Why Comply? Organizational Guidelines Offer a Safer Harbor in the Storm

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I. INTRODUCTION

The Federal Sentencing Guidelines for Organizations have had a significant impact on the way organizations conduct business. These guidelines have been codified in Chapter 8 of the United States Sentencing Commission Guidelines Manual (also referred to as the Federal Sentencing Guidelines for Organizations, hereinafter “FSGO” or “Chapter 8”) and are considered the “gold standard” for evaluating internal corporate compliance programs.1 The Chapter 8 guidelines offer a carrot and stick approach regarding compliance and ethics programs. Organizations that have effective compliance and ethics programs, cooperate with government investigations, and accept responsibility can reduce their potential federal criminal fines by up to 95%. Organizations that tolerate,

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encourage or condone illegal behavior, do not cooperate and do not accept responsibility may have these same fines multiplied by a factor of four. This makes the potential, bottom line impact of compliance and ethics programs an 80:1 swing in what a company may have to pay in federal fines, depending on whether it had good ethics and compliance programs, or bad ethics and compliance programs.2 “In the words of a leading securities law commentator, a general counsel who fails to implement an effective compliance program is guilty of ‘professional malpractice.’”3

One indicator of the guidelines’ impact can be found in the growth of the number of ethics officers since the Chapter 8 guidelines were passed in 1991.4 In 1992, the Ethics Officer Association (EOA) had 12 members, but this organization’s membership has increased exponentially to approximately 1,250 members in 2006.5 The EOA acknowledged the importance of the Chapter 8 guidelines in a 2000 survey of its members, “indicating that the organizational sentencing guidelines influenced many corporations to adopt compliance programs.”6

In 2001, the former chair of the United States Sentencing Commission, Judge Diana E. Murphy, also recognized the importance of the organizational guidelines:

Some believe that the Federal Sentencing Guidelines for Organizations represent a milestone both in federal criminal law and in organizational behavior. Their impact has been wide ranging. They are a real success story for the United States Sentencing Commission in its work to deter crime and encourage compliance with laws. Like any body of law, however, the organizational guidelines may need to be modified as circumstances change. In this tenth anniversary year for these guidelines, practitioners and industry representatives are encouraged to share their thinking about the organizational guidelines and their effect.7

Chapter 8 defines “compliance and ethics programs” as programs “designed to prevent and detect criminal conduct.”8 The Guidelines articulate seven essential areas such a program must embrace in order to be considered for federal fine reductions. These are: (1) establishing standards and procedures to prevent and detect criminal conduct; (2) having high level personnel, with the appropriate resources, access and authority, overseeing the compliance and ethics program; (3) using reasonable efforts to limit individuals with substantial authority from engaging in illegal activity; (4) taking reasonable steps to communicate aspects of the compliance and ethics program, through

4. The EOA.org, Ethics Officer Association (now known as the Ethics & Compliance Officer Association), http://www.theecoa.org/aboutecoa.asp (last visited March 5, 2007).
5. Id. Perhaps also indicative of the guidelines’ force is that in 2005 the Ethics Officer Association changed its name to the Ethics and Compliance Officer Association.
effective training, to the employees and the organization’s governing authority; (5) ensuring the organization’s compliance and ethics program is followed by auditing and monitoring the program on a periodic basis; (6) promoting the compliance and ethics program through incentives for appropriate behavior and sanctions for inappropriate behavior; and (7) taking reasonable steps to respond to criminal behavior and prevent similar misconduct from occurring in the future. 9

9. The complete text of the FSGO definition of an effective compliance and ethics program is as follows:

§8B2.1. Effective Compliance and Ethics Program
(a) To have an effective compliance and ethics program, for purposes of subsection (f) of §8C2.5 (Culpability Score) and subsection (c)(1) of §8D1.4 (Recommended Conditions of Probation - Organizations), an organization shall—

1. exercise due diligence to prevent and detect criminal conduct; and
2. otherwise promote an organizational culture that encourages ethical conduct and a commitment to compliance with the law.

Such compliance and ethics program shall be reasonably designed, implemented, and enforced so that the program is generally effective in preventing and detecting criminal conduct. The failure to prevent or detect the instant offense does not necessarily mean that the program is not generally effective in preventing and detecting criminal conduct.

(b) Due diligence and the promotion of an organizational culture that encourages ethical conduct and a commitment to compliance with the law within the meaning of subsection (a) minimally require the following:

1. The organization shall establish standards and procedures to prevent and detect criminal conduct.

2. (A) The organization’s governing authority shall be knowledgeable about the content and operation of the compliance and ethics program and shall exercise reasonable oversight with respect to the implementation and effectiveness of the compliance and ethics program.

(B) High-level personnel of the organization shall ensure that the organization has an effective compliance and ethics program, as described in this guideline. Specific individual(s) within high-level personnel shall be assigned overall responsibility for the compliance and ethics program.

(C) Specific individual(s) within the organization shall be delegated day-to-day operational responsibility for the compliance and ethics program. Individual(s) with operational responsibility shall report periodically to high-level personnel and, as appropriate, to the governing authority, or an appropriate subgroup of the governing authority, on the effectiveness of the compliance and ethics program. To carry out such operational responsibility, such individual(s) shall be given adequate resources, appropriate authority, and direct access to the governing authority or an appropriate subgroup of the governing authority.

3. The organization shall use reasonable efforts not to include within the substantial authority personnel of the organization any individual whom the organization knew, or should have known through the exercise of due diligence, has engaged in illegal activities or other conduct inconsistent with an effective compliance and ethics program.

4. (A) The organization shall take reasonable steps to communicate periodically and in a practical manner its standards and procedures, and other aspects of the compliance and ethics program, to the individuals referred to in subdivision (B) by conducting effective training programs and otherwise disseminating information appropriate to such individuals’ respective roles and responsibilities.
The Chapter 8 Guidelines came under review in 2002 when the United States Sentencing Commission empanelled a fifteen-person Ad Hoc Advisory Group to analyze the 1991 description of what constituted an effective program to prevent and detect violations. On October 7, 2003, the Ad Hoc Advisory Group presented its recommendations to the United States Sentencing Commission. The Sentencing Commission held public hearings and made some modifications to the recommendations, then sent these amendments of the Chapter 8 Guidelines to Congress on April 30, 2004. These changes became effective on November 1, 2004. Except for mentioning the

(B) The individuals referred to in subdivision (A) are the members of the governing authority, high-level personnel, substantial authority personnel, the organization’s employees, and, as appropriate, the organization’s agents.

(5) The organization shall take reasonable steps—

(A) to ensure that the organization’s compliance and ethics program is followed, including monitoring and auditing to detect criminal conduct;

(B) to evaluate periodically the effectiveness of the organization’s compliance and ethics program; and

(C) to have and publicize a system, which may include mechanisms that allow for anonymity or confidentiality, whereby the organization’s employees and agents may report or seek guidance regarding potential or actual criminal conduct without fear of retaliation.

(6) The organization’s compliance and ethics program shall be promoted and enforced consistently throughout the organization through (A) appropriate incentives to perform in accordance with the compliance and ethics program; and (B) appropriate disciplinary measures for engaging in criminal conduct and for failing to take reasonable steps to prevent or detect criminal conduct.

(7) After criminal conduct has been detected, the organization shall take reasonable steps to respond appropriately to the criminal conduct and to prevent further similar criminal conduct, including making any necessary modifications to the organization’s compliance and ethics program.

