

PUBLIC HEARING HELD BY THE AD HOC ADVISORY GROUP  
ON ORGANIZATIONAL SENTENCING GUIDELINES

BREAKOUT SESSION II

ADMINISTRATION AND IMPLEMENTATION

NOVEMBER 14, 2002

1:33 p.m. to 4:03 p.m.

Held at:

Thurgood Marshall Building

One Columbus Circle, NE

Judicial Conference Center

Washington, D.C. 20002



1                   B-R-E-A-K-O-U-T   S-E-S-S-I-O-N

2                   MR. WALLANCE:   Good afternoon and  
3 welcome to Panel 2, Administration and  
4 Implementation.

5                   We have, I think, an exceptionally  
6 large and exceptionally qualified panel to  
7 address a number of important issues.

8                   For purposes of format, we're going to  
9 give each of the panelists an opportunity, for a  
10 couple of minutes, to express their thoughts on  
11 not just the specific issues which we'll be  
12 dealing with, which I will summarize in a moment,  
13 but really anything else you would like to talk  
14 about in terms of today's proceeding.

15                   After we complete that, we're going to  
16 move on to each of the six questions that we  
17 really have to take up and this is very much a  
18 working session. The Ad Hoc committee formulated  
19 the questions that are generally phrased in terms  
20 of the yes and no answer, things aren't that  
21 simple, but what we hope to achieve today is to

1 answer those questions -- there may be several  
2 answers -- and identify the pros and cons of each  
3 of the answers. And I think that would be of  
4 great value to the Ad Hoc Committee.

5           Just to summarize those questions just  
6 by topic, Internal Communications of Standards  
7 and Procedures, should there be changes?  
8 Encouraging an internal reporting system where  
9 employees are free of retribution, do the  
10 guidelines need changes? Should there be greater  
11 emphasis on auditing and monitoring? Should  
12 there be credit for emphasis on consistent  
13 discipline; that is, should the guidelines have  
14 as a component of an effective compliance program  
15 the evaluation of an employee's performance; that  
16 is, how well the employee fulfills the compliance  
17 objectives set by the company.

18           Should there be an increase in  
19 culpability score if the organization does not  
20 have a compliance program?

21           Carole, you're down in the front. And

1 how can the guidelines encourage self-reporting  
2 given the reality that self-reporting can often  
3 lead to waiver of privilege and therefore third  
4 party claims and litigation. Some of it was  
5 touched on this morning.

6 Those are the topics. I'm going to  
7 briefly introduce the panelists starting from the  
8 first tier, the lower tier, if you will.

9 Gale Andrews, vice president for  
10 Ethics and Business Conduct for the Boeing  
11 Company.

12 Scott Avelino, KPMG here in  
13 Washington.

14 Carole Basri, executive director of  
15 the American Corporate Counsel Association of  
16 Greater New York.

17 Nancy Higgins, vice president, Ethics  
18 and Business Conduct for Lockheed Martin.

19 And going to the top, Professor Donald  
20 Langevoort from Georgetown University School of  
21 Law.

1                   Barbara, Bobby, Kipp from  
2 PricewaterhouseCoopers.

3                   Eric Pressler, the director of Legal  
4 Compliance and Business Ethics for PG&E Corp.

5                   Debra Yang, United States Attorney,  
6 Central District of California.

7                   Scott Gilbert, Counsel for Litigation  
8 and Legal Policy, General Electric.

9                   And to my very left, my colleagues on  
10 the Ad Hoc committee: Lisa Kuca, Richard Bednar,  
11 myself, Richard Gruner and Paul Fiorelli.

12                   So with that we'll start with the  
13 lower right, Nancy Higgins, and work our way left  
14 and then go to the second tier.

15                   Nancy, the floor is yours -- oh, I've  
16 been asked to remind you to -- it won't count so  
17 much in this part, but when we get into the  
18 interactive part to try to avoid cutting each  
19 other off so we have -- I know that's a natural  
20 part of interactive session, but to try to  
21 remember we're trying to get down a clear

1 transcription so it can be described for the  
2 public record.

3 Nancy, the floor is yours.

4 MS. HIGGINS: Thank you. I really  
5 appreciate the opportunity to participate in this  
6 today and share my perspective, which comes from  
7 being involved in the development and  
8 implementation of corporate ethics and compliance  
9 programs, both are for original signatory for the  
10 defense in this technique [inaudible] ethics so  
11 they were familiar with ethics programs and  
12 compliance programs before the guidelines were  
13 pulled. But all the same benefits from the  
14 guidelines and -- [inaudible] to take a look at  
15 the programs and improve them.

16 In fact, I think the greatest benefit  
17 to the guidelines comes from that language in  
18 §8A1.2 Comment (k)(7)(I). It requires that  
19 management have taken steps to prevent specific  
20 types of offenses for which there is a  
21 substantial risk because of the nature of that

1 company's business.

2           As a result of that provision,  
3 companies all across the country did undertake a  
4 comprehensive assessment of the risk areas for  
5 their companies and a systematic review of the  
6 policies and procedures, the training and the  
7 monitoring mechanisms in place to ensure  
8 compliance in each of those special risk areas.

9           For many companies what started out as  
10 a law department driven effort to ensure  
11 compliance with the sentencing guidelines was  
12 radically changed into a management-driven  
13 process aimed not only at reducing the risk of  
14 federal criminal offenses but reducing the risk  
15 of other numerous areas as well.

16           I have a very clear recollection of  
17 one executive telling me after a briefing that  
18 he's going to sleep better at night now that he  
19 knew that someone had assessed all these  
20 instruments and that he had programs in place to  
21 address them.



1                   He then instructed me to expand the  
2 effort to address similar risk areas as well. So  
3 companies really have benefitted from the  
4 guidelines.

5                   With this background, I'd like to  
6 offer two specific recommendations and save my  
7 thoughts for a round discussion of specific  
8 questions.

9                   Again, I ditto the disclaimer that  
10 others have made, my views are my own and don't  
11 represent any official position of Lockheed  
12 Martin Corporation.

13                   First, I'd like to express my  
14 agreement with one of the comments made this  
15 morning by Alan Yuspeh. He recommended that the  
16 Commission mandate that business organizations of  
17 a certain size should have an officer level  
18 position or an ethics and compliance officer that  
19 is comparable in stature to other major  
20 functional organizations such as the general  
21 counsel, the CFO or the head of HR.

1                   I used to believe that as long as  
2 senior management was generally committed to the  
3 company's ethics and business conduct overall  
4 then the title and further inspection of the  
5 ethics officer wasn't all that important.

6                   But since joining Lockheed Martin my  
7 opinion has changed. My effectiveness as an  
8 ethics officer and the success of the Lockheed  
9 Martin ethics and business program is in large  
10 part due to the fact that my position was created  
11 as part of senior management.

12                   I am an invested officer of the  
13 corporation according to the CEO and the COO as  
14 well as to the auditing ethics committee and  
15 board of directors. That position gives me the  
16 opportunity for frequent interaction and  
17 influence with company senior management in a  
18 manner that is simply not possible for those at a  
19 lower level in the organization.

20                   Adoption, a balance recommendation [inaudible]  
21 to use his words, for an upgrade dramatically the

1 level of attention to compliance and sound  
2 business conduct in the large corporations in  
3 this country.

4           Second, I'd like to express my  
5 agreement with the -- frequent testimony of the  
6 Ethics Officers Association. Particularly I  
7 agree with its recommendation to add a note to  
8 comment "K", that would state a requirement for  
9 organizations to have communicative conduct  
10 expectations and organizational values.

11           Put simply, compliance programs are  
12 more effective when they are accompanied by a  
13 clear statement of corporate commitment to a  
14 culture of ethical business conduct.

15           I support the language proposed in the  
16 UAW. Most particularly I would ask that any  
17 ethical cultural language that the Commission  
18 should adopt be a statement of general principles  
19 rather than have specific code content  
20 requirements.

21           In other words, the language should be

1 point of focus rather than perspective.

2 I say this not only for philosophical  
3 reasons because I think that about all of the  
4 parts in the sentencing situation, but for very  
5 practical reasons from the perspective of those  
6 of us who may well be required to implement  
7 changes in our programs based on the Commission's  
8 actions.

9 Most companies are right now in the  
10 process of examining and revising the existing  
11 codes of conduct that are obsolete in the SEC  
12 proposed rules.

13 If the revised guidelines contain  
14 requirements for specific code provisions,  
15 companies that have just revised their codes may  
16 well have to do so again next year in order to  
17 ensure that their codes include the language that  
18 our lawyers will tell us are necessary to assure  
19 compliance for the requirements of the sentencing  
20 guidelines.

21 For Lockheed Martin, which just

1 revised its code last year, found a three  
2 [inaudible] in as many years and generally found  
3 it uncomfortable for all three years. It is  
4 unlikely that any changes that are there, of  
5 course, will need to be publicly exposed. The  
6 SEC rules would really add value to existing  
7 codes of conduct or enhance the effectiveness of  
8 compliance programs.

9           So for that reason I would ask that if  
10 the Commission does decide it has specific code  
11 violation requirements to ensure that it uses  
12 language that is comparable to the code of  
13 conduct requirements in the SEC rules.

14           MR. WALLANCE: Thank you, very much.

15           MS. BASRI: Is it possible to have  
16 someone get back to me?

17           MR. WALLANCE: Sure. Absolutely.

18           Scott Avelino.

19           MR. AVELINO: I would like to thank  
20 the Commission for inviting me here today.  
21 Having worked with some of the organizations

1 across diverse sectors, I'm implementing and  
2 evaluating a compliance program for a sentencing  
3 guidelines framework. It's particularly  
4 gratifying for [inaudible] based on my  
5 experience in that a committee organization  
6 will carry forth.

7           In the interest of speaking favorably  
8 on issues of public policy I will be expressing  
9 my personal views this afternoon which do not  
10 require any particular position of KPMG or its  
11 international member firms.

12           In preparing my today, I spent some  
13 time reading advanced written comments submitted  
14 to the Commission as part of the public comment  
15 period. It was, if I may say, a largely  
16 gratifying experience. I regard those of us who  
17 worked every day in the trenches to advance the  
18 notion of what we call [inaudible],  
19 so maybe I shouldn't have been surprised  
20 when I found myself rooting for and applauding  
21 so many comments which I won't hardly play

1 verdict.

2           Overall, I think we're all saying the  
3 same things. First, the sentencing guidelines  
4 are good. They provide common, practical and  
5 fluid framework which many organizations can  
6 fashion their own approaches for responsible self  
7 governance.

8           Second, the guidelines should not be  
9 overly descriptive in the process although there  
10 are a few processes that could use some  
11 fine-tuning.

12           Finally, at the end of the day, the  
13 guidelines should focus on effective results and  
14 should set more explicit obligations for  
15 organizations to be the same.

16           Indeed, the time has come for  
17 organizations to go beyond designing and  
18 implementing programs like forward management in  
19 force should have a basis for knowing and should  
20 be able to persuasively demonstrate that their  
21 programs are effective.

1                   I was discouraged to see a variety of  
2 comments that seemed to downplay the need to  
3 revisit the guidelines. The comments that went  
4 along the lines of, "If it ain't broke, don't fix  
5 it." I would argue that trust in the American  
6 institutions today is broken and governments do  
7 provide an important remedy to fix this.

8                   To do so, they must be strengthened,  
9 adapted and improved based on the experience in  
10 both the public and private sectors since their  
11 adoption over ten years ago.

12                   Some cited a lack of empirical  
13 evidence that supports [inaudible].  
14 So I'll take this opportunity to share some of  
15 argument.

16                   In the year 2000, KPMG released the  
17 results of its national benchmarking study on  
18 organizational integrity. It was based on a  
19 survey we conducted with their assistance of  
20 well-regarded research and opinion firms on a  
21 statistically grounded cross sample less than



1 2400 working adults across 17 different  
2 industries, 14 job categories 5 levels of  
3 responsibility and via thresholds of  
4 organizational size.

5           By sharing the arguments with you I  
6 think you'll gain an understanding of where I  
7 come from, the exhibit test that came from the  
8 Commission is an important one.

9           So here's where we were in the year  
10 2000, almost ten years after the guidelines have  
11 come into effect. Seventy-six percent of  
12 employees nationally had observed violations of  
13 the law of their company's standards in the past  
14 12 months. Roughly 50 percent of those employees  
15 said that what they observed did cause a  
16 significant loss of public trust in its  
17 discovery.

18           The types of offenses they witnessed  
19 included falsifying financial data, deceptive  
20 sales practices, conflicts of interest,  
21 anti-competitive trade practices, insider

1 trading, environmental issues, unsafe working  
2 conditions, employment discrimination, sexual  
3 harassment and misleading the public or media.

4           The leading root causes of misconduct  
5 cited were cynicism and distrust about senior  
6 management's commitment to manage standards of  
7 business conduct, pressure in numbers, pressure  
8 to cut corners to meet goals and lack of adequate  
9 training.

10           Fifty-seven percent of employees  
11 nationally lacked confidence that top management  
12 knew what type of behavior really went on inside  
13 the company.

14           Fifty-five percent lacked the  
15 confidence that top management would be  
16 approachable if employees had questions, concerns  
17 or needed to deliver bad news.

18           Only 40 percent of employees expressed  
19 a strong level of comfort in using the  
20 organization's hotlines to report violations and  
21 the response series couldn't tell us why.

1           If they reported misconduct, 40  
2 percent lacked confidence that any appropriate  
3 action would be taken, approximately 40 percent  
4 lacked confidence in the confidentiality of the  
5 interview and around 50 percent lacked confidence  
6 they would be protected against retaliation, and  
7 just over 60 percent lacked confidence that  
8 discipline would be applied evenly or fairly.

9           We've offered up the findings of this  
10 study to add to the important public discourse  
11 that takes place on these issues.

12           I will say that we've also offered up  
13 this survey and its benchmarking data as a tool  
14 that organizations can use to help evaluate the  
15 effectiveness of their own ethics and compliance  
16 issues.

17           I will say that relatively few  
18 companies have stepped up to the plate. Why?  
19 Behind the scenes, I can say that the common  
20 reaction is, why would we? Or, why would we  
21 really want to know?

1                   I don't think anyone objects to closed  
2     conduct training hotlines and the like. But to  
3     collect the information back on how well it's  
4     working, I think the middle-of-the-road view  
5     today is "get it."

6                   And with that I will conclude my  
7     remarks by saying thank you again for inviting  
8     me, I look forward to being on your guideline.

9                   MR. WALLANCE: Thank you, Scott. You  
10    may want to come back to some of the findings in  
11    that survey as we go through the guidelines.

12                  Gale Andrews.

13                  MR. ANDREWS: Yes. Again, I'd like to  
14    thank you for the opportunity to be here today to  
15    speak to you on this really important topic. The  
16    guidelines have been a major component of what  
17    has formed a lot of ethics programs and  
18    compliance programs around. And I think it's  
19    very important we're here and I applaud your  
20    efforts.

21                  I'm not going to read my prepared

1 statement because I think you've all been able to  
2 read that. But I do have some comments that I'd  
3 like to make and some of those are based on what,  
4 in fact, I've witnessed this morning, had the  
5 opportunity to see the earlier sessions.

6 In general, I would echo what I heard  
7 this morning. The guidelines are basically  
8 sound. The guidelines provide what is needed at  
9 the level that is needed, and I would add my  
10 voice to those who say we don't want to get more  
11 prescriptive. As my writing indicates, it needs  
12 to be adaptable and it needs to be flexible to  
13 accompany the variety of companies and markets  
14 and customers who are I think today, does that so  
15 I encourage that.

16 I would also note that in my education  
17 this morning as I watched the proceedings,  
18 there's another set of stakeholders that I had  
19 actually considered when I was preparing my  
20 writing which was the legal profession that was  
21 here this morning speaking to us, and I began to

1 see immediately this kind of interesting  
2 dichotomy and approach toward what was needed,  
3 what was [inaudible] and what the decided outcome was.

4           Speaking as an ethics professional,  
5 somebody who has had the daily job to  
6 administer an ethics program in a major  
7 corporation, I had a certain set of desires from  
8 the guidelines to help me in my task, to help me  
9 work the cultural issues which were exposed this  
10 morning, I think, to some degree. Yet as I saw  
11 the legal community speak, they were clearly  
12 looking more for rules of engagement and what to  
13 do after the fact, how do you manage the  
14 breakdown once it's occurred?

