

Some Thoughts on Proposed Revisions to the Organizational Guidelines

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In this article, Professor O'Sullivan, who served as the reporter for the U.S. Sentencing Commission's Ad Hoc Advisory Group for Organizational Sentencing Guidelines, reflects on that Group's work. She concludes that the potential impact of many of the policy fixes within the power of the Sentencing Commission is dwarfed by decisions that lie solely within the power of the Department of Justice or Congress. Specifically, Department of Justice decisions regarding what constitutes organizational "cooperation" may have a determinative impact on organizational incentives regarding compliance efforts and decisions to investigate, self-report, and cooperate in the remediation of organizational wrongdoing. Professor O'Sullivan also describes how congressional inattention handicaps the Commission's attempts to introduce consideration of corporate culpability into organizational sentencing and leaves in place important disincentives for effective compliance created by the "litigation dilemma." Finally, Professor O'Sullivan also discusses the Sentencing Commission's foray into organizational "best practices" for compliance purposes. She concludes that although the Sentencing Commission's mandate is restricted to formulating guidelines that govern the determination of organizational culpability for purposes of criminal sentencing, attention to the purposes of criminal punishment in this context requires the Commission to create, in essence, a flexible compliance manual that outlines practices and structures necessary to effective systems for preventing and detecting violations of law.

The U.S. Sentencing Guidelines that control the sentencing of organizations for most federal criminal violations (the "organizational guidelines" or "Chapter 8") became effective on November 1, 1991.¹ In crafting the organizational guidelines, the Sentencing Commission adopted what some characterize as a "carrot and stick," and others term a "deterrence and just punishment," approach:

The centerpiece of the Sentencing Guidelines structure is the fine range, from which a sentencing court selects the precise fine to impose on a convicted organization. The Commission designed the

* Professor, Georgetown University Law Center. The views expressed in this piece are my own, and do not represent the views of the U.S. Sentencing Commission's Ad Hoc Advisory Group on the Organizational Sentencing Guidelines. My thanks to Alan C. Michaels for his interest and his seemingly endless patience and understanding.

¹ U.S. SENTENCING GUIDELINES MANUAL ch. 8 (2002), available at <http://www.ussc.gov/2002guid/tabconchapt8.htm>.

guideline provisions that established the fine range to meld the two philosophical approaches to sentencing emphasized in the enabling legislation: just punishment for the offense, and deterrence. By varying the fine based on whether, and to what extent, a company has acted “responsibly” with respect to an offense, the Guidelines embody a “just punishment for the offense” philosophy. Consistent with this paradigm, the Guidelines provide for substantial fines when a convicted organization has encouraged, or has been indifferent to, violations of the law by its employees, but impose significantly lower fines when a corporation has clearly demonstrated in specific ways its antipathy toward lawbreaking. At the same time, the guideline structure embodies principles derived from the deterrence paradigm. The specified ways in which a convicted organization may demonstrate its intolerance of criminal conduct, thus entitling it to a more lenient sentence, are actions that, at least theoretically, should discourage employees from committing offenses.²

The “carrot and stick” approach grew out of the Commission’s acceptance of three propositions. First and foremost, the Commission recognized that the respondeat superior principles of organizational liability did not adequately respond to gradations in corporate culpability.³ The simple equation of the corporation with the corporate actor necessary for liability does not reflect on the relative blameworthiness of the corporation itself.⁴ Second, the Commission came to believe that corporations could “hold out the promise of fewer violations in the first instance and greater detection and remediation of offenses when they occur”⁵ through internal discipline, reformation of standard operating procedures, auditing standards, the corporate culture, and institution of corporate compliance programs reflecting such reforms.

² Ilene H. Nagel & Winthrop M. Swenson, *The Federal Sentencing Guidelines for Corporations: Their Development, Theoretical Underpinnings, and Some Thoughts About Their Future*, 71 WASH. U. L.Q. 205, 210–12 (1993).

³ “The black letter law of corporate criminal liability is straightforward: a corporation is liable for the criminal misdeeds of its agents acting within the actual or apparent scope of their employment or authority if the agents intend, at least in part, to benefit the corporation, even though their actions may be contrary to corporate policy or express corporate order.” JULIE R. O’SULLIVAN, *FEDERAL WHITE COLLAR CRIME: CASES AND MATERIALS* 202 (2d ed. 2003).

⁴ Winthrop M. Swenson, *The Organizational Guidelines’ “Carrot and Stick” Philosophy, and Their Focus on “Effective” Compliance*, reprinted in U.S. SENTENCING COMMISSION, *MATERIALS FOR PROGRAM ON CORPORATE CRIME IN AMERICA: STRENGTHENING THE “GOOD CITIZEN” CORPORATION* 5 (Sept. 7, 1995) (“The Commission came to recognize that the doctrine of vicarious criminal liability for corporations operates in such a way that very different kinds of corporations can be convicted of crimes; from companies whose managers did everything reasonably possible to prevent and uncover wrongdoing, but whose employees broke the law anyway, to companies whose managers encouraged or directed the wrongdoing.”).

⁵ *Id.* at 6.

Finally, and critically, the Commission concluded that it could create incentives for responsible corporate actors to foster crime control by the creation of a mandatory guidelines penalty structure that rewarded responsible corporate behavior and ensured certain and harsh sanctions for truly culpable corporations. In short, the Commission defined its objectives as: creating a model for the good corporate citizen; using the model to make corporate sentencing fair and predictable; and ultimately employing the model to create incentives for corporations to take crime controlling steps.

One manifestation of the organizational guidelines' underlying "carrot and stick" philosophy—which has as its object galvanizing organizational efforts to *prevent* organizational wrongdoing—is an important sentencing credit that organizations can claim for having an "effective program to prevent and detect violations of law."⁶ In February 2002, the U.S. Sentencing Commission constituted the Ad Hoc Advisory Group on the Organizational Sentencing Guidelines (affectionately referred to within as "AGOG" or the "Advisory Group") and charged it with evaluating the operation of the organizational guidelines and, in particular, whether the guidelines' definition of an "effective program to prevent and detect violations of law" required updating or amending.⁷

The Advisory Group tendered for the Commission's consideration a voluminous report and specific suggested revisions to Chapter 8 in October 2003.⁸ A few months later, the Sentencing Commission published proposed amendments to Chapter 8, which were substantively identical⁹ to those submitted by AGOG, for comment in the Federal Register.¹⁰ I was privileged to serve as a member of, and the reporter for, AGOG and have been asked to provide a short introduction for the portions of the excerpted report reprinted within.¹¹

Our group was comprised of fifteen individuals with backgrounds in federal criminal prosecution and defense, federal probation, legal academia, business,

⁶ See U.S. SENTENCING GUIDELINES MANUAL § 8C2.5(f); see also *id.* § 8C1.2, cmt. n. 3(k) (definition of an "effective program to prevent and detect violations of law").

⁷ See U.S. Sentencing Commission, News Release (Feb. 21, 2002), available at <http://www.ussc.gov/PRESS/rel0202.htm>; see also Sentencing Guidelines for United States Courts, 66 Fed. Reg. 48306 (Sept. 19, 2001) (U.S. Sentencing Commission's announcement of its intention to form advisory group to study the organizational guidelines), available at http://www.ussc.gov/FEDREG/fedr901_0A.htm.

⁸ See *Report of the Ad Hoc Advisory Group on the Organizational Sentencing Guidelines* (Oct. 7, 2003) [hereinafter *Advisory Group Report*], available at <http://www.ussc.gov/corp/advgrprpt/AppB.pdf>; see also *id.* at App. B (proposed revised chapter 8) [hereinafter Proposed U.S.S.G.].

⁹ The version published by the Sentencing Commission added brackets around one proposal. See *infra* text following note 47.

¹⁰ See Proposed Amendments to the Sentencing Guidelines, Proposed Amendment 2, 68 Fed. Reg. 75339 (Dec. 30, 2003 & Jan. 14, 2004), available at <http://www.ussc.gov/2004guid/rfJan04.pdf>.

¹¹ I must note that although I was the reporter for the Advisory Group, I was not solely responsible for its written work product. Many sections of the report were authored by other members of the Advisory Group, and the Commission's staff was extremely helpful in shepherding our draft efforts into a final report.

corporate compliance, and business ethics.¹² At our introductory meeting, my initial reaction was that getting a substantive piece of work product out of a group as large and varied as ours would be difficult or—in the more colorful view of another member—attempting to create consensus around the table would be like “herding cats.” I was wrong.

