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28 January 2004

United States Sentencing Commission
One Columbus Circle, N.E., Suite 2-500
Washington DC 20002-8002
Attention: Public Affairs

Re: Response to Request for Public Comment on Amendments to Chapter Eight

This letter and attachment are offered in response to the Commission's request for public comment. I have consulted internationally on ethics and compliance programs since 1993 with an emphasis on program evaluation and good governance in emerging market economies. My practice has involved evaluating ethics and compliance programs for the U.S. Air Force under its Voluntary Disclosure Program and work with the Maryland Mediation and Alternative Conflict Resolution Office on a national project to evaluate public policy programs.

We believe that, on balance, the proposed changes/additions reflect well-considered evaluation of the corporate experience in designing and implementing an effective program to prevent and detect violations of the law ("compliance programs"). We are confident that the provisions, such as those aimed at achieving a culture of commitment to compliance, will provide greater guidance to organizations and courts regarding the criteria for evaluating such programs.

There are areas, however, where we think they can be improved as set forth in the following pages and the attachment. We think three issues are important enough to warrant further discussion and request the opportunity to address the Commission: (1) prominent display of the requirements for program evaluation, (2) prominent recognition of the challenges of designing and implementing ethics/compliance programs for small to medium enterprises, and (3) promising confidentiality to encourage employees to come forward with their concerns.

Sincerely,

/S/

KENNETH W. JOHNSON
Director,
Ethics & Policy Integration Centre

Attachment: Proposed Amendments/EPIC Recommendations

cc: Paula Desio Deputy General Counsel

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A. Require a more active, policy role for the governing authority

It is helpful to distinguish between governance and management and ensure that both aspects of organization life are covered by the Federal Sentencing Guidelines for Organizations (FSGO). We recommend that the FSGO make more explicit that the governing authority has an active role in—and responsibility for—requiring and setting broad guidance for the compliance program.

The source of a corporate board's authority is the owners of the enterprise.¹ The board is the pivotal authority. Its authority is neither granted nor defined by management. Policies generated by the board control everything, both governance and management.

In practice, however, the board is often considered an advisor to management rather than its source of authority. Indeed, many recent corporate ethics failures in the U.S. can be traced to the failure of boards to exercise their authority as representatives of the owners.

The FSGO should require a more active board role. See e.g., *IN RE CAREMARK INTERNATIONAL INC. DERIVATIVE LITIGATION*, 698 A.2d 959 (Del.Ch. 1996) where Chancellor Allen noted the Federal Sentencing Guidelines for Organizations and expressed the view 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."

The Chancellor also said such a reporting system should be designed to provide "timely, accurate information sufficient to allow management and the board, each within its scope, to reach informed judgments concerning both the corporation's compliance with laws and its business performance."

This more active role of the governing authority should be reflected in three areas:

- Recommendation: §8B2.1 subsection (b)(1) Include term "governing policies," to read:

"The organization shall establish governing policies and compliance standards and procedures to prevent and detect violations of law."

¹ John Carver and Caroline Oliver, *Corporate Boards that Create Value: Governing Company Performance from the Boardroom* (San Francisco: Jossey-Bass, 2002), pp. xxi-xxii.

- Recommendation: §8B2.1 subsection (b)(2): Change order to place governing authority first in order, then organizational leadership and provide that governing authority shall:

- (1) Set policy for the compliance program
- (2) Ensure that the compliance program meets its own requirements for information

See proposed language in the attachment.

- FSGO 3 Recommendation: §8B2.1 subsection (b)(3): define members of the "governing authority" as "substantial authority."

B. Provide for a more active role for organizational leadership

- Recommendation: §8B2.1 subsection (b)(2): require that they also demonstrate commitment to the compliance program as a matter of leadership. See proposed language in the attachment.
- Recommendation: §8B2.1 subsection (b)(4): Include statements of the organizational leadership demonstrating their commitment to the program as examples of appropriate communication. See proposed language in the attachment.

