Compliance Committee Colleagues:

Greetings from the second annual Corporate Compliance electronic newsletter. I hope the summer weather is to your liking and does not prevent you from being productive. As you know, our editor is Paul McGreal, Professor of Law at Southern Illinois University School of Law and we do hope that this and future issues will be useful resources for you.

This edition contains an article by Michelle M. Wade and Dillon L. Strohm on liability risks related to company policies on employees using non-company aircraft for business. In addition, Paula Tuffin writes about effective compliance programs under the revised sentencing guidelines. I trust you will find both of these articles informative.

2010 Annual Meeting

For this year's Annual Meeting in San Francisco, the Business Law Section will be housed at the Fairmont San Francisco and InterContinental Mark Hopkins (both on Nob Hill).

This summer, our committee will present one CLE program. Paula Tuffin and I will co-chair a CLE program at 8:00 a.m. on Saturday, August 7th, titled "Confronting Thorny Ethical Issues in Internal Investigations." The title nearly speaks for itself, but we plan to engage the attendees in some spirited discussion about critical investigative and compliance issues. I hope you can attend this program.

Pro Bono and Public Service Project

In the name of good causes, the Pro Bono and Public Service Subcommittee of the Business Law Section's Business and Corporate Litigation Committee is partnering with the Mississippi Center for Justice ("MCJ") to raise funds to support residents of coastal communities impacted by the Gulf oil spill. MCJ is one of the few organizations standing between low-wealth communities and economic disaster by working with advocacy organizations in Mississippi, Alabama, Louisiana and Florida to identify and address the legal needs of individuals, small businesses and communities bearing the weight of the disaster. Any contributions you can make to this cause will be used to address the legal needs of the poor arising as a direct result of the oil disaster.

MCJ has created a dedicated contribution page for the Section's use: https://app.etapestry.com/cart/MSCenterforJustice/default/category.php?ref=334.0.177200249

If you have any questions, please email or call Mac McCoy, chair of the subcommittee, at mmccoy@carltonfields.com or 813-229-4165.

Committee Leadership

On a final note, my term as chair of the Corporate Compliance Committee ends at the Annual Meeting this August. My successors are Agnes Bundy Scanlan and Steve Lauer, who are profiled below in this issue. I know that they will continue this Committee's journey in new and exciting directions. They are both active members of the section and the committee. Agnes has been involved in the Business Law Section and the Compliance Committee for quite awhile and Steve has served as Committee vice-chair and chair of the Program and Implementation subcommittee. I trust you
will welcome Steve and Agnes to the Committee Leadership and I am proud to turn over the leadership to this extremely capable duo.

As we mentioned in the first edition, we want to profile our committee leadership and general membership in each edition of this newsletter. This requires that you be actively involved in developing and sharing information about the Corporate Compliance Committee, so please feel free to submit information about yourself or any other Corporate Compliance Committee member that you feel should be spotlighted. In addition, Paul McGreal, our editor, along with Steve and Agnes, will welcome any articles or other publication material sent by email.

I look forward to hearing from you and seeing you in San Francisco. Until then, please take care and please enjoy the rest of your summer!

Michael R. Clarke  
Chair, Corporate Compliance Committee

Vice President and Compliance Officer  
Biomet Spine & Trauma  
michael.clarke@biomet.com

Committee Leadership Profiles

**Steven A. Lauer**  
Incoming Co-Chair  
Committee on Corporate Compliance

Steven A. Lauer consults with law departments and law firms on the value of legal service. He assists them to better align and recalibrate the cost and value of legal service delivered to corporations and other business entities.

Steve served as Corporate Counsel for Global Compliance Services in Charlotte, North Carolina for over two years and for two years previously as Director of Integrity Research for Integrity Interactive Corporation, in which capacity he conducted research, wrote white papers and otherwise worked with clients and potential clients of the company on issues related to corporate ethics and compliance programs. Those two positions culminated Steve's approximately seven years in the compliance industry.

Previously, he consulted with corporate law departments and law firms on issues relative to how in-house and outside counsel work together after spending over 13-and-one-half years as an in-house attorney in the real estate industry, in law departments ranging in size from two attorneys to over 300 attorneys and as the sole in-house attorney for an organization, serving as its General Counsel for over one year. He also spent over two years as Executive Vice Counsel, Deputy Editor and Deputy Publisher of The Metropolitan Corporate Counsel, a monthly journal for in-house attorneys. For six years prior to becoming an in-house attorney, he was in private practice.

From April 1989 until May 1997, Mr. Lauer was an Assistant General Counsel for The Prudential Insurance Company of America. During that time, he held increasing responsibility for the management of legal affairs for the company's commercial real estate investment units, especially in respect of environmental issues and litigation and disputes to which Prudential was a party. From March 1996 until May 1997, he was Project Director for the Prudential Law Department's Outside Counsel Utilization Task
Force. In that capacity, he designed and managed the preparation and distribution of 109 distinct work packages (or RFPs) by which Prudential restructured its purchase of legal services and the evaluation of hundreds of proposals submitted by over 130 firms to handle those packages of work, organized a series of orientation meetings with the 22 law firms that won the most work under those RFPs and helped to organize and implement the Prudential Law Department's Best Practices Conference in February 1997.

Mr. Lauer was the in-house environmental attorney in the Prudential Law Department's Real Estate Section for almost seven years. As such, he managed all environmental litigation for the company's commercial real estate investment units. He also organized a team of environmental litigation counsel (with which he met annually) to handle that litigation for those clients and he developed other litigation-management tools, including a litigation-policies-and-procedures manual. For several years, he was responsible for management of all litigation for those real estate units.

He represented Prudential in several industry groups such as the National Realty Committee (now the Real Estate Roundtable), the ASTM committee that developed an industry standard protocol for environmental assessments, the Mortgage Bankers Association and the American Council of Life Insurance. Mr. Lauer was a member of the task force that developed the Uniform Task-Based Management System codes for task-based billing for the legal profession.

He has authored numerous articles on the relations between in-house and outside attorneys, the selection of counsel by corporate clients, the evaluation of legal service, litigation management and other topics relevant to corporate compliance programs and corporate legal service. He has authored Conditional, Contingent and other Alternative Fee Arrangements (Monitor Press Ltd., Sudbury, Suffolk, UK, 1999), Managing your Relationship with External Counsel (Ark Group, London, UK, 2009) and The Value-Able Law Department (Ark Group, London, UK, 2010). He has spoken at numerous conferences in respect of those subjects and organized conferences and seminars (including online seminars) as well. He is a faculty member of the Law Partnering Institute (www.lawpartnering.com), a member of Law Partnering Advocates, Vice Chair of the Corporate Counsel Committee and Incoming Co-Chair of the Corporate Compliance Committee, both of the American Bar Association Business Law Section and a Fellow of the Council on Litigation Management. He co-founded and co-chairs the Open Legal Standards Initiative.

