



Catholic Healthcare West
CHW

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U.S. Sentencing Commission
One Columbus Circle, NE
Suite 2-500
Washington, DC 20002-8002
Attn: Public Affairs

Subject: United States Sentencing Commission Proposed Changes to the
Federal Sentencing Guidelines

Dear Commissioners:

The purpose of this letter is to provide comment on the proposed changes to the Federal Sentencing Guidelines (Guidelines) related to compliance programs. I appreciate the increased emphasis on compliance programs contained in the proposed changes. It is my view that the proposed changes will improve and enhance compliance programs within organizations. However, I do have concerns with respect to two of the proposed changes. Those concerns are set forth below.

First, the proposed amendments suggest that the compliance officer of the organization is ultimately accountable for the effectiveness of the program. The proposed changes have added language to § 8B2.1(b)(2) which states that the high level person responsible for the program (the compliance officer) has the responsibility to "ensure the implementation and effectiveness of the program."

My concern is that this amendment overstates the role and authority of the compliance officer in most organizations and at the same time absolves management in the organization of its responsibility. As a practical matter, the role of the compliance officer is to develop a compliance program and a structure for implementing the program. The compliance officer should then provide necessary leadership and coordination of the program, monitor program performance, and report to management and the board regarding program implementation.

However, it is ultimately management of the organization which must embrace and assume accountability to ensure the program is effectively implemented. Few compliance officers are involved in the day-to-day management of employees, departments, divisions, business units or ultimately the organization itself. For a compliance program to be effective, each member of management, particularly those at high levels within the organization, must embrace the compliance program and ensure those whom they direct in the organization actively participate in and execute the program. The proposed amendments could be viewed as relieving management of its responsibility to ensure the organization is compliant. I believe that the guidelines should strengthen rather than weaken managements'

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accountability for the organization's compliance efforts. Specifically, I would recommend that the proposed amendment be modified to read as follows:

“Specific individuals within high-level personnel of the organization shall be assigned direct, overall responsibility to coordinate the design, oversee the implementation, and evaluate and report to management and the board on the effectiveness of the program to prevent and detect violations of laws.”

From a historical perspective, it is important to remember that since the Ninth Circuit decision in United States v. Hilton Hotels Corp. 467F.2d1000 (9th Circuit 1972), cert. denied 409 U.S. 1125(1973), corporations have been found liable for the criminal conduct of their agents. Such liability has been based on the courts findings that a corporation has a duty to supervise its employees. In the Hilton case, the courts sustained the jury's instruction that stated that “[a] corporation is responsible for the acts and statements of its agents, done or made within the scope of their employment, even though their conduct may be contrary to their actual instructions or contrary to the corporation's mission statement policy.” Id. at 1004. In short, given Hilton and the many cases that have followed that precedent, I'm troubled by the suggestion that “effectiveness” of the compliance program, which is heavily dependent on the acts of many in the organization, rests on the shoulder of the compliance officer. Consequently, I believe the guidelines should emphasize the role of management in the organization, particularly senior management, in ensuring the program is effectively implemented.

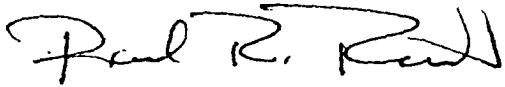
My second concern relates to the treatment of an organization which identifies problems even though the organization had a compliance program in place. While the proposed changes appear to be an improvement over the existing guidelines, it is my view that the proposed changes should do more to promote effective compliance programs.

As drafted, the proposed amendments create a rebuttable presumption that the compliance program was ineffective. However, I would propose a rebuttable presumption that the program is effective if it is the organization that discovers and brings the offense to the attention of the government. The rebuttable presumption of ineffectiveness creates a disincentive for organizations to thoroughly investigate and disclose wrongful conduct. Conversely, a rebuttable presumption that the program is effective (where the organization has uncovered and disclosed the wrongdoing) creates incentives to both investigate and disclose, an approach that is more consistent with the overall emphasis on compliance in Chapter 8 of the Guidelines.

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I would encourage the Commission to consider the changes suggested above. Again, I would like to take the opportunity to express my appreciation for the work of the Commission and for the significant improvement the proposed amendments in Chapter 8 reflect.

Sincerely,

A handwritten signature in black ink, appearing to read "Daniel R. Roach". The signature is stylized with a large, sweeping initial "D" and "R".

Daniel R. Roach
VP Compliance and Audit
Catholic Healthcare West

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