

**Coalition for Ethics & Compliance Initiatives**  
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Washington, DC 20006  
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May 20, 2002

DELIVERED BY FAX

Attention of the Advisory Group  
on Organizational Guidelines  
c/o Office of Public Affairs  
United States Sentencing Commission  
Suite 2-500 South Lobby  
One Columbus Circle NE  
Washington, DC 20002

Re: Nature and Scope of Advisory Group

Dear Members of the Advisory Group:

I am writing to you as the chair of the Oversight Committee of the Coalition for Ethics and Compliance Initiatives (CECI), in response to your March 19, 2002 request for public comment. As explained in our letter of November 6, 2001 to the members of the Sentencing Commission (letter attached), CECI is an informal association of individuals and organizations interested in contributing toward the development of environments more conducive to the implementation of effective organizational ethics and compliance programs.

We appreciate this opportunity to comment on "the nature and scope" of the Advisory Group's efforts. In our view, the Advisory Group should look beyond the limited application of Chapter Eight in sentencing proceedings and instead examine the full range of issues raised by the use of these guidelines to shape and enhance ethics and compliance programs over the last decade.

When Judge Murphy convened the Advisory Group in February, she emphasized the "startling impact" that the organizational guidelines have had "on the implementation of compliance and business ethics programs." Most of this impact, and with it most of the effort to interpret and apply the guidelines, has occurred far outside of the federal sentencing context. In fact, this is one of the more important and enduring accomplishments of Chapter Eight. Any changes to these guidelines will likely have a similar, wide-ranging impact on organizational governance and behavior.

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Thus, it is critical for the Advisory Group to focus a substantial portion of its review on the interpretation and application of the guidelines by those corporations and other organizations that have not come before the federal criminal courts, and to hear from the ethics and compliance practitioners who help make the guidelines come alive in organizations of all stripes. Their experience is essential to a complete evaluation of the current organizational guidelines and to the development of recommendations for improvements in them.

We also believe that this comprehensive examination of the reach and influence of Chapter Eight must necessarily include a review of related legal and regulatory developments since the organizational guidelines were issued. A number of these developments are described on page two of our attached letter to the Sentencing Commission.

More and more each year, the ability of organizations to successfully implement the seven compliance-program elements in the guidelines, and to achieve the Sentencing Commission's goal of creating an "effective program to prevent and detect violations of law," is being shaped by these other factors. In some instances, these factors can hinder the efforts of organizations to meet the Sentencing Commission's goals, as well as the expectations of employees, regulators, the public and the courts.

For one example, compliance-program element five requires that organizations have in place and publicize "a reporting system whereby employees and other agents could report criminal conduct by others within the organization without fear of retribution." However, those organizations that have created such a reporting system within their business ethics or compliance programs are confronted with the following dilemma: many employees will not come forward without assurance that their identities will remain confidential, yet the organizations cannot legally and unequivocally give this assurance. Despite organizational best efforts, the risk - and with it the fear - of disclosure remains a real concern in this legal and regulatory environment.

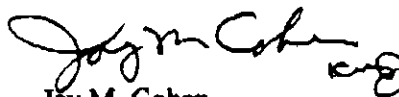
We are convinced that the Advisory Group can best accomplish its mission "to review the general effectiveness of the federal sentencing guidelines for organizations" if it identifies and examines those legal and regulatory rules, policies and procedures which can influence, assist, impede or prevent the successful implementation of the guidelines' requirements. The effectiveness of the guidelines themselves, and of organizational efforts to implement them, can most accurately be assessed with the help of this analysis.

On behalf of the CECI membership, I want to thank the members of the Advisory Group for your consideration of these comments. We would welcome the opportunity to discuss

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**them further and also to answer any questions or provide additional information, in order to assist you in this extremely important and timely endeavor. Thank you again.**

Yours truly,



**Jay M. Cohen**  
**Chair, Oversight Committee**  
**Coalition for Ethics and**  
**Compliance Initiatives**

**Attachment: CECI Ltr to USSC dtd**  
**November 6, 2001**

## Coalition For Ethics And Compliance Initiatives

November 6, 2001

Chair Diana E. Murphy and  
Members of the United States Sentencing Commission  
Thurgood Marshall Judiciary Building  
1 Columbus Circle NE, Suite 2-500  
South Lobby  
Washington, DC 20002

Dear Chair Murphy and Commissioners:

I am writing on behalf of the Coalition for Ethics and Compliance Initiatives (CECI) in response to the Commission's September 19, 2001 request for comment regarding issues related to the organizational guidelines. I will address, in particular, the Commission's request for comment on the scope, duration and membership of any advisory group appointed to review the organizational guidelines and develop proposals on these guidelines for the Commission's consideration.

As noted in our May 30, 2001 letter to the Chair, CECI is a voluntary association of interested individuals and organizations dedicated to the implementation of more effective ethics and compliance programs in organizations. We aim to accomplish this mission by, among other means, facilitating communication among policy makers and members of the ethics and compliance community about significant issues of mutual interest and concern.

The organizational guidelines are unquestionably such an issue, and we are heartened by the Commission's request for comment in this area. In our view, the Commission would most benefit from an advisory group with the broadest possible scope, sufficient time to conduct a comprehensive and deliberate review, and membership that includes experienced ethics and compliance practitioners, as well as lawyers and scholars who have studied and helped apply the organizational guidelines.