He received a B.A. from the State University of New York at Buffalo and a J.D. from Georgetown University Law Center. He can be reached by e-mail at slauer@carolina.rr.com and by phone at (973)207-3741 (cell).

Agnes Bundy Scanlan
Incoming Co-Chair Committee on Corporate Compliance

Agnes Bundy Scanlan is the chief regulatory officer at TD Bank, America's Most Convenient Bank. As chief regulatory officer, Ms. Bundy Scanlan as responsibility for all compliance risk management matters including consumer and
wealth compliance, AML/BSA, community development, and global privacy. She is the primary bank relationship manager with federal banking and security regulators with regard to consumer compliance.

Prior to this position, Ms. Bundy Scanlan was a counsel in Goodwin Procter's Business Law Department and a member of its Financial Services Practice, focuses her practice on advising clients on a broad range of regulatory compliance management issues including information security, privacy and Community Reinvestment Act (CRA). She has been responsible for the creation, development and execution of numerous compliance programs for some of the country's largest financial institutions.

Previously, Ms. Bundy Scanlan served as the Regulatory Relations Executive for Bank of America, where she managed the financial institution's primary relationships with its global government regulators, and ensured that all regulatory examinations, communications and operational strategies were appropriately tailored, integrated and delivered to internal and external audiences. She joined Bank of America in 2004 during its merger with FleetBoston Financial, where she had served as Managing Director and Chief Compliance Officer/Chief Privacy Officer. In 1994, Ms. Bundy Scanlan joined FleetBoston Financial as its first Director of Community Development. Prior to working at FleetBoston, she was Counsel to the U.S. Senate Budget Committee.

Ms. Bundy Scanlan has been selected for inclusion in Chambers USA: America's Leading Lawyers for Business. She is the former chair of the Federal Reserve Board of Governors Consumer Advisory Council; the former (and founding) president and current board member of the International Association of Privacy Professionals; and, co-chair of the Compliance Subcommittee of the American Bar Association. A trustee of the Board of Smith College and trustee emeritus of the Board of Bryant University, Ms. Bundy Scanlan also serves as on the board of the Boston Children's Museum. Ms. Bundy Scanlan is a member of the Bar of United States Supreme Court, the Commonwealths of Pennsylvania and Massachusetts Bars, and the Bar of the District of Columbia.

Ms. Bundy Scanlan is a frequent speaker on government and regulatory relations, ethics, privacy and risk management matters at industry seminars, professional conferences and academic institutions. Ms. Bundy Scanlan received a J.D. from Georgetown University Law Center and a B.A. from Smith College.
Effective Compliance and Ethics Programs Under The Amended Sentencing Guidelines
Paula A. Tuffin, Mayer Brown, LLP

The Amendments to the United States Sentencing Guidelines Manual ("USSG"), set to take effect on November 1, 2010, further enhance the role of Chief Compliance Officer ("CCO") in business organizations. The 1991 implementation of the Business Organizations section of the USSG formalized the sentencing credit a company could receive if it had in place an effective compliance and ethics program and in doing so encouraged companies to raise the stature of their CCO. The description of the components of the compliance program, however, did not mandate that a program had to follow a specific format to be considered effective. Not surprisingly, companies have continuously wrestled with issues relating to the duties, reporting lines and authority of the CCO to maximize the effectiveness of their compliance and ethics programs in government eyes. Up to now, companies have used a variety of formats to structure their compliance programs. Some house the compliance function in the legal department, others in finance. Some require direct reporting to the Board of Directors, others do not. The recent amendment to the guidelines that carves out a limited exception to the prohibition against issuing compliance program credit to a company that has a high-level employee involved in a criminal offense is likely to change that landscape. In setting forth criteria that must be in place for a company to obtain offense level credit in that situation, the United States Sentencing Commission ("Commission") makes clear that an effective compliance program gives its CCO direct reporting obligations to the Board of Directors or an appropriate sub-committee of the governing authority. That statement solidifies the importance of the role of CCO and will impact corporate structure in the future.

Proposed Amendments to the Organizational Sentencing Guidelines

Reason for Amendment: This amendment makes several changes to Chapter Eight of the Guidelines Manual regarding the sentencing of organizations.

First, the amendment amends the Commentary to §8B2.1 (Effective Compliance and Ethics Program) by adding an application note that clarifies the remediation efforts required to satisfy the seventh minimal requirement for an effective compliance and ethics program under subsection (b)(7). Subsection (b)(7) requires an organization, after criminal conduct has been detected, to take reasonable steps (1) to respond appropriately to the criminal conduct and (2) to prevent further similar criminal conduct.
The growth and continued development of corporate compliance and ethics programs has created a need for a ready reference for practitioners. The Corporate Compliance Committee determined to prepare a reference book to address that need. To date, however, we have insufficient contributors lined up to complete the project.

If you are interested in contributing to this project and receiving the accolades that rain down on those who do so, please contact Steve Lauer, incoming Co-Chair of the Corporate Compliance Committee of the ABA Business Law Section, by e-mail at slauer@carolina.rr.com or by phone at 973-207-3741. When you do so, indicate those parts of the following outline in which you are interested. You can, of course, contribute to more than one chapter.
If we do not have sufficient contributors lined up soon, we'll shelve this project for lack of interest. Thanks.

