

COMPLIANCE PROGRAM CHANGES

Announcement from U.S. Sentencing Commission

In early April, the United States Sentencing Commission voted to amend the existing organizational guidelines to make more stringent the guidelines' criteria for effective compliance and ethics programs.

According to the Commission's press release, "(a) fundamental component of the organizational sentencing guidelines, promulgated by the Commission in 1991, is the effective compliance and ethics program." With the new amendments, the Commission "made the standards for the compliance and ethics program more rigorous and put greater responsibility on boards of directors and executives for the oversight and management of compliance programs. In particular, directors and executives now must take an active leadership role for the content and operation of compliance and ethics programs. Companies that seek reduced criminal fines now must demonstrate that they have identified areas of risk where criminal violations may occur, trained high-level officials as well as employees in relevant legal standards and obligations, and given their compliance officers sufficient authority and resources to carry out their responsibilities. Under the revised guidelines, if companies hope to mitigate criminal fines and penalties, they must also promote an organizational culture that encourages a commitment to compliance with the law and ethical conduct by exercising due diligence in meeting the criteria."

The Commission went on to state that the "Commission's focus on ethical corporate behavior is a unique development in the 13-year history of the organizational sentencing guidelines. The Commission also determined that there may be limited situations where an organization may need to waive its attorney-client privilege to qualify for a full, potential fine reduction. These amendments represent the first time the organizational sentencing guidelines have been modified in their history. Some of these modifications are the result of recommendations of the Ad Hoc Advisory Group on the Organizational Sentencing Guidelines or the result of the recent enactment of the Sarbanes-Oxley Act."

The Commission's press release also noted that under "the existing sentencing guidelines, an organization is precluded from mitigation of its sentence if it fails to self-report criminal misconduct to the authorities in a timely fashion, or if executive or management level officials tolerated or were involved in illegal activities. Failure to follow applicable government regulations and industry standards and recurrence of similar misconduct undermine an organization's eligibility for compliance credit under the federal sentencing scheme. The guidelines mandate high fines for organizations that have no meaningful programs to prevent and detect criminal conduct or in which management was involved in the crime."

These amendments were first proposed on December 30, 2003. The Commission's recent approval of these amendments indicates that the amendments will be submitted to Congress by May 1, 2004. If that in fact happens, then the new amendments will take effect on November 1, 2004, unless Congress disapproves them before November 1, 2004.

Commentary on Changes to Sentencing Guidelines

When it first proposed these amendments on December 30, 2003, the Commission made the following comments (which can be found a 68 Federal Register 75340 at pages 75354 - 75356):

Proposed Amendment 2: Effective Compliance Programs in Chapter Eight

Synopsis of Proposed Amendment: The proposed amendment is intended to provide greater guidance to organizations and courts regarding the criteria for an effective program to prevent and detect violations of the law (“compliance programs”). The proposed amendment adds to Chapter Eight, Part B, a new guideline, § 8B2.1 (Effective Program to Prevent and Detect Violations of Law), that identifies the purposes of an effective compliance program, sets forth seven minimum steps for such a program, and provides guidance for their implementation. This proposed amendment was developed by the Ad Hoc Advisory Group on the Organizational Sentencing Guidelines empaneled by the Commission for the purpose of reviewing the general effectiveness of the guidelines for organizations, with particular emphasis on examining the criteria for an effective compliance program. The Advisory Group’s review and analysis can be found in its report of October 7, 2003, to the Commission at www.ussc.gov.

Under subsection (g) of § 8C2.5 (Culpability Score), the existence of an effective compliance program is a mitigating factor that reduces an organization’s culpability score and ultimately its fine range. Also, the implementation of a compliance program may be a condition of probation for organizations under § 8D1.4(c) (Recommended Conditions of Probation-- Organizations).

The proposed amendment incorporates the seven minimum steps for a compliance program, currently located in the commentary to § 8A1.2 (Application Instructions--Organizations) at Application Note 3(k), into a new guideline at § 8B2.1 in order to emphasize the importance of compliance programs and provide more prominent guidance on the attributes of such programs. The proposed amendment defines the obligations and purposes of such programs, adds more detail to the seven minimum requirements, and provides definitions throughout the associated commentary.

The proposed amendment expands the scope of the objective of a compliance program by defining the term “violation of law” more broadly than in the current guidelines, which refer only to violations of criminal law and prevention of criminal conduct. The proposed amendment expands the objective of a compliance program more broadly to include prevention and detection of “violations of any law, whether criminal or noncriminal (including a regulation), for which the organization is, or would be, liable.” This language also replaces the

prior reference to “employees and agents”, relying instead on the legal standard of vicarious liability.

The proposed amendment retains the requirement that an organization exercise due diligence to prevent and detect violations of law, and adds at subsection (a) the requirement that an organization shall also “otherwise promote an organizational culture that encourages a commitment to compliance with the law.” This proposed addition is intended to reflect the emphasis on ethics and values incorporated into recent legislative and regulatory reforms, as well as the proposition that compliance with all laws is the expected behavior within organizations.