15           I think you all have a very difficult  
16 task in front of you to administer to two groups  
17 and find some compromise. But I do have some  
18 ideas along those lines.

19           I think what you need to do, and what  
20 I would encourage you to do, is think in terms of  
21 the best possible outcome.

1                   If, in fact, the guidelines do what we  
2 would like them to do or what I think the ethics  
3 community would like them to do, would, in fact,  
4 generate an environment where people would not be  
5 getting in trouble because their programs were,  
6 in fact, effective. Were they that capable of  
7 changing behavior.

8                   And so I would encourage you to look  
9 at materials we present and make your changes in  
10 terms of what effect will this have on behavior  
11 and we use these guidelines to change what is,  
12 not to adjudicate what was.

13                   I think that's an important step and I  
14 encourage you to keep that focus as you go  
15 forward.

16                   I'll save the rest of my comments on  
17 the specific questions as we go through that  
18 section. Thank you, very much for the  
19 opportunity.

20                   MR. WALLANCE: Thank you, Gale.

21                   Scott Gilbert.

1                   MR. GILBERT: Thank you for having me  
2 here today to join in on the discussion of this  
3 important task.

4                   I come to the discussion from  
5 experience as a federal prosecutor and ten years  
6 of working we have had to be able, in terms of  
7 trying to prevent violations of law and  
8 investigate them when we suspected something  
9 there was wrong. Disclaimer I have just, really,  
10 three broad points to make at the onset and then  
11 go forward to discussion on specific points.

12                   One, I would underscore and join with  
13 others in making a point that I think that the  
14 current set of guidelines or what defines an  
15 effective program are very good. They  
16 establish -- they strike the right balance  
17 between generality and specificity. Too much  
18 more detail as some of the proposals would  
19 envision, I think that we have enough.

20                   Secondly, I think we do have to  
21 remember that we're at a moment when there are



1 many different regulators and bodies that are  
2 considering the forms, both the corporate  
3 governments and the substantive elements of the  
4 compliance program.

5           In our company, the company is  
6 regulated not only by these general, new federal  
7 requirements, it's new requirements that are  
8 coming out, and also by the substantive  
9 regulators in each of the industries in which we  
10 do business; insurance regulators, banking  
11 authorities, defense regulators, healthcare  
12 regulators. And these are the regulators,  
13 really, who are in the best position to  
14 understand what are the particular risks,  
15 challenges in those particular industries, and  
16 naturally those are the regulators that are most  
17 focused on very specific, prescriptive  
18 requirements.

19           I think that for the Commission to get  
20 into the business of trying to propose its own  
21 detailed requirements, an additional form of

1 regulation would be counterproductive.

2           And there's one, sort of, additional  
3 voice which I hope that we've heard from today  
4 which a global company has to deal with which is  
5 that -- well, in our company, for example, a huge  
6 portion of our population of employees work  
7 outside the United States and are subject to the  
8 regulations of the municipalities, provinces and  
9 the federal governments outside of the United  
10 States found any cultures where the notion of  
11 what is pro-ethical may not be the same.

12           By that I don't mean cultures in which  
13 there may be patterns of bribery or that kind of  
14 behavior. I mean that in some places, for  
15 example, Europe, reporting of potential criminal  
16 behavior may be regarded as unethical in and of  
17 itself.

18           And so I think that not only the too  
19 much detail poses a threat not only of  
20 conflicting with regulatory requirements, but if  
21 the prescriptions are along the ethical nature, I

1 think that brings us into a much more complicated  
2 game, which ought not to be played out in the  
3 context of guidelines regulating the sentence to  
4 be imposed upon corporations by assuming.[inaudible]  
5 I don't think it's the right context without being  
6 completely thorough.

7           The third point I will make is that I  
8 do think that this would be a good opportunity to  
9 address the problem of privilege waiver in the  
10 context of self-disclosure. I -- my ten years or  
11 so of experience is in a private sector, what I  
12 have seen as the most effective partnership by  
13 far, is when government and private sector in  
14 industry work cooperatively toward that end.

15           And I think that one step that should  
16 be addressed is you want to promote  
17 self-disclosure but I think the way to do that is  
18 not in the punitive sense, that is to look for  
19 increased punishment of corporations that have  
20 not self-disclosed in some fixed timberline but to  
21 create incentives and to ease the burdens that

1 are upon companies that are voicing themselves.

2 I encourage the Commission to  
3 consider, as some have proposed, an explicit  
4 acknowledgment that self-disclosure will not  
5 result in a waiver of the attorney/client  
6 privilege and work product protection is  
7 associated with internal investigations.

8 MR. WALLANCE: Thank you, Scott. That  
9 certainly is an issue we'll be coming back to  
10 later.

11 Debra Yang.

12 MS. YANG: Thank you for allowing me  
13 to address you, I'll be very brief. Generally, I  
14 just want to set some guidelines and also find [inaudible]  
15 I just wish the government that -- if you  
16 think -- I'm sorry. It just needs a little bit  
17 of tweaking and perhaps more descriptive language  
18 and maybe some guidance on what the guidelines  
19 and compliance will build up to be.

20 One of the things is that -- is the  
21 perspective that I have is that I have the one

1 from the trenches in the court with the  
2 guidelines in front of us with the judge trying  
3 to determine whether or not somebody is, you  
4 know, entitled to immunity or not or how to  
5 calculate the sentence.

6           Oftentimes when there's a dearth of  
7 information many times the judicial officer who  
8 may not have the wealth of experience that  
9 everybody in this room has -- that guidance is  
10 very helpful as far as ascertaining what it is  
11 the corporation should have done.

12           In particular, the government believes  
13 that the language should be clarified to make  
14 clear that training and other methods of  
15 communication are necessary components to be  
16 effective all around.

17           I think that by doing that what you  
18 would do is rather than have some kind of loose  
19 compliance go around, show that you need to have  
20 the training aspects and then some other way of  
21 reinforcing that.

1                   That, and just to put it in that broad  
2 base terminology, and it would also allow itself  
3 to adjust in a very small corporation. Small as  
4 a phone company, where they do the same thing,  
5 however it translates down as workable and  
6 financially sound for them to do it at that  
7 level.

8                   One of the other things is that we  
9 wanted to suggest the organization -- that  
10 language be added as follows: The organization  
11 must have taken steps to communicate effectively  
12 its standards and procedures to all employees and  
13 other agents. What steps are necessary to  
14 accomplish this must be determined on a  
15 case-by-case basis. At a minimum, however, the  
16 organization should have disseminated  
17 publications that explain in a practical manner  
18 what is required and follow them with training  
19 programs and other forms of communication to  
20 ensure that the need to comply with those  
21 requirements is understood.

1                   What we talked about this morning in  
2     some essence was trying to regain culture --  
3     exchange culture. By doing that, you have to  
4     have the mechanisms within the corporation so  
5     that the individual who comes on board that is  
6     new or whatever, knows exactly what is expected  
7     of them, what the protocol is.

8                   Very similar you have a whole strategy  
9     that involves training employment age and  
10    discrimination on a manager's level. Though they  
11    knew what it was like beforehand, break it down  
12    into practical terms of how you relate to other  
13    employees needless to say, so that it is, sort  
14    of, mapped out for them so that it is not  
15    something that is guess work -- clear  
16    understanding of what it is that they should do.

17                  One of the other means that I  
18    suggested this morning, it also put in a  
19    mechanism to confidentially report to the board  
20    of directors or the board audit committee, where  
21    appropriate, without fear of retaliation. That

1 is important so they have the luxury and comfort  
2 of being able to do that.

3           One of the things is that we recommend  
4 against a blanket rule for organizations of all  
5 sizes requiring an increase in culpability score  
6 for a failure to implement an effective program  
7 to prevent and to detect violations of law.

8           In my jurisdiction in particular we  
9 don't have all huge companies. We have a lot  
10 of small and medium sized companies, we have a  
11 lot of high-tech companies and there is a very  
12 different culture there and one would attempt to  
13 enforce, although working very hard with the  
14 corporations, a compliance program onto  
15 them and say what happens where  
16 [inaudible].

17           I think that one follow-up point that  
18 was raised this morning, we do also support the  
19 notion of the limited waiver with respect to some  
20 federal agents who are involved in the process,  
21 whether it be some DOD as it was stated this



1 morning, some of the other agencies, perhaps some  
2 bankruptcy trustee. I'm not sure exactly how we  
3 would course through that but it certainly seems  
4 to me something that would be very valid in  
5 pursuing.

6                   By no stretch of the imagination does  
7 the government and its criminal prosecutions want  
8 to be involved in assisting in a plaintiff's  
9 bar, a civil case which is something that you  
10 all feel is knocking on the other side of the  
11 door.

12                   I'll save the rest of my comments for  
13 later.

14                   MR. WALLANCE: I think we'll be coming  
15 back to some of your comments.

16                   Eric Pressler.

17                   MR. PRESSLER: I want to start by  
18 thanking you for inviting me to join in on the  
19 discussion.

20                   The organizational guidelines have had  
21 an immense cross-industry impact on the

1 prevention of criminal activity and in the  
2 development in the compliance and ethics programs  
3 in corporations.

4 In general, I would say they have done  
5 a good job at promoting this, although I think  
6 there are certain items that need to be kept in  
7 mind as we move forward in changing the  
8 guidelines.

9 I have four points I wanted to  
10 mention. The first of these is that one of the  
11 greatest strengths of the guidelines is that they  
12 provide a framework for compliance management and  
13 identify key elements of an effective compliance  
14 management program without dictating exactly or  
15 prescriptively how the program must be  
16 implemented.

17 In this way, organizations can tailor  
18 their compliance efforts based on the risks they  
19 face, their corporate culture and the resources  
20 available for compliance management issues.

21

1                   I think this is particularly important  
2     as we look at the questions that we'll be  
3     facing later on, the issue of whether  
4     communication in training should be done more  
5     prescriptively in the guidelines, whether there  
6     should be specific encouragement for a self-evaluative  
7     privilege, and whether we should have  
8     periodic compliance auditing required. Things  
9     like that. I think we need to look at this from  
10    the perspective of being non-prescriptive and  
11    not changing the character of the guidelines.

12                   The second point I wanted to make has  
13    to do with corporate conduct standards. I  
14    believe corporate conduct standards matter. They  
15    have a significant impact on organizations by  
16    creating a culture that is supportive of full  
17    compliance and they are key in developing an  
18    effective compliance management program. My  
19    view is that organizations should foster a compliant,  
20    culture and that the organizational  
21    guidelines should promote organizations to

1 do that.

2           The third point, I'm not sure if I  
3 would call this the need for clear incentives or  
4 the need for a self-evaluative privilege.

5           But basically, the implementation  
6 of compliance program that follows the  
7 requirements of the organizational guidelines for  
8 monitoring, auditing and self-reporting could  
9 result in an organization identifying and  
10 disclosing information that could be used against  
11 it in a lawsuit.

12           This is a significant  
13 dis-incentive to organizations that are  
14 considering implementing this type of program.

15           In the absence of an effective  
16 privilege, waiver or guarantee of reduced  
17 penalties, organizations may be reluctant to  
18 fully implement a guidelines type of program.

19           The fourth item, as the Advisory Group  
20 considers recommendations for changes in  
21 guidelines, I would hope that the Advisory Group

1 looks at some of the other guidance being given  
2 to organizations, (e.g. guidance from Sarbanes,  
3 guidance from the New York Stock Exchange and  
4 others) so that there's a consistent and clear  
5 message to organizations.

6 I know right now we're looking at  
7 Sarbanes and we're looking at the stock exchange.

8 One requires such and such for a  
9 code of conduct, this one requires a code of  
10 ethics. I think as we move forward with the  
11 sentencing guidelines, perhaps, we should address  
12 some of the issues that are in the stock exchange  
13 material and Sarbanes and make a significant  
14 effort to make this consistent so organizations  
15 can give consistent advice.

16 Those are my four points. Thank you.

17 MR. WALLANCE: Bobby Kipp.

18 MS. KIPP: Thank you, as everyone else  
19 has said, it's nice to be here. My name is Bobby  
20 Kipp. I am a partner at PricewaterhouseCoopers  
21 and I am PricewaterhouseCoopers' ethics officer

1 internally. I'm in an internal role for  
2 PricewaterhouseCoopers that I've been in since  
3 the beginning of our program which was the end of  
4 1996, so we've been at this for a while. This  
5 isn't something that has come up as a result of  
6 the current environment.

7 My background is as a CPA and I only  
8 mention that from the standpoint of understanding  
9 an environment where there are lots of rules.  
10 I'll talk to that in a second.

11 I also serve on the board of the  
12 Ethics Officer Association as well as the board  
13 of the Ethics Resource Center. I think that all  
14 of these organizations, in addition to the  
15 sentencing guidelines, have done a lot to  
16 advance the ethical culture in business,  
17 particularly in the United States.

18 I'm going to take the  
19 approach that Gale took, which is to not go into  
20 the very specifics of the questions you'd like me  
21 to comment on. I did submit written comments and

1 I hope when we get to the discussion we'll get to  
2 those. But just make a couple of general  
3 comments.

4           As some people have reflected  
5 on here this morning, I think we have to keep  
6 in mind and hopefully you keep in mind, that your  
7 goal is hopefully broader than the notion of  
8 preventing and protecting criminal conduct, but  
9 looking at building ethical cultures and  
10 sustaining ethical cultures. I think we've  
11 heard a lot of people make comments  
12 that reflect on that being a goal that, perhaps,  
13 can be achieved in addition to the goal of legal  
14 compliance.

15           And I think, as others have said, that  
16 the guidelines have done a lot of good in terms  
17 of creating incentives and a structured framework  
18 for these kinds of compliance programs.

19           This, I think, matters when we look at  
20 the Ethics Officer Association, for example. When  
21 we look at some of their membership data,

1 something like 40 percent of the members have  
2 said that their primary incentive for creating  
3 their programs was the guidelines. So I think  
4 the work we're doing really matters. So that's a  
5 good thing.

6 I think the flip side of that says  
7 that, to many companies, the notion of being  
8 sentenced under the guidelines, that's, sort of,  
9 at the end of the game rather than the  
10 ultimate goal. And so I think the guidelines are  
11 there but for many of us aren't necessarily  
12 driving our day-to-day goal. Our goal is to keep  
13 a standard of business conduct that will protect the  
14 corporate reputation. We get to a point in sentencing  
15 which has all of those problems in spades.

16 I should mention that we are a private  
17 company, so we're not subject to Sarbanes for  
18 example, yet we have more of the characteristics  
19 of public companies than I think many other  
20 private companies do because of our size.

21 A couple of overall positions. I



1 think given the notion of the whole culture being  
2 important, I think we would echo others that do  
3 not go in the direction of prescription.  
4 I think that the reaction could be, well, that's  
5 a self-serving position for an ethics officer to  
6 have, that is, I don't want to have a whole  
7 bunch of rules.

8           And I think people will reflect on the  
9 reasons for that, and I absolutely ascribe to  
10 most of those, or all of those, in terms of the  
11 need to tailor activities of individual  
12 organizations to the risks and  
13 size of those organizations  
14 and also to allow the creativity in new solutions  
15 with regard to prescriptions about forms of  
16 training. Ten years ago we might never have  
17 thought about things like CD-ROMs or web training  
18 and things like that.

19           I think you have to allow for  
20 creativity and have to go forward to allow for many  
21 possibilities.

1                   I also see there is an interesting  
2 reflection in the accounting industry which has  
3 evolved over the past 30 or 40 years to set  
4 very detailed rules, and is now moving in the  
5 direction of accounting principles rather than detailed  
6 accounting rules because there's recognition that you  
7 can't define the rule or a specific answer to  
8 every possible situation. What you really need  
9 to do is to cause people to think in terms of  
10 principles and make decisions in terms of  
11 principles.

12                   So I think the same thing can apply as  
13 it relates to accounting systems.

14                   I think, in general, the guidelines  
15 provide the right framework, as I said before. I  
16 think there's probably a couple of places where a  
17 little bit more tweaking or refinement would be  
18 helpful. The notion of mentioning both training  
19 and communication as two different types of  
20 activities but not prescribing forms they should take.