I credit the then Chair of the Commission, Judge Diana Murphy, with selecting members who—virtually to a person—dedicated a great deal of time, labor and thought to the project and were committed to producing a comprehensive and detailed report. Whether or not readers agree with the substance of our report, I hope that they will recognize the amount of careful effort that went into it. Judge Murphy also had the vision to enlist a (former) Marine to be the Chair and chief cat-herder. Todd Jones, a former U.S. Attorney for the District of Minnesota who is now a partner in the firm of Robins, Kaplan, Miller & Ciresi, L.L.P., made clear from the outset that he would set a schedule that we were all expected to meet, and that whatever difficulties we encountered throughout our deliberations would have to be worked out before the final report was issued. He was a skillful and *firm* Chair throughout the process. In committees such as this, the Department of Justice is often the 600-pound gorilla in the room—for good or ill. Whoever selected our representative from the Department of Justice did us a huge favor. Mary Beth Buchanan, who is the U.S. Attorney for the Western District of Pennsylvania as well as the Chair of the Attorney General’s Advisory Committee, earned the respect, trust, and regard of everyone in the group; as a result, she was able to represent the Department’s interests in a constructive, as well as a zealous, way. Finally, the Commission’s staff was unfailingly helpful and (thank goodness) even lent us support in one area in which we did not have any expertise: drafting in guidelines-speak.

Two factors contributed most to the substance of the Advisory Group’s recommendations. First, Todd Jones’ constant admonition was that the group was to have “big ears.” We chose to interpret this as a directive to get out there and solicit the views of all interested constituencies. The Group also made two requests for public comments.¹³ The first request was designed to beat the bushes for general diagnoses regarding the efficacy of the existing guidelines, and the second was intended to elicit commentary on more specific issues generated by the first set of comments and our own personal investigations and ruminations. We then held a hearing, at which we worked to get the testimony and statements of different constituencies and persons with a range of experience in sentencing and compliance.¹⁴

¹² See *Advisory Group Report*, *supra* note 8, at App. A, available at <http://www.uscc.gov/corp/advgrprpt/AppA.pdf> (list of Advisory Group members and brief resumes for same).

¹³ See *Advisory Group for Organizational Sentencing Guidelines: Request for Additional Public Comment Regarding the U.S. Sentencing Guidelines for Organizations* (Oct. 15, 2002), available at http://www.uscc.gov/corp/pubcom8_02.pdf; *Advisory Group for Organizational Guidelines: Request for Public Comment* (March 19, 2002), available at http://www.uscc.gov/corp/pubcom_301/PC_302.htm. Responses to these requests for comment are available at http://www.uscc.gov/corp/pubcom_1002/PC_1002.htm.

¹⁴ Transcripts of the public hearing sessions (and any accompanying written comments) are

We were also blessed with a deep reservoir of compliance and business ethics expertise on the committee.

After digesting all this input, as well as what we were able to mine from the scholarly and practice literature, surveys, and compliance materials, we had a good sense of developments in the compliance area since the organizational guidelines were inaugurated.¹⁵ In a sense, we attempted to bring the guidelines full circle—that is, reestablish the guidelines as the foundation for future progress in refining what constitutes an “effective” program.

The guidelines have been commonly credited with creating a boom in organizational compliance efforts. As a consequence, a consulting industry has been created and significant organizational attention—in a wide variety of industries and businesses—has been devoted to determining how best to structure and maintain effective compliance programs. The organizational guidelines also undoubtedly focused prosecutorial and regulatory attention on the subject. They provided governmental actors with a template upon which to build while formulating their own policies regarding what constitutes an “effective program” for purposes of making decisions regarding the appropriate imposition of civil and criminal penalties. Finally, the organizational guidelines influenced corporate law, spurring most notably in the *Caremark* decision¹⁶ judicial scrutiny of directors’ duties *vis-à-vis* compliance.

available at http://www.ussc.gov/corp/advgrprt/1007_Brief.pdf.

¹⁵ By “compliance efforts,” I mean the various means employed by corporations to prevent and detect violations of law, which generally include some or all of the features identified by the organizational guidelines as integral to an “effective program to prevent and detect violations of law.” Many of these are discussed, at least in part, within. See discussion *infra* Part D.

¹⁶ *In re Caremark Int’l Inc. Derivative Action*, 698 A.2d 959 (Del. Ch. 1996). In *Caremark*, the Delaware Chancery Court was asked to approve the settlement of a shareholder derivative case alleging that the Caremark directors had breached their duty of care by failing to supervise the conduct of Caremark’s employees. The court approved the settlement, but in so doing raised the question “what is the board’s responsibility with respect to the organization and monitoring of the enterprise to assure that the corporation functions within the law to achieve its purposes?” *Id.* at 968–69.

The Chancery Court stated that “[m]odernly this question has been given special attention by an increasing tendency, especially under federal law, to employ the criminal law to assure corporate compliance with external legal requirements” and by the organizational guidelines, “which impact importantly on the prospective effect these criminal sanctions might have on business corporations.” *Id.* at 969. “The Guidelines offer powerful incentives for corporations today to have in place compliance programs to detect violations of law, promptly to report violations to appropriate public officials when discovered, and to take prompt, voluntary remedial efforts.” *Id.* The court went on, in distinguishing a Delaware Supreme Court opinion that could be read to state that directors have no responsibility to assure adequate reporting systems are in place, *Graham v. Allis-Chalmers*, 188 A.2d 125, 125 (Del. 1963), to reiterate the importance of the organizational guidelines: “Any rational person attempting in good faith to meet an organizational governance responsibility would be bound to take into account this development and the enhanced penalties and the opportunities for reduced sanctions that it offers.” *Caremark*, 698 A.2d at 970.

The court concluded that “a director’s obligation includes a duty to attempt in good faith to assure that a corporate information and reporting system, which the board concludes is adequate, exists, and that failure to do so under some circumstances may, in theory at least, render a director liable for losses caused by non-compliance with applicable legal standards.” *Id.* at 970. The Chancery Court’s remarks

Our objective in making these efforts was to identify revisions that reflect what criteria governmental, private, and judicial actors now believe are most likely to create effective programs to prevent and detect violations of law. We hoped that, after learning from the efforts of others, we could assist the Commission in revising Chapter 8 so that it will again serve as a foundation for future advances in identifying the best ways of preventing corporate crime, or at least nipping it in the bud. At the same time, we wished to maintain an important attribute of the existing guidelines: the balance they strike between giving general guidance to organizations, prosecutors, probation officers, and judges regarding the essential attributes of a successful program, and giving the myriad different types of organizations covered by the guidelines the flexibility to apply these attributes in ways that make sense in light of their unique characteristics and needs. In short, we strove to reflect the learning of the last ten years with reasonably specific, yet flexible, guidance.

The second factor that significantly influenced our work product was the fallout from the corporate scandals of 2002. What began as an assignment that provoked barely a ripple of interest, even in the relatively small pool of those who stay abreast of sentencing issues or are concerned with corporate compliance issues, became over the course of our eighteen months of work a more urgent and high-profile task. The reason, of course, is that during AGOG's tenure, a series of corporate scandals dominated the headlines and heightened interest in crime and punishment in corporate suites. While the attention did not affect our deliberations, the lessons that Congress and other regulators drew from the revelations of corporate wrongdoing—often reflected in legislation and regulations—certainly did.

I have no desire to tax readers' patience by attempting to re-write our report in these pages. What I hope will be of some interest are the conclusions I drew about the limits and challenges of the Sentencing Commission's role in attempting to deter and punish corporate crime. I will try to illustrate those limits and challenges by examining some of the issues we investigated—not necessarily in order of importance, but rather in the order of what they may say about the Commission's role. In so doing, I hope that I will also be able to touch upon much of what may be important or interesting about our various proposals.

My overall thesis is that many of the policy fixes within the power of the Commission are dwarfed in their impact by decisions that lie solely within the power of the Department of Justice or Congress. Thus, in Part A, below, I explore the extent to which Department of Justice decisions regarding what constitutes organizational "cooperation" may have a determinative impact on organizational incentives to lean into compliance efforts—and in particular decisions to investigate, self-report, and cooperate in the remediation of organizational wrongdoing. In Part B, below, I

in *Caremark* have raised the prospect—however attenuated—of directors' derivative liability for others' failures to ensure that adequate compliance programs are in place. Consequently, the *Caremark* decision, which was significantly influenced by the Organizational Guidelines, "gave the movement toward corporate self-policing—known as compliance planning—a kick in the pants." John Gibeaut, *For Any Lawyer Trying to Help Keep an Honest Company Straight, a Compliance Plan is the Best Way to Root Out Trouble Before it Happens and to Limit Liability if it Does*, 85 A.B.A. J. 64, 66 (Jun. 1999).

discuss how congressional inattention to the statutory fine limits in organizational sentencing cases handicaps the Commission's attempts to introduce consideration of corporate culpability into organizational sentencing. Another critical legislative default is considered in Part C, which lays out the important disincentives for effective compliance created by the "litigation dilemma."

Finally, in Part D I discuss objections to the Sentencing Commission's foray into "best practices" for compliance purposes, given that its mission is supposed to be to create rules to govern in criminal sentencing proceedings. I conclude that although the Sentencing Commission's mandate is restricted to formulating guidelines that govern the determination of organizational culpability for purposes of criminal sentencing, the purposes of criminal punishment in this context demand that the Commission reach more broadly and create, in essence, a flexible compliance manual that outlines those practices or structures which experience demonstrates are necessary to effective systems for the prevention and detection of violations of law.

