TESTIMONY OF THE UNITED STATES DEPARTMENT OF JUSTICE

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ORGANIZATIONAL SENTENCING GUIDELINES

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BEFORE THE
UNITED STATES SENTENCING COMMISSION

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INTRODUCTION

Members of the Commission–

I thank you for the invitation and very much welcome the opportunity to appear before you today to discuss important issues surrounding organizational sanctions and specifically the federal organizational sentencing guidelines.

I first want to commend the Sentencing Commission for having convened the Ad Hoc Advisory Group on the Organizational Sentencing Guidelines and for inviting me to be a part of it. The Group was an extraordinary collection of academics, prosecutors, defense attorneys, corporate compliance experts, and it was a genuine honor to serve on it. The Group worked conscientiously for 18 months, and despite many significant differences of opinion, seriously tackled the charge that the Commission put before us. The Group's work product was comprehensive and the result of countless hours of

evidence gathering and serious deliberation. We think it was an excellent product, and we support almost all of the proposed amendments to Chapter Eight developed by the Group.

I also want to thank the Commission staff for its support of the Advisory Group. It is no overstatement to say that without the work of the Commission staff, neither the report of the Advisory Group nor the proposed amendments would ever have come to be. The staff is a group of dedicated professionals that is asked to provide expert advice and to walk a very fine line between often strong-minded adversaries. With the Advisory Group, they did so with both grace and achievement.

THE ADVISORY GROUP, AND THE ORGANIZATIONAL SENTENCING GUIDELINES GENERALLY

The past few years have been an especially appropriate time to review the organizational sentencing guidelines. During that time, we have seen in stark terms and on a grand scale the costs – to identifiable victims and to the economy at large – of financial and other organizational crime. Corporate fraud has robbed employees and shareholders of every stripe – the young and the old, the middle class and the working poor, those from large cities and those from rural America – of their financial security. It has undermined public confidence in our financial markets and for a significant time dramatically reduced consumer confidence.

The consequences of corporate and other organizational crime are why we believe the advent of the organizational sentencing guidelines some ten years ago was so significant. The organizational

guidelines – and mandatory corporate criminal penalties as a whole – recognize that the policies, practices, and culture of a corporation or other organization often bear a significant responsibility when someone or something is harmed by an employee or agent of that corporation or organization. We believe that prevention, detection, and prompt disclosure of organizational offenses by organizations themselves can dramatically reduce criminal behavior. The organizational sentencing guidelines, and complementary policies pioneered by the Antitrust Division and other components of the Justice Department, by the Department of Health and Human Services, and by the Environmental Protection Agency, recognize this fundamental principle of organizational behavior. We believe the organizational sentencing guidelines have been a dramatic step forward in corporate criminal law and organizational management.

The proposed amendments to the sentencing guidelines for organizational defendants, recommended by the Advisory Group and published by the Commission, are intended primarily to give greater guidance to organizations and courts regarding the criteria for an effective program to prevent and detect violations of the law ("compliance programs"). The proposed amendments add to Chapter Eight, Part B, a new guideline, §8B2.1 (Effective Program to Prevent and Detect Violations of Law), that identifies for the first time in the body of the sentencing guidelines the purposes of an effective compliance program, sets forth more clearly the seven minimum steps for such a program, and provides greater guidance for their implementation. We strongly support these amendments. We believe compliance programs are key to reducing crime within organizations and that the sentencing guidelines

for organizations have been not only a real innovation but also a great success in providing incentives for organizations to develop and implement these programs. The proposed amendments will communicate to the corporate community, with greater emphasis and clarity, the federal policy of encouraging self-policing through effective compliance programs and self-reporting if violations of law are detected. Moreover, the continuing policy of ascribing a benefit to having such programs will, we believe, likely lead to better compliance programs and practices and increased information to corporations about monitoring their own conduct and self-reporting any misconduct.

Despite our general support for these amendments, we do have concerns about a few specific provisions of the proposed amendments.