21                   I think the notion of including in the

1 response system section that those response  
2 systems should allow for confidential and for  
3 honest reporting, but again, not prescribing that  
4 those be in the form of an ombuds.

5 I'll get to the rest of it later but I  
6 just wanted to get that overall framework.

7 MR. WALLANCE: Thank you, Bobby.

8 Professor Langevoort.

9 MR. LANGEVOORT: My name is Donald  
10 Langevoort, Georgetown University. I have two  
11 apologies to make at the outset. One is that I  
12 am a securities regulation specialist with very  
13 little detailed knowledge of the organization  
14 sentencing guidelines. That's not been a primary  
15 area of focus for me but I have looked a lot at the  
16 problem of compliance in financial services in  
17 the securities industry. Most of my comments are  
18 simply going to be coming out of that analogous  
19 context.

20 My other apology is that I have to  
21 leave at 3:00. So when I stand up here and walk

1 out the door, it's not of either disinterest nor  
2 protest. I have a prior commitment.

3 My work in securities compliance and  
4 securities regulation has led me to an interest  
5 mainly in how one evaluates the costs and  
6 benefits associated with a compliance program.

7 Any system that is subjective or is  
8 based on an assessment of the reasonableness of a  
9 compliance program inevitably should take into  
10 account both benefits -- which are obvious and  
11 easily seen - and by its costs.

12 Most of my work is on some of the  
13 hidden costs and unexpected costs associated with  
14 various systems in compliance in various industry  
15 settings.

16 I won't go into the details. We can  
17 certainly save some of that for subsequent  
18 discussion. But it leads me to a general view of  
19 compliance assessment that is very much  
20 consonant of what I'm hearing from many of the  
21 other panelists today, which is that less detail is

1 better than more detail. Benchmarks are better  
2 than overall netting out of costs and benefits  
3 and one ought to leave much room for  
4 management experimentation and customization  
5 within different compliance challenges in  
6 different contexts.

7           That in turn leads me to a great  
8 interest of mine: trust-based or  
9 ethics-based compliance systems. I am a great  
10 believer in much of what was said here, which is  
11 that absent strong emphasis on ethics the compliance  
12 system is unlikely to be effective.

13           At the same time, I am extremely  
14 skeptical on efforts to mandate much more than a  
15 benchmark baseline that would prompt companies to  
16 pay more attention to the ethics-based systems.

17           Ethics to some extent is inconsistent  
18 with heavy monitoring. Trust-based systems actually  
19 work better at promoting ethics in voluntary  
20 compliance than systems with heavily supervised  
21 auditing or monitoring. There is a tradeoff

1 there.

2 I think companies, based on their own  
3 special challenges, have to make those choices.  
4 Writing them advertently or inadvertently into  
5 the sentencing guidelines takes  
6 you down an unfortunate path.

7 I am a great believer that companies  
8 must have a values statement. It is a very  
9 important thing to do.

10 At the same time, I doubt the  
11 statement by itself makes much of a difference.  
12 You must look to the question of whether it is it an  
13 effective value statement. Does it really work in  
14 managing the perceptions and the ethical decisions made  
15 on the ground in corporation. One could get lost in the  
16 maze.

17 Again, that leads me to feel  
18 on balance that it is often smarter to stay with general  
19 expressions of benchmarks and objectives and not  
20 micro-manage the process.

21 MR. WALLANCE: Thank you.

1                   Carole, you'll get the last word.

2                   MS. BASRI: I am the executive  
3 director of the American Corporate Counsel  
4 Association, I am also an adjunct professor at  
5 University of Pennsylvania School of Law and I  
6 teach a course in corporate lawyering. I also do  
7 consulting work in this area in some major  
8 corporations.

9                   From these personal experiences,  
10 particularly when teaching at the University of  
11 Pennsylvania Law School, I have a lot of students  
12 that already have law degrees. I have a lot  
13 of people that come into my class  
14 [inaudible].

15                   And what I gain from this is an  
16 understanding that a lot of lawyers don't know  
17 very much about corporate compliance. And I  
18 think there really needs to be an education  
19 process going on at an earlier time so that there  
20 is more analytical work done in law schools. For  
21 example appreciate Richard Gruner's work in that

1 area. Professor Gruner has put out the kind of  
2 work to worry us and the kind of work you do in  
3 here is very important. There needs to be a  
4 message getting out because -- [Inaudible]. One  
5 thing that I personally think is important is the  
6 SEC's proposed rules that came out on November  
7 6th in release number 158.

8           We then talked about creating a  
9 qualified legal compliance committee. I found  
10 that idea when we qualified legal compliance  
11 committee in creating that board level to be a  
12 very important change for the large compliance  
13 organizations that have to be ultra-more  
14 organizations.

15           And, therefore, my comment that I made  
16 to Commission, don't miss the fact the Chernoff  
17 decision was different. There should really be  
18 more talk about the responsibility of board of  
19 directors to oversee compliance.

20           I think that this is the time to look  
21 at that issue. I agree with many people who



1 stood by that fact that the guidelines are  
2 basically good, that they have been very  
3 functional, they have allowed for creativity,  
4 they've allowed for value-based systems, but I do  
5 think they need to enter into the equation of  
6 corporate government.

7           Of course, again, the train was going.  
8 They keep referring to corporate compliance  
9 principles but they do that Ad Hoc. Sometimes  
10 it's called conduct, sometimes it's ethics,  
11 post-ethics. It's now time to get alignment  
12 here. And I think that voice in the Commission  
13 that much stronger if you can align with what is  
14 going on and point out these little similar taste  
15 things going on.

16           That brings me to another point which  
17 is culture. I believe that the real thing that  
18 has to occur in companies to have the corporate  
19 compliance is cultural change. Some places are,  
20 by their nature, good corporate citizens. Many  
21 organizations don't. I believe are part of the

1 third mentality --

2

3 MS. BASRI: The FBI and law [inaudible]  
4 enforcement. They found five percent of the  
5 population was -- that's what they want. Five  
6 percent is truly found to be more realistic and  
7 the other 90 percent follows. How do you change  
8 that? Well, what you do is you create a process,  
9 as taking control and I think this is what we  
10 have to do. Look toward creating an environment  
11 with a path more forward encourage that cultural  
12 end in these companies. And, I think that what  
13 can be done now for these now [inaudible].

14 Thank you, very much. I appreciate  
15 this opportunity to speak to you.

16 MR. WALLANCE: Thank you, Carole. All  
17 right. We're going to start with the questions  
18 and work through them one by one. We'll probably  
19 have, on average, 15 to 20 minutes per question,  
20 although some may require more time and some  
21 less.

1                   It's kind of an awkward seating  
2 arrangement because I really would like to see a  
3 debate and I realize that half of you are sitting  
4 with your backs to the other half which is not a  
5 constant to debate, and the other half are  
6 looking at the backs of the heads of the others.  
7 So we'll do the best we can with this format and  
8 at the same time we have to be mindful of the  
9 fact that we're transcribing this and therefore  
10 interruptions are inevitable but we have to try  
11 to keep this as clean as we can.

12                   So we'll start with the first  
13 question.

14                   MR. BEDNAR: Greg, before we do that  
15 can I throw out an observation?

16                   MR. WALLANCE: Sure. Absolutely.

17                   MR. BEDNAR: I listened very carefully  
18 to each of you and I thank you for your remarks,  
19 as I do that on behalf of all of us. What is  
20 interesting is that not one of you spoke to the  
21 application of the Guidelines in the courtroom.

1 All of you spoke to the guidelines as providing  
2 the inspiration or the stimulation or the  
3 innovation for adopting a good ethics and  
4 compliance program within an organization for  
5 other reasons; as an adjunct of developing a  
6 strong ethical culture within the organization,  
7 as a mechanism for risk avoidance, risk penalties  
8 and sanctions in the first place, for  
9 reputational reasons, for image reasons, if you  
10 will. And I just wanted to ask whether that's  
11 right. Did I hear you correctly that companies  
12 with which you're familiar don't really set out  
13 to draft a good ethics and compliance program  
14 because they want to use it in the courtroom but  
15 rather for these higher, broader reasons? I see  
16 a lot of heads nodding up and down. It's sort of  
17 incidental that they may put you in good standing  
18 in the courtroom.

19 MR. ANDREWS: Dick, I would argue that  
20 I think that that's the dichotomy I was speaking  
21 to originally. That the two groups are most

1 concerned about this.

2 MR. BEDNAR: Right.

3 MR. ANDREWS: I think your observation  
4 is correct. I think if you speak to the legal  
5 community they would be more worried about are we  
6 in compliance or we do get the benefit, or at  
7 least we should, or -- if we should get in  
8 trouble. So I think it's really both sides of  
9 that argument that exist. I think it's a matter  
10 of, irrespective of who you're speaking to, it's  
11 going to color how you --

12 MR. AVELINO: It's coincidental that  
13 in the EOA association that their membership  
14 was about 12 organizations and in a broader sense  
15 of guidelines and today there are 800. I would  
16 say the guidelines -- [inaudible] situation.

17 MR. BEDNAR: Right.

18 MR. PRESSLER: I disagree a little bit  
19 there. The sentencing guidelines did have a big  
20 impact on the Ethics Officers Association and on  
21 corporations developing ethics and compliance

1 programs, but was it the incentive or was it the  
2 fact that a program guidance was provided?

3           If you have an organization that  
4 believes it is ethical, it's a good citizen,  
5 wants to be a good citizen, CEO wants to do the  
6 right thing, there is guidance on how to manage  
7 compliance provided by the sentencing guidelines.  
8 I guess there are the incentives but there is  
9 also the model aspect. We should have a Helpline,  
10 and we should have training, we should have some more  
11 auditing. And if you said, okay, we want to do  
12 that, it is not necessarily because there is an  
13 incentive but there's a benefit, since you want to do  
14 the right thing. It's a benchmark, and you  
15 see what other companies are doing.  
16 We are bound to make this better.

17           So I'm not sure that it's the  
18 incentives in a lot of cases that promote this.

19           Earlier today, I don't know which  
20 speaker it was, commented that certain  
21 organizations don't have compliance and ethics

1 programs. Incentives are there for  
2 programs but basically the issue is that the  
3 incentives aren't necessarily what's driving  
4 programs. There is also a communications issue.

5 And there is -- someone mentioned a  
6 publicity issue. Do organizations know what they  
7 should be doing and if they knew what they should  
8 be doing would they do it? It's not necessarily  
9 you need a greater incentives, it may be that you need  
10 to get the word out.

11 MR. WALLANCE: Okay. Bobby?

12 MS. KIPP: I disagree with you. If  
13 the sentencing guidelines went away tomorrow, we  
14 would not see many corporations discontinuing  
15 their efforts in compliance programs. So that  
16 says they are important for other reasons. I  
17 would agree with Eric there that the guidelines  
18 are helpful, but it's not there only because we  
19 think it's going to help us in the courtroom.

20 MR. BEDNAR: Along that same line I  
21 have observed many companies who have been under

1 a compliance agreement of one kind or another who  
2 continue all of those programs even after the  
3 compliance requirement has expired.

4 MS. KIPP: Right.

5 MR. WALLANCE: So we'll start with the  
6 first question: Should Section 8A1.2, comment  
7 3(k)(4) regarding the internal communication of  
8 standards and procedures for compliance be more  
9 specific with respect to training methodologies?

10 And one concrete formulation of the  
11 question that's provided is where currently  
12 participation in training programs, dissemination  
13 of publications is stated in the disjunctive,  
14 meaning either/or, the question is whether they  
15 should be stated in the conjunctive.

16 And I believe I heard Debra Yang  
17 argue, I think along with her colleagues, and  
18 read in the paper that was submitted, that it  
19 should be in the conjunctive. And I was struck  
20 by the fact that to some degree isn't that  
21 prescriptive? Doesn't that then require every



1 company who wants to conform with these  
2 guidelines, to implement training programs, not  
3 simply, let's say, hand out literature or coffee  
4 mugs with, "Compliance is our business," or  
5 whatever other means of creative communication  
6 that they employ.

7 Training programs strike me as being  
8 more expensive, more of a commitment. So I'm  
9 suggesting -- I'm not suggesting that it's  
10 appropriate or not, but I'm just trying to define  
11 the issue. So I think that is what I'll throw  
12 open to discussion.

13 MR. FIORELLI: And in addition to  
14 that, it says, e.g., so these would be examples  
15 of possible -- of ways of accomplishing that, or  
16 are we saying that you should have training  
17 programs, you should have other methods and other  
18 methods of accomplishing that?

19 So is it an example of what would  
20 satisfy that requirement or should that be the  
21 requirement?

1                   MS. YANG: I guess in reaction -- in  
2 follow-up to what I said this morning, part of  
3 this is a lot of experience in working with some  
4 of these companies, may be the training manuals.  
5 They really aren't used in any meaningful way.  
6 They were developed and then they were shelved.  
7 We lack the method of training involved and that  
8 there's no translation necessarily from it being  
9 developed to it being actually used to help  
10 change the ethical culture within the  
11 corporation, which, again, all of us are talking  
12 about how this will instill something some of  
13 that.

14                   So when you say training, yes, I know  
15 it can be very expensive. But by leaving it more  
16 defined as training as opposed to a specific kind  
17 of training. When you are a very small company  
18 training could begin by just somebody saying that  
19 process during orientation. That's just part of  
20 the orientation process. Spend some time going  
21 into that compliance memo, so to speak, so that

1     there is something more that assures us that  
2     something is being done with it, so that it is  
3     being provided to the individuals, so they know  
4     what is required of them as they start to change  
5     their culture.

6                     MR. GRUNER:  Can I ask a follow-up to  
7     that because it strikes me from what you said and  
8     the way you framed it that the issue may not be  
9     so much documents or training but sufficiency.

10                    In other words, you mentioned many  
11     settings where there are training documents or  
12     there are documents being distributed, and either  
13     nobody really reads them or they read them  
14     quickly and it's gone a half an hour later.  
15     Isn't the issue really whether any of this sticks  
16     and if so, shouldn't a key feature of the  
17     training or dissemination process be evaluation  
18     of sufficiency?  And maybe that's the direction  
19     we ought to be going in a guidelines  
20     definition.

21                    MR. WALLANCE:  Scott?

1                   MR. GILBERT: I'm just struck by the  
2     slippery slope that we're on in terms of trying  
3     to describe this kind of detail. The existing  
4     sense is that the organization must have taken  
5     steps to communicate effectively its standards  
6     and procedures -- [inaudible] so for a company  
7     that means what, that means distributors, sales  
8     representatives, lawyers, accountants. And when  
9     we're talking about employees, we're talking  
10    about hourly employees, we're talking about  
11    salaried employees. We're talking about huge,  
12    different variations in populations here.

13                   I think that for this group, for the  
14    Commission to try to get into the weeds and to  
15    start prescribing what is an effective training  
16    program for a company, takes you into areas that  
17    I don't think the Commission is equipped to deal  
18    with.

19                   MR. GRUNER: Well, suppose we use  
20    general language along the lines of the company  
21    has an obligation to evaluate the effectiveness

1 of their own programs in articulating their own  
2 law compliance demands for their own employees  
3 and not really get down to an  
4 employee-by-employee or even a law-by-law  
5 standard. I think we could be general and still  
6 get across that same topic.

7 MR. GILBERT: Can we get an  
8 understanding, though, is it possible to get an  
9 understanding of how to measure the effectiveness  
10 of training, is it percentage of employees taking  
11 the training or is it tracking it adequately, is  
12 there -- do you require testing in order to  
13 measure the rates of retention over time?

14 I just think that as someone who has  
15 designed an on-line training system that's now  
16 conducted in nine languages for 300,000 people, I  
17 can tell you these are incredibly complicated  
18 issues once you get down into them. And I think  
19 there is a huge incentive already. It is  
20 completely obvious that if the company merely  
21 hands out a policy guide of some sort and does

1 nothing further, that company will be policed by  
2 the marketplace because it will run into problems  
3 and it will pay all sorts of other costs in the  
4 form of noncompliance.

5 I just don't think doing a cost  
6 benefit analysis here -- that you need to be more  
7 prescriptive in this context in setting further  
8 requirements in a very complicated area.

