

March 10, 2010

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

Dear Sir or Madam:

Federal Register Vol. 75, No. 13 -- *Request for public comment regarding proposed amendments to sentencing guidelines, policy statements, and commentary.*

Founded in 1922, the Ethics Resource Center (ERC) is America's oldest nonprofit organization dedicated to independent research and the advancement of high ethical standards and practices in public and private institutions. The Center's focus on research helps create objective benchmarks to measure the strength of ethics programs and ethical culture and to track progress over time. It is with this experience in mind that we submit this comment letter to the United States Sentencing Commission.

Chapter Eight of the Sentencing Guidelines has arguably become the de facto standard for an effective compliance and ethics program, particularly in the business sector. ERC's research through its *National Business Ethics Survey*¹ has shown that this is a positive development; the suggestions for program practices made within the Guidelines *do* make a difference. Specifically, when an organization adopts the seven elements of an effective program, misconduct is reduced by as much as 75%, reporting of observed misconduct doubles, and retaliation against whistleblowers is essentially eliminated.² Yet our research has also shown that the implementation of the Guidelines yields these outcomes because a well-implemented program lends itself to the establishment of a strong ethical culture. It is the culture that, in turn, drives these dramatic changes. With this in mind, we therefore support changes to the Guidelines that clarify the elements that constitute an effective program. We also believe that any revision should not emphasize compliance to such an extent that it takes away from an overarching emphasis on the

¹ ERC fields the *National Business Ethics Survey (NBES)* every two years, polling a representative sample of US business employees on their perspectives of ethics in the workplace. NBES provides the US benchmark for many businesses with regard to outcomes of an effective ethics program. The 2009 report is available to the public at www.ethics.org/nbes.

² Ethics Resource Center. *2007 National Business Ethics Survey*. ERC's metrics for a well-implemented program are patterned after the seven elements of an effective program as outlined in the Guidelines.

establishment of an ethical culture as the primary purpose for a compliance and ethics program.

Our comments about specific amendments are limited to three sections of the proposed revisions: (1) guidance on reasonable steps an organization should take after detection of criminal conduct; (2) guidance when probation is imposed; and (3) comment regarding direct reporting authority of compliance and ethics professionals to the board of directors.

§8B2.1, APPLICATION OF SUBSECTION (b)(7)

ERC supports the proposed effort by the Commission to clarify what are considered to be reasonable steps that an organization should take after detection of criminal conduct. Every organization will eventually experience such violations. In fact, ERC's research indicates that in 2009, nearly one in two (49%) business employees across the US observed at least one act that constituted a violation of the law or their employer's ethics standards.³ While ERC's metrics included misconduct that would not be considered criminal acts, our studies consistently show that *all* organizations are faced with the need to respond to misconduct taking place. Guidance by the Commission to clarify its expectation for organizational transparency in the event of criminal conduct is helpful and needed.

Yet we would also suggest that the proposed language in one instance does not go far enough. Specifically, in the Application Notes (b)(7), the proposed language states:

“...Second, to prevent further similar criminal conduct, the organization should assess the *compliance and ethics program* and make modifications necessary to ensure that the program is more effective.” [emphasis added]

ERC suggests that following the detection of criminal misconduct, organizations should not only assess their compliance and ethics programs, they should also be encouraged to assess their *organizational cultures*.

A common theme in high-profile corporate misconduct (*e.g.* Enron, Worldcom, Adelphia, etc.) is that criminal activity was limited a few actors, but a pervasive culture existed that allowed wrongdoing to occur. In some cases, employees felt pressured to cut corners in order to remain employed, given unforgiving performance expectations. In other situations, employees perceived that it was unacceptable to report what they knew was illegal activity taking place.⁴ Regardless of the crime committed, in the wake of

³ Ethics Resource Center's 2009 *National Business Ethics Survey*.

⁴ For example, according to an article in *Business Week* (February 25, 2002) at Enron “the unrelenting emphasis on earnings growth and individual initiative, coupled with a shocking absence of the usual corporate checks and balances, tipped the culture from one that rewarded aggressive strategy to one that increasingly

these criminal acts the public now sees that culture was part of the problem, and it was the organizational culture that needed substantive change as a part of organizational recovery.

