

Greater Rigor for Corporate Compliance: Amended Sentencing Guidelines Tighten Program Requirements

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In April the US Sentencing Commission voted to amend the organizational sentencing guidelines, making the criteria for effective compliance and ethics programs more stringent. The amendments were submitted to Congress on April 30, 2004, and will take effect November 1, 2004, unless Congress disapproves them during a six-month review period.

The current organizational sentencing guidelines became effective in 1991 and are a set of criteria for federal judges to use in determining the severity of criminal penalties (fines and terms of probation) imposed on organizations convicted of federal crimes. If an organization can demonstrate that it had an effective compliance program in place, the criminal penalties imposed may be reduced. The organizational guidelines provide that the “hallmark of an effective program to prevent and detect violations of law is that the organization exercised due diligence in seeking to prevent and detect criminal conduct by its employees and other agents.”

Although the organizational sentencing guidelines are only binding on federal judges, they have become the foundation of voluntary corporate compliance programs. Therefore, any changes to these guidelines affect the development and modification of healthcare organizations’ compliance programs.

The seven key criteria in the existing organizational sentencing guidelines for establishing an effective compliance program are:

- Compliance standards and procedures that are reasonably capable of reducing the prospect of criminal conduct
- Specific individuals within high levels of the organization who have been assigned overall responsibility to oversee compliance with such standards and procedures
- Due care not to delegate substantial discretionary authority to individuals whom the organization knew, or should have known through the exercise of due diligence, had a propensity to engage in illegal activities
- Effective communication of the organization’s standards and procedures to all employees and other agents (e.g., requiring participation in training programs or disseminating publications that explain in a practical manner what is required)
- Reasonable steps to achieve compliance with its standards (e.g., using monitoring and auditing systems reasonably designed to detect criminal conduct and implementing and publicizing a reporting system whereby employees and other agents could report criminal conduct by others within the organization without fear of retribution)
- Consistent enforcement of standards through appropriate disciplinary mechanisms, including, as appropriate, discipline of individuals responsible for the failure to detect an offense (adequate discipline is a necessary component of enforcement, but the form of discipline should be case specific)
- Reasonable steps to respond appropriately to and prevent further similar offenses upon detection of a violation—including any necessary modifications to prevent and detect law violations

Amendments to the Organizational Sentencing Guidelines

The new amendments approved by the US Sentencing Commission enhance the rigor and detail of the standards for a compliance and ethics program. The amended version emphasizes the connection between compliance and ethical conduct.

The amended organizational sentencing guidelines are outlined below, with commentary after each section indicating changed or added text. Within the context of these guidelines, “governing authority” means the board of directors or the high-level governing body in an organization. “High-level personnel of the organization” are defined as individuals who have substantial control over the organization or who have a substantial role in policy making within the organization. “Substantial authority personnel” means individuals who, within the scope of their authority, exercise a substantial measure of discretion acting on

behalf of an organization. The term includes high-level personnel, individuals who exercise substantial supervisory authority, and any other individuals who, although not a part of an organization's management, nevertheless exercise substantial discretion when acting within the scope of their authority. Whether an individual falls within this category must be determined on a case-by-case basis.

The amended organizational sentencing guidelines appear below in italics, quoted from "Amendments to the Sentencing Guidelines" (US Sentencing Commission, available online at www.ussc.gov/2004guid/RFMay04.pdf). Commentary on the amendments appears interspersed in plain, roman type.

To have an effective compliance and ethics program...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.

Commentary: The definition of an "effective" compliance program has been revised and moved from the commentary section to become its own guideline. The first requirement regarding the exercise of due diligence is in the existing definition, but the second requirement is new: organizations must promote an organizational culture that encourages ethical conduct and a commitment to compliance with the law.

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 [the definition of an effective compliance and ethics program] minimally require the following:

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

Commentary: The first requirement has not changed, but the accompanying commentary adds guidance by indicating that "standards and procedures" means standards of conduct and internal controls that are reasonably capable of reducing the likelihood of 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.

Commentary: The second requirement has been significantly revised by expanding the responsibilities for the board of directors, senior management, and compliance personnel with regard to knowledge about the content and operation of the compliance program and responsibility for program oversight. The third part of this requirement is particularly important for organizations in which the corporate compliance officer delegates much of the day-to-day operational responsibilities for the program to another individual. This requirement also stipulates that the individual with day-to-day operational responsibility should have adequate resources and direct access to the governing authority (the board of directors). The accompanying commentary notes that the individual(s) with day-to-day operational responsibility for the program typically should give the

governing authority or an appropriate subgroup information on the implementation and effectiveness of the compliance and ethics program no less than annually.

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.

Commentary: The language of the third requirement has been revised to ensure that all high-level and substantial authority personnel perform their assigned duties in a manner consistent with the exercise of due diligence and the promotion of an organizational culture that encourages ethical conduct and a commitment to compliance with the law. The accompanying commentary explains that if an individual who has engaged in illegal activities is being considered for hire or promotion into a high-level or substantial position of authority, an organization has an obligation to consider the relatedness of the individual's illegal activities and other misconduct to the specific responsibilities the individual is anticipated to be assigned, as well as other factors, such as the recency of the individual's illegal activities and other misconduct and whether the individual has engaged in other such illegal activities and misconduct.

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.

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.

Commentary: Under the fourth requirement, compliance and ethics training is mandatory, and the training requirement is extended to the upper levels of an organization, including the governing authority and high-level personnel in addition to all other employees, and as appropriate, the organization's agents. Further, the training provided should be tailored to the compliance roles and responsibilities of the group being trained. A seemingly small but very important change is the addition of the word "effective" before the word "training." It is no longer appropriate to just provide training. This revision makes the standard related to the training component of a compliance program more rigorous. The obligation for communication and training is ongoing, requiring periodic updates.

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.

Commentary: The fifth requirement has been expanded with regard to the reasonable steps necessary to achieve compliance. Auditing and monitoring systems designed to detect criminal conduct are mandatory. A new requirement stipulates that organizations must periodically evaluate the effectiveness of the compliance and ethics program. The focus of internal reporting has been expanded from simply reporting the criminal conduct of others to either reporting or seeking guidance regarding potential or actual criminal conduct. The addition of "seeking guidance" is consistent with the increased focus of this guideline on the prevention and deterrence of wrongdoing within organizations. Anonymous reporting is now an option, not an absolute requirement. The Joint Commission on Accreditation of Healthcare Organizations recognizes that both anonymous and confidential mechanisms have inherent value and limitations.

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.

Commentary: The existing discipline requirements have been retained as part of the sixth criteria for an effective compliance and ethics program, but a new component has been added requiring promotion of the program through appropriate incentives.

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.

In implementing [these seven requirements for an effective compliance and ethics program], the organization shall periodically assess the risk of criminal conduct and shall take appropriate steps to design, implement, or modify each requirement...to reduce the risk of criminal conduct identified through this process.

Commentary: In addition to the seven requirements for a compliance and ethics program, a new guideline requires an organization to periodically assess the risk of the occurrence of criminal conduct as an essential component of the design, implementation, and modification of an effective program. Organizations should evaluate the nature and seriousness of potential criminal conduct, the likelihood that certain criminal conduct may occur because of the nature of the organization's business, and the prior history of the organization. To be effective, this process must be ongoing. Organizations must periodically prioritize their compliance and ethics resources to target those potential criminal activities that pose the greatest threat in light of the risks identified.

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