The Commission is to be commended for conducting this review of the Organizational Sentencing Guidelines. I believe these guidelines represent an enormous step forward in public policy toward preventing and detecting organizational misconduct. I also believe that the definition for an effective compliance program set forth in the Guidelines has much to commend it.

I recommend that the Commission not revise the Guidelines to add much additional detail, or to make the Guidelines too rigid. Corporate crime and misconduct continue to evolve, and the methods used to prevent and detect this misconduct need to be flexible. Having said this, however, there are areas where the Guidelines would have benefited from a somewhat different focus.

I have proposed below a modified approach for the Guidelines with respect to compliance issues. The standards set out below more closely reflect how the Guidelines have been applied, in practice, by those companies that are serious about compliance.

I hope that you find these useful. I am happy to provide additional information on this material or to respond to questions.

Respectfully submitted,

Joe Murphy

NEW GUIDANCE FOR THE GUIDELINES

1. No fine may be imposed against an organization because of an act of an employee or agent if the organization can demonstrate by a preponderance of the evidence that it:
2. Exercised due diligence to prevent and detect misconduct;
3. Reported on a reasonably prompt basis to an appropriate governmental agency, or directly to those harmed by the misconduct, any such misconduct it discovered; and
4. Acted within a reasonably prompt time with due diligence and good faith to correct the causes and effects of such misconduct.
5. An organization that fails to meet all of the requirements of 1) may nevertheless use in evidence its compliance due diligence in mitigation of any fine that might otherwise be imposed.

Commentary

Compliance due diligence to prevent and detect misconduct is characterized by a management commitment to avoid misconduct and to conduct business in an ethical manner. To meet this standard, an organization must have an effective compliance program, although it need not be a perfect one. Compliance due diligence also includes the exercise of good faith. If an owner or high level person participates in misconduct or is willfully blind to such misconduct, and other owners and/or high level personnel are not diligent in taking steps to prevent, detect, report and correct such misconduct, then the entity cannot be credited with using due diligence.

Good faith includes a willingness to cooperate with governmental authorities in the investigation of misconduct. Good faith is fully consistent, however, with an organization's assertion of any citizen's right to protect confidential communications, including the attorney-client privilege.

The compliance program need only reflect a good faith assessment of the risks of misconduct faced by organizations in similar circumstances, and need not have specifically addressed the risk at issue in the case before the court.

An effective compliance program that meets the due diligence standard will draw from the twelve standards set out below. Meeting all of these standards will create a rebuttable presumption of compliance due diligence. The absence of one of those elements will not negate the existence of compliance due diligence, but no presumption will apply.

Compliance due diligence is characterized by these 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 designed to prevent and detect misconduct.
2. A senior officer or officers with sufficient clout must have been assigned by the highest governing body of the organization overall responsibility to oversee the compliance program.
3. There must be active senior management participation in and support of the program.
4. The program must have appropriate resources and infrastructure so that it is reasonably capable of reducing the prospect of misconduct throughout all parts of the organization.
5. The organization should establish and apply diligent personnel practices, including measures to prevent delegation of authority to those likely to engage in wrongdoing.
6. There should be effective and results-oriented communication of the compliance standards and procedures, including practical training and publications.
7. There should be systems to measure compliance performance, including auditing, monitoring, and self-assessments.
8. The organization should have systems for employees to report misconduct without fear of retribution, and for information about the company's compliance performance to reach the highest governing body of the organization.
9. An effective program will use discipline, employee evaluation systems, incentives and rewards designed to a) deter misconduct; b) deter management practices that permit or encourage misconduct; and c) promote ethical behavior.
10. When there are violations or allegations of violations, there will be reasonably prompt responses, including appropriate investigations and enhancing the program to prevent recurrence of violations.
11. An effective program is characterized by ongoing efforts to keep the program diligent, and at least as good as industry practice.
12. An organization's diligence will be documented.

Acting with due diligence to correct the causes and effects of misconduct includes, as appropriate:

1. Promptly terminating the offensive conduct;
2. Disciplining the wrongdoers, including those who unreasonably failed to detect the misconduct and those who unreasonably failed to manage in a way to reduce the risk of misconduct;
3. Repairing any harm caused and making reparations to those who have been injured; and
4. Examining the causes of the misconduct and implementing appropriate measures to prevent its recurrence.