

ACUA's Institutional Compliance Survey, Part II: Federal Sentencing Guidelines

By Ann Hough

It's hard to imagine that the judges, lawyers and law enforcement officials who made up the U.S. Sentencing Commission over the years might have foreseen the small piece of irony their assignments eventually yielded. After all, they were charged with the grim task of standardizing punishments for organizational misconduct under provisions of the Sentencing Reform Act of 1984 and later, the Sarbanes-Oxley Act; the results of which should have appealed to, hopefully, only a few.

Our survey attempted to glean from the respondents some detail as to the extent universities are aware of and have adopted the elements of the FSG.

Yet today we find that these very guidelines on punitive measures have become the cornerstone reference for businesses wishing to avoid the provisions of the act altogether. For when the commission provided interested parties a small ray of hope, in the form of sentencing grace for certain mitigating circumstances, they found themselves obligated to define the elements of one of those mitigating circumstances: an effective compliance and ethics program.

Today, Chapter 8 of the Federal Sentencing Guidelines (FSG) has become the gold standard by which most industries measure their own compliance oversight programs. As noted by Mary Lee Brown, in her article *Federal Sentencing Guidelines – Requirements for Corporate Compliance and Ethics Programs* (College and University Auditor, Summer 2004), higher education falls under the umbrella of the commission. She writes, "The FSG have a broad reach, in that organizations are defined to include, among others, non-profits. This category encompasses colleges and universities." And indeed some major universities, such as Stanford and Princeton, openly reference the FSG as the basis by which they create their institutional compliance programs.

Our survey attempted to glean from the respondents some detail as to the extent universities are aware of and have adopted the elements of the FSG. Below is a summary of the FSG's seven elements of an effective compliance program and some of feedback generated from the survey.

1. Standards and procedures to prevent and detect criminal activity.

Programs are expected to be "reasonably designed, implemented and enforced so that the program is generally effective in preventing and detecting criminal conduct." It is interesting to note that the guidelines also state that a failure to detect an instant offense isn't necessarily a sign that the program is NOT generally effective. On its face, that sounds like a loophole, but rather it appears to be a segue into another section of the guidelines that state "The organization shall periodically assess the risk of criminal conduct and shall take the appropriate steps to reduce the risk of criminal conduct identified through this process."

Comments provided in the survey indicate that institutions understand the importance of establishing policies and procedures affecting compliance. Most indicated there was a process in place for policy establishment, such as with this response: "We have a formal process for developing institutional policies and procedures. Regulatory requirements are one of the criteria considered when determining the need for policies. Policies undergo review on a set cycle to evaluate continued need."

2. Effective Governance

While this one may seem like a no-brainer, the guidelines are pretty clear that accountability starts at the top, as in the Board of Directors or the equivalent governing body. The guidelines further

state that “high level personnel” shall be assigned responsibility for the compliance and ethics program, and that “specific individuals” shall be delegated with day-to-day operating responsibility.

Some institutions appear to have effectively achieved this. In the comments section for this topic, one survey respondent wrote: “The Audit Committee is formally charged with oversight of the institutional compliance program. The Institutional Compliance Officer reports semi-annually to the committee on the status of the program. The Audit Committee is informed if significant changes in the program itself occur, or of external compliance expectations. An ad hoc group of the Board discusses the specifics of compliance failures when they occur.”

However, one respondent wrote, “Although there are various policies and procedures throughout the organization, there is no system-wide code of conduct (tone at the top).” Another reported that its institution had “no designated compliance officer, centralized plan, compliance committee of the board, or reporting to the board.” Given that the survey results, as outlined in the main article, indicate some blurry lines for compliance accountability on some institutions’ organization charts, the guidelines might provide some incentive to bring those into focus.

3. Employee Conduct

The drafters of the guidelines wisely declined to provide detail on how to accomplish a workforce free of a criminal past, but they made it clear that the employer must have some sort of screening or monitoring technique in place. The standard states that the organization shall use “reasonable efforts” to ensure that they do not designate leadership personnel “whom the organization knew, or should have known through exercise of due diligence, has engaged in illegal activities or other conduct inconsistent with an effective compliance and ethics program.”