(c) In implementing subsection (b), the organization shall periodically assess the risk of criminal conduct and shall take appropriate steps to design, implement, or modify each requirement set forth in subsection (b) to reduce the risk of criminal conduct identified through this process.

Id. at 491-93.

10. The co-author, Paul Fiorelli was privileged to participate as a member of the Ad Hoc Advisory Group. For a complete list of the members of the group, see Ad Hoc Advisory Group on Organizational Guidelines, http://www.ussc.gov/corp/advgrplst.htm (last visited March 5, 2007).


12. UNITED STATES SENTENCING COMMISSION, SENTENCING GUIDELINES FOR UNITED STATES COURTS 2 (no date), available at http://www.ussc.gov/FEDREG/05_04_notice.pdf (last visited March 5, 2007).

The Commission held a public hearing on the proposed amendments in Washington, D.C., on March 17, 2004. After review of hearing testimony and additional public comment, the Commission promulgated the amendments set forth in this notice. On April 30, 2004, the Commission submitted these amendments to Congress and specified an effective date of November 1, 2004.

Id.

possibility of waiving the attorney-client and work product privileges, they were well received by the bar and the government.

These revised guidelines increase the import of compliance and ethics programs at sentencing: “a ‘check the box’ compliance program is theoretically no longer sufficient to secure a sentence downgrade.” The revisions also helped to clarify the existing description of what constitutes an effective program “to prevent and detect” violations of law.

The new Organizational Sentencing Guidelines will bring about a sea change in how compliance programs are designed, implemented and enforced. While the new guidelines structurally maintain the same seven elements of an effective compliance program first articulated in the 1991 guidelines, the new guidelines add more clarity to the program elements, and the standards are tougher.

The promise of a sea change was soon put into question. On January 12, 2005, the Supreme Court in United States v. Booker declared aspects of the sentencing guidelines unconstitutional. Did this “new day” for compliance and ethics programs last less than three months? Should this decision cause budget conscious organizations to stop funding their compliance and ethics initiatives?

In a word—no!

This Article will: (1) provide a brief overview of the Supreme Court cases that presented constitutional challenges to the sentencing guidelines; (2) discuss why organizations should still promote compliance and ethics programs; and (3) analyze changes to the Federal Sentencing Guidelines for Organizations that became effective on

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14. This section appeared in the 2004 and 2005 Guidelines Manuals, but has been removed from the 2006 and subsequent manuals. The 2004 and 2005 Guidelines Manual Section 8C2.5 Commentary, Application Note 12 stated, “Waiver of attorney-client privilege and of work product protection is not a prerequisite to a reduction in culpability score under subdivisions (1) and (2) of subsection (g) unless such waiver is necessary in order to provide timely and thorough disclosure of all pertinent information known to the organization.” U.S. SENTENCING GUIDELINES MANUAL § 8C2.5 cmt. n.12 (2004). The United States Sentencing Commission requested public comment on “review, and possible amendment, of commentary in Chapter Eight (Organizations) regarding waiver of the attorney-client privilege and work product protections;” available at http://www.ussc.gov/FEDREG/fedr0605.htm (last visited March 5, 2007). On May 1, 2006, the Sentencing Commission sent amendments to Congress recommending the commentary on waiver of privilege be withdrawn. A copy of the amendments are available at http://www.ussc.gov/2006guid/FinalUserFrdly.pdf. Because Congress did not amend the recommendation by November 1, 2006, the Sentencing Guidelines position on waiver of privilege effectively reverted to its pre-November 1, 2004, position and is now silent on this as a possible requirement. See also Mary Beth Buchanan, Effective Cooperation by Business Organizations and the Impact of Privilege Waivers, 39 WAKE FOREST L. REV. 587 (2004); Allan Van Fleet, Talking to a Lawyer Could Get Risky: New Guidelines Threaten Attorney-Client Privilege, 20 TEX. LAW. 34 (October 11, 2004).


17. The Supreme Court addressed this issue in consolidating two cases from different circuits. In United States v. Booker, 543 U.S. 220 (2005), the Supreme Court consolidated the Booker and Fanfan cases (hereinafter referred to as the “Booker” decision).

II. THE SUPREME COURT AND THE SENTENCING GUIDELINES

In *United States v. Booker*¹⁹ and *Blakely v. Washington*,²⁰ several key sentencing issues, which had been simmering for almost two decades, combined and boiled over. During the 1980s, '90s, and into the 21st century, both federal and state courts had foundered as they responded to legislative enthusiasm for curbing crime and judicial discretion. Elected bodies used a number of approaches to achieve these controls. “Solutions” included variations of mandatory sentences, sentencing “enhancements,” and sentencing guidelines that legislatures and Congress instructed courts to follow. A constant barrage of refinements to sentencing left judges spinning and courts divided. It seemed each time one hole was plugged, a leak sprung elsewhere. These all came to a head as mandatory state²² and federal sentencing guidelines²³ were challenged at the United States Supreme Court. Especially with the Court’s opinion in *Booker*, the impact of the Court’s struggle with the critical issues of judicial discretion and a defendant’s right to a jury trial, as implicated in the sentencing process, is apparent.

In both the *Blakely*²⁴ and the *Booker*²⁵ cases, the Court addressed whether a defendant has the right to a jury trial with respect to information that could impact sentencing under sentencing guidelines schemes? These cases have a direct impact on those states that had adopted a formal guidelines system.²⁶ The federal courts had operated with guidelines since the sentencing guidelines for individuals were enacted in 1987. Consequently, the cases challenged the very essence of sentencing processes by which trial judges approached sentencing under guidelines systems. This involved gathering information from both defense and prosecution, holding any necessary hearings and determining facts, such as with respect to criminal history, and factors such as harm to the victim and the amount of financial losses or quantity of drugs. The judge then applied the guidelines to the factual conclusions reached.

²¹. For example, in the wake of the death of a promising NBA draft pick and crack user, in 1986 Congress enacted legislation that required a mandatory five-year sentence for selling five grams of cocaine, while the same punishment for powder cocaine sales needed to involve a 500 gram quantity. Stephen J. Dubner & Steven D. Levitt, *Up in Smoke; Whatever Happened to Crack Cocaine?*, N.Y. TIMES, Aug. 7, 2005 (Magazine), at 17.
²⁵. For a discussion of the *Booker* and *Fanfan* cases and their impact, see id. at 1220-27.
²⁶. Regarding the impact that *Booker* had on the Ohio Sentencing Guidelines and criminal justice system, see Sharon Coolidge & Dan Horn, *Judges Get More Leeway*, CINCINNATI ENQUIRER, Feb. 28, 2006, at 1A. Post-*Booker*, in *State v. Foster*, 845 N.E.2d 470 (Ohio 2006), for instance, the Ohio Supreme Court held unconstitutional felony sentencing statutes to the extent that they required judicial fact finding before a judge imposed a sentence that was greater than the statutory maximum, as defined by the Supreme Court in *Apprendi v. New Jersey*, 530 U.S. 466 (2000). The *Foster* decision, finding Ohio’s state guidelines system unconstitutional, “means hundreds, possibly thousands, of criminal defendants soon will return to courts across the state to be sentenced again, this time without the judge consulting the guidelines.” Sharon Coolidge & Dan Horn, *Judges Get More Leeway*, CINCINNATI ENQUIRER, Feb. 28, 2006, at 1A.
Ralph Howard Blakely challenged just such a process; the trial court had increased his sentence for kidnapping based on a judicial finding by a preponderance of evidence that Blakely had committed the offense with deliberate cruelty. Under the Washington State guidelines, such findings could increase the penalty beyond the standard range for the offense, as was the case here. The sentence imposed on Mr. Blakely was 37 months longer than the standard maximum for the underlying offense.