- Part I Organizational matters
  - Chapter 1 - Compliance and ethics what does that mean?
    1. The legal context of a corporate compliance and ethics program
    2. Sarbanes-Oxley Act and compliance and ethics programs
    3. Relevant rules of the SEC
  - Chapter 2 - Corporate compliance and ethics programs what are they?
  - Chapter 3 - The business reasons for a compliance program
  - Chapter 4 - Why implement a corporate compliance and ethics program?
  - Chapter 5 - What elements comprise a corporate compliance and ethics program?
    1. Standards and procedures
    2. Delegation of responsibility for operation of compliance and ethics program
    3. Processes to prevent appointment of individuals as "substantial authority personnel" who should not be
    4. Communication of standards and procedures, including training
    5. Monitoring and auditing for criminal conduct
    6. Promotion and enforcement of compliance and ethics by incentives and discipline
    7. Appropriate responses to criminal conduct and steps to prevent recurrence
    8. The Sentencing Guidelines for Organizational Defendants
  - Chapter 6 - Risk assessment and compliance
  - Chapter 7 - Ethics and business conduct codes
  - Chapter 8 - Compliance-related investigations (internal, external and combined)
  - Chapter 9 - What are the role and attributes of a chief compliance and ethics officer?
  - Chapter 10 - Potential liability of a chief compliance and ethics officer
  - Chapter 11 - Regulators' and other governmental officials' views on such programs
  - Chapter 12 - Voluntary disclosure (statutory and regulatory issues)
  - Chapter 13 - Sources of guidance regarding corporate compliance and ethics programs

- Part II Some substantive areas of particular compliance significance (future publication)
  - Chapter 14 - Healthcare
  - Chapter 15 - Privacy of data and other information
  - Chapter 16 - False Claims Act
  - Chapter 17 - Environmental
- Chapter 18 - Labor/Employment
- Chapter 19 - Records Management and electronic and other discovery
- Chapter 20 - Foreign Corrupt Practices Act
- Chapter 21 - Insider trading
- Chapter 22 - Anti-money laundering
- Chapter 23 - Conflicts of interest
- Chapter 24 - Trade and customs
- Chapter 25 - Financial industry and institutions
- Chapter 26 - Purchasing (vendor management, supply chain integrity, etc.)
- Chapter 27 - Compensation
- Chapter 28 - Political activities
Minimizing Liability Risks with a Company Policy for Employee Use of Non-Company Aircraft on Company Business

Does your company have employees who have their own aircraft or a fractional interest? Do these employees utilize their aircraft on company business? Does the company reimburse the employees for their business travel in their own aircraft? If any of these apply, the company should be aware of several risk management issues and may want to adopt a company policy regarding business use of personal aircraft. Violation of the FAA reimbursement/consideration requirements can carry risk exposure for both the employee and the company, and few employers or employees are aware of these requirements.

Types of Operations
First, the company needs to confirm whether the flights are operated under the non-commercial operation regulations of Federal Aviation Regulation (“FAR”) Part 91, including the fractional operation regulations of FAR Part 91, Subpart K, or under the commercial operation regulations of FAR Part 135. Just as there are different federal regulations governing the different types of operations, there can be different risk issues to be addressed by the company.

For aircraft operations under FAR Part 91, generally no consideration or reimbursement is allowed. The FAA defines consideration in broad terms. It goes beyond monetary compensation and can include goodwill or simply the ability of an employee-pilot to accumulate flight hours (a benefit to many pilots) if the employee-pilot is not paying the operating costs of the aircraft.

Consideration/Reimbursement
14 C.F.R. § 61.113(b) allows reimbursement to an employee-pilot under limited circumstances and allows a pilot for compensation or hire to act as pilot in command of an aircraft in connection with any business or employment if the flight is only incidental to that business or employment and if the aircraft does not carry passengers or property for compensation or hire. If the company’s business is not related to air transportation, the employee-pilot may be reimbursed for costs when the employee-pilot’s travel is incidental to his/her employment and he/she does not carry any passengers or property. It is important that any reimbursement be paid to the employee-pilot directly, not to a management company or any other party, to help avoid the risk that the FAA or an insurance company may deem the flight to fall outside the regulatory requirements.

If the employee is not a pilot, but has his own aircraft or a fractional interest, the company needs to consider similar liability and risk issues. For a FAR Part 91, the non-pilot employee is generally considered to be in operational control of the aircraft even though he/she is not piloting the aircraft. The FARs would not prohibit this employee from submitting a reimbursement request to the company for the cost of his/her business travel, just as he/she would if the employee personally bought an airline ticket for a
business trip and submitted the charge for reimbursement pursuant to the company’s travel reimbursement policy.

Depending on the type of aircraft and operation, there may also be options for the employee’s aircraft to be leased to the company, chartered to the company or timeshared to the company.

**Carriage of Other Company Personnel**

Questions frequently arise regarding whether the employee-pilot or the employee with an aircraft or fractional interest is legally allowed to, or should carry, other company personnel on business flights and whether the employee can be reimbursed by the company for such flights.

For flights by the employee with an aircraft or fractional interest with a flight operated under FAR Part 91 the company will want to prohibit that employee from carrying passengers on these flights. The FARs prohibit the employee from receiving consideration for providing transportation to such personnel so this prohibition will help protect against violations of the FARs and should help limit the potential liability of the company for these passengers.

For flights by the employee with an aircraft or fractional interest with a flight operated under FAR Part 135, the employee may carry passengers. The company could pay a portion of the amount due to the operator of the FAR Part 135 flight, but whether it would allow such payment should be determined by corporate policy in advance.

**Insurance**

The company will want its insurance agent or risk manager to review the insurance policies carried on the aircraft to confirm that the company’s interests are sufficiently protected by these policies. The company may want to require that the employee carry a minimum amount of liability coverage, and that the planned operations and reimbursement procedure do not violate the policies. The risk manager may advise that the company be listed as an additional insured on the aircraft insurance policy and may want to require a waiver of the insurer’s subrogation rights against the company.

The company should review its employee health insurance, workers compensation, disability insurance and any travel accident insurance to verify that the policies cover claims which might arise on or due to these flights. The employee will be traveling on company business and any unforeseen gap in insurance coverages could become significant if an accident or incident were to occur. A non-owned aircraft insurance policy may also be a worthwhile investment.

**Other Risk Issues**

Additional risk minimization may require that the company aircraft use policy establish pilot qualification requirements for employees who wish to use their own aircraft on company business. Depending on the type of operation, the company may want to require a certain standard of pilot certificate, instrument ratings and a certain class of
medical certificate. The company may also want to require minimum pilot experience requirements such as a minimum number of hours of total flight time and a minimum number of hours in the type of aircraft to be flown. These requirements should be reviewed and updated periodically. The company will want any aircraft use policy to require that the employee periodically prove that he/she meets the policy requirements at that time, which may involve an affidavit or proof that the aircraft has a standard airworthiness certificate and is current on its inspections and maintenance at that time. For safety reasons, besides requirements for the pilot and aircraft, the company may want the use policy to place practical limits on the aircraft operations. Depending on the aircraft, pilot and type of operations, these restrictions might include a requirement that all flights be during daylight, under visual flight rules (VFR), only to locations within a certain number of nautical miles of the departure airport, or only to airports with an automated weather reporting system.

