

DEFINITION OF AN "EFFECTIVE PROGRAM TO PREVENT AND DETECT VIOLATIONS OF LAW"

Basic Questions

Existing Provisions

Proposed Amendment

Epic Recommendations

(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, by itself, does not mean that the programs 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.

§8B2.1(a) To have an effective program to prevent and detect violations of law, for purposes of subsection (f) of §8C2.5 (Culpability Score) and subsection (c)(1) of §8D1.4 (Recommended Conditions of Probation - Organizations), an organization shall—
 (1) exercise due diligence to prevent and detect violations of law; and
 (2) otherwise promote an organizational culture that encourages a commitment to compliance with the law.

Epic recommendation
 §8B2.1(a) To have an effective program to prevent and detect violations of law ..., an organization shall—

Due diligence includes governing policies; risk assessment; designing and implementing compliance structures and systems; communication and feedback; aligning operations; and evaluating and learning from the compliance program's governing policies, standards, and procedures.

Such program shall be reasonably designed, implemented, and enforced so that the program is generally effective in preventing and detecting violations of law. The failure to prevent or detect the instant offense does not necessarily mean that the program is not generally effective in preventing and detecting violations of law.

Such program, hereinafter referred to as a "compliance program," shall be reasonably designed, implemented, and enforced so that the program is generally effective in preventing and detecting violations of law. The failure to prevent or detect the instant offense leading to sentencing does not necessarily mean that the program is not generally effective in preventing and detecting violations of law.

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DEFINITION OF AN "EFFECTIVE PROGRAM TO PREVENT AND DETECT VIOLATIONS OF LAW"

Basic Questions	Existing Provisions	Proposed Amendment	Epic Recommendations
<p>What norms, values and standards should we set to guide our members and foster reasonable expectations among our stakeholders?</p>	<p>(k) . . . Due diligence requires at a minimum that the organization must have taken the following types of steps:</p> <p>(1) The organization must have established compliance standards and procedures to be followed by its employees and other agents that are reasonably capable of reducing the prospect of criminal conduct.</p>	<p>§8B2.1(b) (b) Due diligence and the promotion of an organizational culture that encourages a commitment to compliance with the law within the meaning of subsection (a) minimally require the following steps:</p> <p>(1) The organization shall establish compliance standards and procedures to prevent and detect violations of law.</p> <p>Application Note</p> <p>Under this definition, "compliance standards and procedures" are described as "standards of conduct and internal control systems that are reasonably capable of reducing the likelihood of violations of law." This definition emphasizes that standards of conduct and internal controls are essential aspects of effective compliance programs and that these measures should be developed, implemented, and evaluated in terms of their impact on reducing the likelihood of violations of law.</p>	<p>To encourage more governing authority involvement in the compliance program, require that the governing authority set "governing policy" for the compliance program.</p> <p><i>Epic recommendation</i></p> <p>(1) The organization shall establish governing policy and compliance standards and procedures to prevent and detect violations of law.</p> <p>Commentary</p> <p>The governing authority shall establish policy governing a compliance program to prevent and detect violations of law and the organizational leadership shall establish consistent compliance standards and procedures addressing its identified risks, which are consistent with its organizational culture.</p>

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<p>What style, structure, and systems of authority and responsibility at all levels should we exercise?</p>	<p>(k) . . . <i>Due diligence requires at a minimum that the organization must have taken the following types of steps:</i></p> <p>(2) <i>Specific individuals within high-level personnel of the organization must have been assigned overall responsibility to oversee compliance with such standards and procedures.</i></p>	<p>§8B2.1(b)(2) The organizational leadership shall be knowledgeable about the content and operation of the program to prevent and detect violations of law.</p> <p>The organization's governing authority shall be knowledgeable about the content and operation of the program to prevent and detect violations of law and shall exercise reasonable oversight with respect to the implementation and effectiveness of the program to prevent and detect violations of law.</p> <p>Specific individual(s) within high-level personnel of the organization shall be assigned direct, overall responsibility to ensure the implementation and effectiveness of the program to prevent and detect violations of law. Such individual(s) shall be given adequate resources and authority to carry out such responsibility and shall report directly to the governing authority or an appropriate subgroup of the governing authority regarding the implementation and effectiveness of the program to prevent and detect violations of law.</p>	<p><i>Epic recommendation</i></p> <p>§8B2.1(b)(2) <u>The organization's governing authority shall establish the guiding policy for the organization's program to prevent and detect violations of law, be knowledgeable about its design and exercise reasonable oversight with respect to its implementation and effectiveness.</u></p> <p><u>The organizational leadership shall be knowledgeable about the design of a compliance program consistent with the governing policy and support its operation.</u></p> <p>Specific individual(s) within high-level personnel of the organization shall be assigned direct, overall responsibility to ensure the implementation and effectiveness of the compliance program. <u>The organization may also use responsible personnel to administer the compliance program. Both such individual(s) shall be given adequate resources and authority to carry out their responsibility and shall report directly to the governing authority or an appropriate subgroup of the governing authority as set forth in governing policy regarding the implementation and effectiveness of the compliance program directly.</u></p>