The proposed amendment retains the existing seven minimum steps of an effective compliance program but provides greater guidance regarding some of the requirements by adding definitions and clarifying terms at subsection (b). First, for the requirement of the “establishment of compliance standards and procedures that are reasonably capable of reducing the prospect of criminal conduct”, Application Note 1 defines “compliance standards and procedures” as “standards of conduct and internal control systems that are reasonably capable of reducing the likelihood of violations of law.” Second, for the requirement that “specific individuals within high-level personnel of the organization must have been assigned overall responsibility to oversee compliance”, subsection (b)(2) defines the specific roles and reporting relationships of particular categories of high-level personnel with respect to compliance programs. In particular, the proposed amendment provides that the “organizational leadership shall be knowledgeable about the content and operation of the program to prevent and detect violations of law.” The accompanying commentary at Application Note 1 defines “organizational leadership” as “(A) high-level personnel of the organization; (B) high-level personnel of a unit of the organization; and (C) substantial authority personnel” and retains existing definitions for the terms “high-level personnel of the organization” and “substantial authority personnel”.

The proposed amendment also provides at subsection (b)(2) that the “organization’s governing authority shall be knowledgeable about the content and operation of the program to prevent and detect violations of the law and shall exercise reasonable oversight with respect to the implementation and effectiveness of the program to prevent and detect violations of law.” Application Note 1 defines “governing authority” as “(A) Board of Directors, or (B) if the organization does not have a Board of Directors, the highest-level governing body of the organization.” Subsection (b)(2) retains the existing requirement that “specific individual(s) within high-level personnel of the organization shall be assigned direct, overall responsibility for the program,” and specifies that their responsibility is to “ensure the implementation and effectiveness of the program.” The proposed amendment also requires that the individual responsible for

compliance be given adequate resources and authority to carry out such responsibility, and provides that such individual shall report directly to the governing authority.

Third, the proposed amendment at subsection (b)(3) replaces the current requirement that substantial authority personnel be screened for their “propensity to engage in violations of law” with a requirement that the organization “use reasonable efforts and due diligence not to include within the substantial authority personnel any individual whom the organization knew, or should have known, has a history of engaging in violations of law or other conduct inconsistent with an effective program”. For purposes of this subsection only, the proposed amendment defines the term “violations of law” as “any official determination of a violation or violations of any law, whether criminal or noncriminal (including a regulation).” This is meant to ensure that an individual is screened on the basis of his or her culpability and not on the basis of an organization’s vicarious liability. The corresponding commentary enumerates factors to be considered in this determination, among them, the recency of the individual’s violations of law and other misconduct, the relatedness of the individual’s violations of law and other misconduct to his or her responsibilities, and whether the individual has engaged in a pattern of such violations of law and other misconduct.

Fourth, the proposed amendment at subsection (b)(4) makes compliance training a requirement, and specifically extends the training requirement to the upper levels of an organization as well as to the organization’s employees and agents, as appropriate.

Fifth, the proposed amendment at subsection (b)(5) expands the existing criterion for using auditing and monitoring systems by expressly providing that such systems are to be designed to detect violations of law. The proposed amendment adds the specific requirement that there be periodic evaluation of the effectiveness of its compliance program. The proposed amendment replaces the existing reference to “reporting systems without fear of retribution” with the more specific requirement for the implementation of “mechanisms to allow for anonymous reporting.” The proposed amendment expands the stated focus of internal reporting from “the criminal conduct * * * of others” to using internal systems for both “seeking guidance and reporting potential or actual violations of law.”

Sixth, the proposed amendment at subsection (b)(6) broadens the existing criterion that the compliance standards be enforced through disciplinary measures by adding that such standards also be encouraged through “appropriate incentives to perform in accordance with a [compliance] program.” Finally, at subsection (b)(7) the amendment retains the existing requirement that an organization take reasonable steps to respond to and prevent further similar violations of law.

In addition to the seven criteria for a compliance program, the proposed

amendment expressly provides at subsection (c) that ongoing risk assessment is an essential component of the design, implementation, and modification of an effective program. The proposed amendment includes at Application Note 5(A) certain requirements in conjunction with the performance of risk assessments, namely, that organizations assess the nature and seriousness of potential violations of law, the likelihood that certain violations of law may occur because of the nature of the organization's business, and the prior history of the organization. Corresponding commentary specifies that organizations must prioritize the actions taken to implement an effective compliance program and modify such actions in light of the risks identified in the risk assessment. The proposed amendment also provides additional guidance with respect to the implementation of compliance programs by small organizations by making more frequent references to small organizations throughout the commentary and providing illustrations (e.g., § 8B2.1, Application Note 2(B)(ii)).

This proposed amendment also makes two changes to the factors that affect the culpability score of an organization under § 8C2.5 (Culpability Score). First, rather than precluding an organization from obtaining the compliance program credit if certain categories of high-level personnel are involved in the offense of conviction, the proposed subsection (f) establishes that “an offense by an individual within high-level personnel of the organization results in a rebuttable presumption” that effective prevention and detections program did not exist.

