

May 4, 2012

Honorable Patti B. Saris
Chair
United States Sentencing Commission
One Columbus Circle, N.E.
Suite 2-500, South Lobby
Washington, D.C. 20002-8002

Re: Commission Priorities for the Upcoming Year

Dear Judge Saris and Fellow Commissioners:

As the Commission considers its agenda for the coming year there is a great opportunity to examine the Commission's continued role in sentencing organizations and the collateral effects the Sentencing Guidelines have on ethics and compliance worldwide. It is not an overstatement to suggest that the Guidelines widest impact is found in Chapter Eight. Millions of consumers, citizens, employees and other stakeholders of private and public organizations rely on the standards originally set by the Commission in 1991. To put it simply, the Commission was first to seriously address organizational ethics and compliance and the Guidelines remain the most respected and consistently referenced standard for implementing and maintaining ethics and compliance programs.

Now that twenty years have passed since the implementation of the original Sentencing Guidelines for Organizations we encourage the Commission to take time to evaluate how far we have all come and investigate where the Commission might lead in the future. The Ethisphere Institute encourages the Commission to include a review of possible amendments to Chapter Eight, including study on the application of the Guidelines to organizations,¹ to the Commission's list of priorities for the coming amendment cycle.

There are many possibilities to consider.

¹ It has been suggested in the past that the Commission might conduct a more detailed review of some or all of the data collected on organizational sentencing cases over the past twenty years and prepare an overview publication similar to those prepared on discrete sentencing issues in the 2009-2010 amendment cycle.

The Ethisphere Institute sent public comment to the Commission on May 25, 2011 (See Attachment “A”). The recommendations made one year ago remain important today. The Ethisphere Institute recommended clarification on what “appropriate incentives” in the context of an ethics and compliance program should mean.² We also suggested that while anonymous reporting mechanisms are an integral part of any ethics and compliance program, the overwhelming majority of reporting is made to managers³ and any “system” of reporting as defined in the Guidelines should take this practical reality into account.⁴

On May 1st the Ethics Resource Center (ERC) released its final report on “The Federal Sentencing Guidelines for Organizations at Twenty Years” which makes several recommendations for Chapter Eight. The ERC has echoed Ethisphere’s suggestions from last year that the Commission provide guidance on incentives and the role of managers. The Ethisphere Institute agrees with the ERC’s call for the Commission to encourage larger organizations to increase ethics and compliance efforts at the regional and local level. Such allocation of resources reflects best practices and the growing role of non-executive managers in fostering a “tone from the middle.”

The ERC and other commentators⁵ have also suggested that the Commission and the Department of Justice address the inconsistent application of sentencing credit for effective compliance and ethics programs in antitrust prosecutions and other types of cases. The Antitrust Division’s blanket refusal to provide credit for effective compliance and ethics programs for many organizational defendants stands in stark contrast to the focus the rest of the Department places on organizational ethics and compliance. This exception can be addressed in Chapter Eight by specifically noting that credit for an effective program may apply to an organization sentenced for an antitrust violation when that organization

² The Ethisphere Institute suggested amending Application Note 5 of USSG §8B2.1 to include language defining such “incentives” with a non-exhaustive list and a concrete example to avoid “check the box” ethics and compliance performance reviews (See Attachment “A”, page 2).

³ Surveyed employees relate that hotlines are used only 5% of the time versus reports to “management” or “other responsible persons” over 80% of the time when misconduct is reported. See 2011 National Business Ethics Survey, Ethics Resource Center, P. 21 (2011), <http://www.ethics.org/nbes/files/FinalNBES-web.pdf>.

⁴ The Ethisphere Institute suggested in 2011 that the Commission create a new Application Note to define a “system of reporting” to include both anonymous components and other resources to direct employees and others to those managers they could seek guidance from (See Attachment “A”, page 2-3).

⁵ The Ethisphere Institute understands that Joseph E. Murphy, Esq. filed a separate letter to the Commission on May 4th which discusses the Antitrust Division’s disparate policy regarding credit for effective compliance and ethics programs.

otherwise meets the criteria for such credit.⁶ Such a change would best reflect the emphasis the Commission and the Department have put on effective compliance and ethics programs for the past two decades.