A. The Role of the Department of Justice: Clarification of the Relationship Between Privilege Waivers and Cooperation Credit or Departure

The Advisory Group attempted to explore whether the organizational guidelines adequately define self-reporting and cooperation in order to assess whether the Guidelines sufficiently reward organizations that report their own illegal activities and cooperate with federal law enforcement investigations. In so doing, AGOG was forced to inquire whether recent policy changes by the U.S. Department of Justice have made waiver of the protections of the attorney-client privilege and the work-product doctrine a factor in its determination of whether an organization receives sentencing credit for self-reporting or cooperation and, if so, what consequences this policy has for compliance incentives.

Some background here may be helpful. In 1999, then Deputy Attorney General (and AGOG member) Eric Holder issued a memorandum entitled *Federal Prosecution of Corporations*.¹⁷ The memo was recently reissued in revised form by former Deputy Attorney General Larry Thompson.¹⁸ The Holder and Thompson Memos indicate that waiver of attorney-client and/or work-product privileges is a factor that either "should" or "may" be considered by United States Attorneys and other Justice Department enforcement personnel in charging corporate defendants, reaching settlements, granting amnesty and recommending sentences.¹⁹ While this

¹⁷ See Memorandum from Deputy Attorney General Eric H. Holder, Jr., to Heads of Department Components and All United States Attorneys, *Federal Prosecution of Corporations* (June 16, 1999) (on file with author) [hereinafter Holder Memo].

¹⁸ See Memorandum from Deputy Attorney General Larry Thompson, to Heads of Department Components, *Principles of Federal Prosecution of Business Organizations* (Jan. 20, 2003), available at http://www.usdoj.gov/dag/cftf/corporate_guidelines.htm [hereinafter Thompson Memo].

¹⁹ See *id.* at 7 ("One factor the prosecutor may weigh in assessing the adequacy of a corporation's cooperation is the completeness of its disclosure including, if necessary, a waiver of the attorney-client and work product protections, both with respect to its internal investigation and with respect to

policy statement²⁰ indicates that waiver is not necessarily a prerequisite for leniency—which is ultimately a matter of prosecutorial discretion—the express indication that waiver might ever be considered has the potential to muddle incentives for organizational cooperation.

Very few subjects seem to consume the white-collar defense bar more than the issue raised by the Holder and Thompson Memos: whether corporations should be required to waive the protections of the attorney-client privilege and the work-product doctrine as a precondition to declination of prosecutorial or regulatory action against them. This is a question for the Department of Justice and other regulators, not sentencing authorities. However, the issue does spill over to sentencing in two respects.

An organization's sentencing exposure may be significantly reduced as a result of credits awarded for compliance programs, self-reporting, cooperation at the investigative stage, and acceptance of responsibility.²¹ While effective compliance programs may significantly reduce fines, the reduction that accrues from self-reporting, cooperation, and acceptance of responsibility can be nearly twice as great.²² Further, if the Justice Department concludes that the cooperation by an organizational defendant constitutes "substantial assistance," it may file a motion with the court requesting a "downward departure" from the minimum fine prescribed by the sentencing guidelines.²³ Such a departure, which can only be granted upon Department of Justice motion, may be the best vehicle for obtaining reductions in liability because once a departure is granted, the judge is not bound by the guidelines and may significantly reduce—even to zero—the organization's penalty range. Thus, the questions the waiver controversy raises in the sentencing context are: if the Department of Justice proceeds with a criminal case and secures a conviction, may organizations be required to waive the protections of the attorney-client privilege or the work-product doctrine in order (1) to secure credit against their culpability score

communications between specific officers, directors and employees and counsel. Such waivers permit the government to obtain statements of possible witnesses, subjects, and targets, without having to negotiate individual cooperation or immunity agreements. In addition, they are often critical in enabling the government to evaluate the completeness of a corporation's voluntary disclosure and cooperation. Prosecutors may, therefore, request a waiver in appropriate circumstances. The Department does not, however, consider waiver of a corporation's attorney-client and work product protection an absolute requirement, and prosecutors should consider the willingness of a corporation to waive such protection when necessary to provide timely and complete information as one factor in evaluating the corporation's cooperation."); *see also* Holder Memo, *supra* note 17, at 3, 6, 7; Thompson Memo, *supra* note 18, at 3, 6, 7.

²⁰ Prepared by the Attorney General and the Deputy Attorney General, the United States Attorneys Manual ("USAM") is the primary policy document for federal prosecutors and controls in all cases where it conflicts with other Department of Justice policy statements (except statements directly made by the Attorney General). Title 9 of the manual sets policy for Criminal Division prosecutors, who oversee the enforcement of all federal criminal laws except those specifically assigned to other divisions.

²¹ *See* U.S. SENTENCING GUIDELINES MANUAL §§ 8C2.5(f), (g)(1)–(3) (2003).

²² *See id.* § 8A1.2, cmt. n. 3(k).

²³ *See id.* §§ 8C4.1, 5K1.1.

for organization cooperation under § 8C2.5(g); or (2) to obtain a “substantial assistance” departure under § 8C4.1?

The existing Guidelines do not answer these questions. The only Guidelines provision to define cooperation, Application Note 12 to § 8C2.5(g), states that “cooperation must be both timely and thorough.”²⁴ “Thorough” cooperation in turn means “disclosure of all pertinent information known by the organization.”²⁵ “A prime test of whether the 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.”²⁶ The Guidelines are silent, however, on the extent to which, if at all, waiver is a factor in obtaining credit for cooperation and substantial assistance at the sentencing phase.

The Holder and Thompson Memos also do not explicitly answer these questions, although they certainly can be read to endorse the position that waiver should play a role in assessing sentencing culpability and fines, particularly with respect to a downward departure (whereby the government must first make a motion before the judge can deviate from the minimum punishment). And government prosecutors are likely to have a significant influence on a judge’s determination of what constitutes an “effective program to prevent and detect violations of the law,” whether an organization has “fully cooperated” in the investigation, or “clearly demonstrated recognition and affirmative acceptance of responsibility for its criminal conduct,” as well as whether the organization’s cooperation constitutes “substantial assistance” to investigators.²⁷

The question, then, for the Advisory Group was whether the application notes for cooperation under § 8C2.5(g) or substantial assistance departures under § 8C4.1 should clarify that the waiver of existing legal privileges is not required.

One striking—but perhaps unsurprising—fact to emerge from the Advisory Group’s investigation of this issue was that the Department of Justice and the defense bar seem to be living in different worlds. Many defense counsel believe that “[t]he sound you hear coming from the corridors of the Department of Justice is a requiem marking the death of privilege in corporate criminal investigations.”²⁸ Defense lawyers cite what they report to be regular governmental demands that corporations waive otherwise applicable privileges if they wish to avoid indictment or gain credit at sentencing for cooperating with the government as the principal impetus for the “death” of corporate privileges. The defense bar clearly believes that federal

²⁴ *Id.* § 8C2.5, cmt. n. 12.

²⁵ *Id.*

²⁶ *See id.*

²⁷ *See id.* §§ 8C2.5(f), (g)(2)–(3); 8C4.1.

²⁸ David M. Zornow & Keith D. Krakaur, *On the Brink of a Brave New World: The Death of Privilege in Corporate Criminal Investigations*, 37 AM. CRIM. L. REV. 147, 147 (2000); *see also* Lance Cole, *Revoking Our Privileges: Federal Law Enforcement’s Multi-Front Assault on the Attorney-Client Privilege (And Why It Is Misguided)*, 48 VILL. L. REV. 469 (2003).

prosecutors are, with increasing regularity, demanding that corporations waive the attorney-client privilege and work product protection as a condition of securing leniency in charging or at sentencing.²⁹ According to defense practitioners, “[w]aiver of the privilege is now a routine part of discussing a corporate resolution” of a criminal investigation.³⁰ Written submissions and oral testimony by members of the defense bar—many of them former prosecutors—supported this general concern that prosecutors are increasingly requiring, or at least very strongly suggesting, waivers as part of the cooperation process.

The defense bar argued that the specter of routine requests for waiver necessarily has a chilling effect on internal investigations into allegations of organizational wrongdoing. The possibility that the government may require a waiver, and the fear of both the criminal and civil consequences of such a waiver, create a strong disincentive for companies to conduct thorough internal investigations, as well as for employees to cooperate in such investigations. A waiver to the government is a waiver to potential civil plaintiffs and other opposing parties as well, and companies are wary of providing a roadmap that will subject them to potentially crippling civil damages in addition to criminal penalties.³¹ Finally, counsel argued, the attorney-client and work product privileges are critical tools for the defense attorney in the criminal justice process. Required waivers diminish the value of those tools, creating an imbalance in the process that strongly favors the prosecutor.

Some defense counsel suggested that the Sentencing Guidelines’ silence on this issue permits, if not encourages, the practice of requiring waivers, especially when combined with the dictates of the Holder and Thompson memos and the various interpretations accorded the memos by the different U.S. Attorneys’ offices. They opined that this silence creates a danger that required waivers will become

²⁹ See *Counsel Group Assails Prosecution Policy Compelling Corporations to Waive Privileges*, 67 CRIM. L. REP. 391 (June 14, 2000) [hereinafter *Counsel Group*].

