

January 25, 2004

United States Sentencing Commission
One Columbia Circle, NE
Suite 2-500, South Lobby
Washington, DC 20002

RE: Proposed Chapter 8 Amendments to the United States Sentencing
Commission

Dear Commissioners:

I write in response to the Commission's request for comments regarding the proposed amendments to Chapter 8 of the Federal Sentencing Guidelines and very much appreciate the opportunity to do so. I am a licensed clinical and consulting psychologist whose practice focuses on assisting organizations to introduce and implement significant changes at the workplace. I am also the cofounder of the Ethics Officer Association, which currently has more than 800 members, and have worked for 19 years as a consultant to organizations engaged in introducing, implementing, and evaluating broad-based ethics and compliance initiatives.

The Commission has proposed a new guideline at §8B2.1 Effective Program to Prevent and Detect Violations of Law, and, as part of that, has established two obligations of an effective compliance program—i.e., the exercise of due diligence and the promotion of an organizational culture that encourages a commitment to compliance. My experience is that culture always trumps specific rules or guidelines that aim to influence behavior in organizations. Therefore, this enormously significant addition will directly contribute to the efforts of ethics and compliance officers throughout the United States. I would, however, urge that the Commission add the phrase "and shared accountability," so that the final wording reads, "... promotion of organizational culture that encourages a commitment to and shared accountability for compliance throughout the organization." Taken even further, this phrase might read, "... that promotes an organizational culture that encourages a commitment to compliance and that expects all employees to hold themselves and one another personally accountable for ethical and legal conduct." The benefit of incorporating accountability into the wording is that it will provide specific direction to the construct of organizational culture. It will, in effect, tell ethics and compliance officers and, more significantly, their superiors and other organizational stakeholders that a commitment to compliance is one in which all employees hold themselves and each other accountable for specific types of behavior. Organizational culture is much more than what senior management "says." In its truest form, it is a reflection of what employees actually "do."

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Again in §8B2.1 the Commission defined the purpose of a compliance program to be, in part, "taking reasonable steps to prevent illegal conduct in organizational activities." I would urge the Commission to consider changing the phrase "illegal conduct" to "violations of law," in all mentions (e.g., including §8B2.1 (a) (b), etc.). The Commission's words, when published, will be read closely and carefully. The term "violations of law" creates a subtle but potentially very significant change in the spirit of that statement in two ways. First, the "violations of law" has, in common usage, a much broader implication than the phrase "illegal conduct" and speaks to the Commission's increased focus on getting organizations to speak to the spirit, not simply the letter, of the guidelines. Second, many tend to think of violations of law as something to prevent (i.e., before they occur) and illegal conduct as something to address (i.e., after it occurs).

Part of proposed guideline §8B2.1 (i.e., subsection (b) (2)) speaks to the role of "high level personnel of the organization" who shall "be assigned direct, overall responsibility to ensure the implementation and effectiveness of the program to prevent and detect violations of law." The guideline, in part, speaks to the requirement that these individuals engage in periodic meetings with the "governing authority or an appropriate subgroup of the governing authority." I would urge the Commission to make two changes to the wording of this statement.

First, change "periodically" (i.e., as stated in the Commentary) to "quarterly" and consider stating that as part of the guideline itself. The danger of using the term "periodically" is that it may, de facto, encourage adherence to the letter but not the spirit of this proposed guideline. As I have observed so many times, organizations and their management rarely embrace change simply because they believe it is the right thing to do. Most often, they embrace change when the "cost" for not doing so becomes too great. Providing senior level managers with specific guidance in this and other areas takes into account the fact that many will, at least initially, not embrace the spirit of the guidelines and will, instead, comply with the most narrow definition (i.e., that definition that requires the least change) instead. I assume that the goal of this proposed guideline (and others) is to provide the structure and clarity necessary to ensure that the behavioral change the Commission seeks not only becomes habit on the part of those organizations that are affected by the Federal Sentencing Guidelines but that they also adopt the right kind of habit.

Second, I would urge the Commission to add the phrase (provides the high level person) with "overall responsibility for ensuring the implementation of the program with direct access to the governing authority in between designated meetings." The goal of this modification is to ensure that person has access on an as needed basis (i.e., when he or

she specifically believes such contact is necessary) in addition to regularly scheduled access. As before, my experience is that, at least initially, engaging in the culture change the Commission aims to engender will be facilitated by as much clarity as can be provided without becoming too rigid or unnecessarily constraining. Put even more bluntly, unless this is stated in the final wording, it is most unlikely to ever occur in the real world of organizations. Further, and equally important, that high-level person must have, and indeed be mandated to, meet with the governing authority or the appropriate subgroup in private, and I would urge the Commission to rewrite the proposed text to reflect that. All too often I have been witness to meetings such as these where the responsible person changes what he or she might otherwise say to the members of the governing authority (almost always in the direction of being less candid than might otherwise occur or than the situation actually requires) when his/her superiors or other more senior level people are present in the room.

Regarding proposed guideline §8B2.1 subsection (b) (4), I recommend that the Commission take this further and specifically extend the training requirement to upper levels of the organization. Even more important, I recommend that this phrase require that the training upper-level individuals participate in be of the same length and depth as the training in which others within the organization participate. Too often ethics and compliance training for the broad employee population is "condensed" for senior managers, either because they claim, or because others presume, that their time is "too valuable" to do otherwise. The nature of the training that senior managers take part in may be different from the nature of the program that employees take part in, and that is as it should be—but not the length (and, therefore, the commitment it symbolically speaks to). So, for example, when I designed and helped facilitate training for employees, managers, and senior managers at Pacific Bell, following a series of widely publicized unethical and illegal sales practices during the 1980s, we required training for senior managers be of the same length as that of first level supervisors. We did, however, change the orientation of the training for senior managers to focus on their unique ability to build and maintain an ethical work culture throughout the organization.

Proposed guideline §8B2.1 subsection (b) (5) would require organizations to take reasonable steps to periodically evaluate the effectiveness of their programs to prevent and detect violations of law. Measuring the effectiveness of a compliance and ethics programs has been the subject of enormous debate for years. Central to that debate is the question, "How do we define effectiveness?" The Commission's guidelines could help provide direction in answering that question. Ultimately, the effectiveness of any training should be measured by its impact in changing employee's behavior (or sustaining and maintaining desired behavior). So, for example, an evaluation that simply reports the number of calls to the Hotline as a measure of effectiveness often masks the real truth. The program may be completely effective or completely ineffective regardless of the

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number of calls received. If training results in changed behavior, it works. If it doesn't, it does not.

Regarding the unreasonable delay in self-reporting by organizations (Section 8C2.5 (f)), which mandates a three point reduction in the culpability score for effective compliance programs if the organization delays unreasonably in reporting offenses, I urge the Commission to maintain this as it is currently described. As stated previously, organizations typically only change when the penalties associated with not changing become too great. The more personal and consequential those changes are, the more likely behavior will change. This is not meant to represent a Machiavellian view of management or of organizations in general, nor to suggest that senior managers are really Rasputins in disguise, waiting for opportunities to say, in effect, "If it's not prohibited, then I can do it." Rather, the argument is that providing specific, concrete guidance regarding requirements and consequences is much more likely to produce the desired behavior than anything that does not.

I hope that these comments are relevant and useful and speak to some of the issues the Commission hopes will be addressed during the public comment period. I would be most interested in testifying before the Commission in person if the benefit of my experience would be of help.

Yours very truly,

Craig Dreilinger, Ph.D.
Clinical and Consulting Psychologist

cc: Paula Desio, Deputy General Counsel

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