C. Include requiring the senior personnel administering the compliance program to have access to the governing authority

As presently drafted, subsection (b)(2) requires only that the "high-level responsible officer" report to the board. In practice, such an officer often does not administer the program. Indeed, the "ethics/compliance officer," is frequently not the responsible officer, yet has significant insight into the operations of the compliance program. We recommend that this division of authority be recognized in the guidelines. See proposed language in the attachment.

D. Integrate risk assessment and program evaluation in §8B2.1(c)

The provision requiring risk assessment is a positive development, but it should be expanded to require that the risk assessment be translated into specific expected program outcomes and the program be regularly evaluated to determine whether the program is effective at meeting expected outcomes.

Where the 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, this can best be done with reference to expected program outcomes.

In the same vein, the requirement for program evaluation should be removed from subsection (b)(5) and placed in §8B2.1(c). The provisions for auditing, monitoring, and reporting in subsection (b)(5) are internal to the program itself. Evaluation of the program itself is not aimed at compliance per se, but rather the program effectiveness. Program evaluation is more akin to risk assessment and establishing program outcomes. For example, subsection (b)(1) is informed by the risk assessment in §8B2.1(c). It could be a part of that subsection, but is properly some that must be done to inform the "steps" required in the program. See the attachment for proposed language.

E. Do not require training in subsection §8B2.1(b)(4)

The importance of subsection (b)(4) is that the [governing policy and] compliance standards and procedures be adequately communicated, not that any particular form be required. Especially for the small to medium enterprise (SME), training may not be the best or most cost-effective way to proceed. Without more definition, requiring training invites training merely for the sake of meeting a requirement. Furthermore, if any communication is advisable, it is that the organizational leadership communicate its commitment to the program.

We recommend retaining the "e.g.," but add the language extending the scope of training and including "statements of organizational leadership demonstrating commitment," or words to that effect. See the attachment for proposed language.

F. Add language requiring that a program offer a promise of confidentiality where appropriate and enforceable at law

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 FSGO should follow the relevant provision in Sarbanes-Oxley, which requires a "confidential, anonymous" reporting mechanism.² As has been pointed out in the

² Under Section 301 of the Sarbanes-Oxley Act of 2002, audit committees are required to establish procedures for receipt of complaints by employees:

(4) COMPLAINTS- Each audit committee shall establish procedures for--

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literature, this precise wording is grammatically problematic, but the intent reflects experience that the appropriate officials will gain more information where they are able to promise confidentiality than when they only offer anonymity. See proposed language in the attachment.

G. In all steps other than §8B2.1(b)(1) refer to “compliance standards and procedures,” not “violations of law”

Since an organization must establish adequate compliance standards and procedures to “prevent and detect violations of law”, the test thereafter should be whether they have adequate structures, systems, procedures, and practices to follow those standards and procedures. For example, the mechanism to seek guidance and report concerns will be more valuable if employees and other agents can raise issues of compliance standards and procedures precisely because they are designed to prevent and detect actual violations.

Therefore, after successfully complying with §8B2.1(b)(1), references in steps 5, 6, and 7, in particular, should refer to these compliance standards and procedures, not just to violations of law.

H. In all steps after §8B2.1(a) refer to “compliance program”

We further recommend that in §8B2.1(b)(1) the cumbersome term “program to prevent and detect violations of law” be described as a “compliance program” thereafter.

I. Response to Issue Number 1: Self-reporting should be treated as a rebuttable presumption

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.

In our view, elimination of this prohibition may be appropriate to encourage organizations to implement compliance programs without having to deal *ab initio*

(A) the receipt, retention, and treatment of complaints received by the issuer regarding accounting, internal accounting controls, or auditing matters; and

(B) the confidential, anonymous submission by employees of the issuer of concerns regarding questionable accounting or auditing matters.