³⁰ Joseph F. Savage, Jr. & Melissa M. Longo, ‘Waive’ Goodbye to Attorney-Client Privilege, 7 No. 9 BUS. CRIMES BULL. 1, 1 (2000). The Arthur Andersen case may present a cautionary tale. Some argue that “[u]nder most objective standards, [Arthur Andersen, LLP] did everything in its power to avoid a prosecution that it knew would be a ‘death penalty’ for the firm,” except agree to waive the attorney-client privilege. Laurence A. Urgenson, Jack S. Levin & Craig Primis, *Attorney-Client Privilege: Surviving Corp. Fraud Scandal*, 9 No. 9 BUS. CRIMES BULL. 1, 6 (2002). Thus, Andersen reportedly notified the Justice Department and SEC immediately upon learning of the document destruction in its Houston office. *Id.* Andersen was also apparently willing to enter into a deferred prosecution agreement, “in essence a guilty plea, under which the government could have appointed a special monitor to oversee compliance with its new document retention policy and with other reforms to be approved by the DOJ.” *Id.* Finally, Andersen also agreed to expel the individuals responsible for the document destruction and did, of course, fire the head of Andersen’s auditing team for Enron (and the government’s cooperating witness in Andersen’s criminal trial), David Duncan. *Id.* at 6–7. Finally, Andersen “reportedly offered to pay as much as \$750 million to Enron shareholders who had sued Andersen for its role in auditing Enron’s books.” *Id.* at 7. Despite these efforts, the Department of Justice decided to seek an indictment and ultimately secured a conviction of the partnership.

³¹ See, e.g., Zornow & Krakaur, *supra* note 28, at 156–58; *Counsel Group*, *supra* note 29; Savage & Longo, *supra* note 30, at 1; Breckinridge L. Wilcox, *Attorney/Client Privilege Waiver: Wrongheaded Practice?*, 6 No. 12 BUS. CRIMES BULL. 1, 1 (2000).

widespread, and that companies increasingly will be disinclined to self-police, self-report, and cooperate, unless the Guidelines explicitly clarify the role of waivers in obtaining credit for cooperation.

While the defense bar insisted that prosecutors' requests for privilege waivers are routine and comprehensive, the Department of Justice representatives were equally vehement in their assertions that blanket privilege waivers are not regularly demanded as a condition of corporate "cooperation," a position supported by the results of a survey conducted by the Advisory Group of U.S. Attorneys offices.³² In his testimony during the November 14, 2002 hearing, James Comey, then U.S. Attorney for the Southern District of New York and now Deputy Attorney General, said that any divergence from this policy—that is, any automatic requirement of waiver—stems from miscommunication inside the U.S. Attorneys' offices.³³

Further, Justice Department participants at the Advisory Group's November 2002 hearing displayed a much more nuanced view of just when a waiver may be required for cooperation credit than many in the defense bar believe is normally employed by line prosecutors. At the time of the hearing, the Holder Memo controlled federal prosecutors' organizational charging decisions, and it was the topic of testimony by representatives of the Justice Department, including the Chief of the Criminal Division's Fraud Section and the U.S. Attorneys for the Southern District of New York and the Central District of California. In prepared remarks to the Advisory Group, the Justice Department representatives asserted that the waiver issue "has been clouded by a good deal of rhetoric."³⁴ They made the following points:

1. "[I]f the facts can be fully disclosed without a waiver of any privileges, the Department of Justice in its policy does not require a waiver as a full measure of cooperation."³⁵ While an organization must disclose the "full facts of the criminal activity" to earn credit for cooperation, there is no template for such disclosure.³⁶ It can take a variety of forms, not all of which require waiver of privilege. For example, an organization can provide a detailed briefing, relevant documents and the results of witness interviews, or it can provide the government with, "a general briefing, identify the relevant witnesses, and [bring] them in for interviews to provide the government with an opportunity to find the detailed facts. . . ."³⁷ Whether work product or other protections must be waived will depend on the nature and type of disclosure. The Justice Department representatives emphasized, however, that the organization must

³² See *Advisory Group Report*, *supra* note 8, at 98–99.

³³ Transcript of Breakout Session IV, 21, 62–64 (Nov. 14, 2002) [hereinafter Breakout Transcript] (statement of James Comey), available at http://www.uscourts.gov/corp/ph11_02/BRKOUT4.pdf.

³⁴ Written testimony of the United States Department of Justice Before the Ad Hoc Advisory Group on Organizational Sentencing Guidelines 11 (Nov. 14, 2002) [hereinafter DOJ Statement] (on file with author).

³⁵ *Id.* at 12.

³⁶ *Id.* at 10–11.

³⁷ *Id.* at 11.

disclose “precisely what [has] happened [and] who is responsible.”³⁸ The Department noted that corporations always have the option of refusing any waiver, but that there will be certain circumstances under which a waiver is necessary to receive the credit because a waiver is the only means by which the Department can obtain critical information.³⁹

2. The Justice Department distinguishes between work product protection and the traditional attorney-client privilege. As to the latter, “waiver of the core attorney-client privilege—the advice given to clients—will rarely be necessary when a corporation is cooperating with the government.”⁴⁰ One such “rare exception,” according to the Justice Department representatives, might arise where employees disregarded advice of counsel that a particular course of conduct would violate the law, in which case “successful prosecution of those employees may require government access to that advice of counsel.”⁴¹

In sum, consistent with the responses to the survey of U.S. Attorneys’ offices, the Department of Justice’s position was that its policy, as expressed in the Holder memo, does not require waivers of attorney-client privilege to obtain credit for cooperation. Further, it recommended that “the guidelines . . . not be amended to provide that a waiver of privileges is not required in order to cooperate, precisely because in some situations the only way a corporation can cooperate, if it chooses to do so, is by waiving certain privileges.”⁴² Jim Comey suggested that a flat prohibition on requests for waiver would not serve the public interest in pursuing wrongdoing because it would allow organizations to raise the Guidelines as a shield when prosecutors believe they are not doing enough to cooperate.⁴³

Presumably, both the defense community and the government would agree that there are narrow circumstances—such as those described by the Department of Justice representatives at the November 2002 Hearing—when law enforcement interests justify Justice Department requests for privilege waivers. There are also obviously circumstances in which an organizational defendant will conclude that it is in its best interest to waive the protections of the work product doctrine and the attorney-client privilege. Both sides may also agree that the attorney-client and work product protections serve an important function and that requests for organizational waivers, if they are made routinely, will reach a point where they have counterproductive consequences, *i.e.*, actually discouraging effective compliance programs, thorough internal investigations and self-reporting.

The issues as to which there seems to be continuing (and sometimes heated) debate are (1) just how common requests for organizational waivers are, *i.e.*, whether

³⁸ *Id.*

³⁹ *Id.* at 11–12.

⁴⁰ *Id.* at 12.

⁴¹ *Id.*

⁴² *Id.* at 13.

⁴³ See Breakout Transcript, *supra* note 33, at 22–23.

this tipping point has been reached or exceeded; and (2) the value of adding a statement in the Guidelines that would clarify the role of waivers in obtaining credit for cooperation. It should be noted, however, that even if the DOJ is correct that waivers are not routinely requested, perceptions in this context may be more important than reality. That is, if the defense bar is firmly convinced that requests for organizational waivers are now commonplace, this perception may well lead to legal advice grounded on that conviction and the adverse consequences feared, whether or not the defense's perception is empirically valid.

The Advisory Committee finally determined to recommend that the Sentencing Commission add language to the application notes for cooperation under § 8C2.5(g) and substantial assistance departures under § 8C4.1, which states that “[i]f the defendant has satisfied the requirements for” cooperation or substantial assistance set forth in the application notes, “waiver of the attorney-client privilege and the work product protections is not a prerequisite” to a reduction in culpability score for cooperation or to a motion for a downward departure.⁴⁴ Both proposed application notes go on to caution: “However, in some circumstances, waiver of the attorney-client privilege and of work product protections may be required in order to satisfy the requirements of cooperation.”⁴⁵

This language was very carefully negotiated. My concern about the suggested language is that some might read these application notes as *invitations* to demand waivers rather than as what they are—attempts to ensure that waivers are not demanded in every case as a condition for cooperation or substantial assistance credit. My reading may seem paranoid, but the Holder and Thompson Memos—which carry a similar message—have been widely misread as encouraging privilege waivers and have resulted in many more waiver requests than were made when the Justice Department had no articulated policy on privilege waivers in corporate charging. If those Memos, which simply note that on occasion a privilege waiver may be requested as is necessary to corporate cooperation, have created unintended problems, so too may this language. I take comfort, however, in the fact that the Advisory Group's report should make it clear that the objective here is to restrict requests for waiver to situations in which cooperation truly demands them, not to give the green light for routine waiver requests.⁴⁶

The Department of Justice presumably accepted this language, as its representative did not protest this section or dissent from the report. It may be significant, however, that the only change in AGOG's suggested amendments that the Sentencing Commission made in publishing the amendments in the Federal Register for public comment (or at least the only one that I could find) was the bracketing of this language in the proposed application note to the substantial assistance departure.