The Supreme Court used the opportunity in Blakely to expand on its ruling in Apprendi v. New Jersey. While Apprendi seemed to define the right to a jury in scenarios where a sentence could exceed the maximum penalty range for an offense, as the Court explained in Blakely, "[t]he ‘statutory maximum’ for Apprendi purposes is the maximum sentence a judge may impose solely on the basis of the facts reflected in the jury verdict or admitted by the defendant." Increasing a sentence beyond the standard range for an offense, based on information or evidence not presented and determined by a jury beyond a reasonable doubt, violated a defendant’s Sixth Amendment right to a jury trial. The Justice Department had filed an amicus brief in Blakely, and even before the decision, the department was circling its wagons. The Court’s observation, that in its opinion the federal sentencing guidelines were not before the Court in that case, offered little solace. Clearly, Blakely was a thunderstorm on the horizon.

Just months later the same issue was before the Supreme Court Justices in Booker and Fanfan, but this time with respect to the federal sentencing scheme. Freddie J. Booker found himself facing hefty penalties that the federal guidelines had available for possessing large amounts of crack cocaine. Although a jury found him guilty of having crack at the 50 gram offense level, as well as having an additional 92.5 grams in his duffel bag, a post trial hearing revealed this was a drop in the bucket when compared to his actual “stash.” Pursuant to the federal guidelines, after trial, the judge determined that Booker had possessed a substantially higher amount by finding that he had an additional 566 grams of crack. This triggered an enhancement to 30 years to life, from a potential “... sentence of 17.5-21.8” years; Booker received 30 years.

Predictably after Blakely, the Booker majority held that the federal guidelines requirement that judges, without jury participation, consider and determine certain factors

27. Blakely, 542 U.S. at 299-300.
28. Id. at 299.
29. Id. at 300.
32. Id. at 305 n.9.
33. Id.
34. Duncan Fanfan, in the case consolidated with Booker, appealed his sentence for conspiracy to distribute and to possess with intent to distribute at least fifty grams of cocaine, of which a jury convicted him. Although the judge held a post trial sentencing hearing at which the judge found facts that could have evoked a 15-16 year sentence, the trial judge had the benefit of the just decided Blakely decision and “declined” to apply the guidelines, instead limiting the sentence to a considerably lesser range available, based upon the jury verdict. United States v. Booker, 543 U.S. 220, 229 (2005).
35. Id. at 227.
36. Id.
37. Id.
38. Id.
and impose a prescribed sentence, violated the defendant’s right to a jury trial. Unlike *Blakely*, the Court then addressed the remedy. Because it was the mandatory nature of the guidelines that was a critical problem, the Court invalidated Title 18 U.S.C.A. § 3553(b)(1). This section required judges to follow the guidelines, although certain circumstances justified a departure. The Court also struck a second, related provision setting out the standard of review for sentencing determinations. In spite of the assault against them, the guidelines themselves survived, albeit as advisory and not obligatory.

Clearly, the mandatory nature of the federal sentencing guidelines has met its demise, at least for individuals. Is there any rationale for organizations to remain vigilant about their compliance and ethics programs?

There are three good reasons *Booker* should not matter for the organizational guidelines. First, there is serious doubt whether the Sixth Amendment right to a jury trial extends to organizational defendants. Because *Booker* involved an individual defendant, its holding is dicta for corporations, partnerships, and the like. And even if *Booker* is extended to the organizational guidelines, post-*Booker* individual sentencing practice indicates that the decision has had little impact. Lower court decisions show judges calculating a sentence under the guidelines and giving that sentence heavy weight, yielding sentencing patterns similar to those pre-*Booker*.

III. IMPACT OF BOOKER ON COMPLIANCE AND ETHICS PROGRAMS

Even if the logic and the holding of the Supreme Court in *Booker* also apply to corporations, organizations should still consider compliance and ethics programs to be good investments. As it pertains to involvement in the criminal justice system, there are

39. *Booker*, 543 U.S. at 244.
40. For a more comprehensive discussion of the remedy the Court employed in *Booker*, see Tracey & Fiorelli, *supra* note 24, at 1223-26.
42. *Booker*, 543 U.S. at 258.
43. Id. at 259.
44. Id. at 259-60 (citing 18 U.S.C.A. § 3553(a)(4)).
46. An interesting question is whether corporations have a sixth amendment right to a jury trial—the central concern in the recent Supreme Court cases. This is a little unclear. The prevailing view is that they probably do have that right, but it has not been completely settled. As a practical matter, the Justice Department will urge the guidelines to be applied and the courts will look at them as a useful model where they have not had one before and they will tend to apply them.

47. Importantly, organizations can discourage criminal behavior altogether by using strong controls and safeguards that an effective compliance program can provide. See, e.g., Wellner, *supra* note 15, at 508-15 (discussing the “incentives” and “disincentives” of such programs).
two critical reasons why good ethics (programs) are good business: (1) they can reduce potential fines, and (2) they can prompt the Department of Justice to decline or defer prosecution.48

How drug defendants are sentenced under the federal guidelines would be a little note in the boardroom of America if not for one part of the guidelines. The concept of corporate compliance programs was first formalized when, in November 1991, the guidelines for organizational sentencing were revised to permit more lenient sentencing for organizations with an “effective program to prevent and detect violations of law.”49

Now that the federal sentencing guidelines, including the Chapter 8 organizational guidelines, are no longer mandatory in imposing fines, will judges still give credit to organizations with effective compliance and ethics programs? While it is impossible to predict, the following indicators point to why effective compliance and ethics programs will be as important post-

Booker as they were pre-

Booker.

When applied to individuals, the sentencing guidelines have created numerous conflicts among Congress, the judiciary, prosecutors and defendants. However, the organizational guidelines have not received much criticism. “The sentencing guidelines for individuals have always been controversial. In contrast, the corporate guidelines have been well received. I do not see an incentive for judges to depart much from the corporate guidelines and my prediction is that they will not.”50 In addition, “[a]s a practical matter, the Justice Department will urge the guidelines to be applied and the courts will look at them as a useful model where they have not had one before and they will tend to apply them.”51

The Chapter 8 guidelines are entrenched and have become the acknowledged protocol for organizations. It has also become the standard that federal departments will apply in analyzing an organizational commitment to compliance:

A well-developed and effectively implemented corporate compliance program once may have been considered an expensive luxury that business executives believed put them on the cutting edge of best business practices. Now, such programs are critical—not only to meet the specific dictates of the Sarbanes-Oxley Act [SOX] that took effect in November—but also, under the newly enacted corporate sentencing guidelines, to mitigate consequences to a company when employees’ malfeasance subjects the corporation to criminal prosecution. Indeed, a wide array of government and quasi-government rules and programs explicitly provide that the establishment and effective use of compliance programs is a prerequisite for lenient treatment of businesses whose

