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May 20, 2002

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

VIA FAX (202) 502-4699  
Original Via U.S. Mail

Re: Request for Public Comment on Organizational Guidelines

Dear Mr. Jones:

We write on behalf of The Regence Group, a holding company of Blue Cross and Blue Shield plans in the Northwest and Mountain states. This letter is in response to your request for public comment on issues the Advisory Group may wish to consider while reviewing the Sentencing Guidelines' criteria for an effective compliance program.

Overall, much good has resulted from the Guidelines from the standpoint of deterring and detecting improper behavior. Like many other companies, we appreciate the blueprint the Guidelines provide for an effective compliance program. We would also appreciate the opportunity for more interchange of ideas with the Advisory Group and suggest that as an Advisory Group, you publicize your ideas for improvement of the Guidelines and design some reasonable forum for the public to "weigh in" periodically on those ideas before developing them into formal recommendations. To facilitate such interchange, it would be helpful if the Advisory Group would provide a succinct summary of the feedback received from the initial request for comment. Perhaps a second request for public comment following publication of such a summary would sharpen the issues and allow for deeper, more meaningful feedback.

As an initial comment, there are some elements in the guidelines that we believe would benefit from greater clarity or specification. I detail these elements below, with a brief explanation of the clarifications we would suggest.

*The Regence Group is an independent licensee  
of the Blue Cross and Blue Shield Association*

### **“Due Care Not to Delegate Substantial Discretionary Authority”**

The third criterion for an effective compliance program is that the “organization must have used due care not to delegate substantial discretionary authority to individuals whom the organization knew, or should have known through the exercise of due diligence, had a propensity to engage in illegal activities.” 2001 Federal Sentencing Guideline Manual, Section 8A1.2, Application Notes, 3(k)(3).

We understand and support the rationale behind this criterion. In application, however, companies find it challenging because it piles subjective standard on top of subjective standard: “due care,” “substantial discretionary authority,” “should have known,” “due diligence,” and “propensity.” Each term is vulnerable to unrestricted interpretation and application, particularly when viewed in hindsight by a judge or prosecutor. “Propensity” is especially troublesome. It requires virtual clairvoyance on the part of employers, who must accurately forecast employees’ future behavior or face a finding of a non-effective compliance program.<sup>1</sup> Legal and practical limitations on an organization’s ability to perform exhaustive background checks – such as the Fair Credit Reporting Act and the lack of a nationwide criminal database accessible by private parties – also make it difficult to obtain information that a judge or prosecutor may later determine a company “should have known.”

A more workable standard would focus on what the company actually knows and what employees and applicants have actually done: “The organization must not have delegated substantial discretionary authority to individuals whom the organization knew to have been convicted of a felony involving dishonesty or breach of trust, or whom the organization knew to be excluded from participation in any federal program.”

### **“Self-Reporting”**

As the Guidelines make clear, self-reporting is not one of the seven criteria of an effective compliance program. It is an additional, separate activity that may result in a further point reduction in sentencing, but failure to self-report does not mean that an organization’s compliance program was ineffective. *See* 2001 Federal Sentencing Guideline Manual, Section 8C2.5(f), -(g). We have received feedback from other companies that some government agencies have taken the position (at least initially) that a compliance program cannot be effective without self-reporting. Because this position is contrary to the Guidelines, we bring it to your attention.

### **“Full Cooperation”**

Cooperation with the government is another element that may result in a sentencing points reduction but that is not among the criteria of an effective compliance program. There appears to be a disconnect between the Guidelines’ interpretation of “cooperation” and that employed by federal prosecutors. According to Department of Justice Guidelines for the Federal Prosecution

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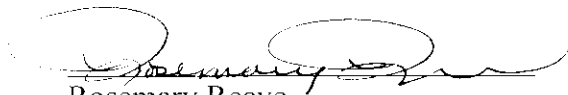
<sup>1</sup> The “propensity” standard also makes the employer vulnerable in dealing with resulting complaints of employment discrimination or wrongful termination, as it can be difficult to defend an employment decision based on an employer’s fear of what an employee *might* do.

B. Todd Jones  
May 20, 2002  
Page Three

of Corporations, waiver of privilege and work product immunity is a factor in determining whether an organization is cooperating. Guidelines for the Federal Prosecution of Corporations, Section II(A)(4). The Sentencing Guidelines do not hinge a finding of cooperation on privilege waiver, which is the appropriate approach. Because the prosecutors' approach seems contrary to that of the Sentencing Guidelines, we bring it to your attention. The waiver requirement in the Prosecutorial Guidelines creates a disincentive for companies to act aggressively to detect and deter improper conduct. If anything, given the rise of compliance programs following the introduction of the seven criteria, it would be beneficial to recognize a federal self-evaluative privilege to incent instead of inhibit such internal investigations.

Thank you for the opportunity to comment on the Guidelines. If you have any questions or need any further information, please contact Mr. Romrell.

Sincerely,



Rosemary Reeve  
AVP, Sr. Associate General Counsel



Randall L. Romrell  
AVP, Corporate Ethics & Compliance Officer

cc: Mr. Tom Kennedy  
Jackie Wells, Esq.