

COMMENTS ON PROPOSED AMENDMENTS TO THE U.S. SENTENCING GUIDELINES
(ORGANIZATIONAL GUIDELINES) PUBLISHED AT 75 FED. REG. 3525

To: Michael Courlander, Public Affairs Officer
United States Sentencing Commission,
One Columbus Circle, N.E., Suite 2-500, Washington, D.C. 20002-8002

The following comments are submitted on behalf of the Open Compliance & Ethics Group (OCEG), a global (U.S. based) nonprofit organization that develops and provides standards, guidelines, tools and online resources to address governance, risk management, compliance and ethics (GRC) for corporations and other organizations. OCEG represents more than 30,000 individual members with involvement in risk, compliance and ethics efforts in organizations, academia and government.

With the input of hundreds of experts and review by thousands of interested parties during public exposure, OCEG has developed the OCEG GRC Capability Model (the Red Book). The Red Book is a detailed process model for the design, operation and evaluation of governance, risk management, compliance and ethics programs. All OCEG guidance is publicly vetted and finalized following a public comment period and testing of the application of the guidance within one or more organizations. The guidance is further augmented by development of online resource collections and toolkits that enable users to swiftly and efficiently customize and apply the guidance within their organizations.

The following comments reflect the knowledge OCEG has gained from interaction with its many members over the past seven years, during development of the Red Book and other guidance and resources, as well as on an ongoing basis. The comments also are informed by discussion about the proposed amendments at the most recent OCEG Leadership Council meeting, held in February 2010.

Comment One – related to the proposed amendment to amend Application Note 3 (addressing what is expected of high-level personnel and substantial authority personnel).

Application Note 3 generally states a requirement for high-level and substantial authority personnel (hereinafter HL&SA personnel) to be knowledgeable about the content and operation of the compliance and ethics program. The proposed amendment adds a specific requirement to be aware of the organization's document retention policies and confirm such policies meet the goals of an effective compliance program.

OCEG agrees that Application Note 3 could be enhanced to provide more guidance, but the special emphasis on document retention policies is too narrow. Document retention, and in particular policies and controls that prevent destruction of documents relevant to potential non-compliance legal action, is

an important part of an effective compliance and ethics program, but there are other aspects of an effective program that warrant special mention as much or more than document retention.

Over the past several years, since the organizational guidelines were last amended, OCEG has received questions and comments from hundreds of its members seeking guidance on what HL&SA personnel should know about the details of an effective program in order to provide appropriate oversight and management of the program. Rather than focus on one aspect of the program, such as document retention, the Application Note would provide more meaningful response to this question by adding a paragraph that indicates such personnel should have a clear understanding of all aspects of what is necessary to ensure an effective program, and clarifying the knowledge requirement regarding document retention, such as the following:

“Both high-level personnel and substantial authority personnel should understand (and when necessary receive specialized training about) these key aspects of the compliance and ethics program:

- **Assigned roles and responsibilities, including lines of reporting and segregation of duties**
- **The established strategic goals of the program**
- **The process for identifying and assessing key compliance risks and maintaining appropriate controls to address them**
- **The key controls (procedural, human capital, physical and technological) in place to address compliance risks through prevention, detection and correction**
- **The processes for issuing, managing, enforcing and updating the Code of Conduct and other policies**
- **The system for periodic and ongoing review of established controls and resolution of issues that arise**
- **The system for capturing, documenting and managing information relevant to the compliance and ethics program, including policies for document retention, litigation hold and control of access.”**
- **The methods established to ensure documentation and repeatability of program procedures, and to enhance the ability to gain an enterprise-wide view of program effectiveness.”**

Comment Two – Related to the proposed addition of new Application Note 6.