⁴⁴ Proposed U.S.S.G., *supra* note 8, at § 8C2.5, cmt. n. 12; *id.* § 8C4.1, cmt. n. 2.

⁴⁵ Proposed U.S.S.G., *supra* note 8, at § 8C2.5, cmt. n. 12; *id.* § 8C4.1, cmt. n. 2.

⁴⁶ *See, e.g., Advisory Group Report, supra* note 8, at 92–104.

I assume that the brackets are the product of belated Justice Department objections and wonder what the fate of this hard-fought Advisory Group compromise will ultimately be.

What does all this have to do with the theme I initially promised to discuss? Without in any way denigrating the efforts that members of our group made to tackle the question of privilege waivers, it seems to me that this issue in the sentencing context is something of a sideshow. It therefore illustrates the limits of the Sentencing Commission's power directly to affect policies which may have important consequences for compliance incentives—and thus for the success of chapter 8. The real action is in the determinations made by the Department of Justice at the charging or declination stage, when most of the waiver requests will be made. If the case is declined, these sentencing questions do not arise. If the waiver is given but the organization is charged, the waiver is a done deal, and so pressure to make the waiver cannot be attributed to these guidelines provisions. It is only in cases in which the organization declines to waive and the government proceeds against it to conviction that the issue may arise as to whether the corporation can be asked to waive its privileges as a requisite to securing credit for cooperation or a downward departure. I do not know as an empirical matter just how many of these cases there are, but I would assume that their numbers are insignificant in comparison to the number of organizations who must face this waiver issue when dealing with the Department of Justice before charging, convicting, or sentencing. Thus, the Sentencing Commission's ability to have a significant influence on the waiver issue seems to me very limited. To the extent that a message is sent by these proposed amendments, it may be simply to increase the visibility of the forced waiver issue and perhaps persuade the Department of Justice to try a little harder to ensure that its prosecutors understand and comply with the Holder and Thompson Memos.

B. Legislative Default: The Alternative Minimum Fine Provision

In the course of its investigation and deliberations, the Advisory Group ran into a number of issues that could not be resolved by the Sentencing Commission, requiring instead legislative “fixes.” Indeed, what struck me in the course of our deliberations was how many of the seemingly obvious problems required the attention of Congress. It was in fact somewhat frustrating to some of us—and I assume is a daily trial to the Sentencing Commission—that the Sentencing Commission's ability to address these problems is restricted to its power to study issues and make statutory amendment recommendations to Congress,⁴⁷ and Congress does not always seem interested in responding. This was certainly evident in our investigation: despite the fact that many problems were not new—and indeed some have dogged the organizational guidelines

⁴⁷ Pursuant to 28 U.S.C. § 995(a)(20) (2000), the Sentencing Commission has the power to “make recommendations to Congress concerning modification or enactment of statutes relating to sentencing, penal, and correctional matters that the Commission finds to be necessary and advisable to carry out an effective, humane and rational sentencing policy.”

from their birth—Congress has done nothing to address them. Among these is one that may indicate that Congress simply does not understand that this very convenient delegee of difficult questions—the Sentencing Commission—cannot alone remedy all that which needs to be fixed. This issue concerns the statutory limit on fines that can be imposed in guidelines cases.

Under the alternative fine provision, 18 U.S.C. § 3571, the statutory maximum for a given count is the *greatest* of (1) the amount (if any) specified in the law setting forth the offense; (2) for an organization convicted of a felony, \$500,000; or (3) “[i]f any person derives pecuniary gain from the offense, or if the offense results in pecuniary loss to a person other than the defendant, the defendant may be fined not more than the greater of twice the gross gain or twice the gross loss, unless the imposition of a fine under this subsection would unduly complicate or prolong the sentencing process.”⁴⁸ This last provision, known as the twice gross gain or loss provision, is likely to be the applicable figure in many cases, especially where the dollar amount of the gain or loss is great.

Section § 3571, as presently drafted, has the perverse effect of *requiring* sentencing judges to impose a fine at the *lowest* point of the fine range computed under the organizational guidelines when sentencing the *most* culpable organizational offenders. Reference to the culpability multipliers demonstrates that the Sentencing Commission determined that those organizational offenders with the highest culpability scores (ten and over) should be sentenced to up to four times the base fine amount (the “base fine” is often equivalent to the gross gain or loss).⁴⁹ Indeed, every organizational offender who receives a culpability score over five (which is the score with which all organizational defendants start when a culpability score is calculated) will have a maximum multiplier of over two and thus, not infrequently, a Guidelines fine range that exceeds at its upper reaches the statutory maximum of twice the gross gain or loss. The effect of this can be to render Guidelines’ culpability factors irrelevant.

For example, assume two corporations cause the same amount of loss, that loss is determined to constitute the base fine amount under § 8C2.4, and both corporations would otherwise have a culpability score of eight. However, one organization has put in place an effective compliance program and thus has a score of five (taking into account the three-point “effective program” credit), while the other has not. Because of the operation of § 3571, both corporations will have the same maximum fine—twice the loss—despite the disparity in their compliance efforts, at least where only one count is charged and no departures are made. The limitation imposed by § 3571, then, defeats much of what the Sentencing Commission sought to achieve in measuring organizational “just deserts” through the culpability score. And the Commission cannot change that fact without the active assistance of Congress.

Further, § 3571 suffers from an ambiguity in drafting that may be best illustrated by example. Assume that the defendant organization pleads guilty to one count of

⁴⁸ See 18 U.S.C. § 3571 (2000).

⁴⁹ U.S. SENTENCING GUIDELINES MANUAL § 8C2.6 (2003).

mail fraud, to which perhaps \$1 million in losses may be attributed, but the entire fraudulent scheme reflected in part in that count caused losses of up to \$10 million. Is the statutory maximum twice the gross loss from the offense of conviction—\$2 million—or is it twice the gross loss attributable to all the criminal conduct at issue—\$20 million? The alternative fine provision simply states that the statutory maximum may be twice the gross gain or loss caused by “the offense.” Although the better reading appears to be that “the offense” is the offense of conviction,⁵⁰ this is by no means clear.

The Advisory Group did not recommend a specific statutory fix, but rather simply suggested that the Sentencing Commission, together with other interested parties, examine whether § 3571’s cap of twice the gross gain or loss “creates disproportional, unfair, and counterproductive sentencing results where organizations’ culpability scores are in the upper ranges.”⁵¹ Were Congress truly aware of its nondelegable responsibilities in relation to corporate sentencing, this would seem to have been a problem that those recently focusing on corporate criminal accountability might have attended to. Yet, my research assistant was unable to find any proposals to amend § 3571 in the flurry of legislative proposals that grew out of the 2002 scandals and that eventuated in the Sarbanes-Oxley Act of 2002.⁵² If this essay has any effect at all, I hope it is to spur congressional interest in the tasks *it* must undertake to enhance corporate compliance efforts, address this problem and, more important, consider the issues posed by the “litigation dilemma,” to which I will now turn.

C. Legislative Default: The Litigation Dilemma

Logically enough, the Advisory Group began its investigation by trying to assess the impact of the organizational guidelines, determining whether they have been a success in promoting organization compliance with the law, and isolating those portions of the guidelines that might require closer attention. For the reasons laid out at length in the Advisory Group’s Report,⁵³ AGOG concluded that the organizational

⁵⁰ The legislative history is unilluminating on this issue. See H.R. REP. NO. 100-390, at 1–6 (1987); H.R. REP. NO. 98-906, at 1–4 (1984). The better reading, however, seems to be that “the offense” refers only to the offense of conviction and not to the entire course of criminal conduct. This certainly seems to have been the Sentencing Commission’s understanding of the term. See U.S. SENTENCING COMM’N, SUPPLEMENTARY REPORT ON SENTENCING GUIDELINES FOR ORGANIZATIONS 11–12 (Aug. 30, 1991). This reading is also consistent with the results courts have reached in reading the analogous restitution provisions of 18 U.S.C. § 3663 (2000). See, e.g., *Hughey v. United States*, 495 U.S. 411, 412 (1990) (predecessor of 18 U.S.C. § 3663 linked restitution to the offense of conviction); *United States v. Akande*, 200 F.3d 136, 137 (3d Cir. 1999); *United States v. Phillips*, 174 F.3d 1074, 1077 (9th Cir. 1999); *United States v. Mancillas*, 172 F.3d 341, 343 (5th Cir. 1999); *United States v. Davis*, 170 F.3d 617, 627 (6th Cir. 1999).

⁵¹ *Advisory Group Report*, *supra* note 8, at 135.

⁵² Pub. L. No. 107-204, 116 Stat. 745 (2002).

⁵³ *Advisory Group Report*, *supra* note 8, at 25–35.

guidelines must be counted as a success to the extent that the objective was to induce many organizations—directly and indirectly through incentives created by other, guidelines-influenced governmental actors—to focus on compliance and to create programs to prevent and detect violations of law. The Advisory Group also concluded, however, that the organizational guidelines’ success was not unqualified. AGOG suggested that compliance incentives could be improved, although some of the most important means of doing so require further study by the Commission and, if the Commission and Congress deem it appropriate, legislative action.