Michelle M. Wade and Dillon L. Strohm are attorneys with the law firm of Jackson & Wade, L.L.C. and counsel clients on the acquisition, financing and operation of corporate jets operated under Part 91 and Part 135 of the Federal Aviation Regulations. Jackson & Wade, L.L.C. can be found at www.jetlaw.com.
Effective Compliance and Ethics Programs Under
The Amended Sentencing Guidelines

By Paula A. Tuffin
Mayer Brown, LLP

The Amendments to the United States Sentencing Guidelines Manual (“USSG”), set to take effect on November 1, 2010, further enhance the role of Chief Compliance Officer (“CCO”) in business organizations. The 1991 implementation of the Business Organizations section of the USSG formalized the sentencing credit a company could receive if it had in place an effective compliance and ethics program and in doing so encouraged companies to raise the stature of their CCO. The description of the components of the compliance program, however, did not mandate that a program had to follow a specific format to be considered effective. Not surprisingly, companies have continuously wrestled with issues relating to the duties, reporting lines and authority of the CCO to maximize the effectiveness of their compliance and ethics programs in government eyes. Up to now, companies have used a variety of formats to structure their compliance programs. Some house the compliance function in the legal department, others in finance. Some require direct reporting to the Board of Directors, others do not. The recent amendment to the guidelines that carves out a limited exception to the prohibition against issuing compliance program credit to a company that has a high-level employee involved in a criminal offense is likely to change that landscape. In setting forth criteria that must be in place for a company to obtain offense level credit in that situation, the United States Sentencing Commission (“Commission”) makes clear that an effective compliance program gives its CCO direct reporting obligations to the Board of Directors or an appropriate sub-committee of the governing authority. That statement solidifies the importance of the role of CCO and will impact corporate structure in the future.

USSG Compliance and Ethics Programs

Since 1991, the United States Sentencing Guidelines Manual (USSG) has provided a road map to Federal Judges on the thorny question of how to sentence business organizations for criminal wrongdoing. The USSG accomplishes its objective by providing a method of calculating what is known as a “culpability” score. That culpability score is the baseline used to determine a sentence. Points are added or subtracted based on factors articulated in the USSG. The USSG adds points for an organization’s involvement in or tolerance of criminal activity, its prior history, violation of an order or obstruction of justice. Points are subtracted for organizations with effective compliance and ethics programs and for organizations that self-report, cooperate with government authorities and accept responsibility for the wrong-doing.

1 The Nine-member U.S. Sentencing Commission was created under the Sentencing Reform Act of 1984. “Its principal purpose is to establish sentencing policies and practices for the Federal Criminal Justice System that will ensure the ends of justice by promulgating detailed guidelines prescribing the appropriate sentences for offenders convicted of Federal Crimes” United States Sentencing Commission, Guidelines Manual, Ch.1, Pt. A; intro. Comment (2009). Chapter 8, entitled Business Organizations, came into effect, in 1991 Chapter 8 provides an outline for a compliance and ethics program that, if instituted, could offer companies investigated for or charged with crimes a means to decrease their exposure to criminal sanction.

2 See USSG §8C2.5.
Although, in the post US v. Booker, 543 U.S. 220 (2005) world, the USSG are simply advisory, Federal judges still look to them for guidance on sentencing business organizations. It is also true that the Department of Justice (“DOJ”) looks to the same factors in determining whether to prosecute corporate entities. Business organizations, consequently, look to the USSG for instruction on how to best protect themselves from the harm that would be caused by a criminal prosecution. Organizations search the guidelines to find ways to minimize the risk presented by the criminal malfeasance of their employees and officers. To date, the best protection a business organization can have to avoid a negative prosecutorial result is to institute a compliance and ethics program consistent with §8B2.1 of the USSG. §8B2.1(b) lists the seven factors that must exist for a compliance and ethics program to be considered “effective”. They are as follows:

“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 activity 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.

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(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.”

The Amendments

As of November 1, 2010, barring congressional action, the United States Sentencing
Commission’s (“Commission”) most recent amendments to the USSG will go into effect. The
Commission has made three significant changes to the USSG with respect to sentencing business
organizations. The amendments (1) clarify that a court has authority to monitor companies as a
condition of probation; (2) provide guidance on how a company with an effective compliance
and ethics program is to respond upon learning of an offense, and (3) create an exception to the
rule that a company with an effective compliance and ethics program cannot get culpability score
credit for that program if high-level personnel are involved in the offense. The third amendment
reshapes the contours of effective compliance and ethics programs and will likely cause alert
organizations to reshape their own compliance and ethics programs as soon as practicable. This
article will discuss the changes required to bring existing compliance and ethics programs into
compliance with the newly amended USSG.

5 U.S.S.G. §82.1(b).
The Exception to USSG §8C2.5(f)(3)

§8C2.5(f)(3), as currently written, prohibits a business organization from obtaining a three point reduction in the baseline offense level for having in place an effective compliance program if “an individual within high-level personnel of the organization or a person within high-level personnel of the unit of the organizations within which the offense was committed where the unit had 200 or more employees, participated in, condoned, or was willfully ignorant of the offense.” The effect of this provision is to deny compliance program credit to a company that suffered the misfortune of having one of its high-level personnel participate, condone or willfully ignore a criminal offense. The practical result of this prohibition has been a “chill” on voluntary reporting to the government of wrong-doing that involves a high-level employee. The Commission did not intend this result. To address concerns “that the general prohibition in §8(2.5(f)(3) operates too broadly and that internal and external reporting of criminal conduct could be better encouraged by providing an exception to that general prohibition in appropriate cases,” the Commission has carved out an exception to this rule. The amended §8C2.5(f)(3) offers a limited opportunity for an organization to benefit from its compliance program if its program meets specified criteria. In the new section §8C2.5(f)(3)(C), the prohibition does not apply if

- (i) the individual or individuals with operational responsibility for the compliance and ethics program (see §8B2.1(b)(2)(C) have direct reporting obligations to the governing authority an appropriate subgroup thereof (e.g., an audit committee for the board of directors);
- (ii) the compliance and ethics program detected the offense before discovery outside the organization or before such discovery was reasonably likely;
- (iii) the organization promptly reported the offense to appropriate governmental authorities; and
- (iv) no individual with operational responsibility for the compliance and ethics program participated in condoned, or was willfully ignorant of the offense.

At first glance, the criteria set out in the amendment calls for nothing more than a compliance program that meets the objectives already outlined in the USSG. The portion of the amendment that requires a company’s compliance program to have uncovered the offense before it was detected outside of the organization and to promptly disclose the offense to the appropriate government officials does no more than restate compliance program tenets covered elsewhere in the USSG. Sub-sections (ii) and (iii) of the amendment mirror the Commission’s expectations about a properly functioning compliance and ethics program and, therefore, are nothing new.

