

March 22, 2010

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

Dear commissioners:

The Ethics and Compliance Officer Association (ECO) and its members are honored to reply to your request for comment on the proposed amendments to Chapter Eight of the *Guidelines Manual* regarding the sentencing of organizations. The ECOA is a founding leader of the ethics and compliance (E&C) field and serves as the sole association exclusively for ethics and compliance officers and members of their teams around the world. The ECOA's more-than 1,100 members span hundreds of organizations, from the largest multinational corporations; to city, state, and federal government agencies; to medium- and small-sized businesses; to colleges and universities; to nonprofit organizations. They're located in 25 countries and represent employees in over-200 nations.

On receiving your proposed amendments in January, the ECOA surveyed its members' opinions on each proposal and the issue for comment. We're very pleased with the number and detail of responses they offered. It's with these results in mind that we deliver the following comments.

First, many ECOA members support the proposal that amends the Commentary to §8B2.1 clarifying the remediation efforts required to satisfy subsection (b)(7). With a few notable exceptions (e.g., concern over the potential effect of new language regarding restitution), many E&C officers favor the specific references to self-reporting and cooperation with authorities. We believe, however, that the proposed addition of the phrase "more effective" undermines the well-regarded approach of the guidelines that a program should not be considered ineffective simply because of one act of misconduct (i.e., §8B2.1 (a)(2) "The failure to prevent or detect the instant offense does not necessarily mean that the program is not generally effective in preventing and detecting criminal conduct."). Based on language crafted by an ECOA member, we suggest the proposed amendment be modified as follows:

"... to prevent further similar criminal conduct, the organization should assess the ethics and compliance program and then modify it as necessary to achieve effectiveness."

Regarding the proposed language about choosing to retain an independent monitor, ECOA members prefer language akin to "independent, qualified, third party" to distinguish between a voluntary decision to engage an independent verifier and a court order to hire a monitor.

Second, regarding the proposed addition to the Commentary to §8B2.1 (i.e., the first bracketed addition amending Application Note 3), the ECOA supports the commission's efforts to hold high-level personnel and substantial authority personnel to a high standard regarding knowledge of E&C program elements,

though there is concern over highlighting “document retention.” While there is broad agreement on the need for high-level and substantial authority personnel to thoroughly understand and honor records and information management policies, many members believe that emphasis on this one program element could motivate disproportionate attention compared to more-important elements. Only 31 percent of ECOA survey respondents supported this proposed addition to the Commentary.

Third, while most members were neutral on the proposed amendments to §8D1.4 regarding conditions of probation for organizations, the ECOA supports both:

- devoting attention to the qualifications (including lack of conflicts of interest) of independent corporate monitors and
- a reasonable number of regular or unannounced examinations subject to probation supervision.

Fourth, many E&C officers support the amendment to Application Note 6, which clarifies that, when an organization periodically assesses the risk that criminal conduct will occur, the “nature and operations of the organization with regard to particular ethics and compliance functions” should be included among the other matters addressed. That said, ECOA members again disliked (i.e., 79 percent did not support) the special focus on document-retention policies. When asked what policy, if any, should merit special attention in the Commentary, the most common response was “the *Code of Ethics*,” or a similarly named document, since that collection of standards is appropriately customized and comprehensive, often including every important E&C-related policy that should be read by all employees.

Fifth, what attracted the most attention from ECOA members was not one of the proposed amendments but the issue published for comment, namely, whether to encourage direct reporting to the board by responsible E&C personnel by allowing an organization to benefit from a three-level mitigation of the culpability score, even if high-level personnel are involved in the criminal conduct. Respondents to the ECOA member survey overwhelmingly support this idea, with important qualifications. At the top of their list of concerns is the need to clarify what “direct reporting authority” means. We respectfully ask the commission to clarify that this phrase means that the individual with day-to-day, operational E&C responsibility must regularly provide reports to the governing authority and have unrestricted access to report to it any E&C concern. To go a step further, the commission should update the guidelines to mandate that the day-to-day E&C officer notify the governing authority when an act of misconduct involves an executive.

Their next qualification responds to the requirement that, to earn the credit, the program must successfully detect the offense prior to discovery or reasonable likelihood of discovery outside the organization. While ECOA members responded favorably to the spirit of this requirement—e.g., it will encourage greater focus on high-level personnel, who often represent the most E&C risk—they are concerned that it could, as written, become a loophole that undermines their efforts. They fear that their organization could have an excellent E&C program that deserves the credit, but could lose it if, for example, an employee first approaches an external friend or otherwise fails to utilize a legitimate internal reporting mechanism (e.g., an effective anonymous helpline).

To the extent your issue for comment calls attention to the relationship between the E&C program and the governing authority, the ECOA asks the commission to seriously consider pursuing a goal that the U.S. Securities and Exchange Commission (SEC) achieved with its requirement that board of directors meet or exceed a minimum standard for financial literacy. With the support of 72 percent of survey respondents, we believe that, for the same reasons motivating that SEC response to the Sarbanes-Oxley

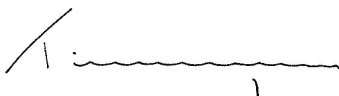
Act of 2002, the sentencing guidelines should support a requirement that boards of directors and other governing authorities meet or exceed a minimum standard for ethics and compliance literacy. Some may feel that §8B2.1 (b)(4) already motivates board-level training but, in effect, it doesn't, given that most organizations perceive the current language to simply mean they must train their employees yet need only communicate to their board. Given the power and influence of boards with regard to program oversight, as well as the growing complexity of E&C issues, we assert that mere, periodic communication to the board—even by the day-to-day E&C officer—is insufficient and that board-level E&C training and/or expertise should be required.

In conclusion, the ECOA thanks the commission for setting aside valuable time and other resources to periodically update the guidelines. Many valuable lessons are learned every day in E&C programs across the world—the best of these are reflected at ECOA conferences and in its professional education courses and should continue to be incorporated into your periodic updates. As the standard-bearer for the integration of business/organizational ethics into compliance programs, the ECOA asks you always to consider that the best path toward achieving the goals of the guidelines is to pursue every opportunity to motivate ethical behavior rather than solely require compliant behavior.

A final point comes from the 2009 study by The Conference Board entitled *Ethics and Compliance Enforcement Decisions—the Information Gap*, a copy of which has recently been sent to each member of the commission: evidence demonstrates that what is needed to achieve the goals of the guidelines is stronger proof that making the effort to honor the letter and the spirit of the law truly matters to the U.S. government. The study finds that the data exist to support this critical stand, though no one has been tasked with the responsibility to collect, organize, and make it available. Senior executives and corporate directors greatly desire to know the extent to which organizations have benefited from implementing effective E&C programs—the ECOA asks the commission to support the gathering and publishing of this information.

Thank you for the opportunity to contribute feedback. Please know that the ECOA and its members stand ready to assist the commission in any way and are always available to weigh in on the continued effectiveness of the guidelines.

Respectfully submitted,



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Chief Operating Officer

cc: Keith Darcy, ECOA Executive Director