9 MR. LANGEVOORT: I'd like to echo that  
10 very strongly. One of my specialties is insider  
11 trader compliance. And, one of my empirical  
12 projects is testing what people who have been  
13 through insider trading compliance programs  
14 really know about insider trading. And the  
15 answer is: pitifully less than they should.

16 It does seem to me that once you  
17 go down what you call the slippery slope of  
18 making the effectiveness of the training the  
19 issue being tested, it is going to be very difficult  
20 to know where to stop.

21 MR. WALLANCE: There are two issues

1 here. And actually, effectiveness, we're going  
2 to take up when we get to the question of whether  
3 there should be self-auditing --

4 MR. LANGEVOORT: Right.

5 MR. WALLANCE: -- of compliance  
6 programs. This simply asks whether, in effect,  
7 training should be a component, should be treated  
8 in the guidelines as an expected component of  
9 what constitutes an effective compliance program  
10 without prescribing what type of training. That  
11 would be left to, you know, the GEs or the other  
12 companies or -- so let me keep the focus there.

13 MR. LANGEVOORT: I just read Mr.  
14 Gruner to be suggesting something else.

15 MR. WALLANCE: We're definitely going  
16 to get to that in a broader context, but just  
17 keeping the focus on whether training should be  
18 part of a compliance program.

19 Gale?

20 MR. ANDREWS: As I read the question  
21 before and made my response, I was struck that

1 they seemed to be debating the words of training  
2 and communication. And as I concurred in my  
3 writing, the purpose of training is to  
4 communicate, to educate through communication or  
5 some form of communication. So to say training  
6 and communication seems a bit on the redundant  
7 side --

8 MR. WALLANCE: But it says to -- no, I  
9 think it's not. I think it's training or  
10 disseminating publications. And the issue that I  
11 think this question raises is whether is it  
12 enough just to disseminate publications or should  
13 companies who want to comply or conform have to  
14 actively train, which does imply something more.  
15 A more inter -- more sort of reaching out to your  
16 employees in an active way.

17 MR. ANDREWS: Let me finish my point  
18 here. The issue in my mind is not whether it's  
19 dissemination of documents or classroom training  
20 or -- there are many avenues that are seen and  
21 accepted as acceptable means in training adults.



1 And so I think we should be focused on, again,  
2 results.

3 For a particular culture, classroom  
4 training may be the answer, for another culture,  
5 web-based training may be the answer, for another  
6 culture it may be just disseminating information  
7 to your company news system or whatever it is.

8 But I think what we should be looking  
9 for here is that, in effect, there's active  
10 learning, that there's an opportunity to --  
11 acceptable means of education. As opposed to  
12 prescribing, you have to train -- assume formal  
13 training classroom and news media or whatever the  
14 answer is.

15 I would think you could word this  
16 around or work this around ensuring that you have  
17 some results-based communication going on there  
18 that provides the breadth of opportunity for a  
19 variety of companies and a variety of  
20 opportunities to perform.

21 MR. FIORELLI: I think in the theme of

1 not being prescriptive and moving towards a point  
2 of focus, I am wondering, do we then do a  
3 disservice by reading this and not stopping at  
4 the end of agents as saying that the organization  
5 must have taken steps to communicate effectively  
6 its standards and procedures to all employees and  
7 other agents. Make that a period and then don't  
8 include any other descriptions or prescriptions.  
9 There must be training and/or other methods of  
10 communication.

11 I'm just thinking that philosophically  
12 when you're writing this document, what are we  
13 looking for? Are we looking for more examples or  
14 are we saying we should be taking examples off  
15 the table because that tends to encourage or  
16 discourage behavior?

17 MS. KUCA: I think we're getting a  
18 little over-analytical. They all, in one way,  
19 shape or form, are trained on the job and if we  
20 include training as part of the dissemination of  
21 information, I don't think it's onerous on any

1 size company, even a small one. I mean, even the  
2 guy who flips a hamburger at McDonald's goes  
3 through training to know that he can't do it  
4 without gloves.

5                   And I also think that you get back to  
6 what Debra has pointed out, which is how are you  
7 showing me that you're educating these people in  
8 what their job duties are?

9                   So I agree with Scott completely, you  
10 cannot get any more detailed than requiring  
11 training because there is different types of  
12 training for different people. But I don't think  
13 any one of you would argue that training is  
14 required. I mean, you need to be trained in how  
15 to do your job whether it's where to put the  
16 paper at the end of the day or when to punch a  
17 clock in or -- I mean, it's just part of it.

18                   MR. WALLANCE: Let me follow up on  
19 that. Would anyone here regard as effective a  
20 compliance program that has no training and  
21 simply relied on a fairly detailed employee code

1 and ethical code and so on that hands out to  
2 employees and even has them submit back, you  
3 know, I read this and every year it does this.  
4 Would anyone here think that that was inadequate?

5           And if that's the case -- and I'm  
6 asking these questions somewhat rhetorically --  
7 it shouldn't be taken as a conclusion or position  
8 that any of us have, it's just to stimulate  
9 debate. If that's the case, then why shouldn't  
10 the guidelines state that an effective program  
11 does have to have a training component and then  
12 leave it to the companies to decide how much that  
13 component should be, but to at least set that  
14 benchmark up there?

15           Scott?

16           MR. AVELINO: I'll agree that  
17 training, put in those phrases is good. I would  
18 caution that I think there is over -- too much  
19 credit is given -- experimenting in training. In  
20 my experience, when someone has done something  
21 wrong, it's not because they didn't know what

1 they were doing was wrong. They knew what they  
2 were doing is wrong and they did it anyway  
3 because of pressures, because of so many other  
4 things, and that's where I think all of this  
5 debate and discussion of training just falls  
6 short.

7                   There's another counter-argument  
8 that no one likes it to come under [inaudible]  
9 values [inaudible] on the right side of anti-trust law.  
10 And that is where training is helpful, but I  
11 caution the over-emphasis encumbered on the  
12 training level.

13                   MS. KUCA: But doesn't that go to what  
14 Mr. Bednar said earlier which is, that helps the  
15 company keep people like Debra at bay while the  
16 person who willfully violated the law --  
17 basically, I mean, the reality is that the  
18 company is going to have to offer up somebody,  
19 and if the company is doing the training, then  
20 the company has a little bit of protection to  
21 offer up the person who willfully behaved badly

1 on his own. Doesn't that give the corporation --  
2 I mean, it may not help you sleep at night, but  
3 doesn't that sort of help you show the government  
4 and others that you're doing your best to educate  
5 your people not to misbehave?

6 MR. AVELINO: It's good on what you  
7 are trying to deal with consequences of  
8 misconduct as limited, like when responding to  
9 preventing misconduct on --

10 MR. WALLANCE: Eric and then --

11 MR. PRESSLER: My perspective is that  
12 training is a very important component. One  
13 example of why I feel training works, aside from  
14 the fact that we have tests that show that people  
15 learn things that they didn't know before they  
16 took the training, is that sometimes when we do  
17 training we go out and measure effectiveness. Our  
18 training program has two components. Training  
19 targeted at specific compliance issues and  
20 and training targeted at the overall organization  
21 regarding compliance and ethics. We do vignettes

1 and for example, we found out that if we put out  
2 vignettes on certain topics, we suddenly in the  
3 next month or two you get a lot of calls in over  
4 our help line system about those topics that we  
5 weren't getting before training.

6                   So something is going on that is  
7 either encouraging people to report things that  
8 are wrong. Perhaps, they now know are certain  
9 actions are wrong because of the training or they  
10 know to ask questions in more detail about how  
11 detail about how things should be done. I think  
12 training is an essential component.

13                   MR. GRUNER: I want to pick up from that  
14 and also distinguish the notion that training doesn't  
15 always work. It clearly doesn't always work and when  
16 there's somebody sentenced, its clear there was a bad  
17 apple that got through the system somehow. But if we're  
18 assessing the general effectiveness of the compliance  
19 program, hopefully there are hundreds, maybe thousands  
20 of other employees that it did influence in a good way.  
21 So we shouldn't just focus on the fact that a training

1 program doesn't influence everybody.

2 But hopefully, also, there is some

3 positive side to it.

4 MR. AVELINO: I agree, I think

5 [inaudible].

6 MR. WALLANCE: Carole?

7 MS. BASRI: I found that when you

8 train, it has to be in small groups; it shouldn't

9 be Internet-based if you're trying to teach

10 concepts. I think Internet-based works very

11 nicely when you have a lot of information to give

12 on those specific kinds of issues. But when

13 you're trying to teach code of conduct, I find it

14 difficult to do your baseline training that way.

15 Now, I do find the training makes a

16 big difference and should be done in a group, as a

17 piece of paper or the Internet doesn't resonate

18 enough. So people who are not aware of values

19 have an opportunity to see that other people have

20 those values and maybe they need to rethink where

21 they are, which is why I think you see some of



1 those changes. So I think training is critical.

2 MR. WALLANCE: I think Carole is an  
3 advocate of face-to-face training. Bobby, you  
4 might have a different view.

5 MS. KIPP: I'm not going to argue with  
6 Carole on that because I don't think we're going  
7 to get to that in this group as to whether we're  
8 going to prescribe Internet or not Internet so --

9 MS. BASRI: Right.

10 MS. KIPP: -- it's an academic  
11 question. I think, Greg, you suggested a pretty  
12 practical approach here, would anybody in this  
13 room object to the notion of including both  
14 words. In my experience, they are different  
15 activities toward the goal  
16 of awareness and knowledge.

17 So I guess I would look at it and say  
18 from my perspective and my experience, training  
19 activities are different, training activities are  
20 very important. Who, what, when, where, how  
21 needs to be decided by the company or the

1 organization itself.

2                   But if you ended it with the words,  
3 "e.g., by required participation in training  
4 programs and disseminating other forms of  
5 communication," I would be happy. I'd also just  
6 like to register that I think this "and other  
7 agents" phrase should come out because it's so  
8 ill-defined that it's problematic.

9                   MR. WALLANCE: We'll take one more  
10 comment on this issue and then we're going to  
11 move to the next question.

12                   MR. FIORELLI: The last time I  
13 suggested stopping the sentence at the comma of  
14 agents, so my question is: Should we rewrite  
15 this to say the organizations must have taken  
16 steps to communicate effectively its standards  
17 and procedures to all employees, maybe, and other  
18 agents, maybe not and other agents? Instead of  
19 "e.g. by requiring participation in training  
20 programs and by disseminating publications that  
21 explain in a practical manner what is required."

1                   If we think training is important,  
2    should it be there?  Should we say that it is  
3    there if we think we also have other methods of  
4    disseminating publications, should that be there  
5    also?  So these would not be examples of what  
6    would be required, they would be required.

7                   MR. WALLANCE:  Carole, last word, but  
8    then I want to move on to the next question.

9                   MS. BASRI:  The changes, if you take  
10   out the "other agents" because I think we've gone  
11   over practices, for example, I would like the  
12   agents to at least get a copy -- [inaudible].  I  
13   think they have responsibilities and agents.  And  
14   I think we get into a whole host of issues, but  
15   the thing is, you do want to get your  
16   subcontractors and agents somewhat on board.  I  
17   don't think you should limit your liability.  I  
18   think that's the lead group.

19                  MR. WALLANCE:  We'll move on to the  
20   second question.  Just an observation, somebody  
21   used the word "tweak" before and I think I heard

1 it this morning. I don't think these are tweaks.  
2 I happen to think that subtle changes can amplify  
3 enormously because of the way these guidelines --  
4 the life that these guidelines have taken on.  
5 And so deleting agents, for example, or  
6 prescribing training and disseminating  
7 publications, I think it would have rather  
8 significant consequences, which is one reason why  
9 we're engaged in this process because we're  
10 trying to evaluate what those consequences might  
11 be and get feedback from people who do this kind  
12 of work on a day-to-day basis. And so far, I  
13 think this has proven to be an extremely useful  
14 process.

15                   So we'll move on to the second  
16 question, 1(f). Should Section 8A1.2, comment  
17 3(k)(5), concerning implementing and publicizing  
18 a reporting system that fosters reporting without  
19 fear of retribution be made more specific and  
20 encouraged?

21                   And then there are four different

1 types of activities; whistle-blowing, a privilege  
2 or policy for self-assessment, creation of an  
3 ombudsman office for confidential reporting and  
4 other means of encouraging reporting without fear  
5 of retribution.

6                   This question could be the topic of a  
7 full-day seminar. I would like to throw out how  
8 could -- assuming you wanted to keep all of these  
9 objectives -- and they are all worthy objectives  
10 I suppose -- how far could you go with the  
11 guidelines? They -- the guidelines are in terms  
12 of, for example, whistle-blowing protection  
13 because there's a reference already to, you know,  
14 reporting without fear of retribution, does that  
15 or does that not in effect sum up what  
16 whistle-blowing protection is all about?

17                   The ombudsman office, some of these  
18 issues get into the question of whether the  
19 Commission not so much should change the  
20 guidelines but be recommending the creation of  
21 privileges by Congress.

1                   So I'm going to throw this out to  
2 discussion. Again, keeping in mind that roughly  
3 15 minutes to 20 minutes is what we'll have to  
4 devote to this very broad and complex issue.

5                   Eric, you started to raise your hand.

6                   MR. PRESSLER: I'll try to keep it  
7 real brief. I wanted to comment both on the  
8 whistle-blowing issue and the ombudsman office  
9 issue. In terms of the whistle-blowing issue, I  
10 think you hit the nail on the head, fear of  
11 retribution is really what is driving this. And  
12 from my experience, corporations deal with the  
13 fear of retribution in two ways; they try to keep  
14 information as confidential as they can and they  
15 allow anonymous reporting.

16                   And in the written material that I  
17 submitted I mentioned that in our company about  
18 20 to 30 percent of employees report allegations  
19 anonymously. The Ethical Leadership Group, the  
20 Priest group indicated, in a study that  
21 included 56 corporations, that was conducted in

1 2001, found that 38 percent of allegations were  
2 submitted this way.

3           So my first suggestion is that  
4 perhaps the sentencing guidelines should  
5 specifically note that organizations should allow for  
6 anonymous reporting.

7           Related to that, I think there should  
8 be some emphasis put on confidentiality, although  
9 confidentiality to the extent practical and  
10 possible because we can't keep things entirely  
11 confidential.

12           In terms of the ombudsman office  
13 issue.

14           MR. WALLANCE: Go ahead.

15           MR. PRESSLER: In terms of the  
16 requirement of encouraging a neutral ombudsman  
17 office, I know that the ombudsman's concept  
18 works well in certain  
19 organizations.

20           Getting back to my statement  
21 about keeping things non-prescriptive, I think

1 there are a lot of ways for people to design  
2 effective reporting systems. They may have  
3 ethics offices, help lines,  
4 hotlines, ombudsman offices, etc. There are a lot of  
5 alternatives.

6 I think by requiring an ombudsman  
7 office, particularly when you think about  
8 small organizations, you're throwing  
9 something out there that is not in keeping with  
10 the guidelines being non-prescription.

11 MR. WALLANCE: Any other comments?

12 MR. GRUNER: Can I ask a question  
13 about the anonymous reporting option, if we were  
14 to frame it that way?

15 MR. WALLANCE: Sure.

16 MR. GRUNER: Are there any companies  
17 that would have an objection, either your own  
18 companies or ones you're aware of where anonymous  
19 reporting is insufficient to trigger an internal  
20 investigation and therefore they would resist  
21 that as even an option? In other words, they



1 would insist that you would identify yourself if  
2 you're a reporting party?

3 MR. PRESSLER: Again, most, the great  
4 majority of organizations do already allow  
5 anonymous reporting.

6 You're saying probably 90 percent plus, but there  
7 are some that don't. And this clarification I  
8 think would help that.

9 MR. GRUNER: I'm trying to flush out  
10 the 10 percent, or whatever their percentage is, and  
11 determine what their objection is. Is it a notion that  
12 they can't effectively investigate it without an identity  
13 of the reporting party?

14 MS. BASRI: I've actually encountered  
15 this and their fear is that you're going to get a  
16 lot of spurious reports that they are going to  
17 have to investigate and it's just going to create  
18 a lot of bad blood within the company.

19 There are companies, interesting enough,  
20 that believe they have very open communication and why  
21 wouldn't somebody come forward and say it, because we're

1 not that kind of company.