48. See id. at 509 & n.32 (citing Frank O. Bowman, III, Drifting Down the Dnieper with Prince Potemkin: Some Skeptical Reflections About the Place of Compliance Programs in Federal Criminal Sentencing, 39 WAKE FOREST L. REV. 671, 678 (2004) (discussing the dramatic impact on a corporate fine an effective compliance program and self-reporting the criminal behavior to the authorities can have)).
50. Project: Corporate Counsel (Compliance Readiness), supra note 46, at 36.
51. Id.
executives run afoul of the law.52

Even after Booker, it is likely the Organizational Guidelines will maintain their vitality. First, they remain just that—guidelines for federal judges. As such, they are relevant to whether a sentence is “unreasonable” for purposes of appellate review.53 In this review the federal appellate courts now consider statutory criteria as well as the guidelines’ factors.54

Another key reason why federal judges, post-Booker, are likely to consider and apply the current Chapter 8 definition of an “effective compliance and ethics program” in sentencing is that Booker requires the courts to reference the federal guidelines prior to sentencing. The Court wrote: “The district courts, while not bound to apply the Guidelines, must consult those guidelines and take them into account when sentencing. See 18 USC §§3553 (a)(4), (5) (Supp. 2004).”55 These Guidelines include evaluating what fine, if any, the court should impose on the defendant, after considering whether the organization had an effective program to prevent and detect violations of law.56

One question is, “What does it mean to ‘consult’ and ‘take into account’ when sentencing?” Will judges give a cursory glance at the guidelines and quickly disregard them, or will they give strong deference to the guidelines and only vary from them in unusual circumstances? The Department of Justice has made its position clear. In February 10, 2005, testimony, Christopher A. Wray, Assistant Attorney General, Criminal Division, to the Subcommittee on Crime, Terrorism and Homeland Security Committee on the Judiciary, United States House of Representatives, stated:

In order to comply with these requirements, the Department [of Justice] has issued guidance to the field instructing prosecutors to recommend guideline sentences in all but the rarest cases, and to recommend guideline departures only when justified by the facts and the law. We will also ask the sentencing court to consult the guidelines and to calculate a guideline sentence prior to other considerations as several courts, including the Second and Fourth Circuits, have directed.57

55. Booker, 543 U.S. at 264.
56. Another reason is the potential career jeopardy and political impact of imposing sentences more lenient than the Guidelines would direct. The PROTECT Act, Pub. L. No. 108-21, § 401(b)(1), 117 Stat. 650, 660 (2003), requires the Sentencing Commission to review mandatory self-reports from judges who have departed downward from the Guidelines and report the same to Congress. “Such oversight could severely impair a judge’s later nomination and appointment to another judgeship, with obvious and considerable impact on a judicial career.” Jared I. Heller, Comment, Do Judges Need Protection?: Legislative And Judicial Responses to the Protect Act’s Feeney Amendment, 68 ALB. L. REV. 755, 775 (2005); see Tracey & Fiorelli, supra note 24, at 1203 (discussing the history of the PROTECT Act and its impact on the guidelines). Congress formulated its efforts to “shield” judges from the PROTECT Act by proposing the Judges Act. See Heller, Comment, supra at 758.
57. FEDERAL SENTENCING AFTER BOOKER 11 (2005), http://judiciary.house.gov/media/pdfs/Wray021005.pdf (last visited March 5, 2007). The Second and Fourth Circuits were citing the United States v. Crosby, No. 03-1675, 2005 WL 240916 (2d Cir. Feb. 2, 2005), and United States v. Hughes, No. 03-4172, 2005 WL 147059 (4th Cir. Jan. 24, 2005), respectively. Indeed, the
At least one court concurs with the Department of Justice’s direction. “[T]he Guidelines are not casual advice, to be consulted or overlooked at the whim of the sentencing judge.” 58 Others see the federal guidelines “as the primary reference point for district judges to institute Congress’ sentencing objectives,” 59 believing they are “bound to the Guidelines in all [but] the most extreme exceptions.” 60

In considering sanctions, are federal judges likely to disregard the FSGO? It is a system that has received almost universal acclaim. If they ignored these guidelines, would they substitute their own definition of “an effective compliance and ethics program?” This is improbable, especially in light of their limited judicial expertise about sentencing organizations. The number of organizational cases is small compared to the number of individual cases. 61

Non-fine sanctions that federal judges are likely to impose may depend on an organization’s size. If the organization has 50 or more employees, pre-Booker guidelines required district court judges to impose probation in lieu of no supervision. Section 8D1.1 states “(a) The Court shall order a term of probation: (3) if, at the time of sentencing (B) the organization does not have such a (compliance) program.” 62 Post-Booker, this section’s requirement that a federal judge “shall order a term of probation” will effectively be “may order a term of probation.” If probation is ordered, section 8D1.4 of the guidelines discusses possible probation conditions. These include a requirement that the organization develop and implement an effective ethics program. “(1) The organization shall develop and submit to the court an effective compliance and ethics program consistent with Section 8B2.1 (Effective Compliance and Ethics Program).”

Justice Department directed prosecutors to “take all steps necessary to ensure adherence to the Sentencing Guidelines.” Memorandum from James Comey, Deputy Attorney General, to all federal prosecutors, Department Policies and Procedures Concerning Sentencing (Jan. 28, 2005), available at http://sentencing.typepad.com/sentencing_law_and_policy/files/dag_jan_28_comey_memo_on_booker.pdf. Comey in this memorandum . . . instructed prosecutors to do the following: to continue to charge and pursue the most serious readily provable offenses, to seek sentences pursuant to the Guidelines in all but the most extreme cases, to oppose all sentences below the Guidelines range, and to adhere closely to the reporting requirements set forth in the United States Attorney's Manual relating to unfavorable decisions.


58. United States v. Crosby, 597 F.3d 103 (2d Cir. 2005).


60. Id. at 1119. The Sixth Circuit even requires that judges “apply the Guidelines much as they existed before Booker and has been very restrictive in what it will allow trial judges to consider.” Id. at 1121 (citing United States v. Davis, 397 F.3d 340, 346 (6th Cir. 2005)).

61. According to the 2005 Annual Sourcebook of Federal Sentencing Statistics, Table 1, available at www.uscc.gov/ANNRPT/2005/table1.pdf (the most recent source of statistics currently published), federal judges dealt with 72,462 cases in which at least one guideline applied. During that same year, there were only 187 federal cases dealing with organizations. There were 45 organizational cases analyzed between October 1, 2004 and January 11, 2005 (pre-Booker), Table 53, www.uscc.gov/ANNRPT/2005/Table53_pre.pdf (last visited Mar. 5, 2007), and 142 organizational cases analyzed between January 12, 2005 and September 30, 2005, Table 53, www.uscc.gov/ANNRPT/2005/Table53_post.pdf (last visited Ma. 5, 2007).


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Instead of waiting for a compliance program to be imposed on them as a condition of probation, organizations should be proactive and implement these programs in order to reduce fines, avoid probation, and possibly even avoid prosecution.