Under the existing guidelines, an organization cannot receive the three-point reduction in its culpability score under § 8C2.5(f) if any one of three categories of individuals participated in, condoned, or was willfully ignorant of the offense: (1) An individual within high-level personnel of the organization; (2) a person within high-level personnel of a unit having more than 200 employees and within which the offense was committed; or (3) an individual responsible for the administration or enforcement of a compliance program. The existing guidelines also provide for a rebuttable presumption that an organization did not have an effective compliance program if an individual within substantial authority personnel participated in an offense. The proposed amendment provides for a rebuttable presumption that the organization did not have an effective compliance program where high-level personnel of the organization participated in, condoned, or were willfully ignorant of the offense. This modification is intended to assist smaller organizations that currently may be automatically precluded, because of their size, from arguing for a culpability score reduction for their compliance efforts under § 8C2.5(f).

Second, the proposed amendment addresses concerns about the relationship between obtaining credit under subsection (g) of § 8C2.5 and waiving the attorney-client privilege and the work product protection doctrine. Pursuant to § 8C2.5(g)(1) and (2), an organization's culpability score will be reduced if it “fully cooperated in the investigation” of its wrongdoing, among other factors. The

Commission’s Ad Hoc Advisory Group on the Organizational Sentencing Guidelines studied the relationship between waivers and § 8C2.5(g) by obtaining testimony and conducting its own research, including a survey of United States Attorney’s Offices (all of which are described at Part V of the Advisory Group Report of October 17, 2003, located at www.ussc.gov). The commentary in the proposed amendment addresses some of these concerns by providing that waiver of the attorney-client privilege and of work product protections “is not a prerequisite to a reduction in culpability score under subsection (g)” but in some circumstances “may be required in order to satisfy the requirements of cooperation.”

Proposed Changes to Sentencing Guidelines

The proposed changes to the sentencing guidelines, insofar as they effect compliance programs, are as follows:

Proposed Amendment:

CHAPTER EIGHT - SENTENCING OF ORGANIZATIONS

Introductory Commentary

The guidelines and policy statements in this chapter apply when the convicted defendant is an organization. Organizations can act only through agents and, under federal criminal law, generally are vicariously liable for offenses committed by their agents. At the same time, individual agents are responsible for their own criminal conduct. Federal prosecutions of organizations therefore frequently involve individual and organizational co-defendants. Convicted individual agents of organizations are sentenced in accordance with the guidelines and policy statements in the preceding chapters. This chapter is 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~~ violations of law.

This chapter reflects the following general principles: First, the court must, whenever practicable, order the organization to remedy any harm caused by the offense. The resources expended to remedy the harm should not be viewed as punishment, but rather as a means of making victims whole for the harm caused. Second, if the organization operated primarily for a criminal purpose or primarily by criminal means, the fine should be set sufficiently high to divest the organization of all its assets. Third, the fine range for any other organization should be based on the seriousness of the offense and the culpability of the organization. The seriousness of the offense generally will be reflected by the highest of the pecuniary gain, the pecuniary loss, or the amount in a guideline offense level fine table. Culpability generally will be determined by the steps taken by the organization prior to the offense to prevent and detect ~~criminal conduct~~ violations of law, the level and extent of involvement in or tolerance of the offense by certain personnel, and the organization’s actions after an offense has been committed. Fourth, probation is an appropriate sentence for an organizational defendant when needed to ensure that another sanction will be fully implemented, or to ensure that steps will be taken within the organization to reduce the likelihood of future ~~criminal conduct~~ violations of law.

PART A - GENERAL APPLICATION PRINCIPLES

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§8A1.2. **Application Instructions - Organizations**

- (a) Determine from Part B, Subpart 1 (Remedying Harm from Criminal Conduct) the sentencing requirements and options relating to restitution, remedial orders, community service, and notice to victims.
- (b) Determine from Part C (Fines) the sentencing requirements and options relating to fines:

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- (2) Otherwise, apply §8C2.1 (Applicability of Fine Guidelines) to identify the counts for which the provisions of §§8C2.2 through 8C2.9 apply. For such counts:

* * *

- (D) Apply §8C2.5 (Culpability Score) to determine the culpability score. To determine whether the organization had an effective program to prevent and detect violations of law for purposes of §8C2.5(f), apply §8B2.1 (Effective Program to Prevent and Detect Violations of Law).

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Commentary

Application Notes:

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- 3. *The following are definitions of terms used frequently in this chapter:*

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- (c) *“Substantial authority personnel” means individuals who within the scope of their authority exercise a substantial measure of discretion in acting on behalf of an organization. The term includes high-level personnel of the organization, individuals who exercise substantial supervisory authority (e.g., a plant manager, a sales manager), and any other individuals who, although not a part of an organization’s management, nevertheless exercise substantial discretion when acting within the scope of their authority (e.g., an individual with authority in an organization to negotiate or set price levels or an individual authorized to negotiate or approve significant contracts). Whether an individual falls within this category must be determined on a case-by-case basis.*

* * *

- ~~(k) An “effective program to prevent and detect violations of law” means a program that has been reasonably designed, implemented, and enforced so that it generally will be effective in preventing and detecting criminal conduct. Failure to prevent or detect the instant offense, by itself, does not mean that the program was not effective. The hallmark of an effective program~~

