

Statement of Steven J. Priest
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To the Ad Hoc Advisory Group on Organizational Sentencing Guidelines
United States Sentencing Commission

Thank you for inviting me to be with you today. I am gratified to know that this group of esteemed individuals will be making decisions to improve the existing-and already highly effective-Organizational Sentencing Guidelines. I am doubly gratified to remember that the Chair of the USSC, Judge Murphy, and indeed the entire USSC, had the foresight to create this Advisory Group and implement this process many months before the recent spate of corporate scandals came to light. The need for increased public trust in our business organizations was great when this process began; it is of course greater now than at any other time in recent history.

The views expressed here today are based on ten years of experience consulting on ethics and compliance issues. Most of our clients have been large, publicly traded corporations-including over 10% of the Fortune 200. Our clients come from the fields of insurance, financial services, energy, consumer products, retail, transportation, telecommunications, health care, pharmaceuticals, defense and technology. Through numerous benchmarking projects, surveys and program assessments, we have developed a fairly solid understanding of the characteristics of “an effective program to prevent and detect violations of the law.” In reality, not on paper.

In my opinion the current Guidelines relating to effective compliance programs are very successful in offering guidance and incentives to organizations. At the same time, they remain sufficiently broad to allow for the incredible variety of organizations across the United States. So we have only a few modest suggestions for improvement.

1. Clarify that the Guidelines apply to “violations of the law,” and not, more narrowly, “criminal conduct.” Advisory group members know better than I do the public dismay in the U.S. over illegal actions of executives and organizations, both criminal and civil. Over the past four months I have spent almost half my time in Europe, Asia and Latin America, meeting with executives and many others. Concern over American business practices is very high, and threatens both our economic and our political stature. Nothing positive is gained by focusing solely on criminal conduct in the Organizational Guidelines; and indeed much is lost.

2. In the portion of the Guidelines requiring “due diligence in seeking to prevent and detect violations of the law,” add language explicitly indicating that such due diligence must include a periodic assessment of a program’s effectiveness. (Question 1g of request for additional public comments.) In the current Guidelines, it is arguable whether “assessment” is included or implied in §8A1.2, comment 3(k)(5) or comment 3(k)(7). And while it is common sense that an organization must assess the effectiveness of its ethics/compliance program, in order to determine whether it is living up to the

Organizational Guidelines, in practice assessments are very often not done. Some organizations fear what they might find; others fear what plaintiffs' attorneys or regulators or attorneys general may discover.

These fears impede progress and effectiveness. Organizations that assess their programs have better programs than those that don't. Companies that benchmark their own practices vs. others in their industry almost always discover practices that they can improve. Organizations that conduct internal evaluations-through surveys, focus groups or other means-almost always discover opportunities for improvement. And something more: American organizations-even nonprofits-are motivated by competition and guided by metrics.

We know a company that was disappointed by the results of its first, baseline measurement of employee perceptions of its ethics/compliance program and culture. This spurred the management team to action, and improvements to the program were implemented. Follow-up surveys indicated significant progress for most divisions: more employees knew about the Code and had training in it; employees felt more comfortable in reporting issues; more employees understood the company's commitment; fewer employees reported concerns about unethical or illegal conduct. Overall, management was quite pleased by the results; they felt as if their efforts had accomplished something. The few divisions in which significant progress had not been made, however, were not so gratified by the results. Management in these divisions was held accountable and immediate improvements in their implementation of the compliance program were required. The marked improvement of this company's ethics and compliance program, an improvement that was inspired by the results of an assessment, provides a striking example of the benefits of such a review.

I have gone on at some length about the importance of adding language about assessments because we believe that such an addition will encourage continued innovation and improvement without imposing undue burdens. Note that we do not recommend using the word "audit," which has connotations we don't believe are appropriate for the Guidelines. Audit is a financial term of art that, for example, implies check-lists and outside auditors. We do not recommend mentioning the use of outside auditors, lawyers or consultants in this process, unless it is to specifically state that they are not required to conduct or take part in the assessment. Nor do we believe that an enumeration of the elements of the assessment is necessary or desirable. The Guidelines' governing emphasis on flexibility, which has proven to be such a successful approach, should apply here. Let the organizations decide for themselves what form the assessment should take. The simple and common sense guideline that organizations should periodically assess the effectiveness of their programs will be a sufficient driver of improved effectiveness.

3. Require compliance officers to report to the Chief Executive Officer and, where a Board of Directors exists, to an independent committee of the Board. (Question 1a, b and c)

We know from ten years of observation that the likelihood of compliance program

success increases substantially if the Ethics and Compliance Officer reports directly to the CEO and an independent committee of the organization's Board of Directors. (For many companies this has historically been the audit committee, but with the increased workload faced by members of this committee and the increased amount of governance, compliance and corporate responsibility issues faced by boards, a number of companies are looking to spread the burden.)

Reporting to the CEO and an independent committee accomplishes several key objectives. It sends a message to all employees in the company that law abiding behavior is important, indeed, a top priority. It gives the Compliance Officer credibility, and important resources to draw upon when necessary. It firms up the governance links between the Board, the CEO, and compliance. And it provides the Compliance Officer with a "Fail-safe" option in the case of a crisis involving top management of the company.

We do not believe it is necessary to add further definition to the roles of the CEO, CFO, other executives, or the Board. The reporting structure recommended here, especially combined with assessments outlined in recommendation #2, will drive appropriate oversight relationships within the company.

4. We do not advocate specifically including language about culture in the Guidelines. (Question 6 of your additional request for public comment.) A company culture that fosters ethical behavior (and punishes unethical or illegal conduct) is the most important element in determining whether "an effective program" exists. As a result, a fundamental precept of our organization is that we are committed to help companies strengthen cultures through their ethics and compliance programs. However, defining an "ethical culture" with precision is not a task that seems appropriate for the judicial branch of our government. Instead, we believe that requiring an assessment for program effectiveness (recommendation #2) will lead organizations on their own to emphasize the importance of cultures that do not tolerate illegal conduct.

The current Organizational Guidelines strike an excellent balance between specificity and flexibility. The three modest changes suggested here continue on this successful path.

1. Cover "violations of the law," not simply criminal conduct.
2. Include "assessment of the program's effectiveness" as a necessary component of due diligence.
3. Recommend a defined reporting relationship between the Ethics/Compliance Officer and the CEO, and an independent committee of the Board of Directors where applicable.

I am delighted to answer any questions you may have.