The Commission should not assume that in the wake of criminal conduct, assessment of a compliance and ethics program will also include an assessment of ethical culture. Metrics for the two can be quite different. Yet as previously stated, ERC's research indicates that it is the culture of an organization that is impacted by an ethics and compliance program, and it is the culture that will be the single largest determinant of the extent to which further criminal activity will occur.⁵ Therefore, when an organization responds to the detection of criminal conduct, failure to examine the culture of the organization constitutes a failure to gauge the real metric of risk for recurrence.

ERC has demonstrated through its research and individual company assessments that it is possible to measure key aspects of an ethical culture, and we therefore encourage the Commission to make this important dimension explicit in its expectations. This language would also have the added benefit of enhancing interpretation of current language in other sections of Chapter Eight, for example:

- §8B2.1(a)(5)(B) encouraging that organizations take reasonable steps to “evaluate periodically the effectiveness of the organization’s compliance and ethics program”;
- §8B2.1(c) suggesting that the organization “periodically assess the risk of criminal conduct and ... take appropriate steps to design, implement, or modify each requirement set forth in subsection (b) to reduce the risk of criminal conduct identified through this process”; and
- Application of Subsection (b)(2) — suggesting that high-level personnel and substantial authority personnel of the organization “promote an organizational culture that encourages ethical conduct and a commitment to compliance with the law.”

An effort by the Commission to explicitly encourage attention to culture when criminal conduct is detected will decrease the likelihood that further wrongdoing will occur in its aftermath.

relied on unethical corner-cutting.” http://www.businessweek.com/magazine/content/02_08/b3771092.htm. Similarly, in 2003 employees at HealthSouth (where an accounting scheme continued for 15 years) described an atmosphere of intimidation that kept them quiet: NY Times, March 24, 2003, “HealthSouth Officials Seek to Cut Deals with the US.”

⁵ In 2007 ERC reported that ethics risk (defined as high likelihood of misconduct and low likelihood of detection) is reduced by as much as 75% when an organization has a strong ethical culture in place. ERC's *2007 National Business Ethics Survey*.

§8BD1.4 (b)(1) and (4)(B)

ERC suggests that additional information should be provided to the court by organizations placed under probation, as outlined in §8BD1.4 (b)(1) and (4). Specifically, an organization placed under probation (per §8BD1.1) should not only provide the court a *schedule* for the implementation of a compliance and ethics program (b)(1), it should also furnish the *outcome measures* by which it will gauge the effectiveness of its program during the implementation phase. Similarly, later *reports* on progress (b)(4) should include assessment reports based on those metrics, and an overall determination by a third party of the program effectiveness to date.

The Commission has already sent a strong message to organizations about the importance of metrics and the demonstration that compliance and ethics programs are more than window dressing. Through its 2004 adoption of §8B2.1(a)(5)(B) into the Guidelines, the Commission encouraged organizations to take reasonable steps to “evaluate periodically the effectiveness of the organization’s compliance and ethics program.” As a result, organizational attention shifted toward the measurement of a program against a set of metrics that demonstrate that the program actually makes a difference. Common practice in the compliance and ethics industry now involves the identification of outcome measures (i.e. reduced misconduct, increased reporting, stronger perceptions of culture), and the determination of program effectiveness against positive change in these metrics.⁶

An organization entering probation may develop these metrics as a part of its compliance with the proposed language already suggested by the Commission (specifically in implementing §8B2.1), but unless explicitly stated, these organizations may not be compelled to share their metrics with the court. Yet federal officials would be well served by the disclosure of metrics and outcome-based progress reports. More importantly, the Commission will reinforce its message that actual demonstration of program effectiveness is essential.

ISSUE FOR COMMENT -- §8C2.5 (f)(3) (Culpability Score)

It is our view that §8C2.5 (f)(3) (Culpability Score) should be amended to allow an organization to receive the three-level mitigation for an effective program when high-level personnel are involved in the offense, provided the organization satisfies all the requirements outlined by the Commission.

We support the amendment because three current challenges for compliance and ethics professionals would be addressed through the adoption of the proposed language.

⁶ In addition to compliance in the program structure itself.

- Increased exposure of the governing authority to the program (through direct reports from the compliance and ethics official) will increase the likelihood that compliance and ethics standards will be taken seriously at the highest levels of the organization;
- Emphasis on self-detection of criminal conduct will increase the prioritization of internal systems to encourage reporting of misconduct; and
- Incentives for organizations that report violations to authorities will increase voluntary transparency with regulators.

Nevertheless, the language as proposed poses additional difficulty. ERC therefore suggests two changes for the Commission to consider.