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~~to prevent and detect violations of law is that the organization exercised due diligence in seeking to prevent and detect criminal conduct by its employees and other agents. Due diligence requires at a minimum that the organization must have taken the following types of steps:~~

- ~~(1) The organization must have established compliance standards and procedures to be followed by its employees and other agents that are reasonably capable of reducing the prospect of criminal conduct.~~
- ~~(2) Specific individual(s) within high level personnel of the organization must have been assigned overall responsibility to oversee compliance with such standards and procedures.~~
- ~~(3) 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.~~
- ~~(4) The organization must have taken steps to communicate effectively its standards and procedures to all employees and other agents, e.g., by requiring participation in training programs or by disseminating publications that explain in a practical manner what is required. (5) The organization must have taken reasonable steps to achieve compliance with its standards, e.g., by utilizing monitoring and auditing systems reasonably designed to detect criminal conduct by its employees and other agents and by having in place and publicizing a reporting system whereby employees and other agents could report criminal conduct by others within the organization without fear of retribution.~~
- ~~(6) The standards must have been consistently enforced through appropriate disciplinary mechanisms, including, as appropriate, discipline of individuals responsible for the failure to detect an offense. Adequate discipline of individuals responsible for an offense is a necessary component of enforcement; however, the form of discipline that will be appropriate will be case specific.~~
- ~~(7) After an offense has been detected, the organization must have taken all reasonable steps to respond appropriately to the offense and to prevent further similar offenses—including any necessary modifications to its program to prevent and detect violations of law.~~

~~The precise actions necessary for an effective program to prevent and detect violations of law will depend upon a number of factors. Among the relevant factors are:~~

- ~~(i) Size of the organization — The requisite degree of formality of a program to prevent and detect violations of law will vary with the size of the organization: the larger the organization, the more formal the program typically should be. A larger organization generally should have established written policies defining the standards and procedures to be followed by its employees and other agents.~~
- ~~(ii) Likelihood that certain offenses may occur because of the nature of its business — If because of the nature of an organization's business there is a~~

substantial risk that certain types of offenses may occur, management must have taken steps to prevent and detect those types of offenses. For example, if an organization handles toxic substances, it must have established standards and procedures designed to ensure that those substances are properly handled at all times. If an organization employs sales personnel who have flexibility in setting prices, it must have established standards and procedures designed to prevent and detect price fixing. If an organization employs sales personnel who have flexibility to represent the material characteristics of a product, it must have established standards and procedures designed to prevent fraud.

(iii) Prior history of the organization — An organization’s prior history may indicate types of offenses that it should have taken actions to prevent. Recurrence of misconduct similar to that which an organization has previously committed casts doubt on whether it took all reasonable steps to prevent such misconduct. An organization’s failure to incorporate and follow applicable industry practice or the standards called for by any applicable governmental regulation weighs against a finding of an effective program to prevent and detect violations of law.

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**PART B - REMEDYING HARM FROM CRIMINAL CONDUCT,
AND PREVENTING AND DETECTING VIOLATIONS OF LAW**

1. REMEDYING HARM FROM CRIMINAL CONDUCT

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2. PREVENTING AND DETECTING VIOLATIONS OF LAW

§8B2.1. Effective Program to Prevent and Detect Violations of Law

(a) To have an effective program to prevent and detect violations of law, for purposes of subsection (f) of §8C2.5 (Culpability Score) and subsection (c)(1) of §8D1.4 (Recommended Conditions of Probation - Organizations), an organization shall—

(1) exercise due diligence to prevent and detect violations of law; and

(2) otherwise promote an organizational culture that encourages a commitment to compliance with the law.

Such program shall be reasonably designed, implemented, and enforced so that the program is generally effective in preventing and detecting violations of law. The failure to prevent or detect the instant offense does not necessarily mean that the program is not generally effective in preventing and detecting violations of law.

(b) Due diligence and the promotion of an organizational culture that encourages a commitment to compliance with the law within the meaning of subsection (a) minimally require the following steps:

of law without fear of retaliation, including mechanisms that allow for anonymous reporting.

(6) The organization’s program to prevent and detect violations of law shall be promoted and enforced consistently through appropriate incentives to perform in accordance with such program and disciplinary measures for engaging in violations of law and for failing to take reasonable steps to prevent or detect violations of law.

(7) After a violation of law has been detected, the organization shall take reasonable steps to respond appropriately to the violation of law and to prevent further similar violations of law, including making any necessary modifications to the organization’s program to prevent and detect violations of law.

(c) In implementing subsection (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.

Commentary

Application Notes:

1. Definitions.—For purposes of this guideline:

“Compliance standards and procedures” means standards of conduct and internal control systems that are reasonably capable of reducing the likelihood of violations of law.

“Governing authority” means the (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.

“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. The terms “high-level personnel of the organization” and “substantial authority personnel” have the meaning given those terms in the Commentary to §8A1.2 (Application Instructions - Organizations). The term “high-level personnel of a unit of the organization” has the meaning given that term in the Commentary to §8C2.5 (Culpability Score).

“Violations of law” means violations of any law, whether criminal or noncriminal (including a regulation), for which the organization is, or would be, liable, or in the case of Application Note 4(A), for which the individual would be liable.