As the Commission notes in its request for comment, the organizational guidelines have had an enormous influence on the development, shape and scope of ethics and compliance programs in many organizations. The impact has been the greatest from those portions of the organizational guidelines which detail the credit organizational defendants can receive for corporate compliance programs, as well as related provisions regarding cooperation with the authorities and voluntary disclosure of wrongdoing. As the Commission also recognizes, the impact of these provisions goes well beyond the

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relatively limited number of organizational sentencing cases that come before the courts each year.

These areas should be a focus of any advisory group review. Now is an appropriate time, 10 years after the organizational guidelines were implemented, to carefully review their application and impact on organizational ethics and compliance programs and make recommendations for improvement. An advisory group is an excellent vehicle for undertaking this review and providing the Commission with the most thoughtful and comprehensive information and recommendations.

At the same time, perhaps in part because of the limited opportunities for the courts to interpret the organizational guidelines, there have been a substantial number of relevant legal and regulatory developments outside of the sentencing context. These include regulatory compliance guidance issued by federal agencies, voluntary disclosure programs, state and federal cases interpreting the compliance responsibilities of corporate boards of directors, False Claims Act cases, corporate integrity agreements and consent decrees. Also relevant are United States Department of Justice standards for the prosecution of organizations, self-audit and source privilege issues and recent United States Supreme Court civil cases in the areas of sexual harassment and punitive damages, as well as other litigation and enforcement activity.

We believe the advisory group should, consistent with the Commission's legal authority, have the ability and opportunity to review these related legal and regulatory developments. This is because these initiatives often interpret, enforce, apply, augment, support or even conflict with the principles, objectives and provisions of the organizational guidelines. In many cases, policymakers have moved beyond the Commission's elements in prescribing what it takes to establish and maintain an "effective" compliance program. In other cases, these efforts may offer helpful suggestions for improvements in the guidelines themselves, especially as regards the compliance program elements. A careful study of them is indispensable to any consideration of the success of the organizational guidelines, as now applied, at meeting the Commission's goal of defining "an effective program to prevent and detect violations of law" [see USSG §8A1.2, comment. (n.3 (k))].

For these and other reasons, we are convinced that an advisory group should be given sufficient time to conduct a careful, thoughtful and extensive review of the broad impact of the organizational guidelines and these related issues. By focusing exclusively on the organizational guidelines and taking the time to study the wide range of complex issues related to their application, the advisory group can best help lay the groundwork for any future efforts by the Commission to promote additional innovation and effectiveness in organizational ethics and compliance programs.

Finally, this advisory group should include ethics and compliance officers and other experts on organizational ethics and compliance, in addition to members of the bar who represent corporations in criminal matters. Ethics and compliance officers can describe

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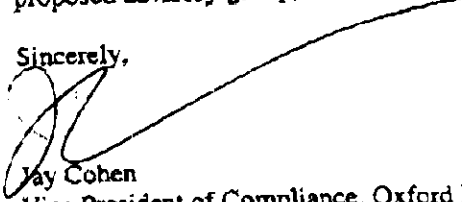
the day-to-day impact in their organizations of the organizational guidelines and, especially, the practical value and application of the guidelines' elements of an effective compliance program. They can address the strengths and any weaknesses of the organizational guidelines as both written and applied. These experts can also detail the impact (both positive and negative) of the other legal and regulatory developments discussed above on the ability of their organizations to meet the standards of corporate "good citizenship" contemplated by the Commission.

CECI would welcome the challenge of participating in this advisory group process. Members of CECI's Oversight Committee and its sponsors include compliance, ethics and ombuds professionals from a wide variety of companies and industries; corporations and professional organizations with vast experience at evaluating and applying the organizational guidelines; scholars in the field of business ethics and corporate compliance who have studied the effectiveness of the guidelines and specific provisions of them; legal experts and counsel who have helped organizations effectively implement compliance programs; and representatives of the Ethics Resource Center, the Ethics Resource Center's Fellows Program and the Ethics Officer Association. As you know, the Ethics Officer Association and the Sentencing Commission have conducted regional symposiums on the organizational guidelines. In addition, the Ethics Resource Center's Fellows Program has recently initiated an effort to bring researchers and practitioners together to study the impact of the organizational guidelines and offer recommendations for future initiatives, including possible changes to the guidelines.

The mission, objectives and membership of CECI, and our ability to assist the Commission, are explained in more detail in the May 30<sup>th</sup> letter (which is attached). The individuals and organizations within CECI bring diverse perspectives and a wide range of invaluable experiences, from organizations of varying size, industries, cultures, and complexity, to any consideration of the operation and impact of the organizational guidelines.

Thank you on behalf of CECI for the Commission's consideration of an advisory group to review the organizational guidelines. We firmly believe that an in-depth review of the organizational guidelines and related law and policy developments would best serve to advance the Commission's objectives. CECI and its members have a great interest in the proposed advisory group, and we stand ready to contribute to it.

Sincerely,



Jay Cohen  
Vice President of Compliance, Oxford Health Plans  
Chair, Oversight Committee  
Coalition for Ethics and Compliance Initiatives  
Tel. (203) 459-7773