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October 30, 2002

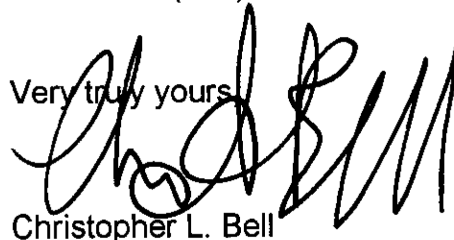
Michael Courlander
United States Sentencing Commission
One Columbus Circle, N.E.
Suite 2-500
Washington, DC 20002-8002

Re: November 14, 2002 Public Hearing

Dear Mr. Courlander:

Enclosed is testimony from the American Chemistry Council for the November 14, 2002 public hearing being held by the Ad Hoc Advisory Group on Organizational Guidelines to the U.S. Sentencing Commission. If you have any questions regarding this testimony, I can be reached at (202) 736-8118 or cbell@sidley.com.

Very truly yours,



Christopher L. Bell

cc: James Conrad
(American Chemistry Council)
David T. Buente

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STATEMENT OF JAMES W. CONRAD, JR., AMERICAN CHEMISTRY COUNCIL, TO THE ADVISORY GROUP ON ORGANIZATIONAL SENTENCING GUIDELINES TO THE UNITED STATES SENTENCING COMMISSION RELATED TO THE REVIEW OF CHAPTER EIGHT OF THE U.S. SENTENCING GUIDELINES
NOVEMBER 14, 2002

Good morning, my name is Jamie Conrad, and I am counsel with the American Chemistry Council. On behalf of the Council, I thank you for the opportunity to testify today before the Advisory Group on Organizational Guidelines to the United States Sentencing Commission.

The American Chemistry Council represents the leading companies engaged in the business of chemistry. Council members apply the science of chemistry to make innovative products and services that make our lives better, healthier and safer. The business of chemistry is a $460 billion-a-year enterprise and a vital part of our nation's economy. It is the nation's #1 exporting sector, accounting for 10 cents out of every dollar in U.S. exports. Chemistry companies invest more in research and development than any other industry.

The Council submitted written comments to the Advisory Group on May 16 and October 11 of this year. We have explained our views in some detail in these comments, including our responses to some of the specific questions posed by the Advisory Group. I would like to highlight some important principles for you today.

The Advisory Group has initiated the action called for by Congress in Sarbanes-Oxley.

In Section 805(a)(5) of the Sarbanes-Oxley Act of 2002, Congress directed the Commission to ensure that the *Guidelines* "are sufficient to deter and punish criminal misconduct." At least with respect to those elements of the Guidelines establishing the criteria for an effective compliance assurance program, the Advisory Group is already considering this question. Sarbanes-Oxley does not call for a separate or new review: you are simply ahead of schedule.

The *Guidelines* should continue to focus on criminal conduct in the context of criminal sentencing.

The Commission is charged with promulgating "detailed guidelines prescribing the appropriate sentences for offenders convicted of federal crimes." The courts use the *Guidelines* to sentence those convicted of crimes. The purpose of the *Guidelines,* therefore, is to "further the basic purposes of criminal punishment: deterrence, incapacitation, just punishment, and rehabilitation." The Commission should not stray from this mission. The *Guidelines* should not be expanded to address general issues of corporate social responsibility or ethics that are not governed by criminal laws or that are not directly relevant to criminal sentencing.

The Council's members strongly believe in ethical behavior and responsible social conduct. However, the Commission is tasked to address criminal conduct, not promulgate a code of ethics. Any suggested changes to the *Guidelines* must be evaluated in the very serious criminal sentencing context in which the *Guidelines* are used.

The *Guidelines* should not be used to encourage or force organizations to foster "ethical cultures" to ensure compliance with the "intent" of the law as opposed to "technical compliance." Our members certainly support ethical conduct by organizations, and recognize that encouraging organizations to create an "ethics infrastructure" that goes "beyond compliance" with criminal law is a laudable goal. However, that is not the function of the Sentencing Commission. The focus of the *Guidelines* should remain on systems that assure compliance with legal requirements, not ethics programs that may focus on important questions in a wider domain. This is particularly true given that there is no agreed-upon set of ethical criteria against which organizations can be measured and that can be the basis for setting criminal penalties.

Any changes to the *Guidelines* should be based on objective evidence and a demonstrable need for change.

Any suggested changes to the *Guidelines* should be based on facts, not theory. Thousands of organizations have invested significant resources implementing compliance systems based on the *Guidelines*. Yet, we are unaware of any actual data or other evidence in the public record showing deficiencies in the *Guidelines* that need correcting. On the contrary, as the Commission has noted, the "organizational guidelines have had a tremendous impact on the implementation of compliance and business ethics programs over the past ten years." The Advisory Group should follow the adage: "If it ain't broke, don't fix it." Material changes should only be considered after finding the *Guidelines* are flawed and that the user community is demanding changes.

