U.S. Sentencing Guidelines for Organizations

Dear Mr. Courlander:

Philip Morris Companies Inc. appreciates the opportunity to submit these comments in response to the "Request for Additional Public Comments Regarding the U.S. Sentencing Guidelines for Organizations," recently issued by the Advisory Group on Organizational Guidelines to the United States Sentencing Commission.

As noted in the Request for Additional Public Comments, the Advisory Group has identified specific areas of concern and developed a list of key questions relating to the terminology and application of Chapter 8 of the Sentencing Guidelines (the "Organizational Guidelines"). The Advisory Group seeks additional public input prior to preparing its report and recommendations for improvement of the Organizational Guidelines to the United States Sentencing Commission. The areas of concern and questions formulated by the Advisory Group relate to the criteria for an "effective compliance program" identified in the Organizational Guidelines.

Philip Morris Companies Inc. ("PM") is the parent of Kraft Foods, Inc., which sells branded food and beverage products; Philip

Morris U.S.A. and Philip Morris International, domestic and international cigarette manufacturers; and Philip Morris Capital Corporation, a financial services company.

Philip Morris Companies Inc. is committed to corporate responsibility. For many years, we have had compliance programs both at the corporate and operating company levels. This commitment is reflected in our enterprise-wide compliance program and in the appointment of a corporate-level Chief Compliance Officer. The corporate Compliance Program is intended to address areas of legal, policy and reputational risk. It has been designed to track the elements of the Sentencing Guidelines' definition of "an effective" program, as well as best practices associated with that definitional standard. In addition, each operating company has its own compliance office and compliance program, which is tailored to the operating company's specific businesses and operations, and also is intended to meet the Sentencing Guidelines and best practice standards.

In the following paragraphs, PM offers comments in response to certain questions posed by the Advisory Group:

Question 1.a: Should §8A1.2, comment 3(k)(2), referring to the oversight of compliance programs by high-level personnel, specifically articulate the responsibilities of the CEO, the CFO and/or other person(s) responsible for high-level oversight? Should §8A1.2, comment 3(k)(2) further define what is intended by "specific individuals(s) within high-level personnel of the organization" (*see also*, §8A1.2, comment 3(b)) and "overall responsibility to oversee compliance?"

PM Comment: PM fully endorses the concept in §8A1.2, comment 3(k)(2) that there be a link between senior management and a company's compliance program. PM believes that this is essential to a meaningful and effective compliance program. Accordingly, PM has appointed a full-time, parent company Chief Compliance Officer who

has been charged with oversight of the Company's enterprise-wide compliance programs. The Chief Compliance Officer is a Senior Vice President of PM and a member of the Company's Management Committee. The Chief Compliance Officer has the responsibility to report about compliance programs to the Audit Committee of the Company's Board of Directors.

While PM is firmly committed to the need for high-level, senior management oversight of the Company's compliance program, as demonstrated in its own Company-wide program, PM also endorses the need for flexibility in the designation of high-level personnel responsible for compliance oversight in corporate compliance programs, depending on the organization's size (Fortune 100 or small business) and types of business operations (*e.g.*, centralized or decentralized, domestic or global).

Question 1.b: To what extent, if any, should Chapter Eight specifically mention the responsibility of boards of directors, committees of the board or equivalent governance bodies of organizations in overseeing compliance programs and supervising senior management's compliance with such programs?

PM Comment: PM believes that developments in corporate governance and compliance practices since the passage of the Organizational Guidelines have given Boards of Directors and their committees the responsibility to oversee compliance programs and senior management's compliance with the legal requirements applicable to their organization's business and operations. Chapter 8 of the Sentencing Guidelines should reflect that role consistent with those developments. The recently enacted Sarbanes-Oxley Act of 2002, as well as the revised listing standards proposed in August 2002 by the New York Stock Exchange (and now pending approval by the SEC), address the role of the Board of Directors, and particularly the Audit Committee, in corporate governance. For example, section 301 of the Sarbanes-Oxley Act, directs a company's Audit Committee to

establish procedures for anonymous internal reporting of accounting irregularities.

Question 1.d: Should §8A1.2, comment 3(k)(3), which refers to the delegation of substantial discretionary authority to persons with a "propensity to engage in illegal activities," be clarified or modified?

PM Comment: PM joins in the request for clarification of the term "propensity to engage in illegal activities."

Question 1.e: Should §8A1.2, comment 3(k)(4), regarding the internal communication of standards and procedures for compliance, be more specific with respect to training methodologies? Currently §8A1.2, comment 3(k)(4) provides: "The organization must have taken steps to communicate effectively its standards and procedures to all employees and other agents, *e.g.*, by requiring participation in training programs **or** by disseminating publications that explain in a practical manner what is required." (Emphasis in original.) The use of the "e.g." can be interpreted to mean that "training programs" and "disseminating publications" are illustrative examples, rather than necessary components, of "communicating effectively." The use of "or" can be interpreted to mean that "training programs" and "disseminating publications" are alternative means for satisfying the "communicating effectively" requirement. Should the preceding language be clarified to make clear that both training and other methods of communications are necessary components of "an effective" program? If so, should the term "disseminating publications" be replaced by more flexible language such as "other forms of communications?"