2           And it really counts against them when  
3 to put them at odds with reporting these. It's  
4 like admitting they didn't have open  
5 communication. They have a problem, they're  
6 going there now because of Sarbanes-Oxley and  
7 Section 301 that there's a problem.

8           And so if the reason that they  
9 wouldn't want to get involved with it is because  
10 they are scared that they won't get the who,  
11 what, when and where and be investigating  
12 something that's not quite there.

13           To get that information, they are  
14 going to end up getting personal information in  
15 the process that it might not be honest. And  
16 then they feel they violated their relationship  
17 with that person because to investigate it they  
18 are going to probably need to determine who that  
19 person is. So they are having a real conflict  
20 there.

21           We also have this more with companies

1 that are based abroad and have subsidiaries here,  
2 because there is a cultural difference also going  
3 on. I've seen it happen in U.S. companies as  
4 well, very broad terms.

5 MR. WALLANCE: Bobby?

6 MS. KIPP: I am surprised by what I  
7 just heard, Carole. My experience is as Eric  
8 said -- first of all; I echo Eric's comments, I  
9 won't repeat them. We are at the exact same  
10 position on questions. But I think the question  
11 was, do you know of anybody that would object or  
12 doesn't have an anonymous reporting capability?  
12 I don't know of any organization that objects  
13 to this. It seems to me that there are  
14 certainly situations in which things are  
15 anonymously reported and that -- because they  
16 anonymously reported, you can't investigate because you  
17 are not given enough information to investigate.  
18 This is the nature of the beast.

19 The question I think is: Do you do  
20 more good than not by allowing an avenue for  
21 people to come forward? And it seems to me that

1 an organization that has a culture where people  
2 openly communicate shouldn't be scared by the  
3 notion of adding a safety valve in anonymous  
4 reporting. So it's maybe they think they have  
5 open reporting but they really don't. Just an  
6 interesting reflection on your feedback you've  
7 gotten from --

8 MR. WALLANCE: Let's give Scott an  
9 opportunity.

10 MR. GILBERT: I come from a company  
11 which has an anonymous reporting option and we  
12 get a lot of anonymous reports, and I think it's  
13 a very useful mechanism to have because I think  
14 some employees feel more comfortable surfacing  
15 information that way.

16 But I do want to come back to this  
17 cultural issue because I have found that as we  
18 have discussed these issues around the world,  
19 these are very serious issues. That is, people  
20 who lived through World War II who have a  
21 visceral reaction to any form of anonymous

1 reporting which resonates to them to the  
2 experience with authoritarianism in World War II  
3 are very much opposed to that. So that any  
4 requirement of providing an anonymous reporting  
5 channel, I think, is a mistake for global  
6 companies to oppose that kind of requirement  
7 through this mechanism on global companies that  
8 are operating -- [inaudible]. It's a very  
9 serious issue that in Europe is very strong now.

10           The other point I wanted to make is  
11 that we spent a long time in dictionaries looking  
12 up -- [inaudible] and scanning the history of the  
13 ombudsman office and reading the case laws  
14 emerging on what is privileged and whether we  
15 could guarantee confidentiality. And our  
16 conclusion was that we can't guarantee  
17 confidentiality and that we were not comfortable  
18 with the notion that someone could report  
19 something to one of our employees whose title is  
20 ombudsman, that information could have serious  
21 impact on the well-being of employees, the

1 corporation, and that person could not be free to  
2 surface that information that is beyond what's  
3 been -- would be shielded by some confidentiality  
4 notion and could not surface that information  
5 properly -- [inaudible].

6                   The -- [inaudible] writing --  
7 [inaudible] certain exceptions to the  
8 confidentiality, once again, very complicated  
9 kind of notion. So I counsel against stepping  
10 up, making more specific the requirement has some  
11 sort of confidential, neutral ombudsman.

12                   MS. KUCA: Scott, I have a question.  
13 I just want to make sure I'm understanding what  
14 you're saying.

15                   MR. GILBERT: Right.

16                   MS. KUCA: With regard to this whole  
17 confidential reporting system in the global  
18 company, are you saying that -- I mean, if they  
19 require that there be an anonymous reporting  
20 function, there could also be an open-door  
21 policy. Are you saying that they are

1 inconsistent and they can't function together so  
2 that the company can decide what to employ where?

3 MR. GILBERT: I'm making two points,  
4 that you can confuse them, anonymity with  
5 confidentiality, they are two different things.

6 MS. KUCA: Um-hmm.

7 MR. GILBERT: Anonymity means the  
8 person can report information without giving up  
9 his or her name. Confidentiality issue is  
10 whether if a person walks in to the ombudsman  
11 office, there should be some guarantee that that  
12 communication between that employee and that  
13 ombudsman person is somehow shielded by some  
14 notion of confidentiality and the ombudsman  
15 person is restricted from providing information  
16 about who the person is or details that might  
17 reveal the person's identity.

18 I think that companies are  
19 hard-pressed, really, to say to an employee we're  
20 going to treat this confidentially because they  
21 may have to disclose to the government, they may

1 have to give it up to management in a new review  
2 they may have to report to an audit committee.

3           The practical realities of life, it's  
4 very hard to shield the person's identity in that  
5 context. So my conclusion is that I think you  
6 ought not to prescribe that there must be an  
7 ombudsman that is a confidential reporting  
8 mechanism. I think that's a very unclear term  
9 which in a practical implication is --  
10 [inaudible].

11           MR. WALLANCE: I'd like to ask Debra  
12 Yang to comment on what Scott said, but first I'd  
13 like to read the response to the Department of  
14 Justice to this question.

15           "The inclusion of the internal  
16 whistle-blower protection is an important  
17 measure of an organization's commitment to have  
18 an effective program. Similarly, the creation of  
19 an ombudsman office may also be  
20 an important measure, although as we stated  
21 above, we think the guidelines should not dictate



1    specifics, as would creation of  
2    other means of encouraging  
3    reporting without fear of  
4    retribution," here is the key point: "Such other  
5    means could include a mechanism to confidentially  
6    report to the board of directors or the board  
7    audit committee where appropriate without fear of  
8    retaliation." Confidentiality is even in  
9    italics.

10                   Debra, Scott seems to be suggesting  
11    that as a practical matter, a company could  
12    never, would never want to assure that kind of  
13    confidentiality. It needs the flexibility, among  
14    other things, I suppose, to take it and disclose  
15    it to your office in order to get the benefit of  
16    a disclosure marked down in culpability score if  
17    not the cooperation criteria.

18                   So can you comment on what you had in  
19    mind and how to reconcile what you put in here  
20    with what Scott is saying?

21                   MS. YANG: [inaudible] -- Scott's

1 comments, I don't think -- this is from my own  
2 perspective, [inaudible] issues -- [inaudible]  
3 corporation.

4 I think the general idea is that --  
5 [inaudible] example of any type of variation of  
6 the program that not one was required, don't have  
7 to have an ombudsman, you know. The thought  
8 process behind that was that we wanted to have  
9 some mechanism to get the information to somebody  
10 who was not a participant in the wrongful  
11 conduct.

12 There are some clear issues on the  
13 corporate side. But you still need to have some  
14 sort of ability for them to get that information  
15 out.

16 And so any of these -- [inaudible]  
17 subsequent mechanism to go to, you've also --  
18 [inaudible] protection. Let's say you're the  
19 young accountant that just joined some place and  
20 uncomfortable with what he is over-seeing,  
21 obviously he needs some protection you're not

1 going to get fired but what do you internally,  
2 who do you go to?

3 I guess that's why we want examples  
4 given, we don't want to -- [inaudible] required  
5 because in large part I can't begin to  
6 contemplate all of the issues that you may come  
7 across on an international basis.

8 MR. GILBERT: See, what I'm saying is  
9 we have a very robust ombudsman organization.  
10 [inaudible] allowed to go outside their  
11 chain-of-command to a different context and  
12 report -- [inaudible]. We require them to report  
13 concerns, not violations, because the moment they  
14 report it they may not know it's a violation of  
15 law or corporate policy, but concerns.

16 What we're very careful to do is,  
17 fundamentally we want to be candid with the  
18 people that work there, is to say we will use our  
19 best efforts to control this information to  
20 protect you because we have an absolute  
21 protection against retribution.

1                   We stop short of saying it's  
2 confidential because if you think about it, it's  
3 not because at the end of the day you may have to  
4 disclose it to the government or the auditor or  
5 management to take action.

6                   MS. KUCA: Hey, Scott, what about  
7 the -- forget the confidentiality issue and let's  
8 go back to the anonymity issue. Should -- is  
9 there some sort of unanticipated harm that we're  
10 overlooking to require the company to have the  
11 ability to report something anonymously? Do the  
12 same sort of restrictions apply, you're not going  
13 to be able to keep it anonymous for long,  
14 therefore -- I mean --

15                   MR. GILBERT: There you have a greater  
16 chance of keeping it anonymous forever. Someone  
17 can just drop a typed note over somebody's desk.  
18 But all I'm saying is I actually think it works  
19 pretty well in its current arrangement.

20                   A reporting system that fosters  
21 reporting without fear of retribution leaving an

1 open for the company given it's context to choose  
2 which of these mechanisms works best. Because  
3 frankly, if you're a domestic U.S. company and  
4 you have no operations overseas and you don't  
5 have this issue of informant concerns, you should  
6 put in an anonymous reporting form. That should  
7 be part of the program.

8 All I am saying is I think that this  
9 is an example required, they must have an  
10 anonymous element, I think there will be some  
11 companies that are going to --

12 MS. YANG: Let me clarify something  
13 just with this confidentiality aspect, is when we  
14 say confidential, we don't just mean I get to  
15 tell Scott and that is just it. And that is not  
16 the issue. That it be treated in a confidential  
17 manner so that I can tell Scott, and Scott can  
18 make that determination as far as what to do. I  
19 realize that that not always gives the assurances  
20 to the reporting individual -- [inaudible].

21 MR. GILBERT: The employee is going to

1 say, you told me it was confidential --

2 MS. YANG: Right.

3 MR. GILBERT: And then the next thing  
4 either you have breached a trust or you have a  
5 lawsuit.

6 MR. WALLANCE: Gale?

7 MR. ANDREWS: Again, I think in this  
8 discussion about being too descriptive, I would  
9 also be worried about the focus slightly  
10 differently, which is what the employees are  
11 worried about, whether they are anonymous or  
12 confidentiality is a lack of retribution.

13 I think anything we're doing around  
14 crimes of nature -- [inaudible] or the confidence  
15 of the company should focus on that result side  
16 as opposed to trying to prescribe ways to cause  
17 either anonymity or confidentiality issues to  
18 occur.

19 I'll give you an example: In a large  
20 company like Boeing, we have an anonymous  
21 opportunity and if we somewhat guarantee

1 confidentiality, much as Scott has been talking  
2 about, if an employee, say, witnesses a felony  
3 and comes forward and says, "I witnessed this  
4 felony and I want to be confidential," well, I'm  
5 sorry, we're going to turn it over to the  
6 appropriate authorities and there is going to be  
7 an investigation and this person is a witness and  
8 all of these other things and we don't have an  
9 all witness protection program so, therefore, you  
10 are where you are.

11           But what we really need to worry about  
12 in that in the dichotomy nature the employee is  
13 not harmed. And so from the standpoint of, in my  
14 view of what the sentencing piece of this should  
15 look like is, are we protecting these people,  
16 should be the primary concern.

17           (End of Side 1, Tape 4.)

18           MS. KUCA: I think Scott's statistics  
19 from his survey indicate that the employees have  
20 no faith in the system already so it seems like  
21 this component is one that may not be working

1 because you can have a non-retribution policy but  
2 the statistic is saying that there is no faith in  
3 it.

4 MR. ANDREWS: And I would agree that  
5 we begin to focus people on being worried about  
6 confidentiality and worried about anonymity. In  
7 fact, it's almost impossible, again, for the  
8 Boeing Company with 170,000 employees, you know,  
9 making sure that the -- [inaudible] isn't going  
10 to hold something is very difficult to do. I  
11 mean, there is just the truth of the matter. And  
12 with all good intentions, you can't always manage  
13 that piece of information.

14 So we have to focus on making sure  
15 that -- you know, try not to let things get out.  
16 But if they should, making sure there is no  
17 consequence to the individual who, in fact, came  
18 forward and did what we asked him to do which is  
19 to be honest, to come forward with issues, to  
20 voice their concerns.

21 Again, I think that whatever we're



1 doing with the language is, we don't want to  
2 focus on this front end piece which may or may  
3 not be useful depending on the culture you're  
4 coming from.

5 MR. FIORELLI: One thing I think we  
6 should remember is that retaliation can be both  
7 formal and informal.

8 MR. ANDREWS: Right.

9 MR. FIORELLI: You can have  
10 retaliation where a person comes forward, makes a  
11 complaint and you can make sure that she or he is  
12 not fired or terminated. That's easy. But how  
13 does he or she integrate back into the work  
14 place? What are people -- the rumor mill. What  
15 do people say about the methods? How is their  
16 career tracked? Has it slopped a lot less than  
17 it was?

18 And that was really my basic question.  
19 By promising -- what we're doing by having  
20 whistle-blower protection and promising we're not  
21 going to retaliate against you. Is that enough

1 to get the information into the hands of  
2 management or do we want to have anonymous  
3 reporting or do we want to try to go toward  
4 confidentiality where you could have more of a  
5 conversation with the person less clandestine,  
6 drop boxes, and an easier ability to follow up on  
7 details?

8                   At the same time, I hear your concerns  
9 that we don't have the mechanism now to promise  
10 confidentiality. And so it's a very -- I guess  
11 in an ideal world, perhaps we would be able to do  
12 that. And maybe that is what the reporting  
13 source wants. They just want to be able to get  
14 it off of their plate and onto somebody else's  
15 plate and say, "I just don't want this to come  
16 back to hurt me." And don't let this -- you  
17 know, "You deal with it and don't let this affect  
18 my career."

19                   MR. WALLANCE: Nancy and Eric and  
20 Carole and then we will bring this to a close.

21                   MS. HIGGINS: Thank you. I think that

1 you should bear in mind that most of the  
2 companies have programs, have ways to report  
3 anonymously and as you have just said, to keep  
4 things confidential to the greatest extent  
5 possible.

6           Now, reality is that by the time  
7 somebody contacts one of our programs, that  
8 person has taken a lot of time thinking about it,  
9 trying to get up their nerve to do that. They've  
10 already told eight or ten of their closest  
11 friends. So when a confidential or anonymous  
12 investigation gets underway -- it gets to the  
13 organization, most of the people there know  
14 who -- and oftentimes they've already brought the  
15 matter to the attention of the management, as is  
16 suggested in the first place. And the reason  
17 they came to the reporting office is because  
18 management didn't act as they hoped that they  
19 would.

20           So we all try our best to keep things  
21 confidential. I think the biggest concern that

1 people in many of these offices have is that we  
2 can't protect them from outside sources. If the  
3 government comes in with a subpoena or a  
4 third-party litigant comes in with a subpoena, we  
5 are not at this time able to protect that person  
6 from disclosure by our office. And that is  
7 something that keeps people from coming forward.

8 MR. GRUNER: I'd like to follow up on  
9 that. Your facts assume  
10 that there is a report made where  
11 the reporting party already sought relief or change from  
12 their own management and didn't get it. Isn't  
13 that a situation where there is a very high likelihood  
14 of retaliation because you're not only  
15 accusing somebody, you're also essentially taking on the  
16 management's first negative response to the problem?

17 Is there ever a follow-up, then, about  
18 somebody who was in that obviously  
19 hostile management environment as to what happens  
20 to them next?

21 MS. HIGGINS: Yes. And it isn't

1 always a hostile situation. You have to bear in  
2 mind that a large number of -- [inaudible]  
3 offices are not substantiated, not just because  
4 we didn't have enough information to investigate,  
5 but because the reporter had their facts wrong.

6 MR. GRUNER: Whether or not it is not  
7 substantiated though, you've now taken on your  
8 manager by saying, you know, Joe Blow  
9 inadequately responded to this. Even if the  
10 reporting party somehow got their facts wrong,  
11 they're in a hostile manager/manager  
12 relationship.

