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March 19, 2010

Chief Judge William K. Sessions III, Chair
United States Sentencing Commission
One Columbus Circle, N.E.
Suite 2-500, South Lobby
Washington, D.C. 20002-8002

Attention: Public Affairs

Re: Response to Request for Comments on 2010 Proposed Amendments
to the Federal Sentencing Guidelines, Policy Statements and Official
Commentary

Dear Chief Judge Sessions:

On behalf of the Ethisphere Institute, we submit the following comments
on the Commission's proposed amendments to the Federal Sentencing
Guidelines and application notes.

Before providing our commentary, we would like to make the following
fundamental observations derived from the Ethisphere Institute's
research.

**The board of directors is typically unaware of most malfeasance
that occurs within an organization.**

Our research indicates that the board of directors is commonly isolated
from the misconduct that occurs within a corporation. Although an
increasing number of boards require corporations to disclose all inquiries
and reports placed by employees to any anonymous reporting channels,¹
there is a high likelihood that most risky or illegal behavior remains
unreported altogether. This is corroborated by recent independent
research indicating that 37 percent of employees who witness misconduct
in the workplace do not report it.²

**The person with operational responsibility for an ethics and
compliance program generally does not have a direct reporting
line to the board.**

Compounding the problem is that the person who is most likely to learn
about the occurrence of illegal or improper behavior, the person with day-
to-day operational responsibility for the compliance program, commonly

¹ Association of Corporate Counsel & Corpedia, *2010 Compliance Program and Risk Assessment Benchmarking Survey* (forthcoming 2010) (stating that 66 percent of respondents' organizations present hotline reporting statistics to the board).

² The Ethics Resource Center, *The 2009 National Business Ethics Survey* (Nov. 2009).

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does not have a direct reporting channel to the board to discuss concerns.³ Rather, in many organizations, the person responsible for the compliance and ethics function reports to the general counsel or chief legal officer. The Ethisphere Institute has found that actively engaging the chief executive officer and board in the ethics and compliance function greatly reduces the potential of fraudulent behavior; indeed, the Guideline's focus on "tone at the top" underscores the need for the highest levels of the organization to be actively engaged in ethics and compliance. Increasingly, the government regulatory and judicial communities are beginning to actively require this, as well.

For instance, every single corporate deferred prosecution agreement entered into by the U.S. government in 2009, and many of the non-prosecution agreements entered into in the same period, includes a revamp of the offending corporation's compliance and ethics program.⁴ Many of these overhauls include specific involvement of the senior leadership team and the board. One such reform includes a Corporate Integrity Agreement between the Department of Health and Human Services and Pfizer, which requires that the company appoint a chief compliance officer who reports directly to the chief executive officer, update the audit committee of the board directly on at least a quarterly basis, and have unfettered access to the board on any issue at any time.⁵ As part of its responsibilities, the audit committee is expected to oversee and regularly evaluate the effectiveness of the company's compliance program.⁶ Furthermore, under the agreement the audit committee is expected to adopt a resolution for each reporting period that attests to proper inquiry and oversight.⁷

This increased focus on audit committee oversight is in line with recent developments in Delaware corporate law, as well as Securities and Exchange Commission rule-making regarding the board's responsibility to effectively oversee risk. It is also in line with recent recommendations by the Organisation for Economic Co-Operation and Development that signatory countries pass legislation requiring listed companies to disclose details about their ethics and compliance efforts.

³ Association of Corporate Counsel & Corpedia, *ACC/Corpedia Benchmark Survey of In-house Counsel Roles and Attitudes in Relation to Compliance, Ethics and Corporate Social Responsibility Activities* (February 2010).

⁴ Gibson Dunn, 2009 Year-End Update on Corporate Deferred Prosecution and Non-Prosecution Agreements, available at <http://www.gibsondunn.com/publications/Pages/2009YearEndUpdateCorpDeferredProsecutionAgreements.aspx> (last visited Mar. 19, 2010).

⁵ Pfizer Inc., Office of Inspector General of the Department of Health and Human Services Corporate Integrity Agreement (Aug. 31, 2009).

⁶ *Id.*

⁷ *Id.*

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Risk assessments are conducted in numerous different manners.

In connection with its research activities, the Ethisphere Institute has also found that organizations address §8B2.1(c) of the Guidelines in varying manners. A recent study by the Association of Corporate Counsel and Corpedia reveals that organizations are increasingly conducting risk assessments in house.⁸ The form these assessments take can vary, but are often included as an aspect of an Enterprise Risk Management (ERM) process, as part of a Governance Risk and Compliance (GRC) process conducted by Internal Audit, or as a combination of reviews conducted by different parts of an organization who may or may not be specifically trained to satisfy the "monitoring and auditing" requirements of the Guidelines.

SPECIFIC RECOMMENDATIONS

We at the Ethisphere Institute applaud the Commission's effort to expand and clarify the guidance provided about certain aspects of the Federal Sentencing Guidelines as they relate to the sentencing of organizations. Although we recognize the necessity of maintaining some generalities in the Guidelines in order to allow them to be tailored to an individual organization and industry, this additional guidance will allow companies to make better decisions as to the structure and components of their compliance programs. Our commentary specifically focuses on the issue for comment, regarding encouraging direct reporting to the board by responsible compliance personnel and allowing an organization with such a structure to benefit from a three-level mitigation of the culpability score, even if high-level personnel are involved in the criminal conduct at issue. In addition, our commentary addresses the current guidance provided in §8B2.1(c) regarding periodic assessments of the risk of criminal conduct.