PM Comment: PM recognizes that a literal reading of §8A1.2, comment 3(k)(4) may have created some confusion and views the suggested change as simply clarifying that both training and other forms of communication are important components of an effective program. Companies should, however, be afforded the flexibility to

determine which methods of communication and training are best suited to the organization, its size, structure, compliance policies and procedures, and other factors and circumstances specific to an individual company or organization.

Question 1.f: Should §8A1.2, comment 3(k)(5), concerning implementing and publicizing a reporting system that fosters reporting without fear of retribution, be made more specific to encourage: (i) whistleblowing protections; (ii) a privilege or policy for good faith self-assessment and corrective action (*e.g.*, 15 U.S.C. §1691(c)(1)(1998)); (iii) the creation of a neutral or ombudsman office for confidential reporting; or (iv) some other means of encouraging reporting without fear of retribution?

PM Comment: Comment 3(k)(5) currently provides that the organization must have taken reasonable steps to achieve compliance with its standards, specifying as one example "by having in place and publicizing a reporting system whereby employees . . . could report criminal conduct by others within the organization without fear of retribution." PM believes that a mechanism allowing employees to report in good faith instances of misconduct or suspected misconduct without fear of retribution is an essential element of an effective compliance program. PM has long made this an element of its own compliance program. PM believes, however, that the existing language of Comment 3(k)(5) already encourages organizations to establish such reporting mechanisms, and we question whether it would necessarily be helpful for the Chapter Eight Guidelines to specify the types of mechanisms that should be adopted. This appears to be the type of implementing decision that is best made by an individual organization, based on its specific circumstances.

With respect to encouraging a privilege or policy for good faith self-assessment and corrective action, and the creation of a neutral/ombudsman office for confidential reporting, PM recognizes that offering these sorts of protections to employees could significantly

enhance the effectiveness of an organization's compliance program. There are, however, practical limits on an organization's ability to offer such protections.

For example, an employee cannot be afforded an absolute promise of confidentiality, so long as information on his or her report may be discoverable in litigation and/or sought by the Government as a condition of the organization's cooperation in a Government investigation or inquiry. Similarly, an employer can promise that good faith self-assessment and corrective action will not result in employment sanctions (at least as long as it feels that the Government will not penalize the employer itself for not sanctioning the employee), but it cannot promise an employee that good faith self-assessment and corrective action will not result in legal action by the Government or private plaintiffs. The ability to offer employees these sorts of assurances would be valuable to an organization's compliance efforts, and PM encourages the Advisory Group to develop recommendations for addressing the underlying problems that currently prevent organizations from offering such assurances.

Question 1.g: Should greater emphasis and importance be given to auditing and monitoring reasonably designed to detect criminal conduct by an organization's employees and other agents, as specified in §8A1.2, comment 3(k)(5), including defining such auditing and monitoring to include periodic auditing of the organization's compliance program for effectiveness?

PM Comment: PM believes that periodic auditing is a useful tool for identifying weaknesses in and potential improvements to an organization's compliance program. PM believes that the Sentencing Guidelines should encourage auditing as a basic element of an effective compliance program and should also note the importance of training for either inside or outside auditors who conduct compliance audits.

PM questions the wisdom, however, of requiring specific types of audits or specific methodologies for auditing the "effectiveness" of a compliance program. PM believes that any attempts at such specificity would detract from the flexibility now afforded by the Chapter Eight Guidelines' criteria for effective compliance programs, which allow for a range of audit activities. Such activities could include, for example, "process audits" (checking compliance programs against the Sentencing Guidelines criteria and evaluating systems and controls) and "substantive audits" (checking for and identifying specific instances of non-compliance). The latter, of course, implicates the privilege issues identified in question three. The Sentencing Guidelines could note these as illustrative of the types of audits that companies should consider within the context of their overall compliance programs.

PM further believes that the Guidelines should avoid prescribing any specific methodology for measuring the "effectiveness" of compliance programs at a time when definitive standards have not been defined, and the term is subject to broad interpretation.

Question 1.h: Should §8A1.2, comment 3(k)(6), be expanded to emphasize the positive as well as the enforcement aspects of consistent discipline, *e.g.*, should there be credit given to organizations that evaluate employees' performance on the fulfillment of compliance criteria? Should compliance with standards be an element of employee performance evaluations and/or reflected in rewards and compensation?

PM Comment: PM believes that compliance responsibilities and satisfaction of compliance objectives, particularly on the part of supervisory employees, should be considered in employee performance evaluations. Here again, however, PM believes that individual companies should be afforded the flexibility to design job performance criteria that are tailored to the organization's structure

and culture, specific job functions, supervisory responsibilities, and other relevant factors.

