

November 8, 2002

Advisory Group on Organizational Guidelines  
C/O Office of Public Affairs, US Sentencing Commission  
Suite 2-500 South Lobby  
One Columbus Circle, NE  
Washington, DC 20002  
Attn: Michael Courlander

Dear Mr. Courlander:

LRN, The Legal Knowledge Company is pleased to have the opportunity to respond to the Advisory Group on Organizational Guidelines' Request for Additional Public Comment Regarding the U.S. Sentencing Guidelines for Organizations. We commend the Advisory Group for its thoughtful and timely request for comment on this important issue.

As a provider of online legal, ethics and compliance training for Global 1000 corporations, we have had the opportunity to work with and understand the needs of some of the largest companies in the world when trying to increase legal and ethical knowledge throughout their workforce. In that regard, we therefore respond below to those questions raised by the Advisory Group specifically relating to training on legal, ethics and compliance issues.

**Question 1.e.**

1. *Should the Chapter Eight Guidelines' criteria for an "effective program to prevent and detect violations of law" at §8A1.2, comment 3(k)(1-7), be clarified or expanded to address the specific issues designated below? If so, how can this be done consistent with the limitations of the Commission's jurisdiction and statutory authority at 28 U.S.C. §999 et seq.?e. Should §8A1.2, comment 3(k)(4), regarding the internal communication of standards and procedures for compliance, be more specific with respect to training methodologies? Currently, §8A1.2, comment 3(k)(4) provides:*

*"The organization must have taken steps to communicate effectively its standards and procedures to all employees and other agents, e.g., by requiring participation in training programs **or** by disseminating publications that explain in a practical manner what is required." (Emphasis added.).*

*The use of the "e.g." can be interpreted to mean that "training programs" and "disseminating publications" are illustrative examples, rather than necessary components, of "communicating effectively." The use of "or" can be interpreted to mean that "training programs" and "disseminating publications" are alternative means for satisfying the "communicating effectively" requirement.*

*Should the preceding language be clarified to make clear that both training and other methods of communications are necessary components of "an effective" program? If so, should the term "disseminating publications" be replaced by more flexible language such as "other forms of communications?"*

**Response:**

As many of the public comments have already noted, the strength of the Organizational Guidelines lies in their flexibility. This flexibility should also apply to the standards used to measure how effectively the organization communicated its standards and procedures to all employees and other agents. Thus, the "necessary components" of "communicating effectively" may vary significantly from organization to organization, but they all should have the same goal: to make employees aware of and understand the organization's standards and procedures.

Rather than impose on all organizations a requirement that they both require participation in training programs and that they disseminate publications, the Guidelines should remain illustrative and not prescriptive as to what constitutes an effective communications system. Moreover, with the advent of Web-based and other electronic communications, the distinction between "training programs" and "publications" has blurred. And by focusing simply on the disjunctive or conjunctive implications of the single conjunction "and" or "or," an organization could easily lose sight of the larger point of the internal communications process—namely that it be *effective*. In other words, not only did the organization physically reach its intended audience with the communication, the audience also understood the content of the communication.

In that regard, we suggest that Comment 3(k)(4) could do more to provide guidance as to what constitutes an effective communications process. It should therefore address more fully two issues: (1) additional illustrative examples of training, publications or other forms of communications, and (2) examples of how an organization may demonstrate that its system of communication effectively reached the desired audience.

We therefore suggest that Comment 3(k)(4) provide additional examples of the types of communications that may be used to implement an effective communications process. Examples could include the organization's intranet or website, online and Web-based training, e-mail notices, and "disconnected learning," such as CD-ROM or downloadable media. Each could play a role in an effective system for communicating the organization's standards and procedures.

The Guidelines recognize that all the communication in the world is useless unless that communication is also effective. However, the Guidelines and comments remain relatively silent concerning how to measure that effectiveness. Comment 3(k)(4) should also provide guidance to organizations as to how the effectiveness of the communications process can be measured. Again, illustrative examples-and not prescriptive standards-of the mechanisms that may be used to demonstrate employee awareness and comprehension of the organization's compliance standards and procedures provide the most flexibility.

Examples of such guidance may include

- certifications by employees (either written or electronic) that they have received and understood the organization's standards and procedures; and
- examination or testing of the knowledge provided by the organization to the employee.

We therefore suggest that Comment 3(k)(4) be amended to read as follows:

*The organization must have taken steps to communicate effectively its standards and procedures to all employees and other agents, e.g., by requiring participation in training programs, by disseminating publications that explain in a practical matter what is required, or by other forms of communications. Such other forms may include the organization's Website or intranet, e-mail, online or Web-based training programs, workshops, or other electronic media.*

*The effectiveness of an organization's communications may be demonstrated through one or more mechanisms, as appropriate, such as by acknowledgement or certification by the employee that he has received and understands the organization's standards and procedures, or via a testing method.*

## **Question 6**

*Should Chapter Eight of the Sentencing Guidelines encourage organizations to foster ethical cultures to insure compliance with the intent of regulatory schemes as opposed to technical compliance that can potentially circumvent the purpose of the law or regulation? If so, how would in the organization's performance in this regard be measured or evaluated? How would that be incorporated into the structure of chapter 8?*

## **Response**

The notion of examining an organization's ethical culture is not entirely unique or new in a regulatory scheme. For example, in the securities industry it is not unheard of for the securities regulators to examine the "tone at the top" set by management with regard to the system of financial reporting and internal controls. Thus, even if an organization's standards and procedures are communicated, to the extent technicalities are emphasized over substance, the securities regulators have felt free to criticize that tone. Thus, should senior management fail to set the appropriate tone--and a securities violation has occurred--the securities regulators may point to that evidence to infer the organization's failure to establish adequate internal controls.

Similarly, much of the Organizational Guidelines' comments relate to the effective communication of compliance standards and procedures. Many of these standards and procedures are based on fundamental ethical principles, as the convergence of compliance and ethics is already discernible in the business world. Indeed, the Sarbanes-Oxley Act was, to an extent, an attempt to legislate the creation of ethical cultures within organizations where that convergence had not yet occurred. In addition, the securities regulators have proposed a code of ethics for senior executives and directors for publicly-traded companies, and any waivers of such codes must be disclosed. Encouragement of an ethical culture in the Guidelines seems like the next logical step.

But that step should be taken cautiously.

For example, it may be appropriate to examine the extent management has set the proper "tone at the top" fostering compliance. One element of such a tone could be whether the organization, as part of its effective communications process, has addressed ethics in those communications. To that extent, Comment 3(k)(4) could be amended to include, as another example of effective communications, information or training relating to ethics.

The Guidelines serve as a flexible tool for both regulators and organizations that has thus far fostered the development of successful compliance programs. However, the balance between that flexibility and the structure needed to provide concrete guidance could easily be disrupted by a legally prescribed ethics component. Ethics is about more than simply following a set of legal requirements. It is about the distinction, to paraphrase Justice Potter Stewart, between that which you have a right to do and that which is right to do.

While we fully support the guidelines encouraging the development of an ethics initiative, there is an inherent risk in mandating a program. Once ethics is mandated, it is no longer about ethics, it is about compliance with a requirement. As a result, there is an inherent risk of downgrading the ethics discussion from one about doing right to one about formulaic satisfaction with Guidelines requirements.

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LRN appreciates the opportunity to participate in the Advisory Group's discussion and analysis of the Organizational Guidelines and the preparation of its report to the Sentencing Commission. We hope these comments will be useful.

Sincerely,

Dov Seidman  
Chairman and Chief Executive Officer