2. Factors to Consider in Meeting Requirements of Subsections (a) and (b).—

(A) In General.—Each of the requirements set forth in subsections (a) and (b) shall be met by an organization; however, in determining what specific actions are necessary to meet those requirements, factors that shall be considered include (i) the size of the organization, (ii) applicable government regulations, and (iii) any compliance practices and procedures that are generally accepted as standard or model practices for businesses similar to the organization.

(B) The Size of the Organization.—

(i) In General.—The formality and scope of actions that an organization shall take to meet the requirements of subsections (a) and (b), including the necessary features of the organization’s compliance standards and procedures, depend on the size of the organization. A larger organization generally shall devote more formal operations and greater resources in meeting such requirements than shall a smaller organization.

(ii) Small Organizations.—In meeting the requirements set forth in subsections (a) and (b), small organizations shall demonstrate the same degree of commitment to compliance with the law as larger organizations, although generally with less formality and fewer resources than would be expected of larger organizations. While each of the requirements set forth in subsections (a) and (b) shall be substantially satisfied by all organizations, small organizations may be able to establish an effective program to prevent and detect violations of law through relatively informal means. For example, in a small business, the manager or proprietor, as opposed to independent compliance personnel, might perform routine audits with a simple checklist, train employees through informal staff meetings, and perform compliance monitoring through daily “walk-arounds” or continuous observation while managing the business. In appropriate circumstances, such reliance on existing resources and simple systems can demonstrate a degree of commitment that, for a much larger organization, would only be demonstrated through more formally planned and implemented systems.

(C) Applicable Government Regulations.—The failure of an organization to incorporate within its program to prevent and detect violations of law any standard required by an applicable government regulation weighs against a finding that the program was an “effective program to prevent and detect violations of law” within the meaning of this guideline.

3. Application of Subsection (b)(2).—

(A) Governing Authority.—The responsibility of the governing authority under subsection (b)(2) is to exercise reasonable oversight of the organization’s efforts to ensure compliance with the law. In large organizations, the governing authority likely will discharge this responsibility through oversight, whereas in some organizations, particularly small ones, it may be more appropriate for the governing authority to discharge this responsibility by directly managing the organization’s compliance efforts.

(B) High-Level Personnel.—The organization has discretion to delineate the activities and roles of the specific individual(s) within high-level personnel of the organization who are assigned overall and direct responsibility to ensure the effectiveness and operation of the program to detect and prevent violations of law; however, the individual(s) must be able to carry out their overall and direct responsibility consistent with subsection (b)(2), including the ability to report to the governing authority, or to an appropriate subgroup of the governing authority, the effectiveness and operation of the program to detect and prevent violations of law.

In addition to receiving reports from the foregoing individual(s), individual(s) with day-to-day operational responsibility for the program should periodically provide to the governing

authority or an appropriate subgroup thereof information on the implementation and effectiveness of the program to detect and prevent violations of law.

(C) Organizational Leadership.—Although the overall and direct responsibility to ensure the effectiveness and operation of the program to detect and prevent violations of law is assigned to specific individuals within high-level personnel of the organization, it is incumbent upon all individuals within the organizational leadership to be knowledgeable about the content and operation of the program to detect and prevent violations of law pursuant to subsection (b)(2); to perform their assigned duties consistent with the exercise of due diligence; and to promote an organizational culture that encourages a commitment to compliance with the law, under subsection (a).

4. Application of Subsection (b)(3).—

(A) Violations of Law.—Notwithstanding Application Note 1, “violations of law,” for purposes of subsection (b)(3), means any official determination of a violation or violations of any law, whether criminal or noncriminal (including a regulation).

(B) Consistency with Other Law.—Nothing in subsection (b)(3) is intended to require conduct inconsistent with any Federal, State, or local law, including any law governing employment or hiring practices.

(C) Implementation.—In implementing subsection (b)(3), the organization shall hire and promote individuals consistent with Application Note 3, subdivision (C) so as to ensure that all individuals within the organizational leadership will perform their assigned duties with the exercise of due diligence, and the promotion of an organizational culture that encourages a commitment to compliance with the law, under subsection (a). With respect to the hiring or promotion of any specific individual within the substantial authority personnel of the organization, an organization shall consider factors such as: (i) the recency of the individual’s violations of law and other misconduct (i.e., other conduct inconsistent with an effective program to prevent and detect violations of law); (ii) the relatedness of the individual’s violations of law and other misconduct to the specific responsibilities the individual is anticipated to be assigned as part of the substantial authority personnel of the organization; and (iii) whether the individual has engaged in a pattern of such violations of law and other misconduct.

5. Risk Assessments under Subsection (c).—Risk assessment(s) required under subsection (c) shall include the following:

(A) Assessing periodically the risk that violations of law will occur, including an assessment of the following:

(i) The nature and seriousness of such violations of law.

(ii) The likelihood that certain violations of law may occur because of the nature of the organization’s business. If, because of the nature of an organization’s business, there is a substantial risk that certain types of violations of law may occur, the organization shall take reasonable steps to prevent and detect those types of violations of law. For example, an organization that, due to the nature of its business, handles toxic substances shall establish compliance standards and procedures designed to ensure that those substances are always handled properly.

