

de la PARTE & GILBERT
PROFESSIONAL ASSOCIATION
ATTORNEYS AT LAW

VIVIAN ARENAS
DAVID M. CALDEVILLA*
RONALD A. CRISTALDI
EDWARD P. de la PARTE, JR.
L. DAVID de la PARTE
DAVID D. DICKEY
CHARLES R. FLETCHER
RICHARD A. GILBERT**
PATRICK J. McNAMARA
MICHAEL J. STANTON

* BOARD CERTIFIED APPELLATE LAWYER
* BOARD CERTIFIED IN BUSINESS LITIGATION LAW
* BOARD CERTIFIED CIVIL TRIAL LAWYER

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101 E. KENNEDY BLVD.
SUITE 3400
POST OFFICE BOX 2350
TAMPA, FLORIDA 33601-2350
(813) 229-2775
FACSIMILE (813) 229-2712
FOUNDER
LOUIS A. de la PARTE, JR.

VIA E-MAIL TO: PUBAFFAIRS@USSC.GOV
VIA FEDERAL EXPRESS AIRBILL No. 8185 3043 4466

Office of Public Affairs
Attention: Advisory Group
on Organizational Guidelines
United States Sentencing Commission
500 South Lobby, Suite 2
One Columbus Circle, N.E.
Washington, D.C. 20002

Re: United States Sentencing Commission Guidelines Manual
Proposed Modifications to Chapter Eight - Sentencing of Organizations

Dear Sir or Madam:

Pursuant to your request for comments, we hereby submit the enclosed comments regarding Chapter Eight - Sentencing Organizations, of the United States Sentencing Commission Guidelines Manual. For purposes of the comment procedure, please regard me, or my partner, L. David de la Parte, as knowledgeable points of contact. We can be contacted at the above address and telephone number.

We look forward to your consideration of our comments. Please do not hesitate to contact us if you have any questions or if we can provide you with further information.

Sincerely,

de la PARTE & GILBERT, P.A.

Ronald A. Cristaldi

RAC/lcs
Enclosure
143254-94038-011

UNITED STATES SENTENCING GUIDELINES;
PROPOSED MODIFICATIONS TO CHAPTER EIGHT - SENTENCING OF ORGANIZATIONS

1. Chapter 8, §8A1.2 (Application Instructions - Organizations), Commentary Section 3

EXISTING LANGUAGE AND PROPOSED MODIFICATION

3. The following are definitions of terms used frequently in this chapter:

* * * *

(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[s], by itself, does not mean that the program 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. Due diligence requires at a minimum that the organization must have taken the following types of steps:

* * * *

COMMENT

The concern with the existing language is that it permits the existence of other prior offenses, in and of themselves, to mean that a compliance program is not effective. The purpose of maintaining the implementation of an "effective program to prevent and detect violations of law" as a mitigating factor in criminal sentencing is principally to encourage organizations to be proactive in their efforts to prevent and detect violations of law. The current language indicates that only the instant case, which has caused sentencing consideration under the Guidelines, should not, by itself, mean that the program was not effective. This rationale should not be limited to only the instant offense. The true hallmark of an effective program is its ability to reduce the number of offenses through effective prevention and detection. Accordingly, the number of past offenses is not, by itself, a true indicator of whether a program is effective. Rather, the number and types of prior offenses would need to be balanced by such other factors as the overall reduction of offenses and the success of the program in preventing additional offenses. This is not to say that any prior offenses cannot be considered in sentencing, but rather that they should not be the only factor considered in determining the effectiveness of the program. Otherwise, the reward for implementing a vigorous and otherwise successful compliance program could be totally negated by a few offenses, when the program may have prevented numerous other offenses.

II. Chapter 8, §§A1.2 (Application Instructions - Organizations), Commentary, Section 3

EXISTING LANGUAGE AND PROPOSED MODIFICATION

3. The following are definitions of terms used frequently in this chapter:

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(k)

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(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 due diligence, had a ~~{propensity to engage}~~ [history of engaging] in illegal activities.

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COMMENT

The current language seems to indicate that the organization has a duty to identify individuals who may engage in illegal activity based on factors other than the individual's past history of illegal activity. While this commenter agrees that an indicia of an effective program is the organization's ability to identify those with a past criminal history, the commenter disagrees that the organization should have an obligation to look at other factors or profile individuals in this regard. The common language definition of "propensity" is having a natural or innate tendency or inclination. The commenter believes that this choice of word is inappropriate in that it indicates that an organization has a duty to identify those individuals with such "natural" or "innate" tendencies. To the extent the Guidelines mean to suggest that factors such as race, socio-economic background, religion, ethnicity or other such factors may, through statistic evidence, indicate a propensity of an individual to commit a crime, such factors are inappropriate. Accordingly, the language should be modified to clarify that the duty of the organization is to identify those with an actual history of illegal behavior. Just as an individual is not culpable until that individual actually commits a crime, an organization's compliance program should not be deemed ineffective for not identifying potential criminals before a crime is committed.

EXISTING LANGUAGE AND PROPOSED MODIFICATION

3. The following are definitions of terms used frequently in this chapter:

* * * *

(k)

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(6) The standards must have been consistently enforced through appropriate discretionary mechanisms, including, as appropriate, discipline of individuals responsible for the failure to ~~{detect an}~~ [report a known] 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.

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COMMENT

It is not reasonable to request that an organization discipline individuals for trying in good faith to detect, but nonetheless failing to detect, an offense. It is also unreasonable to believe that each and every offense will in fact be detected and prevented. The Guidelines should focus on requiring the effective program to include a mechanism for disciplining those who have knowledge of an offense and, despite that knowledge, fail to report the offense. If failing to detect an offense is met in each instance with discipline, organizations will have difficulty in recruiting and retaining quality compliance officers. For these reasons, the focus of this requirement should be clarified so that it is focused on discipline of those who fail to report a known offense, rather than those who fail to detect an offense.

EXISTING LANGUAGE AND PROPOSED MODIFICATION

3. The following are definitions of terms used frequently in this chapter:

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(k)

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(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.

* * * *

COMMENT

The modifier "all" in this instance seems to put an inordinate burden on organizations in that in order to maintain an effective program, the organization is required to take response steps even though those response steps may be duplicative or mutually exclusive to other appropriate response steps previously or simultaneously taken by the organization in response to an offense. In considering the appropriate response to an offense, an organization is frequently presented with several options (each of which may include various appropriate steps). If the organization chooses the option it believes will be most effective, such option may be mutually exclusive to other options and the steps associated with such other options. For instance, putting an offending employee on suspension and seeking rehabilitative counseling for that individual is generally mutually exclusive from terminating the individual and severing all ties between the individual and the organization. While both may be reasonable and appropriate, all of the steps cannot be taken. Accordingly, the language should be modified to remove the word "all."