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Basic Questions	Existing Provisions	Proposed Amendment	Epic Recommendations
<p>How can we ensure that we have the right people in the right places to pursue our purpose as an enterprise?</p>	<p>(k) . . . Due diligence requires at a minimum that the organization must have taken the following types of steps:</p> <p>(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 reasonable due diligence, had a propensity to engage in illegal activities.</p>	<p>§8B2.1(b) Due diligence and the promotion of an organizational culture ... minimally require the following steps:</p> <p>(3) The organization shall use reasonable efforts not to include within the substantial authority personnel of the organization any individual whom the organization knew, or should have known through the exercise of due diligence, has a history of engaging in violations of law or other conduct inconsistent with an effective program to prevent and detect violations of law.</p> <p>Application Note</p> <p>Definition of "substantial authority."</p>	<p>Agreed</p>

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DEFINITION OF AN "EFFECTIVE PROGRAM TO PREVENT AND DETECT VIOLATIONS OF LAW"

Basic Questions	Existing Provisions	Proposed Amendment	Epic Recommendations
<p>How can we most effectively communicate our standards and procedures and foster reasonable expectations among our stakeholders?</p>	<p>(k) . . . Due diligence requires at a minimum that the organization must have taken the following types of steps: . . .</p> <p>(4) 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.</p>	<p>§8B2.1(b) Due diligence and the promotion of an organizational culture . . . minimally require the following steps:</p> <p>(4) (A) The organization shall take reasonable steps to communicate in a practical manner its compliance standards and procedures, and other aspects of the program to prevent and detect violations of law, to the individuals referred to in subdivision (B) by conducting effective training programs and otherwise disseminating information appropriate to such individual's respective roles and responsibilities.</p> <p>(B) The individuals referred to in subdivision (A) are the members of the governing authority, the organizational leadership, the organization's employees, and, as appropriate, the organization's agents.</p>	<p>Agree with (b), but prefer original language. Epic is concerned about requiring training. This tends to suggest that formal training is the best means of communicating organizational standards and procedures. This is not necessarily true, especially for small to medium enterprises. Emphasizing the general importance of training can best be described in Application Note.</p> <p>Provision is awkwardly drafted, including circular reference to "individuals."</p> <p>The recommended language below expands the elements of an effective program and expands the list of target audiences to include suppliers and service providers, which is an emerging best practice.</p>

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			<p><i>Epic recommendation</i></p> <p>§8B2.1(b) Due diligence and the promotion of an organizational culture ... minimally require the following steps:</p> <p>(4) The organization shall take reasonable steps to communicate its compliance standards and procedures, and other aspects of the program to prevent and detect violations of law. An effective communication program shall involve:</p> <p>(A) <u>A balance of formal and informal means of communication that reflects the organization's style of leadership, resources available, and organizational culture: e. g., leaders declaring support for the compliance program, requiring participation in training programs, or disseminating publications that explain what is required of individuals, and</u></p> <p>(B) Communication of governing policy and compliance standards and procedures, as appropriate, to all members of the organization, including its governing authority, leadership, and employees, as well as its agents and suppliers or service providers.</p>

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Basic Questions	Existing Provisions	Proposed Amendment	Epic Recommendations
<p>How can we know that our members are following our standards and procedures and meeting reasonable stakeholder expectations?</p>	<p>(k) ... Due diligence requires at a minimum that the organization must have taken the following types of steps:</p> <p>(5) The organization must have taken reasonable steps to achieve compliance with its standards, e.g., by utilizing monitoring and auditing systems reasonably designed to detect criminal conduct by its employees and other agents and by having in place and publicizing a reporting system whereby employees and other agents could report criminal conduct by others within the organization without fear of retribution.</p>	<p>§8B2.1(b) Due diligence and the promotion of an organizational culture ... minimally require the following steps:</p> <p>(5) The organization shall take reasonable steps— (A) to ensure that the organization's program to prevent and detect violations of law is followed, including using monitoring and auditing systems that are designed to detect violations of law; (B) to evaluate periodically the effectiveness of the organization's program to prevent and detect violations of law; and (C) to have a system whereby the organization's employees and agents may report or seek guidance regarding potential or actual violations of law without fear of retaliation, including mechanisms that allow for anonymous reporting.</p>	<p><i>Epic Recommendation</i></p> <p>(5) The organization shall take reasonable steps— (A) To ensure that the organization's compliance program is followed, including using monitoring and auditing systems that are designed to detect its compliance standards and procedures; and (B) To have a system whereby the organization's employees and agents may report or seek guidance regarding potential or actual violations of its compliance standards and procedures without fear of retaliation, including mechanisms that allow for anonymous reporting and promises of confidentiality, where appropriate and enforceable as a matter of law.</p>

