

Advisory Group on Organizational Guidelines to the United States Sentencing Commission

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REQUEST FOR ADDITIONAL PUBLIC COMMENT REGARDING THE U.S. SENTENCING GUIDELINES FOR ORGANIZATIONS

Over the last several months the Ad Hoc Advisory Group on Organizational Sentencing Guidelines has received public comments and has undertaken its own initial evaluation of both the terminology and the application of Chapter Eight of the Guidelines. The public advice received so far has been instructive, including specific suggestions for changes as well as the advice of some to the effect that Chapter Eight of the Guidelines works well and need not be changed. In the course of continuing its work the Advisory Group has identified several specific areas of concern and generated a list of key questions in an effort to focus and stimulate additional public comment prior to preparing its report to the United States Sentencing Commission.

Written public comment regarding these questions, set forth below, should be received by the Advisory Group not later than October 5, 2002. Commentators are urged to be specific in their recommendations and, where appropriate, include references to the relevant provisions of the Chapter Eight Guidelines. For example, if a commentator suggests definitional clarification, specific language should be provided. Comments submitted to the Advisory Group will be made available to the public and will be posted on the Commission's website at <http://www.ussc.gov>. Public comment should be sent to: United States Sentencing Commission, One Columbus Circle, N.E., Suite 2-500, Washington, D.C. 20002-8002, Attention: Michael Courlander. The Advisory Group requests that, if practicable, commentators also submit an electronic version of their comments as an attachment in either Word Perfect or MS Word to an e-mail addressed to pubaffairs@ussc.gov.

Questions

1. Should the Chapter Eight Guidelines' criteria for an "effective program to prevent and detect violations of law" at §8A1.2, comment 3(k)(1-7), be clarified or expanded to address the specific issues designated below? If so, how can this be done consistent with the limitations of the Commission's jurisdiction and statutory authority at 28 U.S.C. §994 *et. seq.*?

- a. Should §8A1.2, comment 3(k)(2), referring to the oversight of compliance programs by high-level personnel, specifically articulate the responsibilities of the CEO, the CFO and/or other person(s) responsible for high-level oversight? Should §8A1.2, comment 3(k)(2) further define what is intended by “specific individual(s) within high-level personnel of the organization” (*see also*, §8A1.2, comment 3(b)) and “overall responsibility to oversee compliance?”
- b. To what extent, if any, should Chapter Eight specifically mention the responsibility of boards of directors, committees of the board or equivalent governance bodies of organizations in overseeing compliance programs and supervising senior management's compliance with such programs?
- c. Should modifications be made to §8A1.2, comment 3(b) (defining “high-level personnel”) and §8A1.2, comment 3(c) (defining “substantial authority personnel”)? Should modifications be made to §8C2.5, comments 2, 3, or 4, relating to offenses by "units" of organizations and "pervasiveness" of criminal activity?
- d. Should §8A1.2, comment 3(k)(3), which refers to the delegation of substantial discretionary authority to persons with a “propensity to engage in illegal activities,” be clarified or modified?
- e. Should §8A1.2, comment 3(k)(4), regarding the internal communication of standards and procedures for compliance, be more specific with respect to training methodologies? Currently §8A1.2, comment 3(k)(4) provides:

“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.”(Emphasis added).

The use of the “*e.g.*” can be interpreted to mean that “training programs” and “disseminating publications” are illustrative examples, rather than necessary components, of “communicating effectively.” The use of “or” can be interpreted to mean that “training programs” and “disseminating publications” are alternative means for satisfying the “communicating effectively” requirement.

Should the preceding language be clarified to make clear that both training and other methods of communications are necessary components of “an effective” program? If so, should the term “disseminating publications” be replaced by more flexible language such as “other forms of communications?”