The changes come in subsections (i) and (iv). Subsection (i) defines the exception and subsection (iv) limits the exception to exclude companies whose compliance personnel

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7 USSG §8C2.5(f)(3)(A)
participated, condoned or ignored the offense.\textsuperscript{10} Amendment 8C2.5(f)(3)(C)(i) requires that a company seeking to take advantage of the point reduction must, as part of its compliance program give, “the individual or individuals with operational responsibility for the compliance and ethics program [ ] direct reporting obligations to the organization’s governing authority or appropriate subgroup thereof.”\textsuperscript{11} The amendment also adds an application note that defines ‘direct reporting obligations’ for the purpose of meeting the §8C2.5(f)(3)(c) criterion. According to that note, “an individual has ‘direct reporting obligations’ if the individual has express authority to communicate personally to the governing authority or appropriate subgroup thereof (A) promptly on any matter involving criminal conduct or potential criminal conduct, and (B) no less than annually on the implementation and effectiveness of the compliance and ethics program.”\textsuperscript{12}

Interestingly, the direct reporting line to the governing authority expectation echoes a recommendation of the Council for Further Combating Bribery of Foreign Public Officials in International Business Transactions. In November of 2009, the Council issued ‘Good Practice Guidance for Companies’ that included a suggestion that insuring effective internal controls required “oversight of ethics and compliance programs or measures regarding Foreign bribery, including the authority to report matters directly to independent monitoring bodies such as internal audit committees of boards of directors or of supervisory boards.”\textsuperscript{13} It appears that the Commission’s amendment is in line with current approaches to compliance.

Anticipated Changes To Compliance And Ethics Program

The significance of this amendment cannot be understated. The Commission says, in unequivocal terms, that persons performing the chief compliance officer function must have ‘direct reporting obligations’ to the company’s governing authority or a subgroup of the governing authority. It is well known that up to this point, a compliance program could be considered effective under the guidelines if the CCO reported to the General Counsel or other high-level personnel in the organization or had dotted line access to the Board of Directors or another governing authority. The Society of Corporate Compliance and Ethics conducted a survey that reported that only 41% of publicly traded companies have their CCO report directly to the Board of Directors.\textsuperscript{14} The survey also showed that in other compliance programs, the CCO reported to the General Counsel, the Chief Financial Officer and other senior positions within a company. The variation in lines of reporting obligations suggests that the current USSG contemplates a broader spectrum of acceptable CCO reporting lines than the amended version.

Business organizations must now come to terms with how to address this change. In order to be in a position to take advantage of the three point-reduction for having a compliance program if a high-level employee is implicated in an offense, the compliance program must have its CCO report directly to the Board of Directors or a subgroup such as the audit committee. As

\begin{footnotesize}
\begin{itemize}
  \item[10] Id. p. 18.
  \item[11] Id p18.
  \item[12] Id.
  \item[14] “The Relationship between the Board of Directors and the Compliance and Ethics Officer,” Society of Corporate Compliance and Ethics, April, 2010.
\end{itemize}
\end{footnotesize}
pointed out above, this line of reporting is not widespread, suggesting that many organizations will have to determine how to respond to this amendment. Even if a particular company does not believe that it will ever require the three point reduction contemplated by this limited exception there is no doubt that the Commission has determined that a well designed compliance and ethics program will have its CCO report directly to the Board of Directors. Such a direct communication regarding the components of an effective compliance program warrants serious consideration. Business must now weigh the benefits of revamping their compliance and ethics programs to adjust to this guidance against the costs in resources and expense of making the change. While this is an individual company by company decision, there are benefits to be gained by reviewing a compliance program even if, ultimately, the modification is not made.

The act of reviewing the program is a marker of effectiveness. Throughout the USSG, the Commission’s expectation is that companies will periodically review their compliance programs to make certain they are achieving their purpose – preventing and detecting wrongdoing – in an effective manner. Moreover, the process of evaluating a compliance and ethics program is likely to lead to function improvements. The criteria set forth in amendments §8C2.5(f)(C)(ii) and (iii) can only be realized through an effectively functioning compliance program. Those amendments require the organization to detect an offense before an outside entity does and to report it to the appropriate governmental authorities. Neither of those criteria can be met with a ‘paper tiger’ compliance program. A comprehensive review of an existing compliance program will unearth any problems that require attention. Making sure that those problems are addressed will enhance the effectiveness of the program.

Other Factors To Consider

Companies that modify their compliance and ethics programs to accommodate the changes to the guidelines should be aware of the affect these modifications might have on their workplace. For example, if a company has its compliance function report to the General Council in its existing program, shifting that function to a stand alone unit with direct reporting obligations to the Board of Directors or Audit Committee is likely to unsettle key personnel. In many organizations, access to the Board of Directors is highly coveted and viewed as a measure of authority within the corporate culture. Key personnel may view the CCO’s enhanced status with a degree of concern. Companies should evaluate the credentials of their CCO and where that individual fits within the firm hierarchy before giving the existing CCO direct reporting lines to the Board of Directors. It may be necessary to create a new title with different job requirements and conduct a CCO search in order to accomplish the desired reporting change with a minimum of workplace disruption.

Measured analysis should also be applied to the resources required to create a separate compliance function if it is currently part of the legal or finance units. Compliance units must be able to conduct investigations, train personnel, monitor conformity with company compliance and ethics standards consistently manage information - some from anonymous sources – on compliance issues and report regularly to the governing authority. Companies need to determine whether their compliance unit can ‘borrow’ personnel from other units to perform these functions or require their own specially designated staff.

15 See USSG §8B2.1(b)(5)(B).
Conclusion

The amendment to §8B2.5(f)(C)(3) of the USSG has undoubtedly narrowed the scope of the types of reporting lines that are acceptable in an ‘effective’ compliance and ethics program. While companies still maintain the ability to chose whether to comply with the amendments, those averse to risk are likely to undertake the task of modifying (or implementing) a compliance program that meets the USSG parameters.
ORGANIZATIONAL GUIDELINES

Reason for Amendment: This amendment makes several changes to Chapter Eight of the Guidelines Manual regarding the sentencing of organizations.