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with the issue of self-reporting. Self-reporting as a matter of policy is problematic for many counsel in view of the "litigation dilemma" so well discussed in the Advisory Group's report. While we feel strongly that organizations should both self-report and remedy any harm they cause, it is also our view that the two factors (an "effective program" and "self-reporting") should not be bound together except where the failure to self-report tends to indicate that the program was not effective.

If this is followed, however, the reduction in the culpability score under §8C2.5(f) for an effective program to prevent and detect violations of law currently should remain at three.

J. Response to Issue Number 4: Provide a separate provision re: the challenges to the small to medium enterprise (SME)

The Commission asked whether there were factors or considerations that could be incorporated into Chapter Eight (Sentencing of Organizations), particularly §8C1.2, to encourage small and midsize organizations to develop and maintain compliance programs?

Domestically and around the globe, approaching ethics and compliance programs for the small to medium enterprise (SME) has been challenging. While there are references to these challenges throughout the guidelines, we recommend that an additional section, §8B2.1(d), be added to give specific guidance to the judiciary. The Commission's doing so will be particularly helpful to those making the case for the SME ethics/compliance program as they will be able to point to a separate provision addressing the SME.

We recommend language and commentary covering the following points:

Each small to medium enterprise ("SME")³ is unique, often taking on the character of its owners and managers. There is surprisingly little research ethics and compliance programs for the SME. Moreover, it is difficult, at best, to generalize the SME experience.

In most economies, SMEs provide the bulk of jobs, especially new jobs, and contribute significantly to the welfare of their communities because they are so closely connected. On the other hand, SMEs often lack the capital, staff, or time of large, complex enterprises ("LCEs") to address many business

³ There are many definitions of the SME, especially the small enterprise. The World Bank definition of the small enterprise is under 300 employees, while the U.S. Small Business Agency definition is 500 employees.

issues. For example, tracking and meeting changing laws and regulations are relatively more costly for the SME.

Though many of the best practices developed over the last two decades reflect the experiences of LCEs, the process of developing standards, procedures, and expectations is the same for all enterprises. The answers for each enterprise will depend upon the size and complexity of the enterprise itself. The goal for the SME, then, is not to duplicate the standards, procedures, infrastructure, practices, and expectations of LCEs, but to learn from them—and to improve them.

SMEs have an additional incentive to adopt the discipline of responsible business conduct: to create a wider commercial network. Where owners and managers embrace the global language of responsible business through a Business Ethics Program, a network of business enterprises and supportive NGOs based on shared values is possible. Such a network allows the individual SME to develop some of the synergies and economies of scale that only larger enterprises can afford.

Due to resource limitations, most small to medium enterprise ("SME") program strategy and planning will be informal. Owners and managers will be less apt to use formal teams and processes to set goals, objectives, strategies, and action plans than large enterprises. Nonetheless, they can adapt the processes and best practices of LCEs to meet their circumstances.⁴

The following table is included in the forthcoming work identified above intended to address the concerns of SMEs. We do not recommend that it be included in the Guidelines, but it is illustrative of what may be possible.

⁴ This language summarizes various provisions in a forthcoming work, Kenneth W. Johnson and Igor Y. Abramov, *Business Ethics: Manual on Managing the Responsible Business Enterprise in Emerging Market Economies* (Washington, D.C.: Government Printing Office, 2004).

Business Ethics Infrastructure SME Conversion Chart	
Function	Typical SME Staffing
High-level responsibility for program oversight (the "Responsible Officer")	Often an owner, but another highly respected employee, who has substantial authority in the enterprise, is preferable.
Performing or coordinating the specific functions of the Business Ethics Program (the "Business Ethics Officer")	Typically, a respected staff member performs or coordinates the functions of the Business Ethics Officer. An SME can form or join a business association to develop training materials and provide a forum for managers to discuss ethics, compliance, and social responsibility issues, problems, and solutions. The SME can employ an independent answering service to provide a mechanism for employees and agents to seek advice or report concerns anonymously. The SME can use an outside service to conduct a periodic evaluation of its Business Ethics Program.
Advising the Responsible Officer and Business Ethics Officer that represents the enterprise as whole ("Business Ethics Council")	An SME can conduct regular meetings of all or representative employees, perhaps 30-60 minutes per meeting, once a month, to discuss enterprise core beliefs; standards, procedures, and expectations; and current ethics, compliance, and social responsibility issues. A medium enterprise, especially one with multiple locations, can appoint

