

An Overview of the Organizational Guidelines

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Organizations, like individuals, can be found guilty of criminal conduct, and the measure of their punishment for felonies and Class A misdemeanors is governed by Chapter Eight of the sentencing guidelines. While organizations cannot be imprisoned, they can be fined, sentenced to probation for up to five years, ordered to make restitution and issue public notices of conviction to their victim and exposed to applicable forfeiture statutes. Data collected by the Sentencing Commission reflect that organizations are sentenced for a wide range of crimes. The most commonly occurring offenses (in order of decreasing frequency) are fraud, environmental waste discharge, tax offenses, antitrust offenses, and food and drug violations.

The organizational sentencing guidelines (which apply to corporations, partnerships, labor unions, pension funds, trusts, non-profit entities, and governmental units) became effective November 1, 1991, after several years of public hearings and analyses. These guidelines are designed to further two key purposes of sentencing: “just punishment” and “deterrence.” Under the “just punishment” model, the punishment corresponds to the degree of blameworthiness of the offender, while under the “deterrence” model, incentives are offered for organizations to detect and prevent crime.

Effective Compliance Programs

Criminal liability can attach to an organization whenever an employee of the organization commits an act within the apparent scope of his or her employment, even if the employee acted directly contrary to company policy and instructions. An entire organization, despite its best efforts to prevent wrongdoing in its ranks, can still be held criminally liable for any of its employees’ illegal actions. Consequently, when the Commission promulgated the organizational guidelines, it attempted to alleviate the harshest aspects of this institutional vulnerability by incorporating into the sentencing structure the preventive and deterrent aspects of systematic compliance programs. The Commission did this by mitigating the potential fine range - in some cases up to 95 percent - if an organization can demonstrate that it had put in place an effective compliance program. This mitigating credit under the guidelines is contingent upon prompt reporting to the authorities and the non-involvement of high level personnel in the actual offense conduct.

Chapter Eight outlines seven key criteria for establishing an “effective compliance program”:

Compliance standards and procedures reasonably capable of reducing the prospect of criminal activity—

- Oversight by high-level personnel
- Due Care in delegating substantial discretionary authority
- Effective Communication to all levels of employees
- Reasonable steps to achieve compliance, which include systems for monitoring, auditing, and reporting suspected wrongdoing without fear of reprisal
- Consistent enforcement of compliance standards including disciplinary mechanisms
- Reasonable steps to respond to and prevent further similar offenses upon detection of a violation

The organizational guidelines criteria embody broad principles that, taken together, describe a corporate “good citizenship” model, but do not offer precise details for implementation. This approach was deliberately selected in order to encourage flexibility and independence by organizations in designing programs that are best suited to their particular circumstances.

Sharing “Best Practices” Ideas

The innovative approach put forward in the sentencing guidelines has spawned complementary efforts by a number of regulatory and law enforcement authorities. Executive agencies such as the Environmental Protection Agency, the Department of Health and Human Services, and the Department of Justice’s Antitrust Division have developed, or are developing model compliance programs, programs for self-reporting, and programs for amnesty - all of which are modeled after some aspect of the organizational sentencing guidelines. Industry and peer organizations are forming to share ideas on “best practices” for compliance training and ethics awareness.

The Commission will continue to study the effectiveness of these efforts to implement the compliance criteria of Chapter Eight. In particular, the Commission is interested in assessments of the viability of its efforts to encourage organizations - from large corporations to non-profits organizations to governmental units - to develop institutional cultures that discourage criminal conduct. ■

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