I. Rebuttable Presumption When High-Level Personnel Are Involved In Crime

Currently, there is a provision in §8C2.5(f) that prohibits an organization from receiving a three level downward adjustment to its culpability score for having an effective compliance program if an individual within high-level personnel of the organization, or a person within high-level personnel of a unit having more than 200 employees and within which the offense was committed, or an individual responsible for the administration or enforcement of a compliance program participated in, condoned, or was willfully ignorant of the offense; and there is a rebuttable presumption against receiving the adjustment if an individual within substantial-authority personnel participated in the offense. The Commission proposes to delete this provision in its entirety and replace it with one that creates a rebuttable presumption against receiving the adjustment where high-level personnel of the organization

participated in, condoned, or were willfully ignorant of the offense. The synopsis to the proposed amendment indicates that "this modification is intended to assist smaller organizations that currently may be automatically precluded, because of their size, from arguing for a culpability score reduction for their compliance efforts under §8C2.5(f)." In its issues for comment, the Commission "requests comment regarding whether the automatic preclusion should continue to apply in the context of large organizations. Moreover, should the rebuttable presumption apply in the context of small organizations, in which high-level individuals within the organization almost necessarily will have been involved in the offense?"

We oppose this proposed change for several reasons. First, we do not believe the proposed amendment is suggested by the Advisory Group study, report, or recommendations. The Advisory Group report notes that small organizations rarely qualify for the three level downward adjustment to their culpability score for having an effective compliance program. Two causes are mentioned: one, small organizations frequently fail to establish effective compliance programs, and two, the involvement of high-level officials in the commission of an offense is likely in the case of the small, closely-held organizations that are in fact prosecuted in federal court and that do make up the majority of organizations sentenced under Chapter 8. Report at 131-32. The only recommendation related to small organizations made by the Advisory Group is that "the Sentencing Commission devote resources to reaching and training this target audience (small organizations), perhaps through coordinating with the Small Business Administration and other appropriate policy makers." Report at 133. The Report provides little or no support for the proposed amendment beyond the language already quoted.

Second, we do not believe simply making it easier for small organizations to qualify for the adjustment for having an effective compliance program by creating a litigatable issue is good public policy. By definition, it is more likely that crime involving small organizations (as compared to larger organizations) will involve high-level personnel. But whether in a small organization or large, when high-level personnel are involved in crime, there can be no effective organizational self-policing and therefore no downward adjustment for an effective compliance program is warranted. Indeed, in a small organization, it is less likely that the criminal acts of the high-level person will be secret and it is more likely that they will have permeated the organization.

Yet, even if the Commission found the small business rationale compelling, the proposed amendment is considerably overbroad. It sweeps away the current automatic preclusions on receiving the adjustment for high-level personnel involvement in the offense, as well as the rebuttable presumption against receiving the adjustment for substantial-authority personnel involvement in the offense, for all organizations, large and small. There is no discussion in the Report concerning the need to make it easier for large organizations to qualify for the adjustment despite high-level or substantial-authority personnel involvement in the offense of conviction. In fact, such a change would be directly contrary to the thrust of the Report, which is to increase the involvement of governing authorities and organizational leadership both in the oversight of compliance programs and, more significantly, in creating law-abiding organizational cultures.

> [T]he corporate scandals that exploded shortly following the tenth anniversary of the adoption of the organizational sentencing guidelines

> demonstrated that the involvement of officers and directors in corporate crime was not confined to small businesses. The corporate scandals of 2002 greatly contributed to the public's lack of confidence in the capital markets. In virtually all of the scandals, the alleged malfeasance occurred at the senior management and/or governing authority level. Where there was no actual malfeasance by members of the governing authority, there were often instances of negligence.

Report at 57.

As a result of this finding, the amendments now under consideration would require higher levels of awareness of, and involvement in, compliance programs by governing authorities and organizational leaders in order for those programs to be considered to be effective. They also propose that to be considered effective a compliance program must not only be designed to prevent and detect violations of law, but it must also "promote an organizational culture that encourages a commitment to compliance with the law." Proposal at 60. We believe to propose, at the same time, an amendment that would make it easier to qualify for the adjustment where there is actual involvement in (or willful negligence of) the instant offense by high-level and substantial-authority personnel is inconsistent at best. The involvement of these personnel in compliance programs is the clearest indication of a law-abiding organizational culture and their involvement in criminal activity the clearest indication that the organization's compliance program is ineffective. That was the reason that the limitations on receiving the adjustment were originally imposed, and the spectacular failure of the leadership of numerous large organizations in recent years to obey the law is the strongest possible argument in favor of retaining them.