There are not many organizational cases prosecuted per year, and in 2003 none of the 200 organizational defendants received credit for an effective compliance program. Instead of dealing with the expense and negative publicity of defending themselves in open court, organizations would prefer that the Department of Justice decline or defer prosecution. Compliance and ethics programs can be an integral part in the Department’s decision whether to prosecute, decline prosecution or agree to defer prosecution of an organization:

If the corporation admits to criminal wrongdoing, the prosecution is delayed for some period of time, during which, the corporation must comply with the terms set forth by the DOJ in the agreement. If the corporation does comply, the criminal charge is dismissed. Otherwise, the prosecution goes forward and the corporation’s admission of guilt can be used as evidence against it. This approach addresses the issue of corporate wrongdoing while providing a second chance for companies that truly want to remedy the misconduct.

In order to promote clarity and consistency within the Department of Justice, in 1999, then-Deputy Attorney General Eric Holder issued a memorandum to provide

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63. Id. § 8D1.4(c)(1).
federal prosecutors guidance about when to charge organizations. By both defining and articulating the “rules of the game,” the Department of Justice has the ability to not only influence the culture within an organization, but also an entire industry:

The Holder Memorandum further indicates that the benefits of charging corporations include: 1) the government’s ability to change the behavior of the particular corporation under investigation; and 2) the greater ease in “preventing, discovering, and punishing white collar crime.” The decision to charge may also have a deterrent effect on the entire business community. For instance, if certain conduct is deemed inappropriate or illegal during the course of an investigation, the surrounding corporate community is more likely to take immediate action to modify and correct that practice rather than continue with the illegal conduct and risk prosecution of the company.

Mr. Holder’s successor, Deputy Attorney General Larry Thompson, modified this memo in 2003. “Principles of Federal Prosecution of Business Organizations,” also known as the “Thompson Memo”) consisted of nine factors for federal prosecutors to consider when deciding whether the Department of Justice should charge an organization. The nine factors are: (1) “the nature and seriousness of the offense;” (2) “the pervasiveness of the wrongdoing within the [organization];” (3) “the history of similar [mis]conduct;” (4) “the timeliness and voluntary disclosure of wrongdoing,” plus the organization’s “willingness to cooperate,” including waiving the “attorney-client and work product protections;” (5) “the existence and adequacy of a [corporate] compliance program;” (6) “remedial actions,” to either improve or implement a compliance program, “terminate wrongdoers,” replace responsible managers, and “pay restitution;” (7) the “collateral consequences,” including a consideration of the “disproportionate harm” that may arise from the prosecution; (8) “the adequacy of prosecution of individuals” who are criminally liable; and (9) the adequacy of civil and regulatory remedies.

In analyzing the existence and adequacy of a corporate compliance program, “[t]he fundamental questions any prosecutor should ask are: ‘Is the corporation’s compliance program well designed?’ and ‘Does the corporation’s compliance program work?’” Regarding the first question, the Thompson Memo states:

While the Department recognizes that no compliance program can ever prevent all criminal activity by a corporation’s employees, the critical factors in evaluating any program are whether the program is adequately designed for maximum effectiveness in preventing and detecting wrongdoing by employees

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68. Conden, supra note 66, at 407-08 (internal citations omitted); see also Holder Memo, supra note 67, § I.B.
70. Id. § II(A).
71. Id.; see also Kathryn Keneally, White Collar Crime: Corporate Compliance Programs: From the Sentencing Guidelines to the Thompson Memorandum—And Back Again, 28 CHAMPION 42, 43 (June 2004) (discussing the “role of a corporate compliance program under the Thompson Memorandum”).
and whether corporate management is enforcing the program or is tacitly encouraging or pressuring employees to engage in misconduct to achieve business objectives.\footnote{72}{\textit{Thompson Memo, supra} note 69, § VII.B.}

Prosecutors will consider whether the program was a “paper program” deserving no credit, or whether it was designed to give the organization the greatest chance of preventing and detecting violations. The extent to which effective compliance programs have snatched corporations from the jaws of prosecution is not readily ascertainable; the Justice Department has not disclosed that information publicly.\footnote{73}{\textit{Wellner, supra note 15, at 517.}}

Answering the second question about whether the compliance program worked may appear easy, but it requires a more intensive review. The easy answer to whether the compliance program worked would be “no;” if it had worked, there would not have been a violation that the Department of Justice was investigating. As is often the case, the easy answer is not necessarily the correct one. Just because the Department of Justice is investigating a potential violation, it does not mean the organization’s compliance program is by definition “ineffective.” The organization may have an excellent corporate compliance program that actually detected the violation. The organization may have conducted a thorough investigation, voluntarily disclosed the information to the Department, and fully cooperated with the government. While the organization may not have prevented the potential violation, it still deserves significant credit for its detection and cooperation.\footnote{74}{\textit{Boeing} is one such example of a company that had an extraordinary program yet could not escape the impact of legal and ethical problems employees generated. \textit{Id. at} 517-18.}

Even if the organization failed to prevent or detect the violation, a small number of problem employees, or problem processes, should not preclude a company from receiving consideration to decline or defer prosecution.\footnote{75}{\textit{In certain limited circumstances, it may not be appropriate to impose liability upon a corporation, particularly one with a compliance program in place, under a strict \textit{respondeat superior} theory for the single isolated act of a rogue employee.” \textit{Id.} at 517-18.}} Even if prosecuted, an organization’s program should weigh heavily in the charging and sentencing process. In fact, the Thompson Memo directs prosecutors to consider whether a company had an effective compliance program in “negotiating plea agreements” and “reaching a decision as to the proper treatment of a corporate target.”\footnote{76}{\textit{Thompson Memo, supra} note 69, § IV.A.}

\begin{itemize}
\item \textbf{Note 72}: Thompson Memo, \textit{supra} note 69, § VII.B.
\item \textbf{Note 73}: Wellner, \textit{supra} note 15, at 517.
\item \textbf{Note 74}: Boeing is one such example of a company that had an extraordinary program yet could not escape the impact of legal and ethical problems employees generated. \textit{Id. at} 517-18.
\item \textbf{Note 75}: For a discussion of the federal vicarious liability standard for corporations with respect to criminal liability, see Pamela H. Bucy, \textit{Corporate Ethos: A Standard for Imposing Corporate Criminal Liability}, 75 M\textsc{inn.} L. \textsc{rev.} 1095, 1102 (1991). \textit{see also} \textsc{Developments in the Law—Corporate Crime: Regulating Corporate Behavior Through Criminal Sanctions}, 92 \textsc{Harv. L. Rev.} 1243, 1247-75 (1979) (discussing criminal liability standards for corporate offenses committed by the corporation or by individuals). The Thompson Memo, \textit{supra} note 69, also discusses prerequisites for liability of corporations: corporate agent’s acts must “(i) [be] intended, at least in part, to benefit the corporation.” \textit{Id.} § 1.
\item \textbf{Note 76}: Thompson Memo, \textit{supra} note 69, § IV.A.
\item \textbf{Note 78}: Thompson Memo, \textit{supra} note 69, § II.
\end{itemize}
The Thompson Memo recognizes that not all areas of the Department of Justice will necessarily give credit for compliance programs, or the other eight factors. The Antitrust Division of the Department of Justice is a good example of a division that has developed its own policy for declining prosecution. The Antitrust Division’s Corporate Leniency Program is designed to break up antitrust conspiracies by rewarding (or at least not punishing) the first violator who brings the violation to their attention.

