

U.S. Sentencing Commission
One Columbus Circle, N.E.,
Suite 2-500
Washington, D.C. 20002-8002
Attention: Public Affairs
VIA FAX: 202/502-4699

PUBLIC COMMENT ON PROPOSED CHANGES TO ORGANIZATIONAL SENTENCING GUIDELINES

I appreciate the opportunity to provide comments on the proposed amendments to the Guidelines. I am choosing to send these anonymously, with your indulgence.

First, I commend the Advisory Group on delivering such a well thought-out, well-researched, well-articulated fine instrument. It was actually a pleasure to read. The effort that went into its production is evident in the quality of all details, throughout.

I am a compliance/ethics professional and would like to share just briefly my thoughts on the proposals.

1. Sec. 8B2.1(b)(2) The proposal draws in DOJ's call for resources and authority, which is excellent. I respectfully submit, however, that the distinction between the day-to-day designer and manager of an organization's compliance program, and the 'high-level personnel' assigned to ensure implementation, is worth a closer look. In my experience, the latter is often a member of the organization's executive team who has taken on compliance as a secondary function, and is often quite disengaged from the actual on-the-ground challenges involved in the program's implementation.

a. I suggest that the proposal's call for adequate authority and resources should be directed at the individual at the operational helm of the program, rather than at the executive, who generally has easier access and larger discretionary funding. To the extent that granting "authority" and "resources" is intended to facilitate the practical success of the program, it would make sense to clarify that it is the operational head that should have the authority and resources, since that is where the majority of the program challenges lie. The operational head of the program is the person who is the 'face' of the program throughout the organization on a daily basis, the one who must persuade others to support the various initiatives in the cross-functional implementation of the program. On the other hand, the 'high level personnel' typically oversee the results, which the operational head is charged with achieving. In fact, much of the operational head's time may often be spent competing for bandwidth of the necessary support functions (e.g., HR, Security, Training, I.T.), among those functions' other primary initiatives, for which they are measured. For example, if the operational head, the 'brains and brawn' behind the program, is a mid-level manager, consider the increased difficulty in getting a share of the often very limited time of other functions, as opposed to a VP seeking that same interdepartmental assistance. As a practical matter this makes program implementation more difficult (difficult to get meetings with senior management, difficult to get other functions to spend their limited time supporting compliance initiatives, etc.) and less efficient. It seems to me if the on-the-ground compliance lead is less than a VP, there is little appearance of, or actual, authority.

b. In some organizations where the operational head currently reports to the governing authority, requiring the high level personnel to do so separately may have the effect of the governing authority receiving less practical detailed info, from seeing the operational head less.

2. Sec 8C2.5 (f) (3): consider changing the rebuttable presumption that a compliance program is not effective if "an individual within high-level personnel of the organization" is the offender to 'two or more' high-level personnel. The rationale behind this is that a program cannot necessarily prevent every instance of misconduct, particularly if it is well hidden; however, if more than one person is involved, there is at least one additional person beyond the main perpetrator who is aware of the malfeasance. If the second person does nothing it is likely a symptom that that program is not working.

3. General comment: there is some disagreement in the regulated community as to whether the compliance program is responsible for ensuring reasonable response steps to misconduct throughout the organization or just in relation to what comes directly to the attention of the compliance program through the hotline. It seems more appropriate that the program should have visibility into, and the ability

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to become involved in further preventing, all illegal/unethical conduct.

4. Consider defining what 'other conduct inconsistent' with an effective program means. Does it include failure to discuss the code of conduct with subordinates? Failing to report a violation to management? Ignoring evidence of misconduct? These clarifications would give teeth to compliance programs. Should this screening also apply to promotions or just to hiring new substantial authority personnel? Finally, since employees take their cues from their immediate managers as well as from those at the top, shouldn't this be true of any person in management as well as those at the high levels of the organization?