It is obviously difficult to empirically test whether the organizational guidelines’ success in raising corporate America’s consciousness about the importance of compliance programs has translated into the actual prevention or deterrence of organizational crime. In particular, it is difficult to know whether the widespread movement to adopt compliance programs has resulted in the institution of *effective* compliance programs. Indeed, there is substantial evidence demonstrating that, as strong as the guidelines’ and guidelines-influenced compliance incentives are, there are countervailing, and in some instances equally weighty, incentives to create *ineffective* compliance programs.

Specifically, the institution of truly effective programs—the auditing and monitoring that those programs require, and the training and internal reporting systems those programs contemplate—all create a real risk that information flowing from these admirable practices will be used by governmental actors or third parties to harm the organization, most often in litigation. This is referred to as the “litigation dilemma,” which over the entire life of the organizational guidelines has been recognized as one of the greatest impediments to the creation of truly effective compliance programs.⁵⁴ As noted, the litigation dilemma affects organizational incentives with respect to training, auditing, and monitoring, internal reporting, and cooperation and self-reporting; all of these critical aspects of a vigorous and effective compliance system can be compromised or rendered entirely worthless by persons more concerned about litigation exposure than the statistically less likely event of criminal prosecution.

The litigation dilemma loomed large in the Advisory Group’s investigations and discussions. If many industry representatives are to be credited, removing the impediments created by the litigation dilemma would be the single most important step that the Commission could take to promote effective compliance efforts. Indeed, some would argue that many if not most of the enhancements the Advisory Group recommended (e.g., in training, monitoring, and auditing) will only be successful if organizations are able to implement them without fear that such innovations will not come back to bite them. But ultimately the Commission does not have the power to solve this problem, for example, by creating a selective privilege waiver or a self-evaluative privilege; in the end, only Congress can remove this stumbling block to truly *effective* programs and thus to Chapter 8’s success.

⁵⁴ See *id.* at 121–25.

The Advisory Group did not arrive at a specific recommended resolution of the “litigation dilemma” for the consideration of the Sentencing Commission and, ultimately, Congress. This is a very complex issue which requires the input of constituencies from which we did not hear (e.g., the plaintiff’s bar).⁵⁵ Further, a number of proposed “fixes” have been identified, but which, if any, merit implementation in legislation requires a great deal of study. That said, the litigation dilemma has haunted the organizational guidelines since their inception, and it creates a potentially significant *disincentive* for the implementation of truly *effective* programs. If the Sentencing Commission and Congress are serious about promoting a real crime-fighting partnership with corporate America and encouraging effective compliance programs in aid of that partnership, they will take AGOG up on its strong recommendation that the litigation dilemma requires and deserves greater study. If nothing else comes of AGOG’s Report, I hope this recommendation will bear fruit because I remain convinced that it may ultimately be more important to *effective* compliance than the textual changes proposed in the new § 8B2.1.

D. *The Sentencing Commission’s Mission in its “Effective Program” Definition*

Obviously, much of the Advisory Group’s work and suggestions focus on the definition of an *effective* program. In studying what could be done to ensure that organizations would put in place *effective* compliance systems, the Advisory Group’s review suggested that a number of refinements to the definition of an *effective* program would be advisable. These refinements were intended to eliminate problems revealed by ten years of sentencing experience. It was also hoped that they would better describe those essential attributes of successful compliance programs revealed by ten years of program development and testing.

A number of the changes AGOG proposed simply make explicit that which was assumed in the existing definition. For example, the proposed § 8B2.1(c) provides that, in creating a program that meets the seven minimum requisites in § 8B2.1(b), “the organization shall conduct ongoing risk assessment and take appropriate steps to design, implement, or modify each step set forth in subsection (b) to reduce the risk of violations of law identified by the risk assessment.”⁵⁶ One would assume that appropriate risk assessments are a part of any effective program, but it seemed wise to make this requirement—and its applicability to each of the seven criteria—explicit. Another example would be the provision of a definition of “compliance standards and procedures” to mean “standards of conduct and internal control systems that are

⁵⁵ It also strikes me that the potential unintended consequences of a selective privilege waiver may counsel that those parties who are urging some action with respect to the “litigation dilemma”—potential organizational defendants—may want to be careful what they wish for. Were Congress to create some type of selective waiver doctrine, for example, whereby organizations could produce privileged materials to federal prosecutors without risking a broader waiver, they would no longer be able to claim this dilemma as a reason to decline waivers or other types of cooperation with the government or as an excuse for less than vigorous compliance programs.

⁵⁶ Proposed U.S.S.G., *supra* note 8, § 8B2.1(c).

reasonably capable of reducing the likelihood of violations of law.”⁵⁷

The Advisory Group also attempted to cure textual ambiguities or deficiencies. A case-in-point was our effort to make sense of one of the guidelines’ existing criteria for an “effective program” that has provoked a great deal of confusion and criticism: “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*.”⁵⁸ We thought that the original intent underlying this section was better captured in the following proposed language: “The organization shall use reasonable efforts not to include within the substantial authority personnel of the organization any individual whom the organization knew, or should have known through the exercise of due diligence, has a history of engaging in violations of law or other conduct inconsistent with an effective program to prevent and detect violations of law.”⁵⁹

Some of the suggested clarifications require more from compliance programs but would seem to be relatively uncontroversial changes given advances in the compliance field. Two such proposed revisions take steps that are now listed as examples of what might satisfy one of the seven general criteria and make the steps set forth in the examples mandatory. Thus, one of the existing criteria requires that the “organization must have taken steps to communicate effectively its standards and procedures to all employees and other agents” and lists (in the disjunctive) the examples of requiring training programs *or* disseminating publications that explain in a practical matter what is required. Our proposed revision requires that the organization take reasonable steps to communicate in a practical manner its compliance standards and procedures and other aspects of its program to all “members of the governing authority, the organizational leadership, the organization’s employees, and, as appropriate, the organization’s agents” by conducting effective training programs *and* otherwise disseminating information, appropriate to the recipients’ respective roles and responsibilities.

Similarly, one of the criteria presently in the definition requires that the “organization must have taken reasonable steps to achieve compliance with its standards,” and suggests as an example that an organization may pursue this aim “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 whereby employees and other agents could report criminal conduct by others within the organization without fear of retribution.”⁶⁰ The Advisory Committee determined, based on its review, that an organization could not effectively ensure that its program was followed without using some monitoring and auditing systems designed to detect violations of law. Accordingly, AGOG recommended that this be converted from a suggestion to a requirement. The Advisory Committee

⁵⁷ Proposed U.S.S.G., *supra* note 8, § 8B2.1, cmt. n. 1.

⁵⁸ U.S. SENTENCING GUIDELINES MANUAL § 8A1.2, cmt. n. 3(k)(3) (emphasis added).

⁵⁹ Proposed U.S.S.G., *supra* note 8, § 8B2.1(b)(3).

⁶⁰ U.S. SENTENCING GUIDELINES MANUAL § 8A1.2, cmt. n. 3(k)(5).

further concluded that organizations had to “evaluate periodically the *effectiveness* of the organization’s program”⁶¹ in order to be able to show that, despite the wrongdoing for which it had been convicted, the organization had in place an “effective” program. A “paper” program, drafted to satisfy regulatory or guidelines criteria but left to gather dust in desk drawers, simply will not suffice. Finally, the proposed guideline now broadens the reporting requirement to include the creation of a system that provides guidance as well as permits reporting without retribution, and to specify that organizations include in their reporting system some mechanism for anonymous reporting.⁶²

I would assume that the above revisions should not be terribly controversial from a compliance point of view but may provoke opposition from those who believe that the guidelines should maintain the highest possible level of generality or who are concerned that the criteria will become unduly expensive or burdensome, particularly for small organizations. A response to both concerns is that these criteria, while slightly more specific, in fact are flexible and should be crafted to fit the size and nature of the business as well as the type and likelihood of legal risk the organization is likely to encounter.⁶³

The proposal that may garner the most attention but which, to me at least, seemed a no-brainer, is § 8B2.1(b)(2)’s attempt to set forth in general terms the responsibilities of the organization’s leadership and governing authority in constructing and maintaining an effective compliance program. The existing definition provides no guidance on the role of organizational leadership or boards of directors in the creation and supervision of an effective program. Under the proposed standard, “organizational leadership”⁶⁴ must be “knowledgeable about the content and operation of the program.”⁶⁵ The organization’s board of directors or other “governing authority”⁶⁶ must be “knowledgeable about the content and operation of

⁶¹ Proposed U.S.S.G., *supra* note 8, § 8B2.1(b)(5)(B) (emphasis added).

⁶² *Id.* § 8B2.1(b)(5)(C).

⁶³ *See id.* § 8B2.1, cmt. n. 2.