An organization that, due to the nature of its business, employs sales personnel who have flexibility to set prices shall establish compliance standards and procedures designed to prevent and detect price-fixing. An organization that, due to the nature of its business, employs sales personnel who have flexibility to represent the material characteristics of a product shall establish compliance standards and procedures designed to prevent fraud.

(iii) The prior history of the organization. The prior history of an organization may indicate types of violations of law that it shall take actions to prevent and detect. Recurrence of similar violations of law creates doubt regarding whether the organization took reasonable steps to prevent and detect those violations of law.

(B) Periodically, prioritizing as most likely to occur and most serious, the actions taken under each step set forth in subsection (b), in order to focus on preventing and detecting the violations of law identified under subdivision (A).

(C) Modifying, as appropriate, the actions taken under any step set forth in subsection (b) to reduce the risk of violations of law identified in the risk assessment.

Background: This section sets forth the requirements for an effective program to prevent and detect violations of law. This section responds to section 805(a)(2)(5) of the Sarbanes-Oxley Act of 2002, Public Law 107–204, which directed the Commission to review and amend, as appropriate, the guidelines and related policy statements to ensure that the guidelines that apply to organizations in this Chapter “are sufficient to deter and punish organizational criminal misconduct.”

The requirements set forth in this guideline are intended to achieve reasonable prevention and detection of violations of law, both criminal and noncriminal, for which the organization would be vicariously liable. The prior diligence of an organization in seeking to detect and prevent violations of law has a direct bearing on the appropriate penalties and probation terms for the organization if it is convicted and sentenced for a criminal offense.

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§8C2.4. Base Fine

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Commentary

Application Notes:

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2. Under 18 U.S.C. § 3571(d), the court is not required to calculate pecuniary loss or pecuniary gain to the extent that determination of loss or gain would unduly complicate or prolong the sentencing process. Nevertheless, the court may need to approximate loss in order to calculate offense levels under Chapter Two. See Commentary to §2B1.1 (~~Larceny, Embezzlement, and Other Forms of Theft~~)(Theft, Property Destruction, and Fraud). If loss is approximated for purposes of determining the applicable offense level, the court should use that approximation as the starting point for calculating pecuniary loss under this section.

* * *

Background: Under this section, the base fine is determined in one of three ways: (1) by the amount, based on the offense level, from the table in subsection (d); (2) by the pecuniary gain to the organization from the offense; and (3) by the pecuniary loss caused by the organization, to the extent that such loss was caused intentionally, knowingly, or recklessly. In certain cases, special instructions for determining the loss or offense level amount apply. As a general rule, the base fine measures the seriousness of the offense. The determinants of the base fine are selected so that, in conjunction with the multipliers derived from the culpability score in §8C2.5 (Culpability Score), they will result in guideline fine ranges appropriate to deter organizational ~~criminal conduct~~ violations of law and to provide incentives for organizations to maintain internal mechanisms for preventing, detecting, and reporting ~~criminal conduct~~ violations of law. In order to deter organizations from seeking to obtain financial reward through criminal conduct, this section provides that, when greatest, pecuniary gain to the organization is used to determine the base fine. In order to ensure that organizations will seek to prevent losses intentionally, knowingly, or recklessly caused by their agents, this section provides that, when greatest, pecuniary loss is used to determine the base fine in such circumstances. Chapter Two provides special instructions for fines that include specific rules for determining the base fine in connection with certain types of offenses in which the calculation of loss or gain is difficult, e.g., price-fixing. For these offenses, the special instructions tailor the base fine to circumstances that occur in connection with such offenses and that generally relate to the magnitude of loss or gain resulting from such offenses.

§8C2.5. Culpability Score

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(f) Effective Program to Prevent and Detect Violations of Law

- (1) If the offense occurred ~~despite even though the organization had in place, at the time of the offense, an effective program to prevent and detect violations of law, as provided in §8B2.1 (Effective Program to Prevent and Detect Violations of Law),~~ subtract 3 points.

Provided, that this subsection does not apply if an individual within high-level personnel of the organization, a person within high-level personnel of the unit of the organization within which the offense was committed where the unit had 200 or more employees, or an individual responsible for the administration or enforcement of a program to prevent and detect violations of law participated in, condoned, or was willfully ignorant of the offense. Participation of an individual within substantial authority personnel in an offense results in a rebuttable presumption that the organization did not have an effective program to prevent and detect violations of law.

Provided, further, that this subsection does not apply if, after becoming aware of an offense, the organization unreasonably delayed reporting the offense to appropriate governmental authorities.

- (2) This section does not apply if, after becoming aware of an offense, the organization unreasonably delayed reporting the offense to appropriate governmental authorities.

- (3) Participation in, condoning of, or willful ignorance of, an offense by an individual within high-level personnel of the organization results in a rebuttable presumption that the organization did not have an effective program to prevent and detect violations of law.