In general, OCEG agrees with the addition of new Application Note 6, and suggests that it may be further strengthened by referencing more specific steps the organization may take to “assess the compliance and ethics program and make modifications necessary to ensure the program is more effective.” OCEG members often note that the requirement of “effectiveness” as described in the guidelines is not specific enough in providing guidance about “how” to gain such an outcome. For example, the guidelines refer to assessing risk, but do not provide guidance on what constitutes an effective risk assessment process. Similarly, the guidelines require effectiveness in detecting criminal conduct but do not offer guidance on what are reasonable and appropriate ways to do so.

More specific guidance may be found in publicly vetted independent standards or guidelines released by non-profit or non-governmental organizations. Such guidance, including the OCEG GRC Capability Model, provides clear steps for ensuring effectiveness as defined by the sentencing guidelines, as well as an opportunity for comparison/benchmarking of efforts between organizations. And, as the Commission knows, many organizations look to the sentencing guidelines when structuring their programs in the first instance, not just as a response to a conviction. Thus, the advice provided in the Application Note should direct readers to available resources and indicate that use of certain types of guidance or standards may provide evidence of establishment of an effective program.

Such a comment also could be similar to that provided by the SEC interpretive guidance on management reporting under section 404(a) of SOX, where it indicates that guidance provided by the 1992 Committee of Sponsoring Organizations of the Treadway Commission (COSO) *Internal Control–Integrated Framework*, the Canadian CoCo framework, and the UK Turnbull guidance meet SEC criteria for a “suitable” control assessment framework.

Accordingly, the new Application Note 6 would be enhanced by addition of the following sentences prior to the final sentence:

“The organization should also consider publicly available guidance and standards issued by non-profit or non-governmental organizations to address programs for compliance and ethics (including those with practices that enhance information flow necessary for effective governance, risk management and compliance efforts), and which have been through public review and comment, when designing modifications to the program. The OCEG GRC Capability Model (Red Book) meets the criteria for an effective compliance & ethics program and demonstration that the organization has implemented the Red Book provides credible evidence of effectiveness.”

Comment Three – Related to the proposed amendment to new Application Note 7.

OCEG agrees with the addition of new paragraph (iv) to include a requirement for periodic assessment of the nature and operations of the organization with regard to particular ethics and compliance functions. We strongly disagree, however, with the example given indicating that all employees should be aware of the document retention policies and conform any such policy to meet the goals of an effective program. First, there is a weakness in the drafting which leaves the implication that all employees (or any employee) may change the document retention policy. Second, it is incorrect to assume that “all employees” must be aware of the document retention policy. This is simply not the case in every type of organization, including the many where some employees have no involvement with documents or any opportunity for retention or destruction of documents. Further, document retention is only one small part of a strong information management system essential to an effective compliance and ethics program and use of this example inflates its importance.

We recommend either ending the new paragraph after the first sentence or changing the paragraph to the following to be both broader in scope than the current example and more specific in detail:

“The design and operation of the compliance and ethics program in light of identified requirements and risks, including:

- **reliability and effectiveness in preventing and detecting conduct or events that violate requirements**
- **continued appropriateness of designed controls when identified requirements and risks change**
- **potential for failure of established controls and methods of identifying such failures**
- **design and operation of key program components including but not limited to policy management, education, information management, issue identification and resolution and ongoing performance monitoring.”**

Comment Four – Regarding the proposed amendments to §8D1.4

Similar to Comment Two above, we encourage the Sentencing Commission to adopt the approach used by the SEC in stating that a particular set of guidance or standards (or several such if identified as appropriate) meet the criteria for an effective compliance and ethics program. This not only offers a clearer pathway for designing an effective program, but also reduces the burden on probation officers and other officials in reviewing and assessing each submitted program. Thus, we recommend adding the following to paragraph (1):

“The OCEG GRC Capability Model (Red Book) meets the criteria for an effective compliance & ethics program and demonstrating that the organization has designed its compliance and ethics program in accordance with the Red Book, by obtaining a program design certification from OCEG or otherwise, provides credible evidence of effectiveness.”

Respectfully submitted,

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