⁶⁴ “Organizational leadership” means “(A) high-level personnel of the organization; (B) high-level personnel of a unit of the organization; and (C) substantial authority personnel.” Proposed U.S.S.G., *supra* note 8, § 8B2.1, cmt. n. 1; *see also* U.S. SENTENCING GUIDELINES MANUAL §§ 8A1.2 (defining “high-level personnel of the organization” and “substantial authority personnel”); 8C2.5 (defining “high-level personnel of a unit of the organization”). “Collectively, these parties represent the key decision makers within organization management—the range of leaders who set directions for organizational actions and who determine when organizational performance is successful in attaining organizational goals.” *Advisory Group Report*, *supra* note 8, at 61.

⁶⁵ Proposed U.S.S.G., *supra* note 8, § 8B2.1(b)(2).

⁶⁶ The “governing authority” of an organization is “(A) the Board of Directors, or (B) if the organization does not have a Board of Directors, the highest-level governing body of the organization.” Proposed U.S.S.G., *supra* note 8, § 8B2.1, cmt. n. 1.

the program” *and* must “exercise reasonable oversight with respect to the implementation and effectiveness of the program to prevent and detect violations of law.”⁶⁷

Compliance experts seem to be unanimous in the belief that unless the proper tone is set at the top—that is, unless the organizational leadership makes clear that compliance with the law is an organizational priority—no compliance program is likely to succeed. Specifying the role of the organizational leadership had accordingly become standard practice even before the recent corporate scandals broke.⁶⁸ This development is consistent with the views the Delaware Chancery Court expressed in *Caremark* regarding officers’ and directors’ duties to become informed about compliance reporting systems in order to reach informed decisions about organizational compliance with law.⁶⁹ Finally, the Advisory Group concluded that:

the current total silence in the organizational sentencing guidelines relating to the role of the governing authority fails to state what may otherwise be obvious: ultimately the governing authority is responsible for the activities of the organization. It can only perform this function if its members are actively involved in compliance reviews and reasonably educated about the business of the organization and the legal and fiduciary duties of governing authority members.⁷⁰

I expect that other Advisory Group’s proposals concerning an “effective program” will generate more controversy. Among these are proposals that I believe may raise interesting conceptual questions regarding the Sentencing Commission’s mission in drafting these guidelines. Three examples should suffice to illustrate the point:

1. The Commission now defines an “effective program to prevent and detect violations of law” as a “program that has been reasonably designed, implemented, and enforced so that it generally will be effective in preventing and detecting criminal conduct.”⁷¹ At a minimum, the guidelines state, effective compliance programs require that organizations exercise “due diligence in seeking to prevent and detect criminal conduct by [their] employees and other agents.”⁷² The seven criteria, some of which are explored above, then define the minimum steps an organization must take to demonstrate such “due diligence.” The Advisory Group has recommended revising this in a potentially significant way to require that organizations demonstrate

⁶⁷ Proposed U.S.S.G., *supra* note 8, § 8B2.1(b)(2).

⁶⁸ See *Advisory Group Report*, *supra* note 8, at 59.

⁶⁹ See *supra* note 16.

⁷⁰ *Advisory Group Report*, *supra* note 8, at 58.

⁷¹ U.S. SENTENCING GUIDELINES MANUAL § 8A1.2, cmt. n. 3(k).

⁷² *Id.*

something beyond “due diligence.” Thus, the proposed § 8B2.1(c) states that to have an “effective program to prevent and detect violations of law,” an organization shall “exercise due diligence to prevent and detect violations of law” and “otherwise promote an organizational culture that encourages a commitment to compliance with the law.”⁷³ It is important to note, however, that this does not necessarily require assessments of an organization’s “culture” in each case. The proposed § 8B2.1(b) provides that if organizations satisfy the seven minimum criteria listed in that section, they will have demonstrated “[d]ue diligence and the promotion of an organizational culture that encourages commitment to compliance with the law within the meaning of subsection (a).”⁷⁴

2. The “effective program” definition now does not address areas of great concern to those with experience in corporate compliance: ensuring that the organization provides adequate resources to compliance systems, and giving individuals with responsibility for the program the ability to report directly to the governing authority or a subgroup of that authority where necessary. The amendments proposed by the Advisory Group make these criteria part of the definition of an “effective program.”⁷⁵

3. The definition as it now stands (and indeed all of Chapter 8) focuses on preventing and detecting “criminal conduct,”⁷⁶ and the seven steps concern those actions necessary to make sure that the compliance standards and procedures are reasonably capable of reducing “criminal conduct.” The proposed definition replaces references to “criminal conduct” with the more general “violations of law,” and the application notes make clear that “violations of law” is intended to mean “violations of any law, whether criminal or noncriminal (including a regulation), for which the organization is, or would be, liable.”⁷⁷

Some might argue that if the Sentencing Commission adopts these suggestions it will have exceeded its mandate—which authorizes the Commission *only* to set rules for assessing organizational culpability in the *criminal* sentencing context. No doubt arguments will be made that these amendments cross the line between the appropriate policing of compliance directed to deterring *criminal* conduct and the *ultra vires* setting of general standards for compliance with any and all legal requirements (and which unduly interfere with business prerogatives). Specifically, some may question whether the Sentencing Commission should be in the business of deciding, or inviting prosecutors and sentencing judges to decide: whether organizations have devoted adequate resources to compliance efforts; to whom compliance officers should report or have access; and whether an organization has fostered a qualifying organizational “culture” of compliance.

To explain this point, I will quote at length from one of the responses we

⁷³ Proposed U.S.S.G., *supra* note 8, § 8B2.1(a) (emphasis added).

⁷⁴ *Id.* § 8B2.1(b) (emphasis added).

⁷⁵ *Id.* § 8B2.1(b)(2).

⁷⁶ *Id.*

⁷⁷ Proposed U.S.S.G., *supra* note 8, § 8B2.1, cmt. n. 1; *see also id.*, cmt. n. 4(A).

received to a proposal that was ultimately not reflected in the Advisory Group's final draft, but which involved a proposed criterion that drew many of the same objections that will likely be made to the above amendments and, in particular, to the requirement relating to organizational compliance "culture." When the Advisory Group issued its second request for public comment, one of the questions we posed was:

Should Chapter Eight of the Sentencing Guidelines encourage organizations to foster ethical cultures to ensure compliance with the intent of regulatory schemes as opposed to technical compliance that can potentially circumvent the purpose of the law or regulation? If so, how would an organization's performance in this regard be measured or evaluated? How would that be incorporated into the structure of Chapter Eight?

Although not alone in asserting that the guidelines "should continue to be understood and evaluated in the criminal sentencing context—that is, the jurisdictional scope of the Sentencing Commission—and should not be expanded to address more general ethical issues,"⁷⁸ an October 11, 2002 submission by David T. Buente of Sidley Austin Brown & Wood, L.L.P. on behalf of the American Chemistry Council perhaps stated the objection best—and thus I shall borrow liberally from that submission as follows:

[T]he role of the *Organizational Guidelines* is to address the specific issue of criminal noncompliance with legal requirements and not to expand into general issues of corporate social responsibility or ethics that are not directly regulated by criminal law.

Some of the suggestions raised in the comments submitted to the Commission in response to the Federal Register notice that led to the formation of the Advisory Group would have the Commission expand its charter beyond its authority to address violations of criminal law. For example, requiring an "integrity and ethics based system," however admirable, is not necessarily related to preventing, detecting or reporting criminal conduct. . . . Criminal conduct is defined in a discrete set of federal statutes. Individuals and organizations are convicted and sentenced because of specific violations of specific statutory provisions. They are not convicted

⁷⁸ Letter from David T. Buente, Sidley Austin Brown & Wood, L.L.P., on behalf of the American Chemistry Council, to B. Todd Jones, Chair, U.S. Sentencing Commission's Advisory Group on the U.S. Sentencing Guidelines for Organizations regarding the August 21, 2002 Request for Public Comment (Oct. 11, 2002) (on file with the author).

or sentenced because they may in some manner be unethical or lack integrity—even if that is the case.

The focus of the Commission should remain on systems that assure compliance with legal requirements, not ethics programs that focus on important questions in a wider domain. This is particularly true given that, unlike the defined realm of criminal offenses, there is no agreed-upon set of ethical criteria against which organizations can be measured. Encouraging organizations to create an “ethics infrastructure” that goes beyond compliance with criminal law is a laudable goal. However, the presence or absence of such an ethical infrastructure should not have consequences in the very serious context of sentencing those convicted of crimes. . . .

The *Organizational Guidelines* are used by courts to sentence those convicted of crimes. Therefore, proposed changes to the *Organizational Guidelines* should *always* be assessed in terms of how they would be used in the very serious context of sentencing in a court of law. However, almost all of the comments submitted to the Commission thus far treat the *Organizational Guidelines* as a guidance manual or educational tool on how to implement effective compliance systems, and do not discuss how these changes would be implemented in the *sentencing* context. . . .

In the 10+ years since they were first issued, the *Organizational Guidelines* have clearly taken on a significant secondary role as an inspiration and template for the development of effective corporate compliance programs. These programs in turn have frequently grown into, or been merged with, more general programs designed to foster ethical behavior and that extend beyond notions of law-abidance.

