

Does Your Organization Have an Effective Compliance and Ethics Program in Place?

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We would all agree that interaction with the federal government and its regulatory agencies has become increasingly complex. Nowhere is this more evident than in the area of organizational liability for the misdeeds of corporate officers, agents, and employees. Business organizations are more frequently being held criminally responsible for the misconduct of those who act under their authority. What ultimately happens to those organizations held accountable for criminal conduct is largely determined by rules and regulations promulgated by the United States Sentencing Commission. Starting with the Sarbanes-Oxley Act of 2002, the Commission has broadened and refined its guidelines regarding organizational sentencing. SOX directed the Commission to review and amend as appropriate, the guidelines and policy statements to ensure that the guidelines that apply to organizations are sufficient to deter and punish organizational misconduct.¹ The Commission has expanded its Organizational Guidelines as a result. Chapter 8 of the Sentencing Guidelines sets out in great detail, the considerations a sentencing court should undertake when determining how to sentence an organizational defendant.

Key to ameliorating punishment is the existence of a viable and effective compliance and ethics program. Organizations should have in place a compliance program tailored to meet the rigorous expectations of the Commission before they come under scrutiny by the authorities. Recognizing the complexities of negotiating all of the requirements set forth in the Guidelines, the commission has now adopted a policy statement encouraging business organizations to "include the use of an outside professional advisor to ensure adequate assessment and implementation of the (compliance program)."²

An effective compliance and ethics program should be designed to prevent and detect criminal conduct, promote an organizational culture that encourages compliance with the law, and should include the following elements:

- Oversight of the program by the organization's governing authority
- Day-to-day operational responsibility for compliance assigned to specific high level personnel with direct access to the organization's governing authority.
- Communication of the standards set forth in the program throughout the organization
- Regular training in compliance and ethics
- A publicized system allowing confidentiality for employees reporting criminal conduct without fear of retaliation
- Periodic evaluation of the program's effectiveness

Business organizations should be aware of the need for an effective compliance and ethics program and should have their programs reviewed by an advisor familiar with the intricacies of the federal sentencing guidelines. The Sentencing Commission puts it best. "The prior diligence of an organization in seeking to prevent and detect criminal conduct has a direct bearing on the appropriate penalties and probation terms for the organization if it is convicted and sentenced for a criminal offense."³

(1) Sarbanes-Oxley Act, Section 805(a)(2)(5).

(2) Amendment 744, Effective Nov. 1, 2010.

(3) U.S.S.G. Section 8B2.1, Background Note.