Question 3: How can the Chapter Eight Guidelines encourage auditing, monitoring, and self-reporting to discover and report suspected misconduct and potential illegalities, keeping in mind that the risk of third-party litigation or use by government enforcement personnel realistically diminishes the likelihood of such auditing, monitoring and reporting?

PM Comment: One modest step that would help to address this problem is suggested by question five - - *i.e.*, whether the provision for "cooperation" at §8C2.5, comment 12, and/or the policy statement relating to downward departure for substantial assistance at §8C4.1, should clarify that the waiver of existing legal privileges is not required to qualify for a reduction in culpability score or as a predicate to a substantial assistance motion by the Government. The answer to this question is yes; both sections should clarify this point. An explicit statement that "cooperating" with the Government and providing "substantial assistance" to the Government do not require turning over privileged information would reduce (if not eliminate) the risk that voluntary self-policing could increase an organization's legal exposure, and would thereby reduce the disincentives that now exist for self-policing.

A second important step the Commission should consider taking is supporting – or, alternatively, facilitating a discussion of the need for – a self-evaluative privilege relating to compliance activities. As Question (3) implicitly recognizes, when companies undertake rigorous evaluations to understand how their compliance programs can be improved, there is no guarantee that the information generated will not be used against them in various legal proceedings, both criminal and civil. This, ironically, puts companies that do rigorously self-evaluate their programs at greater risk than companies that do not. The Commission's enabling statute (see, *e.g.*, 28 USC §

995(a)(12),(20),(21)) provides the Commission with various avenues to study the question and, if so desired, propose statutory changes to resolve it.

Of course, another way in which the Chapter Eight Guidelines could encourage auditing, monitoring, and self-reporting is simply to increase the credit for an effective compliance program in §8C2.5(f) (now three points). This obviously would not reduce the risks associated with compliance programs, but it could still encourage organizations to develop and maintain strong compliance programs by increasing the benefits.

Question 4.b: According to §8C2.5(f), if an individual within high-level personnel or with substantial authority "participated in, condoned, or was willfully ignorant" of the offense, there is a rebuttable presumption that the organization did not have an effective program to prevent and detect violations. Does the rebuttable presumption in §8C2.5(f), for practical purposes, exclude compliance programs in small and medium-sized organizations from receiving sentencing consideration? If so, is that result good policy and why?

PM Comment: In a large corporation, it is possible for employees at the top of the organization to engage in misconduct, which in turn affects and victimizes innocent employees, among other stakeholders. This is clearly demonstrated by recent corporate scandals where high-level personnel or individuals with substantial authority are charged with having participated in, condoned, or been willfully ignorant of the corporate malfeasance alleged.

Such conduct, which involves only a single or limited number of individuals, does not necessarily reflect the absence of an effective compliance program. Compliance programs can deter, but they cannot prevent all misconduct by determined individuals. Accordingly, PM does not believe that there should be a rebuttable presumption that the organization did not have an effective compliance program in place to

prevent and detect violations involving the organization's senior officials, unless it is shown that a significant number of individuals with substantial authority to act on behalf of the organization participated in the misconduct — in other words, that the conduct was pervasive. PM questions whether it is fair, absent such circumstances, to punish an entire organization and its various stakeholders.

Question 5: Should the provision for "cooperation" at §8C2.5, comment 12, and/or the policy statement relating to downward departure for substantial assistance at §8C4.1, clarify or state that the waiver of existing legal privileges is not required in order to qualify for a reduction either in culpability score or as predicate to a substantial assistance motion by the government? Can additional incentives be provided by the Chapter Eight Guidelines in order to encourage greater self-reporting and cooperation?

PM Comment: This question is addressed as part of the response to question three above.

Question 6: Should Chapter Eight of the Sentencing Guidelines encourage organizations to foster ethical cultures to ensure compliance with the intent of regulatory schemes as opposed to technical compliance that can potentially circumvent the purpose of the law or regulation? If so, how would an organization's performance in this regard be measured or evaluated? How would that be incorporated into the structure of Chapter Eight?

PM Comment: PM believes that organizations should be encouraged to employ an ethics or a values-based approach in formulating their basic business conduct guidelines and compliance policies. PM prefers the term "values"-based to "ethics"-based, because it is a more neutral term. PM supports the view that in order for a compliance program to become part of a company's culture and embedded in its basic business processes, senior management must define a set of shared values and standards for business conduct with

the objective of improving employee decision-making across a broad range of practical business situations.

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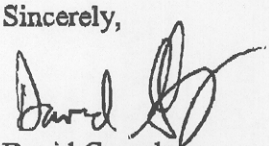
Philip Morris Companies Inc. appreciates the opportunity to present these comments to the Advisory Group. We hope that these comments will be useful to the Advisory Group as it prepares its report to the United States Sentencing Commission. We would be pleased to respond to any further questions you may have.

Sincerely,



David Greenberg