



SOCIETY OF CORPORATE COMPLIANCE AND ETHICS

March 19, 2010

United States Sentencing Commission,
One Columbus Circle, N.E.,
Suite 2-500,
Washington, D.C. 20002-8002,
Attention: Public Affairs.

Dear Commission:

On behalf of the Society of Corporate Compliance and Ethics (SCCE) and the Health Care Compliance Association (HCCA), I would like to take this opportunity to thank you for the opportunity to comment on the proposed amendments to the Organizational Sentencing Guidelines provisions related to compliance and ethics programs (Guidelines). Together, the SCCE and HCCA represent more than 8,000 members who work diligently every day to promote ethical and compliant practices in businesses and other organizations across the country and around the world.

At the outset we would note that the Guidelines are clearly the single most important foundation for compliance and ethics programs. Practically the Guidelines establish the benchmark against which compliance and ethics programs will be measured. Moreover, the Guidelines are critical to creating an environment which enables compliance and ethics professionals to effectively fulfill their obligations. Consequently, even modest changes to the Guidelines can have a huge impact on the compliance and ethics activities in virtually every organization.

Impact of High Level Personnel Involvement in Misconduct. We support the proposal to give organizations credit for effective compliance and ethics program efforts, even where misconduct may involve a few members of senior leadership if certain conditions are satisfied. The true test of an organization's commitment to compliance and ethics is not measured by how it treats a low level employee who engages in wrongdoing, but how it responds to misconduct at the highest levels of the organization. While it is unfortunate, many organizations experience the challenge of a senior leader who makes a decision to engage in conduct contrary to the law and the organization's policies. Frequently, the most significant wrongdoing in an organization occurs at the direction of or with the tacit approval of one or more members of management. If organizations are deprived of credit in such situations, the incentive to invest the talent and resources necessary to build and

maintain an effective compliance and ethics program is significantly diminished. Because the purpose of Section 8.B.2. is to incentivize organizations to develop effective compliance and ethics programs, we believe such a change would be consistent with those goals.

Obviously, we understand that the courts will need to look at the facts and circumstances of each case in determining how much credit an organization will receive. Corruption that was pervasive and long term should be treated differently than corruption that involved limited participants and was quickly and properly corrected. Similarly, an organization that identified and investigated misconduct internally, then promptly remediated and disclosed, should expect more favorable treatment than the organization which failed to identify and/or properly remediate and disclose the misconduct.

Reporting Authority of the Compliance & Ethics Officer. As noted in the testimony of Joseph Murphy, the positioning of the compliance and ethics officer in the organization is very important. We support efforts to ensure that compliance and ethics officers are positioned in a manner intended to maximize their effectiveness in organizations. This includes regular, direct interaction with the organization's governing authority (or an appropriate committee of the governing authority). We also believe the most effective reporting structures have the compliance and ethics officer reporting directly to the governing authority or appropriate committee. Where the compliance and ethics officer does not report directly to the governing body, the reporting structure should be to the highest management in the organization. Finally, we believe that compliance and ethics officer should not be removed from office or have responsibilities or compensation diminished except with the concurrence of the highest governing authority. We believe that Commission could accomplish this goal by adding Commentary which reads something like the following:

"direct report authority" means the following:

- a) has the unfettered right to report any matter to the highest authority without any form of filtering and without fear of retaliation;*
- b) meets in person with the highest governing authority periodically and no less than quarterly;*
- c) is obligated by the highest governing authority to report promptly any allegation involving high-level personnel; and*
- d) cannot be removed from office or have responsibilities or compensation diminished except with the concurrence of the highest governing authority.*

We have attached a recent survey of compliance professionals on the subject of reporting that the Commission may find useful.

Document Retention. While we agree that appropriate document retention is an important component of any effective compliance and ethics program, we are not sure that it is practical for every employee in the organization to be aware of the organization's document retention policies. Moreover, we are a bit concerned that the inclusion of one important substantive compliance obligation would have the unintended consequence of diminishing other substantive requirements. Consequently, we would request that those provisions be dropped.