Business Ethics Infrastructure SME Conversion Chart	
Function	Typical SME Staffing
	members to such a council, but meet regularly by telephone. An SME can form or join a business association to provide a forum to discuss current ethics, compliance, and social responsibility issues, problems, and solutions. A college, university, or business development council might host a forum for SMEs. A large enterprise can, and often should, host a forum for its suppliers and service providers to address the requirements of its program.
Advising the Responsible Officer, Business Ethics Officer, and employees and agents about professional ethics, compliance and social responsibility issues, most often seen in hospitals, ("Professional Ethics Council")	An SME can conduct regular meetings of all or representative professionals, perhaps 30-60 minutes, once a month, to discuss enterprise core beliefs, standards, procedures, and expectations on current professional ethics, compliance, and social responsibility issues. A medium enterprise, especially one with multiple locations, can appoint members to such a council, but meet regularly by telephone An SME can form or join a business association to develop training materials and provide a forum to discuss current professional ethics, compliance, and social responsibility issues, problems, and solutions. A college, university, or business

Business Ethics Infrastructure SME Conversion Chart	
Function	Typical SME Staffing
	development council can host a forum for SMEs. A large enterprise might host or sponsor a forum for its suppliers and service providers.
Individuals at various levels of the enterprise who link a central ethics office with the field ("Business Conduct Representatives")	For the SME, these may be respected, knowledgeable staff members at its various levels or locations, who have the right to communicate directly with the Owner/Owner-representatives, Responsible Officer, or Business Ethics Officer on responsible business conduct issues: ethics, compliance, and social responsibility. These Business Conduct Representatives can also conduct responsible Business Conduct training and education and assist in program evaluation at local levels.
Related executive and department functions, such as the Chief Financial Officer; Legal Counsel; Human Resources; Internal Audit; Environmental, Health and Safety; government procurement; and Investor Relations	The SME often uses trusted, independent professionals to perform many of these functions. If so, they should participate in enterprise responsible business conduct training programs and, where practicable, its discussions of current ethics, compliance, and social responsibility issues. These independent professionals can form their own independent forums to discuss current ethics, compliance, and social responsibility issues. They may also be engaged to advise SME owners and managers on how to

Business Ethics Infrastructure SME Conversion Chart	
Function	Typical SME Staffing
	design and implement a Business Ethics Program using this Manual and other resources. Provided they respect the confidences and proprietary information of each SME, they can amortize the cost of providing these services over multiple clients.
The individual responsibility of every employee and agent of the enterprise to abide by the standards and procedures and strive to meet reasonable stakeholder expectations	Individual responsibility of employees and agents applies to all enterprises regardless of size. In the SME, it may be difficult for employees to seek advice or report concerns confidentially and anonymously. Owners and managers of SMEs must work to develop an organizational culture where employees and agents are able to speak up confidently and safely.



28 January 2004

SPECIFIC PROPOSALS FOR AMENDMENTS TO THE DEFINITION OF AN "EFFECTIVE PROGRAM TO PREVENT AND DETECT VIOLATIONS OF LAW"

DEFINITION OF AN "EFFECTIVE PROGRAM TO PREVENT AND DETECT VIOLATIONS OF LAW"