4. Communication and Training

This too may seem obvious. But note that this particular guideline aims right at the top and moves down through the pyramid. It describes the required recipients of the communication and training as “members of the governing authority, high level personnel, substantial authority personnel, the organization’s employees, and, as appropriate, the organization’s agents.”

The survey indicated that training appears to be a component of most compliance programs, as only 10 percent of the respondents indicated their plans did not offer training. However, the frequency of training varies greatly from institution to institution. Only 29 percent of the respondents indicated that training is provided at or near the hire date. Routine re-training is offered at least once per year by 24 percent of the respondents, and on a more infrequent basis (less often than once per year) for 38 percent. Of note also is the fact that most respondents, 78 percent, are making use of technology and offering online training.

5. Monitoring and Auditing

There are actually three parts to this section of the Federal Sentencing Guidelines. The first is that there should be monitoring and auditing in place to address the compliance risks identified in each area of the institution, and that these methods should be defined in the institutional compliance plan. The second is *a periodic evaluation of the effectiveness of the compliance and ethics program itself*. Once the appropriate governance structure is in place, this individual/group must have a method or manner by which they determine their overall plan is performing as intended.

Surprisingly, there were very few comments on the requirement that a compliance program include monitoring and testing within the areas deemed to have compliance risk. Perhaps that is because we, as auditors, believe this is obvious. However, the survey provided more feedback on the respondent’s assessment of the compliance program as a whole. For example:

How would you rate your institution’s ability to describe and quantify the effectiveness of the institutional compliance and ethics programs?	
Poor – the institution has not defined effectiveness for its program	18%
Fair – the institution has defined effectiveness for its program but does not have a process in place to evaluate the program	36%
Good – the institution has defined effectiveness for its program and has a methodology to measure effectiveness but does not consistently perform evaluations	32%
Excellent – the institution has defined effectiveness for its program, has a methodology to measure effectiveness, assesses the program on a consistent basis, and makes any modifications necessary	14%

The near bell-shaped response distribution is heartening, and is consistent with a survey question regarding methods used by institutions to assess the effectiveness of their compliance programs. Sixty-four percent of the respondents said their institutions were using monitoring, auditing or a combination of the two to assess compliance program effectiveness. However, 27 percent of the respondents indicated that their institution had not yet formally established metrics and methods by which to gauge the effectiveness.

The third part of this section of the guidelines addresses the need for a “hotline” or other independent and anonymous method for employees to report suspected criminal conduct. Although the survey did not capture the number of respondent institutions that actually had hotlines, it did make an inquiry as to how hotline information is used, and only nine percent of the respondent’s indicated that information garnered from “hotline” or other self-reporting mechanisms was analyzed for implications for the compliance program.

6. Enforcement

Many compliance programs have clearly defined consequences for bad behavior, but how many include incentives for good behavior? The guidelines specify that both are necessary. It should be noted that the guidelines state that the program should have “appropriate disciplinary measure for engaging in criminal conduct *and for failing to take reasonable steps to prevent or detect criminal conduct.*” The highlighted section is another example of the commission clarifying that accountability lies within the leadership in compliance.

In a question specifically aimed at this portion of the guidelines, only one respondent indicated that his or her institution provided “incentives for compliance.” Only 30 percent of the respondents indicated their compliance programs had “clearly defined disciplinary measures for non-compliance,” with one commenter making the distinction between having the enforcement measures, and having them “clearly defined.”

7. Response

After criminal conduct has been detected, the guidelines state that the organization shall take reasonable steps to respond appropriately to prevent further similar conduct. The guidelines then go on to specify that this means a reassessment and revision to an organizations compliance and ethics program.

CONCLUSION

While the survey indicated that many institutions still struggle with governance and accountability issues for institutional compliance, many institutions appear to already have at least a footing in each of the seven elements of an effective compliance program as defined by the FSG. ■



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