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Commentary

Application Notes:

1. ~~“Substantial authority personnel,” “condoned,” “willfully ignorant of the offense,” “similar misconduct,” “prior criminal adjudication,” and “effective program to prevent and detect violations of law,” are defined in the Commentary to §8A1.2 (Application Instructions – Organizations).~~

1. Definitions.—For purposes of this guideline, “condoned,” “prior criminal adjudication,” “similar misconduct,” “substantial authority personnel,” and “willfully ignorant of the offense” have the meaning given those terms in the Commentary to §8A1.2 (Application Instructions - Organizations).

* * *

3. “High-level personnel of the organization” is defined in the Commentary to §8A1.2 (Application Instructions - Organizations). With respect to a unit with 200 or more employees, “high-level personnel of a unit of the organization” means agents within the unit who set the policy for or control that unit. For example, if the managing agent of a unit with 200 employees participated in an offense, three points would be added under subsection (b)(3); if that organization had 1,000 employees and the managing agent of the unit with 200 employees were also within high-level personnel of the ~~entire~~ organization in its entirety, four points (rather than three) would be added under subsection (b)(2).

* * *

10. ~~The second proviso in subsection (f)~~ Subsection (f)(2) contemplates that the organization will be allowed a reasonable period of time to conduct an internal investigation. In addition, no reporting is required by this proviso-subsection (f)(2) if the organization reasonably concluded, based on the information then available, that no offense had been committed.

* * *

12. To qualify for a reduction under subsection (g)(1) or (g)(2), cooperation must be both timely and thorough. To be timely, the cooperation must begin essentially at the same time as the organization is officially notified of a criminal investigation. To be thorough, the cooperation should include the disclosure of all pertinent information known by the organization. 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. However, the cooperation to be measured is the cooperation of the organization itself, not the cooperation of individuals within the organization. If, because of the lack of cooperation of particular individual(s), neither the organization nor law enforcement personnel are able to identify the culpable individual(s) within the organization despite the organization’s efforts to cooperate fully, the organization may still be given credit for full cooperation. If the defendant has satisfied the requirements for cooperation set forth in this note, waiver of the attorney-client privilege and of work product protections is not a prerequisite to a

reduction in culpability score under subsection (g). 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.

* * *

§8C2.8. Determining the Fine Within the Range (Policy Statement)

- (a) In determining the amount of the fine within the applicable guideline range, the court should consider:

* * *

(9) partial but incomplete satisfaction of the conditions for one or more of the mitigating or aggravating factors set forth in §8C2.5 (Culpability Score); and

(10) any factor listed in 18 U.S.C. § 3572(a); and

(11) whether the organization failed to have, at the time of the instant offense, an effective program to prevent and detect violations of law within the meaning of §8B2.1 (Effective Program to Prevent and Detect Violations of Law).

Commentary

Application Notes:

* * *

4. *Subsection (a)(6) provides that the court, in setting the fine within the guideline fine range, should consider any prior criminal record of an individual within high-level personnel of the organization or within high-level personnel of a unit of the organization. Since an individual within high-level personnel either exercises substantial control over the organization or a unit of the organization or has a substantial role in the making of policy within the organization or a unit of the organization, any prior criminal misconduct of such an individual may be relevant to the determination of the appropriate fine for the organization.*

* * *

4. DEPARTURES FROM THE GUIDELINE FINE RANGE

* * *

§8C4.1. Substantial Assistance to Authorities - Organizations (Policy Statement)

* * *

Commentary

Application Notes:

1. Intent of Provision.—Departure under this section is intended for cases in which substantial assistance is provided in the investigation or prosecution of crimes committed by individuals not directly affiliated with the organization or by other organizations. It is not intended for assistance in the investigation or prosecution of the agents of the organization responsible for the offense for which the organization is being sentenced.

- [2. Waiver of Certain Privileges and Protections.—If the defendant has satisfied the requirements for substantial assistance set forth in subsection (b)(2), waiver of the attorney-client privilege and of work product protections is not a prerequisite to a motion for a downward departure by the government under this section. However, the government may determine that waiver of the attorney-client privilege and of work product protections is necessary to ensure substantial assistance sufficient to warrant a motion for departure.]

* * *

§8C4.10. Mandatory Programs to Prevent and Detect Violations of Law (Policy Statement)

If the organization’s culpability score is reduced under §8C2.5(f) (Effective Program to Prevent and Detect Violations of Law) and the organization had implemented its program in response to a court order or administrative order specifically directed at the organization, an upward departure may be warranted to offset, in part or in whole, such reduction.

Similarly, if, at the time of the instant offense, the organization was required by law to have an effective program to prevent and detect violations of law, but the organization did not have such a program, an upward departure may be warranted.

