

GOVERNMENT AND REGULATORY AFFAIRS

BLAST

Federal Sentencing Guidelines and Risk Management

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STATUTE/REGULATION SOURCE

To learn more, visit <http://www.ussc.gov/Guidelines>. Specifically, see *Chapter 8, Federal Sentencing Guidelines Manual*.

BRIEF DESCRIPTION

Understanding some basic principles of the federal sentencing guidelines can assist in managing, implementing, and guiding a university's risk management program.

POTENTIAL/ACTUAL IMPACT

Like individuals, organizations can be found guilty of criminal conduct. Organizations cannot be sent to prison, but they can be fined. Fines and penalties may have a significant impact on a university. This financial impact often cannot be transferred by way of insurance.

DISCUSSION

The federal sentencing guidelines are designed with three purposes: punishment, deterrence, and incentives. Punishment refers to what is appropriate given the degree of "blameworthiness" of the offender, while deterrence refers to a model where certain behaviors are discouraged. Chapter 8 of the Federal Sentencing Guidelines Manual "is designed so that the sanctions imposed upon organizations and their agents, taken together, will provide just punishment, adequate deterrence, and incentives for organizations to maintain internal mechanisms for preventing, detecting, and reporting criminal conduct."¹ This chapter also governs felonies and Class A misdemeanors. The most commonly occurring offenses are fraud, environmental waste discharge, tax offenses, antitrust offenses, and food and drug violations.

An organization can mitigate the financial impact of the potential fine by demonstrating that it had put in place an effective compliance program. There are key criteria outlined in Chapter 8 for establishing an effective compliance program, including:

- Oversight by high level personnel: The importance of setting the "tone from the top"
- Due care in delegating substantial discretionary authority: "...Such individual(s) shall be given adequate resources, appropriate authority, and direct access to the governing authority..."²
- Effective communication to all levels of employees: Written policies and procedures, training and education, open lines of communication
- Reasonable steps to achieve compliance, which include systems for monitoring, auditing, and reporting suspected wrongdoing without fear of reprisal: Periodic internal audits, risk assessments
- Consistent enforcement of compliance standards including disciplinary mechanisms: Written policies and procedures
- Reasonable steps to respond to and prevent similar offenses upon detection of a violation

¹ Chapter Eight - Sentencing of Organizations, Introductory Commentary, *Federal Sentencing Guidelines Manual*.

² §8B2.1(b)(2)(C), Effective Compliance and Ethics Program, *Federal Sentencing Guidelines Manual*.

Federal Sentencing Guidelines and Risk Management (cont.)

The use of these steps in setting up effective compliance and ethics programs goes beyond the criminal justice system. Other regulatory and law enforcement authorities have adopted similar approaches, and industry and peer organizations have developed and adopted best practices that incorporate many of these key criteria.

ACTION

While these criteria are for an effective compliance program for managing criminal conduct, they have been adopted and embraced in other areas of compliance risk management. Use these criteria in assessing other compliance and risk management programs. Some questions your university might use to review your programs include:

- Are your programs “defensible”? How do they measure up against these criteria?
- What reasonable steps have been taken to achieve compliance and manage risk?
- What systems are in place to monitor compliance and risk?
- How frequently are your programs audited?
- What training do you do? Is your training effective?
- Do you have a mechanism to enforce compliance, including disciplinary mechanisms, and how effective are those?
- What actions do you take when a violation has been detected?

SOURCES AND REFERENCES

1. Federal Sentencing Guidelines Manual, United States Sentencing Commission (http://www.ussc.gov/Guidelines/2012_Guidelines/index.cfm).
2. Paula Desio, “An Overview of the Organizational Guidelines,” United States Sentencing Commission (http://www.ussc.gov/Guidelines/Organizational_Guidelines/ORGOVERVIEW.pdf).
3. Remarks of Hon. Patti B. Saris, Chair, U.S. Sentencing Commission, 12th Annual Compliance and Ethics Institute (http://www.ussc.gov/Guidelines/Organizational_Guidelines/Special_Reports/index.cfm).
4. Higher Education Compliance Alliance, National Association of College and University Auditors (NACUA) (<http://www.higheredcompliance.org>).
5. Christopher Myers, Lori Brown, and Nikita Williams, “Compliance 101: A Guide to Building Effective Compliance Programs,” NACUA, November 1, 2011 (<http://www.higheredcompliance.org/resource/compliance-101-a-guide-building-effective-compliance-programs>).

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