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May 20, 2002

Todd Jones, Chairman
Advisory Group on Organizational Guidelines
c/o Office of Public Affairs
United States Sentencing Commission
Suite 2-500 South Lobby
One Columbus Circle, N.E.
Washington, D.C. 20002

Re: Comments on Issues To Be Considered by Advisory Group on Organizational Guidelines

Dear Mr. Jones:

By notice dated March 19, 2002, posted on the U.S. Sentencing Commission's website, the recently convened Advisory Group on Organizational Guidelines (Advisory Group) requested public comment "on the nature and scope of issues which the Advisory Group might wish to address during its (18) eighteen-month term." In particular, the Advisory Group is focusing its inquiry on the "application of the criteria for an effective compliance program, as listed in Application Note 3(k) to Section 8A1.2 of the Sentencing Guidelines." The Commission's criteria for an effective compliance program is aimed at reducing the culpability score of the convicted organization, which, in turn, reduces the fine that may be imposed on the organization.

The Washington Legal Foundation (WLF) hereby submits the following preliminary comments in response to that request, and urges the Advisory Group to solicit further public comment during its tenure, particularly upon the submission to the Commission of the Advisory Group's interim report, so that more focused and informed comments can be made. In addition, WLF urges the Advisory Group to conduct its meetings and those of any of its subcommittees in the open as much as possible, rather than behind closed doors, in order to achieve transparency in its operations, and to conduct its business as do hundreds of other government advisory groups and committees.

**Interests of WLF**

WLF is a national non-profit public interest law and policy center based in Washington, D.C., with supporters nationwide. WLF has a longstanding interest in the work of the Sentencing Commission and the appropriate sentences that should be established for various categories of offenses.

Since the Commission's formation over 15 years ago, WLF has submitted written comments and has testified before the Commission on several occasions regarding various substantive issues. WLF has supported strict sentences for certain violent *malum in se* crimes, and more lenient sentences for others, particularly *malum prohibitum* violations, such as environmental regulatory infractions, where the underlying conduct is subject to myriad and often confusing rules and regulations which would be better remedied by administrative and civil enforcement rather than the heavy hand of criminal prosecution. As the former Assistant Administrator for the EPA Office of Solid Waste even concluded, the Nation's hazardous waste laws are a "regulatory cuckoo land of definition" and beyond the grasp of all but a handful of career bureaucrats working for EPA. *United States v. White*, 766 F. Supp. 873, 882 (E.D. Wash. 1991).

WLF has also litigated cases raising corporate criminal liability issues, particularly the growing and disturbing trend by the Justice Department to prosecute corporate employees and officers under the so-called "responsible corporate officer" doctrine that impermissibly allows the *mens rea* requirement to be diluted or ignored altogether. *See Hansen v. United States*, 70 U.S.L.W. 3497 (U.S. Jan. 24, 2002) (No. 01-1104); *United States v. Weitzenhoff*, 35 F.3d 1275 (9th Cir. 1993), *cert. denied,* 513 U.S. 1128 (1995); *United States v. Ahmad*, 101 F.3d 386 (5th Cir. 1996); *United States v. Hanousek*, 176 F.3d 1116 (9th Cir. 1999), *cert. denied*, 528 U.S. 1102 (2000). WLF has also argued in court briefs and in communications to the Commission that prison sentences mandated by the guidelines for environmental offenses are draconian, arbitrary, and the result of double-counting offense characteristics.

WLF has also urged the Commission and its advisory committees to operate in a transparent manner when formulating Commission policy and guidelines with respect to corporate environmental offenses, and has taken the Commission to court for failing to do so. *See Washington Legal Foundation v. U.S. Sentencing Comm'n*, 17 F.3d 1446 (D.C. Cir. 1993); *Washington Legal Foundation v. U.S. Sentencing Comm'n*, 89 F.3d 897 (D.C. Cir. 1996).

