

Statement of

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before the  
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Public Hearing  
Proposed Amendments to the Federal Sentencing Guidelines and Issues for Comment

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Introduction

Chairman Sessions and distinguished members of the commission: thank you for inviting me to represent the Ethics and Compliance Officer Association, or ECOA, and its members to discuss 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 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—the largest number of ethics and compliance officers in any organization worldwide—span hundreds of organizations, from the largest multinational corporations; to city, state, and federal government agencies; to medium-sized businesses; and to nonprofit organizations. They're located in 25 countries but represent employees in over-200 nations—in fact, our Executive Director Keith Darcy likely would be sitting in this very chair if he weren't traveling today from Malaysia to South Korea as he meets with Asian ethics and compliance leaders.

One of the best qualities of the ECOA is the diversity of our members' professional backgrounds. While old-fashioned compliance programs were led only by attorneys, the modern field of ethics and compliance draws from many domains. This evolution reflects the fact that excellence in ethics and compliance requires that the E&C team possess or have access to not only legal expertise, but organizational development, audit, program planning and evaluation, communications, organizational behavior, and many other roles, including business ethics, which is my area of expertise. I've worked in ethics and compliance for 23 years, including stints as an ethics officer at two *Fortune* 500 corporations before joining the ECOA's leadership team in 2006.

On receiving your proposed amendments in January, the ECOA surveyed our 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 I deliver the following comments. Note that it would take longer than my allotted 10 minutes to fully address all the issues associated with each proposed amendment. Therefore, what follows are brief comments on the most-important issues. We offer greater detail, including alternate language, in our formal, written submission.

First, many ECOA members support the proposal that amends the Commentary to §8B2.1 clarifying the remediation efforts required to satisfy subsection (b)(7). Regarding monitors, our members prefer language akin to "an independent, qualified, third party" to distinguish between a voluntary decision to engage an independent verifier and a court-ordered mandate to hire a monitor.

Second, regarding the Commentary of §8B2.1, the ECOA supports the commission's efforts to hold high-level and substantial authority personnel to a high standard regarding knowledge of E&C risks, though there is concern over the decision to highlight only document retention. While there is broad agreement on the importance of document-retention policies, and records management in general, we believe that emphasis on this one risk could motivate disproportionate attention compared to more-

important risks. Fifty-six percent of our survey respondents disagreed with the proposed addition to the Commentary that high-level and substantial authority personnel “should be aware of the organization’s document retention policies ...” while 13 percent remained neutral on the amendment.

Third, many ethics and compliance 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, they 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 comprehensive and includes all the risk-related policies that the organization has determined should be read by all employees.

Fourth, it may not surprise you that 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 ethics and compliance 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 our 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 operational responsibility for ethics and compliance must regularly provide reports to the board of directors and have unrestricted access to report to the board any ethics and compliance concern.

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, 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 the credit if, for example, an employee first describes the offense to a spouse or friend before contacting the ethics officer.

To the extent your issue for comment calls attention to the relationship between the E&C program and the board, 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 boards 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 federal sentencing guidelines should support a requirement that boards of directors 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 practice, 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 is insufficient and that board-level E&C training should be required.

### Conclusion

In conclusion, the ECOA thanks the commission for setting aside time and other resources to periodically update the guidelines. I know personally that many valuable lessons are learned every day in E&C programs across the United States—the best of these are reflected at ECOA events and should continue to be incorporated into your periodic updates. As the standard-bearer for the integration of ethics into compliance programs, the ECOA asks you to remember 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 recent study by The Conference Board entitled *Ethics and Compliance Enforcement Decisions—the Information Gap*: evidence demonstrates that what is most 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.

This concludes my prepared remarks. Thank you, again, for the opportunity to contribute to this hearing and, thereby, to your decision-making. Please know that the ECOA and its members stand ready to assist the commission in any way.