First, the Commission should add an exception to the amendment. Three-level mitigation should not be applied if employees responsible for the compliance and ethics program are among the high-level personnel involved in the criminal offense. This exception will encourage organizations to be sure that the individuals they task with responsibility for the compliance and ethics program have a high level of personal commitment to integrity. It also urges compliance and ethics professionals to monitor the activities of their own personnel.

Second, the Commission should avoid the identification of “the board level (*e.g.* an audit committee of the board)” as the specific reporting relationship for “the individual(s) with operational responsibility for compliance.” This is for several reasons:

- Some organizations do not have boards of directors, and still others have boards that do not have fiduciary responsibility;
- If they report directly to the board, compliance and ethics practitioners may face difficulty in being accepted as a member of the management team, especially when their input is needed as an equal player in strategic discussions;
- Every organization is unique. In some organizational cultures (particularly large, complex organizations), reporting to the Chief Executive Officer may give more credibility to the compliance and ethics program than reporting to the board.

In 2007 ERC gathered the executive directors of the leading nonprofit organizations in the compliance and ethics industry to collectively define the most appropriate role and reporting relationship of a Chief Ethics and Compliance Officer.⁷ In order to satisfy the

⁷The project was a product of the ERC Fellows Program, a forum for corporate executives, senior government ethics professionals and scholars committed to workplace ethics and fresh thinking on emerging ethics issues in policy and practice. Co-authors of the *Leading Corporate Integrity* paper

above issues and yet increase the priority given to the compliance and ethics function, the group suggested four principles that, if satisfied, would adequately position the compliance and ethics function for success. The group issued a paper entitled *Leading Corporate Integrity: Defining the Role of the Chief Ethics & Compliance Officer (CECO)*.


ERC suggests that the Commission lean on this effort by the industry and adopt the language as outlined in the *Leading Corporate Integrity* paper. Individual(s) with operational responsibility for compliance in the organization should be:

- **“Accountable to the governing authority** while carrying out its delegated fiduciary responsibilities;
- **Independent** to raise matters of concern without fear of reprisal or a conflict of interest;
- **Connected to company operations** in order to build an ethical culture that advances the overall objectives of the business; and
- **Provided with authority** to have decisions and recommendations taken seriously at all levels of the organization.”⁸

Adoption of such language allows room for organizational differences, while ensuring that compliance and ethics officer(s) have access to the highest levels of the organization, especially if criminal conduct is taking place among high-level personnel.

We would be happy to comment further or provide additional research findings to the Commission if desired, and we are pleased to have the opportunity to provide our ethics perspective to the rulemaking process.

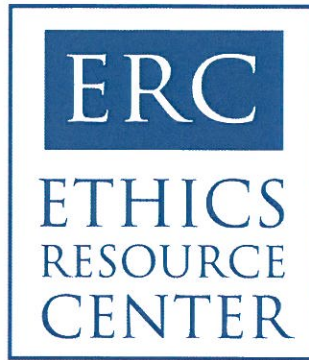
Respectfully Submitted,



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President

included the Business Roundtable Institute for Corporate Ethics; the Ethics and Compliance Officer Association; the Open Compliance and Ethics Group; and the Society for Corporate Compliance and Ethics. The paper is available to the public at www.ethics.org.

⁸ Ethics Resource Center. 2007. *Leading Corporate Integrity: Defining the Role of the Chief Ethics & Compliance Officer*, p. 15 and 16. Available at www.ethics.org



MICHAEL G. OXLEY
Chair, ERC Board of Directors

Michael G. Oxley currently serves as the chair of the Ethics Resource Center (ERC) Board of Directors. Oxley is also senior advisor to the board of directors of NASDAQ OMX Group, Inc. In addition to his position at NASDAQ OMX, he is of counsel at the Washington Office of Baker Hostetler, LLP, where he advises U.S. and multinational clients on a wide range of corporate governance and compliance matters.

In addition, Oxley is a popular keynote speaker on a wide range of business topics and is frequently interviewed and quoted in the news media. He has made presentations all over the United States and the world.

In 2007, he concluded a successful, 25-year career in Congress representing Ohio's Fourth Congressional District. During the last six years of his congressional tenure, he was chairman of the House Financial Services Committee, with wide-ranging legislative jurisdiction over securities and exchanges, insurance, banking, housing, and monetary policy. He is best known as the co-author of The Sarbanes-Oxley Act of 2002, which responded to a series of corporate scandals early in the decade.