Incentives. Incentives play a major role in employee and organization behavior. Although Section 8B2.1.(b)(6) of the Guidelines points out the need for both 'appropriate incentives to perform in accordance with the compliance and ethics program' (as well as 'appropriate disciplinary measures' for engaging in or failing to prevent or detect criminal conduct), little emphasis has been placed on the 'appropriate incentives to perform' language.

However, despite the widespread knowledge of the importance of incentives, many compliance and ethics programs fail to address this requirement. Highlighting the importance of such incentives would clearly promote more effective programs. We recommend adding to the existing reference to 'appropriate incentives to perform' an explanation in the commentary that further emphasizes this point, perhaps drawn from excellent material promulgated by the Canadian Competition Bureau in its 2008 Compliance Program Bulletin.

Other Matters. Finally, we would urge the Commission to encourage the Department of Justice to do more to promote the Guidelines and effective compliance and ethics programs through its enforcement activities and decisions, and to more broadly articulate how it evaluates compliance and ethics programs in enforcement decisions. While the principal role of the Department of Justice is enforcement, ultimately it does not have the resources needed to address all issues of non-compliance. The SCCE and HCCA believe that the DOJ could be a much more effective force in the promotion of voluntary compliance and ethics programs with relatively little time or expense.

Thank you for the opportunity to comment on the proposed changes to the Guidelines. If we can answer any questions, or provide any assistance to the Commission in its important work, please let us know.

Sincerely,



Daniel R. Roach
Co-chair - Society of Corporate Compliance and Ethics
Board Member - Health Care Compliance Association

Zoomerang Survey Results

Board Survey

Cross Tab Report

Response Status: Completes

Filter: No filter applied

Mar 18, 2010 1:21 PM PST

Does the Chief Compliance and Ethics Officer of your organization report directly to the board?				
	Total*	Please tell us what type of organization you work for:		
		Non-profit	For profit, privately held	For profit, publicly traded
	430	275	85	70
Yes	237 55.10%	164 59.60%	46 54.10%	27 38.60%
No	193 44.90%	111 40.40%	39 45.90%	43 61.40%
Don't know	0 0.00%	0 0.00%	0 0.00%	0 0.00%
To what position within your organization does the Chief Compliance and Ethics Officer report?				
	Total*	Please tell us what type of organization you work for:		
		Non-profit	For profit, privately held	For profit, publicly traded
	193	111	39	43
CEO	105 54.40%	69 62.20%	22 56.40%	14 32.60%
CFO	18 9.30%	10 9.00%	5 12.80%	3 7.00%
GC	33 17.10%	12 10.80%	6 15.40%	15 34.90%
HR	0 0.00%	0 0.00%	0 0.00%	0 0.00%
Audit	3	2	1	0

	1.60%	1.80%	2.60%	0.00%
Other	34 17.60%	18 16.20%	5 12.80%	11 25.60%
Don't know	0 0.00%	0 0.00%	0 0.00%	0 0.00%

How many regularly scheduled meetings per year does the Chief Compliance and Ethics Officer have with the board, including board committees?

	Total*	Please tell us what type of organization you work for:		
		Non-profit	For profit, privately held	For profit, publicly traded
	429	275	84	70
None	40 9.30%	19 6.90%	12 14.30%	9 12.90%
One	47 11.00%	30 10.90%	8 9.50%	9 12.90%
Two	30 7.00%	20 7.30%	7 8.30%	3 4.30%
Three	19 4.40%	16 5.80%	2 2.40%	1 1.40%
Four	164 38.20%	98 35.60%	38 45.20%	28 40.00%
Five or more	117 27.30%	87 31.60%	14 16.70%	16 22.90%
Don't know	12 2.80%	5 1.80%	3 3.60%	4 5.70%

In an average year, how many total meetings does the Chief Compliance and Ethics Officer have with the board, including board committees?

	Total*	Please tell us what type of organization you work for:		
		Non-profit	For profit, privately held	For profit, publicly traded
	410	258	83	69
None	38 9.30%	15 5.80%	14 16.90%	9 13.00%
One	40	24	7	9

One	9.80%	9.30%	8.40%	13.00%
Two	23 5.60%	15 5.80%	5 6.00%	3 4.30%
Three	21 5.10%	17 6.60%	2 2.40%	2 2.90%
Four	125 30.50%	76 29.50%	26 31.30%	23 33.30%
Five or more	148 36.10%	103 39.90%	26 31.30%	19 27.50%
Don't know	15 3.70%	8 3.10%	3 3.60%	4 5.80%

In an average year, how many of the total meetings that the Chief Compliance and Ethics Officer has with the board are conducted in executive session?