Basic Questions	DEFINITION OF AN "EFFECTIVE PROGRAM TO PREVENT AND DETECT VIOLATIONS OF LAW"		
	Existing Provisions	Proposed Amendment	Epic Recommendations
Background		Consequently, the new guideline at §8B2.1 proposed by the Advisory Group contains separate subdivisions describing several important characteristics of an effective compliance program: • the purpose of a compliance program and the importance of preventive due diligence and organizational culture in carrying out such a program (§8B2.1(a)); • the seven minimum attributes that should be present in all compliance programs (§8B2.1(b)); and • the need for risk assessments and related compliance program adaptation as a basis for constructing and operating a generally effective program to prevent and detect violations of law (§8B2.1(c)).	Needs assessment is properly recognized as necessary for an effective compliance program. It provides the factual basis for each step. No less important—in the same vein—is for the organization to establish expected program outcomes <i>and</i> regularly evaluate the compliance program to determine whether it was effective. A program is unlikely to hit targets it does not explicitly aim for. <i>Epic Recommendation</i> In implementing subsection (b), the organization shall conduct ongoing risk assessment; 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; and regularly evaluate its program with reference to specific expected program outcomes. (§8B2.1(c)).

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DEFINITION OF AN "EFFECTIVE PROGRAM TO PREVENT AND DETECT VIOLATIONS OF LAW"

Basic Questions

Existing Provisions	Proposed Amendment	Epic Recommendations
(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 programs was not effective. The hallmark of an effective program 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.	§8B2.1(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.	<i>Epic recommendation</i> §8B2.1(a) To have an effective program to prevent and detect violations of law ..., an organization shall— ... <u>Due diligence includes governing policies; risk assessment; designing and implementing compliance structures and systems; communication and feedback; aligning operations; and evaluating and learning from the compliance program's governing policies, standards, and procedures.</u> Such program, <u>hereinafter referred to as a "compliance program,"</u> 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 leading to sentencing does not necessarily mean that the program is not generally effective in preventing and detecting violations of law.

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DEFINITION OF AN "EFFECTIVE PROGRAM TO PREVENT AND DETECT VIOLATIONS OF LAW"

Basic Questions	Existing Provisions	Proposed Amendment	Epic Recommendations
What norms, values and standards should we set to guide our members and foster reasonable expectations among our stakeholders?	(k) . . . 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.	§8B2.1(b) (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: (1) The organization shall establish compliance standards and procedures to prevent and detect violations of law. Application Note Under this definition, "compliance standards and procedures" are described as "standards of conduct and internal control systems that are reasonably capable of reducing the likelihood of violations of law." This definition emphasizes that standards of conduct and internal controls are essential aspects of effective compliance programs and that these measures should be developed, implemented, and evaluated in terms of their impact on reducing the likelihood of violations of law.	To encourage more governing authority involvement in the compliance program, require that the governing authority set "governing policy" for the compliance program. <i>Epic recommendation</i> (1) The organization shall establish <u>governing policy and compliance standards and procedures to prevent and detect violations of law.</u> Commentary <u>The governing authority shall establish policy governing a compliance program to prevent and detect violations of law and the organizational leadership shall establish consistent compliance standards and procedures addressing its identified risks, which are consistent with its organizational culture.</u>