- f. Should §8A1.2, comment 3(k)(5), concerning implementing and publicizing a reporting system that fosters reporting without fear of retribution, be made more specific to encourage:
 - i.. whistleblowing protections;
 - ii. a privilege or policy for good faith self-assessment and corrective action (*e.g.*, 15 U.S.C. §1691(c)(1) (1998));
 - iii. the creation of a neutral or ombudsman office for confidential reporting; or,
 - iv. some other means of encouraging reporting without fear of retribution?
- g. Should greater emphasis and importance be given to auditing and monitoring reasonably designed to detect criminal conduct by an organization's employees and other agents, as specified in §8A1.2, comment 3(k)(5), including defining such auditing and monitoring to include periodic auditing of the organization's compliance program for effectiveness?
- h. Should §8A1.2, comment 3(k)(6), be expanded to emphasize the positive as well as the enforcement aspects of consistent discipline, *e.g.*, should there be credit given to organizations that evaluate employees' performance on the fulfillment of compliance criteria? Should compliance with standards be an element of employee performance evaluations and/or reflected in rewards and compensation?

2. While the Chapter Eight Guidelines currently provide a three-level decrease in the culpability score of organizations that are found to have implemented an "effective program to prevent and detect violations of law" (at §8C2.5(f)), should this provision be amended to provide an increase for organizations that have made no efforts to implement such a program? If so, what is the appropriate magnitude of such an increase?

3. How can the Chapter Eight Guidelines encourage auditing, monitoring, and self-reporting to discover and report suspected misconduct and potential illegalities, keeping in mind that the risk of third-party litigation or use by government enforcement personnel realistically diminishes the likelihood of such auditing, monitoring and reporting?

4. Are different considerations or obstacles faced by small and medium-sized organizations in designing, implementing and enforcing effective programs to prevent and detect violations of law? If so, does §8A1.2, comment (k)(7)(I) adequately address them? If not, how can Chapter Eight better address any unique concerns and obstacles faced by small and medium-sized organizations? What size organization requires unique/special treatment (*e.g.*, 50 employees, 200, 1000, 5000)?

- a. How frequently do small and medium-sized organizations implement "effective programs[s] to prevent and detect violations of law" within the meaning of Chapter Eight of the Sentencing Guidelines? If the frequency is low, to what factors is this attributable, and how may Chapter Eight be modified to promote

increased awareness and implementation of effective compliance programs among small and medium-sized organizations?

- b. According to §8C2.5(f), if an individual within high-level personnel or with substantial authority “participated in, condoned, or was willfully ignorant” of the offense, there is a rebuttable presumption that the organization did not have an effective program to prevent and detect violations. Does the rebuttable presumption in §8C2.5(f), for practical purposes, exclude compliance programs in small and medium-sized organizations from receiving sentencing consideration? If so, is that result good policy and why?
 - c. In addition to the rebuttable presumption in §8C2.5(f), §8C2.5(b) also provides an increase in the culpability score (from 1 to 5 points) where an individual within high-level personnel or with substantial authority participated in, condoned, was willfully ignorant or tolerant of the offense. Is that good policy and why?
 - d. Should the rebuttable presumption in §8C2.5(f) continue to apply to large organizations and if so, why?
5. Should the provision for “cooperation” at §8C2.5, comment 12, and/or the policy statement relating to downward departure for substantial assistance at §8C4.1, clarify or state that the waiver of existing legal privileges is not required in order to qualify for a reduction either in culpability score or as predicate to a substantial assistance motion by the government? Can additional incentives be provided by the Chapter Eight Guidelines in order to encourage greater self-reporting and cooperation?
6. Should Chapter Eight of the Sentencing Guidelines encourage organizations to foster ethical cultures to ensure compliance with the intent of regulatory schemes as opposed to technical compliance that can potentially circumvent the purpose of the law or regulation? If so, how would an organization’s performance in this regard be measured or evaluated? How would that be incorporated into the structure of Chapter Eight?

The Advisory Group plans to hold a public hearing regarding these questions on **November 14, 2002**. The hearing will be held at the Thurgood Marshall Building, One Columbus Circle, N.E., Washington, D.C. 20002, from 8:30 a.m. to 5:00 p.m. The Advisory Group will invite witnesses to testify on the issues specified prior to the hearing. Any person desiring to testify should request to do so in writing prior to or in conjunction with submitting public comment. Timely submission of written testimony is required for testifying at the public hearing. All written testimony must be received by the Commission not later than **October 30, 2002**. The Advisory Group reserves the right to select persons to testify at the hearing and to structure the hearing as the Advisory Group considers appropriate and the schedule permits.