13 MS. HIGGINS: What I was going to say  
14 is that those are the situations where you would  
15 have the most honest, the most concern because  
16 once somebody alleged -- [inaudible]. It is  
17 investigated and it's found out, and that  
18 person -- that problem isn't there anymore.

19 MR. GRUNER: Yeah.

20 MS. HIGGINS: So it's really an effort  
21 to maintain -- to build a culture where people

1 are encouraged to go forward and make that --

2 MR. GRUNER: You're assuming the  
3 manager is the person accused.

4 MS. HIGGINS: Right.

5 MR. GRUNER: I am not assuming that.  
6 I am assuming somebody else is the accused but  
7 the manager has said let's forget this. So, then  
8 the report is made in the face now of essentially  
9 taking on management's decision.

10 It just strikes me that that is the  
11 sort of retaliation setting where an  
12 anti-retaliation program would have to have some  
13 follow-up to be a serious anti-retaliation  
14 measure. I'm wondering if anybody pursues it at  
15 that level.

16 MS. HIGGINS: Yes. Our process  
17 involves a requirement for the ethics office to  
18 get back in touch with the person after the  
19 matter has been closed in a case where it appears  
20 that there is a high risk of retaliation.

21 They tell people at the time to come

1 back to us if they feel that they are suffering a  
2 retaliation.

3 Of course, retaliation is not a very  
4 difficult issue. Everyone who reports something  
5 for the rest of their lives thinks that any  
6 adverse occurrence in their career directly is a  
7 result of that report. So it's difficult.

8 MR. WALLANCE: I promised Eric and  
9 Carole quick last words.

10 MR. PRESSLER: In terms of what I have  
11 observed, let's take a situation where the  
12 company has promised no retribution but also  
13 fails to promise confidentiality because they  
14 cannot do that and you are Susie Smith, the  
15 secretary to some high-level person. You know  
16 that the high-level person may be doing things  
17 that look a little fishy to you and you're not  
18 sure but you are suspicious. Is it enough for  
19 Susie Smith to come forward unless she can come  
20 forward anonymously?

21 We've handled about 2500 cases on our

1 help line in the past few years and I'd like to  
2 say that about 95 percent of the value comes from  
3 about five percent of the cases. And of that  
4 five percent there are a number of those with merit,  
5 where the secretary or someone like that came  
6 forward, who I don't believe would have come  
7 forward at all if they couldn't come forward  
8 anonymously.

9           Very often they will come forward  
10 anonymously and then two or three discussions in  
11 they say, "Oh, I'll just tell you who I am but  
12 keep it quiet." Something like that.

13           But I don't believe they would have  
14 come forward at all had they not been able to  
15 come forward anonymously.

16           And I think the fact that 38 percent  
17 of the cases -- quoting the Ethical Leadership  
18 Group Benchmarking study, that 38 percent of the  
19 cases in all of these corporations they surveyed,  
20 56 corporations, were anonymous. There are people  
21 out there with items to report, and a policy may say no



1 fear of retribution, but they are not going to come  
2 forward unless they feel protected. And the only way  
3 to do that in the absence of a promise of confidentiality  
4 is to permit coming forward anonymously.

5                   So I think it has to be in there.

6                   MR. WALLANCE: Okay, Carole, and then  
7 we'll move on to auditing.

8                   MS. Basri: Just one point. With  
9 anonymous reporting and particularly third-party  
10 anonymous reporting, we can go back to that  
11 person after they have been assigned a case  
12 number and ask additional questions.

13                   The person doesn't always remain  
14 anonymous because sometimes when we report on  
15 merit they are so specific that that ends up --  
16 [inaudible]. I just want to point that out. We  
17 think that makes a difference. I think anonymous  
18 reporting is a good thing and it can be done as a  
19 process so that you do get as much information as  
20 possible to safeguard any serious claims, but it  
21 has to be a process of supporting -- [inaudible].

1 I just want to make that point. I think it is a  
2 good idea, but there has to be an appropriate  
3 process involved.

4 MR. WALLANCE: Okay. I'd like to move  
5 on to auditing. And what I am going to do is  
6 treat 1(g) and 3 together because they are both  
7 auditing-related questions.

8 1(g) asks whether there should be  
9 greater emphases and importance given to auditing  
10 and monitoring including either through  
11 prescription or point of focus, self-auditing of  
12 the compliance program for its effectiveness.

13 And Number 3 asks whether -- how can  
14 Chapter Eight encourage auditing and monitoring  
15 and self-reporting regarding suspected misconduct  
16 and potential illegalities, keeping in mind the  
17 risk of third party litigation or use by  
18 government enforcement personnel realistically  
19 diminishes the likelihood of such auditing?

20 And since, Debra, you indicated you  
21 have to make a plane, I'm going to start with

1 Number 3 and pick up with something you said  
2 which came up this morning, which is to what  
3 extent would the Department of Justice be willing  
4 to advocate a safe harbor against or from waiver  
5 of the work product, if not attorney/client  
6 privilege, when a company discloses to the  
7 government the results of an internal audit or  
8 let's say an employee whistle-blower report?

9           And you indicated, and I think James  
10 Comey indicated, some interest -- and obviously  
11 none of this is literally official in the sense  
12 that you're committing anyone, but I want to  
13 explore this because I think there would be some  
14 interest -- I am guessing there would be some  
15 interest in the white-collar community in  
16 resolving the issues created by the waiver problem,  
17 perhaps this way.

18           MS. YANG: Actually, I wrote a note  
19 here to remind myself to make a disclaimer --  
20 [inaudible] officially. But from things that  
21 came up with this morning and some other things

1 before, it definitely would seem to make sense.  
2 We've had a number of situations and problems  
3 with bankruptcy trustees, situations where we  
4 have to shared information with the bankruptcy  
5 trustee who ultimately generates a public report.  
6 And that's not something that we necessarily want  
7 to do or endorse because some of the information  
8 we have is from protected sources, so to speak,  
9 things that are not public in nature.

10                   So we've had that -- [inaudible].  
11 Corporations that had dealings with other  
12 agencies, federal agencies. So I think that  
13 there is an interest there trying to see whether  
14 or not we can pursue some sort of safe harbor. I  
15 think the department suffers from that, I think,  
16 in some ways -- well, I think the difficulty is  
17 putting all of the heads together with the  
18 federal agencies and is trying -- [inaudible]  
19 with all of the varying interest.

20                   MR. WALLANCE: Let me throw this out  
21 because it's probably the easiest cases where

1 there is a safe harbor from disclosure to  
2 plaintiff's attorneys for use in private  
3 litigation --

4 MS. YANG: Right.

5 MR. WALLANCE: And then I have the  
6 sense that, again, unofficially, you and your  
7 colleagues didn't think that that could create  
8 enormous issues.

9 MS. YANG: Right.

10 MR. WALLANCE: But what about, for  
11 example -- and I think Josh raised the notion,  
12 well, maybe we would want to give it to the civil  
13 division of the Department of Justice.

14 But you're looking also at the SEC  
15 , you're looking at state attorney  
16 generals, you're looking at Congress,  
17 congressional committees, would it be -- just to  
18 think out loud, would it make sense to have a  
19 safe harbor but within that safe harbor there  
20 could be disclosure within the executive branch  
21 of government but not to Congress, not to state

1 attorney generals and obviously not to  
2 third-party litigants?

3 I realize these create enormous policy  
4 issues but I would just like to have a discussion  
5 without any official statement on your part on  
6 that point.

7 MS. YANG: Just purely on a thought  
8 basis, not on any sort of policy or a formal  
9 basis, that might be a workable alternative.  
10 Oftentimes when we ourselves during our  
11 investigations come across situations where  
12 congress is doing something else on that same  
13 case amidst any witnesses and there is the  
14 uncomfortable relationship anyway, diverse  
15 interest in what it is that we want to -- of how  
16 we want to work -- what goals have been brought  
17 to us, what entities we want to achieve. So at  
18 least with respect to the legislative --  
19 [inaudible].

20 With respect to state agencies that  
21 may have parallel investigations, I don't know,

1 that one we have to think through. I think there  
2 are a few more policy problems that are included  
3 in that. Oftentimes, we work in conjunction  
4 with -- [inaudible] -- cross-designated over on  
5 certain cases. Oftentimes, we have --  
6 [inaudible] over certain cases, so I'm not sure  
7 how -- that's not an easy question to answer.

8           One of the things that you did bring  
9 out in sort of the full sense of self-report,  
10 you're going to run into -- [inaudible], power of  
11 the United States government onto yourself and  
12 who really wants to do that in a willing fashion?

13           Who said it this morning -- MR.  
14 Lytton, start to chum the waters. And I say,  
15 yes, I can definitely see that, but I also say  
16 that chum the waters enough and you may actually  
17 get yourself in a situation where your  
18 corporation may never be charged.

19           We had a case recently where a  
20 corporation came forth, did self-reporting, turn  
21 things over and ultimately because we felt that

1 they were so pious and also trying to sort of do  
2 the right things by themselves, we didn't charge  
3 them. So they actually managed to cross the  
4 great divide. So there was a great incentive,  
5 that of a benefit. The corporation could save  
6 itself from being charged. So there is some  
7 comfort in knowing that that is feasible and a  
8 viable option and something that we look at all  
9 the time. Because as we sort of got into this  
10 morning, the ultimate goal here is not to  
11 dismantle corporate America, the ultimate goal  
12 here is to take out those wrongdoers and  
13 perpetrators who are, I guess, causing the  
14 American public to have a crisis in confidence in  
15 corporate America.

16           And so it's not the goal of the  
17 Department of Justice nor my office in particular  
18 to look at corporations. If they come to us and  
19 tell us, "Look, we did this, we did this, we did  
20 this," -- and trying to comply with this program.  
21 That doesn't look like somebody who is really



1 turning their back on what you are trying to put  
2 everything together. And that's something that  
3 is very persuasive to us.

4 That same conversation with MR. --  
5 [inaudible] in the hallway about -- reverse the  
6 corporation and see what it is that they are  
7 doing and what mechanisms they put in place, they  
8 can't protect themselves against every possible  
9 situation, but they try to put something in  
10 place to minimize that and to allow those  
11 individuals to come forward they need to  
12 consider -- that's a big factor.

13 Back to the safe harbor, we should be  
14 interested in --

15 MR. BEDNAR: Creates tension.

16 MR. WALLANCE: Richard was just saying  
17 this is an area of great tension and so I'm  
18 wondering -- and I hear you on the value of a  
19 company self-disclosing.

20 MS. YANG: Right.

21 MR. WALLANCE: The audit companies

1 make that decision without regard to whether they  
2 are ultimately going to have to deal with  
3 plaintiff's lawyers and so on because there is so  
4 much in their interest.

5           There are probably a lot of close  
6 calls. It may have gone against disclosure  
7 because they were concerned about the third  
8 parties coming down and the chumming waters concern.  
9 And really I think that this safe harbor -- and I  
10 welcome some of your comments, particularly  
11 before Debra leaves, on this issue, because I  
12 think it strikes me as a possible solution to  
13 this tension. It may not be a perfect solution,  
14 particularly it depends on where the line is  
15 drawn and who is inside and who is outside.

16           But nonetheless, just getting the  
17 plaintiff's lawyers outside or within the safe  
18 harbor, if you will, I think would probably serve  
19 a lot of Department of Justice interests and I  
20 don't think interfere with any law enforcement or  
21 societal interests. They still have the right to

1 go after the documents in ordinary discovery,  
2 during their discovery and the Courts will  
3 resolve the issues.

4 So I really welcome --

5 MS. YANG: What if the line were drawn  
6 as far as including -- you know, because as I  
7 said to you before, it's problematic when you try  
8 to expose some other state agencies. But what if  
9 you drew the line around everybody inside the  
10 circle in all of the regulatory agencies so that  
11 would exclude your legislative aspects.

12 MR. WALLANCE: Federal only or both  
13 state and --

14 MS. YANG: Both federal and state.

15 MR. WALLANCE: You know, my view would  
16 be that that would be an improvement of the  
17 current situation because the waiver -- at least  
18 you've excluded the plaintiff's attorneys and  
19 they've excluded Congress. You don't have to  
20 deal with all of these rulings that are all over  
21 the place, vertical waiver and horizontal waiver

1 and inconsistent jurisdictions on this issue. It  
2 does give some clarity.

3 I think there would have to be a significant  
4 dialogue before anything could get done, but I  
5 think it's something that our group would have to  
6 look at and that's why I'm encouraging this in  
7 the context of this hearing.

8 Some other thoughts, particularly if  
9 you think -- for those of you in the private  
10 sector, you think that even just excluding that's  
11 all that can be achieved, but even just  
12 excluding the federal government there's no waivers  
13 against private litigants. Whether that would be  
14 seen as something positive. The company still  
15 has the option whether to disclose or not, but at  
16 least it's offered that additional protection.

17 Any thoughts?

18 MR. GILBERT: How would you articulate  
19 the C problem?

20 MR. WALLANCE: I haven't gotten quite  
21 that far in the legislative drafting process.

1 It's a concept right now. But I've seen other  
2 safe harbors and it would be the disclosure to  
3 the Department of Justice, and I guess you could  
4 say pursuant to the sentencing guidelines or in  
5 hopes of the qualifying for the sentencing  
6 guidelines but not constitute a waiver as regards  
7 to third parties.

8 That's not the elegant language but  
9 that would be the concept.

10 I think it's fairly easy to define  
11 what you're waiving or not waiving as against  
12 whom. I think what is harder is to define what  
13 circumstances the safe harbor is triggered. It's  
14 the disclosure to law enforcement of what and,  
15 you know, that would require some thought.

16 But I do think that the guidelines  
17 themselves, when they talk about disclosure of  
18 the information, that  
19 kind of gives you a starting point.

20 MR. GILBERT: I think it's a great  
21 idea. I think the public policy objectives

1 should be encouraged, companies to come forward.  
2 I think that voluntary social programs in the  
3 defense region work really well in encouraging  
4 that kind of reporting and this would solve one  
5 of the difficult problems which is the  
6 third-party litigation under harassment. So I  
7 encourage you in that endeavor.

8 MR. WALLANCE: Bill's point was that  
9 he really wasn't that worried about disclosing it  
10 to government officials. He may have even meant,  
11 I won't quote him, but the SEC because he  
12 knows he's dealing with responsible people. But  
13 he really seemed to be expressing a lot of  
14 concern about just opening his door to these  
15 plaintiffs. You know the plaintiff's lawyers  
16 these days are extraordinarily well-funded, jury  
17 verdicts have been astronomical. So it's a very  
18 legitimate fear.

19 And these waiver decisions are all over  
20 the place. Nobody really knows what's going to  
21 happen if they make that disclosure, how long it

1 will be. So I would think that this is something  
2 that is really worth exploring.

3 Carole?

4 MS. Basri: Just a short thing. The  
5 whole foundation of what we're trying to do is  
6 create an effective compliance programs. You're  
7 going to go intellect processes corporation  
8 You're going to have to do some base level of  
9 risk assessment. You really want a rigid  
10 approach, you don't want a cookie cutter taken  
11 off the shelf. To really want them to have a  
12 co-product that makes sense and a training  
13 program that really addresses the robists, they  
14 are going to have to do it.

15 Now, if they feel they are shielded  
16 and protected in some way, they are going to do a  
17 better job of really coming up with a good code  
18 of conduct that really addresses the issues that  
19 ingrain the training program. And I think what  
20 we really want to have is a program -- the  
21 government has to realize we got to have some

1 kind of protection.

2           It's very hard to go in and teach  
3 senior people and 8A bring in an outside free  
4 cell and then create these records and then say,  
5 "No, we can't create them," and then we don't  
6 have a basis for litigating a good code of  
7 conduct with compliance records.

8           I see that if we don't get to the  
9 bottom of this, we'll always be dealing with a  
10 house of cards. What their risks are and what  
11 their problems are and what needs to be addressed  
12 in code of conduct, what do we really need  
13 training in?

14           I think this is a very fundamental  
15 issue.

16           MS. KUCA: I just want to caution one  
17 thing and maybe get some thoughts from others on  
18 it, which is remembering the fact that this is  
19 not an exercise in the United States' best  
20 practice standard on corporate compliance  
21 programs. This body of law kicks in at the



1 sentencing process. We could more unevenly  
2 tip the playing field if we're going  
3 to embody this prosecutorial discretion  
4 element into the application of the guidelines.  
5 We are going to see very much what we  
6 see going on in individual indictments which is  
7 leaving the whole departure issue in the  
8 hands of the  
9 Department of  
10 Justice. If we're looking at this as  
11 an application process to mitigate sentence,  
12 the  
13 probation officer is  
14 not going to be empowered to make that call.