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DEFINITION OF AN "EFFECTIVE PROGRAM TO PREVENT AND DETECT VIOLATIONS OF LAW"			
Basic Questions	Existing Provisions	Proposed Amendment	Epic Recommendations
What style, structure, and systems of authority and responsibility at all levels should we exercise?	(1) . . . Due diligence requires at a minimum that the organization must have taken the following types of steps: (2) Specific individuals within high-level personnel of the organization must have been assigned overall responsibility to oversee compliance with such standards and procedures.	§8B2.1(b)(2) The organizational leadership shall be knowledgeable about the content and operation of the program to prevent and detect violations of law. The organization's governing authority shall be knowledgeable about the content and operation of the program to prevent and detect violations of law and shall exercise reasonable oversight with respect to the implementation and effectiveness of the program to prevent and detect violations of law. Specific individual(s) within high-level personnel of the organization shall be assigned direct, overall responsibility to ensure the implementation and effectiveness of the program to prevent and detect violations of law. Such individual(s) shall be given adequate resources and authority to carry out such responsibility and shall report directly to the governing authority or an appropriate subgroup of the governing authority regarding the implementation and effectiveness of the program to prevent and detect violations of law.	<i>Epic recommendation</i> §8B2.1(b)(2) The organization's governing authority shall establish the guiding policy for the organization's program to prevent and detect violations of law, be knowledgeable about its design and exercise reasonable oversight with respect to its implementation and effectiveness. <u>The organizational leadership shall be knowledgeable about the design of a compliance program consistent with the governing policy and support its operation.</u> Specific individual(s) within high-level personnel of the organization shall be assigned direct, overall responsibility to ensure the implementation and effectiveness of the compliance program. <u>The organization may also use responsible personnel to administer the compliance program. Both such individual(s) shall be given adequate resources and authority to carry out their responsibility and shall report directly to the governing authority or an appropriate subgroup of the governing authority as set forth in governing policy regarding the implementation and effectiveness of the compliance program directly.</u>

DEFINITION OF AN "EFFECTIVE PROGRAM TO PREVENT AND DETECT VIOLATIONS OF LAW"

Basic Questions	Existing Provisions	Proposed Amendment	Epic Recommendations
How can we ensure that we have the right people in the right places to pursue our purpose as an enterprise?	(k) . . . Due diligence requires at a minimum that the organization must have taken the following types of steps: (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 reasonable due diligence, had a propensity to engage in illegal activities.	§8B2.1(b) Due diligence and the promotion of an organizational culture . . . minimally require the following steps: (3) 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. Application Note Definition of "substantial authority."	Agreed

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DEFINITION OF AN "EFFECTIVE PROGRAM TO PREVENT AND DETECT VIOLATIONS OF LAW"

Basic Questions	Existing Provisions	Proposed Amendment	Epic Recommendations
How can we most effectively communicate our standards and procedures and foster reasonable expectations among our stakeholders?	(k) ... Due diligence requires at a minimum that the organization must have taken the following types of steps: ... (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.	\$8B2.1(b) Due diligence and the promotion of an organizational culture ... minimally require the following steps: (4) (A) The organization shall take reasonable steps to communicate in a practical manner its compliance standards and procedures, and other aspects of the program to prevent and detect violations of law, to the individuals referred to in subdivision (B) by conducting effective training programs and otherwise disseminating information appropriate to such individual's respective roles and responsibilities. (B) The individuals referred to in subdivision (A) are the members of the governing authority, the organizational leadership, the organization's employees, and, as appropriate, the organization's agents.	Agree with (b), but prefer original language. Epic is concerned about requiring training. This tends to suggest that formal training is the best means of communicating organizational standards and procedures. This is not necessarily true, especially for small to medium enterprises. Emphasizing the general importance of training can best be described in Application Note. Provision is awkwardly drafted, including circular reference to "individuals." The recommended language below expands the elements of an effective program and expands the list of target audiences to include suppliers and service providers, which is an emerging best practice.

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DEFINITION OF AN "EFFECTIVE PROGRAM TO PREVENT AND DETECT VIOLATIONS OF LAW"

Basic Questions	Existing Provisions	Proposed Amendment	Epic Recommendations
			<i>Epic recommendation</i> §8B2.1(b) Due diligence and the promotion of an organizational culture ... minimally require the following steps: (4) The organization shall take reasonable steps to communicate its compliance standards and procedures, and other aspects of the program to prevent and detect violations of law. An effective communication program shall involve: (A) <u>A balance of formal and informal means of communication that reflects the organization's style of leadership, resources available, and organizational culture: e. g., leaders declaring support for the compliance program, requiring participation in training programs, or disseminating publications that explain what is required of individuals, and</u> (B) Communication of governing policy and compliance standards and procedures, as appropriate, to all members of the organization, including its governing authority, leadership, and employees, as well as its agents and suppliers or service providers.