In August 1993, the Division revised its Corporate Leniency Program to make it easier and more attractive for companies to come forward and cooperate with the Division. Three major revisions were made to the program: (1) amnesty is automatic if there is no pre-existing investigation; (2) amnesty may still be available even if cooperation begins after the investigation is underway; and (3) all officers, directors, and employees who cooperate are protected from criminal prosecution.\footnote{James M. Griffin, Deputy Assistant Attorney General, U.S. Department of Justice Antitrust Division, A Summary Overview of the Antitrust Division’s Criminal Enforcement Program at the American Bar Association Section of Antitrust Annual Meeting (Aug. 12, 2003), \textit{available at} http://www.usdoj.gov:80/atr/public/speeches/201477.htm.}

The Antitrust Division recognizes the role that an antitrust compliance program can play in detecting the violation,\footnote{Even when compliance programs fail to prevent antitrust offenses from occurring, they have proven to be very effective in terms of identifying violations. Many of the Division’s recent amnesty applications were initiated as a result of early detection by the firm’s antitrust compliance program. In these cases, the applicants understood that early detection gave them a head start in the race for amnesty, and they were unwilling to gamble that the activity would not be detected by another company who would take advantage of the Amnesty Program. Gary R. Spratling, Deputy Assistant Attorney General, Antitrust Division, U.S. Department of Justice, Making Companies an Offer They Shouldn’t Refuse: The Antitrust Division’s Corporate Leniency Policy—An Update, Remarks at the Bar Association of the District of Columbia’s 35th Annual Symposium on Associations and Antitrust, (Feb. 16, 1999), \textit{available at} http://www.usdoj.gov/atr/public/speeches/2247.htm.}

The McNulty Memo, which addresses the now commonplace practice of line prosecutors seeking waivers of the attorney-client and work product privileges as an element of the company’s cooperation with a government investigation, supersedes the guidance provided in prior memoranda issued by McNulty’s predecessors, Robert McCallum and Larry Thompson. Although this new guidance presents a relatively abrupt, if long overdue amendment to the Justice Department’s policy concerning waiver requests, it offers only mild assurance that the attorney-client privilege will, in practice, be treated as what the Department itself acknowledges is “one of the oldest and most sacrosanct

\footnote{Memorandum from Paul J. McNulty, Deputy Attorney General, U.S Department of Justice, To Heads of Dep’t Components, United States Attorneys (2006), \textit{available at} http://www.usdoj.gov/dag/speech/2006/mcnulty_memo.pdf [hereinafter McNulty Memo].}
privileges under U.S. Law."

The Department of Justice, like the U.S. Sentencing Commission, seems to be rethinking its position on requiring organizations to waive the attorney-client privilege. Just as the Sentencing Commission dropped waiving the attorney-client privilege for an organization to be considered for receiving fine reductions, the Department of Justice has decreased the demand for waiving attorney-client privilege for an organization to be considered for a deferred prosecution agreement. The McNulty Memo also clarified the Department of Justice’s position about organization’s paying the legal fees for its executives. "Prosecutors generally should not take into account whether a corporation is advancing attorney’s fees to employees or agents under investigation and indictment." This revision was foreseeable, especially in light of Judge Lewis A. Kaplan’s decision against this practice, in United States of America v. Stein.

U.S. District Court Judge Lewis A. Kaplan of the Southern District of New York held that the U.S. government violated the Fifth Amendment right to a fair trial and the Sixth Amendment right to effective assistance of counsel by pressuring accounting firm KPMG into not paying the legal fees of individual employees and breaching a fee agreement with one person.

Allowing organizations to maintain the attorney-client privilege and honor its commitments to reimbursing its executive’s legal expenses, make following all of these Department of Justice memoranda more attractive to companies.

Even after Booker, the possibility of fine reductions and prosecutorial declinations create a strong incentive for organizations to invest in compliance and ethics programs. After all, Congress may make only modest changes in the guidelines, or perhaps it is more likely—at least during the 2006-2008 election cycle—that it may choose to accept the status quo for now. However, clearly organizations must be attuned to new developments and strategies that will deal effectively with them. As Justice Breyer stated in Booker, “the ball now lies in Congress’ court,” and the question will be what Congress does next.

IV. REVISED GUIDELINES

The prospect of not being prosecuted coupled with the possibility of decreased fines if an organization is prosecuted are two excellent reasons for organizations to follow the revised organizational guidelines, even post-Booker. Part IV of this Article will address

83. See supra note 14 and accompanying text.
84. McNulty Memo, supra note 81, at 11.
86. John O. Cunningham, Department of Justice’s Policy on Attorney Fees is Ruled Unconstitutional, St. LOUIS DAILY RECORD, July 20, 2006.
87. For a discussion of possible approaches that Congress could take with respect to the guidelines, see Tracey & Fiorelli, supra note 24, at 1227-33. See also Frank O. Bowman, III, Beyond Band-Aids: A Proposal for Reconfiguring Federal Sentencing After Booker, 2005 U. CHI. LEGAL F. 149, 150 (2005).
some of the major changes that became effective on November 1, 2004, that organizations should be integrating into their compliance and ethics programs.

A. A New Home for Compliance and Ethics Programs

The first change that is immediately noticeable about the revised guidelines is its placement within Chapter 8. Between 1991 and 2004, an interested party had to be part-detective, part-bloodhound to find the definition of an effective program to prevent and detect violations, which was buried in the Guidelines Manual section 8A1.2 Commentary Application Note 3(k). “In order to emphasize the importance of compliance and ethics programs and to provide more prominent guidance on the requirements for an effective program, the amendment elevates the criteria for an effective compliance program set forth in the Commentary to section 8A1.2 . . . into a separate guideline.”89 The new home for these minimum requirements for an effective compliance and ethics program is section 8B2.1.

B. Incorporating “Ethics” into the Guidelines

Another major change in the FSGO is the Commission’s somewhat controversial inclusion of the word “ethics” in the revised guidelines.90

While many letters encouraged the Commission to include the concept of “ethics” along with compliance in any Guidelines revisions, the support was not universal. Some even questioned whether the Commission had any authority to require or even encourage ethics programs, in order to receive a credit against penalties. If the organizational sentencing guidelines did require “ethics”, which “ethics” would it be? Would these new ethics-focused guidelines punish, or fail to reward, organizations that were not on the leading edge of ethics? These questions were carefully considered by the Ad Hoc Advisory Group, which did not include the word “ethics” in its proposal to the Commission. Nonetheless, after considerable discussion, the Commission incorporated the concept of “ethics” into its amendments sent to Congress on May 1, 2004.91

“Ethics” has been used in two distinct ways in the revised Chapter 8 Guidelines: (1) compliance and ethics “programs,”92 and (2) “otherwise promote an organizational culture that encourages ‘ethical’ conduct and a commitment to compliance with the law.”93 The new terminology defines a compliance and ethics program as “a program designed to prevent and detect criminal conduct.”94 While the revised guidelines may
have an organization arrive at the same place (to prevent and detect criminal conduct) as
the old guidelines, including the concept of “ethics programs” is more than just a
symbolic gesture. By repeatedly mentioning “ethics programs,” the United States
Sentencing Commission has effectively recognized that compliance and ethics initiatives
have evolved within many organizations.