Some may say that something must be done because of the alleged criminal activities and corporate governance scandals that currently are high-visibility issues. However, the mere existence of alleged illegal or unethical conduct in some organizations does not mean that the *Guidelines* were at fault or that changing the *Guidelines* would have produced a different result. Changes to the *Guidelines* should be based on objective evidence that the *Guidelines* have not established adequate criteria for effective compliance systems, not on general concerns about unethical conduct. Further, one should not assume, without supporting evidence, that "ethics programs" necessarily prevent criminal misconduct. Indeed, an evidentiary project for this Group might be to determine whether some of the companies currently charged with illegal conduct had ethics programs and, if so, why those programs were ineffective in preventing the misconduct that occurred.

The *Guidelines* must remain flexible, practical and generally applicable to all organizations in all sectors.

The *Guidelines* currently offer the flexibility needed to allow organizations of all sizes and types to implement effective compliance programs. Any proposed changes to the *Guidelines* should take into account the small and medium-sized organizations that are the vast majority of U.S. businesses. This is not a theoretical concern. The Commission's statistics reveal that in FY 2000, some 87% of organizations sentenced under Chapter 8 had fewer than 200 employees, and that approximately 65% of all sentenced organizations had fewer than 50. Whatever obstacles small and medium-sized businesses face will not be lessened by increasing the level of detail or complexity in the *Guidelines*. Further, attempting to create unique provisions in the *Guidelines* for small and medium-sized businesses would require the Sentencing Commission to be able to discern which obstacles are unique to such businesses

and to draw arbitrary lines between which businesses would "qualify" for any unique provisions and which would not.

The "best practices" developed by sophisticated companies, consulting firms or academia should not become the model for what all organizations must undertake. While smaller organizations should follow the *Guidelines*, they should not be potentially subject to greater criminal penalties if they cannot implement the "best practices" of large enterprises.

The *Guidelines* already provide sufficient guidance on designing, implementing or auditing compliance systems.

Some commenters have suggested that the *Guidelines* should include more detailed guidance on designing, implementing or auditing compliance systems. These suggestions, however well-intentioned, are misplaced. The *Guidelines* should remain generic and applicable to all organizations.

There is no evidence of a "market need" for the Commission to provide detailed implementation guidance. There has been a proliferation of sector-specific, public, private, national and international guidance documents and standards on compliance assurance, many of which we surveyed in our May 16 comments. This vast literature is already available to the user community. It is not the function of the Commission to provide such general educational assistance through the *Guidelines*, since the failure of an organization to conform to the *Guidelines* can have direct implications in the criminal sentencing context.

Moreover, if the Commission were inclined to provide more detail on compliance programs, the practical impact of that effort must be carefully weighed. The available specific guidance on compliance programs continues to be refined and tailored to the needs of specific areas of regulation. For example, several Federal agencies have already developed sector-specific guidance or even regulations on compliance management systems. Adding detail to the *Organizational Guidelines* could create conflicts with these other efforts, leading to practical implementation problems.

The Guidelines do not need to provide more detail on "corporate governance."

It is no secret that corporate governance is a significant topic of public interest, and that there are several major legislative and regulatory initiatives that are making significant changes to corporate governance. Not the least of these are the new requirements just created by Congress in the Sarbanes-Oxley Act of 2002 and that are being implemented by various regulatory and self-regulatory bodies such as the Securities & Exchange Commission, the New York Stock Exchange and the National Association of Securities Dealers.

Adding specific corporate governance responsibilities in the *Guidelines* at this time could create conflicts with the flood of new requirements already being generated. For example, the *Guidelines* should not provide detail on the responsibilities of boards of directors or equivalent governance bodies in overseeing compliance programs. Not all organizations, particularly smaller ones, have such governance bodies, and the *Guidelines* already embody the principle that compliance programs should be supervised by "high level" personnel. Further, specifying the responsibilities of particular functions associated with corporate governance (e.g., CEO or CFO), expanding the definitions of "high level per-

sonnel," or providing additional comments on what is intended by "specific individual(s) within high-level personnel of the organization" would decrease the flexibility that is currently an outstanding feature of the *Guidelines*. These are all issues that are already topics of considerable federal legislative, regulatory and self-regulatory attention.

To provide one last example, more specificity on whistleblower protection is not necessary. We agree that whistleblowers must be completely protected from acts of retribution. However, the *Guidelines* already clearly state that internal reporting should be without fear of retribution. Further, many Federal and State statutes already provide specific whistleblower protections. Adding more specific whistleblower provisions in the *Guidelines* might either create conflicts with existing substantive laws or be duplicative, or even create loopholes that might result in less protection.

It is not the function of the Sentencing Commission to create new corporate governance rules. That is properly the province of Congress and the numerous regulatory bodies that have been delegated the authority to promulgate and enforce regulations on this topic. The remarkable extent of recent legislative and regulatory activity on this topic – in an otherwise stalemated political environment -- demonstrates that there is not a "gap" that the Commission must fill. As the legal requirements on corporate governance are revised and expanded, organizations that implement compliance assurance systems that conform to the criteria in the *Guidelines* will necessarily have to include those new requirements in their systems. Therefore, without any modification to the Guidelines themselves, any new corporate governance requirements will become elements of an effective compliance assurance system.

Thank you again for the opportunity to speak today. I would be happy to answer any questions you may have, and look forward to participating in this afternoon's sessions.