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DEFINITION OF AN "EFFECTIVE PROGRAM TO PREVENT AND DETECT VIOLATIONS OF LAW"

Basic Questions	Existing Provisions	Proposed Amendment	Epic Recommendations
How can we know that our members are following our standards and procedures and meeting reasonable stakeholder expectations?	(k) . . . Due diligence requires at a minimum that the organization must have taken the following types of steps: (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.	§8B2.1(b) Due diligence and the promotion of an organizational culture . . . minimally require the following steps: (5) The organization shall take reasonable steps— (A) to ensure that the organization's program to prevent and detect violations of law is followed, including using monitoring and auditing systems that are designed to detect violations of law; (B) to evaluate periodically the effectiveness of the organization's program to prevent and detect violations of law; and (C) to have a system whereby the organization's employees and agents may report or seek guidance regarding potential or actual violations of law without fear of retaliation, including mechanisms that allow for anonymous reporting.	<i>Epic Recommendation</i> (5) The organization shall take reasonable steps— (A) To ensure that the organization's compliance program is followed, including using monitoring and auditing systems that are designed to detect its compliance standards and procedures; and (B) To have a system whereby the organization's employees and agents may report or seek guidance regarding potential or actual violations of its compliance standards and procedures without fear of retaliation, including mechanisms that allow for anonymous reporting and promises of confidentiality, where appropriate and enforceable as a matter of law.

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DEFINITION OF AN "EFFECTIVE PROGRAM TO PREVENT AND DETECT VIOLATIONS OF LAW"

Basic Questions	Existing Provisions	Proposed Amendment	Epic Recommendations
How can we encourage our members to follow our standards and procedures and meet the reasonable expectations of our stakeholders?	(k) . . . Due diligence requires at a minimum that the organization must have taken the following types of steps: (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.	§8B2.1(b) Due diligence and the promotion of an organizational culture . . . minimally require the following steps: (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.	<i>Epic recommendation</i> (6) The organization's compliance program shall be promoted and enforced consistently through appropriate incentives to perform in accordance with said program and disciplinary measures for violating its compliance standards and procedures or failing to take reasonable steps to prevent or detect violations thereof.

DEFINITION OF AN "EFFECTIVE PROGRAM TO PREVENT AND DETECT VIOLATIONS OF LAW"

Basic Questions	Existing Provisions	Proposed Amendment	Epic Recommendations
What do we owe our stakeholders when mistakes, misconduct, or misunderstandings occur that involve our standards and procedures or their reasonable expectations?	(k) . . . Due diligence requires at a minimum that the organization must have taken the following types of steps: 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.	§8B2.1(b) Due diligence and the promotion of an organizational culture . . . minimally require the following steps: (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.	If an organization must self-report violations of law to receive credit for having an effective program, recommend including that as a required response. <i>Epic recommendation</i> (7) After a violation of it compliance standards and procedures has been detected, the organization shall take reasonable steps to respond appropriately and prevent similar violations, e. g., including self-reporting a violation of law to appropriate authorities and making any necessary modifications to the its compliance program.

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DEFINITION OF AN "EFFECTIVE PROGRAM TO PREVENT AND DETECT VIOLATIONS OF LAW"

Basic Questions	Existing Provisions	Proposed Amendment	Epic Recommendations
How should we monitor, track, and report our performance as an enterprise, and continuously learn from it?		§8B2.1(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.	Needs assessment is properly recognized as necessary for an effective compliance program. It provides the factual basis for each step. No less important—in the same vein—is for the organization to establish expected program outcomes and regularly evaluate the compliance program to determine whether it was effective. A program is unlikely to hit targets it does not explicitly aim for. <i>Epic Recommendation</i> §8B2.1(c) In implementing subsection (b), the organization shall conduct ongoing risk assessment; regular program evaluation with reference to specified expected program outcomes; and take appropriate steps to design, implement, or modify each step set forth in subsection (b) to prevent and detect violations of law.

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