

HCCA



HEALTH CARE COMPLIANCE ASSOCIATION

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February 16, 2004

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

Dear Commissioners:

The Health Care Compliance Association (HCCA), established in 1996, is the only national, nonprofit organization dedicated solely to improving the quality of compliance. Its membership is made up of over 3,000 compliance professionals who oversee the compliance efforts of thousands of organizations both in and outside of health care. The HCCA has a rich history of facilitating the development and maintenance of compliance programs, providing a forum for understanding complicated regulatory environments, and collaborating with enforcement agencies to provide tools, resources, and educational opportunities for those involved with compliance. Its mission is to "champion ethical practice and compliance standards in the health care community and to provide the necessary resources for compliance professionals and others who share these principles."

HCCA Website: <http://www.hcca-info.org/>

The Executive Committee of the Health Care Compliance Association offers the following comments on the proposed changes to the US Sentencing Guidelines – See attached.

Sincerely,

Al Josephs
President
Health Care Compliance Association

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Washington, DC 20002-8002

Attention: Public Affairs

Subject: United States Sentencing Commission Proposed Changes

Dear Commissioners:

The purpose of this letter is to comment on the proposed changes to the Federal Sentencing Guidelines (Guidelines) relating to compliance programs. At the outset I would note that the Commission appears to be placing increased emphasis on the importance of compliance programs and the role of the compliance officer as a member of senior management. We completely support this effort. Moreover, we agree with the many changes proposed by the Commission to provide additional guidance and direction to organizations regarding compliance programs and to emphasize the need for compliance officers to have sufficient authority and resources to be able to perform effectively. While the board of directors of the Health Care Compliance Association supports virtually all of the proposed changes to the Guidelines, it does have concerns with two of the proposed changes. Those concerns are outlined below.

First, the proposed amendments suggest that the compliance officer of the organization is 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."

Our concern is that this amendment may not reflect the fact that compliance can only be achieved if the operating management of an organization (at all levels) performs the roles and responsibilities assigned to it through the compliance program. 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 leadership and coordination of the program, as well as monitoring program performance and reporting to management and the board on program implementation.

Ultimately, however, the operating management of the organization must embrace, the program and assume accountability to ensure that the compliance program is effectively implemented. It is not realistic to hold the compliance officer alone responsible for the overall success or failure of the compliance program. If there are failures, the responsibility may reside with the compliance officer or may reside with any number of other leaders in an organization. The proposed amendments could be read as relieving management of the job of ensuring the organization is compliant. We believe that the guidelines should strengthen rather than weaken managements' accountability for the

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organization's compliance efforts. For the reasons stated above, we would recommend that the proposed amendment be modified to read as follows:

"Specific individuals(s) 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."

Our second concern relates to the treatment of organizations which encounter trouble even though the organization had a compliance program in place. While the proposed changes are an improvement over the existing guidelines, it is our view that the proposed changes could do more to promote effective compliance programs.

As drafted, the proposed amendments create a rebuttable presumption that the compliance program was ineffective. However, we 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.

In summary, we support most of the proposed changes to the Guidelines and applaud the work of the Commission. The changes proposed by the Commission will help us strengthen organizational compliance programs and the role of the compliance officer. However, we would strongly encourage the Commission to revise the proposed Guidelines on the two very important points discussed above.

Sincerely,

Executive Committee
Health Care Compliance Association
5780 Lincoln Drive, Suite 120
Minneapolis, MN 55436

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