Commentary 1: Encouraging Direct Reporting to the Board

The United States Sentencing Commission writes:

Should the Commission amend §8C2.5(f)(3) (Culpability Score) to allow an organization to receive the three level mitigation for an effective compliance program even when high-level personnel are involved in the offense if (A) the individual(s) with operational responsibility for compliance in the organization have direct reporting authority to the board level (e.g. an audit committee of the board); (B) the compliance program was successful in detecting the offense prior to discovery or reasonable likelihood of discovery outside of the organization; and (C) the organization

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⁸ Association of Corporate Counsel & Corpedia, *2010 Compliance Program and Risk Assessment Benchmarking Survey* (forthcoming 2010).

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promptly reported the violation to the appropriate authorities?

In response to this proposed language, the Ethisphere Institute recommends that the Commission clarify what is meant by "direct reporting authority to the board level." Without further description, it is unclear whether the Commission means a satisfactory structure would be one where the individual with operational responsibility for compliance in the organization has a direct reporting line to the board level, or whether the Commission is referencing "dotted line" reporting with unfettered access, such as the Pfizer structure cited above. The Ethisphere Institute is of the opinion that such a clarification is critical to the analysis regarding whether an organization has an effective compliance program and is deserving of three-level mitigation.

The Ethisphere Institute has determined through the research it has conducted that the leading best practice is to provide the individual with operational responsibility for compliance direct reporting authority to the organization's chief executive officer, with "dotted line" reporting authority to the board level. While access to the board level is certainly critical for the person with operational responsibility for the compliance program to ensure unfettered communication regarding high-level issues or concerns, directing said individual to report on all concerns to the board level, including routine business matters, has been found to be ineffective. In essence, such a reporting structure often results in a reporting channel that is not utilized, as routine matters are typically outside the scope and expertise of a board member. Therefore, the Ethisphere Institute recommends clarification of this component so that three-level mitigation is awarded if the individual with operational responsibility for the compliance program has been provided direct reporting authority to the chief executive officer, as this is the person who should address routine business matters, and "dotted line" authority has been provided to the board level, so that immediate or high-level concerns can be directly raised with this group. This, of course, would be in addition to the satisfaction of the two other components included in the issue for comment, as quoted above.

In addition, the Ethisphere Institute recommends that the Commission clarify whether "direct reporting authority to the board level" must result from an individual's role as having operational responsibility for the compliance program. For example, a person with operational responsibility for a compliance program oftentimes also serves as the organization's general counsel. Such individuals will typically have reporting authority to the board level as a result of their general counsel position. While some may assume that the genesis of the reporting authority is irrelevant, so long as some sort of reporting authority is provided, the Ethisphere Institute respectfully disagrees. Instead, we have found that the reporting authority provided to a general counsel

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oftentimes differs from that provided to the individual with operational responsibility for a compliance program. For example, the board members to whom the reporting authority is provided may differ. In addition, the expected focus of that reporting may diverge, given the general counsel's more expansive job responsibilities. Again, in the Ethisphere Institute's opinion, the role from which the direct reporting authority originates—and accordingly what is reported—impacts the analysis regarding whether an organization has an effective compliance program and is deserving of three-level mitigation, and therefore should be addressed.

Commentary 2: Periodic Assessments of the Risk of Criminal Conduct

In §8B2.1(c), the United States Sentencing Commission writes:

In implementing subsection (b), the organization shall periodically assess the risk of criminal conduct and shall 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.

Although no issue has been provided for comment with respect to this provision of the Guidelines, proposed changes have been made to the application note to this subsection. The Ethisphere Institute recommends that the Commission provide additional guidance via the application note regarding the assessment process. For example, we suggest that the Commission consider adding language stating that this process should include an organizational health and culture survey, as well as a knowledge assessment survey of a portion of the organization's population. In addition, the Ethisphere Institute recommends that the Commission clarify whether this Guideline can otherwise be satisfied through an enterprise-wide risk assessment process. The Ethisphere Institute recommends that the Commission provide guidance stating that a standalone ethics and compliance risk assessment process should be conducted on a periodic basis, at least every three years, and comment on whether periodic independent assessment is advisable. Both of these attributes are necessary components of a truly effective compliance program, and should be considered when sentencing organizations.

Conclusion

Ethisphere Institute recommends taking these steps to further clarify the guidance being provided by the Guidelines as they relate to compliance programs. We thank you for affording us the opportunity to comment upon the Commission's proposed amendments to the Federal Sentencing Guidelines and application notes.

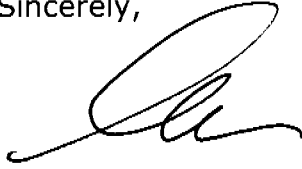
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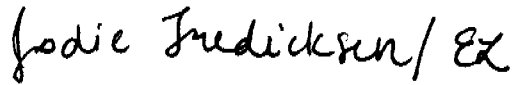
Sincerely,



Alexander F. Brigham
Executive Director
The Ethisphere Institute



Erica Salmon Byrne
Managing Director
The Ethisphere Council



Jodie Fredericksen
Director
The Ethisphere Council