For example, in many recent major international antitrust/cartel prosecutions, including the prosecutions of Archer Daniels Midland Company, UCAR International Inc., and F. Hoffmann-La Roche Ltd. and BASF Aktiengesellschaft, high-level personnel participated in and, in fact, were among the leaders of the cartels. It is impossible, as many of the proposed amendments put forward by the Advisory Group and the Commission recognize, to create a law-abiding organizational culture from the bottom up; respect for the law must begin at the top and permeate downward by means of an effective compliance program. If an organization is rotten at the top it cannot be the good corporate citizen that the adjustment for having an effective compliance program was designed to reward.

This is true to an equal, if not greater, extent in small organizations as in large. Clearly, there should be distinctions between what large and small organizations must do to establish effective compliance programs. An effective compliance program in a small organization may be much less formal than in a large organization. The Commission proposes to add commentary to the guidelines making this plain, and we support this commentary. "For example, in a small business, the manager or proprietor, as opposed to independent compliance personnel, might perform routine audits with a simple checklist, train employees through informal staff meetings, and perform compliance monitoring through daily "walk-arounds" or continuous observation while managing the business." This proposal recognizes that in a small organization the personal involvement of an owner/manager is the key element to creating an effective compliance program. Yet how can personal involvement create a law-abiding organizational culture when the manager or proprietor is engaged in unlawful activity?

To the extent that small organizations are not receiving credit for having effective compliance programs, the better solution is the one identified by the Advisory Group: making greater efforts to educate small companies on their obligations under the law and working with them to establish effective compliance programs, rather than giving them credit for compliance programs despite the participation of their owners and high-level managers in criminal activity. Adopting the proposed amendment, even revised to apply only to small organizations, would send exactly the opposite message to the one being sent by virtually every other change being proposed by the Commission regarding compliance programs. And, in our view, it would send the wrong message.

II. Waiver of Attorney-Client Privilege and Work Product Protections

There has been considerable debate – within the Advisory Group and beyond – about the circumstances under which an organization ought to be asked to waive the attorney-client privilege or its work product protections in order to receive a reduction in its culpability score for cooperation with the government or to receive a downward departure for providing substantial assistance in the investigation or prosecution of another. The Department's position on this has been, and continues to be that what is required to receive these reductions is simply cooperation and substantial assistance; and that neither waiver of the attorney-client privilege nor waiver of the work product protections are prerequisites to receiving these reductions. We recognize and the Advisory Group recognized, however, that in many cases, cooperation and substantial assistance will not be fully achieved unless there is a waiver of some kind. It comes down to a case-by-case analysis, depending on the particular circumstances of the investigation.

It is for these reasons that we accept the proposed new language in §8C2.5, Application Note 12, that clearly indicates that in certain circumstances, but not all cases, a waiver will be necessary to receive the reduction in the culpability score for cooperation. Where we believe the Application Note falls a bit short is in recognizing that the government is in a unique position to assist the court in determining whether the defendant has effectively cooperated and whether a waiver of the attorney-client privilege or work product protection is necessary for full cooperation.

The current guideline Application Note 12 correctly points out that "[a] prime test of whether an organization has disclosed all pertinent information is whether the information is sufficient for law enforcement personnel to identify the nature and extent of the offense and the individual(s) responsible for the criminal conduct." We believe that in determining whether sufficient cooperation has occurred, the sentencing court should consider all evidence, but should give substantial weight to the government's assessment of the defendant's cooperation and the government's assessment of the sufficiency of the cooperation in identifying the nature and extent of the crime and those responsible. This idea is included in §5K1.1 and it should be included here. It's absence may be construed as an intentional omission. Consequently, we think the language of the proposed Application Note would be improved by incorporating this idea as follows:

> To be thorough, the cooperation should include the disclosure of all pertinent information known by the organization. Thorough cooperation may require the organization to waive its work product protection and, in a lesser number of instances, its attorney-client privilege, though waiver is not necessarily a prerequisite to a reduction in culpability score. Substantial weight should be given to the government's evaluation of the extent of the organization's cooperation, particularly where the extent and value of the cooperation are difficult to ascertain.