First, the amendment amends the Commentary to §8B2.1 (Effective Compliance and Ethics Program) by adding an application note that clarifies the remediation efforts required to satisfy the seventh minimal requirement for an effective compliance and ethics program under subsection (b)(7). Subsection (b)(7) requires an organization, after criminal conduct has been detected, to take reasonable steps (1) to respond appropriately to the criminal conduct and (2) to prevent further similar criminal conduct.

The new application note describes the two aspects of subsection (b)(7). With respect to the first aspect, the application note provides that the organization should take reasonable steps, as warranted under the circumstances, to remedy the harm resulting from the criminal conduct. The application note further provides that such steps may include, where appropriate, providing restitution to identifiable victims, other forms of remediation, and self-reporting and cooperation with authorities. With respect to the second aspect, the application note provides that an organization should assess the compliance and ethics program and make modifications necessary to ensure the program is effective. The application note further provides that such steps should be consistent with §8B2.1(b)(5) and (c), which also require assessment and modification of the program, and may include the use of an outside professional advisor to ensure adequate assessment and implementation of any modifications.

This application note was added in response to public comment and testimony suggesting that further guidance regarding subsection (b)(7) may encourage organizations to take reasonable steps upon discovery of criminal conduct. The steps outlined by the application note are consistent with factors considered by enforcement agencies in evaluating organizational compliance and ethics practices.

Second, the amendment amends subsection (f) of §8C2.5 (Culpability Score) to create a limited exception to the general prohibition against applying the 3-level decrease for having an effective compliance and ethics program when an organization’s high-level or substantial authority personnel are involved in the offense. Specifically, the amendment adds subsection (f)(3)(C), which allows an organization to receive the decrease if the organization meets four criteria: (1) the individual or individuals with operational responsibility for the compliance and ethics program have direct reporting obligations to the organization’s governing authority or appropriate subgroup thereof; (2) the compliance and ethics program detected the offense before discovery outside the organization or before such discovery was reasonably likely; (3) the organization promptly reported the offense to the appropriate governmental authorities; and (4) no individual with operational responsibility for the compliance and ethics program participated in, condoned, or was willfully ignorant of the offense.

The new subsection (f)(3)(C) responds to concerns expressed in public comment and testimony that the general prohibition in §8C2.5(f)(3) operates too broadly and that internal and external reporting of criminal conduct could be better encouraged by providing an exception to that general prohibition in appropriate cases.

The amendment also adds an application note that describes the "direct reporting obligations" necessary to meet the first criterion under §8C2.5(f)(3)(C). The application note provides that an individual has "direct reporting obligations" if the individual has express authority to communicate personally to the
governing authority "promptly on any matter involving criminal conduct or potential criminal conduct" and "no less than annually on the implementation and effectiveness of the compliance and ethics program". The application note responds to public comment and testimony regarding the challenges operational compliance personnel may face when seeking to report criminal conduct to the governing authority of an organization and encourages compliance and ethics policies that provide operational compliance personnel with access to the governing authority when necessary.

Third, the amendment amends §8D1.4 (Recommended Conditions of Probation – Organizations (Policy Statement)) to augment and simplify the recommended conditions of probation for organizations. The amendment removes the distinction between conditions of probation imposed solely to enforce a monetary penalty and conditions of probation imposed for any other reason so that all conditional probation terms are available for consideration by the court in determining an appropriate sentence.

Finally, the amendment makes technical and conforming changes to various provisions in Chapter Eight.

Amendment:

§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) 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 subparagraph (B) by conducting effective training programs and otherwise disseminating information appropriate to such individuals' respective roles and responsibilities.

(B) The individuals referred to in subparagraph (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.

Commentary

Application Notes:

* * *

2. Factors to Consider in Meeting Requirements of this Guideline.—

* * *

(D) Recurrence of Similar Misconduct.—Recurrence of similar misconduct creates doubt regarding whether the organization took reasonable steps to meet the requirements of this guideline. For purposes of this subdivision, "similar misconduct" has the meaning given that term in the Commentary to §8A1.2 (Application Instructions - Organizations).

* * *

6. Application of Subsection (b)(7).—Subsection (b)(7) has two aspects.

First, the organization should respond appropriately to the criminal conduct. The organization should take reasonable steps, as warranted under the circumstances, to remedy the harm resulting from the criminal conduct. These steps may include, where appropriate, providing
restitution to identifiable victims, as well as other forms of remediation. Other reasonable steps to respond appropriately to the criminal conduct may include self-reporting and cooperation with authorities.

Second, the organization should act appropriately to prevent further similar criminal conduct, including assessing the compliance and ethics program and making modifications necessary to ensure the program is effective. The steps taken should be consistent with subsections (b)(5) and (c) and may include the use of an outside professional advisor to ensure adequate assessment and implementation of any modifications.

67. **Application of Subsection (c).**—To meet the requirements of subsection (c), an organization shall:

* * *

**(B) Prioritize periodically, as appropriate, the actions taken pursuant to any requirement set forth in subsection (b), in order to focus on preventing and detecting the criminal conduct identified under subdivision subparagraph (A) of this note as most serious, and most likely, to occur.**

**(C) Modify, as appropriate, the actions taken pursuant to any requirement set forth in subsection (b) to reduce the risk of criminal conduct identified under subdivision subparagraph (A) of this note as most serious, and most likely, to occur.**

**Background:** This section sets forth the requirements for an effective compliance and ethics program. This section responds to section 805(a)(2)(5) of the Sarbanes-Oxley Act of 2002, Public Law 107–204, which directed the Commission to review and amend, as appropriate, the guidelines and related policy statements to ensure that the guidelines that apply to organizations in this chapter "are sufficient to deter and punish organizational criminal misconduct."

The requirements set forth in this guideline are intended to achieve reasonable prevention and detection of criminal conduct for which the organization would be vicariously liable. The prior diligence of an organization in seeking to prevent and detect criminal conduct has a direct bearing on the appropriate penalties and probation terms for the organization if it is convicted and sentenced for a criminal offense.

* * *

**§8C2.5. Culpability Score**

(a) Start with 5 points and apply subsections (b) through (g) below.