In addition, WLF's Legal Studies Division has published numerous studies, reports, and analyses on corporate criminal liability and related issues. *See, e.g.*, Joe D. Whitley, *et al.*, *The Case For Reevaluating DOJ Policies On Prosecuting White Collar Crime* (WLF Working Paper, May 2002); George J. Terwilliger, III, *Corporate Criminal Liability: A Handbook For Protection Against Statutory Violations* (WLF Monograph, 1998); William C. Hendricks, III and J. Sedwick Sollers, III, *Corporate Vicarious Criminal Liability* (WLF Contemporary Legal Note, April 1993); Alan Yuspeh, *Developing Compliance Programs Under The U.S. Corporate Sentencing Guidelines* (WLF Contemporary Legal Note, July 1992); Irvin B. Nathan and Arthur N. Levine, *Understanding And Complying With The U.S. Corporate Sentencing Guidelines* (Contemporary Legal Note, May 1992); Joseph R. Creighton, *New Corporate Sentencing Guidelines Are Vulnerable To Constitutional And Statutory Non-Compliance Challenges* (WLF Legal Backgrounder, March 6, 1992).

**WLF Comments**

1. First and foremost, WLF urges the Advisory Group to conduct its activities as much as possible in the open. Such open meetings, and the public availability of documents and research received and developed by the Advisory Group, will be conducive to "foster[ing] a dialogue on the organizational guidelines" which the Sentencing Commission indicated was one of the primary objectives of establishing the Advisory Group in its September 19, 2001 announcement. On the other hand, secrecy breeds suspicion and undermines the integrity of the work product of the Advisory Group.

To be sure, the D.C. Circuit has determined that the Commission and its advisory committees are not subject to various open government laws such as the Federal Advisory Committee Act, on the grounds that while the Commission is not a "court of the United States," it is within the judicial branch and can take advantage of the "court" exemption to the definition of "agency" under the Administrative Procedure Act. *See Washington Legal Foundation v. U.S. Sentencing Comm'n*, 17 F.3d 1446 (D.C. Cir. 1993). Nevertheless, while the Advisory Group may not be legally required to conduct its activities in the open, the Advisory Group should exercise its discretion to open its proceedings and deliberations to the public as a matter of sound public policy and the public interest, or at a minimum, make publicly available its research, data, and other work product.

2. Unfortunately, the Commission passed up a great opportunity to have the Advisory Group consider organizational guidelines in the context of environmental offenses. Criminal enforcement of environmental laws of both individuals and corporations have been growing over the years, and raise serious issues both respect to penalties for corporations, as well as those imposed on individuals in the form of lengthy and unwarranted prison terms under Sections 2Q1.2 and 2Q1.3 of the guidelines. To the extent that the Commission or the Advisory Group can reconsider this decision, we urge it to do so. Alternatively, we urge the Commission to establish another Advisory Group to specifically address the environmental guidelines. At a minimum, this Advisory Group can and should examine corporate compliance programs of those companies subject to environmental laws to determine their effectiveness in relation to the general organizational guidelines.

3. WLF urges the Advisory Group and Commission staff that may be assigned to work with the Group to conduct extensive empirical research to determine the effectiveness of the corporate compliance provisions. The general wisdom is that the Commission's corporate compliance provisions have had a substantial impact on the way that companies conduct self-audits, self-report, encourage whistle-blowers, and the like.

However, there seems to be fundamental disconnect between what the Commission regards as an effective compliance program under Application Note 3(k) to Section 8A1.2 of the Sentencing Guidelines, and what is meant by the term "effective." In other words, if the compliance program is so "effective," it should not have resulted in a criminal violation and conviction in the first place. Rather, the "effective" compliance program is simply regarded

as a bureaucratic model for reducing, but not eliminating, fines that may be imposed on the convicted organization. The primary question, then, is whether corporate compliance programs as outlined in the guidelines change behavior and reduce the incidence of violations. As observed by some expert commentators in this area:

> Aside from the advertised changes to penalty levels and structure, the main feature of the 1991 guidelines was the emphasis on corporate "compliance programs"--essentially, a formalized corporate bureaucracy devoted to legal compliance. Under the 1991 provisions, such a compliance program was mandated by the probation guidelines for convicted corporations and, if in existence at the time of the offense and found satisfactory at sentencing, could reduce the fine imposed on the corporation. Under these circumstances, we may expect to see some change in the incidence of compliance programs in the postguidelines regime. Regrettably, the available data are too few and ambiguous to draw even tentative conclusions. However, the raw data do suggest possible lines of inquiry for further research.

