February 23, 2004

United States Sentencing Commission
One Columbus Circle, N.E.
Washington, DC., 20002

The purpose of this letter is to set forth on behalf of the National Association of Criminal Defense Lawyers (NACDL) our comments on the proposed amendments to Chapter 8 (Sentencing of Organizations) of the Federal Sentencing Guidelines. We ask that the Sentencing Commission consider these comments before finalizing the proposed amendments.

Possibly the most significant change is the requirement that effective compliance programs would no longer be required to attempt to detect and prevent violations of criminal law, but would now be required to attempt to detect and prevent violations of any law, criminal or non-criminal, including regulatory violations. See Application Notes 1 and 4(A) to Section 8B2.1. This proposed change conforms with a dangerous trend toward blurring the distinctions between criminal law and regulatory violations. Under the proposed changes, an organization's punishment for a criminal violation would be dependent, in part, on its implementation of programs to prevent civil administrative regulations. See Section 8C2.5(f)(an organization's culpability score would be lower if it had in place an effective program to detect and prevent "violations of law"). Criminal sanctions should be reserved for violations of criminal laws. They should not be used as a back door route to increase the penalties for regulatory non-compliance. The Sentencing Commission should resist the temptation indirectly to criminalize conduct that can be, and is, sanctioned through the administrative regulatory process.

Another proposed change in one of the criterion for an effective compliance program would change a provision that now says that the organization should use due care not to delegate substantial discretionary authority to individuals whom the organization knows, or should have known, "have a propensity to engage in illegal activities," to a new provision that states that the organization shall use reasonable efforts not to include within the substantial authority personnel of the organization any individual whom the organization knows, or should have known, has a history of engaging in violations of law or other conduct inconsistent with an effective compliance program. Section 8B2.1(b)(3). This proposed provision and the commentary to the provision are an improvement over the present version, but should make clear that the mere fact that a person of substantial authority within the

organization has a prior violation or violations of any law (including civil administrative regulations) is not by itself inconsistent with the existence of an effective compliance program. Rather, the organization should merely be required to consider the factors set forth in proposed Application Note 4C (recency of violation(s), relation of violation(s) to current duties and whether or not there is a pattern of prior violations) in determining whether or not including the individual within the organization's substantial authority personnel presents a significant impediment to the effectiveness of the compliance program.

Proposed Application Note 2C to Section 8B2.1 should be eliminated. In accordance with the proposed change to make effective compliance programs responsible not merely for detecting and preventing criminal violations, but regulatory violations, this proposed Application Note would make it weigh against a finding that a program is effective if any standard required by any administrative regulation is not incorporated in the compliance program. A compliance program required to preclude punishment for violations of criminal law should not need to be a comprehensive regulatory compliance program.

Subsection (f) of Section 8C2.5 currently prohibits the three-level reduction in the culpability score even if the organization has an effective compliance program, if the organization unreasonably delayed reporting the offense to governmental authorities. Section 8C2.5(g) provides a five-level decrease based on cooperation, which includes timely notification of the offense. In light of this provision, a failure of timely notification should not preclude the application of the three-level decrease.

Subsection (f) of Section 8C2.5 also currently prohibits the three level-reduction in the culpability score even if the organization has an effective compliance program, if certain high-level officials within the organization were culpable in the offense. The proposed amendments change this prohibition to a rebuttable presumption that this reduction does not apply if certain high-level officials within the organization were culpable in the offense. This is a positive change that gives discretion to sentencing judges to assess the facts on a case-by-case basis. NACDL endorses this amendment and believes it should apply regardless of the size of the organization.

The Sentencing Commission seeks comments on whether the current three-level reduction under Section 8C2.5(f) should be changed to four levels to reflect the increased requirements of an effective compliance program. NACDL opposes the

increased requirements as discussed above. If, however, the requirements are to increase, it would be appropriate to increase the reduction for having an effective program to four levels.

Proposed Application Note 12 to Section 8C2.5 notes that if various criteria are met, waiver of the attorney-client privilege and the work product doctrine will not be a prerequisite to a reduction in culpability for "cooperation." However, the proposed Application Note states, waiver of the attorney-client privilege and the work product doctrine may be required in order to obtain the reduction for cooperation. NACDL believes that under no circumstance should waiver of the attorney-client privilege or the work product doctrine be a prerequisite to obtaining credit for cooperation. Respect for these privileges is necessary in order for the organization frankly and candidly to determine whether there have been criminal violations, the scope of any such violations and appropriate corrective actions. An organization can cooperate with the government without waiving these privileges and should not be required to waive these privileges in order to obtain appropriate recognition for its cooperation.

Proposed Application Note 4 to Section 8C2.8 says that in determining where within the applicable range to set a fine, the court "should" consider any prior criminal record of an individual within high-level personnel. This proposed Application Note should state that the mere fact of a prior criminal record of such an individual is not necessarily relevant to where within the range to set the fine. Based on the criteria set forth in Application Note 4C to Section 8B2.1(b)(3), such a criminal record may be wholly irrelevant to whether or not the organization had an effective compliance program. In such cases, it should likewise be irrelevant to where within the applicable range the fine is set.

Proposed Application Note 2 to Section 8C4.1 states that if various criteria are met, waiver of the attorney-client privilege and the work product doctrine will not be a prerequisite to a providing "substantial assistance." However, the proposed Application Note states, the Government may determine that waiver of attorney-client privilege or work product doctrine may be necessary to ensure that a substantial assistance departure motion will be made. NACDL believes that under no circumstance should waiver of the attorney-client privilege or the work product doctrine be a prerequisite to obtaining credit for substantial assistance. Respect for these privileges is necessary in order for the organization frankly and candidly to determine whether there have been criminal violations, the scope of any such violations and appropriate corrective actions. An organization can substantially

assist the government without waiving these privileges and should not be required to waive these privileges in order to obtain appropriate recognition for its substantial assistance.

Very truly yours,

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