	Total*	Please tell us what type of organization you work for:		
		Non-profit	For profit, privately held	For profit, publicly traded
	427	275	83	69
None	201 47.10%	130 47.30%	43 51.80%	28 40.60%
One	52 12.20%	36 13.10%	7 8.40%	9 13.00%
Two	18 4.20%	12 4.40%	5 6.00%	1 1.40%
Three	12 2.80%	10 3.60%	2 2.40%	0 0.00%
Four	59 13.80%	35 12.70%	13 15.70%	11 15.90%
Five or more	35 8.20%	24 8.70%	6 7.20%	5 7.20%
Don't know	50 11.70%	28 10.20%	7 8.40%	15 21.70%

How often are the Chief Compliance and Ethics Officer's reports to the board screened and substantively edited by the general counsel or any other person prior to being sent to the board?

	Total*	Please tell us what type of organization you work for:		
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	Total	Non-profit	For profit, privately held	For profit, publicly traded
	429	275	85	69
Always	71 16.60%	34 12.40%	12 14.10%	25 36.20%
Sometimes	70 16.30%	51 18.50%	8 9.40%	11 15.90%
Never	251 58.50%	173 62.90%	52 61.20%	26 37.70%
Don't know	37 8.60%	17 6.20%	13 15.30%	7 10.10%

Who is the Chief Compliance and Ethics Officer's primary contact on the board?

	Total*	Please tell us what type of organization you work for:		
		Non-profit	For profit, privately held	For profit, publicly traded
	426	273	83	70
Chairman	136 31.90%	83 30.40%	38 45.80%	15 21.40%
Chair of the audit committee	154 36.20%	96 35.20%	17 20.50%	41 58.60%
Don't know	44 10.30%	23 8.40%	13 15.70%	8 11.40%
Chair of another committee (please list)	92 21.60%	71 26.00%	15 18.10%	6 8.60%

Do you believe that there are a sufficient number of contacts between the board and the chief compliance and ethics officer each year?

	Total*	Please tell us what type of organization you work for:		
		Non-profit	For profit, privately held	For profit, publicly traded
	425	272	84	69
Yes	278	190	47	41

Yes	65.40%	69.90%	56.00%	59.40%
No	119 28.00%	65 23.90%	30 35.70%	24 34.80%
Don't know	28 6.60%	17 6.30%	7 8.30%	4 5.80%

Does the board, one of its committees or an outside board member conduct a formal exit interview with the compliance officer?

	Total*	Please tell us what type of organization you work for:		
		Non-profit	For profit, privately held	For profit, publicly traded
	424	271	84	69
Yes	36 8.50%	18 6.60%	11 13.10%	7 10.10%
No	223 52.60%	135 49.80%	45 53.60%	43 62.30%
Don't know	165 38.90%	118 43.50%	28 33.30%	19 27.50%

Please indicate what best describes the industry in which you work:

	Total*	Please tell us what type of organization you work for:		
		Non-profit	For profit, privately held	For profit, publicly traded
	429	275	84	70
Healthcare	316 73.70%	238 86.50%	58 69.00%	20 28.60%
Manufacturing	10 2.30%	0 0.00%	1 1.20%	9 12.90%
Energy	17 4.00%	3 1.10%	3 3.60%	11 15.70%
Consumer goods	5 1.20%	0 0.00%	2 2.40%	3 4.30%
Retail	5 1.20%	0 0.00%	0 0.00%	5 7.10%
Higher Education	9	9	0	0

Higher Education	2.10%	3.30%	0.00%	0.00%
Professional Services	10 2.30%	1 0.40%	6 7.10%	3 4.30%
Government Contractor	13 3.00%	2 0.70%	8 9.50%	3 4.30%
Government	6 1.40%	6 2.20%	0 0.00%	0 0.00%
Other	38 8.90%	16 5.80%	6 7.10%	16 22.90%

* Total = The number of respondents for the entire survey who answered the Row question and, if a filter is applied, meet the filter criteria.