Jeffrey S. Parker & Raymond A. Atkins, *Did the Corporate Criminal Sentencing Guidelines Matter? Some Preliminary Empirical Observations*, 42 J. Law & Econ. 423, 443 (Apr. 1999) (hereinafter Parker & Atkins). We urge the Advisory Group to consider the suggestions made by Parker & Atkins in their study.

In that regard, this Advisory Group should review as many corporate compliance programs that it can during its tenure and to interview as many corporate counsel and officers on this subject to determine what works and what does not. While the Commission apparently picked members of this Advisory Group to represent the various stakeholders in this process, both from the prosecution and defense sides, WLF believes that the corporate interests are not fully represented. Remarkably, there appears to be no in-house corporate representative at all, either from the company's legal department or corporate officer level. What may work for a large company, may be unworkable for a small one, and vice-versa.

To be sure, the Advisory Group includes some white collar defense attorneys and representatives of compliance and ethics organizations; but they represent interests that may have a stake in promoting bureaucratic compliance programs rather than streamlining them, and the more complicated the better, in order to perpetuate a market for their services to their clients. As Parker & Atkins noted in a related context,

> One of the continuing debates about criminal punishment concerns the extent to which the precise determination of penalties within the criminal sentencing process effectively serves any utilitarian goal of public law enforcement or is merely political theater. Even if we grant the point that some criminal sanction is more useful than none, there remain the questions of whether and when it is worthwhile at the margin to devote resources to refinements in the formal criminal penalty determination system, except perhaps as required to preserve marginal deterrence.

Parker & Atkins at 424.

With respect to the need for the Advisory Group and Commission to obtain reliable data and to open up its processes to the public, WLF believes that Parker & Atkins said it best when they admonished the Commission on this issue as follows:

> As is suggested by our speculative observations regarding compliance programs, better data from the criminal sentencing system may permit more useful inferences about the advisability of such things as mandated compliance programs and the like without necessarily taking on the far more daunting prospect of seeking to evaluate the optimality of the overall public law enforcement system.
>
> As this example also indicates, the use of the criminal sentencing system to gain a perspective on the law enforcement system requires at the very least consistent and reliable data, which the Sentencing Commission so far seems unable (or unwilling) to release. Regrettably, the most immediate policy implication of our work on this subject is that the Sentencing Commission is not doing a very good job of compiling and releasing usable data. The commission needs to do a better job if it is to be faithful to the congressional directives that the commission base its sentencing policies on "advancement in knowledge of human behavior as it relates to the criminal justice process" and that the commission "develop means of measuring the degree to which the sentencing, penal, and correctional practices are effective," which together comprise two of the four enumerated purposes for which the Sentencing Commission was created by Congress. The commission cannot carry out either of those mandates behind closed doors and without the assistance of independent outside researchers if the operative intent is to make the commission accountable for these functions.

Parker & Atkins at 447.

4. While there are many aspects of the corporate compliance provisions that can be explored, WLF encourages the Advisory Group to consider the effectiveness of corporate compliance programs in the context of both a strict liability system and in the context of a negligence system. These are two different systems in the criminal law which corporations are subject to, and the one-size-fits-all corporate compliance approach may likely produce different results in these different contexts.

## Conclusion

As noted, these comments are only preliminary in nature because the Advisory Group has yet to establish the specific topics of inquiry that it wishes to study. WLF would like the opportunity to provide further assistance and input as the Advisory Group undertakes its review of the organizational guidelines. Accordingly, the Advisory Group should publish the specific topical areas which it intends to research and address, and to invite further public comment and hold public hearings on those topics as warranted.