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DEFINITION OF AN "EFFECTIVE PROGRAM TO PREVENT AND DETECT VIOLATIONS OF LAW"			
Basic Questions	Existing Provisions	Proposed Amendment	Epic Recommendations
<p>How can we encourage our members to follow our standards and procedures and meet the reasonable expectations of our stakeholders?</p>	<p>(k) ... Due diligence requires at a minimum that the organization must have taken the following types of steps:</p> <p>(6) The standards must have been consistently enforced through appropriate disciplinary mechanisms, including, as appropriate, discipline of individuals responsible for the failure to detect an 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.</p>	<p>§8B2.1(b) Due diligence and the promotion of an organizational culture ... minimally require the following steps:</p> <p>(6) The organization's program to prevent and detect violations of law shall be promoted and enforced consistently through appropriate incentives to perform in accordance with such program and disciplinary measures for engaging in violations of law and for failing to take reasonable steps to prevent or detect violations of law.</p>	<p><i>Epic recommendation</i></p> <p>(6) The organization's <u>compliance program</u> shall be promoted and enforced consistently through appropriate incentives to perform in accordance with said program and disciplinary measures for <u>violating its compliance standards and procedures</u> or failing to take reasonable steps to prevent or detect violations thereof.</p>

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Basic Questions	Existing Provisions	Proposed Amendment	Epic Recommendations
<p>What do we owe our stakeholders when mistakes, misconduct, or misunderstandings occur that involve our standards and procedures or their reasonable expectations?</p>	<p>(k) . . . Due diligence requires at a minimum that the organization must have taken the following types of steps:</p> <p>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.</p>	<p>§8B2.1(b) Due diligence and the promotion of an organizational culture ... minimally require the following steps:</p> <p>(7) After a violation of law has been detected, the organization shall take reasonable steps to respond appropriately to the violation of law and to prevent further similar violations of law, including making any necessary modifications to the organization's program to prevent and detect violations of law.</p>	<p>If an organization must self-report violations of law to receive credit for having an effective program, recommend including that as a required response.</p> <p><i>Epic recommendation</i></p> <p>(7) After a violation of it compliance standards and procedures has been detected, the organization shall take reasonable steps to respond appropriately and prevent similar violations, e. g., including self-reporting a violation of law to appropriate authorities and making any necessary modifications to the its compliance program.</p>

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<p>How should we monitor, track, and report our performance as an enterprise, and continuously learn from it?</p>		<p>§8B2.1(c) In implementing subsection (b), the organization shall conduct ongoing risk assessment and take appropriate steps to design, implement, or modify each step set forth in subsection (b) to reduce the risk of violations of law identified by the risk assessment.</p>	<p>Needs assessment is properly recognized as necessary for an effective compliance program. It provides the factual basis for each step. No less important—in the same vein—is for the organization to establish expected program outcomes and regularly evaluate the compliance program to determine whether it was effective. A program is unlikely to hit targets it does not explicitly aim for.</p> <p><i>Epic Recommendation</i></p> <p>§8B2.1(c) In implementing subsection (b), the organization shall conduct ongoing risk assessment; regular program evaluation with reference to specified expected program outcomes; and take appropriate steps to design, implement, or modify each step set forth in subsection (b) to prevent and detect violations of law.</p>

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ERC Fellows Program: Building New Knowledge



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February 20, 2004

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

Attention: Public Affairs.

This letter is on behalf of the Ethics Resource Centers (ERC) Fellows Program. The Fellows Program is made up of corporate, academic, non-profit and government representatives who focus on questions of ethics in business. The Fellows Program appreciates the opportunity to comment and the tremendous effort that both the Ad Hoc Advisory Group and the entire United States Sentencing Commission have spent in clarifying and modifying the current organizational sentencing guidelines.

There are many excellent improvements that the proposed guidelines offer. We think the change in §8B2.1(b)(3) is a good one. The new language in this section and the commentary to this section, provide a much more objective standard by which to judge the substantial authority personnel.

The change to §8C2.5(f)(3) is also a positive change. We think creating only a rebuttable presumption as to the effectiveness of the program based on high-level personnel participation in the alleged misdeed provides a more balanced approach. Rogue employees can be found at all levels and if only one of many high-level employees acts contra to the program the entire program should not be discounted.

The Fellows Program does have some concerns with several of the proposed changes. The following sections will discuss the concerns, plus propose possible modifications.

Expanding the definition of Violation of Laws:

Under the current Chapter 8 Guidelines, §8A1.2, Application note (k), the Sentencing Commission defines an "effective program to prevent and detect violations of law" as "a program that has been reasonably designed, implemented, and enforced so that it generally will be effective in preventing and detecting criminal conduct." This is the requirement that organizations have been basing their compliance and ethics effort on for the past thirteen years. It is also logical and consistent with the mission of the United States Sentencing Commission, to focus on criminal conduct.

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