III. Substantial Assistance

These same principles surrounding the waiver of the attorney-client privilege and the work product protections apply in the context of substantial assistance motions. However, one critical difference between substantial assistance departures and reductions in culpability score for cooperation

is that under existing statutes and guidelines, the availability of a substantial assistance departure is triggered only by the government. Simply put, departures for substantial assistance pursuant to 18 U.S.C. § 3553(e), §5K1.1, or §8C4.1 may not be made absent a motion by the government. Thus, if the government makes no motion, there is nothing pending before the court and the language in the application note is unnecessary. If, on the other hand, the government has made a motion, the government agrees that there has been cooperation and the application note is, likewise, unnecessary. In Wade v. United States, 504 U.S. 181, 185-86 (1992), the Supreme Court clearly held that the filing of a substantial motion is the sole prerogative of the government. The only authority a district court has to review a prosecutor's refusal to file such a motion and the only authority a court has to grant a remedy is if the court finds "that the refusal was based on an unconstitutional motive." Id. The Court gave as an example of an unconstitutional violation the refusal to file the morion "because of the defendant's race or religion." Id.

We believe that proposed Application Note 2 in §8C4.1, which mirrors Application Note 12 in §8C2.5, suggests that the government's determination of whether or not to file a substantial assistance motion is reviewable, at least to the extent that the government's determination may hinge on a waiver of the attorney-client privilege or waiver of the work product protection. We think this suggestion is at best confusing and at worst contrary to law. We strongly urge that this proposed application note be eliminated as it only invites unwarranted litigation.

SPECIFICITY OF THE ORGANIZATIONAL GUIDELINES

Some of those who have commented on the proposed amendments as a whole have suggested that the amendments would require too much of organizations. For example, some have balked at the proposed amendment that would change the goals of creditable compliance programs from those that prevent and detect "criminal conduct" to those that prevent and detect "violations of law." The concern raised is that changing the goals will require compliance programs to encompass and address every possible civil and administrative rule to which an organization might be subject; that no organization will be able to comply, and that ultimately the proposed changes will create a disincentive to implement any compliance program at all. Similar complaints have been raised about the addition of language surrounding corporate ethics and other provisions of the proposed amendments.

We believe this concern is simply a straw man and is based on a fundamental misunderstanding of the organizational sentencing guidelines. The organizational sentencing guidelines are not intended to micromanage organizational compliance programs, and we do not believe the amendments proposed would do so or would be burdensome. As a regulatory scheme, the organizational sentencing guidelines have struck the correct balance of specificity in seeking good organizational behavior and have not been, and should not be, crafted to describe precisely what is required of an organizational compliance program. The organizational guidelines are used to sentence very small organizations with dozens or fewer employees as well as global, multi-billion dollar corporations with tens of thousands of employees, as well as municipal entities of varying sizes. No single set of sentencing rules issued by a centralized regulatory body can correctly specify exactly what good management practices and actions should be for all shape and size of organization. The organizational guidelines properly set forth

principles and lay out a model framework of the good corporate citizen, leaving it to the courts – the entity best positioned to properly evaluate and judge individual organizational defendants – to determine the level of compliance and culpability within the framework and to define a just sentence. This scheme takes advantage of the organizational strengths of the Commission and the courts alike: the Commission to help define broad national policies and create a national framework, and the courts to judge case-specific and organization-specific facts and craft sentences within the Guidelines' parameters.

Changing the goals of creditable compliance programs from the prevention and detection of "criminal conduct" to the prevention and detection of "violations of law" or including references to ethics in describing a good compliance program is not intended to greatly expand the requirements of an effective compliance program. These proposed changes are intended to recognize that a corporation with a law abiding and ethical culture is less likely to have its employees involved in crime than one that is not. We think the proposed changes are a small but meaningful improvement on the organizational guidelines.

We believe each corporate compliance program ideally will be creatively tailored to the unique characteristics of each organization's individual structure and business in the context of a broad guideline framework. It is more likely that organizations will be encouraged to do more, rather than less, and to construct a successful compliance program with guidelines that more generally describe elements which could be included as part of an "effective" program.

CONCLUSION

The swift and certain punishment of financial and other organizational crimes is critical if our country, and in particular if our country's economy, is to thrive. We believe the mandatory organizational guidelines have brought a level of certainty to organizational sanctions that simply was not present before the guidelines. This certainty has, in turn, brought more just punishment, led to greater restitution for victims, and fostered more ethical behavior in corporate America. As importantly, the organizational sentencing guidelines have helped forge a new ethic of and commitment to compliance. Recent events, though, have shown that there is room for improvement. We believe the proposed amendments, with the modifications we have here suggested, are such an improvement. We look forward to working with the Commission in the remaining weeks of this year's amendment cycle to revise and ultimately promulgate the proposals to make the organizational guidelines that much better.