In closing, the Ethisphere Institute recognizes the tangible motivation and practical guidance that the Sentencing Guidelines have provided organizations on ethics and compliance issues and encourages the Commission to remain involved in the process in a meaningful way. The Commission's leadership in this arena is respected, appreciated and needed.

The Ethisphere Institute appreciates the opportunity to suggest issues for consideration and stands ready to assist the Commission in any way.

Respectfully,

/s/Alexander F. Brigham

Executive Director

The Ethisphere Institute

/s/Erica Salmon Byrne

Managing Director

The Ethisphere Council

/s/Eric Morehead

Director

The Ethisphere Council

⁶ The Ethisphere Institute believes that an amendment to the Guidelines to emphasize the applicability of credit for an effective compliance and ethics program in organizational antitrust cases could do much to promote the development and rigor of antitrust compliance programs.

May 25, 2011

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Chair
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Washington, D.C. 20002-8002

Re: Commission Priorities for the Upcoming Year

Dear Judge Saris and Fellow Commissioners:

This year marks the twentieth anniversary of Chapter Eight of the Guidelines (“Organizational Guidelines”). In those twenty years, the Commission has been a leading light for organizational responsibility and the development of ethics and compliance standards, not only in the United States, but worldwide. For these accomplishments and the continued efforts of many dedicated Commissioners and staff members, the Ethisphere Institute congratulates you for the hard work and foresight that has made an indelibly positive impact on organizational culture.

While the design of the original Organizational Guidelines—and their subsequent significant revisions—have guided organizations seeking to develop an effective compliance and ethics program, ambiguities remain. There are also ways the Commission could assist the public by providing sentencing data and soliciting opinions. The Ethisphere Institute below provides examples and suggestions for the consideration of the Commission, and would suggest that the Commission include in its priorities for this amendment cycle a review of the current state and the future of the Organizational Guidelines.

First, one of the most vexing and difficult aspects of designing and implementing an effective compliance and ethics program is determining what is meant by the phrase “appropriate incentives to perform in accordance with the compliance and ethics program” in §8B2.1(b)(6) of Chapter Eight. Most organizations have little trouble identifying the other side of the coin; discipline is highly visible and easy to define. Incentives for compliance are a little more difficult and organizations often give them short shrift, not because they do not wish to follow the standards in the Organizational Guidelines, but because they need guidance. Additionally, some organizations call aspects of their program “incentives” when they are not really incentives. For instance, rewarding an employee for not being involved in a violation cannot be what the Commission had in mind when it called for incentives. Such “check box” options on annual performance reviews do not incentivize ethical performance.

The Commission could provide limited guidance and a non-exhaustive list of simple examples as part of the existing Application Note 5 to act as a guidepost (note: existing text is in italics below). A revised Application note could read:

5. *Application of Subsection (b)(6).*— Appropriate incentives can include, but are not limited to: individual awards or recognition for employees or agents that show leadership in the area of compliance and ethics; awards or recognition for special contributions to the compliance and ethics program; as a defined component of the employee or agent’s performance review; or as a considered component of any employee’s promotion within the organization. For example, as a component of the employee or agent’s performance review, incentive consideration would be given for the employee or agent’s involvement in compliance and ethics training or communication efforts – not given simply for the lack of reported violations involving the employee or agent.

Adequate discipline of individuals responsible for an offense is a necessary component of enforcement; however, the form of discipline that will be appropriate will be case specific.

Second, while the inclusion of anonymous mechanisms for employees to report issues without fear of retaliation was a major step forward led by the Commission, in the following years, practical research in the field has shown that employees still overwhelmingly prefer to report to their supervisors and managers and still overwhelmingly fear retaliation.¹ While §8B2.1(b)(5)(C), which describes the use of an anonymous mechanism, actually describes a “system” that “may include” anonymous mechanisms among other methods of reporting, many organizations do not carefully consider reporting and retaliation outside of the context of anonymous hotlines.