This is a good development, whether or not foreseen by Congress or the Commission. But it is not the function that Congress or the Commission intended the *Organizational Guidelines* to accomplish. Nor should the *Organizational Guidelines* be expanded now to encompass these broader but ultimately irrelevant purposes. It is a happy development that the *Organizational Guidelines* are being integrated with aspirational ethics programs. It would be wrong, however, for organizations now to be punished more severely for not having taken these “leading,” “best practice” steps[.] The threat of increased criminal penalties should not be used to “encourage” organizations to upgrade their compliance

assurance systems into “ethics programs.”⁷⁹

When I first read this letter, it resonated with me. As a former defense lawyer and prosecutor, I was concerned that it would be difficult if not impossible to expect participants in the day-to-day realities of criminal sentencing to arrive at objective, fair, and uniform assessments of whether a corporation’s compliance program was sufficiently imbued with the proper “ethics” or “values.” Further, this letter and others forced me to question what the Sentencing Commission’s appropriate role was in these circumstances—beyond the narrow question of whether “ethics” or “values”-based programs ought to be mandated. That is, shouldn’t the Commission confine its attention to making judgments regarding organizations’ *criminal* culpability and leave the formulation of “best practices” to the organizations themselves?

After a great deal of reflection and discussion, however, I came to the conclusion that some attention had to be paid to the organization’s compliance “culture” (a concept potentially as indeterminate as “ethics”). The basis for that decision is explained at some length in the Advisory Group’s Report⁸⁰ and I will not repeat it here. More important, I decided that the Sentencing Commission’s obligation to create a criminal sentencing regime for organizations actually *requires* the Commission—*given the purposes of punishment in the organizational context*—to create precisely that which Mr. Buente objects to: a “guidance manual” (albeit a fairly generally worded and flexible “guidance manual”) that outlines those practices or structures which experience demonstrates are necessary to an “effective” system to prevent and detect violations of law.

While this conclusion may warrant more extended treatment, let me briefly summarize my reasons for adopting this view of the Sentencing Commission’s role and obligations with respect to the delineation of what constitutes an “effective program.” Most commentators appear to believe that deterrence is the foremost, if not the only, legitimate aim of corporate criminal liability.⁸¹ In traditional terms, deterrence theory presupposes that the credible threat of sanctions will discourage rational actors from engaging in illegal or unethical conduct (“negative deterrence”). This negative deterrent calculus is said to be a function of the likelihood that the sanction will be imposed and the costs associated with the sanction:

⁷⁹ *Id.* at 3–4.

⁸⁰ *See Advisory Group Report, supra* note 8, at 50–55.

⁸¹ *See, e.g.,* Vikramaditya S. Khanna, *Corporate Criminal Liability: What Purpose Does It Serve?*, 109 HARV. L. REV. 1477, 1494 & nn.91–93 (1996) (collecting authorities); Julie Rose O’Sullivan, *Professional Discipline for Law Firms? A Response to Professor Schneyer’s Proposal*, 16 GEO. J.L. ETHICS 1, 40 & n.160 (2002); Harvey L. Pitt & Karl A. Groskaufmanis, *Minimizing Corporate Civil and Criminal Liability: A Second Look at Corporate Codes of Conduct*, 78 GEO. L.J. 1559, 1573 (1990) (“[T]he most commonly accepted basis for corporate criminal liability is the need to deter misconduct.”); *Developments in the Law—Corporate Crime: Regulating Corporate Behavior Through Criminal Sanctions*, 92 HARV. L. REV. 1227, 1235 (1979) (“In justifying the imposition of criminal sanctions for illicit corporate activity, commentators most often cite deterrence as the primary rationale.”).

Economists generally agree that an actor who contemplates committing a crime will be deterred only if the “expected punishment cost” of a proscribed action exceeds the expected gain. This concept of the expected punishment cost involves more than simply the amount of the penalty. Rather, the expected penalty must be discounted by the likelihood of apprehension and conviction in order to yield the expected punishment cost.⁸²

When deterrence is designed to affect the conduct of entities, however, this formula must take into account the fact that deterrence in this context must have a catalyzing as well as inhibiting function (“catalyzing deterrence”). As Brent Fisse explains in the corporate crime context:

[O]rganizational offenders cannot exert self-control merely by individual self-denial. Self-denial on offenders’ parts must be embodied in corporate policy and backed by appropriate disciplinary measures and organizational procedures. Accordingly, under a scheme of corporate deterrence, punishment or a threat of punishment requires corporations to do more than merely exercise inhibition and self-restraint; they are expected to institute effective crime prevention policies, disciplinary controls and changes in standard operating procedures.⁸³

Indeed, the sweep of this catalyzing theory potentially includes incapacitative and rehabilitative goals which may be difficult to fit into a corporate liability theory. As Brent Fisse argues “[p]olicy revision, internal disciplinary control, and procedural action—the forms of rehabilitation and incapacitation that are most practical and useful in preventing corporate crime—are subgoals of [catalyzing] deterrence.”⁸⁴ In short, the catalyzing theory of deterrence provides that the ultimate purpose of organizational criminal sanctioning is to galvanize organizations to put in place policies, and to reform organizational cultures, such that future criminal harms will be avoided.

The Sentencing Commission is charged with promulgating “detailed guidelines prescribing the appropriate sentences for offenders convicted of federal crimes.”⁸⁵ In so doing, it must “further the basic purposes of criminal punishment: deterrence, incapacitation, just punishment, and rehabilitation.”⁸⁶ The organizational guidelines,

⁸² John C. Coffee, Jr., “No Soul to Damn, No Body to Kick”: *An Unscandalized Inquiry Into the Problem of Corporate Punishment*, 79 MICH. L. REV. 386, 389 (1981).

⁸³ Brent Fisse, *Reconstructing Corporate Criminal Law: Deterrence, Retribution, Fault, and Sanctions*, 56 S. CAL. L. REV. 1141, 1160 (1983).

⁸⁴ *Id.* at 1159.

⁸⁵ U.S. SENTENCING GUIDELINES MANUAL ch. 1, pt. A (2003).

⁸⁶ *Id.*

in particular, are “designed so that the sanctions imposed upon organizations and their agents, taken together, will provide just punishment, adequate deterrence, and incentives for organizations to maintain internal mechanisms for preventing, detecting, and reporting criminal conduct.”⁸⁷ Given the above explanation of what deterrence requires in the corporate context, it seems to me that the last two objectives articulated by the Commission are in fact redundant. That is, “adequate deterrence” *requires* that the Commission create “incentives for organizations to maintain internal mechanisms for preventing, detecting, and reporting criminal conduct.”⁸⁸

The organizational guidelines structure incentives and penalties so as to serve the goal of galvanizing deterrence. That is, the guidelines attempt to induce organizations to put in place an “effective” compliance system that will prevent future corporate criminality. To secure the full benefits of galvanizing deterrence, it would seem fairly evident that where the Sentencing Commission can give organizations assistance in creating these systems, it should do so to further its deterrent aims *and* to provide fair notice of what will be tested at criminal sentencing. The Sentencing Commission, then, *ought* to identify—without being overprescriptive but with sufficient specificity to be helpful—those steps that the evidence demonstrates will be effective to prevent future misconduct. This is appropriate even where the steps may seem invasive from a corporate perspective or may appear to wander into areas (*e.g.*, “ethics,” “culture”) that are traditionally not the subject of assessment at criminal sentencing. Recall that these steps are not legally mandatory; rather, they simply provide notice of what the Commission believes is necessary to demonstrate good faith efforts to prevent and detect organizational crime.

It is not only appropriate for the guidelines to provide a checklist of “best practices” to assist in the formulation of those programs, it is also arguably imperative in the context of criminal sentencing. The societal interest in galvanizing organizations to take effective steps to prevent *criminal* harms is obviously great; this interest is most efficiently and reliably met by the provision of expert, up-front guidance regarding the ingredients of “effective” compliance. Further, due process “notice” concerns, as well the organizational interest in knowing with some amount of specificity that which will help them avoid potentially crippling criminal penalties, also argue for the Sentencing Manual to set forth, at least in general terms, a compliance “guidance manual.” Finally, advance articulation of those steps necessary to “effective” compliance will serve to guide the discretion of prosecutors, probation officers, and judges. Absent such guidance, these actors—who rarely can be relied upon to have expertise in corporate management or compliance—are left at sea, to make potentially subjective and erroneous assessments of whether corporate compliance efforts are “effective.”

There may be a variety of practical reasons why some types of criteria may be difficult to include in the minimum criteria for an effective compliance program. It may well be that it is unwise to include, for example, required steps that relate to the

⁸⁷ *Id.* ch. 8, introductory cmt.

⁸⁸ *Id.*

implementation of “ethics” or “values-based” compliance programs. But the objection should not be that such inquiries are beyond the jurisdiction of the Commission. Rather, it should be that either the evidence does not demonstrate that these types of programs are necessary to effective compliance, or that “ethics” or “values-based” criteria are not fairly administrable.

CONCLUSION

I look forward to reviewing the comments that these proposed amendments provoke from the public. I assume that the public comments will allow the Sentencing Commission to improve on AGOG’s work product. However, my final hope—as may be evident from the above—is that our work will not only inform the Commission’s work product, but also will provoke constructive responses from the Department of Justice and Congress.