Thank you for your consideration of these thoughts -

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I appreciate the chance to provide the following comments on the proposed amendments to the Guidelines. Let me begin by thanking the Sentencing Commission for your efforts at thoughtfully reviewing these vital areas of ethics, law and policy. If recent events have taught us anything, it is that ethics and compliance issues are important to individual, corporate and our country's economic success. Corporate conduct sets an important example for all our citizens – and is a vital influence on the leaders of tomorrow.

As Francis Fukuyama has recently noted, "economic life reflects, shapes and underpins modern life itself." He goes on to note that "a nation's well-being, as well as its ability to compete, is conditioned by a single, pervasive cultural characteristic: the level of trust in society." To the extent that the proposed changes to the Organizational Sentencing Guidelines can help each of us – all of us – increase the level of trust we place in corporations – and the other significant elements of our economy – we will all be the better for it.

I have been a passionate ethics and compliance professional, advisor and teacher for many years and appreciate the opportunity to say a few words concerning the proposed amendments. The comments below are based on a colleague's thoughtful reflections already submitted to you....I have incorporated them herein by my colleague's express permission:

1. Sec. 8B2.1(b)(2) The proposal draws in DOJ's call for resources and authority, which is excellent. We respectfully submit, however, that the distinction between the day-to-day designer and manager of an organization's compliance program, and the 'high-level personnel' assigned to ensure implementation, is worth a closer look. In our experience, the latter is often a member of the organization's executive team who has taken on compliance as a secondary function, and is often quite disengaged from the actual on-the-ground challenges involved in the program's implementation. We suggest that the proposal's call for adequate authority and resources should be directed at the individual at the operational helm of the program, rather than at the executive, who generally has easier access and larger discretionary funding. To the extent that granting "authority" and "resources" is intended to facilitate the practical success of the program, it would make sense to clarify that it is the operational head that should have the authority and resources, since that is where the majority of the program challenges lie. The operational head of the program is the person who is the 'face' of the program throughout the organization on a daily basis, the one who must persuade others to

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support the various initiatives in the cross-functional implementation of the program. On the other hand, the 'high level personnel' typically oversee the results, which the operational head is charged with achieving. In fact, much of the operational head's time may often be spent competing for bandwidth of the necessary support functions (e.g., HR, Security, Training, I.T.), among those functions' other primary initiatives, for which they are measured. For example, if the operational head, the 'brains and brawn' behind the program, is a mid-level manager, consider the increased difficulty in getting a share of the often very limited time of other functions, as opposed to a VP seeking that same interdepartmental assistance. As a practical matter this makes program implementation more difficult (difficult to get meetings with senior management, difficult to get other functions to spend their limited time supporting compliance initiatives, etc.) and less efficient. It seems to us that if the on-the-ground compliance leader is less than a VP, there is little appearance of, or actual, authority.

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3. General comment: there is some disagreement in the regulated community as to whether the compliance program is responsible for ensuring reasonable response steps to misconduct throughout the organization or just in relation to what comes directly to the attention of the compliance program through the hotline. It seems more appropriate that the program should have the ability to become involved in preventing, all illegal/unethical conduct.
4. Consider defining what 'other conduct inconsistent' with an effective program means. Does it include failure to discuss the code of conduct with subordinates? Failing to report a violation to management? Ignoring evidence of misconduct? These clarifications would give teeth to compliance programs. Should this screening also apply to promotions or just to hiring new substantial authority personnel? Finally, since employees often take their cues from their immediate managers as well as from those at the top, shouldn't this be true of any person in management as well as those at the high levels of the organization?
5. Lastly - give corporations credit for going beyond the minimum requirements of a "compliance program." The most successful programs are those that combine the best elements of an ethics and a compliance program into a coherent and consistent organizational culture. If people are convinced that ethics are truly important to an organization, then they are all-the-more likely to both comply

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with law and go beyond the minimum requirements of the law to create positive corporate culture and a strong civil society.

Thank You!

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