(b) **Involvement in or Tolerance of Criminal Activity**

If more than one applies, use the greatest:

(1) If –
(A) the organization had 5,000 or more employees and

(i) an individual within high-level personnel of the organization participated in, condoned, or was willfully ignorant of the offense; or

(ii) tolerance of the offense by substantial authority personnel was pervasive throughout the organization; or

(B) the unit of the organization within which the offense was committed had 5,000 or more employees and

(i) an individual within high-level personnel of the unit participated in, condoned, or was willfully ignorant of the offense; or

(ii) tolerance of the offense by substantial authority personnel was pervasive throughout such unit,

add 5 points; or

(2) If --

(A) the organization had 1,000 or more employees and

(i) an individual within high-level personnel of the organization participated in, condoned, or was willfully ignorant of the offense; or

(ii) tolerance of the offense by substantial authority personnel was pervasive throughout the organization; or

(B) the unit of the organization within which the offense was committed had 1,000 or more employees and

(i) an individual within high-level personnel of the unit participated in, condoned, or was willfully ignorant of the offense; or

(ii) tolerance of the offense by substantial authority personnel was pervasive throughout such unit,

add 4 points; or

(3) If --

(A) the organization had 200 or more employees and
(i) an individual within high-level personnel of the organization participated in, condoned, or was willfully ignorant of the offense; or

(ii) tolerance of the offense by substantial authority personnel was pervasive throughout the organization; or

(B) the unit of the organization within which the offense was committed had 200 or more employees and

(i) an individual within high-level personnel of the unit participated in, condoned, or was willfully ignorant of the offense; or

(ii) tolerance of the offense by substantial authority personnel was pervasive throughout such unit,

add 3 points; or

(4) If the organization had 50 or more employees and an individual within substantial authority personnel participated in, condoned, or was willfully ignorant of the offense, add 2 points; or

(5) If the organization had 10 or more employees and an individual within substantial authority personnel participated in, condoned, or was willfully ignorant of the offense, add 1 point.

(c) Prior History

If more than one applies, use the greater:

(1) If the organization (or separately managed line of business) committed any part of the instant offense less than 10 years after (A) a criminal adjudication based on similar misconduct; or (B) civil or administrative adjudication(s) based on two or more separate instances of similar misconduct, add 1 point; or

(2) If the organization (or separately managed line of business) committed any part of the instant offense less than 5 years after (A) a criminal adjudication based on similar misconduct; or (B) civil or administrative adjudication(s) based on two or more separate instances of similar misconduct, add 2 points.

(d) Violation of an Order

If more than one applies, use the greater:
(1) (A) If the commission of the instant offense violated a judicial order or injunction, other than a violation of a condition of probation; or (B) if the organization (or separately managed line of business) violated a condition of probation by engaging in similar misconduct, i.e., misconduct similar to that for which it was placed on probation, add 2 points; or

(2) If the commission of the instant offense violated a condition of probation, add 1 point.

(c) Obstruction of Justice

If the organization willfully obstructed or impeded, attempted to obstruct or impede, or aided, abetted, or encouraged obstruction of justice during the investigation, prosecution, or sentencing of the instant offense, or, with knowledge thereof, failed to take reasonable steps to prevent such obstruction or impediment or attempted obstruction or impediment, add 3 points.

(f) Effective Compliance and Ethics Program

(1) If the offense occurred even though the organization had in place at the time of the offense an effective compliance and ethics program, as provided in §8B2.1 (Effective Compliance and Ethics Program), subtract 3 points.

(2) Subsection (f)(1) shall not apply if, after becoming aware of an offense, the organization unreasonably delayed reporting the offense to appropriate governmental authorities.

(3) (A) Except as provided in subdivision (B) subparagraphs (B) and (C), subsection (f)(1) shall not apply if an individual within high-level personnel of the organization, a person within high-level personnel of the unit of the organization within which the offense was committed where the unit had 200 or more employees, or an individual described in §8B2.1(b)(2)(B) or (C), participated in, condoned, or was willfully ignorant of the offense.

(B) There is a rebuttable presumption, for purposes of subsection (f)(1), that the organization did not have an effective compliance and ethics program if an individual—

(i) within high-level personnel of a small organization; or

(ii) within substantial authority personnel, but not within high-level personnel, of any organization,
participated in, condoned, or was willfully ignorant of, the offense.

(C) Subparagraphs (A) and (B) shall not apply if—

(i) the individual or individuals with operational responsibility for the compliance and ethics program (see §8B2.1(b)(2)(C)) have direct reporting obligations to the governing authority or an appropriate subgroup thereof (e.g., an audit committee of the board of directors);

(ii) the compliance and ethics program detected the offense before discovery outside the organization or before such discovery was reasonably likely;

(iii) the organization promptly reported the offense to appropriate governmental authorities; and

(iv) no individual with operational responsibility for the compliance and ethics program participated in, condoned, or was willfully ignorant of the offense.

(g) Self-Reporting, Cooperation, and Acceptance of Responsibility

If more than one applies, use the greatest:

(1) If the organization (A) prior to an imminent threat of disclosure or government investigation; and (B) within a reasonably prompt time after becoming aware of the offense, reported the offense to appropriate governmental authorities, fully cooperated in the investigation, and clearly demonstrated recognition and affirmative acceptance of responsibility for its criminal conduct, subtract 5 points; or

(2) If the organization fully cooperated in the investigation and clearly demonstrated recognition and affirmative acceptance of responsibility for its criminal conduct, subtract 2 points; or

(3) If the organization clearly demonstrated recognition and affirmative acceptance of responsibility for its criminal conduct, subtract 1 point.

Commentary

Application Notes:

* * *
10. Subsection (f)(2) contemplates that the organization will be allowed a reasonable period of time to conduct an internal investigation. In addition, no reporting is required by subsection (f)(2) or (f)(3)(C)(iii) if the organization reasonably concluded, based on the information then available, that no offense had been committed.

11. For purposes of subsection (f)(3)(C)(i), an individual has "direct reporting obligations" to the governing authority or an appropriate subgroup thereof if the individual has express authority to communicate personally to the governing authority or appropriate subgroup thereof (A) promptly on any matter involving criminal conduct or potential criminal conduct, and (B) no less than annually on the implementation and effectiveness of the compliance and ethics program.

12. "Appropriate governmental authorities," as used in subsections (f) and (g)(1), means the federal or state law enforcement, regulatory, or program officials having jurisdiction over such matter. To qualify for a reduction under subsection (g)(1), the report to appropriate governmental authorities must be made under the direction of the organization.

13. To qualify for a reduction under subsection (g)(1) or (g)(2), cooperation must be both timely and thorough. To be timely, the cooperation must begin essentially at the same time as the organization is officially notified of a criminal investigation. To be thorough, the cooperation should include the disclosure of all pertinent information known by the organization. A prime test of whether the organization has disclosed all pertinent information is whether the information is sufficient for law enforcement personnel to identify the nature and extent of the offense and the individual(s) responsible for the criminal conduct. However, the cooperation to be measured is the cooperation of the organization itself, not the cooperation of individuals within the organization. If, because of the lack of cooperation of particular individual(s), neither the organization nor law enforcement personnel are able to identify the culpable individual(s) within the organization despite the organization's efforts to cooperate fully, the organization may still be given credit for full cooperation.

