ETHICS OFFICER ASSOCIATION

Dedicated to promoting ethical business practices

October 30, 2002

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

Dear Mr. Jones:

The Board of Directors of the Ethics Officer Association (EOA) thanks you for the opportunity to present our views and recommendations regarding possible enhancements to the Organizational Sentencing Guidelines.

The EOA Board recognizes the immense impact the Organizational Sentencing Guidelines have had in shaping the activities of organizations that are working to prevent criminal and unethical activity. The Organizational Guidelines provide both a framework for effective compliance management and substantive incentives that encourage organizations to implement effective compliance and ethics programs. They have helped redefine corporate responsibility and to a great extent, have helped create the profession of ethics and compliance officers.

Although the Organizational Guidelines have had a substantial impact on organizational practices and culture, it is apparent from recent corporate compliance and ethics failures that the need to focus organizations on compliance, business conduct and ethics has never been more critical. Recent ethical failures by corporations, and the resulting crisis in public and investor confidence, have had significant detrimental effects on our economy, our institutions and our society. In response, the government, with implementation of the Sarbanes-Oxley Act, and the New York Stock Exchange (NYSE), with proposals to revise listing standards, are strengthening corporate governance and are requiring specific codes of conduct and ethics. As the Organizational Guidelines are revised, these other efforts should be examined so that common standards and direction are provided to organizations.

Background on the EOA

The Ethics Officer Association is a national organization of professionals that have come together to facilitate the exchange of ideas and information regarding compliance management, business conduct standards and business ethics. The EOA currently has over 800 members, including representatives from every major industry in the U.S.

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The EOA Board is composed of individuals representing twenty-one organizations that are EOA members. A list of current Directors and the organizations that they represent is included as Exhibit I. The comments presented in this document are those of the EOA Board as an entity and may not represent the views of all EOA member companies. In addition, some individual Directors are also independently providing testimony for their organizations to the Advisory Group on Organizational Guidelines.

Recommendations

The EOA Board recommends that the Advisory Group maintain the flexible, non-prescriptive nature of the Organizational Guidelines as suggested changes to the Organizational Guidelines are considered.

The EOA Board offers recommendations in response to three questions posed by the Advisory Group, including:

1. Ethical Cultures. (Question 6). Should the Organizational Guidelines encourage organizations to foster ethical cultures to ensure compliance with the intent of regulatory schemes?
2. Neutral Office or Ombudsman (Question 1,f, iii). Should the Organizational Guidelines encourage the creation of a neutral or ombudsman office for confidential reporting?
3. Whistleblower Protections (Question 1,f, I). Should the Organizational Guidelines be more specific to encourage whistleblower protections?

Ethical Cultures

Effective prevention of criminal activity necessitates the development of an organizational culture that is supportive of full compliance and ethical business conduct. It is the view of the EOA Board that organizations should foster a compliant and ethical culture through conduct expectations and organizational values. By identifying conduct expectations and values that must be universally applied, employees are provided with a basis for business decisions when complex legal requirements may be unclear or when the law fails to specifically address behavior that may be in conflict with the interests of employees, investors and society. A commitment to ethics strengthens an organization's compliance program.

The need to address business conduct and corporate culture is recognized in the Sarbanes-Oxley Act and in the Securities and Exchange Commission proposed rules that were issued earlier this month to implement this Act. The SEC rules specifically address the need for a "Code of Ethics", which is defined as "a codification of standards that is reasonably necessary to deter wrongdoing and to promote":

- Honest and ethical conduct
- Avoidance of conflict of Interest
- Full, fair, accurate, timely and understandable disclosure
- Compliance with applicable governmental laws, rules and regulations
- Prompt internal reporting of code violations
- Accountability for adherence to the code.

The Corporate Accountability and Listing Standards Committee of the NYSE also proposed a requirement that "companies must adopt and disclose a code of conduct and ethics for directors, officers and employees, and promptly disclose any waivers of the code for directors or executive officers". As stated in the NYSE proposal, the code of conduct and ethics will "focus the board and management on ethical risk, provide guidance to personnel to help them recognize and deal with ethical issues, provide the mechanisms to report unethical conduct, and help to foster a culture of honesty and accountability." The NYSE proposal also mandates that the code of conduct and ethics for each organization specifically require organizations to "proactively promote compliance with law, rules and regulations".

The EOA Board recommends that the Organizational Guidelines be revised to focus more directly on the need to communicate conduct expectations and organizational values. This change would be consistent with the Sarbanes-Oxley Act and with the NYSE listing standards recommendation. The EOA Board believes that this change would enhance the effectiveness of compliance management efforts and contribute to the prevention of unethical business activities.

The EOA Board recommends adding the following note to section to §8A1.2(k) of the Organizational Guidelines.

"The organization must have established and communicated conduct expectations and organizational values through a code of conduct and ethics or other mechanism appropriate to the organization. These conduct expectations and organizational values must include the requirement for full compliance with applicable laws and regulations and must be periodically and effectively communicated with employees".

Neutral Office or Ombudsman

In *The Federal Sentencing Guidelines for Organizations: A Decade of Promoting Compliance and Ethics*, the Honorable Diana E. Murphy, Chair, United States Sentencing Commission, stated "Not unlike the United States Constitution, the organizational guidelines contain simple statements of general principle that permit its application to varied and changing circumstances". The EOA Board agrees that one of the greatest strengths of the Organizational Guidelines is that they provide a general framework for compliance management without becoming overly prescriptive in directing organizations on the specific implementation of each of the seven program requirements. In taking this non-prescriptive approach, organizations have the flexibility to design compliance efforts in a fashion that best meets their organizational culture and individual assessment of compliance risk.

Since the EOA Board believes that maintaining maximum flexibility in the Organizational Guidelines should be a priority, we do not support a proposal to specifically encourage a neutral or ombudsman office. There are many different potential approaches that organizations may elect to implement to effectively meet the reporting system requirement. Implementation of a neutral or ombudsman office is only one of many possible approaches, and should not be specifically encouraged or required over other alternatives.

The EOA Board recommends that §8.1.2(k) 5 remain non-specific as to the required methodology of providing a reporting system. However, this section could be expanded to give examples of reporting systems, including ethics offices, compliance offices, ombudsman offices, hotlines and helplines.

Whistleblowing Protections

The Organizational Guidelines require organizations to provide a reporting system that employees and agents may use without fear of retribution. The effectiveness of a reporting system is dependent on individual participation by employees and on individual employees overcoming fears that they may have regarding the use of the system. It is our experience that fears are typically related to the potential for harassment or retribution based on a breach of confidentiality regarding the identity of the employee using the reporting system.

The EOA Board recommends that §8A1.2(k) 5 of the Organizational Guidelines should be modified to specifically address: 1) the need for confidentiality, and 2) the need to provide employees with the opportunity to anonymously use reporting systems. The EOA Board proposes the following language for this section:

"The organization must have taken reasonable steps to achieve compliance with its standards, e.g., by utilizing monitoring and auditing systems reasonably designed to detect criminal conduct by its employees and other agents and by having in place and publicizing a reporting system that is confidential to the extent practical and <u>which permits anonymous reporting</u>, whereby employees and other agents could report violations of conduct expectations and values as well as criminal conduct by others within the organization without fear of retribution".

The EOA Board thanks you for the opportunity to provide comments regarding enhancements to the Organizational Guidelines.

Nancy Thomas Moore

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Chair
EOA Board of Directors

Gretchen A. Winter

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Vice-Chair
EOA Board of Directors

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