C. Compliance and “Ethics” Programs

When the Chapter 8 Guidelines were instituted in 1991, many organizations were
struggling with implementing basic compliance programs. What became known as the
“seven minimum requirements” to an effective program to prevent and detect violations
became the milestones that organizations used to develop their programs. Many
organizations simply complied with these basic requirements, but some went further,
migrating towards “ethics programs.” While compliance programs may be effective in
conveying the legal minima, ethics programs tend to go further, often-times addressing
issues surrounding values, integrity and what an organization “should” do to promote an
ethical culture, not what it “must” do to avoid fines and imprisonment.95

The Ad Hoc Advisory Group of the Sentencing Commission recognized that
organizations might be tempted to have a “paper” compliance program in order to
improve their chances of not being prosecuted, or to receive fine reductions, if they were
convicted of an offense. This point was demonstrated during one of the Ad Hoc Advisory
Group’s Public Hearings, in which a commentator stated, “It is critical to note that Enron
had a fully compliant ethics program. I would argue compliant on paper and not in
reality.”96 While it might be debatable whether Enron would have satisfied the due
diligence requirement of the former guidelines, Enron did have many of the indicators of
an “effective program to prevent and detect a violation.”

While Enron may have facially met the legal minimum, it is doubtful whether it
would have met the existing standard of due diligence, even before the
amendments. Fortunately, or unfortunately, for companies like Enron, on May
1, 2004, the [United States Sentencing] Commission sent proposed changes to
Congress that would make it even clearer that companies like Enron would
never receive any credit for a token, or paper, compliance program.97

D. Promoting an Ethical Culture

The Chapter 8 amendments included section 8B2.1(a)(2), which stated that in order
for a compliance and ethics program to be considered effective, it shall “otherwise
promote an organizational culture that encourages ethical conduct and a commitment to

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95. For an example of a values related statement, see Johnson & Johnson’s Credo,
96. Public Hearing Held by the Ad Hoc Advisory Group on Organizational Sentencing Guidelines 60
(2002) (Testimony of Dr. Stuart Gillman, former President of the Ethics Resource Center), available at
97. Fiorelli, supra note 6, at 567-68. The Ad Hoc Advisory Group’s proposals were modified by the
United States Sentencing Commission and sent to Congress on April 30, 2004. Because they were unchanged
by Congress, the amendments became effective on November 1, 2004.
compliance with the law.” As previously mentioned, the term “ethical conduct” was not included in the Ad Hoc Advisory Group’s original recommendations, but was later added by the Sentencing Commission after it held its own public hearings.98 Organizations must now try to identify what actions will help develop a culture that promotes ethical conduct. Some of the key factors several authors identify are: (1) the employees’ perception that the organization has “shared values;” (2) the “tone” of the organization; and (3) the system of communication within the organization.99 Shared values have been defined as “the shared set of norms and beliefs that guide individual and organizational behavior.”100 Johnson & Johnson’s response to a crazed killer, who replaced Tylenol with cyanide, is often cited as an example of how shared values can work effectively within an organization.

The “Tylenol decision,” then, is best understood not as an isolated incident, the achievement of a lone individual, but as the reflection of an organization’s culture. Without a shared set of values and guiding principles deeply ingrained throughout the organization, it is doubtful that Johnson & Johnson’s response would have been as rapid, cohesive, and ethically sound.101

The organization’s “tone” is also critical in promoting a culture of ethical conduct. Much has been written about the “tone at the top” and its crucial role in an ethical organization. For example, if top management takes a zero tolerance policy for violations, all others will follow, or eventually leave (or be forced to leave) the organization.

While necessary, setting the tone at the top in itself may be insufficient to prompt an ethical culture. First, like a game of “post office,” executive communications may be lost or diluted in trickling down to lower levels. While rank and file employees may have some anecdotal familiarity with what is happening in the executive suites, they take their daily cues from their co-workers and immediate supervisors.102 “Leaders at every level serve as role models, and employees have more daily contact with their supervisors than they do with executive leaders.”103 Organizations must be concerned not only about the “tone at the top,” but they must also be aware of the “tone at the middle” and the “tone at the bottom” of the organization.104

The third consideration for promoting a culture of ethical conduct—having a system of communication, has several sub-factors: (1) the opportunity and frequency in discussing compliance and ethics issues, (2) employee willingness to bring bad news forward, (3) managerial follow-through, and (4) a system for rewarding good behavior.

98. See supra note 91 and accompanying text.


100. Treviño et al., supra note 99, at 131-32.
102. Treviño et al., supra note 99, at 141.
103. Id.
Do employees discuss ethics during training, monthly meetings, or at the lunch table? Is management receptive to these discussions, or are they merely tolerated as an oddity? The answer to these questions will help in developing a sense of the organization’s culture. “One of the ways ethics and values get ‘baked into’ the corporate culture is to make these sorts of discussions the norm. These open discussions of ethics and values should help develop a trusting environment in which employees feel comfortable seeking guidance or reporting problems.”

How comfortable do employees feel in bringing bad news forward? Most employees would prefer to live in a “fools paradise,” ignorant of violations, either legal or ethical. Unfortunately, sometimes this information falls in their laps. The question becomes, what do they do with the information once they become aware of it?

Even though it may not have been our fault, we now know something we wish we did not. What do we do when we have observed our colleagues, maybe even our friends at work, engaged in improper or illegal activity? If we report the incident, will our careers become “ethical road kill” on the corporate highway of life? Companies with a good corporate culture will understand the difficulty employees face in this situation. These companies will develop an environment of trust in which employees will have the opportunity and feel comfortable reporting bad news.

Organizations that foster this open environment will be doubly rewarded. First, they will be better situated to convince a prosecutor not to prosecute, or a judge to reduce their potential fine. Second, “[O]rganizations that respect their employees, listen to their concerns, and provide them the resources to perform their jobs ethically will be better companies in the long run. Morale will improve and there will be fewer violations.”

The final factors to consider in developing an ethical culture deal with follow-through and rewarding ethical conduct. A study by Linda Klebe Treviño et al., noted that “[t]he more that employees in our study perceived the organization to be following through, the more positive were all of the outcomes.” The need to see follow-through is also consistent with whistleblowers’ fear of managerial inaction. “In a 1981 report entitled ‘Whistleblowing and the Federal Employee: Blowing the Whistle on Fraud, Waste, and Mismanagement,’ MSPB [Merit System Protection Board] noted that while employees feared retaliation for blowing the whistle, a greater hindrance to whistleblowing was the belief that nothing would be done to correct the problem.”

The Treviño study called for rewarding ethical conduct, which the Ad Hoc Advisory Group addressed and incorporated into the revised guidelines.

**E. Incentives for “Doing the Right Thing”**

To be an effective compliance and ethics program, the revised federal guidelines

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105. Fiorelli, supra note 6, at 583 (quoting Treviño et al., supra note 99, at 143).
108. Treviño et al., supra note 99, at 141.
also require rewarding ethical conduct, as opposed to only punishing improper behavior. Section 8B2.1(b)(6) holds:

The organization’s compliance and ethics program shall be promoted and enforced consistently throughout the organization through (A) appropriate incentives to perform in accordance with the compliance and ethics program; and (B) appropriate disciplinary measures for engaging in criminal conduct and for failing to take reasonable steps to prevent or detect criminal conduct.\textsuperscript{110}

The old guidelines focused on negative sanctions for failing to have an effective program to prevent and detect violations (e.g. fine enhancements). The revised guidelines require organizations to have positive incentives to reward good behavior. Some may say that it is inappropriate to reward people for being compliant, because that is already the expected behavior. The Ad Hoc Advisory Group discussed its rationale for recommending this language in its October 7, 2003, Report to the United States Sentencing Commission.