In today’s organizations retaliation claims have for the first time supplanted harassment as the most common complaint reported to the EEOC.² Given the close association (and fear) of retaliation around the issue of reporting, and given that the Commission clearly did not intend for anonymous mechanisms to be considered the only “system” of reporting for employees, the Commission could address these realities by including an application note that encourages organizations to consider other reporting mechanisms. The new application note could also reflect the fact that employees overwhelmingly prefer to report to managers and supervisors by encouraging organizations to consider designating a list of individuals for employees to report issues and concerns to. While many organizations already have implemented such a system by necessity, and while it may be an obvious solution to the low utilization of anonymous reporting mechanisms, an application note could serve as a valuable touchstone for organizations facing internal

¹ Surveyed employees relate that hotlines are used only 3% of the time versus reports to “management” or “other responsible persons” 90% of the time when misconduct is reported. While observed misconduct has declined recently, employees perceive retaliation as a greater threat than in past years. See 2009 National Business Ethics Survey, Ethics Resource Center, P. 35 and P. 13 (2009), <http://www.ethics.org/nbes/files/nbes-final.pdf>.

² EEOC Reports Job Bias Charges Hit Record High of Nearly 100,000 in Fiscal Year 2010, Retaliation Surpasses Race as Most Frequent Allegation, January 1, 2011, <http://www.eeoc.gov/eeoc/newsroom/release/1-11-11.cfm>.

reporting issues who currently associate this guideline standard only with anonymous mechanisms. For example, a new application note could be inserted after existing Application Note 4 and read:

Application of Subsection (b)(5)(C).— A “system” as described in subparagraph (C) may include, among anonymous components, a publicized listing of individuals to whom the organization’s employees and agents may report or seek guidance regarding potential or actual criminal conduct without fear of retaliation. Such individuals should be adequately trained, knowledgeable about their role, and have the appropriate authority and resources to ensure that the organization’s employees and agents will be aware of their reporting options and not be subject to retaliation.

By including this simple example, which can be implemented by organizations of any size, the Commission will ensure that the Organizational Guidelines effectively communicate basic reporting parameters outside of anonymous mechanisms for employees to voice their concerns without fear of retaliation.

Third, the Commission’s expert marshalling of organizational sentencing data has had a profound impact on the ability of ethics and compliance professionals to note trends and provide their organizations with relevant data to support ethics and compliance reforms. While the annual USSC Sourcebook contains a wealth of information about organizational sentencing, there are some reasonable suggestions for supplementing what is currently provided. For example, if the Commission could provide more granular data about the type of offense committed by convicted organizations, such as more specificity around broader categories such as “fraud” and “environmental,” a more complete picture of the types of cases being sentenced would emerge. Additionally, if the Commission could provide the public with a breakdown of the size (by employees) of the organizations sentenced, this would also aid with understanding the data overall.

Finally, just as the Commission recently undertook extended and diligent efforts to solicit national opinion and comment on the twenty-fifth anniversary of the sentencing guidelines for individuals³, the twentieth anniversary of the Organizational Guidelines presents a wonderful opportunity for the Commission to have at least one forum with the public and stakeholders to assess the current state of organizational sentencing, ethics and compliance efforts, and the future of the Organizational Guidelines.

We appreciate the opportunity to provide suggestions to the Commission and are available should the Commission wish to discuss these issues or make further inquiry with the Institute.

Respectfully,

/s/Alexander F. Brigham
Executive Director

³U.S. Sentencing Commission to Conduct Regional Public Hearings on Federal Sentencing Policy, January 13, 2009, http://www.uscc.gov/Legislative_and_Public_Affairs/Newsroom/Press_Releases/20090113_01_Press_Release.htm.

The Ethisphere Institute

/s/Erica Salmon Byrne
Managing Director
The Ethisphere Council

/s/Eric Morehead
Director
The Ethisphere Council

About The Ethisphere Institute

The research-based Ethisphere Institute is a leading international think-tank dedicated to the creation, advancement and sharing of best practices in business ethics, corporate social responsibility, anti-corruption and sustainability. The Institute's associated membership groups, the Ethisphere Council and Business Ethics Leadership Alliance, are forums for business ethics that includes over 200 leading corporations, universities and institutions. These groups are dedicated to the development and advancement of members through increased efficiency, innovation, tools, mentoring, advice, and unique career opportunities. Ethisphere Magazine, which publishes the globally recognized World's Most Ethical Companies Ranking™, is the quarterly publication of the Institute. Ethisphere provides the only third-party verifications of compliance programs and ethical cultures, Ethics Inside Certification®, Anti-Corruption Leader Verification and Compliance Program Verification. More information on the Ethisphere Institute, including ranking projects and membership, can be found at <http://www.ethisphere.com>.