15           Having been on that side, you  
16 know, they are going to march across the U.S.  
17 attorney's office and say, "Did they self-report,  
18 was it timely?" I am not saying it's not what  
19 we're saying, I think it's a terrific idea, I'm  
20 just saying that when we look to what we're going  
21 to put in ink -

1                   MR. WALLANCE:  If this is only an  
2   exploratory -- I want to stress that this is only  
3   an exploratory discussion and nobody here has  
4   gone beyond that stage yet.

5                   MR. FIORELLI:  Just for the sake of  
6   being a devil's advocate, I'm not a plaintiff's  
7   attorney and I don't know if there are any of  
8   them here, and I guess my question would be to  
9   turn it on its head, what argument would they  
10  make as -- let's just say, I would like the  
11  information?  If you're going to disclose that to  
12  the government, and perhaps the government is not  
13  being as diligent as we would like them to be.  
14  And we would advance that case on a private level  
15  if the government doesn't do an adequate job on  
16  the federal level.

17                   MS. YANG:  I can tell you --

18                   MR. BEDNAR:  And they'll do it on a  
19  pro bono basis.

20                   MS. YANG:  But have been cases where  
21  [inaudible], they are always there.  They are

1 always waiting for whatever information -- they  
2 were right on top of whatever we do in our case.  
3 We do not, you know -- ignore them because that's  
4 not part of what it is that we do, nor do they  
5 drive what it is that we do, but you can feel  
6 them right there just waiting for any tidbit on  
7 any discovery.

8                   So I don't know that they necessarily  
9 have a right to any of the stuff. I know not  
10 much of what we do has certain protections. It  
11 actually is public, grand jury investigation  
12 generally has all the succeeding protections --  
13 the minute it gets filed, it's --

14                   MR. FIORELLI: But haven't there been  
15 keystone cases where plaintiff's attorneys say  
16 that the government didn't do as good a job as  
17 they should have done, weren't as diligent as  
18 they should be, and I will advance this case. If  
19 you're not going to do it, I will. If you don't  
20 give me any information that was available to the  
21 government then you were disadvantaging MR.

1                   I'm not saying that I disagree with  
2 the argument, I'm just saying that I'm not sure  
3 if we're giving the plaintiff's side a fair  
4 hearing.

5                   MR. WALLANCE: Well, thank you for --

6                   MS. YANG: I apologize but George  
7 Cardoz (phonetic) is the first assistant in our  
8 office and he is going to stay for the rest of  
9 the meeting. Thank you, very much.

10                  MR. WALLANCE: Debra, the Ad Hoc  
11 committee is very grateful. I  
12 think you flew out here on a red eye?

13                  MS. YANG: I did.

14                  MR. WALLANCE: Yes. So we greatly  
15 appreciate your presence and the contribution  
16 that you and your colleagues made this morning.  
17 I thought it was enormously invaluable to this  
18 process. So thank you, very much.

19                  MS. YANG: I appreciate all of the  
20 work that you do. It's nice to see this side of  
21 it as opposed to just reading it and -

1                   MR. WALLANCE: Have a good flight  
2 back. Let's move on to the related issue in the  
3 auditing which is whether more emphasis should be  
4 given to auditing and monitoring including either  
5 prescriptively or by point of focus,  
6 self-auditing of compliance. There is a  
7 certain logical feel to that. If you're going to  
8 have a compliance program, just as you're going  
9 to have any other business activity, shouldn't  
10 you be auditing that effort to see whether it's  
11 effective? But that's a generality. The  
12 practicality of doing it may create issues and I  
13 welcome thoughts on any or all of the foregoing.

14                   MR. GRUNER: To modify the question  
15 slightly, which is what I was trying to do  
16 earlier with training, and I'd like to address a  
17 more general concept. It seems to me that there is a  
18 real risk of being too prescriptive about how companies  
19 should do these various things. But the less we demand as  
20 particulars, the more we should, in fact, expect the  
21 companies themselves to develop as standards for assessing

1 the sufficiency of what programs they've chosen.

2           So the notion is that we wouldn't -- in  
3 the training setting we wouldn't say, "Do this  
4 kind of training over that kind of training,"  
5 just do training that matters.

6           And in the general case as to the  
7 effectiveness of the overall program, I don't  
8 think that it's too much to expect that  
9 companies periodically assess how well they're  
10 doing and whether they need to move compliance efforts  
11 in a different direction. Companies ought to be  
12 interested in making that assessment such that when  
13 a sentencing activity actually does come up, it's  
14 not a matter of, well, okay we're really evaluating  
15 the effectiveness of this program in court for the first  
16 time, it's rather there is a record showing that the  
17 company has assessed its program and modified it where  
18 necessary. Consequently the company can say "we have  
19 reason to believe it was effective and if it wasn't, we  
20 changed it."

21           It's in that sense that I view auditing by

1 companies as something that reduces our need to be  
2 prescriptive. I'd be much more willing -- I would think it  
3 would be logical to be much more flexible about  
4 compliance evaluation standards and allow these to be  
5 developed by companies, but also more demanding about  
6 self-assessment by companies under their own standards.

7 MR. WALLANCE: Bobby?

8 MS. KIPP: I have to leave as well,  
9 but I absolutely agree with what you just said, Richard  
10 and I think that as a practical matter most companies  
11 do go through and assess and evaluate the effectiveness  
12 of their procedures of their process. You can't  
13 prescribe how to do that, different things matter for  
14 different activities.

15 But I do think that in the spirit of  
16 strengthening what are already good standards,  
17 there is no harm, in my opinion--I think it  
18 actually strengthens the standards--to explicitly  
19 say that organizations should evaluate  
20 periodically the effectiveness of their  
21 activities. And I think it has to be, sort of,

1 in those broad terms.

2 MS. KUCA: Before you leave, in one of  
3 the written submissions somebody pointed out an  
4 aversion to the term, "audit," saying it was a  
5 financial term of art. And while you and Scott  
6 are here, I was curious if you -- what your  
7 thoughts were on that, whether you thought  
8 review, assess, evaluate or better or worse than  
9 "audit."

10 MS. KIPP: I think the word "audit" is  
11 a term of art and I think it's better to say  
12 evaluate effectiveness for the reasons  
13 you just said.

14 MS. KUCA: Thank you.

15 MR. WALLANCE: Gale?

16 MS. KIPP: Thank you and I apologize  
17 for having to leave.

18 MS. KUCA: Thank you.

19 MR. WALLANCE: We will take Gale and  
20 then Scott.

21 MR. ANDREWS: No longer -- well, the



1 term "audit" sometimes can be seen as onerous  
2 depending on the culture that you're in. I would  
3 contend that any control be monitored, needs to  
4 be evaluated or audited in some frequency or it  
5 will lapse. So I would think that it is  
6 unrealistic in anybody who runs control systems  
7 survey doesn't think that it's unrealistic to  
8 have good values, different goals periodically.

9 I would not shy away from the word  
10 audit because if you open up this one area of  
11 record be more prescriptive. It may be  
12 beneficial if you open this open this up to  
13 evaluation, you may to get a new assessment. And  
14 I think -- so whatever you do there whether you  
15 use the word audit or independent evaluation or  
16 whatever, I think the key is independence. I  
17 think you need to have -- you know, I think the  
18 benefit of the transparency that it would bring  
19 to effectiveness of your program would be what  
20 you're looking for.

21 And so in my mind the audit has

1 independent translators -- there are other words  
2 you could use.

3 MR. BEDNAR: There is a corollary to  
4 that, I believe, Gale, and that is if we fall  
5 away from the word "auditing," which is in the  
6 guidelines now, many would take that as a  
7 relaxation of the requirement.

8 MR. ANDREWS: That's why it's always  
9 been my concern that people who were worried  
10 about the term audited. It has more than four  
11 letters in it, so I don't think we should worry  
12 about frankly neither should you. Generally, it  
13 sends a clear signal of independence I believe.

14 MR. BEDNAR: Yeah.

15 MR. WALLANCE: Scott Avelino and then  
16 Scott Gilbert.

17 MR. AVELINO: I think there is  
18 Curie-Weiss law some definitional confusion  
19 around the audit term and I wouldn't Gale's  
20 comment in finding out that. There is an audit  
21 that the company is doing, a self audit, can

1 evaluate whatever compliance they want.  
2 Independent verification on any individual party  
3 testing the reliability of that audit is on the  
4 sly.

5           In terms of Value, Parment, Levit  
6 (phonetic), ME Value's program -- well, why agree  
7 with everything, but must not be too sure but was  
8 wondering about some minor-- for example,  
9 illustrative guide -- something along that  
10 line -- because in my experience, there is a vast  
11 low, but there's significant confusion on what it  
12 is to evaluate the program. I think the  
13 definition moves forward into two categories.  
14 One, I would refer to as a process audit and you  
15 would go to a company and say, "How do you know  
16 if your program is effective? Well, we  
17 distribute the code to everybody. We have signed  
18 certifications back from 87 percent of  
19 employees," so on and so forth. Okay. That  
20 speaks to a process being in place and that is  
21 probative on whether or not compliance is being

1 achieved. It is not terminative as to whether or  
2 not an organization policed or compliant with the  
3 law. And that's where a substantive audit is  
4 required where standards comply with that  
5 inquiry.

6                   So the distinction between what is a  
7 process are making sure that the training is  
8 taking place, the board is being briefed, the  
9 code is one thing. I think companies relying on  
10 that may be falling short actually chucking  
11 correctional compliance. So the attention to  
12 repositis is subject to embodiments.

13                   MR. WALLANCE: Scott Gilbert.

14                   MR. GILBERT: First of all, I'm struck  
15 by -- there was a parallel discussion along these  
16 lines taking place, it probably still is taking  
17 place, treasury in respect to the elements for  
18 compliance program. In patriot and compliance,  
19 There are a lot of times we spend trying to keep  
20 in focus on what constitutes an audit for that  
21 purpose. So if we haven't already looked at

1 Balor and Lature (phonetic) to navigate, that  
2 probably would be a rich source of information.

3           One thing that occurs to me is that I  
4 think that it is absolutely essential that  
5 companies do assess the effectiveness of their  
6 programs periodically. But if one technique the  
7 organizations do is to privilege reviews using  
8 self evaluative privilege or by having lawyers  
9 and other people, compliance types or auditors  
10 working together on legal issues and the  
11 operational issues together there is some  
12 objection that is attached to that. And I'm just  
13 thinking forward, if an organization were  
14 actually put in place of having to demonstrate  
15 that it is centralized, would it have to then  
16 waive the privilege that's associated with the  
17 underlying audits or reviews, whatever you call  
18 them, in order to demonstrate that impact is  
19 doing that.

20           I don't have the answer to that  
21 question, but again, it strikes me as the sort of

1 thing that one has to be careful about the  
2 consequences of imposing some requirement. If  
3 I've clearly confused everyone -- Greg has a  
4 confused look on --

5 MR. WALLANCE: Well, it's the  
6 consequences part as a new requirement because I  
7 think that's the issue. Even if it said, for  
8 example, auditing the compliance program  
9 periodically for effectiveness, I think that  
10 would have a significant impact. I think  
11 companies would feel -- lawyers would feel  
12 compelled to tell their companies, "If you want  
13 to be sure of getting the credit and you want to  
14 be sure of having a compliance program that is at  
15 the level of your peers, then we have to start  
16 auditing the compliance program on a regular  
17 basis."

18 So what are the consequences to that?

19 MR. GILBERT: One other thing -- this  
20 did come up in a treasury conference. I do think  
21 it is very important that you choose the word

1 carefully because I did hear a representatives in  
2 treasury, for example, confronting a problem with  
3 a small company saying, "Look, we don't need a  
4 year to go out and hire the DWC to conduct an  
5 audit of your company, of your compliance  
6 program," it just means that someone is not  
7 responsible for the compliance program. Someone  
8 else within your company has to take a careful  
9 look, and that's the kind of check and balance  
10 that we're talking about.

11 I think that's a good kind of lesson  
12 to draw here, which is to say that what you  
13 really want is some other person who is not  
14 responsible for the day-to-day operation of these  
15 programs to have -- I hesitate to use the word  
16 "independent," but that's really what I'm talking  
17 about.

18 MR. WALLANCE: Nancy.

19 MS. HIGGINS: I'd like to say that I  
20 agree with what Scott is saying that it's very  
21 important to have a regular, periodic

1 self-assessment of your program. It's good to  
2 have someone other than the compliance eyes do  
3 that so that you just don't just get a word about  
4 what a great job you're doing.

5           But I do urge you to be careful in  
6 formulating requirements that would suggest a  
7 requirement for hiring outside agencies, outside  
8 auditors, outside counsel. One of the things  
9 that we have learned that those that have the  
10 programs for a long time is this huge cottage  
11 industry with experts who learn from us and then  
12 come back and try to sell it to us.

13           We are happy to work with them and  
14 we're happy to help them help others who don't  
15 know what they're doing, but we don't want to  
16 take valuable dollars and resources that can be  
17 used to improve our programs to pay somebody else  
18 to do for us what we already know how to do.

19           They are an internal audit  
20 organization and dealing with the audits, my  
21 program and they -- [inaudible]. And I think the



1 experience that we have in the DII (phonetic)  
2 [inaudible] where at the outset we have a  
3 requirement for our signatures to have an annual  
4 questionnaire on the external auditors. And we  
5 found over the course of the years that basically  
6 we were doing all of the work and they were  
7 getting \$100,000 a year to tell us, "good job."

8 MS. KUCA: I just would like to ask  
9 you, Greg's question which is the consequence of  
10 doing this assessment of your program. I would  
11 think one of the consequences would be finding  
12 deficiencies and not addressing them. Can any of  
13 you share any insights on that? Is it your  
14 experience that companies are prepared to sort of  
15 do what needs to be done once these things are  
16 found -- educate me a little bit.

17 MR. ANDREWS: In my experience,  
18 absolutely. I've done this from both sides. I  
19 was a general auditor for the corporation and now  
20 I'm the ethics officer of the corporation so  
21 now -- [inaudible] function. There's never a

1 question there's an issue -- deficiency or  
2 something in our process that's failing, that's  
3 causing things not to be recorded or recorded  
4 properly, we step up immediately. And I think --  
5 [inaudible] different associations we belong to,  
6 I don't think I've ever heard anybody not  
7 thinking that that was an important factor in  
8 what goes on in having a healthy ethics program.

9 MS. KUCA: So it wouldn't be perceived  
10 as burdensome?

11 MR. ANDREWS: I didn't say that. I  
12 said important.

13 MS. HIGGINS: Again, it would depend  
14 on the size of the organization, the type of  
15 program in non-prescriptive banter then it  
16 should -- [inaudible].

17 MR. ANDREWS: I guess it gets back to  
18 the heart of the issue which is why would you  
19 want to spend the money on an ethics program in  
20 the first place that didn't work? And so you  
21 need a mechanism to help you make that a valuable

1 expenditure. Part of that is some kind of a  
2 review process. The logical support, well, I'm  
3 spending my money but I don't want to spend more  
4 money because I don't want to know if it works or  
5 not.

6 MS. HIGGINS: Make sure it's value  
7 added.

8 MR. PRESSLER: I agree that a focus on  
9 effectiveness is important. But when I think  
10 about an audit, I think of an audit where you  
11 have some specific standards and you  
12 measure performance against those standards.

13 Since the sentencing guidelines  
14 themselves are not very prescriptive, we seem to  
15 agree that that's a given.

16 If you're auditing an element of a  
17 program, let's say you are auditing the reporting  
18 system. I may personally have some ideas about what  
19 we have been calling a good reporting system.  
20 We have a case data base to track things, such as  
21 certain specifics related to allegations, or things

1 like that. But there are really no imposed standards.

2                   So I am wondering if you're talking  
3 about a required audit, what you're  
4 doing is setting up a system where basically  
5 consultants are advising you on what they think  
6 would be good or you yourself are telling your  
7 auditors what you think is good and what they  
8 ought to look at. I'm just having a hard time  
9 visualizing this as an audit process of any sort.