14. Entry of a plea of guilty prior to the commencement of trial combined with truthful admission of involvement in the offense and related conduct ordinarily will constitute significant evidence of affirmative acceptance of responsibility under subsection (g), unless outweighed by conduct of the organization that is inconsistent with such acceptance of responsibility. This adjustment is not intended to apply to an organization that puts the government to its burden of proof at trial by denying the essential factual elements of guilt, is convicted, and only then admits guilt and expresses remorse. Conviction by trial, however, does not automatically preclude an organization from consideration for such a reduction. In rare situations, an organization may clearly demonstrate an acceptance of responsibility for its criminal conduct even though it exercises its constitutional right to a trial. This may occur, for example, where an organization goes to trial to assert and preserve issues that do not relate to factual guilt (e.g., to make a constitutional challenge to a statute or a challenge to the applicability of a statute to its conduct). In each such instance, however, a determination that an organization has accepted responsibility will be based primarily upon pretrial statements and conduct.

15. In making a determination with respect to subsection (g), the court may determine that the chief
executive officer or highest ranking employee of an organization should appear at sentencing in order to signify that the organization has clearly demonstrated recognition and affirmative acceptance of responsibility.

Background: The increased culpability scores under subsection (b) are based on three interrelated principles. First, an organization is more culpable when individuals who manage the organization or who have substantial discretion in acting for the organization participate in, condone, or are willfully ignorant of criminal conduct. Second, as organizations become larger and their managements become more professional, participation in, condonation of, or willful ignorance of criminal conduct by such management is increasingly a breach of trust or abuse of position. Third, as organizations increase in size, the risk of criminal conduct beyond that reflected in the instant offense also increases whenever management’s tolerance of that offense is pervasive. Because of the continuum of sizes of organizations and professionalization of management, subsection (b) gradually increases the culpability score based upon the size of the organization and the level and extent of the substantial authority personnel involvement.

* * *

§8D1.4. Recommended Conditions of Probation - Organizations (Policy Statement)

(a) The court may order the organization, at its expense and in the format and media specified by the court, to publicize the nature of the offense committed, the fact of conviction, the nature of the punishment imposed, and the steps that will be taken to prevent the recurrence of similar offenses.

(b) If probation is imposed under §8D1.1(a)(2), the following conditions may be appropriate to the extent they appear necessary to safeguard the organization’s ability to pay any deferred portion of an order of restitution, fine, or assessment:

(1) The organization shall develop and submit to the court an effective compliance and ethics program consistent with §8B2.1 (Effective Compliance and Ethics Program). The organization shall include in its submission a schedule for implementation of the compliance and ethics program.

(2) Upon approval by the court of a program referred to in paragraph (1), the organization shall notify its employees and shareholders of its criminal behavior and its program referred to in paragraph (1). Such notice shall be in a form prescribed by the court.

(3) The organization shall make periodic submissions to the court or probation officer, at intervals specified by the court, (A) reporting on the organization’s financial condition and results of business operations, and accounting for the disposition of all funds received, and (B) reporting on the organization’s progress in implementing the program referred to in paragraph (1). Among other things, reports under subparagraph (B) shall disclose any criminal prosecution, civil litigation, or administrative
proceeding commenced against the organization, or any investigation or formal inquiry by governmental authorities of which the organization learned since its last report.

(4) The organization shall notify the court or probation officer immediately upon learning of (A) any material adverse change in its business or financial condition or prospects, or (B) the commencement of any bankruptcy proceeding, major civil litigation, criminal prosecution, or administrative proceeding against the organization, or any investigation or formal inquiry by governmental authorities regarding the organization.

(25) The organization shall submit to: (A) a reasonable number of regular or unannounced examinations of its books and records at appropriate business premises by the probation officer or experts engaged by the court; and (B) interrogation of knowledgeable individuals within the organization. Compensation to and costs of any experts engaged by the court shall be paid by the organization.

(3) The organization shall be required to notify the court or probation officer immediately upon learning of (A) any material adverse change in its business or financial condition or prospects, or (B) the commencement of any bankruptcy proceeding, major civil litigation, criminal prosecution, or administrative proceeding against the organization, or any investigation or formal inquiry by governmental authorities regarding the organization.

(46) The organization shall be required to make periodic payments, as specified by the court, in the following priority: (A) restitution; (B) fine; and (C) any other monetary sanction.

(c) If probation is ordered under §8D1.1(a)(3), (4), (5), or (6), the following conditions may be appropriate:

(1) The organization shall develop and submit to the court an effective compliance and ethics program consistent with §8D2.1 (Effective Compliance and Ethics Program). The organization shall include in its submission a schedule for implementation of the compliance and ethics program.

(2) Upon approval by the court of a program referred to in subdivision (1), the organization shall notify its employees and shareholders of its criminal behavior and its program referred to in subdivision (1). Such notice shall be in a form prescribed by the court.

(3) The organization shall make periodic reports to the court or probation officer, at intervals and in a form specified by the court, regarding the
organization's progress in implementing the program referred to in subdivision (1). Among other things, such reports shall disclose any criminal prosecution, civil litigation, or administrative proceeding commenced against the organization, or any investigation or formal inquiry by governmental authorities of which the organization learned since its last report.

(4) In order to monitor whether the organization is following the program referred to in subdivision (1), the organization shall submit to: (A) a reasonable number of regular or unannounced examinations of its books and records at appropriate business premises by the probation officer or experts engaged by the court; and (B) interrogation of knowledgeable individuals within the organization. Compensation to and costs of any experts engaged by the court shall be paid by the organization.

Commentary

Application Note:

1. In determining the conditions to be imposed when probation is ordered under §8D.1(a)(3) through (6), the court should consider the views of any governmental regulatory body that oversees conduct of the organization relating to the instant offense. To assess the efficacy of a compliance and ethics program submitted by the organization, the court may employ appropriate experts who shall be afforded access to all material possessed by the organization that is necessary for a comprehensive assessment of the proposed program. The court should approve any program that appears reasonably calculated to prevent and detect criminal conduct, as long as it is consistent with §8B2.1 (Effective Compliance and Ethics Program), and any applicable statutory and regulatory requirements.

Periodic reports submitted in accordance with subsection (c)(3)(b)(3) should be provided to any governmental regulatory body that oversees conduct of the organization relating to the instant offense.