* * *

§8D1.1. Imposition of Probation - Organizations

- (a) The court shall order a term of probation:

* * *

- (3) if, at the time of sentencing, an organization having 50 or more employees does not have an effective program to prevent and detect violations of law (A) the organization (i) has 50 or more employees, or (ii) was otherwise required under law to have an effective program to prevent and detect violations of law; and (B) the organization does not have such a program;

* * *

§8D1.4. Recommended Conditions of Probation - Organizations (Policy Statement)

* * *

- (b) If probation is imposed under §8D1.1(a)(2), the following conditions may be appropriate to the extent they appear necessary to safeguard the organization’s ability to pay any deferred portion of an order of restitution, fine, or assessment:

* * *

- (4) The organization shall be required to make periodic payments, as specified by the court, in the following priority: (~~4A~~) restitution; (~~2B~~) fine; and (~~3C~~) any other monetary sanction.
- (c) If probation is ordered under §8D1.1(a)(3), (4), (5), or (6), the following conditions may be appropriate:
- (1) The organization shall develop and submit to the court ~~a~~ an effective program to prevent and detect violations of law, consistent with §8B2.1 (Effective Program to Prevent and Detect Violations of Law). The organization shall include in its submission including a schedule for implementation of the program.
 - (2) Upon approval by the court of a program referred to in subdivision (1) to prevent and detect violations of law, the organization shall notify its employees and shareholders of its criminal behavior and its program ~~to prevent and detect violations of law referred to in subdivision (1)~~. Such notice shall be in a form prescribed by the court.
 - (3) The organization shall make periodic reports to the court or probation officer, at intervals and in a form specified by the court, regarding the organization's progress in implementing the program referred to in subdivision (1) to prevent and detect violations of law. Among other things, such reports shall disclose any criminal prosecution, civil litigation, or administrative proceeding commenced against the organization, or any investigation or formal inquiry by governmental authorities of which the organization learned since its last report.
 - (4) In order to monitor whether the organization is following the program referred to in subdivision (1) to prevent and detect violations of law, the organization shall submit to: (A) a reasonable number of regular or unannounced examinations of its books and records at appropriate business premises by the probation officer or experts engaged by the court; and (B) interrogation of knowledgeable individuals within the organization. Compensation to and costs of any experts engaged by the court shall be paid by the organization.

Commentary

Application Notes:

1. *In determining the conditions to be imposed when probation is ordered under §8D1.1(a)(3) through (6), the court should consider the views of any governmental regulatory body that oversees conduct of the organization relating to the instant offense. To assess the efficacy of a program to prevent and detect violations of law submitted by the organization, the court may employ appropriate experts who shall be afforded access to all material possessed by the organization that is necessary for a comprehensive assessment of the proposed program. The court should approve any program that appears reasonably calculated to prevent and detect violations of law, ~~provided as long as it is~~ consistent with §8B2.1 (Effective Program to Prevent and Detect Violations of Law), and any applicable statutory and ~~or~~ regulatory requirements.*

* * *

§8D1.5. Violations of Conditions of Probation – Organizations (Policy Statement)

Upon a finding of a violation of a condition of probation, the court may extend the term of probation, impose more restrictive conditions of probation, or revoke probation and repentance the organization.

Commentary

Application Note:

1. *In the event of repeated, serious violations of conditions of probation, the appointment of a master or trustee may be appropriate to ensure compliance with court orders.*

* * *

PART F - VIOLATIONS OF PROBATION - ORGANIZATIONS

§8E1.1. Violations of Conditions of Probation - Organizations (Policy Statement)

Upon a finding of a violation of a condition of probation, the court may extend the term of probation, impose more restrictive conditions of probation, or revoke probation and repentance the organization.

Commentary

Application Notes:

1. Appointment of Master or Trustee.—In the event of repeated, serious violations of conditions of probation, the appointment of a master or trustee may be appropriate to ensure compliance with court orders.
2. Conditions of Probation.—Mandatory and recommended conditions of probation are specified in §§8D1.3 (Conditions of Probation - Organizations) and 8D1.4 (Recommended Conditions of Probation - Organizations).

ISSUES FOR COMMENT:

1. *Subsection (f) of §8C2.5 (Culpability Score) currently prohibits receipt of the three-point reduction in the culpability score for an effective program to prevent and detect violations of law if the organization unreasonably delayed reporting an offense to appropriate governmental authorities after becoming aware of the offense. The proposed amendment retains that prohibition. The Commission requests comment regarding whether the prohibition should be eliminated so that an organization could be considered for the reduction under §8C2.5(f) regardless of whether the organization unreasonably delayed reporting the offense after its detection. Elimination of this prohibition may be appropriate in light of the fact that §8C2.5(g) provides for a five-point decrease for cooperation with authorities, including reporting the offense to authorities within a reasonable time.*

2. *Subsection (f) of §8C2.5 also currently precludes receipt of the three-point reduction for an effective program to prevent and detect violations of law if certain high-level individuals within the organization participated in, condoned, or were willfully ignorant of the offense. The proposed amendment changes this automatic preclusion to a rebuttable presumption that the organization did not have an effective program to prevent and detect violations of law under such circumstances. The Commission requests comment regarding whether the automatic preclusion should continue to apply in the context of large organizations. Moreover, should the rebuttable presumption apply in the context of small organizations, in which high-level individuals within the organization almost necessarily will have been involved in the offense?*
3. *The reduction in the culpability score under §8C2.5(f) for an effective program to prevent and detect violations of law currently is a three-point reduction. Should the extent of that reduction be increased to four points given the heightened requirements for an effective program to prevent and detect violations of law under the proposed amendment?*
4. *Generally, are there factors or considerations that could be incorporated into Chapter Eight (Sentencing of Organizations), particularly §8C1.2, to encourage small and mid-size organizations to develop and maintain compliance programs?*