10 This is more a required overview or  
11 something like that, not an audit.

12                   MR. GRUNER: Can I ask that as a  
13 follow-up to those who are being audited? How  
14 does the internal audit work with those of you  
15 whose programs are being audited now? Are there  
16 effectiveness measures that are the criteria of  
17 the audit?

18                   MS. HIGGINS: What you've actually hit  
19 upon is one of the things that all of the people  
20 that I talk to in the ethics compliance world  
21 agree upon, and that is there is no general

1 agreement about what makes an effective program  
2 or good ways to measure the effectiveness of the  
3 program.

4 Scott spoke to that a little, talking  
5 about the difference between process other than  
6 other terms --

7 MR. ANDREWS: Substantive.

8 MS. HIGGINS: Substantive audit. But  
9 generally, our program is audited to determine  
10 that the ethics officers are following the  
11 procedures that we set forth in our ethics  
12 officers manual, that we are following all the  
13 little processes, things that Scott mentioned,  
14 everyone is getting trained, all of the companies  
15 who developed compliance plan, to best qualify  
16 risk areas.

17 MR. GRUNER: Which is in turn  
18 presumably your  
19 company's best take on what it would take to be  
20 an effective program. You're not sure if it is right  
21 but it's your best approach to that?

1 MS. HIGGINS: That's correct.

2 MR. ANDREWS: And it's more history as  
3 well. As these programs mature they've smoked  
4 over time to adapt to entering into what they are  
5 today. We've documented that, we've documented  
6 our changes and now we come back and make sure we  
7 are executing against our plan which softer  
8 sciences that the most you can do is monitor your  
9 actions against what you believe your mission  
10 statement is in determining there's a connection  
11 and it would be great, jump up and down if, in  
12 fact, there was some dollar thing I could put on,  
13 you know, how many dollars a day I saved in my  
14 program. Unfortunately, we haven't quite figured  
15 out how.

16 MS. KUCA: Call me when you do.

17 MR. WALLANCE: Scott and then Eric and  
18 then we move on to our last two questions.

19 MR. GILBERT: I think my fellow  
20 Scott's distinction between substantive and  
21 process is that you do it -- persistent.

1 MR. AVELINO: Sure.

2 MR. GILBERT: It's very important  
3 because we're talking about -- the proposal is  
4 some notion that there should be a regular  
5 monitoring pumped up program for effectiveness.  
6 And I would submit that the highest stage in a  
7 company is beyond a program compliance to a stage  
8 in which compliance with the law has been so  
9 operationalized in the business processes that is  
10 sort of built into the fabric of the company.

11 And so, therefore, what you want in  
12 the auditing is not so much the elements of a,  
13 quote, formal compliance program but substantive  
14 process standards that are designed to promote  
15 compliance within the key business processes.  
16 That's a lot of jargon, let me give you an  
17 example.

18 Perhaps the most important risk area  
19 for a company might be the Foreign Corrupt  
20 Practices Act or improper payments, and then it's  
21 not so much important, then, to be auditing

1 formal elements of the program but to be looking  
2 at percentage of sales representative agreements  
3 that have fulfilled all of the due diligence  
4 elements which were executed prior to the  
5 performance by an individual.

6           These are operational standards that  
7 are completely related to the specific legal  
8 risk, but you wouldn't look at them as a form of  
9 compliance. There are very important standards  
10 that are designed to reduce violations of the  
11 law, substantive audit in order to detect  
12 variance from these standards.

13           So my point is, again, this is one of  
14 these notions where if you try to delve more,  
15 that is if you say you require an audit of the  
16 program's effectiveness, that again raises five  
17 questions about what it means to do that kind of  
18 audit.

19           MR. WALLANCE: The nice thing about  
20 the guidelines is they are fairly general and  
21 it's left to commentators and the in-house folks,



1 the specialists who work out the details.

2 Eric, last comment and the last two  
3 questions and I'll have you out of here at 4:00.

4 MR. PRESSLER: It occurs to me that if  
5 you have -- if you're at the sentencing stage,  
6 let's say, and your organization is being  
7 considered, let's say that Gale's organization is  
8 being considered and Nancy's organization is  
9 being considered, do they have an effective  
10 program?

11 In Gale's organization, they've done an  
12 audit and reviewed the program and they have a  
13 standard for percentage of employees trained, there's a  
14 full compliance commitment, and the standard is 70  
15 percent or better, we think we've done a great  
16 job. In Nancy's company the standard is 95 percent or  
17 better.

18 Well, they've each done an audit or a  
19 review, should they each get the same credit when  
20 one company has 95 percent trained and the other has  
21 70 percent?

1 So you run into an issue because of the lack of  
2 of standards. All of this has become very relative,  
3 so when you get into the sentencing phase, I'm  
4 concerned that it would be seen as not equally applied.

5 MR. WALLANCE: That's a valid point.  
6 Consistency of standards.

7 All right. I know it's painfully  
8 obvious that we haven't given you any breaks  
9 since 1:30, but just to cover the last two  
10 questions and to get reactions to these. There's  
11 only a few minutes left. 8A1.2 should have a  
12 3(k)(6) be expanded to emphasize positive as well  
13 as the enforcement aspects of consistent  
14 discipline?

15 The example here, to illustrate that,  
16 should there be credit given to organizations that  
17 evaluate employees' performance based on the  
18 fulfillment of the compliance criteria?

19 Should compliance programs  
20 prescriptively or by a point of focus include an  
21 element that employee performance evaluations

1 will affect their compensation? It's kind of a  
2 little bit of a hodge-podge but in general it's a  
3 fairly specific -- I think it would be a  
4 significant addition to the guidelines to -- for  
5 example, point of focus say, employees'  
6 compensation should be evaluated on the basis of  
7 the fulfillment of compliance objectives.

8 How do people feel about that? Scott.

9 MR. GILBERT: I think this is the best  
10 practice and it should be done. I don't think it  
11 should be incorporated into compliance  
12 guidelines. I think that, you know, I think the  
13 issues of compensation are complicated. There  
14 are lots of reasons why they need to be tailored  
15 and I think it should be done and I think that  
16 many companies do do it.

17 My concern is that there would be lots  
18 of implementation issues and interpretation  
19 issues of this standard.

20 MR. WALLANCE: Scott?

21 MR. AVELINO: I would echo that. In

1 some instances there seems to be cases where the  
2 corporation of the compliance falls to  
3 performances evaluations effective to reverts  
4 negative effect. Easy example of health and  
5 safety standards where a work force gets a bonus  
6 for having pure group dissentionents (phonetic).  
7 There is actually an incentive among the local  
8 production force to under-report violations. In  
9 fact, in a way this effort has -- it's  
10 over-reached shirker to change the compensation  
11 systems in corporate America.

12 I would offer up one interesting thing  
13 that I have seen -- is that it's happened to me  
14 in probably two situations that it's an  
15 organization as part of its co-certification  
16 basically bind the insurances by the company,  
17 that I will not suffer personally, if business is  
18 lost due to my office, out of my appearance.  
19 That's a pretty novel thing. Maybe to -- as a  
20 practice to the Guidelines [inaudible].

21 MR. WALLANCE: Eric.

1                   MR. PRESSLER: The current standards  
2 talk about exclusively the disciplinary  
3 mechanisms, and to me that feels very  
4 prescriptive, getting back to this  
5 prescriptive/non-prescriptive measure. I think  
6 really the intent is that the  
7 organization must have taken reasonable steps to  
8 reinforce the importance of compliance.

9                   If you keep that concept, whether it  
10 be discipline or performance reviews or whatever,  
11 you could state something along the lines that  
12 the organization must have taken reasonable steps  
13 to reinforce the importance of compliance through  
14 the use of mechanisms such as disciplinary  
15 action, performance evaluations, compensation  
16 systems and other forms of incentives. To make  
17 it less prescriptive, give some examples.

18                   I really feel that the issue is making  
19 this important to people. It's not whether it's  
20 discipline or some other mechanism.

21                   MR. WALLANCE: I think it goes along

1 with the concept that was raised this morning of  
2 elevating -- well, it's probably elevating the  
3 chief compliance officer to a level equal to the  
4 general counsel or the CFO and then setting  
5 compensation based on compliance achievement.  
6 Also it tells the employees that our business  
7 activities -- or, our compliance activities are  
8 no less important than our business activities.

9           So it's a conceptual approach, but I  
10 think it's something that has to be looked at  
11 carefully because it would, I think, involve a  
12 significant change from what we have now even if  
13 we're not prescriptive.

14           MR. BEDNAR: Greg, you don't suppose  
15 that if we looked into the reason why some of our  
16 CEOs are compensated so highly it's because the  
17 company does have that system and these CEOs  
18 would brace and allocate and practice at such a  
19 high level of ethical behavior that they are  
20 entitled to both levels of compensation?

21           MR. WALLANCE: I think I know the

1 answer but --

2 MR. BEDNAR: We know who they are.

3 MR. WALLANCE: But I think it would be  
4 a significant innovation to these guidelines. We  
5 raised it for that reason.

6 Last question and then -- I promised  
7 4:00, we've just got a couple of minutes -- this  
8 notion of, in effect, punishing companies that  
9 have no compliance program, a decrease, you  
10 certainly don't get the benefit of a compliance  
11 program, but if you don't have a compliance  
12 program, your culpability score will go in the  
13 opposite direction; it will be worse than it  
14 otherwise would have been without the benefit.  
15 Any thoughts?

16 MR. GRUNER: I would just contest the  
17 way you just described this possible guidelines change.  
18 It's a change in the assumption of what the norm is,  
19 what the midpoint of culpability is. We're assuming  
20 that having a compliance program is the midpoint, not  
21 having one puts you below the average.

1                   MR. WALLANCE:  If you have a five as a  
2 starting point, you can trade off.  If you have a  
3 compliance program, then presumably you wouldn't  
4 have five, you would have --

5                   MR. GRUNER:  When we define what five  
6 means, that's what we're really doing here.  
7 We're defining it now as having a compliance  
8 program, whereas before we were defining it as if we  
9 were neutral about whether the average company has a  
10 compliance program.

11                  MR. WALLANCE:  Your starting culpability  
12 is always five, right?

13                  MR. GRUNER:  Right.

14                  MR. WALLANCE:  And if you have a  
15 compliance program, you take three off and you  
16 get down to two, set aside other factors.  If you  
17 don't have a compliance program, I assume what  
18 this is getting at is your culpability score  
19 would go up to eight or whatever, setting aside  
20 other factors.

21                                So the question is, do we



1 collectively, it's a collective process, think  
2 it's a good idea, bad idea or what?

3 Scott?

4 MR. GILBERT: I think it's a bad idea.  
5 My company -- I think it is a bad idea for small  
6 businesses. I think what the issue is, do you  
7 want to reduce the judge's discretion when she  
8 sentences a small business to give that company a  
9 break when the company didn't have a compliance  
10 program?

11 MR. WALLANCE: Punishment.

12 MR. GILBERT: They didn't even know  
13 that this rule existed.

14 MR. GRUNER: That isn't quite what we  
15 were contemplating changing. The question is what  
16 if you did nothing? In other words, it's envisioned  
there is a middle ground.

17 If you did nothing you would get the penalty. If  
18 you did something but it didn't quite qualify,  
19 you're neutral, you're at the five point. And if  
20 you did the full-scale qualifying effort, you get  
21 the mitigating sentence.

1                   So in fact this envisions that middle  
2 ground of, "well, I tried but I didn't quite get  
3 it all right" as being the norm. And you're only  
4 punishing --

5                   MR. WALLANCE: Absolutely.

6                   MR. GRUNER: If the company ignored its  
7 compliance program completely.

8                   MR. WALLANCE: Just as an example, the  
9 2001 report of Sentencing Commission indicated  
10 that there were 200 plus Chapter Eight sentences.  
11 Ninety-four of those had some sort of culpability  
12 score or sentencing analysis. Of those 94, only  
13 two companies even attempted to implement  
14 compliance programs. None of them got credit for  
15 an effective program. So it suggests that 92  
16 companies had not even attempted to implement  
17 compliance programs.

18                   These are undoubtedly mostly small  
19 companies, probably the fronts for a gangster's  
20 business activities and so on. So it may not be  
21 that representative. But I think what this is

1 getting at is that kind of company --

2 MR. GRUNER: Yes.

3 MR. GILBERT: I don't see how this  
4 would address the problem.

5 MR. GRUNER: Puts more of a stick behind  
6 at least getting started. I think is the idea.

7 MR. WALLANCE: Carrot. This is  
8 supposed to be a carrot and stick approach and  
9 that creates a -- sorry, it's a stick, it's a  
10 bigger stick.

11 MR. GILBERT: Assumes that people knew  
12 about --

13 MR. WALLANCE: What. You're presuming  
14 ignorance of the law is --

15 MR. GILBERT: Based on what I heard  
16 this morning, there was testimony this morning  
17 that I think that's a big issue --

18 MR. WALLANCE: The publicity part.  
19 Any other thoughts?

20 MR. ANDREWS: It just seems to me that  
21 if we believe -- to take the opposite side, if we

1 believe that the sentencing guidelines provide  
2 all of these great benefits then why shouldn't we  
3 be doing things that promote people in that  
4 direction if we believe in what gets done is a  
5 pretty direct measurement.

6           So I would shy away from it based on  
7 these other concerns. I think it needs to be  
8 considered directly because both sides -- I think  
9 companies that do participate and comply need  
10 some recognition for -- you know, beyond just  
11 getting their sentence reduced, and I think on  
12 the other side, you bring on a whole another  
13 group, much like what happens in bigger  
14 organizations, the O.A.N.T.R.I.'s (phonetic) as  
15 issues get hotter, we get more membership and  
16 people get more aware.

17           So there needs to be a reason at times  
18 to make people more aware. So I would shy away  
19 from this.

20           MR. WALLANCE: Let me try something  
21 out on you. The Department of Justice recommends

1 against such a blanket rule, changing the  
2 culpability score. But an interesting, sort of,  
3 alternative which is adding an application to the  
4 commentary stating that the failure to have an  
5 effective program to prevent and detect  
6 violations of law could be weighed against the  
7 larger organizations as evidence that an individual  
8 of high-level personnel of the organization  
9 condoned or was willfully ignorant of the criminal  
10 conduct. So it's a basis for an inference that  
11 puts you into that category that would preclude  
12 you from any credit as well as enhance the  
13 culpability score.

14           And I thought that was an interesting  
15 alternative. I don't know whether you have any  
16 thoughts on that.

17           MR. CARDONA: Our thought pattern  
18 there was essentially along the lines of smaller  
19 corporations. Especially in our district, most  
20 of the corporations we prosecute are fairly  
21 small. Giving them an extra penalty would not

1 have to comply to a copy to receive that penalty  
2 and one of the -- they don't do a -- a hero would  
3 contact would contact that house based outside of  
4 the company, basically make matters hectic in  
5 their industry. Besides given the award but for  
6 larger corporations where juristitude that have  
7 this be a stit (phonetic). You could make that  
8 part just for larger corporations.

9 MR. WALLANCE: Do you have any  
10 definition of larger corporations?

11 MR. CARDONA: Well, we would suggest  
12 using the ones, the guidelines -- different sizes  
13 and I think you could pick one of those levels as  
14 an appropriate for defining when a company when a  
15 company qualifies as larger -- not exactly sure  
16 where you might draw the line, but top level, two  
17 levels down --

18 MR. WALLANCE: I thought that was a  
19 very creative idea.

20 MR. BEDNAR: It is.

21 MR. WALLANCE: Again, it's a good

1 illustration of -- it's maybe a little bit more  
2 than a tweak, but it's not prescriptive. It's  
3 really just the commentary in some respects and  
4 it could have an impact.

5 MR. CARDONA: Yeah.

6 MR. WALLANCE: It's 4:00. You've all  
7 been here almost -- I think on behalf of myself  
8 and my colleagues and the Ad Hoc committee  
9 generally, we're very grateful for your  
10 participation. I found this extremely useful and  
11 I think it's going to be a very important factor  
12 in our recommendations and I'm going to  
13 thank you. We appreciate it. We look  
14 forward to a solution.

15 (Breakout Session adjourned 4:03 p.m.)

16

17

18

19

20

21