While the Advisory Group concluded that few changes are needed to the provisions on accountability, in general, it concluded that language should be added to promote compliance standards through positive incentives as well as through disciplinary mechanisms. A culture of compliance can be promoted where organizational actors are judged by, and rewarded for, their positive compliance performance. Accordingly, the Advisory Group proposes the addition of language indicating that compliance standards should be promoted through incentives as well as enforced through disciplinary measures, giving both a “carrot and stick” to this component of the guidelines.\textsuperscript{111}

One way of providing such an encouragement of ethical behavior could be by including an appreciation of ethics within a manager’s annual performance review. This could be just one of the many factors used in analyzing a person’s leadership and management skills. To evaluate this component, questions could be posed to a manager’s superiors, peers, and subordinates (a 360 degree review). These could include: (1) does the manager communicate the importance of compliance and ethics during his or her daily activities and interactions with others?; (2) has the manager attended all of the appropriate compliance and ethics training?; (3) have all of the manager’s subordinates attended all of the appropriate compliance and ethics training?; (4) did all new employees, and employees being promoted, receive an appropriate background check?; (5) have all corrective action plan elements been implemented within an agreed upon time?; and (6) have all initial investigations from hotline/helpline complaints been investigated within an agreed upon time?\textsuperscript{112} Other considerations may be more difficult to quantify, but could rely on employee perceptions. For example: (1) does the manager act in a way that promotes an ethical climate within the organization?; and (2) does the manager

\textsuperscript{112} Many of these elements were discussed in a presentation by Dan Roach, Vice President, Compliance and Audit, Catholic Healthcare West, at the Corporate Compliance Workshops: Management Accountability: Practical Advice on Building an Effective Compliance Program (June 23, 2006). A copy of the presentation is available on file with the authors.
accomplish her/his goals in an ethical fashion? This new “incentives” section truly places the “carrot” into the “carrot and stick” approach to compliance and ethics.

F. Training is No Longer Optional

Under the old guidelines, training was one example of a way an organization could effectively communicate its standards and procedures. “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.”\(^1\) The Ad Hoc Advisory Group noted that by using “e.g.” the old guidelines held training was illustrative of one possible way of accomplishing communication, not a requirement. This group also noted that by including “participation in training programs, or by disseminating publications,” training could have been considered one alternative to publications.

The revised guidelines no longer say training is optional. It is a requirement of an effective compliance and ethics program under section 8B2.1(b)(A)-(B).

The organization shall take reasonable steps to communicate periodically and in a practical manner its standards and procedures, and other aspects of the compliance and ethics program, to the individuals referred to in subdivision (B) by conducting effective training programs and otherwise disseminating information appropriate to such individuals’ respective roles and responsibilities. (B) The individuals referred to in subdivision (A) are the members of the governing authority, high-level personnel, substantial authority personnel, the organization’s employees, and, as appropriate, the organization’s agents.\(^1\)

Effective training both educates and motivates. “Training involves more than the transfer of information to willing recipients. It is also about motivating employees to follow the rules.”\(^1\) In order to have an effective compliance and ethics program, all members of the organization, including the governing authority, will now have to receive training. While many organizations have conducted compliance and ethics training for employees and even management in the past, prior to the revised guidelines getting on the board’s agenda and providing meaningful training was less common.

Compliance and Ethics Officers have often had access to governing authorities (boards of directors) and have reported on matters such as the number of hotline violations, or the resolution of investigations. Board training represents a different dynamic in their relationship. The Compliance or Ethics Officer is no longer the passive reporter, answering specific questions from the board, then being dispatched until the next meeting. This new relationship envisions a Compliance or Ethics Officer who has important information about initiatives with which the board may not be familiar. Engaging the board in targeted training can give the board members a new sense of

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\(^1\) U.S. SENTENCING GUIDELINES MANUAL § 8A1.2 cmt. n.3(k)(4) (1998).
\(^1\) Joseph E. Murphy, Training “In a Practical Manner,” in CORPORATE COMPLIANCE 1999, at 559 (1999).
appreciation for the risks and concerns that other members of the organization are facing.

This new training requirement complements section 8B2.1(b)(2)(A), which states that “the organization’s governing authority shall be knowledgeable about the content and operation of the compliance and ethics programs and shall exercise reasonable oversight with respect to the implementation and effectiveness of the compliance and ethics programs.”\(^\text{116}\) In a post-Sarbanes-Oxley environment, good corporate governance calls for boards to be aware of, understand, and ultimately oversee their organization’s compliance and ethics programs.

Implicitly, with these new responsibilities (e.g., training) and new relationship with the board, an organization’s Compliance or Ethics Officer may have a heightened position within the organization. This became explicit in section 8B2.1(b)(2)(C), which holds:

Specific individual(s) within the organization shall be delegated day-to-day operational responsibility for the compliance and ethics program. Individual(s) with operational responsibility shall report periodically to high-level personnel and, as appropriate, to the governing authority, or an appropriate subgroup of the governing authority, on the effectiveness of the compliance and ethics programs. To carry out such operational responsibility, such individual(s) shall be given adequate resources, appropriate authority, and direct access to the governing authority or an appropriate subgroup of the governing authority.\(^\text{117}\)

Organizations can no longer just “check-the-box” affirming that they have a Compliance or Ethics Officer. To have an effective compliance and ethics program, those responsible must now be given the appropriate authority, resources and access to fulfill this new mission.

V. CONCLUSION

Although the Supreme Court in Booker tolled the bell for mandatory federal sentencing guidelines, it is much too soon to write their obituaries. Importantly, the Court only severed the portion of the legislation that mandated judges apply guidelines in formulating a sentence, and a related de novo appellate provision. As with any legislation, especially where the Court only amputates a portion, the balance of the sentencing guidelines has a healthy prognosis, and Congress may even regenerate it. The sentencing guidelines protocol, including the organizational guidelines, remains vital and relevant for reasons that are especially critical for organizations.

The guidelines’ definition of an effective compliance and ethics program goes hand in hand with that for which organizations should strive: one that “promote[s] an organizational culture that encourages ethical conduct and a commitment to compliance with the law.”\(^\text{118}\) After all, it is a win-win situation to preempt unethical and illegal conduct in the first instance. But human nature being what it is, as even the Department of Justice recognizes, “no compliance program can ever prevent all criminal activity by a


corporation’s employees . . . “119 Organizations then will want to be in the best possible position when the specter of federal prosecution looms. Having an effective compliance program that meets the sentencing guidelines requirements, together with voluntarily disclosing illegal activity and cooperating with investigators, are the best defenses an organization can have in seeking to avoid or contain prosecution. Its existence is a key factor in the government’s decision whether and how to prosecute a corporation, and is one that the business has within its control.

Even if an organization is charged and convicted criminally, an effective compliance program can provide it with some insulation. The Supreme Court in *Booker* directed judges to consult the guidelines in sentencing, and even emphasized the import of doing so for purposes of withstanding an appellate review. By complying with the Chapter 8 Guidelines, any punitive strikes in sentencing can be greatly reduced.

Organizations are well advised to maintain, or even expand their compliance and ethics. They are a barricade against criminal activity, and a safer harbor in a storm. This may become even more important as the courts, the Sentencing Commission and Congress plot their post-*Booker* courses.

119. Thompson Memo, *supra* note 69, § VI.